CA on appeal from QBD (Her Honour Mrs Justice Hallett) before Pill LJ; Arden LJ; Neuberger LJ. 5th July 2006.

**JUDGMENT : LADY JUSTICE ARDEN**

2. Since the decision of this court in ***English v Emery Reimbold & Strick Ltd.*** [2002] EWCA Civ 605 practitioners and judges have been conscious of the need for judges to give reasons for their decisions, including in some circumstances their findings of fact. The issues which this appeal seeks to raise to some extent follow on from that decision and raise the issue of what happens if some of the judge's reasons can individually be criticised. What impact does such an error have on a finding of fact for which several reasons are given by the judge, particularly if one of those reasons turns out to be wrong, or is overstated? In answering this question it is, in my judgment, helpful to bear in mind the approach of an appellate court in findings of fact. It is well established that where a trial judge makes a finding of primary fact based on the evidence of witnesses whom the judge has had the advantage of observing, an appellate tribunal will rarely interfere. It will rarely be able to be satisfied that the trial judge was wrong. Where, however, the findings of fact are based on inferences from evidence or are based on documentary evidence, an appellate tribunal is in a better position to reach a conclusion of its own as to whether or not the trial judge was wrong.

3. The position is, in my judgment, similar when an appellate court is reviewing the reasons given by a trial judge for the trial judge's findings of fact. Thus, for example, where those reasons are themselves based on documents or on inherent likelihood, there is no reason for this court not to examine them, and it would be more ready to come to a conclusion as to whether or not they support the judge's conclusions. If, on examination of the reasons, it appears that the substance of the reasons cannot stand, then as I see it the court will probably have to set aside the judgment and order a retrial. If, however, the error does not affect the substance of the reasons, the judge's conclusion should normally stand. The appellate court should take into account reasons which can be inferred, as well as those which are expressly stated.

4. I turn to this action. This action has been in progress since 1998 and it arises out of events in 1992. Some time ago there was a direction for the trial of a preliminary issue as to foreseeability. That was tried by Mr Justice Elias. There was an appeal from his judgment and this court ([2002] QB 1312)set aside his judgment. This court held that the judge had applied the wrong test and, in any event, it was inappropriate to try the preliminary issue as such. The matter, therefore, was remitted to trial.

5. I therefore return to the facts of this matter. In this action, Mr. McLoughlin, the appellant, seeks damages against his former solicitors, Grovers, for their failure to carry out his instructions given for the purpose of his defence of criminal proceedings brought against him. Those instructions were to employ an enquiry agent and to enquire and advertise for witnesses as to the incident in the local newspapers. These matters were, in fact, only done after the trial at which he was convicted of assault. Mr McLoughlin was sentenced to a term of four years and while in prison suffered psychiatric injury and, in addition, he then and thereafter sustained financial loss. After conviction, however, the newspaper advertisement was placed and an enquiry agent was employed. A witness came forward which led to his appeal against the conviction being allowed and a retrial ordered. Mr McLoughlin's case is that Grovers should have placed the advertisement earlier, as he had instructed them to do. The judge, Mrs Justice Hallett, as she then was, heard this action for several days and shortly thereafter she gave a judgment of some 164 paragraphs.

6. The principal events in issue in the criminal proceedings are as follows. On 19 June 1992, a Mr Mark Martin was allegedly assaulted and robbed at his home at 24 Whitebrook Road, Manchester. This was a property owned by the appellant, Mr McLoughlin, and Mr Martin was his tenant. Mr McLoughlin was arrested and subsequently charged with assault and robbery in the sum of £60. Thereafter, Mr McLoughlin instructed Grovers to act for him in the criminal proceedings. The trial ultimately took place between the 4 and 6 January 1993. Mr McLoughlin's case was, in essence, that the case against him had been fabricated and that what had happened was that Mr Martin had already been assaulted at his home before Mr McLoughlin arrived on 19 June. Mr McLoughlin had been summoned there to receive a part payment towards rent arrears, which Mr Martin owed him for his occupation of that property. Mr McLoughlin saw that Mr Martin was already injured and that the house was in disarray. Mr Martin took Mr McLoughlin outside and gave him £60 in cash, which he had in the boot of his car parked in the driveway. He subsequently alleged that Mr McLoughlin had assaulted him and robbed him of this sum.

7. As I have said, the jury did not accept Mr McLoughlin's version of events. Mr McLoughlin was convicted and sentenced to 4 years' imprisonment. He served 15 weeks of this sentence. In due course his conviction was set aside by the Court of Appeal Criminal Division and at a retrial he was acquitted of robbery and found not guilty of assault.

8. I now turn to this action, which is one for professional negligence. There are two allegations of negligence. The first is that Mr McLoughlin alleged that Grovers had failed to carry out his instructions, which he said he had given to Ms Rowley of Grovers from July 1992 onwards to place an advertisement for witnesses and for other evidence in connection with the assault. The second allegation was that Grovers had failed to carry out Mr McLoughlin's instructions to instruct an enquiry agent. It has never been very clear what the enquiry agent was to do, or at least it was not made clear in the hearing of this appeal. In the event, an agent was instructed and he made enquiries as to Mr Martin's background and in 1994 he found another witness, a Mr Harris, who said that Mr Martin had told him that it was not Mr McLoughlin who had attacked him on 19 June.

9. The critical question for determination was when the alleged instructions were given. The pleaded case was set out in further and better particulars served in June 1999. These appear at volume 7, page 1672 B to E: *"The claimant met Ms Rowley, or spoke to her on the telephone on at least 11 occasions prior to 4 January 1993. In the case of each occasion no other party was present other than the claimant and Ms Rowley except for the conference with counsel on 27 October 1992 when Mr Leonard Webster was also present."*

*There then follows a list of dates in further event of particulars, I need only refer to the 6, 7, and 11 of those dates, and they were as follows:*

*6) On 22 October 1992 in conference with counsel, Mr Leonard Webster, at Mr Webster's chambers in Manchester to Ms Rowley.*

*"7) On 26 October 1992 on the telephone by the claimant to Ms Rowley at the defendant's offices. […]*

*"11) On 22 December 1992 at the defendant's offices by the claimant to Ms Rowley."*

10. The further and better particulars continue as follows: *"The claimant cannot recall with precision what was said on each occasion. On 15 October 1992 the claimant, having been contacted by a representative of City Link Investigators, a firm of private investigators who appeared to have information which may assist his defence, suggested that Ms Rowley should make enquiries of that firm. During the course of the conference with counsel on 22 October 1992 the question of instructing an enquiry agent was a matter for discussion. The attendance note in respect to the conference with Mr Leonard Webster on 22 October 1992 makes reference to a private detective, namely, 'Private detective, two reasons -- money in boot of car, scrap a few days before.'"*

11. Subsequently, on the day in early December 1992, probably the first week in December 1992, the claimant reiterated the position in respect of City Link Investigations in a conversation with Ms Rowley. To the best of the claimant's recollection he did on three occasions, in early December 1992, on 19 December 1992 and on 22 December 1992, specifically request what was happening in relation to the investigation of his case, and in particular what inquiries of City Link Investigations were being made. To the best of the claimant's recollection, it is on these three last occasions that requests were made for an advertisement to be placed in the Manchester Evening News in order to establish whether anybody could give evidence as to what happened on 19 June 1992 so as to establish that the assault upon Mr Martin had been caused by others. The claimant was assured by Ms Rowley that investigations were in hand and in particular he need not concern himself with such investigations since the trial date was to be postponed.

