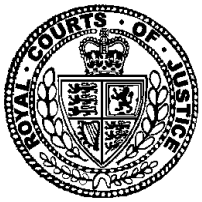

Neutral Citation Number: [2022] EWHC 1288 (Admin)

Case No: CO/3118/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/05/2022

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE BENNATHAN

- -

Between :

R (on the application of Leslie Balkwell)	**Claimant**
- and -	
The Chief Constable of Essex Police	**Defendant**

- -
- -

Kirsty Brimelow QC (instructed by **Edmonds Marshall McMahon**) for the **Claimant**
John Beggs QC and James Berry (instructed by **Essex Police Legal Services**) for the **Defendant**

Hearing dates: 3rd February 2022

- -

Approved Judgment

Dame Victoria Sharp, P :

Introduction

1. This is the judgment of the Court.

2. The claimant, Mr Leslie Balkwell is the father of Mr Lee Balkwell.

3. In July 2002, Mr Lee Balkwell (Mr Balkwell), then aged 33 was working for Upminster Concrete, an unincorporated business run by Simon Bromley from Baldwins Farm at Upminster in Essex. Mr Balkwell had worked from time to time as a driver, delivering mixed cement. Baldwins Farm was also the home of Simon Bromley and his father David Bromley. In the early hours of 18 July 2002, a '999' call was made from Baldwins Farm. When the emergency services arrived, they found the body of Mr Balkwell trapped within the machinery of a Ford Iveco Hymix cement mixer lorry (the lorry), his head and shoulders wedged between the drum and the chassis.

4. A police investigation into Mr Balkwell's death was commenced (the original investigation) and a file submitted to the Crown Prosecution Service (the CPS). In August 2002, the CPS determined there was insufficient evidence to charge Simon Bromley with gross negligence manslaughter. Numerous failings in the original investigation were subsequently identified by the Independent Police Complaints Commission (the IPCC) following complaints against Essex Police made by the claimant. The IPCC characterised the original investigation as seriously flawed.

5. The claimant subsequently commenced proceedings against the defendant in the Queen's Bench Division under section 7 of the Human Rights Act 1998, for breach of its investigative obligations under article 2 of the European Convention of Human Rights (the Convention). The defendant admitted liability in those proceedings; he accepted that the original investigation was ineffective for the reasons given by the IPCC and that Essex Police had failed to comply with the article 2 investigative obligation. He apologised to the claimant and paid him damages.

6. The claimant now brings this claim for judicial review, in respect of the defendant's decisions to close and not to re-open the criminal investigation into the death of his son. The claimant contends that these decisions were irrational, and breached the defendant's investigative obligations under article 2 of the Convention - beyond the breaches admitted in the Queen's Bench action referred to above. Though the current claim relies on articles 2 and 3 of the Convention, it is common ground that for present purposes it is sufficient to refer to the investigative obligations under article 2.

7. The claimant has a committed belief that his son was murdered; he believes that he was violently attacked and killed by Simon Bromley and/or others, and that the "accident" in which he died was staged. He does not accept that there has ever been any effective investigation into the death of his son. In summary however, the substance of this challenge is that the emergence of fresh evidence has given rise to a duty to re-open the original criminal investigation that took place. The

claimant also alleges that there are several avenues of investigation which have not been explored satisfactorily. Accordingly, it is said that the defendant's decisions not to re-open the criminal investigation, or conduct a fresh investigation are irrational and in breach of the police's obligation to investigate suspicious deaths under article 2 of the Convention. Accordingly, he now asks the court to quash the impugned decision(s) and to order an effective investigation.

8. The defendant's case is that the impugned decisions are rational. The investigations undertaken following the original investigation have satisfied the requirements of article 2 and the claimant does not come close to surmounting the very high hurdle for challenging police decisions with respect to investigations. Further, while new information/evidence can revive an article 2 investigative obligation, the information/evidence presented by the claimant did not do so, or it if it did, the defendant complied with his obligations, by taking such further steps as were reasonable in the circumstances. It is common ground that the original investigation into Mr Balkwell's death was unsatisfactory. Since the original investigation however, the defendant arranged for a separate police force to conduct *Operation Nereus*, a major investigation conducted between 2010 and 2015 which resulted in a file being submitted to the CPS and the prosecution of Simon Bromley for the gross negligence manslaughter of Mr Balkwell. The professional assessment of the defendant's senior officers in their impugned decisions was, and remains, that in the light of the very extensive investigations to date, and gaps in the evidence that can never be filled, there is no realistic prospect of Mr Balkwell's death yielding evidence that would enable the CPS Full Code Test to be satisfied for a charge of murder, when the state of the evidence is considered as a whole.

The proceedings

9. The proceedings have a long and convoluted history.

10. The application to apply for judicial review was issued on 8 August 2018. The claim as originally formulated, challenged the defendant's decision in a letter dated 26 April 2018. In that letter, Assistant Chief Constable Downing, the Head of Kent and Essex Police Serious Crime Directorate, said in summary, that he did not consider a further investigation into Mr Balkwell's death was justified and the investigation into Mr Balkwell's death should be closed. Thereafter, the claim was stayed by consent or by orders of the court, for various periods, at the claimant's request. This was to enable the claimant to obtain further disclosure from the defendant and to facilitate access to the lorry by Dr Richard Shepherd (a forensic pathologist instructed by the claimant) so that Dr Shepherd could produce an expert report. On 29 November 2018, the defendant refused to re-open and conduct a fresh investigation into Mr Balkwell's death after the claimant provided it with a witness statement dated 1 August 2018 from the managing director of the company that manufactured the lorry (Mr Nicholas Humpish). On 10 January 2020, the claimant disclosed to the defendant a report from Dr Shepherd, following which, on the 6 July 2020, the defendant made a final decision confirming its decision "not to request a fresh investigation". Following this final decision, the action was revived. Amended Grounds were served on 7 August 2020 in which it was said that, whilst the claim continues to challenge the

26 April 2018 decision, the grounds were "amended to update the detail of the material considered (and reconsidered) by the defendant which underpinned the 6 July 2020 not to re-open…" the investigation into Mr Balkwell's death. On 23 July 2021, permission to apply for judicial review was granted by Dove J.

11. In the absence of a formally pleaded claim relating to the decision of 29 November 2018, there is some dispute as to whether we are concerned as the claimant contends, with three decisions or, as the defendant contends, only with two (where it is also said that the decision of the 6 July 2020 was a fresh decision, replacing that of 26 April 2018). Nothing turns on this issue for the purposes of our decision on the merits however in circumstances where the decisions sequentially evolved from one to the next and where the principal focus of the parties has been on the final decision of 6 July 2020.

The material before the court

12. We were provided with a large volume of evidence for the purposes of this hearing. The defendant served its amended detailed grounds of resistance and its evidence in support on 13 September 2021. Directions made by Dove J gave the claimant permission to serve evidence in reply. That evidence was served on the 7 December 2021. It consists, in the main, of material which is similar to that already placed before the court such as extensive commentary on other evidence. It also includes a statement from the claimant explaining amongst other things, the impact that the death of his son and subsequent events has had on him and his family. Most of this further evidence is objected to by the defendant. Several reasons are given. First, because it does not constitute reply evidence, properly so called; secondly, because it is not reasonably required to resolve this claim and thirdly, because it contains what purports to be expert evidence, which is no such thing, and for which no permission has been given under the Civil Procedure Rules. Further, the late provision of such a substantial body of evidence is, it is said, unfair, and puts the defendant in considerable difficulties in addressing its substance at the hearing.

