

HIS HONOUR: Yes, Mr Hoser. Come back into witness box, please.

<RAYMOND TERRENCE HOSER, recalled:

HIS HONOUR: Just before you re-examine there is a couple of matters I want to put to Mr Hoser.

Mr Hoser, I have read what you have said about the trial where you were unrepresented, and I think your counsel described it as you "couldn't take a trick" during the course of the trial. I just want to put something to you. I notice at page 142 of book B, the second book, at the top of the page, the first full paragraph you say this: "It has always amazed me how an innocuous activity by myself is always deliberately misinterpreted by the prosecution as part of some major criminal plot". Given the stresses of appearing unrepresented, in a trial which I think went for about a month, did it - not this one, the trial before Judge Neesham; is that right, it went for about a month or so? --- That did. This paragraph refers to an earlier trial - - -

I know; I know? --- At an earlier day.

Why I am referring you to that particular passage is this: has it occurred to you the possibility that you may well have been doing precisely what you have accused the prosecution of there; that is, viewing every activity or every ruling which was made which had a potentially innocent explanation, as being one which was directed against you as part of some suggestion that you were facing a conspiracy? --- Your Worship - sorry, Your Honour - that is a very valid question, and one I have asked myself many times over the last 20 years; not just relating to these cases, but others. Now, it is the sort of question now,

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if you read the books in full you will realise that that is not a possibility, and you will see, because I go through cases where they have gone in my favour, you will read earlier cases in front of other judges and magistrates which I won - and I explain why I won and why I lost, whatever the case may have been - but if you get the Hoser Files and you have a look at the relevant sections, which also relate to Judge Adams, in particular, there was an earlier case I mentioned in front of a Magistrate Hoare.

Now, in that particular case, the Magistrate accepted the police version of events as opposed to mine. Now, I actually, I won't say I justify the Magistrate, but I have an explanation, and there is a heading in the Hoser Files - I can draw your attention to the page if you pass me the book - where I actually explain how and why it could have been come about, and I explain that it is no great conspiracy. Basically, the Magistrate had chosen to accept one person's words against me. And I make a point at that particular point in the Hoser Files, I had no evidence other than my word to say that a single thing I had written was true and correct, as opposed to what they had said.

Then along came the next case involving the same prosecution witness, a Miss O'Shannessy, and in that particular case she gave evidence that totally contradicted and rebutted evidence that she gave in the earlier case. So she committed perjury in at least one of the cases, serious perjury. Anyway - and then, of course, that case also fell apart in that the - there is a whole stack of things that happened, including the fact that one

police officer admitted to being present in a room when she was present and that was corroborated by a covert tape. This is a situation where the police - I could go on for hours but - - -

Well, could I - - -? --- What I am saying is, yes, I have asked that question many times; and there is a saying that when you have a case of a conspiracy or a stuff-up, you always take the stuff-up, every time.

Well, do you, or is that - that quote, that you also take the conspiracy every time, do you view it that way - - -?  
--- No, no.

Or do you view it that you always take it as a stuff-up? --- No, Your Honour. If you read the two books in their totality, and also the Hoser Files, you will see that there are cases where there are obvious things that are wrong, and you can draw your conclusion as to why. And you referred to Adams - there is a detailed coverage of that in the Hoser Files. My barrister at the time, a Miss Elleray, believed that, she was of the view that the Magistrate had been spoken to. They were her words. And in any event, they came out with this "paying off" the Magistrate and, as I say, in light of other covert tapes it tended to exclude the possibility that he was alluding to me. There is also a case in New South Wales, which you have probably seen on television, in which a policeman by the name of Chook Fowler - - -

HIS HONOUR: Mr Hoser, I don't want to stop you, but let me take you to the sort of thing I have in mind to get your comment on it. One of the passages on which I have ruled that there was no case to answer - so don't understand or don't think that I am going to change my mind about that -

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I just want to illustrate a point and ask you for a comment. It is on page 367 of the second book, and it is the passage which the Crown alleged against you, and which I have ruled had no case to answer, that says: "Neesham had probably made a deliberate mistake here because the date 1993 would indicate that I had premeditated and planned the alleged perjury in early 1994. It was part of his not so subtle and deliberate campaign to sow the seeds of doubt in the minds of the jurors".

Now, in the passage which runs prior to that comment being made, you refer to the intervention of the judge, at a time when you had produced the tape, you had asked the tape to be played. The tape was then played, and during the course of the tape, as you say yourself, "During the search of my office, the police retrieved a file marked 'Allegations of perjury 1993'. When that part of the tape was played Neesham ordered it to be stopped and said the following: 'Members of the jury, you heard one of the members of the search party refer just a moment ago to hear allegations of perjury 1993'. You should not think anything, but, and it is agreed that those allegations relate to the very matter you are hearing, not something else'".

Now, further on, at page 371, about that episode, you say that occurred, the judge said that, without asking anything of you, and said it in the presence of the jury as soon as the passage appeared in the tape, and the jury heard it. You said you "finally got a chance to raise the matter about Neesham's wrong statements about the 'Allegations of perjury 1993' with Neesham showing his error, he wasn't remorseful. He instead blamed me for not

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tipping him off about the matter on the tape earlier!"  
Did one possibility occur to you, that what was occurring there was the judge, perhaps unwisely, but attempting to stop the jury from thinking that you had a prior conviction for perjury in 1993? --- That was possible, and it was mentioned in the case - I think one of the barristers mentioned that earlier, when you were arguing that point earlier in this case. That was possible, but the context of it was, perjury, the Crown case was trying to run on this thing, that I had premeditated and plotted to commit perjury, like a conspiracy, right? And if there is an allegation, I follow them up with alleged perjury in 1994, and the alleged perjury was committed in 94. It was implied that I was some great mastermind who had planned it as far as back as 1993, which is ludicrous, Your Honour. There is a thousand and one other probabilities that could possibly come into play.

Now, as I state in the beginning of the book - and bearing in mind that all through this case there has been paragraphs taken out of context and quoted, and bits and pieces - if the books are taken in their totality, I believe then - now, I haven't read the books in the last month or so, but I still believe I have got it right in terms of the overall perspective. However, I have always allowed the possibility that maybe there are other possibilities I have got wrong, or facts I have overlooked, or whatever, and that is why I have posted all the relevant transcripts and the list of all my sources, documents, inquest files, the whole box and dice, on the web; so that any given area of any of these books, not just the pictures, sections picked out by Mr Langmead, any

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section of the books, if a person thinks, "I think Hoser has got it wrong" they can then look at the whole lot and come to their own conclusion. Now, notwithstanding the fact that it appears - and I could be wrong, Your Honour - you have only looked at sections of the book, I believe that if you were to read the books from go to whoa, with an open, unbiased mind, as open and unbiased as any person can be - and we all harbour biases to some degree - I believe that you would come to the same conclusions that I have, by and large.

When you lodged the 26 grounds of appeal and they were subsequently not argued by the QC who represented you, did he put to you that they weren't allegations which could be sustained, that they had innocent explanations? --- No. The state of play is explained in the book, Your Honour, and I again ask you to read the book. The situation is this: I engaged Chris Dane. At the time he promised me that if I hired him he would guarantee me an acquittal. I was - when you are an unrepresented person - I don't like to say bullied by the law, so I don't - someone said to go to a barrister by the name of Chris Dane, so I did. They collected material for me, all the previous transcripts, copies of the books, files, the documents, the whole lot, and he was - - -

I won't ask you do go into the details of it - - -? --- In a court - -

All right, if you want to, yes? --- The reality is, unbeknownst to me he was representing another person by the name of Brookes - and again, as I say it is covered in the book here - and Brookes was up on a murder trial. He was a young person - I can't remember the details; you may know

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more about the case than I - and it ran longer than expected. To cut a long story short, Dane did not read the transcripts, or most of them. He did not read any of the other material, and on the morning of the case he rang up the court co-ordinator, who I believe was Jack Gaffney - I could be wrong - and asked him for an adjournment. And Dane was told - and this was in my presence - he was told that he would not get an adjournment. So then Dane turned to me and said he wouldn't be able to argue my three-day case, my three grounds that I put up, and I said "I want you to argue the whole lot". And in the course of his argument Dane came up with some other comments which were very offensive to me because there was an implication that I known about the perjury, but I was charged wrongly or something. And my view was that I wasn't too concerned about the charge. I hadn't committed perjury and the evidence was there to see. So I was - that basically sums it up. The reality of the circumstances was Dane had not perused, had not properly briefed himself, and I had done everything as a client should, and I was effectively sold down the river by - whether it was by circumstances or what doesn't matter; it is covered in the books, the facts and circumstances, and that is the state of play.

All right. Thank you? --- I was in the dock there. Dane was standing at the front talking. I suppose I could have jumped up and said, "Hey, I sack you", but I probably would have been carried off by a couple of security people. I don't know the situation, but that is basically what happened.

One final question I want to ask you. At page 144 - and this is one of the counts on which I found there is a case to

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answer - under the heading "Another Balls-up".