12. I now turn to the material passages in the judgment. I start at paragraph 28 to 30. These passages arise out of a proof of evidence which is in the core bundle, which was said to have been taken in about December 1992 or possibly January 1993. The judge said this:

> *"28. A proof of evidence appears in my papers. It is undated and was never sent to the claimant for approval and signature which Miss Rowley accepted would have been advisable. Amongst the considerable detail provided in the proof as to the events of June 1992 the claimant provided some information on Martin's background and his financial problems. He said that men from a firm of private investigators called City Link were trying to find Mr. Martin. Employees of that firm, in particular a Mr. Sharman, were therefore being put forward as possible suspects for the assault on Mr. Martin. In fact Mr. Sharman was a perfectly respectable private investigator who was trying to trace Mr. Martin on behalf of a client in relation to a bad debt. The client was a utility, British Gas.*
>
> *29. Mr. Sharman and the claimant's brother, Patrick McLoughlin, both gave evidence that they had met coincidentally in June 1992. Mr. Sharman explained to Mr. Patrick McLoughlin what he was doing in trying to track down Mr. Martin and provided Mr. Patrick McLoughlin with his contact details. The claimant says that as a result he telephoned Mr. Sharman in June before the assault and it was this conversation which put the thought in his mind that it would be a good idea to instruct an enquiry agent to make enquiries about Mr. Martin and his background. Both he and Patrick McLoughlin said they felt that if Mr. Sharman could be ruled out as a suspect he would be a good person to handle the matter given his knowledge of Mr. Martin.*
>
> *30. Mr. Sharman, however, also recalls that his conversation with Mr. McLoughlin as being very pleasant. I find it puzzling, therefore, that thereafter there could have been any question in the claimant's mind that Mr. Sharman was a possible suspect, certainly I find it puzzling that he could have thought that as late as December, which is when he says this proof may have been taken or indeed January 1993. It is also slightly odd, in my judgment, at the same time as Mr. McLoughlin says that he was telling Miss Rowley to employ enquiry agents he was putting them forward as potential suspects."*

13. I now turn to paragraphs 32 to 33 of the judgment, which deals with the conflict with counsel on 22 October 1992:

> *"32. On 22 October 1992 a conference took place with Mr. Leonard Webster. At that conference mention was made of a private detective. The claimant says he told Mr. Webster he had been approached by a private detective, Mr. Sharman, from the firm City Link and Mr. Sharman was making enquiries about Martin's whereabouts. As far as the defendants' attendance note to this conference is concerned made by Miss Rowley it reads where relevant to this issue, 'Private detective, two reasons -- money in boot of car. Scrap a few days before'. The claimant insists that he had instructed Lynne Rowley, and Mr. Webster knew of this, to employ an enquiry agent to pursue the possibility of someone else having assaulted Martin, and that is the reference to the scrap a few days before. He also insists that he had instructed Miss Rowley to advertise for witnesses by posters and in the press.*

*33. Both Mr. Webster and Lynne Rowley disagree. They say no mention was made of advertising for witnesses and if anybody was going to consult or employ an enquiry agent it was the claimant himself."*

14. I need not read further from paragraph 33. I go next to paragraph 35, which contains the judge's findings on the telephone conversation of 26 October 1992:

*"35. On 26 October 1992 a telephone conversation took place between Miss Rowley and Mr. McLoughlin. Again there was reference to an enquiry agent. One party to the call mentioned that an enquiry agent had come across Mark Martin in Winsford who had been found trafficking in drugs. Mr. Sharman told me that this was in fact the kind of information he had obtained when he was investigating Martin's background. As I have indicated no one suggests Miss Rowley was in touch with Mr. Sharman or any other enquiry agent during the autumn. The defendants argue therefore that this supports their account that this information must have come from the claimant himself and it must have been he who was talking to an enquiry agent. I have to say I can see considerable force in that argument. It is difficult to see how this information could have emanated from Miss Rowley and if that is right, in my judgment, it must undermine the claimant's account. The defendants also argue that had Miss Rowley been told to instruct an enquiry agent she would have made a note of it. Mr. Stewart argues that, given her negligent preparation of the case generally, I can make no such assumption."*

15. I turn on to paragraph 43, which reads as follows. It deals with the meeting on 22 December 1992: *"Mrs. Mary McLoughlin, the claimant's wife, and Patrick McLoughlin purport to remember that on 22nd December Patrick McLoughlin drove the claimant to the defendants' offices and he came out complaining and annoyed that Lynne Rowley ha only just appreciated that they were not ready for trial. In the absence of any documents Miss Rowley cannot confirm or deny such a meeting but she certainly denies the alleged content. In my judgment, it would be surprising if a meeting of that length occurred and there was no record made of it for billing purposes. Certainly from the invoices the claimant was not charged for any such meeting. I am prepared to accept that the claimant may well have contacted Grovers by visiting them or by telephone them, but I have difficulty in accepting all that he says about that meeting for reasons I shall come to later."*

16. Paragraph 58 deals with Mr Sharman again:

*"58. Mr. Gibson QC, on behalf of the defendants, relies very heavily upon the fact that in the summer and winter of 1992 all parties agree that Mr. Sharman had not been instructed, yet when the draft was prepared Mr. Sharman must have been on the scene as an agent as his contact details were provided. Mr. McLoughlin accepts it was he who provided Mr. Sharman's details. He was the link between Miss Rowley and Mr. Sharman. He says he gave Miss Rowley the contact details back in the summer of 1992. Both the claimant and Mr. Sharman said that after the initial conversation in June 1992 the claimant did not contact again until January 1993. Thus, if this is right and the advertisement had been planned and discussed for some time and Miss Rowley, as the claimant maintains, was merely waiting her moment to place it, then these contact details must have been provided to Miss Rowley in the summer of 1992. They must have been retrieved in October and then used at a time when no one suggested Mr. Sharman had been instructed as an agent. Indeed, according to the claimant, he was still a potential suspect at that time."*

17. I now move on to paragraphs 91 to 104, which are the paragraphs on which Mr Stewart most focused in the first ground of appeal. At 91 the judge says that Mr McLoughlin: *"... now says that he wanted Miss Rowley to advertise for witnesses not only in the paper but by putting up posters, and he wanted an enquiry agent employed. I should say, to put Mr. & Mrs. McLoughlin out of their misery at the earliest possible stage, that I am afraid I simply do not accept that these were the instructions that he gave to Miss Rowley before his conviction in January 1994."*

18. I think that should be January 1993. The judge continues: *"Having seen the witnesses give evidence, of one thing I became absolutely sure as this trial proceeded, that had this particular claimant, Mr. Martin McLoughlin, given clear instructions that were ignored and had he found out, as he claims that he did, that they were either being ignored or put to one side, it is, in my judgment, simply inconceivable that he and his family would have said and done nothing for days, weeks and months."*

19. I can then go to near the end of the paragraph: *"He would have complained to Mr. Wish [who is a partner in the firm Grovers] or to Mr. Jones, whomever else he could have found. He certainly would have complained to Miss Rowley. He would have challenged her. He would have challenged Mr. Webster. He would have asked why the case was proceeding when they both knew full well, on his case, that the enquiries had not been made and they both must have known full well that the case was not ready for trial.*

*"93. I consider it highly significant that there is not one reference to any complaint against Miss Rowley and her failure to obey the claimant's express instructions. There is not a reference before the trial, at the time of the original trial, on the claimant's conviction, at a time when they were considering placing an advertisement for witnesses and an advertisement was placed, at the time Mr. Whittaker responded, at the time when Mr. Webster formulated the grounds of appeal, at the time of sentence, at the tie when the application was made to rely on Mr. Whittaker's evidence as fresh evidence, nor during the time when the claimant was in prison."*