13. In our view, there is substantial merit in each of these objections. The material served by the claimant in reply seems to have been put in without consideration of the terms of the Order of Dove J or of issues of admissibility or relevance. However, we considered all of the material *de bene esse*, and looking at the matter pragmatically, we do not consider it is necessary to rule formally on the objections made for the purposes of resolving this application for judicial review. It is sufficient to say that in arriving at our conclusions, we have had regard to all the material placed before us.

The fatal event

14. Simon Bromley's account of the events leading to Mr Balkwell's death has not always been consistent and is not accepted, by the claimant at least, as being truthful. The essential elements of his account are as follows.

15. Mr Bromley said that Mr Balkwell was driving the lorry, delivering a load of concrete on Wednesday 17 July 2002, when the lorry developed a fault. Acting on Simon Bromley's instructions, Mr Balkwell drove to a local vehicle service

centre in West Thurrock. The lorry was repaired but the time taken meant the load had hardened to an extent that only part could be delivered, and the remainder could not be discharged. Mr Balkwell drove the lorry back to Baldwins Farm, arriving at about 7pm.

16. The process of removing hardened concrete from a cement mixer is called 'gunning out'. Simon Bromley and Mr Balkwell began to use electric drills (referred to as "Kango" drills) to loosen, then remove, the load from the drum of the lorry. There are inspection hatches in two places, opposite one another, towards the front of the drum. These were removed to allow easier access to the hardening cement. Both men stood inside the drum for most of the time, and according to Simon Bromley, both wore boots and gloves. The Kango drills are heavy, so they would be used downwards in the manner of a pneumatic drill deployed in roadworks. In consequence, the drum had to be rotated from time to time so that different sections of the inside of the drum could be worked upon.

17. At about 11.30pm, Mr Balkwell left to get food from a takeaway, before returning at about midnight (his leaving and return could be seen from some footage from a nearby CCTV camera). Mr Bromley's account was that he and Mr Balkwell then carried on with the 'gunning out', as the task would be much more difficult the next day when the concrete had hardened further. In addition, there were deliveries booked and his other vehicle was being serviced. The procedure followed to rotate the drum, was that one man would leave the drum and start the engine from within the lorry's cab, as the system to rotate the drum would only work when the engine was running. The man outside the drum would then move to the rear nearside of the cement mixer, where there were external controls that would allow the operator to move the drum. The man at the controls would then rotate the drum very slowly while the man inside the drum would tell him when to stop, he being able to see when the rotation had exposed the next part of the concrete within. It was Mr Bromley's account that both he and Mr Balkwell had taken the role of the man outside the drum that day.

18. The fatal event, said Mr Bromley, occurred when he got out of the drum, leaving Mr Balkwell inside. He entered the cab and started the engine, then went to leave the cab to move to the rear of the lorry to operate the external controls. As he did so, he realised the drum was already rotating. His accounts are not precise and have varied in the detail, but in the next few moments, he said he became aware that Mr Balkwell was climbing or falling out of one of the inspection hatches feet first, and he saw him being drawn into the very narrow space between the front of the drum and the rear of the cab of the lorry. Mr Bromley said he used the external mechanism to stop the drum rotating and that he tried to free Mr Balkwell both by pulling him and by reversing the drum's rotation. When neither worked, he jumped back into the cab and stopped the engine by stalling the lorry, as the alternative method of stopping the engine required hydraulic pressure to have built up and there had not been time for this to occur. Mr Bromley stated that he realised Mr Balkwell had been killed and ran to his father's bungalow to get him to call the emergency services.

19. The call to the emergency services was timed at between 1.03am and 1.08am. David Bromley seems to have made the call, but it was Simon Bromley who

spoke, giving an account of what had happened. The ambulance service arrived at about 1.23am, the police arrived at around 1.50am.

The original investigation

20. The actions of Essex Police after they arrived at the scene have been the subject of very extensive scrutiny over many years, including by other police forces. As set out in the introduction, it is conceded that there were numerous failings in the original investigation. These included:

    i) The scene and vehicles within it, including the lorry and Mr Balkwell's van, were not kept properly secure or protected from the elements.

    ii) Potentially important witnesses were not asked to make statements while events were fresh in their memories. One officer who attended the scene from the Fire Brigade, for example, was asked to make a statement almost a year after Mr Balkwell's death.

    iii) Numerous other potential witnesses were not asked to make statements at all.

    iv) The CCTV footage was "seized" but only to the extent of accepting a video cassette that Simon Bromley produced to the police.

    v) Although the clothing worn by Simon Bromley was seized, albeit later than it might have been, there was no attempt to secure or seize clothing left in the cab of the lorry.

21. The pathologist engaged to examine Mr Balkwell's body was Dr Michael Heath. He did not attend the scene, but carried out a post mortem at Basildon Hospital Mortuary on 19 July 2002. The post mortem report listed numerous and severe injuries. Its essential findings were that the injuries and death were consistent with Mr Balkwell having been drawn within the moving parts of the lorry Dr Heath had seen in a video recording. Dr Heath also said that in his opinion, there was no pathological evidence of defence wounds, restraint wounds, scuffle injuries or offensive injuries.

22. Dr Heath is no longer a Home Office pathologist. In a series of cases, his professional judgment was called into question, up to and including *R v Puaca* [2005] EWCA Crim 3001 where a murder conviction was overturned on the grounds that his flawed evidence may have led to an unsafe verdict. One of the reports into the investigation of Mr Balkwell's death says that the Advisory Board for Forensic Pathology upheld 20 disciplinary charges against Dr Heath, after which he resigned from the Home Office register. Later findings of inadequate performance would not necessarily be a basis to doubt the conclusions reached in this particular post mortem, but there have been a number of criticisms of Dr Heath's performance of the post mortem on Mr Balkwell, including some made by another Home Office forensic pathologist, Dr Benjamin Swift.

23. Dr Swift was first instructed in relation to the death of Mr Balkwell by HM Coroner for Essex and Thurrock in December 2006. Since then he has provided

seven expert reports on Mr Balkwell's death (dated 29 January 2007, 20 May 2009, 23 July 2009, 12 February 2013, 23 April 2013, 20 May 2013 and 17 February 2020). Dr Swift also attended an exhumation of Mr Balkwell on 25 March 2013, and conducted the further post mortem that followed (see further, paras 44 to 45 below). While broadly agreeing with Dr Heath's conclusions, in his report of 20 May 2009, Dr Swift pointed out that Dr Heath's report: "provides no accurate anatomical localisation of the injuries, nor their individual dimensions……clearly, given the questions raised when reviewing this case, such measurements would have been of great assistance. The requirement for such measurements is detailed within the "Code of practice and performance standards for forensic pathologists", published jointly by the Royal College of Pathologists and Home Office Policy Advisory Board for Forensic Pathology."