"Balmford's bias in favour of police and the DPP isn't just something I've noted. In fact three Supreme Court Judges have noted it as well", you then in the following passage refer to the decision of the Court of Appeal in De Marco. Had you read that decision prior to that appearing in the book? --- My recall is that I had not. My recall is that information probably came from a news clipping and speaking to the journalist who wrote it. That would be my recall, and judging by the date, and the fact that this book was written over a two and a half-year period, I was probably not aware that there was even a legal database site. I mentioned it - Auslit - I became aware of it a while back, about a year ago; but, no, I don't recall having read that judgment.

Do you now suggest that the Court of Appeal made any comment about bias on the part of Judge Balmford? --- Well, the words speak for themselves, and my understanding is - and I spoke to, I have heard the comments in the court, I should say - there, the comment in the book says: "Balmford had misdirected a jury in a way that helped guide the jury to a guilty verdict". Whether that was deliberate or otherwise doesn't matter. The fact is it occurred and - - -

Well, can I ask you, do you know whether bias was referred to at all, by the Court of Appeal in that judgment? --- 'Bias' as a word, no, I have got no idea.

No idea at all? --- Not off the type of my head, no. But in fairness, Your Honour, a lot of things mentioned in this book are no longer in my memory; but my recall is - and this may not be accurate - at the time I presume I

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followed on a news article written by a court reporter and it was probably someone, one of the, one of the regulars, and I would have spoken to them on the phone and asked for further and better particulars of the case, and they presumably told me, and I would have jotted down notes and filed them with - - -

Well, do you believe, then, that either in a published article, newspaper article or in something said by one of the court journalists, it was stated that the Court of Appeal referred to bias on the part of Judge Balmford? --- Words to that effect, yes.

And now that is, whether they used the word "bias" or whether they used a word that means the same thing as bias?  
--Yes.

Did you think the use in the first sentence, "Balmford's bias, isn't just something that I've just noted. In fact three Supreme Court Judges have noted it as well", do you think that that is an allegation of bias which you should have checked to see what the precise words were? --- Well, Your Honour, I think it was checked. I think we are splitting hairs in that your definition of "bias", and "bias" in the general sense may be different. The public at large view anything that would, could in fact alter the verdict as bias. Whether it is deliberate or inadvertent doesn't matter. The result is essentially the same. And I mean, we were talking about this business about that paragraph that Mr Langmead read out to me, when I said "All things being equal, if a police witness" - words to effect of, "if a police witness says one thing and a civilian witness says another, judges and magistrates will tend to side with the police witness", that is - now, you

know, some people will regard that as bias. People behind the Bench think that is just a matter of course. You know, I am speaking off the top of my head on that. But that is a general perception, and it is a general belief. And I mean serious bias, in my mind - I am not talking about cases where I have actually been a litigant, but I have often sat in courts waiting for my case to be heard, and I have seen it repeatedly, what happens is one person says something, and there is no other evidence which supports the story, and yet the presiding Judge or Magistrate has come along with words to the effect of "I am satisfied beyond reasonable doubt the policeman has told the truth. You are convicted", words to that effect. That is a common, everyday event, and in my view that is an inherent bias in the system, rightly or wrongly, and I believe that readers at large should be aware of the fact that if they do go to court, in those circumstances where they are unable to prove indelibly, by the form of tapes, transcripts or whatever, that a certain sequence of events has occurred they may have trouble proving their case or their defence; and I think the legal system is strengthened by people knowing, particularly unrepresented people, knowing what their rights are and where they are likely to come a cropper.

Yes. Thank you. Yes, Mr Maxwell?

<RE-EXAMINED BY MR MAXWELL:

Mr Hoser, just a few questions. You said in one of your answers to my learned friend, Mr Langmead, that you took steps to discourage copying of your books. Would you tell His Honour what steps you took to discourage copying? --- Yes. The books themselves, Your Honour - this one is 736 pages,

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that includes what they call the preliminary pages. The second one is 800 pages. Now, if you were to photocopy those at Officeworks it would probably cost you more than to buy the books, so that is an automatic discouragement. And that is not by chance, because it was suggested I publish them in four volumes, but we stuck to two for that very reason. In terms of the CD ROMS which are the most copyable items, because you can buy a blank CD ROM now for about a dollar, we have deliberately priced the CD ROM at well over a hundred dollars with the view that people will think, "Well, it is just as cheap to buy the books so I may as well buy the books". And again, with the number of pages to be printed, the cost of printing off a CD ROM, the printer and toner would work out dearer again, so it is prohibitive. Furthermore - that is the inherent discouragement of the CD ROMS. We have done that mainly so that people, genuinely interested people, students and institutions who want to investigate the material or whatever, can in fact have access to it all, and including in the references and sources, via the CD ROM. Whereas the average reader, member of the public, really doesn't want to read case judgments. The third thing which should be noted, and we have made this patently clear - it is referred to in Victoria Police Corruption 2 - is we sued The Age for violation of copyright, and they did in fact pay \$10,000 for using some of my material without my permission and acknowledgment. That doesn't connect with these particular books, but it is referred to in Victoria Police Corruption 2 as a case where someone has unlawfully violated my copyright and we have taken action.

I wanted to ask you about the CD ROMS just to clarify the

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matter: you were being asked about, but I don't think you were shown, what was in the affidavit from the defamation proceeding on which the Crown relied, and in that you have said, of book 1 - and this was April 2000 - - -

HIS HONOUR: Can I have that exhibit, please. What exhibit number was that?

MR MAXWELL: It is Exhibit F.

HIS HONOUR: I won't have those - - -

MR MAXWELL: It is only one sentence. So the evidence is complete on the CDs, because I think it is right to say we have inadvertently not dealt with this in the affidavit, You said as at April 2000 the book - and you were only talking about book 1, but you have now told His Honour both books are on the CDs - has been on sale. Since July 1999 about 300 of those have been put in circulation by the author and publisher. That is as at April 2000. What, in your best estimate, would be the comparable figure for sales of the CD as at October 2001 - just an estimate? --- Probably about double.

Thank you. You have mentioned several times that you have published all of the sources on which you rely. Where can someone wanting to ascertain what those sources are, and, if appropriate, check them - let me start that again. Where is a listing of your sources to be found for public access? --- Well, in each book, Your Honour, on the imprint page where it says "Published by", et cetera, there is a reference on the bottom of page, Roman iv, and it says, and it will be here somewhere - right? On the second last paragraph it says: "All information sources used to compile this book can be found at <http://www.smuggled.com/Tran1.htm>. Now if you go to that

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web page there is a list of links, including one which says "List of all sources for the books, including Victoria Police Corruption, Victoria Police Corruption 2 and Hoser Files", and I do have a printout of that in the bag there. And as I said it runs over a couple of pages, the same font and layout. That file is available as either Word or PDF which means virtually any computer user can access them. We also publish that same list to CD ROM and again on the CD ROM it is available as Word PDF and HTM. So you have got three options there.

HIS HONOUR: That, I take it, would not include such matters as the De Marco judgment under that site? --- The source of the information where I got that information would be, so if there is a news clipping, or something, that would be there, yes, the news article. And as it happens, from the date you would probably be able to - you could probably identify it from the date without, too much drama looking. You are correct, I don't, don't recall the De Marco judgment being there, but you can check that yourself. I can provide you with a list and, yes, that sums it up.

MR MAXWELL: Thank you. But would it include a tape of the Bingley conversation? --- Yes, most certainly. There is a vast number of tapes and other transcript material referred to there, including - oh, there is a huge number. It is many thousands of entries.

Now, you were being asked about that part of volume 2 which contains advice on covert taping? --- Yes.

Why, in your view, is covert taping - let me put that differently. What do you see as the benefit of covert taping? --- Well, it is summed up quite early in the piece

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in that chapter. Basically, the aim of any corruption whistle-blower, or any person who wishes, is to establish the truth; and the aim of corrupt people is to hide the truth, or those who are opposed to the good guy, so to speak. So basically, the advantage of covert taping is so that if you covert - if you tape, for example, a policeman - and it is explained in detail in the book there, and I recommend you all read it - if, for example a, policeman is doing the wrong thing by you in the street, and you happen to covertly tape them, if they go to court and they perjure themselves, which is also a distinct possibility, you will then be able to produce the tape and say: "Hold it. This is what really happened", and the facts remain as documented in the Hoser Files and Victoria Police Corruption 2. My production of covertly made tape recordings of police and others has saved me from serious criminal conviction on a number of occasions. And I also have no doubt, Your Honour, that if the tape recording that I had made of the Balmford proceedings had been played to the jury in the Neesham trial, I would not have been convicted of a perjury I hadn't committed. And that is a salient fact that cannot be escaped.

Finally, Mr Hoser, you answered a question about steps taken to restrict publication by saying that the Attorney-General, or a spokesman for him had said there was no ban on the books, and that that was reported in the Yarra Leader. Would you have a look at this extract from that newspaper, and I have a copy for His Honour, and a copy for my learned friends. And do you recognise that as an extract from the Yarra Leader of Monday October 9, 2000? --- Yes, it is actually reduced in size. The newspaper itself is much

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larger. It is the same size as The Herald-Sun. That is the front page.