20. I need not read the remainder of paragraph 93. At paragraph 94 the judge says:

*"94. As I have already indicated I am confident that given the time and effort that they devoted to this case, Messrs. Jones Maidment & Wilson and indeed others such as counsel would also have noted it had there been a complaint*

*or hint of a complaint against Grovers, but again there is no record of any such complaint when Jones Maidment & Wilson took over the case in December 1993."*

21. I will interpose to say that Messrs Jones Maidment & Wilson were instructed in late 1993 to take over the conduct of the retrial from Grovers and the partner responsible was a Mr Roxborough, to whom I will refer later. At paragraph 95 the judge says this:

*"95. Had the claimant given these instructions and had there been a failure to comply with them which he believed had led to his conviction, I have no doubt that he would also have recalled such instructions very clearly when the pleadings were drafted and when he made his witness statement in May 2000. He now says he has a very clear recall of them, but in May 2000 in his witness statement he said he recalled drawing a possibility of assistance from City Link to Miss Rowley's attention and her assuring him the matter was in hand in October 1992 and December 1992. He made no mention in that statement of the placing of an advertisement until after he was convicted and Mr. Webster advised there was no prospect of appeal without fresh evidence."*

22. The judge in paragraph 96 goes on: *"Further, when the documents, which are still available from Miss Rowley's file, are considered I am driven to the conclusion that they assist the defence case and not that of the claimant. They assist the case in establishing that the instructions were given post trial. Those documents are the undated attendance note, to which I have already referred, that plainly indicates a discussion about placing an advertisement for witnesses and is plainly after conviction. There is an undated handwritten fax to Mr. Sharman, the private detective employed by the claimant, which is also clearly post conviction. There is the defendants' fax to the Manchester Evening News. There is a notice of application for a witness order to the Court of Appeal Criminal Division. There are also draft handwritten letters to the Criminal Appeal's Office written by Miss Rowley in March 1993 and a letter from her to explain why the claimant should be given permission to appeal and why they required an extension of time."*

23. I would pause to refer to page 98 of the core bundle, which states that: *"The statement accompanying the Notice of Application for Leave to Call a Witness states: 'Following conviction and prior to sentence, the Appellant decided to instruct Enquiry agents to make enquiries and as a last resort an advertisement was placed in a local paper (copy enclosed). As a result the witness whose evidence it is sought to adduce came forward'."*

24. The letter to the Court of Appeal Criminal Division is from page 297 to 298 of the core bundle. I need not read all of this; I need only read the passage on the second page beginning: "Following sentence and advice that there were no grounds for appeal against the jury's decision, the Appellant decided to make enquiries through the use of a local private investigation firm, City Link. Whilst the investigators received information that the Appellant may have been unjustly accused by the Complainant, no information of sufficient standard that would be acceptable to a trial judge was available. It was eventually decided that an appeal for information be placed in a local paper, the Manchester Evening News. Our advice was sought on this course of action, and we consulted the Law Society's guidance team who confirmed we should proceed with caution but that it would not be contempt of court, particularly since the trial of the action had now taken place, although sentencing had not.

"In the end, one person responded to that advertisement …"

25. I need not read the remainder of that paragraph but I continue with the paragraph thereafter: *"In view of all the above, it should be clear that the application could not have been submitted any earlier than when fresh evidence became available, as before that time there were no grounds for appeal.*

*"It may be arguable that an appeal for witnesses could have been made at an earlier date. However, it did not occur to the Appellant to do so, because he did not believe he would be convicted and has maintained his innocence throughout, and it is not, we submit, standard practice to advertise for information. We further submit that once the fresh evidence became available, the application for leave to appeal was dealt with promptly."*

26. I now return to paragraph 97 of the judgment, which states as follows:

*"97. Mr. Gibson argues that this letter indicates that Miss Rowley was telling the Court of Appeal, Criminal Division that these investigations were carried out post conviction. He submits that Miss Rowley would not have lied to the Court of Appeal and having seen her cross-examined robustly in the witness box I agree with him. She was, in my judgment, an honest witness doing her best in difficult circumstances. I have, as I have indicated, found that there were areas in which I believe she could have done more on the claimant's behalf, but I certainly do not accept that she is someone who would deliberately lie either to the Court of Appeal or indeed to me. In her letter to the Court of Appeal office she indicates that it was only post sentence (she meant conviction) that the decision was taken to instruct private investigators. The information that they produced was inadequate and the she said this, 'It was eventually decided that an appeal for information be placed in a local newspaper.'*

*"98. Mr. Stewart may be right that the letter was arguably misleading because on Miss Rowley's own evidence the claimant himself had had some involvement with private investigators before the trial and the decision to advertise was taken soon after conviction. His involvement was not necessarily the same as instructive private investigators and if there was any misleading of the Court of Appeal I am satisfied it was entirely unintentional. I do not accept, as I have indicated, that Miss Rowley would have deliberately written a misleading letter."*

27. That letter to the Court of Appeal was dated 1 March 1993. The judge goes on then to deal with documents on the file at Grovers and the judge said this:

*"99. I have also borne in mind when considering the documents that nowhere in Miss Rowley's records is there a single note or record of her being given these instructions."*

28. I can then go to paragraph 100:

> *"100. I accept the force of Mr. Gibson's submissions that there was no obvious reason why consideration should have been given to advertising for witnesses."*

29. I can then go to the end of that paragraph: *"I accept the argument advanced by the defendants that advertising for witnesses on the facts of this case and given this claimant's instructions would have been unusual. It would not have occurred necessarily to Mr. Webster or Miss Rowley to advertise for witnesses and, therefore, I have no doubt they would have remembered had that suggestion been made and they been instructed to do so before the trial."*

30. The position was that Mr McLoughlin alleged that the assault of Mr Martin, which had preceded his arrival, had taken place inside the house. At paragraph 101 of her judgment the judge said this:

> *"101. As far as the two drafts of the advertisement are concerned, as I have indicated both parties place considerable reliance upon them. In my judgment, the dates upon them must be, as Miss Rowley says, a coincidence because I fail to see how documents drafted in the autumn of 1992 could have upon them Mr. Sharman's contact details given the history provided to me by Mr. McLoughlin. On his case, on the defendants' case, on Mr. Sharman's evidence, Mr. Sharman was not instructed by that time. He may have been consulted informally by the McLoughlin brothers about what he knew and about what he was doing, but he was not acting as the claimant's agent or the defendants' agent by that time. The claimant clearly instructed him in January 1993, post conviction. This, I believe, must have been prompted by a discussion or discussions with Miss Singleton, as the claimant seems to have told the clinical psychologist in September 1993, or indeed by Mr. Webster's advice on the chances of successful appeal being none without there being fresh evidence. I am satisfied that before the conviction the only person taking any steps as far as any enquiry agent is concerned was the claimant himself, just as he did when he was using the services of Jones Maidment & Wilson."*

31. I pause for one moment. The judge there refers to the dates of the advertisements. The position was that the documents for trial included drafts of the advertisements which were ultimately placed and these drafts were in the handwriting of Miss Rowley. The advertisements were drafted on the back of other documents as the passages from the judgment have already explained. The passages actually drafted by Miss Rowley refer to the date of the incident but the do not otherwise contain a date and so the date to which the judge was referring was the date on which the reverse side of the drafts was prepared, and as will be recalled it said that those documents were dated in the autumn of 1992, in the first case, September 1992 (the document was an application form for a book on copyright), and in the second case, 12 October 1992, being the date of a "cold call" letter received from Peter Taylor and Associates. It was on the reverse of those two documents that the draft advertisements were prepared.