24. On 6 August 2002, Simon Bromley was interviewed under caution by Detective Sergeants Weald and Jose. Interviews under caution inevitably vary in the manner of the questioning and in their length. The interview of Simon Bromley is exceptional however, both for its brevity and because of its unchallenging nature. At the outset of the interview, Detective Sergeant Weald reminded Mr Bromley that he was being investigated for an offence of involuntary manslaughter but immediately added, "I would prefer to say that we are investigating what I consider to be a tragic accident". At one stage, the interviewing officers extended an offer to Mr Bromley of Essex Police Force's victim support services. There were occasions when leading questions – helpful to Mr Bromley – were posed, even on central aspects of the fatal events. To take one example, at about 19 minutes into the interview, Detective Sergeant Weald, asked, "And then you have got out I assume to what, to turn the engine on the [sic] rotate the drum?" Mr Bromley agreed. The entire interview, including the introductory formalities, took a little over 41 minutes. There were no follow up police interviews with Simon Bromley in 2002.

25. In addition to the criticisms made by the claimant of the investigation itself, it is said that Simon Bromley should have been viewed and treated with greater suspicion by the police because of his general character. In this context, it is to be noted that in August 2002, the police launched *"Operation Portwing",* which was "commissioned to infiltrate an organised crime group in the Thurrock and Grays Boroughs of Essex… relating to the supply of Class A drugs and firearms". Simon Bromley was named within that inquiry in July 2004, and in 2006 was sentenced at Chelmsford Crown Court to a total of 8 years' imprisonment for offences of conspiracy to supply cocaine and conspiracy to supply firearms.

Later events

26. The claimant has been vocal in his criticisms of Essex Police, and in seeking an investigation (leading to a prosecution) into what he believes was the murder of his son. During the events in question, he or those acting on his behalf, have been in regular contact with Essex Police.

27. In 2003, Detective Superintendent Coxall of Essex Police reviewed the initial investigation. He had no formal terms of reference, but met the claimant on a

number of occasions. In December 2003, he submitted an advice file to the CPS. On 18 December 2003, the CPS advised no further action should be taken.

28. Between 2004 and 2006, a further, intelligence led operation was carried out by Essex Police ("*Operation Guthrie")*. The review by Detective Superintendent Coxall considered some of the material generated by *Operation Portwing*, exploring any link between the death of Mr Balkwell and the drugs investigation. On 3 February 2006, Detective Superintendent Coxall submitted a file to the CPS with a view to a charge of gross negligence manslaughter being considered. The CPS again advised that no further action should be taken.

29. In 2006 *"Operation Jerboa"* was launched by Essex Police to examine claims made within a website called "JusticeforLeeBALKWELL" that had been set up by the claimant, where it was alleged amongst other things, that Mr Balkwell's death was not an accident and the true circumstance of his death had been covered up by corrupt officers. Assistant Chief Constable Brigginshaw appointed Detective Superintendent Garnish of Essex Police to conduct a review of some twenty-two points of concern relating to the case that were made on that website. After this review, Detective Superintendent Garnish took the view there was no evidence worthy of presentation to the CPS.

30. Between 22 January and 5 February 2008, HM Coroner for Essex and Thurrock held an inquest into the death of Mr Balkwell, at which the claimant was represented as an Interested Person, as were the defendant and Simon Bromley. The claimant argued that a verdict of unlawful killing on the basis of murder, should be left to the jury. The Coroner declined to do so, having concluded that there was insufficient evidence upon which a reasonable jury, properly directed, could return that verdict. The possible verdicts left to the jury were unlawful killing on the basis of gross negligence, accident and an open verdict. On 5 February 2008, the jury returned a verdict of unlawful killing by way of gross negligence.

31. Dr Andrew Morris, a vehicle safety expert at the Vehicle Safety Research Centre at Loughborough University, had produced a report for Essex Police in December 2003. Following the inquest, on 7 May 2008, he was asked by Essex Police to produce a further report. The focus was two-fold. First, to establish whether Mr Balkwell could have been placed in the chassis and the drum of the lorry, rather than falling or climbing out of the hatch; and secondly, to comment on the possibility of the mixer drum rotating of its own volition and the effect this may have had on the outcome. Both were possible scenarios that had been suggested by the claimant. Dr Morris had available various documents including records of interviews with Simon Bromley, photographs and videos of the scene, and previous forensic reports; and he inspected the lorry. His view, in both reports, the second produced in September 2009, was that the most likely sequence of events was that Mr Balkwell had begun to climb out of one of the inspection hatches, the drum then began to revolve, and he was drawn into the area by the chassis, and crushed. Dr Morris did not feel able to exclude altogether one of the possible scenarios suggested by the claimant, namely that Mr Balkwell had been placed halfway into the drum before it was revolved, though he said he believed this was unlikely.

32. In the aftermath of the inquest, in September 2008, Assistant Chief Constable Lowton of Essex Police ordered a full forensic review to be carried out by the Forensic Science Service. A meeting took place between the Forensic Science Service and the claimant on 1 December 2008. The claimant's suggestion that his son may have been killed in the pool room at Mr Bromley's home led to a scientific examination by Judith Cunnison of the Forensic Science Service of that room (some 6 to 7 years after the death of Mr Balkwell) which yielded no scientific evidence of blood. At the request of Essex Police, in May 2009, Ms Cunnison also did tests on a pair of white Adidas trainers that were recovered from the cab of the lorry to see if they provided evidence to support the claimant's belief there had been a violent attack on his son. In a report dated 28 July 2009, she concluded that they (the trainers) did not provide such evidence.

33. In 2008, the claimant complained to the IPCC. The IPCC's interim report of 29 June 2009 included a recommendation that Essex Police consider appointing an external independent force "to re-investigate Lee Balkwell's death".

34. On 16 August 2009, Assistant Chief Constable Bliss of Essex Police informed the IPCC that he had commissioned an investigating officer from another police force to conduct an independent review of the investigation by Essex Police into the death of Mr Balkwell; and West Midlands Police were duly appointed to review the Essex Police investigation. This West Midlands Police review was named "*Operation Abante"* and it was headed by Detective Chief Superintendent Dave Mirfield of West Midlands Police. Its terms of reference were set out at paragraph 1.3 of the *Abante* report, as follows:

> "The fundamental objective is constructively to evaluate the strategic conduct of all phases of the investigation to ensure that:
>
> a) It conformed to nationally approved standards.
>
> b) It has been thorough.
>
> c) It has been conducted with integrity and objectivity.
>
> d) That no investigative opportunities have been overlooked.
>
> e) It identifies good or bad practice."

35. The *Operation Abante* report was delivered on 21 April 2010. It ran to some 135 pages followed by two appendices. It was highly critical of the original investigation by Essex Police, and made ninety-one recommendations which ranged from general matters of policy to specific suggestions such as obtaining witness statements from named individuals. One of the ninety-one recommendations made (recommendation 30) was in these terms:

> "It has been noted that a number of these allegations have been investigated to their natural conclusion and have not revealed any corroborative evidence. It is however, recommended that all

> allegations made by [the claimant] at various stages of this enquiry and in their various forms are reconsidered to ensure that no investigative opportunities have been overlooked."

36. Amongst other things, the *Abante* report said that the police's actions in the days that followed Mr Balkwell's death did not help to instil confidence in the overall quality of the investigation. Although the investigation was described by those in charge as a homicide investigation for example, the crime scene was poorly managed. The *Abante* report also suggested (in part because of the inquest verdict) that there was an obvious evidential basis to allege Simon Bromley was guilty of gross negligence leading to the death of Mr Balkwell.