And did you make a copy of the newspaper at the time for your own records? --- Yes.

And just take a moment to read it. You will see it refers to the relevant books, and that an order was placed by the Justice Department, and then there are some comments attributed to you. Do you see in the third column, "While we are keen to supply the books...", et cetera? --- Yes.

Can you read what is attributed to you, which is in that paragraph and the whole of the next column, and I want to ask you whether, to the best of your recollection, that is an accurate report of what you said at the time? --- It is. I will read it out - - -

No, no need to read it out - - -

HIS HONOUR: I am sorry. Go on.

MR MAXWELL: The witness has just confirmed, Your Honour, that what is recorded in columns 3 and 4 is, to the best of his recollection, an accurate record of what he said at the time.

HIS HONOUR: Starting with the "While we are keen..."

MR MAXWELL: "While we are keen to supply the books..." Then there are references in the final column to comments attributed to a Ms Wilson, who is said to be a spokeswoman for Mr Hulls. Do you know, were you present when those comments were made, or have you just read them in the paper? --- The first I have heard is in the paper. But I will say I did speak to the journalist before and after she wrote the article, and she confirmed them as accurate.

MR LANGMEAD: I object to reception of that evidence.

HIS HONOUR: It is a bit late. I have already received it. I

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have seen it.

MR LANGMEAD: I am sorry, I am talking about the statement.

HIS HONOUR: On hearsay grounds?

MR LANGMEAD: Well, this hasn't sought to be tendered, but I will be objecting to this being tendered as well.

MR MAXWELL: Well, I do tender it, and perhaps to - my learned friend should make his objection - - -

MR LANGMEAD: I object to the tendering of this as it contains some words attributed to this man that Mr Hoser can give without the benefit - he doesn't need this. It contains extraneous matters that are irrelevant to this proceeding, and neither the respondent's case nor the applicant's case are progressed by the reception of this evidence. Nothing is added to the words in quotes being put to Mr Hoser if he says, "Yes. I said those words". The rest is simply irrelevant.

HIS HONOUR: And it is on the grounds of relevance that you object to it?

MR LANGMEAD: It is on the grounds of relevance, yes.

HIS HONOUR: I see.

MR MAXWELL: Well, Your Honour, in my respectful submission - - -

HIS HONOUR: It is relevant. If it is going to be objected to on other grounds, I would have said it wasn't admissible. Go on.

MR MAXWELL: If Your Honour please.

HIS HONOUR: Are you tendering that?

MR MAXWELL: I tender that, if Your Honour please.

HIS HONOUR: Exhibit D2.

#EXHIBIT D2 - Newspaper article from Yarra Leader.

MR MAXWELL: If Your Honour pleases, I have no further questions in re-examination.

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HIS HONOUR: Yes, thank you.

MR MAXWELL: Could Mr Hoser stand down? Of course, he will remain.

HIS HONOUR: Yes.

<(THE WITNESS WITHDREW)

MR MAXWELL: Your Honour, that concludes the case for the defence, the respondents. Your Honour, by agreement, and probably in any event as required by the rules, it is proposed that I address first on behalf of the respondents.

HIS HONOUR: Yes. Very well.

MR MAXWELL: And Your Honour, subject to what follows, my learned friends, my learned juniors and I rely on what we have said in the previous written submissions.

HIS HONOUR: Yes. You can take it that I will have regard to all of that.

MR MAXWELL: And I don't propose to repeat any of that, save to give emphasis to some particular aspects of those submissions. We, of course, have attended carefully to what Your Honour said on the ruling in the no-case to answer. I will just cover the matters in that as bearing on the final submission.

The burden of the final submission is, as Your Honour drew attention to, both in the course of my submission and in Your Honour's reasons this morning, addressed to the different question, that is to say, whether this court should be satisfied beyond reasonable doubt that either respondent is guilty of contempt of court. In our respectful submission, Your Honour could not be so satisfied on this material, having regard to all the evidence which is in, the tests which have been

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adumbrated, and the character of the publication as identified principally in our outline at the beginning of the case.

Your Honour, Mr Hoser's affidavit is a very important document. In its first part it simply reproduces what was in the affidavit in the defamation trial, up to and including the general statement that "In relation to all my books I research them carefully". We had sought to persuade Your Honour that the Crown couldn't pick and choose in relation to the affidavit on which it sought to rely, but, as things have eventuated, we don't need to make that submission. We now have the writer himself saying those things; and it is in the nature of this proceeding that this evidence was only provided to the prosecution when Mr Hoser went into the witness box.

HIS HONOUR: Sorry, which information is that?

MR MAXWELL: The content of the affidavit.

HIS HONOUR: I see. Right.

MR MAXWELL: But I want to draw to Your Honour's attention that the cross-examination proceeded without demurrer, and concluded without any request for more time, an opportunity to get instructions, an opportunity to consider the affidavit further. It is not a very long affidavit, and in our respectful submission it is unmistakably clear in what it says, and we are not surprised that no adjournment was sought. But it wasn't, and it is what wasn't cross-examined on which is of critical importance now, and this is a new pillar of the respondent's case now that the matter is going to judgment.

As I have mentioned, Your Honour, paragraphs 1

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through to 7 of the affidavit are substantially in the terms in which they appeared in that earlier affidavit in April 2000, but what we did as a matter of candour was to make good the deficiency in the prosecution evidence about book 2, and that is covered in paragraph 6. What we omitted to do, but we have attended to in re-examination, is update the information about the CDs; and as I endeavoured to make clear in the submissions on the no-case, my clients do not shrink from what is in the books, nor do they shrink from the fact that they have sought to sell the books.

But, Your Honour, it is - what follows in paragraphs 8 through to 10, is critically important, and Your Honour will note was not the subject of any challenge other than in the most indirect fashion in relation to gross generalisations. And I will, at the risk of belabouring the point, take Your Honour to what is now uncontested evidence in this proceeding. He set out in the relevant book, and I will read from the affidavit, paragraphs 8, 9 and 10. I will read them. "I set out the facts and matters upon which my comments criticisms and opinions as expressed in the books were based. All transcript extracts relating to the passages complained of were taken from the official court transcripts and to the best of my knowledge at the time of publication were accurately reproduced. 9: To the necessary of my knowledge at the time of publication the statements of fact contained in the relevant books were true. Wherever in the relevant books I expressed views, opinions or beliefs, I was expressing views, opinions and beliefs which I held at the time of publication. 10: It was no part of my purpose in

writing the relevant books to harm the administration of justice. As stated at page 18 of Book 2 and elsewhere, my purpose in writing both books was to highlight what I perceived to be corruption as defined in the books, and wrongs in the justice system and in the conduct of the police. I sought to do so as the first step towards rectifying those deficiencies, and ultimately strengthening public faith and trust in the criminal justice system".

As the High Court said in Fairfax, intention is always relevant. As I conceded in the opening submissions, it is not incumbent on the prosecution to prove an intent to harm; it is the tendency of the words in context, objectively viewed. But in our respectful submission it is a highly material matter that this witness has gone on oath to say what he says in paragraph 10. Though, even without that, we would have invited Your Honour to infer from what is said in the books and from the books themselves, that when the writer says at page 18 in effect what is now in paragraph 10, he was stating his honest intention, that that was, we have submitted previously was the irresistible inference from the books themselves in any event. But he has now sworn it, and he has not been challenged on it.

He has - and the importance of this cannot be overstated - verified the truth of the matters relied on, and he has not been challenged on that. He has sworn to having held the views opinions and beliefs which are expressed in the book. That means these were honest beliefs, absent any suggestion that he has lied in saying that. And what is - - -

HIS HONOUR: Well, in asserting that he was honestly holding views, opinions and beliefs, if what was published was not expressed to be a view, opinion or belief but a fact, does that alter it?

MR MAXWELL: Well, Your Honour, he says in 9: "To the best of my knowledge at the time of publication the statements of fact contained in the relevant books were true". That is the best he can do, and he avers the truth of the factual statements. That wasn't challenged. To the extent that there was any challenge at all, it was, that is too narrow a basis for the conclusion you seek to draw. And I will come back to that. That is a quite different kind of challenge. And what is unsurprising, in view of the way the case was conducted in-chief by the prosecution, but nevertheless of profound significance, is that there was no cross-examination on the underpinnings of any of the criticisms other than that of Magistrate Adams - not a word.

Now, we relied, in the no-case submission, on an inference that, absent some assertion by the prosecution that this was unreliable material, Your Honour would infer there was no basis than to take it otherwise than at face value. That is now established by sworn evidence. And Mr Hoser's position is all the stronger because, as he said, and this is not challenged, every source on which he relied, newspaper clipping, conversation, and so forth, personal experience, is available, has been on the public record since the books were published in mid-1999; and the reason he wasn't cross-examined on it is that there was there is no basis to cross-examine him. Indeed, the prosecution, for reasons which remain a mystery, has not

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bothered to investigate the facts.