32. I return to paragraph 102 of the judgment:

> *"102. I prefer the evidence of Miss Rowley and Mr. Webster even if, as Mr. Stewart suggested, it means that they have missed a potentially interesting line of enquiry. It is plain that Miss Rowley did nothing about instructing an enquiry agent before the first trial and therefore the only possible interpretation, in my judgment, of the attendance note of 26th October 1992 is the claimant telling Miss Rowley what he had learnt from the enquiry agent. I accept the evidence of Miss Rowley and Mr. Webster that the references at the conference were references to what the claimant himself was doing and they were not references to his having instructed Miss Rowley to involve an enquiry agent."*

33. There are two other short passages to which I must refer. They are in paragraphs 103 and 104, in which the judge makes her findings as to the credibility of Mr McLoughlin and his family:

> *"103. It goes without saying that I accordingly reject the evidence of Mr. McLoughlin and his family and I should explain the basis for so doing. I have read and re-read the witness statements filed on behalf of each member of the McLoughlin family. I have compared them with what the witnesses said in court. I do not intend to rehearse everything that was said. In my judgment those statements and their evidence bore all the hallmarks of a collective memory and one based on the claimant's own faulty recollection. The witnesses are plainly and understandably very supportive of the claimant and have been for many years. They have had innumerable discussions about this case. I have no doubt they have all now convinced themselves of the accuracy of their recollection but they have failed to convince me.*
>
> *"104. As far as Mr. Martin McLoughlin is concerned, I agree with Mr. Gibson, there are sufficient examples of differences between his witness statement prepared for the trial, the preliminary issues of foreseeability and limitation in May 2000, his witness statement in April 2005 and his evidence in the witness box to suggest that either he is prepared to tailor his evidence in ways that he thinks will help him or his recollection is entirely unreliable. I hope that I have given a number of examples throughout this judgment ..."*

34. Then the judge says that she will give two more examples. Mr. Gibson for the defendants took me to a number of paragraphs in the judgment in which judge points out that the evidence was, as she put it, tailored or unreliable and it is not necessary for me to go into those paragraphs further. The paragraphs to which we were referred were 23, 70, 78, 103, 104 -- those are the last two I read -- 112, and 132.

35. Mr Roger Stewart appears for Mr McLoughlin on this appeal and he has made a skilful and highly focused attack on the judge's judgment. He has confined his challenge to paragraphs 91 to 111, which I have already summarised. In summary, what Mr. Stewart submits is that the judge was wrong not to accept the evidence of Mr

McLoughlin that he had given instructions to Miss Rowley to place an advertisement and to appoint an enquiry agent before the first trial. Mr Stewart submits that there were a number of matters, including Miss Rowley's careless handling of Mr McLoughlin's case, which when put together should have led the judge to conclude that there must, as Mr McLoughlin said, have been a meeting or a conversation in October 1992 at which Mr McLoughlin instructed Miss Rowley to advertise or employ an enquiry agent. Alternatively, those instructions were given on 22 December 1993.

36. The judge, he submits, placed a lot of weight on Mr McLoughlin's failure to complain at the time, but she failed to take into account that there had been complaints at the time on his evidence. He in particular gave evidence that he had made such complaints at the meeting on 22 December. However, the judge's finding on this point was against the weight of the evidence in at least two respects. First, the evidence that Mr McLoughlin's solicitor as from December 1993, that is Mr Roxborough, clearly was evidence of complaints which Mr McLoughlin had made to him about Grovers' failure to advertise for witnesses, which Mr Stewart submits that the judge had overlooked.

37. In addition, he submits that the judge was wrong to hold that Mr McLoughlin had not said in his statement made for the purposes of the preliminary issue of May 2000 that he had given instructions for an advertisement to be placed. That statement clearly set out his complaint about the failure to instruct an enquiry agent: to draw the inference of the complaint about advertisement as an afterthought was unfair, as the complaint was clearly made in the further and better particulars served on his behalf in June 1999. Those are the further and better particulars to which I have already referred.

38. Moreover, on Mr Stewart's submission, the judge failed to give sufficient weight to the draft advertisements or to the letter to the Court of Appeal Criminal Division. These are documents to which I have also already referred.

39. I must take each of these points in turn. I start with Miss Rowley's conduct of the case. As to Miss Rowley's conduct of the case, Miss Rowley in her evidence accepted that she had been guilty of a number of important failures. On Mr Stewart's submission those failures are important not because they were causative but because they were the background to the failures which were causative. Miss Rowley accepted in her evidence that she had no attendance note of any conference with Mr McLoughlin on 22 December 1992.

40. As to the conference with counsel on 22 December, she had prepared a manuscript note that included a list of action points for her, marked by asterisks. For instance, she had to obtain a copy of the receipt which Mr McLaughlin had given Mr Martin for the £60; that needed to be in evidence. There was also a reference to a missing page and then there was also a reference to his statement to be obtained from a Mr Bill Moss, who was a neighbour who had observed what had taken place in the driveway. Unfortunately, Mr Moss died before the trial so that in the end all that could be obtained was a short edited statement from the police as to the comments he had made to them.

41. With reference also to the plaintiff, Mr Stewart submits that this also referred to another of Miss Rowley's failures. Mr McLoughlin had been interviewed on two occasions without a solicitor. Those interviews were recorded and transcribed. The tapes needed to be obtained; they were not obtained until shortly before the trial. The Crown Prosecution Service asked those acting for Mr McLoughlin to agree to the record of the interview in accordance with standard practice and therefore it was Miss Rowley's task to check the transcript against the tape. Mr Stewart submits that where a solicitor is as lax as this the likelihood is that the lay client would be making requests for things to be done. He also points out that Mr McLoughlin was a private paying client and he was telling Miss Rowley that Mr Martin had been involved with drug-dealing. Nothing was done to follow that up. Accordingly on any view there had been discussion, nothing followed, and Mr McLoughlin was a forceful character and so it was unlikely that he would have gone to his trial and into the witness box without having asked for Miss Rowley to have taken these matters into hand and obtained the report of an enquiry agent or place an advertisement. That may be so, but Mr McLoughlin still has to show that such a request was in fact made to instruct an agent and to place an advertisement. Indeed, if he was as strong a character as the judge said, then it is all the more likely that he would have ensured that it was done, and that there would have been evidence of them.

42. As to the instructions for the placing of the advertisement and instruction of an enquiry agent, I must go to the two communications in October and the meeting in December. I start with the conference with counsel on 22 October 1992. There is a note of this conference at page 280 of the core bundle. This is the manuscript note which Miss Rowley prepared, as I have already described. It states that the meeting with Mr McLoughlin lasted from 4.30 to 6.20 and that the actual conference with counsel was from about 4.30 to 5.30. At the foot of the first page there appear the words which I have already quoted:
*"Private detective.*
*2 reasons - money in boot of car*
*scrap a few days before."*

43. Those are the passages referred to by the judge in her judgment. There is another reference to the £60 and also a reference to the other tenants and an expression of the view that the statements have been tailored. There is then the following: *"Citylink. debt collection. Potential suspect?"*

44. I need not read further from that conference note at this point. It is a common ground that there was a discussion about a private detective at this conference with counsel, and indeed that is borne out by the references to the private detective and to Citylink, to which I have referred. Mr McLoughlin said that the two reasons described as such on the first page of the conference note were the reasons to instruct a private detective. Miss Rowley's case

was that this is what Mr McLoughlin said that he had already done, namely instruct a private detective. Mr McLoughlin's case was that Mr Martin kept money in the boot of his car and as the judge said the scrap was a reference to an incident which had already taken place. It was said that Mr Martin's hand had been jammed in a door and that the reference to £60 it also appears was as I have said to the money that was stolen. The reference to Citylink was to Mr Sharman. It was not in dispute that he had been looking for Mr Martin in connection with a debt which he was said to owe to British Gas. As the judge explained, Mr Sharman contacted Patrick McLoughlin and other tenants.