37. The *Abante* report led into *Operation Nereus* which was launched to discharge the ninety-one recommendations made in the *Abante* report

38. *Operation Nereus* was conducted by the Major Crime Directorate of a separate police force, Kent Police. The Essex and Kent forces were by then starting to collaborate to carry out some of their functions, as was permitted by section 23 of the Police Act 1996; and this included establishing a joint Serious Crime Directorate. A "sterile corridor" was operated however, and *Operation Nereus* was conducted only by Kent officers**.** See further, as to the scope of and work done by *Operation Nereus* at paras 41, 42, 44, 45 and 47 to 51 below.

39. On 30 January 2012, the final report of the IPCC was published. It said: "Although [the claimant] has made many complaints, in essence what Mr Balkwell has been seeking is to: know how and why his son died; have anyone responsible for the death brought to justice; have any police officers responsible for failing to properly investigate this case to be held to account." The report said:

> "...after the initial stages of our enquiries I recommended that Essex Police bring in another force to reinvestigate Lee Balkwell's death. The Chief Constable considered this recommendation and decided he wanted an external force to review the earlier investigations prior to making any decision in relation to re opening the case. West Midlands Police undertook this review and made more than 90 recommendations about further action that should be undertaken. Essex Police accepted all these recommendations and commissioned Kent and Essex Serious Crime Directorate to carry out this work. The criminal investigation into Lee Balkwell's death is still ongoing."

40. The introductory paragraphs of the IPCC's final report, give a flavour of its conclusions:

> "We have found that Mr. Balkwell's belief that the original investigation into Lee Balkwell's death was inadequate was well founded. In our view it was seriously flawed. From the outset it

> was mired in assumption that what had happened to Lee Balkwell was a tragic industrial accident. Officers failed to secure potential evidence, failed to interview potential witnesses and failed to treat the death with an open mind. Reviews and further investigative work have been undertaken but the all important first hours of this investigation, where vital evidence must be preserved, had been lost. The failure of the investigation at that early stage has left evidential gaps which may never be filled.
>
> As a result Mr Balkwell lost all faith in the police service he had a right to rely on to give him the answers he sought. As a consequence he has developed his own theories about how his son died and developed a view there was a conspiracy by the police to cover up the circumstances of his son's death. The IPCC has sought to find some answers for Mr Balkwell about how the police handled his case. He came to us with more than 130 complaints, making this a complex and difficult investigation to handle, especially given the length of time since Lee Balkwell's death.
>
> …
>
> The investigation has found that many of the substantive and serious allegations have been upheld. It is these key failures that have led to the raft of follow-up complaints, the speculation and the complete breakdown in communication between Mr. Balkwell and Essex Police. Of the remaining complaints some are partially substantiated and some unsubstantiated. Whilst our investigation has provided evidence of poor police work, we have found no evidence to support any allegations of corruption or a conspiracy theory.
>
> However in the light of Essex Police's prolonged failure to fully address his concerns, it is perhaps understandable how and why Mr. Balkwell reached such conclusions himself."

41. The terms of reference of *Operation Nereus* directed that its Senior Investigating Officer liaise with the CPS. Accordingly, the *Operation Nereus* team worked closely with a senior CPS lawyer (Mr Staite). In 2011, it was agreed that an advice file would be submitted for early consultation on the question as to whether there was evidence of a homicide offence. The three offence hypotheses to be evidentially tested were murder, gross negligence manslaughter and unlawful act manslaughter. At a meeting in July 2012, Mr Staite gave direction on the points to prove for all possible homicide offences, including murder.

42. As a result of the work done by *Operation Nereus*: a file was sent to the CPS; on 14 November 2012, three warrants were executed at venues linked to the Bromley family; Simon Bromley was arrested *inter alia* on suspicion of the offence of

gross negligence manslaughter and he was eventually charged with (and prosecuted for) that offence and an offence under section 2(1) of the Health and Safety at Work Act 1974 (see para 46 below).

43. On 13 January 2013, the claimant brought the claim in the Queen's Bench Division to which we have referred in the introduction, for damages against the defendant for a breach of its obligations under article 2 of the Convention to investigate his son's death. In its amended defence to those proceedings, the defendant conceded that it had failed to carry out an effective investigation into the death of Mr Balkwell and that this failure amounted to a breach of the state's obligation under article 2. Judgment for the claimant was entered on 15 October 2015 and the proceedings were stayed by an Order sealed on 13 January 2017. The defendant also issued two apologies. The first, on the 26 January 2012, that is, after the publication of the final IPCC report; and the second, on 4 January 2017, as part of the settlement of the civil claim. A substantial sum of damages was also paid to the claimant. In the latter apology, the Chief Constable of Essex Police, Stephen Kavanagh, said:

> "Essex Police accepts that the initial investigation was ineffective for the reasons set out by the IPCC and accordingly it failed to comply with the duty to investigate required by article 2 of the European Convention of Human Rights. Whilst further investigations have been conducted to address those failings, Lee Balkwell's death remains classed by Essex Police as an unresolved homicide as a result of his father's belief that he was murdered. It is clear that the failings by Essex Police caused Lee Balkwell's family anguish and distress. Essex Police wishes to reiterate its previous apology and accordingly apologised to Lee Balkwell's family for the distress and anguish caused by those failings."

44. On 25 March 2013, at the request of Detective Inspector Janine Farrell (the Senior Investigating Officer of *Operation Nereus*) and under the instructions of HM Coroner for Essex and Thurrock, Mr Balkwell's body was exhumed for the purpose of conducting a Home Office post mortem. Also in attendance at the exhumation were HM Coroner for Essex and Thurrock, and four police officers from Kent Police.

45. The post mortem was conducted by Dr Swift, with Dr David Rouse, a senior forensic pathologist, in attendance on behalf of Simon Bromley (Dr Rouse, a home office pathologist, had produced three reports in 2003, 2006 and 2007 and agreed with Dr Heath's conclusions, that Mr Balkwell had a large number of injuries that were consistent compression under a rotation drum and that he was alive at the time such injuries were caused). Also present were two Crime Scene Investigators, one acting as a photographer and the other acting as an exhibits officer; two Forensic Anthropologists and others including Detective Inspector Farrell, Detective Constable Nick Baxter, HM Coroner for Eastern District of Greater London, HM Coroner for Essex and Thurrock and a representative of the family of Mr Balkwell, Mr Ivan Biddle, a retired mortician. The *Operation*

Nereus report noted that the body of Mr Balkwell was discovered to be in a remarkably good condition, particularly in the light of the passage of time since his initial burial; and this enabled a comprehensive two-hour post-mortem examination to be conducted by Dr Swift**.** This post mortem found there were no marks of violence or injuries on the body or skeleton of Mr Balkwell that supported the hypotheses that he had been assaulted, stabbed or shot prior to being crushed in the cement mixer. Dr Swift said he would: "agree that death was due to multiple injuries, and would be consistent with the rotating action of the cement drum."

46. On 25 November 2013, Simon Bromley was charged with manslaughter by gross negligence and an offence under section 2(1) of the Health and Safety at Work Act 1974, namely a violation of the duty of every employer to ensure so far as is reasonably practicable, the health, safety and welfare at work of all his employees. In October 2014, Simon Bromley was tried on those charges at Chelmsford Crown Court. On 11 October 2014, he was acquitted of manslaughter but convicted of the health and safety offence, for which he was later fined.