And we draw attention to the fact that counsel, junior counsel for the prosecutor conspicuously avoided dealing, in his cross-examination, with any of the substantive bases of the Neesham criticisms, the Waldron, the Heffey, the Balmford criticisms. And the fact that Your Honour has already dismissed the counts - or not so much of the count as we rely on what is said about Judge Waldron - wouldn't have prevented my learned friend cross-examining on it for the reason that Your Honour put to me in connection with a statement about selection of judges, for example, that once we put context in issue then the approach to any part of the book, including things which are not even complained of, is at large and relevant.

It is, in our respectful submission, of great importance that the witness has verified what the reader would, we say, have gleaned in any event from the books, that is, his intention is to improve the system of justice, not to bring it down. He expressly disclaims a slur on all judges and all police. To the contrary, he has said in Your Honour's court today that the majority of police and the majority of judges - I may not be getting his words precisely right - do a very good, make a very good fist of a very difficult job. He was not challenged on that. There was no suggestion this is disingenuous or a little performance for the court's benefit. It is consistent with everything in the book. There are no prior inconsistent statements, because his approach is strikingly consistent, in our respectful submission, that is to say, a genuine concern about what he perceives and

describes as serious issues about inadequate, Inappropriate, improper functioning of the system, and he perceives that the airing of these matters in a way which exposes to scrutiny the basis of the criticisms is in the public interest, and in our respectful submission Your Honour should so find.

That doesn't mean that Your Honour has to find that they are true, and for the purposes of this proceeding it may not be necessary to find that they are true. But Your Honour has no alternative, in our respectful submission, but to find that the matters were the subject - let me put that differently - that the author, Mr Hoser, has thoroughly researched the matters in the books. That is not to say that there may not have been further steps, and he has acknowledged in answer to a question from Your Honour that he thinks he didn't look at the Full Court judgment in the De Marco case.

But my learned friend asked him, "When you say you have made a study of the police corruption, what sort of study was that?", and Your Honour heard, in our respectful submission, a credible account, that is to say, it is a process over years of collecting information from a range of sources and also relevantly recording in great detail his own experiences. That is the study. So it is a mixture of personal and reported, and he said in evidence, and it wasn't challenged, "wherever possible I have sought to verify what I have been told".

And the absence of cross-examination, in our respectful submission, is all the more significant because my client's case has been on the table since last Tuesday. We put in a written submission, in the middle of

last Tuesday when the case opened, setting out how the case would be put on the no-case, and asserting that the onus lay on the prosecution to show want of good faith, and that, absent any evidence, it should be concluded that there was no contempt. So all we have done in the affidavit, in fact, is to verify things which we were arguing about, or verify a basis which we relied on in those submissions last week.

Now, Your Honour, one of the important issues was context, as we dealt with in paragraphs 16 and 17 of the outline, the tendency of the publication and the need to judge it by reference to all of the circumstances; and as we submitted in the reply, our learned friends' submission on the no-case confirmed that what we said about context was uncontentious. That is in paragraphs 19 to 26 of the reply submission.

But paradoxically, the cross-examination this morning has served only to make stronger the case we put in that regard, and I remind Your Honour, without being able, of course, to give transcripts references, that it was put to my client, Mr Hoser, that he published these books "to those who share similar concerns regarding the judicial system", or to "those concerned about corruption". . That is our case. The questioning of course is directed to the apparent proposition that it is a vice that there should be any communication between people who share concerns about maladministration in the criminal justice. Well, in our respectful submission, that is what discussion and criticism in a free society is about, and people tend to gather together with those of like mind to exchange views and opinions, and that is the kind of

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movement which may or may not result in reform, and it is more likely to produce good things for the system when people come together than when individuals work in isolation.

And we said in paragraph 17 of the outline, little (d), "The author has a long-standing, demonstrated commitment to investigating and exposing what he perceives to be improprieties in the administration of justice". Our learned friends apparently accepted that, and sought to demonstrate it by showing that his good faith involves providing copies of his campaigning books to others who he perceives to share those concerns.

Which leads me to what we would respectfully describe as the false dichotomy which our learned friend drew in his questions between a disgruntled litigant on the one hand and a campaigner on the other, as if they were mutually exclusive or contradictory. They are complimentary. They go together. He is a campaigner, in part, because he is a disgruntled litigant, and we said a great deal about that in our earlier submissions and I won't repeat it.

And, with respect, he put it eloquently at the end of his answer to one of Your Honour's questions. "If I had been allowed to play the tape that I made of what I said before Judge Balmford - I beg your pardon - at the proceeding in respect of which the perjury was alleged, I would not have been convicted". As I submitted in-chief, Your Honour wouldn't be surprised at someone having a burning sense of grievance about going to gaol for a false statement which he maintains to this day he did not make.

HIS HONOUR: Well, it wasn't a false statement, was it? It was

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a false document which was being alleged.

MR MAXWELL: I am sorry, Your Honour - for an act of perjury which he maintains he did not commit. But, Your Honour, I want to come in a minute to the question of an unbalanced view of things, and in our respectful submission Your Honour would accept the force of, or accept the genuineness, the sincerity of what Mr Hoser said in answer to Your Honour's questions about, "Well, has it ever occurred to you that you impose a conspiracy or a black view on everything when really there may be innocent explanations?". And candidly he said "Yes, it has. I have asked myself that many times". That has a ring of truth about it, as we submitted his books do, or what he says about what occurred, and he gave, in our respectful submission, a cogent account of why, having considered that, he has rejected it. He does not think that he jumps too readily to a conclusion. Now, he might be right and he might be wrong about that, Your Honour. Your Honour might take view that he is paranoid, to use a well-known term from psychiatry, that is to say, he believes he is being got at when he is not.

HIS HONOUR: Well, I see it was a word that was used by Judge Neesham in the course of the trial.

MR MAXWELL: Yes, Your Honour. Well, it may be that that is the view you take. But in our respectful submission, he hasn't presented in the witness box as someone with paranoid obsessions. Someone with paranoid obsessions wouldn't make the kinds of concessions which Mr Hoser made under cross-examination and in answer to Your Honour's questions. He has a degree of insight into his own perspective on things, and has tried to discount for it,

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maybe insufficiently. In our respectful submission it wouldn't be surprising if he hadn't discounted sufficiently for his own partial view of what has gone on. He has suffered at the hands of the judicial system, the court system, he thinks wrongly and unfairly, and if that is not a perfectly balanced view of things, in our respectful submission, that is only to be expected. But it is not paranoid obsession.

But putting it less graphically, Your Honour would, in our respectful submission, recognise the notion of "can't take a trick", which we referred to earlier, which is different but has a sense - it is consistent with the sense that, you know, "if I am up against traffic officer or a policeman and I swear it didn't happen and he or she says it does, I am not going to be believed". And the defendant believes that he was telling the truth; he will start to get the feeling that the system doesn't give him a fair go. That wouldn't be an unreasonable view to form, and if that coloured what he thought about the next thing that happened, again that, in our respectful submission, would be well within the range of an appropriate response to circumstances, each of which is disclosed.

HIS HONOUR: Well, he is faced with the dilemma, I suppose, that he has been rejected on his oath by a jury of 12.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: So the answer to that would appear to be, they would not have done so had the judge not been involved in some sort of a plot to ensure that that was going to be the end result. In a sense what you are saying is, it really doesn't matter that he is right, wrong or indifferent about that. If that is a genuine belief on

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his part as to what occurred to him, you would say he is entitled to say it.

MR MAXWELL: We would, Your Honour, yes. But if someone believes he has been wrongfully convicted, he is entitled to say so publicly, and he is entitled to - Your Honour would say to me, "Well, he has done rather more than that". And so he has. We wouldn't be here if there hadn't been strong language used about those involved in the case.

HIS HONOUR: I think I should have regard, too, to the fact that the point you made about the unrepresented litigant. In this case the finding made against him, if you are right that he is a person who had, prior to that time presented himself as a campaigner, who should be accepted, et cetera, the fact of a jury's finding of perjury would obviously have a fairly unHINGING or fairly seriously, impact on him in those circumstances. If there was an element of, the word paranoia - I can't think of another one to use - - -

MR MAXWELL: Hypersensitive, Your Honour.

HIS HONOUR: Of hypersensitivity, then no doubt the fact that it is a conviction at that stage, not about the traffic fine as some of the others had been, but about perjury, one might expect the sensitivity to be the greater because the difficulty of persuading an audience that you should be accepted thereafter will be so much greater because of it.