45. Not withstanding Mr Stewart's evidence on this point, it is clear that the judge made a clear finding as to what took place at this conference with respect to a private detective. She finds at paragraph 102 in a passage that I have already read: *"I accept the evidence of Miss Rowley and Mr. Webster that the references at the conference were references to what the claimant himself was doing and they were not references to his having instructed Miss Rowley to involve an enquiry agent."*

46. So far as this is concerned, this is a conclusion which the judge came to having heard the evidence in the witness box of Miss Rowley and Mr Webster and accordingly as I see it, it is not a finding which this court would readily overturn. Indeed, so far as I can see, nothing has been produced up to this point which would justify setting aside the judge's finding on this point.

47. I now turn to the telephone conference on 26 October, which is four days later. This is at page 304 of the core bundle. In the handwriting of Miss Rowley, it is dated 26 October 1992. It is headed with Mr Martin McLoughlin's name and it reads: *"Advised had telephoned counsel's chambers [it appears to be the word chambers] and book Mr Webster for plead and fix. Confirmed it was not the trial tomorrow 10.00 before Judge Faucus. Enquiry agent [and then there is a word which was either 'slow' or 'speed'] have come across a Mark Martin in Winsford found to be trafficking in drugs. 2 telephone calls 1 routine, 1 10 minutes."*

48. Mr Stewart submitted that the first telephone call was in connection with the plead and fix hearing and that the second telephone call was the more substantive discussion referred to in the note. Mr McLoughlin's case was that it was Miss Rowley who had spoken to the enquiry agent and that she was reporting back to him. Miss Rowley, for her part, was asked about this in cross-examination. She accepted that a solicitor would try to speak to the agent in the light of this information but she had no recollection of doing that. Her evidence was that the note was, in fact, saying that Mr McLoughlin had obtained this information and that appears from the examination at page 192 of the core bundle. Mr Stewart asks:

*"Q. But it is possible, is it not, that it is a record, actually, of you getting information from the enquiry agent?*

*"A. Certainly it is information from an enquiry agent. But whether that was given to me first hand or whether it was given to me by Mr. McLoughlin, which is what I believe this note is saying, I agree it is difficult to be clear on the fact of that letter."*

49. Then it was put to her:

*"Q. You would want to follow it up, would you not. You would want to say, 'Right, well, I must speak to this enquiry agent and find out more about him?'"*

Then she says: *"I do not think that is what happened."* But later at page 193 of the core bundle after a pause she says:

*"I am trying to think what I would do. (Pause) Yes, I suppose you would, a solicitor would make enquiries and try and find out, to strictly answer your question."*

50. The judge was therefore faced with a conflict between the version put forward by Mr McLoughlin and that put forward by Miss Rowley. The judge in her judgment points out that no witness had, in fact, suggested that Miss Rowley was in touch with Mr Sharman or any other enquiry agent during the autumn. That is from paragraph 35, which I have already read. Mr McLoughlin's case was that Miss Rowley should instruct the agent, but that agent was not necessarily Mr Sharman; at that point in time Mr Sharman was still under suspicion by him.

51. As to the passage which I have just read from Mr Stewart's cross-examination of Miss Rowley, Mr Stewart had put it to Miss Rowley that it was she who had been in touch with the enquiry agent. Accordingly, when the judge says at paragraph 35 in relation to this conversation, "… no one suggests that Miss Rowley was in touch Mr Sharman or any other enquiry agent during the autumn", that statement would not have been accurate if the judge intended to include in that Mr Stewart's cross-examination. Reading this passage it seems to me that what the judge was saying was that Miss Rowley had not made that suggestion, nor had Mr Sharman, which he had not, and no other private investigator had been brought as a witness to the trial to say that Miss Rowley had been in touch with him, and that the reference to "no one" is a reference to one of the actors in the trial, not to the advocates.

52. Mr Stewart has a further submission; he says it is inherently likely that Mr McLoughlin would have told Miss Rowley to do something about that. Indeed, may well have been argued to the judge in closing submissions, but as I see it that particular point on likelihoods was a point for the judge. It was not inevitable that Miss Rowley would have contacted an agent, particularly as the original contact with Mr Sharman was with Mr McLoughlin or his brother. In those circumstances, in my judgment, it cannot be said that the judge's findings as to the telephone conversation on 26 October were necessarily flawed. As will be recalled, she found at paragraph 102 that in her judgment the only possible interpretation of the attendance note was that the claimant was telling Miss Rowley what he had

learnt from the enquiry agent. That may not be the only possible interpretation, but the finding that the note recorded what Miss Rowley had learnt from Mr McLoughlin was certainly, as I see it, a finding that was open to the judge on the evidence that was before her.

53. I now turn to the meeting of 22 December. As will be recalled, the judge found that although a meeting took place, she did not accept the evidence of the McLoughlin family as to what took place at that meeting. Mr McLoughlin's case was that he had made complaints to Miss Rowley at that meeting and that she had shown him to the door of the office and said that she would have to apply for an adjournment. The judge rejected what Mr McLoughlin said about the meeting. She accepted that there was a meeting. She made her finding as to that on the basis that there was no record for billing purposes. That can be seen from paragraph 43 where the judge says:

*"In my judgment it would be surprising if a meeting of that length occurred and there was no record made of it for billing purposes. Certainly from the invoices the claimant was not charged for any such meeting. I am prepared to accept that the claimant may have contacted Grovers by visiting them or by telephone them, but I have difficulty in accepting all that he says about that meeting for reasons I shall come to in greater detail later."*

54. Mr Stewart makes the point that the judge's finding was based on the absence of a record for billing purposes, but he says the records of Grovers for billing were indeed very poor as a whole and, in any event, Miss Rowley could hardly charge for a meeting when the client had come to see her to complain about the lack of preparation. Mr Gibson for the respondent for his part says that would not have been a decision from her. Turning to Mr Stewart's submissions, he submits rhetorically that the prospects of Mr McLoughlin not having complained were really rather small given how little had been done, and more importantly he submits that the judge had assumed that which had to be proved and that, in a nutshell, the reasoning was circular.

55. As I see it, the judge had to make findings about this meeting as a question of fact before she could come to a view as to whether or not there had been instructions at that meeting to Miss Rowley. As regards her reliance on the lack of a record for billing purposes, as I read paragraph 43 that was not the entirety of her reasoning. She went on to say, as I have already just read:

*"I am prepared to accept that the claimant may well have contacted Grovers by visiting them or telephone them, but I have difficulty in accepting all that he says about that meeting for reasons I shall come to in greater detail later."*

56. As I read the judgment the place where the judge comes to that later is paragraphs 103 and 104, where she makes adverse findings of credibility about the claimant and his family. Accordingly, I do not accept the argument that the judge's findings about the meeting of 22 December can be set aside on appeal.

57. I now turn to Mr Roxborough's evidence. In paragraph 94, which I read, the judge refers to the fact that Jones Maidment & Wilson would have remembered if there was a complaint and Mr Stewart submits that Mr Roxborough gave evidence that in December 1993, that is in advance of the new trial, another barrister had become involved and had given advice on evidence about the steps which needed to be taken, and that had led to Mr Roxborough's firm being instructed. In his statement he said that a complaint had been made to him about a failure by Grovers to give instructions for advertisement. The statement does not say anything about a failure to employ an enquiry agent.