47. On 22 July 2015, the *Operation Nereus* report was produced. It described itself as not a re-investigation. Nevertheless, its stated purpose had been to: "Conclude the investigative recommendations made by the West Midlands Review Report – Operation Abante and pursue or conclude any other lines of enquiry the SIO and Gold considers reasonable and proportionate in the circumstances. This will be with the clear objective of searching for the truth about what happened to (Mr Balkwell) leading up to his death." It followed that *Operation Nereus'* purpose included discharging recommendation 30 of *Operation Abante* (see para 35 above).

48. As part of *Operation Nereus* therefore the following steps were taken: an "Investigation Plan" was drafted by the Senior Investigating Officer, which was designed to be continually updated, Simon Bromley's involvement in Mr Balkwell's death was investigated, as were the different hypotheses in this connection suggested by the claimant, including the hypothesis that Simon Bromley had murdered Mr Balkwell, a number of experts were instructed, and other lines of inquiry were pursued.

49. Thus, amongst other things:

    i) A forensic metallurgist, Mr David Price, was commissioned to examine a broken rod (the rod and clevis) in the apparatus in the cab of the lorry that had it not been broken, would, have afforded a way of operating the rotation of the drum, in addition to the device at the rear nearside of the lorry. The claimant had alleged the rod had been deliberately broken by the emergency services. Mr Price concluded that it had broken due to metal fatigue.

    ii) An independent tachograph expert, Mr Keith Lloyd was commissioned to examine the lorry and tachograph and also to review prior expert reports. Mr Lloyd was able to restart and test the equipment in the lorry. He concluded that a short movement of the lorry's prop shaft (such as might be caused by starting or stalling the engine) may or may not generate a

"*spike*" that would be recorded within the tachograph. As such, the records recovered, showing such spikes at 00.52 and 00.55, with a gap of between 160 and 200 seconds, could have been caused by either a very small movement of the vehicle or stalling of the engine. Mr Lloyd was unable to prove the readings related to 18 July 2002, but concluded that they were broadly consistent with the starting and stalling of the lorry spoken of by Mr Bromley.

iii) Mr David Sackett, a concrete expert, was instructed. He had worked in the industry for over 40 years and had City and Guild qualifications in concrete practice and concrete technology. He was asked to view such photographic records as existed both of the scene around the lorry and the inside of the drum, and addressed a number of matters, including issues concerning the state of the concrete inside and outside of the lorry. He believed, amongst other things, that "a rinse [of the drum had] occurred to get out some spoil with a view to carry on working, or to finish for the night and carry on at a later time or just to have a break from gunning out".

iv) A pathology strategy was adopted that led to the instruction of Dr Swift (because of his detailed knowledge of the case). Dr Swift was provided with extensive material and was specifically briefed to remain open to all hypotheses, including homicide offences. His final report was produced on 12 February 2013, and ran to some 40 pages. It addressed 27 questions posed by Detective Constable Baxter of Kent Police, and a further 50 questions posed by the claimant and Anthony Bennett, a former solicitor assisting the claimant. It is apparent from Dr Swift's detailed answers to those questions, that the views he had expressed in his earlier reports, remained the same.

v) A telephony strategy was created which largely focused on allegations made by the claimant that Mr Balkwell's death had been covered up by corrupt police officers. It concluded that:

> "[N]o assertions can be made that are consistent with, or support [the claimant's] claim that his son was deliberately killed and there then followed a complicated conspiracy to contaminate the scene and lay a false time line. There is no evidence to suggest within any intelligence material, that such a high level conspiracy between the BROMLEY family, Senior Organised Crime Figures and Corrupt Police Officers existed."

vi) In considering the exhumation of Mr Balkwell (see paras 44 and 45 above) it was noted that a mobile phone was recovered during the exhumation. The handset was water damaged and it was not possible to recover text messages or incoming/outgoing call data. However, the phone's contact list was recovered, and contact was made or attempted with each of the eighty names on the phone's contact list. Many of the individuals identified were already on *Operation Nereus*'s database, but a significant

number of previously unknown people were identified. This led to the identification of a friend of Mr Balkwell, who made a witness statement that was later used at the trial of Simon Bromley.

vii) *Operation Nereus* used the Kent Police financial investigator, Duncan Brown, to research and conduct relevant inquiries. This led to financial documents being obtained that had been seized from Baldwins Farm in 2005, and which enabled investigators to understand how Bromley's Upminster Concrete business operated during the relevant dates in 2002. This documentation provided evidence that Simon Bromley was the owner of Upminster Concrete and the employer of Mr Balkwell at the time of his death, which was essential to establishing the charge of manslaughter by gross negligence.

50. Appendix E to the *Operation Nereus* report, which ran to 104 pages, also provided a detailed point by point response to a document produced by the claimant (and Mr Bennett) which was entitled "141 Reasons why the death of Lee Balkwell was no accident".

51. The *Operation Nereus* report concluded in part:

> "17.1 In August 2010 Operation Nereus was commissioned to discharge the 91 recommendations from the West Midlands Police Review [Op. Abante]. It was confirmed at that time that Op. Nereus would not be a re-investigation of the 2002 incident. However in addition to discharging the Op. Abante recommendations, the Op. Nereus TOR ["terms of reference"] also allowed the SIO ["Senior Investigating Officer"] to "pursue or conclude any other lines of enquiry the SIO and Gold considers reasonable and proportionate in the circumstances". Both Op. Nereus SIO's were committed to ensure that "every stone has now been turned" in their search for the truth about how [Mr Balkwell] died; the requisite standard required by CPS lawyer Nick STAITE. This was an extensive, costly and lengthy process, but in the interests of justice, ensuring [the claimant] received a good service and minimising further risk to the organisation; it was essential that an appropriate level of resources and time was invested in the case."

It is to be noted, that West Midlands Police conducted an independent review of *Operation Nereus* and concluded that *Operation Abante's* recommendations had been or were close to being actively addressed and completed to a satisfactory or high standard.

Further events leading to the decisions under challenge

52. By 2017, the claimant was being assisted *pro bono* by a private investigative agency, TM Eye. Amongst those working on the claimant's case were David McKelvey, Stephen Hobbs, Garry Staples, Barry Walker and Tony Nash. All had

served as police officers for many years and had extensive experience investigating crime in general and homicides in particular. On 14 September 2017, some of those from TM Eye met Assistant Chief Constable Nick Downing. On 20 November 2017, TM Eye provided Mr Downing with a report setting out their reasons for seeking a (further) investigation. In this report, they suggested Mr Balkwell had been attacked by members of the Bromley family who had then staged the "accident" to kill him and cover up their crime.