MR MAXWELL: Your Honour, we would respectfully adopt that, and we would invite Your Honour to find that what you have seen of Mr Hoser in the box would reinforce the basis of what Your Honour has just put in argument, that is to say,

someone who is conscientious to the point of exposing, in a hundred pages I think he said, his sources, is someone it is to be inferred wants to be received, accepted as credible or at least saying "Check me, verify me, test me, validate me, or invalidate me. Show that what I have said is wrong". He has acknowledged candidly to Your Honour, as any sensible person would, he might be wrong in some of these things; and so that, exactly as Your Honour has put it, for a court finding to be made that this is someone who puts false evidence on oath is profoundly affecting and calculated to damage his reputation, and it is a finding which he would be expected to, given his view of it, that it is a wrongful conviction, that he would be expected strenuously to disclaim, to seek to discredit, and to draw attention to what he says are the various steps along the way where he was treated unfairly.

HIS HONOUR: I am going to take a break at some stage this afternoon. Just a five minute or so break, so when it is convenient to you, I will.

MR MAXWELL: Well, Your Honour, it is convenient now. My learned friend and I have expressed the joint hope and intention that we will finish today. I am finding I am taking longer than I thought I would.

HIS HONOUR: That is all right. I will try to make it brief, but we have been going since 9:30 so it is useful to have a break.

MR MAXWELL: I wasn't saying don't take a break, I was really trying to give Your Honour an indication, and I don't know how long my learned friend thinks he will be - now is a convenient time if the court pleases.

HIS HONOUR: All right. We will take a short break.

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(Short adjournment).

HIS HONOUR: Yes?

MR MAXWELL: If Your Honour pleases. If I might now deal with some of the particular matters that were the subject of the cross-examination and questions from Your Honour. I won't - we have dealt, as Your Honour noted in our submissions in-chief, with the various passages, and again we - not in writing, but it is in the transcript and we rely on what was said there.

HIS HONOUR: Yes.

MR MAXWELL: Your Honour, the first matter is covert taping. This was the subject of some questioning. In our respectful submission the answer which Mr Hoser gave in re-examination was cogent, consistent with his view of the importance of a contemporaneous record, and consistent with his - sorry, full stop. What he said in that part of the book is consistent with his desire to assist others to avoid being verbaled, is a way of putting it, having things attributed to them which they did not say; or putting it differently, having those who make allegations say things in court which are contrary to what actually occurred. And Your Honour knows, as any counsel does, the enormously greater evidentiary weight of a contemporaneous record.

HIS HONOUR: I don't think this is a topic you need worry too much about.

MR MAXWELL: If Your Honour please.

HIS HONOUR: I don't see how it is harmful to you. If it is put that it is, you can deal with it in reply.

MR MAXWELL: If Your Honour pleases. But I only mention it because it is, it does tie up a thread which we dealt with

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in the submissions on the passages, which is, there is a preoccupation with that topic.

HIS HONOUR: Absolutely. It starts from Day 1.

MR MAXWELL: It starts from Day 1, and they won't let me do it. Why won't they? What is the harm?

HIS HONOUR: It is not wise to be taping judges against an order that there be an no taping. But that is something which goes to the wisdom of the conduct that - - -

MR MAXWELL: Rather than the genuineness of it or the genuineness of purpose, which is to say, "Well, I want for my own protection to have a record", and indeed, of course, at the heart of his grievance about the conviction before Judge Neesham was that the very thing which he had done, which was to covertly tape his evidence, was not allowed to be in the proceeding.

HIS HONOUR: I don't ask you to do it, but you might be able to have your juniors check it, that passage in the book where the attempt to get that particular tape in, it is somewhat confusing because there seems to be a variety of tapes which are being addressed.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: The particular tape which was the one from the hearing in front of Judge Balmford, if someone can just tell me what the page is, where that attempt to get it in is made and fails before Judge Neesham, I will recheck it, because I am not sure that when I read it I was reading the right tape.

MR MAXWELL: Yes, Your Honour. If I might then deal with the remarks about Magistrate Adams - - -

HIS HONOUR: Yes.

MR MAXWELL: To which Your Honour in particular has drawn

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attention. My learned friend also cross-examined on it. Your Honour. The witness, Mr Hoser, was asked, "Well, what was your basis for what is said about Magistrate Adams with respect to the matter in which policeman Bingley allegedly paid the Magistrate?", and his answer, in cross-examination, was, as I noted it, in three parts. First, there was the Bingley confession. I will come back to that in a moment. Second, there was what he described as the overwhelming evidence of his innocence, and he had, as he said - and this wasn't challenged - his view of that accorded with a number of other people, each of whom, according to his evidence, was of the same view, that there was no way you could convict on that evidence. Thirdly, and importantly, he relied on the fact that the conviction before the Magistrate was overturned on appeal. Now, I need to deal with the first and third of those, in particular. The back cover of book 2 refers to, as Your Honour has seen, "the Magistrate that the cop said he paid off". It doesn't say "the Magistrate who was paid off". And the next sentence "Following the 1995 publication of Policeman Ross Bingley's confession that he paid off Magistrate Adams to fix a case, some of his other rulings that seemingly flew in the face of the truth or logic have come under renewed scrutiny". And he mentioned some others.

And as we submitted in the reply, our learned friends appear to have proceeded on the assumption that the reader would find his or her way to the Hoser Files as being the location of the confession. There is the point that this - I think Your Honour found in the no-case judgment that it was open to the view that this was an official



confession. In our respectful submission either it is not open when read by reference to the actual account in the book, the other book, or alternatively Your Honour would not be satisfied beyond reasonable doubt that it is a - -  
-

HIS HONOUR: There is a number of factors which it seems to me are important in this question of how one should view this passage. I mean, as I think in the course of your argument, I said there is the fact that it is a stand-alone page - - -

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Inside the back cover, where everyone tends to have a browse, it has got a photograph which, if you wanted to have your photograph taken against an allegation that you were guilty of corruption you would look something like that I would imagine: head down, looking fairly grim. "Photo courtesy of The Age". So it is absolutely highlighted as a particularly significant feature; otherwise, why is that there? Why is that photograph in that particular issue out of 730 pages chosen to be the one? It would be hard to read that without concluding that it was suggesting some sort of official conclusion having been reached that this was the person who was engaged in corruption.

MR MAXWELL: Well, Your Honour, with respect, we don't accept the latter point, and I wish to address that a little bit more fully if I may; that it would be hard to read it otherwise than as suggesting an official confession. But the other thing is, Your Honour, I accept of course, as I think I did previously, the prominence which is given to this; but in our respectful submission there is no

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particular perspective to be attached to the photograph;  
that is to say, it is in my respectful submission a  
photograph of a Magistrate in pensive mood, and no more -  
that it doesn't look to - - -

HIS HONOUR: But it is one of not many photographs in the book.

MR MAXWELL: That is so, I accept that. But I was just wishing  
to make clear the respondents wouldn't accept Your  
Honour's characterisation of it as the kind of photo you  
would publish if you were wanting to make it look as if he  
was guilty. In our respectful submission that is not a -  
that it is nothing more than what I have said: a photo of  
a Magistrate looking serious, and that it is neutral in  
terms of any inference to be drawn.

But, Your Honour, if we can continue, the points  
shortly are, that one then goes - and as we said in reply,  
we understand the prosecution not to dispute this - to the  
front cover, which says "The policeman", and that is  
clearly hooked up with the Magistrate on the book, and  
"Bingley gained notoriety for several actions which are  
identified. After one case he confessed to fixing" - and  
in our respectful submission that is only open to one  
interpretation, that is to say, it was not during a matter  
but after one, so it is post-court. Now, whether it is  
official, and whether "confession" means confession to  
authorities or, as I submitted previously, that the word  
has its ordinary meaning, which is that you admit doing  
something, is entirely open in our respectful submission.  
But the fact is, as Mr Hoser pointed out, that where  
Mr Adams' photo appears in one or other of these volumes,  
there is, only four or five pages earlier, a specific  
reference to the Bingley matter and a footnote to the

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Hoser Files; and I am not sure whether I have a precise note of that, but it was certainly the evidence given in cross-examination.

HIS HONOUR: Yes, at page 54 was the reference to the Hoser Files. The photograph is 57.

MR MAXWELL: Yes, Your Honour. Well, Your Honour, that is the point. And in our respectful submission, that is an answer to the, or it explains why we don't understand any serious issue to be taken with the proposition that the reader would find his or her way to the Hoser Files and read what is said there about the so-called confession, and it is described accurately in that book as a statement made in a conversation, and - - -

HIS HONOUR: Well, the particular quote, if you are referring to that, is somehow ameliorating the photograph. I mean, look at its terms. "Adams is well known for doing deals with the prosecution to predetermine a trial. Refer to the Hoser Files". It doesn't seem to me it ameliorates the situation very much.

MR MAXWELL: No, Your Honour, for the moment I am simply relying on, that the book itself provides the reader with the necessary signpost to the source of the material relied on. And there isn't time to, but we may be able to do it in reply, to identify any other mentions of Mr Adams in the Hoser Files; but the critical one is specifically the footnote, and the reader must in our respectful submission be expected to check that out before forming any view. In other words, you are put on inquiry by the book itself. What is more - - -

HIS HONOUR: But the specific one you are referring to there is at 57 in the first book.