58. The judge did not, on Mr Stewart's submissions, accept this submission. I think it is very important to be careful about what the judge says in paragraph 94. She is careful to say:

*"…again there is no record of any such complaint when Jones Maidment & Wilson took over the case in December 1993".*

I have referred to the paragraph in Mr Roxborough's witness statement, it is quite unparticularised. The judge was not bound to accept Mr Roxborough's evidence. He could have been mistaken about the date. When he was cross-examined he said the date was Christmas 1993, but he explained he had no attendance note and that he had not investigated the matter, and indeed that was one of the many matters with which he was concerned arising out of the instructions which he had received for the retrial. So Mr Roxborough was not concerned with whether or not Grovers had had instructions to place an advertisement, he was simply concerned with getting on and preparing the case properly for the retrial.

59. In those circumstances what the judge says accords with this evidence, namely there was no record of any such complaint when Jones Maidment & Wilson took over the case in December 1993. The judge was obviously in possession of his evidence from the witness statement but the question of the weight to be given to that evidence in the light of the other evidence was, in the circumstances, a matter for her and in my judgment it is not a good ground for setting aside her judgment on appeal. That does not refer to the statement which Mr Roxborough made in his witness statement.

60. I now turn to Mr McLoughlin's statement of May 2000. I already referred to paragraph 95 of the judgment, in which the judge states that: *"…in his witness statement he said he recalled drawing a possibility of assistance from City Link to Miss Rowley's attention and her assuring him the matter was in hand in October 1992 and December 1992."*

The judge continues: *"He made no mention in that statement of the placing of an advertisement until after he was convicted and Mr. Webster advised there was no prospect of appeal without fresh evidence".* Mr Stewart submits that the judge was not entirely fair to Mr McLoughlin at this point. He refers the court to the further and better

particulars, which I have already read, which refer to the 11 occasions on which, on his case, Mr McLoughlin had already stated constituting this case to say that Miss Rowley had been instructed to employ an enquiry agent and place an advertisement. In addition, as the judge says, he states that in October and December 1992 he had drawn Miss Rowley's attention to the need for a private investigator.

61. Mr Stewart at one point submitted that the judge had omitted paragraph 6 of the statement, but indeed that is referred to in substance in the passage I have just read from paragraph 95. At the end of the day on this point the critical question was whether Mr McLoughlin had made a complaint about the failure to advertisement and the failure to employ an agent at the time. The most important time was the time when the case was being prepared for the original trial, and the judge came to the conclusion that there was no complaint made in that period. That was a very important period and in view of the importance of that period in my judgment it is not possible to set aside the judge's findings because she did not refer to the further and better particulars.

62. I accept that further and better particulars are one of the places where the allegations may be made because those further and better particulars are all part of the pleadings in this action. However, the position is that there are, in this case, very few records of complaints being made.

63. I now turn to the documents created after the conviction took place, and in particular to the letter to the Court of Appeal Criminal Division, which I have already read. This was carefully drafted. It went through manuscript drafts, which were slightly amended before the final draft was sent. Miss Rowley accepted that she knew that Mr McLoughlin had himself instructed private investigators before the original trial, and so Mr Stewart submits that on any basis the letter was misleading. He also submitted that the letter was misleading in that it suggested that the placing of the advertisement could not have been done earlier.

64. The judge's finding at paragraph 96 was that this was one of the documents which assisted the defendant and she referred to a number of other documents in that connection. She also describes Mr Stewart's case as one that the letter was "… arguably misleading\2 when Mr Stewart in fact submitted that the letter was misleading because, as I have said, it did not refer to the enquiries which had by then on any basis been made, and suggested that the decision to investigate it had only recently been taken; see in particular the use of the word 'eventually'.

65. I accept that the letter may not have been candid but the crucial point which impressed the judge was that Miss Rowley was a witness of truth and she held that Miss Rowley would not deliberately mislead the court. On that basis, it is of some significance that the letter does not refer to any instructions to place an advertisement before the trial or to instruct a private investigator then. I would not go so far as to say that the document assisted the defendants except in some negative sense, but on the other hand as I see it this document does not assist the claimant either. Accordingly, in my submission, the attack which Mr Stewart launched on this letter on the basis of his submission that it was misleading does not lead to the conclusion that the judge's failure to accept that submission should lead to the judge's decision on this point being set aside.

66. There is now a point that I must deal about whether or not a private detective ought to have been employed at all. As I have explained, Mr McLoughlin's case was that the assault which preceded his arrival on 19 June had in fact occurred to Mr Martin inside 24 Whitebrook Road. However, it was also noted that Mr Moss, a neighbour, had witnessed what had happened in the driveway, and one of the questions considered at the conference with counsel was getting a statement to confirm what Mr Moss had seen. It was explained that Whitebrook Road was a quiet, residential road but there could have been neighbours "twitching curtains".

67. As to this point, with which the judge does not deal, because she holds that the instruction of private investigators was not consistent with the claimant's case, we are left with the same point. Mr McLoughlin still has to prove that he gave instructions that a private investigator should be appointed. That was the fundamental issue in the case with which the judge had to deal, and the mere fact she does not refer to the question whether a private detective ought to have been appointed does not in the circumstances throw into doubt her findings in respect of those instructions.

68. I now turn to the draft advertisements. There were two drafts of the advertisement for witnesses in January, which the judge says were coincidentally prepared on the back of documents bearing dates from the autumn of 1992. The judge says in paragraph 101 that the dates on the documents on the reverse of which the advertisements were drafted must be a coincidence: *"…because I fail to see how documents drafted in the autumn of 1992 could have upon them Mr. Sharman's contact details given the history provided to me by Mr. McLoughlin. On his case, on the defendants' case, on Mr. Sharman's evidence, Mr. Sharman was not instructed by that time. He may have been consulted informally by the McLoughlin brothers about what he knew and about what he was doing, but he was not acting as the claimant's agent or the defendants' agent by that time".*

69. Mr Stewart submits that the judge has at this point forgotten a finding that she had already made at paragraph 29, namely that Mr Sharman had already provided his contact details before the incident to Mr Patrick McLoughlin and therefore it was open to Mr Patrick McLoughlin to have given them to his brother and his brother to have given them to Miss Rowley. The position on this is that the judge uses the expression in paragraph 101 that she does not see how the documents "could have upon them" Mr Sharman's contact details and then she explains that Mr Sharman had not been instructed by that time, and indeed at this time he was still under some suspicion according to other evidence of Mr McLoughlin.

70. If the judge was referring by the use of the words "could have upon them" to the physical possibility of the contact details being available, then there was a clear discrepancy between paragraph 29 and paragraph 101 of her judgment, but she may have been referring to the question whether it could in reality have had Mr Sharman's contact details given that he was not instructed and, indeed, was under some suspicion and upon that basis there would be no discrepancy.

71. Mr Stewart takes the point further. He says that Mr McLoughlin is entitled to have the reasons for the judge's findings on this point and if the reasons do not stand up there has to be a retrial. There was no evidence, he submitted, that the contact details had been lost by October and at the same time he accepted that the judge had preferred Miss Rowley's evidence and Mr Webster's evidence, even if they had made errors and he also accepted that Mr Sharman had given evidence there was no contact in the autumn of 1992.

72. Accepting for the moment Mr Stewart's interpretation of the words "could have upon them" in paragraph 101 of the judge's judgment, I would go on to hold that the reason given in that sentence was not the only reason which the judge gave in that paragraph. As indicated, Mr Sharman was under suspicion; there is no evidence as to when he was cleared as a suspect. He was not contacted again until January 1993. And in any event, the proposition was that the draft advertisement must have the same date as the documents on whose reverse they were drafted is, as I see it, a house built upon sand. There is no inevitable inference that if a person writes on the blank reverse side of a document he did so at the very same date as the document itself was produced. So, as I see it, this particular alleged discrepancy between paragraphs 101 and 29 of the judgment cannot justify the attack which Mr Stewart has launched.