53. Their report asserted the following, amongst many other matters. The tachograph readings supported the suggestion of the lorry being moved at the time of the staged event. Both Kango drills were outside the drum of the lorry in emergency service photographs of the scene. This was inconsistent with the account of Simon Bromley, on the basis of which, at least one of the drills should still have been within the drum. The photographs of the scene also showed deposits of concrete and nearby slurry which, together with images of the drum, showed that the 'gunning out' had been completed before the fatal event. The photographs showed a single lamp positioned outside the drum; any 'gunning out' would have been impossible with such limited lighting. It was "ridiculous" to suggest Mr Balkwell would have been climbing out of the drum's inspection hatch feet first. Mr Balkwell's body was found to be wearing his blue fleece, a garment he was known to wear only when he had finished work. The blood on the lorry was insufficient to have been left by the events described by Simon Bromley, as the rotations of the drum he spoke of would have led to far more extensive staining. The CCTV seized omitted any images from cameras placed in significant locations within the farm. The photographs taken at the (first) post-mortem revealed signs of restraint, burn marks to his hand and injuries to his back which were not explicable by his being trapped and crushed by the lorry. Dr Heath had failed to record any of these injuries. The lever within the cab of the lorry which operated the drum, that Simon Bromley had claimed was broken, was in fact functioning on the night of the death.

54. The claimant also relied on reports produced by Robert Milne, who described himself as a "forensic practitioner." We have reservations about Mr Milne's objectivity and his qualifications to give an opinion on the many matters on which he commented (which had otherwise been dealt with by individuals with an expertise in their particular field). It is sufficient to say in brief however, that he had examined documents supplied to him on behalf of the claimant, and felt able to express the opinion that Mr Balkwell was deliberately killed after being restrained and subdued, or that the machine that caused his death was started deliberately or carelessly, causing his death.

The first decision letter

55. The first decision letter of 26 April 2018 from Assistant Chief Constable Downing, said that *Operation Nereus* had amounted to a "substantive investigation", and he declined to re-open the investigation into Mr Balkwell's death. In reaching his decision, Mr Downing had been assisted by Detective Inspector Scarfe, the Deputy Senior Investigating Officer of *Operation Nereus*; and Mr Downing had also commissioned further enquiries to enable him to reach an informed decision, including speaking with a Mr Heathorn who according to TM Eye had further evidence to give.

56. Mr Downing addressed in detail TM Eye's report in the course of explaining why the criminal investigation into Mr Balkwell's death would be closed. Mr Downing addressed (over 12 pages) amongst other matters, the alleged ante mortem "burn marks" to Mr Balkwell's arm, eye witness accounts, CCTV, the tachograph issues, the control rod and clevis, what was found at the scene, including lighting etc, Mr Balkwell's clothing, the issue of motive and the report of Mr Milne. In relation to the suggestion that there had been a burn injury to Mr Balkwell's arm, Mr Downing relied on the opinions of the three pathologists who had attended at the two post mortems, each of whom had found no evidence of restraint injuries, defensive wounds or any other significant injuries beyond those caused by the fatal crushing. Dr Heath had been shown the images that led some of the claimant's witnesses to discern burn marks and had explained they were the remnants of dried blood. Mr Downing accepted that Dr Heath's professional position had since been "tainted" but nonetheless felt it proper to consult him given he had been the Home Office accredited pathologist who had carried out the first post mortem.

57. Further, in addressing what was said about the tachograph readings, Mr Downing referred to the conclusions of Mr Lloyd (see para 49ii) above) whose findings were set out within the *Operation Nereus* report. Mr Downing acknowledged there were a number of matters thrown up by an examination of the photographs of the scene, but pointed out that the poor control and management of the scene meant that there were questions that could not now be answered. As for the fleece, he suggested that earlier images showed that Mr Balkwell's T-shirt was very torn which may have led him to don his fleece; and that poor control and examination of the crime scene meant the significance of the absence of any recovered T-shirt could not be judged. Further, it could now be shown that the CCTV footage recovered had not been tampered with; and there was now no basis for the suggestion that there may have been a further camera in existence in 2002 that could have supplied more relevant footage. As for the single light, Mr Downing noted that *Operation Nereus* had established that the single light at the scene had been moved at one stage after the arrival of the emergency services. He also pointed out that the lack of adequate lighting had been relied on in the prosecution of Simon Bromley for manslaughter and for the Health and Safety offences. Mr Downing did not engage with the detail of Mr Milne's various reports; but he did say that one of his conclusions (that the evidence may point to a "careless" killing) was consistent with the basis for the offence (of manslaughter) for which Simon Bromley had already been prosecuted.

The 29 November 2018 decision

58. On the 2 October 2018, the claimant sought again to have the investigation re-opened on the basis of further material he provided to the defendant.

59. As already mentioned, this further material consisted of a witness statement dated 1 August 2018 from the managing director of Hymix, Mr Humpish. Hymix manufacture and assemble the drum fabricators for cement mixer lorries, and it had done so for the lorry in this case. Mr Humpish had worked for the company for many years and had made several statements in connection with the case since the fatal events of 2002. In this further statement, Mr Humpish said he was not an expert in concrete and described himself as a "lay person". Mr Humpish said

that the broken metal rod which prevented the drum-rotation mechanism in the cab from functioning, could have been deliberately damaged by reversing and over-tightening a nut that was attached to it. Mr Humpish made clear this was a hypothesis that would require testing. Mr Humpish further described the type of safety precautions which, in his view, would be required before any 'gunning out' could take place, and which were very different to what Simon Bromley described as having taken place on 17 and 18 July 2002. Mr Humpish said he would never allow a mixer lorry's engine to be started with "me or anyone" inside the drum. He described various properties of concrete and aspects of the working of a mixer lorry; and made a series of comments about what seemed to him to be oddities in terms of the type of concrete detritus and the state of both the inside and the chute of the drum in respect of a series of images he had been shown from a laptop computer operated by one of the TM Eye investigators.

60. In a report to the solicitor for Essex Police, forwarded to the claimant, Assistant Chief Constable Downing said this further witness statement from Mr Humpish did not persuade him that the investigation should be re-opened.

61. Mr Downing pointed out that Mr Humpish was not an expert in metallurgy, concrete or forensic accident investigation. Nor was he a new witness; he had made previous witness statements and had given evidence at the inquest into Mr Balkwell's death. Mr Downing also pointed out that Mr Price (see para 49i) above), had examined the broken rod and concluded that the break in it had been the result of metal fatigue, and this new statement from Mr Humpish said nothing that cast doubt on Mr Price's conclusion that he had previously accepted. Mr Downing said the combination of the poor preservation of the scene and the (acknowledged) lack of expertise of Mr Humpish, meant that his thoughts on the state of the scene did not provide "credible new lines of enquiry". Mr Downing accepted Mr Humpish had given consistent evidence about the dangers and impropriety of the method of 'gunning out' described by Simon Bromley, but those aspects of the case supported a prosecution for gross negligence manslaughter and health and safety offences, not for murder.

The 6 July 2020 decision

62. On 10 January 2020, the claimant served on the defendant the report dated 19 December 2019 that he had obtained from Dr Shepherd. In his 38-page report Dr Shepherd considered numerous images of the post mortems conducted on Mr Balkwell and videos of the scene in question.

63. Amongst Dr Shepherd's observations, and conclusions were the following. The lack of sufficient post mortem photographs of sufficient quality and the failure of Dr Heath to describe and measure the injuries adequately, caused severe problems in assessing the injuries. Dr Shepherd agreed with Dr Swift that there were no stab wounds, defensive injuries, signs of restraint, or offensive injuries. None of the examinations of the scene showed any evidence of significant blood loss in, on or around the lorry. Dr Shepherd said he could not conceive that the type of injuries described by Dr Swift would not have led to "immediate and severe external haemorrhage" if Mr Balkwell had been alive when they were caused. There were no pathological features that would support the hypothesis that Mr Balkwell was alive at the time of the compression, and conversely there many

that would support the opposite hypothesis. There were linear bruises to Mr Balkwell's front and back that suggested injuries caused by a linear object before death. On the evidence available, he concluded that the death of Mr Balkwell must be considered "very highly suspicious" and there was "very strong evidence of staging of the scene in an attempt to make Mr Balkwell's death "appear to be an accident". He was unable however to offer a conclusion as to Mr Balkwell's cause of death.