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MR MAXWELL: Yes, Your Honour.

HIS HONOUR: And you are put on inquiry by 54.

MR MAXWELL: I am sorry, Your Honour, yes. And 57 says, near the photograph at 57 says, we submit accurately, "In a separate matter a policeman admitted to paying", and then the reference is to the Hoser Files at 71, at page 54, and the reader would there see the transcripts of the conversation between Hoser and Bingley, and would know from the prefatory pages to the book that that tape - well, if the source is checked, the tape exists. Your Honour, in our respectful submission it would be a strange result if a man who says "This policeman confessed to paying that Magistrate, and I taped it and the tape is available" were convicted on the application of a prosecutor who hasn't bothered to get hold of the tape. What if it is true? And in our respectful submission, having heard Mr Hoser, Your Honour would be inclined to think that if he says - - -

HIS HONOUR: You mean, what if it is true that he said it or what it is true that the Magistrate was bribed?

MR MAXWELL: Well, the first question is, what if it is true that the tape says what is said? Then the question arises, well, is this to be taken at face value or not, and if it is, then what if the Magistrate was bribed? A very serious matter. My learned friend, the Solicitor, said if an allegation of bribing a judge was true it wouldn't be contempt. That is why this case shouldn't have been brought: because it might be true. In our respectful submission it would be a very odd result to have a man convicted of saying something when he says it is true and he is exposed for more than two years for raw

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material which he says supports the allegation. No, I withdraw that. This is a 1995 book. It is six years since that was published, and nothing was done in relation to that book, as Mr Lee admitted; and Mr Adams, as far as the court knows, took no action in respect of it. It is the most serious allegation to have made by implication. I mean, if Your Honour could view the matter from the perspective of the campaigner who says "This is something which needs to be looked into. If I am right, this is an outrage. This is an abuse of the system". And in his assessment of this policeman, it was a cocky boast after the event, and Your Honour would know that it wouldn't be the first time that sort of thing had been said. And if we might - - -

HIS HONOUR: Well, why would he not say, "admitted to me"? Why put it in the way, if not to give an impression to the reader, which is quite false, that is, that "this is something which is merely based on my say-so, that there was a genuine confession made to me outside a courtroom"?

MR MAXWELL: Well, Your Honour, because he would say, and in our respectful submission with some justification, "unlike allegations that have been made against me, I have got this on tape. I have a contemporaneous record of this conversation. See the sources for my book. That is why I can call it a confession, and why I can say that in the 1995 book, and republish it in the 1999 books, because I know it happened and if you doubt it, come and listen to the tape". Now, if Your Honour, in our respectful submission, was to say, "Well, the language is a bit overstated, that it should have said 'confession to me' or it should have used 'admission' rather than 'confession'",

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in our respectful submission, that is applying a degree of stringency to an author; not just this author but authors generally. It may be that Your Honour is correct; that to be absolutely 100 per cent accurate it should have said "The policeman confessed to me that he had done it".

HIS HONOUR: But why shouldn't there be a requirement of greater stringency, the greater the seriousness of the assertion? I mean, as you accept yourself, it couldn't be a more serious assertion of corruption - - -

MR MAXWELL: I accept that.

HIS HONOUR: A Magistrate who is paid off to gaol someone in a court case.

MR MAXWELL: Yes, Your Honour.

HIS HONOUR: Now, if that is what is being alleged, why would it not be that stringency should be required?

MR MAXWELL: Well, Your Honour, I accept, with respect, the force of that, and the answer has to be the one we have already given, which is that if this were an - if no basis were put forward for this, then we would have a very different case. But in our respectful submission, an author who, in the very book itself, cross-references to the book in which the evidence exists, and in which the existence of physical evidence of the conversation is referred to, then that is where stringency might be applied. You can't go round saying these things when you have only got your poor recollection of what happened. But if Your Honour accepts that he is beyond criticism in having kept a record of it and made it available to anyone who cared to inspect it or ask to listen to it, then the fact that his wording may not be entirely accurate doesn't turn it - doesn't put it beyond a reasonable publication

on the material set out. A fortiori, when, as I have submitted, nothing was done in 1995, no-one has come along and prosecuted him for contempt on the 1995 book which made the principal allegation, he would be entitled to assume that no-one took issue with it. And he does it again, relying again expressly on the material. That is really the key: the fact that you have a signpost in the book to the, so far unchallenged, contemporaneous record of this confession, admission.

That, in our respectful submission, ought to be an answer to the complaint that he wasn't in good faith, or that he acted without any proper basis. And we rely on the fact that, even where the pictures appear on the covers, the heavy reference is to "the cop said he took money". So it is - I mean, the imputation, we accept, is there. If what the cop said was true, then there was a corrupt Magistrate. But it is premised on that which the earlier book precisely verifies, and nothing has happened in the intervening four years to suggest that this is rejected, disbelieved, regarded as outrageous, defamatory, let alone contemptuous.

Your Honour, we then move to - but then I was going to submit, viewed from the perspective of the campaigner, he says: "I have evidence which, on my viewing of all the circumstances, suggests corruption. I want this investigated", that is, in our respectful submission, a proper matter to raise, and this is a proper matter for inquiry. I was going to say in relation to cocky admissions when you don't know you are being listened to. If Your Honour has seen any of the Four Corners programs about corruption in the drug squad in New South Wales

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police, I mean, to the extent that Your Honour can take judicial notice of that, there is an extraordinary degree of cockiness and openness when there was no awareness that there were tapes and cameras in place.

But the third of the three bases for what is said about Magistrate Adams is that it was overturned on appeal, and, Your Honour, we need just to refer you to - the short point is this: the prosecution led no evidence on the appeal. That is in the books. He has sworn it is true, and we refer Your Honour - - -

HIS HONOUR: You mean in the general sense?

MR MAXWELL: In the general sense. He hasn't been challenged on that. We invite Your Honour to see pages 130 to 131 of the Hoser Files, which talks about the non-leading of evidence. In other words, the prosecution gave up, consented to an acquittal. And at 733 to 4 of book 2 - 733 to 4 says, "If it hadn't been for my recording him, that conviction might have stood". This is at the introduction to the "How you Do Covert Taping" section. Does Your Honour see at the foot of 733?

HIS HONOUR: Yes.

MR MAXWELL: And the top of 734. Well, that is the inference he draws. It is because - and this is spelt out in the Hoser Files book itself - it is because he had Bingley on tape, he believes, they backed off. Well, in our respectful submission, that is a not an unreasonable inference. It might be right, but probably no-one will ever know unless someone in Government decided this was a matter warranting investigation where witnesses could be subpoenaed and required to answer questions. Then there might be some interesting matters to find out as to why the appeal was

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abandoned. And that, when you put those three things together in our respectful submission, Bingley's confession on tape, the fact that on Hoser's view and that of others this was a conviction simply not open on the evidence which was overwhelmingly in his favour, and the prosecution runs dead on the appeal, pulls out, then one deals then with the question which Your Honour raised with Mr Hoser: "Well, did it ever cross your mind that this might be a joke? He might be having", as Mr Hoser put it "a lend of you, in saying this was all a deal with the Magistrate?"

His candid evidence was, "Yes, that crossed my mind, but I concluded that it was a cocky boast. I eventually excluded that possibility because I believed he didn't know he was being taped, because when they found out that I had been taping them they didn't run the appeal, and that was my judgment".

The other thing we would say, with respect, is that it is true he has had a chance to reflect on this after the event, but if the conversation occurred immediately upon his wrongful conviction, as he perceives it, he would be less likely to see the funny side of a statement in that state of mind. As he concedes, the answer to that is, "Well, he has got time to think about it later and listen to it". But to the extent that the underpinning of Your Honour's question is, "Well, it is improbable, isn't it, that a policeman would openly say, 'I paid the Magistrate'?", then Your Honour is applying the view of the sensible reader which is to discount the seriousness of the allegation.

I mean, if we are right in saying that he has

conscientiously grounded these allegations in the evidence that he sets out in the Hoser Files, then if the reader says, "Oh, well, I would take that with a very large grain of salt", that weakens, to almost nothing the sting of the allegation. It is seen to be a highly coloured unjustified inference. We don't concede that it is that. But the more outlandish it is perceived by a particular reader to be, the less sting there is. We, our clients, stand by what is said, on the basis of the material referred to and the view of it which Mr Hoser has, after consideration, taken. He might be wrong-headed about it, but he is genuine, he is in good faith, he thinks this is a serious matter which should be investigated, and despite it being published six years ago, it hasn't been, as far as he knows, as far as the court knows. Again, in relation to the question of the - if I might now move to the point of the file marked 'Perjury 1993', and Your Honour said in a question to my client, "Did it occur to you that one possibility was that the Judge was trying to help you?", and in our respectful submission that may be one way of looking at it.

HIS HONOUR: I mean, it stands out to be the likely one, I would have thought.