73. I therefore come to my conclusions. There were four errors in the judge's detailed reasons; however, in my judgment, her overriding reason for rejecting the claim remains. She did not accept that Mr McLoughlin and his family gave untailored evidence or evidence that was wholly reliable, and I have read out the material parts of paragraphs 103 and 104. On the contrary, she accepted Miss Rowley and Mr Webster as witnesses of truth. The judge was particularly troubled by the lack of complaint made by Mr McLoughlin at the time. I accept that Mr McLoughlin obviously became depressed after his trial but that was later. The judge was particularly concerned, as I see it, about the lack of complaint at the relevant time, namely, the time of the trial.

74. Moreover, there was no documentary evidence to support Mr McLoughlin's case. Indeed, there was other evidence which conflicted with his case. Mr Sharman accepted that he had been contacted by Mr McLoughlin direct. This happened prior to October 1992. Mr McLoughlin contacted him again directly in May 1994, even though he had new solicitors and had had detailed advice on evidence from new counsel and was awaiting a new trial. This was so even though counsel had advised in November 1993 that there were a large number of matters to be done by his solicitors before the retrial took place. It was, I think, of some significance that Mr McLoughlin was the person who contacted Mr Sharman in May 1994. He was not content to leave those matters to his new solicitors.

75. It is necessary, in my judgment, to look at the imperfections in the judgment as a whole, cumulatively. Even so, they are not in my judgment to shake the foundations on which the judgment was based. Namely, the absence of credibility and the absence of contemporaneous complaint. As those are fundamental matters which could only be resolved by the judge deciding which evidence she accepted as truthful she was entitled to decide that she preferred the evidence of Miss Rowley and Mr Webster; she was entitled to do this, and as I have already explained, those findings of primary fact on credibility are matters with which this court cannot interfere.

76. I would like to add this postscript: Mr Stewart also made short submissions about the remaining grounds of this appeal. In the light of my above conclusions, those grounds do not now arise. They include the question whether when a person is wrongfully imprisoned and suffers psychiatric injury and that wrongful imprisonment is the result of negligence on the part of his solicitors in the conduct of that person's defence, it is necessary for the claimant to do more than show that it was obviously foreseeable that the negligent conduct of his defence would result in conviction and imprisonment.

77. This was the view of Hale LJ, as she then was, on the earlier appeal in this case, reported as I have said at [2002] QB 1312, at paragraphs 57 to 59. Brooke LJ who gave the first judgment in that case described this point as *"interesting and clearly worthy of full argument on some future occasion"*. He added:

*"Like almost everything else in this field of law, it opens up policy questions on which it would be wrong for us to express any view on the present appeal."*

78. I agree with Brooke LJ that the question is certainly an interesting one and that it does open up policy questions of some magnitude. On this appeal the question raised by Hale LJ was not fully argued on both sides. In those circumstances, I do not propose to express a view on that question.

79. For these reasons I would dismiss the appeal.

80. LORD JUSTICE NEUBERGER: I had prepared a short judgment of my own, but having heard what my lady, Lady Justice Arden, has to say, I do not think there would be any benefit in my saying anything other than that I entirely agree with her conclusion and all the reasons she has given for arriving at it.

81. LORD JUSTICE PILL: This is a case about allegedly negligent conduct by solicitors in preparing for a criminal trial at which Mr Martin McLoughlin, the appellant, was convicted at Manchester Crown Court on 6 January 1993 of offences of robbery and of causing grievous bodily harm with intent. When charged with those offences he consulted the respondent solicitors who had acted for him in civil matters. He was sentenced to a substantial term

of imprisonment. Both the quality of their preparation and their record keeping were open to criticism. The judge criticised some aspects of the respondents' conduct, stating for example at paragraph 97: *"…there were areas in which I believe she [that is, Miss Rowley] could have done more on the claimant's behalf ..."*

82. The judge, Hallett J, clearly took into account the view she had formed on that subject. However, two specific complaints gave rise to the action. They are identified at paragraph 88 of the judgment: *"The case in fact has a very narrow focus and it is to that that I now turn. The issues before me, as I have indicated, are, firstly, did the claimant instruct Miss Rowley to place an advertisement prior to the original trial? Did the claimant instruct her to employ enquiry agents prior to the original trial, if so what was the effect of those omissions?"*

83. In the event, enquiries subsequent to the trial revealed evidence which was called at a retrial which followed a decision of the Court of Appeal Criminal Division on 24 May 1993, Staughton LJ presiding, quashing the appellant's convictions and ordering a retrial. At the retrial in August 1994 the appellant was acquitted. That being so, he plainly feels very badly about his conviction at the first trial and his subsequent imprisonment. I should say, when granting leave to appeal to the CACD, bail was granted by the court.

84. The proceedings before Hallett J in the civil action were long and included thorough cross-examination of the witnesses upon whose evidence issues of fact arose, notably the appellant and the solicitor mainly concerned with the preparation for the previous trial, Miss Lynne Rowley, who was an assistant solicitor with the respondent firm. The judge had a very good opportunity to assess the witnesses and the evidence they gave. Her findings on credibility were very firmly in Miss Rowley's favour. At paragraph 97:

*"She was, in my judgment, an honest witness doing her best in difficult circumstances."*

Later in that paragraph:

*"I certainly do not accept that she is someone who would deliberately lie either to the Court of Appeal or indeed to me".*

At paragraph 110 the judge held, having considered evidence from members of the appellant's family:

*"Accordingly, where there is a conflict between their evidence and the evidence of Miss Rowley I unhesitatingly accept that of Miss Rowley, supported as it is in my view by Mr. Webster and the documents that survive."*

Mr Webster was counsel for the appellant at the trial at which he was convicted.

85. On the evidence as a whole the judge was, in my view, entitled to reach the conclusion she did on questions of credibility. However, if it could be established that her central findings were based on a misunderstanding, or an erroneous interpretation of the evidence, it is open to an appellant to argue that the conclusion on credibility is contaminated to such a degree that a retrial is required to ensure fairness to the parties. The judgment of Hallett J was comprehensive and detailed.

86. There may be considerable doubt as to what would have flowed from it, but an important issue was whether at a conference on 22 October 1992 attended by the appellant, Mr Webster and Miss Rowley, the appellant, who was paying for his own defence, had instructed Miss Rowley to employ an enquiry agent for the purposes of preparation for the trial. The judge concluded at paragraph 101:

*"I am satisfied that before the conviction the only person taking any steps as far as any enquiry agent is concerned was the claimant himself, just as he did when he was using the services of Jones Maidment & Wilson."*

87. Jones Maidment & Wilson are also a firm of solicitors. They acted for the appellant from December of 1993 and no challenge is made to the second of those findings by the judge. There was evidence that in April 2004, that is 8 months after the appellant's appeal against conviction was allowed, it was he himself who was dealing with an enquiry agent with a view to producing evidence as to the alleged victim's conduct, which was in fact called at the re-trial.