64. By this stage, Assistant Chief Constable Downing had retired, and Assistant Chief Constable Timothy Smith had taken over from him as Head of Kent and Essex Police Serious Crime Directorate. Assistant Chief Constable Smith asked Detective Superintendent Cronin (Head of Department for the Major Crime Unit for Essex Police) to conduct a review and provide a recommendation. Detective Superintendent Cronin provided his report and recommendation (extending to 10 pages) on 14 May 2020.

65. Detective Superintendent Cronin began by acknowledging the obligation on the state under article 2 of the Convention to conduct an effective investigation where death occurs in suspicious circumstances. He then set out the history of the case and reviewed the evidence, including the 'new' evidence submitted by the claimant and those acting on his behalf. He said that Assistant Chief Constable Downing's letter of 26 April 2018 had addressed the matters and hypotheses raised by TM Eye and the claimant which did not amount to new evidence. The new evidence which, might be said to revive the article 2 obligation was the report of Dr Shepherd. This was expert opinion evidence (rather than new primary evidence) and was at odds with the expert opinion evidence of Dr Swift who had access to the same primary evidence and had the benefit of conducting a post mortem examination of Mr Balkwell. Dr Swift had reviewed Dr Shepherd's report, questioning how he could have publicly reported his findings before reviewing the material and concluded Dr Shepherd's report was not supported by evidence. In his further report, Dr Swift confirmed that his view was unchanged. Further, in a long and detailed statement dated 20 May 2009, Dr Swift had previously addressed and rejected the suggestion now raised again by Dr Shepherd, that Mr Balkwell had been (deliberately) killed. Detective Superintendent Cronin went on to say:

"To bring charges for murder, the investigation must show there is sufficient evidence to provide a realistic prospect of conviction against the named suspect(s)….While Dr Shepherd's report does provide new expert opinion evidence, that evidence is in conflict with other expert evidence, which will undermine his evidence. There is the potential for his evidence to be further undermined for the reason outlined by Dr Swift, namely that he made public statements before he even concluded his investigation. The reports of Dr Swift would certainly be disclosable to the defence in any criminal case and even if all the other evidence was put to one side, there would be a serious conflict in the expert pathology evidence. Dr Swift's report would be capable of being used by the defence to undermine Dr Shepherd's evidence and to establish reasonable doubt that Lee Balkwell was murdered. The pathology evidence must be considered in the context of all of the evidence in the case. There is a significant volume of evidence which does not support the hypothesis that Lee Balkwell was

assaulted and the scene staged. CCTV, telephony, and tachograph evidence all either do not support or undermine areas of concern raise[d] by [the claimant] about who was present at the scene and the circumstances of Lee Balkwell's death. The IPCC report highlighted failures in Essex Police's handling of the scene and of the original investigation of the scene more generally. Many of those failings cannot now be 'cured' by a fresh investigation. The IPCC report would certainly be disclosable to the defence in any criminal case and its findings would be used by the defence to undermine the prosecution's evidence and to establish reasonable doubt that Lee Balkwell was murdered. I do not believe the report of Dr Shepherd alters the position to the case to suggest that the CPS will now be able to prove a charge or charges for murder. The evidence (other than Dr Shepherd's report) has been tested in the Coroner's Court and considered by the CPS, and at no time has sufficient evidence been shown to support a case for murder. In the criminal case Mr Bromley was only found guilty in the Crown Court of an HSE offence. I find it significant that following the Op. Nereus investigation Mr Bromley was charged with gross negligence manslaughter, but the evidence was insufficient to convict even him of this lesser offence.

66. Addressing the question of whether a fresh investigation was justified, Detective Superintendent Cronin considered the extensive history of investigations, as well as the significant passage of time since the death of Mr Balkwell. Balancing the prospects of uncovering new evidence against the significant cost of any new investigation, Detective Superintendent Cronin concluded that a fresh investigation would not be in the public interest and was not justified. He said:

"Under the CPS Full Code Test, the second (Public Interest) stage is not reached if the Evidential Stage is not satisfied - a case which does not pass the Evidential Stage must not proceed, no matter how serious or sensitive it may be.

I have separately considered the public interest in re-opening the investigation into Lee Balkwell's death. The starting point is that it is clearly in the public interest to identify the circumstances of the death of a person, to identify those responsible and to try to gather sufficient evidence to bring them to justice.

However, as outlined this matter has been investigated by several SIOs, including by Kent Police as an independent Police Force.

The evidence to date has been tested in public hearings in the Coroner's Court and then in the Crown Court, when Mr Bromley was charged and acquitted of manslaughter. While double jeopardy rules would not prevent him being charged for murder, there would need to be substantial new evidence to support this. The report of Dr Shepherd alone does not provide sufficient evidence for the reasons set out above.

As well as the investigations and proceedings to date, I have also taken account of the age of the matter and the question of priorities and resources. As to the age of the matter, it is now approaching 18 years old, which in itself presents issues in terms of witness recollection. As to priorities and resources, re-investigating Lee Balkwell's death would be a very significant undertaking in terms of resources. Given the investigations to date, the probability of a new investigation securing new evidence is low. A new investigation will not be able to cure the

> defects in the original investigation and, even with the new report from Dr Shepherd, it is unlikely to result in a murder charge and/or conviction.
>
> For all these reasons, I do not believe it is in the public interest to commission a further investigation into Lee Balkwell's death.
>
> Therefore, in conclusion, I do not believe that there is, or will be, sufficient evidence to bring charges for Lee Balkwell's murder. The new report from Dr Shepherd does not alter the prospect of a murder charge being brought against any suspect to a sufficient degree to justify a new investigation. Essex Police is entitled to take into account the prospects of success of any prosecution in deciding what investigative steps are required by 'new' evidence. In my opinion, the prospects of a new investigation producing an alternative outcome, and of the CPS authorising a charge of murder, let alone of succeeding in a murder prosecution, remain low. I also do not think it is in the public interest to reinvestigate this matter, which has already been to Crown Court on a manslaughter charge and resulted in the acquittal of the suspect.
>
> As such I recommend to the Gold Commander that the request for a further investigation is declined. The request that such an investigation be conducted by an independent Police Force does not therefore arise."

67. On 6 July 2020, after taking legal advice (in respect of which legal professional privilege has not been waived) and reviewing Detective Constable Cronin's recommendation, Assistant Chief Constable Smith reached a policy decision in which he endorsed Detective Sergeant Cronin's conclusion and accepted his recommendation. Mr Smith agreed that there was no realistic prospect of any investigation resulting in a murder charge being brought. In relation to the prospect of a new inquiry, he acknowledged the failings of the original investigation but noted that these defects could not now be cured. As such it was not in the public interest to conduct a fresh investigation. This decision was communicated to the claimant on 8 July 2020.