MR MAXWELL: Yes, Your Honour. But we would respectfully say that, for the reasons put in the principal submission, it was an extraordinarily - whether the intent was right, it is an extraordinary confusion on His Honour's part to think that a file with a date preceding the date of the alleged perjury could - I mean, without asking a question at least, and maybe there was a question - - -

HIS HONOUR: I don't think it is surprising at all. I have

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seen it occur, people in a panic trying to avoid aborting a trial, trying to say something useful which will stop the jury's instant thought that there must be prior convictions.

MR MAXWELL: I accept that. But Your Honour, in our respectful submission, if he has drawn the wrong inference - - -

HIS HONOUR: Perfectly understandable from his point of view. I understand the point you are making.

MR MAXWELL: That is all we would say, and because of the - - -

HIS HONOUR: Perfectly understandable if you start from the proposition that everything that is happening against you is designed to run against you.

MR MAXWELL: Yes. And also, when you take what we still think, with respect, is a reasonable point, that, leave aside the haste with which His Honour moved, on Your Honour's scenario a moment's ago, no more reflection than His Honour had time to make would have raised the question, well, how could there be a file predating the alleged perjury, and that is a point that is made in the book and in our respectful submission.

HIS HONOUR: Only because there had been a previous perjury; that is why. That is the inference the jury might have drawn: there must have been another occasion where he has committed perjury, and they are investigating that one too.

MR MAXWELL: Your Honour, in relation to Judge Balmford, there was, in our respectful submission, an important answer from Mr Hoser about the word "bias". His answers were candid, but he also went on to describe his, what he understands or believes about an inherent bias in the system, meaning the presumption in favour of prosecution

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witnesses. He didn't put it that way, but the other things being equal, the sworn evidence of a prosecution witness will be believed where it conflicts with the sworn evidence of a lay defendant. So he, on his own account, uses "bias" in a more general way than it might be thought to have been used in that particular passage; that is, conduct which tends to be the result of a conviction, which is a correct characterisation of what the court said in De Marco, that is to say, it was a prejudicial direction, the effect of which required the quashing of the conviction.

Questions about generalisations - we would simply say that they would be seen as such; that the basis from which the generalisations are drawn or on which they are based is set out in the books, and it is a matter for the reader to decide whether they are justified or not. We made the point, and I think Your Honour accepted it, that what is said about trusting the legal system at 241 is not a generalisation, it is just a corollary of what is said about Chief Judge Waldron, and the basis for it is clear. Attention was drawn to the general criticisms at page 17 of book 2. We remind Your Honour that at page 18 of book 2 is the general statement which is now verified in the affidavit, that "I am not attacking all police and all judicial officers, and furthermore, my purpose is to improve the system". So again, you read over, and we do say with respect that the books need to be read in their entirety, and indeed, so far as relevant, with the Hoser Files.

And three more specific matters, Your Honour. The application for leave to appeal: Mr Hoser has given

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evidence that he was "sold down the river", to use his phrase. He deals with this in book 2 at 517 to 18. We invite Your Honour to look at what His Honour Mr Justice Winneke, the President of the Court of Appeal said in the report of the appeal - I am sorry I haven't copied it for Your Honour.

HIS HONOUR: I did have a look at it and I saw there was that reference there to counsel saying he "didn't have instructions to abandon" - in effect, didn't have instructions to abandon but wasn't going to argue.

MR MAXWELL: Yes. Well, Your Honour, in our respectful submission that is an extraordinary state of affairs, and we say this from the perspective of the defendant. Your Honour has heard the sworn evidence as to what occurred, and the last paragraph of the affidavit deposes to the fact that this was contrary to instructions which were to argue all the grounds, and he said as much in the witness box. But the judgment independently confirms that Mr Dane properly informed the court that he did have instructions to abandon the grounds, but having been told that there was an abandonment, by necessary implication went ahead and abandoned by necessary implication. And he was, as he said in answer to a question, "between a rock and a hard place". He has got a barrister appearing for him, having been unable to get legal assistance. I mean, yes, in the theory of the contract, he might have withdrawn the retainer. But for that to be realistically put against him, that, you know, "if you were serious about these other grounds of appeal you would have sacked Mr Dane and conducted the appeal yourself", I mean, that is just a wholly unrealistic submission in our respectful

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submission.

The other thing that we draw Your Honour's attention to is the report which Judge Neesham made to the court appeal, which is Annexure B to the affidavit, and Your Honour will see when you come to, I think the foot of the second page of the affidavit, His Honour confirms that there was inappropriate behaviour by the prosecutor.

HIS HONOUR: Yes.

MR MAXWELL: And that on at least one occasion His Honour intervened. Now, that is, in our respectful submission, quite significant. You wouldn't get that from the judgment of the Court of Appeal because I assume that was a ground not pursued - no, I withdraw - - -

HIS HONOUR: Well, it looks as though His Honour reported on the 26 grounds.

MR MAXWELL: Yes, Your Honour yes - - -

HIS HONOUR: Yes.

MR MAXWELL: Exactly. The fact that His Honour would say, "Yes, the prosecutor had behaved inappropriately at times, and I had to caution him, and I did refer to it in the summing up" is very important corroboration of my client's perspective - not the whole of it plainly; but he wasn't imagining this. What he says in the book did in fact happen. The judge himself saw it and intervened.

HIS HONOUR: Well, something happened.

MR MAXWELL: Something happened. That is all we say. There will be differing perspective, of course, as to how bad it was, how often it happened; whether it was allowed to go through too often or not; whether His Honour saw it, and so on. But it is just that there is pro tanto important corroboration by the very person whose judgment is under

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attack by this applicant. And His Honour very properly acknowledged that, on that point, yes, there were some things that had happened which the Court of Appeal should know about.

Reference to the alleged deals: again, this was, this is not a matter complained of. This is at 655 in the second book. Of necessity, in our submission, an allegation of that kind is based on inference, from circumstantial evidence. As Mr Hoser said, and this must be right, you don't get, in the absence of someone like Mr Bingley, verification that these deals have been done. You look at something and say, well, this was a very serious offence and the person was convicted and they got a suspended sentence, and plea bargaining is a matter of open common knowledge. Plea bargaining does occur. It is not understood by the lay public by and large. It is the subject of criticism because it produces, some would argue - - -

HIS HONOUR: I must say I am not aware that plea bargaining goes on involving judges.

MR MAXWELL: No, Your Honour. Sorry, I - if I might - - -

HIS HONOUR: It is pretty strongly disapproved of, as I understand it.

MR MAXWELL: Yes, Your Honour, but - no, I meant plea bargaining between prosecution and defence - - -

HIS HONOUR: Yes. Well, of course, that happens.

MR MAXWELL: That happens, and yet, those who think that sentences are too lenient will say, "Well, it is no business of the prosecution to give up a charge or say, 'well, if you plead to this we will not press for a custodial sentence'". Those of us who practice in the

system understand that judgments of that kind are properly made for all sorts of reasons to do with witnesses and evidence and so on. But it is important to note that it is not asserted that these are deals involving prosecutor, informant and judge. The phrase is rather something like one or other of prosecutor, informant or judge. Now, that is not meant to be a - - -

HIS HONOUR: Or court staff, I think was the other one.

MR MAXWELL: The only point there, Your Honour, is that it is not, it is a much - - -

HIS HONOUR: Well, he is not charged with this.

MR MAXWELL: Precisely, but - - -

HIS HONOUR: Its only relevance could be on credit generally or - - -

MR MAXWELL: Yes, Your Honour, and we say that any attack on his credit, based on that, should be rejected, because it is a comment which can be made about these plea bargains. Whether it is open to someone as an observer in the court, when the prosecution says "Well, Your Honour" - in the trial court - "we don't want a custodial sentence", the defence's plea, and then the judge says "Yes. Well, I heard what is said and I will sentence a Community Based Order". Someone out there might think, "Oh well, the judge has obviously been in on this. It is a three-way deal".

Now, it is not suggested that in any case that is so, but there is, it is one of those mysteries of the criminal process that the person who is not part of it doesn't understand and might misunderstand. I put it, say nothing more about it than that.

Your Honour, in conclusion, then, we respectfully



submit that applying the test which, as we understand it, Your Honour accepted as applicable, that is to say, that there is no offence unless the matter published has as a matter of practical reality a tendency to interfere with the due course of justice; or putting it differently, as Your Honour did in the reasons, it is a matter the publication of which creates a real risk of interference with the due course of justice, Your Honour would not be satisfied beyond reasonable doubt that any of the offending passages left, after Your Honour's ruling this morning, beyond reasonable doubt satisfies those requirements, and that conclusion, in our respectful submission, is informed by all the matters that have been put about both the particular context of the remarks in question, the perspective of the writer and the character of the books and their avowed constructive intent. If Your Honour please.

HIS HONOUR: Yes. Thank you, Mr Maxwell. Yes, Mr Langmead?

MR LANGMEAD: Your Honour, it might be appropriate to start with some of the matters that Mr Maxwell raised whilst they are fresh in your mind and mine.