88. On behalf of the appellant, Mr Stewart QC has concentrated upon the specific findings of the judge and has submitted that the findings are contaminated, notably that the reasoning used to justify them is not sound reasoning or is based on a misapprehension of the evidence. The judge found at paragraph 101, when dealing with the question whether instructions had been given to publish an advertisement in advance of the trial, with a view no doubt to seeing whether witnesses to the alleged attack on Mr Martin could be found:

*"…I fail to see how documents drafted in the autumn of 1992 could have upon them Mr. Sharman's contact details given the history provided to me by Mr. McLoughlin".*

89. The appellant's case was that he had given such instructions prior to trial, Mr Sharman being an enquiry agent. Miss Rowley's evidence was that the question of advertisement, as far as she was concerned, only arose after conviction in January of 1993. Mr Stewart submits that the judge's statement was not accurate upon the judge's own summary and findings as to the evidence. At paragraph 29 of her judgment, the judge referred to the fact that Mr Sharman and the appellant's brother, Mr Patrick McLoughlin, had met coincidentally in June of 1992, and they both gave evidence to that effect.

90. Mr Sharman provided Patrick McLoughlin with contact details. At that time the appellant and Patrick McLoughlin said that they felt, if Mr Sharman could be ruled out as a suspect, he would be a good person to handle the matter, given his knowledge of Mr Martin. The judge further considered this issue when summarising the appellant's case at paragraph 58 of the judgment:

*"He says [that is, the appellant] he gave Miss Rowley the contact details back in the summer of 1992. Both the claimant and Mr. Sharman said that after the initial conversation in June 1992 the claimant did not contact Mr. Sharman again until January 1993."*

The judge recorded that, according to the claimant, he, that is, Mr Sharman, was still a potential suspect at that time.

91. Paragraph 101 is to be read, in my judgment, in the context of the evidence which is set out in the earlier paragraphs, and which describe the full circumstances which may have been operating upon the minds of the parties. In putting it as she did, the judge may have put it too strongly. It is not impossible that following the meeting in June 1992 the appellant passed on details of Mr Sharman, including phone numbers, to Miss Rowley. However, the judge was entitled to take the view that that was not likely to have happened, having regard to the lack of contact between Mr Sharman and the appellant between June 1992 and January 1993, and to the fact that Mr Sharman was himself considered by the appellant to be a suspect. It certainly does not conclude whether instructions were given in the appellant's favour, though the judge may have put the point too strongly when using the wording she did.

92. Paragraph 102 deals with the question of instructing an enquiry agent. Mr Stewart submits that the propositions stated by the judge in that paragraph assume what it is sought to prove:

*"It is plain that Miss Rowley did nothing about instructing an enquiry agent before the first trial and therefore the only possible interpretation, in my judgment, of the attendance note of 26 October 1992 is the claimant was telling Miss Rowley what he had learnt from the enquiry agent."*

93. Lady Justice Arden, has spelled out the facts in detail and I respectfully adopt her statement of them. Lady Justice Arden has referred to a note of a conference, to which I have referred; held on 22 October 1992, and to an attendance note made by Miss Rowley on 26 October 1992 following a telephone discussion with the appellant. I would agree that the judge's use of the word "therefore" may not have been appropriate in the circumstances. It does not necessarily follow from the reading of the note of 26 October that it was the appellant telling Miss Rowley of dealings with an enquiry agent rather than the other way around. What however the judge was doing, and in my judgment it is sufficiently clear from what she has said, is that having considered the evidence of Miss Rowley, Mr Webster and the appellant, she accepted the evidence of Miss Rowley and Mr Webster. The judge went on to state in paragraph 102:

*"I accept the evidence of Miss Rowley and Mr. Webster that the references at the conference were references to what the claimant himself was doing and they were not references to his having instructed Miss Rowley to involve an enquiry agent."*

94. What the judge was indicating in the preceding sentence was that, having formed that view as to credibility as to what had happened on 22 October at the conference, it was a fair, indeed an inevitable inference, that the reference to the enquiry agent's activities in the later note was to the activities of the appellant and the enquiry agent and not Miss Rowley. In my judgment, the judge was entitled to find that the question of Miss Rowley instructing an enquiry agent arose only post-trial and that is sufficiently reasoned in her judgment.

95. At paragraph 96 the judge refers to documentation. She stated:

*"Further, when the documents, which are still available from Miss Rowley's file, are considered I am driven to the conclusion that they assist the defence case and not that of the claimant."*

96. The judge may have been putting it too high in using that general form. She goes on to refer to at least six documents, some of which Mr Gibson QC for the respondent has not sought to establish as supporting the account of Miss Rowley rather than that of the appellant. However, it was open to the judge to find that the documentation did not support the appellant.

97. Particular consideration has been given in the course of this appeal to a letter which Miss Rowley wrote to the Court of Appeal Criminal Division Office on 1 March 1993; that is almost 2 months after the appellant's conviction and well out of time if an application for leave to appeal against conviction was to be made. What the appellant needed if he were to obtain leave to appeal was first an extension of time, and second permission to adduce fresh evidence before the Court of Appeal. The letter makes both those points very clearly. It should in my judgment be read in the light of a not infrequent occurrence following the conviction of a defendant, which is that an allegedly relevant witness appears after the trial; sometimes there is justification for a fresh trial, sometimes there is not and the court is accustomed to dealing with such applications with care.

98. In deciding whether to admit fresh evidence under the Criminal Appeal Act 1968, section 23(1), the court must consider whether it is necessary or expedient to do so in the interests of justice and one of the matters which has to be considered specifically under section 23(2)(d) is whether there is a reasonable explanation for the failure to adduce the evidence at the trial. Thus the appellant by his solicitors needed to justify why the post-trial action had not been taken pre-trial, as well as needing to explain the delay which had occurred before the application was made.

99. Miss Rowley's letter sought to do that. The terminology was, I would expect, to a degree disingenuous and it put a favourable gloss on the sequence of events; favourable, that is, to the appellant obtaining leave to appeal. It would certainly not have assisted the appellant had reference been made in the letter to the fact that the appellant himself had contact with an enquiry agent pre-trial. The judge was entitled to hold that failure to tell

the Court of Appeal Criminal Division of the appellant's involvement with an enquiry agent pre-trial did not mean that Miss Rowley was acting dishonestly or was dishonestly concealing negligence on her part in failing to instruct an enquiry agent herself. The letter is consistent with her not having received such instructions. It helped her evidence to the extent of showing that it was consistent with it and it did not damage her case. It did not, however, provide corroboration of it and that is why I made an earlier comment in relation to it.

100. The judge's findings of fact on this point, which I have already cited in paragraph 97, were in my view justified. In the event, the CACD granted leave to appeal on the basis of Mr Whittaker's statement, which followed the newspaper advertisement inserted after the trial.

101. I have considered several of what seemed to me probably the best of Mr Stewart's points in considering the effect of them, both individually and cumulatively, on the judge's finding of credibility in favour of Miss Rowley and against the appellant. It was the judge's overall finding on credibility which determined the issues between the parties. That finding is not, in my judgment, impugned or significantly damaged by the appellant's case, persuasively though that has been presented by Mr Stewart QC on his behalf. The lack of recorded contemporaneous complaint by the appellant was a remarkable feature of the case and is difficult to reconcile with the appellant's oral evidence as to the events of the autumn of 1992. There were no records of complaint until years later; further and better particulars in 1999 and the statement of Mr Roxborough, his present solicitor, in 2005. Those records are years after the events which were in issue at the trial. The judge was entitled to give, as she did, considerable importance to that factor when considering the issue of credibility.

101. For those reasons and the reasons given by Lady Justice Arden, I too would dismiss this appeal.

**Order:** Appeal dismissed.

MR R STEWART QC and MR J STEVENSON (instructed by Irwin Mitchell Solicitors, Riverside East, 2 Millsands, SHEFFIELD, S3 8DT), appeared on behalf of the Appellant.
MR C GIBSON QC and MR N BROWN (instructed by Halliwells, St James Court, Brown Street, MANCHESTER, M2 2JF), appeared on behalf of the Respondent.