Just by way of introduction, Mr Maxwell's last comment about avowed constructive intent: that of course is no answer or no defence, if there is an objectively assessed destructive effect, as assessed by looking at the words. And I think my friend concedes it is their inherent tendency that is the test.

So that there is no doubt about the relevance of intent, I understand my friend to concede that mens rea is not an order of the offence, but he uses the authorities to say that intent is relevant. Whilst it is relevant, it

nonetheless remains not an element of the offence, and we say that these matters as to Mr Hoser's declarations of his purpose take the matter no distance at all for the respondents.

As to the affidavit of Mr Hoser, it was put by my learned friend, at paragraphs 8 to 10, that there was no cross-examination on them; in a sense that he was not taken to 8, 9 and 10 and said "Look at this. What do you say?" that is correct. But if it is said that the substance of what is said there was not challenged, with respect, that is incorrect. Indeed, if you look at the first sentence of paragraph 8 of the affidavit, "I set out in the relevant books the facts and matters upon which my comments, criticisms and opinions, as expressed in the books were based", a number of his criticisms and opinions he was taken to with great particularity. When he was asked as to the basis of them he was challenged that there was an inadequate link with the only real basis he put, which was his perception of various court proceedings involving him and others. And indeed, it was put strongly and repeatedly that the necessary link was missing; and indeed that can only be seen as a challenge to the substance of what appears in the first sentence in paragraph 8.

It is said that what Mr Hoser deposes to in paragraph 9, that he verifies the truth and that he was not challenged. What he says in paragraph 9 is, "To the best of my knowledge at the time of publication the statements of fact contained in the relevant books were true". He then says, about views, opinions and beliefs that he expressed something different. He says "Wherever in the

relevant books I expressed views, opinions or beliefs, I was expressing views, opinions and beliefs which I held at the time of publication".

Now, that does not establish anything other than his belief in the truth of what he says. It does not link his summaries and accounts of matters that he calls facts with the extravagant opinions he expresses about particular judges and about the judicial system in general.

The mere fact that he held a view that he was expressing a view, opinion and belief which he held at the time of publication, with respect, takes the respondent's case nowhere, because we would interpose there that the evidence shows that in fact he unreasonably held such views, and that he was forever jumping at shadows; and that his perspective indeed was, as was discussed only moments ago, a perspective that everyone is against him. And whilst some of his conduct on that premise may be reasonable, or explicable, the premise itself is entirely unreasonable, and there is no evidence to rebut that proposition.

It is said in paragraph 10 of the affidavit: "It was no part of my purpose in writing the relevant books to harm the administration of justice". That disavowal is to be read in light of various statements that I have taken Mr Hoser to, as to generalised comments; for example, about it being unlikely that any Judge or Magistrate in Australia would accept the evidence of a civilian witness over an official witness in a prosecution, and other statements that I will take you back to.

So to suggest that there was some mystery, mysterious unexplained gap in the cross-examination is without

substance.

It was said there was no cross-examination on the underpinnings of the passages, the remaining passages in the various counts of which complaint is made. The relevant test is: At face value, what is their tendency, do they have the relevant tendency? An objective test is of the likely effect or the effect that the words tend to have.

It was said by my learned friend that Mr Hoser referred to sources, and you heard Mr Hoser say that, nodding, I think, towards a bag, that he had them, had them here, a hundred pages or so. They were not tendered. Jones and Dunkell permits the inference that those documents would not have assisted.

It was said that there being no cross-examination on the passages, that is so, but the fact upon which the prosecution relies is that there is no evidence of their truth; merely of belief in their truth.

Indeed, Mr Maxwell, my learned friend, has pointed repeatedly to my learned leader, the Solicitor-General, saying that if something was true, that would be a defence, and that was said last week.

Mr Hoser gave evidence this afternoon. No other evidence was called. No attempt was made by my learned friend, either in the affidavit of Mr Hoser or indeed in examination-in-chief of him, to lead any evidence as to the truth of particular allegations. There is no doubt - it is not contested that he has a belief. But as to the objective truth, none has been called. The only exception to that, I point out, is of course the evidence in the exhibit that refers to Judge Neesham's response to what I

call the 26 draft grounds, Your Honour.

A further notable omission in this regard - for example, I think it was page 404 of what is Exhibit B to Mr Lee's affidavit - my learned friend says, and perhaps it was more with a flourish than factual recollection, that Mr Hoser didn't imagine what occurred between the prosecution and the jury; he didn't imagine it. And I think it was indeed the original case put by my learned friend that Mr Hoser heard about this afterwards, that others noticed it. One such asserted other is said to be a K.R. Sawyer, from an unnamed university, who is said to be a professor and a doctor.

Given the reliance placed on the evidence, of Judge Neesham, as to one or two episodes of this interference with the jury by the prosecution, Mr Sawyer has not been called and there is no explanation as to his absence. I again refer Your Honour to the inference that it is open to the court on the basis of Jones and Dunkell. It is open to the court that his evidence would not have assisted.

My learned friend noted, correctly, that in cross-examination I put that Hoser sought to share the views expressed in his books and indeed to share those publications with those similarly concerned about corruption. My friend then went on with less foundation, in my respectful submission, to either ask rhetorically or to assert that we put - I am now unsure without transcript which it was - but the words he used were: "It was a vice that people share concerns about corruption ". Whilst the question is rhetorical, the answer is of course no, and that was never put. It was a rhetorical flourish from my

friend.

The vice is that material is published which has the relevant tendency to undermine the administration of justice. As my learned friend would understand and, as I hope, Your Honour would understand, the questions put to Mr Hoser about his connection with like-minded people and with organisations consisting of such like-minded people, was of course to provide some particulars of evidence as to his status; in other words, on a spectrum from entirely unbelievable through to entirely authoritative, it is relevant to the practical reality test for Your Honour to place Mr Hoser somewhere on that spectrum. And we will be submitting, the Crown does submit, that Mr Hoser's scientific, his self-asserted scientific qualifications, experience and publications, albeit herpetology, that his assertion, for example, that he has made a study of police corruption, his references to - I will take Your Honour to this later, but he makes references in Exhibit B to people - and indeed he did so in cross-examination - to people asking him questions about how to protect themselves in these regards; he is assuming the role in the final chapter in Exhibit B of adviser to those who would ward off the forces of corruption in the legal system through the use of covert tapes, and other methods prescribed there, or recommended there. We say they all serve to place Mr Hoser further down that continuum that I referred to, towards the authoritative end, rather than at the rabid, paranoid, entirely unbelievable end. That is not Mr Hoser, and as my friend is at pains to point out to Your Honour repeatedly, he presents in the witness box as somebody who has some insight into his

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position. And indeed if Your Honour is being invited to extrapolate from that presentation, Your Honour is also entitled to do it for this purpose, and that is, to move Mr Hoser yet another increment or two down towards the authoritative end of the spectrum to which I referred. My friend referred to what was implicit in the questions that I put to Mr Hoser, of him being a disgruntled litigant and a campaigner. He referred to that as a false dichotomy. We reject that description. It is plain that a person unsatisfied with an experience with the court system could be a disgruntled litigant. It is plain that a person could be a campaigner without being a disgruntled litigant, and indeed, the two; it is not just a dichotomy, one could be either without being the other; one could be both. We simply put that Mr Hoser is both, and it is important, that conjunction. There is something understandable, and I don't want to be understood in saying that that it is defensible, but there is something understandable about a person who perceives that they have been wronged, and we don't take issue that Mr Hoser so perceives in relation to himself and certain issues attending his cases, that that is his perception. But the next step is optional. What one can take is specific steps of approaches to the Attorney-General, the Ombudsman, legal advice, as a disgruntled litigant to say, "I seek redress and I seek it A in my case, and B in general, to prevent this wrong occurring again". To become a campaigner, and then to get to the area, as Mr Hoser has, of expressing opinions and engaging in what we will say is properly characterised as extravagant hyperbole about the system in general, on the

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limited bases that he has named in the book and further advised of in evidence today, is unsustainable.

HIS HONOUR: Mr Langmead, I don't get time and a half after 4:15. Can you give me an idea of what duration you expect to be?

MR LANGMEAD: One to one-and-a-half hours, I would say.

HIS HONOUR: Okay. Well, I was going to suggest that if you were very close to finishing, I would have pressed on. But in those circumstances I think I should leave it until tomorrow.

MR LANGMEAD: Your Honour, would it be of assistance if I were to hand you an outline of submissions overnight, and I will simply hand them to my learned friends.

HIS HONOUR: Yes, both to me and to your opponents. Are you in trouble tomorrow.

MR MAXWELL: Yes, Your Honour, I am, but we don't suggest that the matter not proceed. I just want to indicate that I won't be here in the morning, Your Honour. My learned juniors will deal with the matter.

HIS HONOUR: Well, given that they have now got a written outline, that should assist in doing a reply in the morning.

MR MAXWELL: Indeed.

HIS HONOUR: Well, we will adjourn now until 10:30 tomorrow morning.

ADJOURNED UNTIL 10: 30 AM, WEDNESDAY, 31 OCTOBER 2001

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