The parties' submissions

68. Ms Kirsty Brimelow QC for the claimant submits that the defendant's decision to close the investigation into Mr Balkwell's death and to refuse to re-open it in the face of the available evidence and opportunities for further inquiry, runs counter to the core operational duties of the police and is irrational. The defendant has failed to address the substantial evidence from Dr Shepherd, failed to account for recent advances in forensic science, failed to pursue the evidence of new witnesses who may now be willing to come forward, and has left numerous factual issues from the original investigations unresolved. The authorities cited by the defendant, indicating that the court should show deference to the Chief Constable's decision-making in respect of the allocation of resources, are distinguishable as they are concerned with the decisions of investigators. Here, *Operation Nereus* was not an investigation, and at any rate, the high threshold for a *Wednesbury* reasonableness challenge has been surmounted, because of the new evidence uncovered by TM Eye.

69. Further, the defendant's decision to close the investigation without taking all reasonable steps to make up for the flaws in the original investigation, and to refuse to revive the investigation in light of further evidence is incompatible with the obligation to carry out an effective investigation under article 2 of the Convention. In this connection it is said that no effective investigation has yet taken place. As such, the positive obligation under article 2 has not been met. The original flawed investigation has been followed by a series of mere reviews. After the last of the reviews, a thorough analysis by TM Eye, has produced plausible allegations, information and evidence relevant to Mr Balkwell's alleged murder which revive the obligation to investigate. Moreover, the defendant has been overly prescriptive in its reliance on the CPS Full Code test. Rather than assessing the currently available evidence against this standard, the defendant should have considered what evidence would likely come to light through further investigation.

70. The defendant submits that the decision not to re-open the criminal investigation was rational. Such a decision is not immune from judicial review (see *In the matter of an application by Margaret McQuillan and ors for Judicial Review* [2021] UKSC 55, [2022] 2 W.L.R. 49 at [243]), but such a review must meet the demanding *Wednesbury* test and be accorded the appropriate deference shown to "the decisions of an independent prosecutor and investigator", per Lord Bingham in *R (Corner House Research) v Director of the SFO* [2008] UKHL 60; [2009] AC 756 at [30].

71. The claimant's challenge does not come close to meeting this high hurdle. Even if the further evidence presented by the claimant did revive the duty to investigate, the defendant complied with this duty by reviewing the report from Dr Shepherd carefully and by securing the response of Dr Swift. Dr Swift's response was brief, but he had, by that stage, already written seven reports of considerable length, concerning Mr Balkwell's death. The defendant was entitled to have regard to the prospects of conviction in making the decision as to whether to re-open the investigation. It was Assistant Chief Constable Smith's reasonable conclusion that there were no further investigative opportunities with a realistic prospect of success. Additionally, the investigative obligations under article 2 were complied with. The obligation is one of means and not of result. It has been admitted that the defendant breached the article 2 obligation in relation to the original investigation; however the duty has since been discharged through *Operation Nereus* and Simon Bromley's prosecution for manslaughter.

72. As to new evidence, the defendant submits the revival of the obligation is not automatic: the new evidence must be of a certain quality, and the new obligation is not necessarily to re-open the investigation but to "take further investigative measures" or "steps", depending on what is reasonable in the circumstances (see *Brecknell v UK* App no. 32457/04; (2008) 46 EHRR 42 [71]). The correct test is whether there is a realistic prospect of any further investigation obtaining sufficient evidence to satisfy the evidential stage of the CPS Full Code Test in order to charge an identifiable individual with a relevant offence. The High Court, in *Al-Sadoon and ors v Secretary of State for Defence* [2016] EWHC 773, approved the use of this 'evidential sufficiency' test by the Director of Service Prosecutions as a benchmark for whether the Iraq Historic Allegations Team

should investigate an allegation as being article 2 compliant (see *Al-Sadoon*, [281]). It was appropriate for the defendant to have asked whether there was a realistic prospect of obtaining such evidence.

73. Even if the evidence produced by the claimant post 2017, was sufficient to revive the investigative obligation, this obligation has been discharged by the further steps taken by the defendant. The TM Eye report contained very little new evidence, and was carefully considered by Assistant Chief Constable Downing; and Dr Shepherd's report was carefully considered by Assistant Chief Constable Smith, with the assistance of Dr Swift.

Discussion

74. We start with a brief discussion of the law, the essential elements of which are not in dispute.

75. It is well-settled that the decision of a public body to launch, close or re-open an investigation is susceptible to review by the courts, but only in rare and exceptional cases. As Lord Bingham said in *R (Corner House Research)* at [30], "…only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator".

76. The rationale for the deference shown to the decisions of investigators was explained by the Supreme Court in *McQuillan*:

> "242. In performing their general duty… all police officers in the United Kingdom… have a very broad discretion. It is for them – and not any other public official or private individual – to judge whether an allegation that an offence has or may have been committed warrants investigation, if so what investigative steps to take, whether to continue or discontinue an investigation at any stage and whether sufficient evidence has been obtained to charge a suspect or refer a case to a prosecutor to consider whether a person should be charged with a criminal offence. In making such decisions, the police officers concerned are entitled to take into account a wide variety of factors and it is they – and not the courts – who have the constitutional responsibility and the practical competence to evaluate and decide what weight to give to those factors.
>
> 243. Given the nature of this discretion, a decision taken by a police officer to close a criminal investigation is seldom susceptible to legal challenge. Many cases confirm this…"

77. Article 2 of the Convention imposes an obligation on member states to investigate any death in suspicious circumstances, even where the state itself is not accused of playing any part in the fatality. In *In the matter of an application by McCaughey and anor. for Judicial Review (Northern Ireland)* [2011] UKSC 20, [2012] 1 AC 725 Lord Phillips (citing *Angelova and Iliev v Bulgaria* (2008) 47

EHRR 7) said the article 2 obligation "requires some form of effective official investigation".

78. The nature of the investigative obligation and the circumstances in which new evidence will revive such an obligation were considered in *Brecknell*, cited with approval by the Supreme Court in *McQuillan*. We derive the following propositions from *Brecknell* at [66] to [71]:

    i) The investigative obligation does not create an absolute right to a prosecution or a conviction for an unlawful killing, and would be fulfilled by a proper investigation. It is an obligation of means only.

    ii) Where events or circumstances cast doubt on the original investigation, an obligation for a further investigation may arise.

    iii) The nature and extent of any further investigation would depend on the circumstances and might well differ from that required immediately after a suspicious, violent death has occurred.

    iv) It is difficult to devise any prescriptive test that will apply to all cases where it is suggested that new material has come to light, but the state must be sensitive to such fresh evidence.

    v) The investigative obligation must not be imposed in a manner that results in an impossible or disproportionate burden on the authorities.

    vi) Where a plausible new piece of evidence comes to light, the steps the authorities are obliged to take will vary considerably depending on the circumstances and may be limited to, for example, verifying the credibility of the source.

    vii) In assessing whether to re-open an investigation, the authorities are entitled to take into account the prospects of a successful prosecution.

79. Against this legal background, and having dealt in some detail with the factual background to this application, we can state our conclusions relatively shortly.

80. We address first, one of the central issues raised before us, namely whether *Operation Nereus* was a review or an investigation.

81. The claimant relies heavily on the terms of reference of *Operation Nereus* ["Nereus would not be a re-investigation of the 2002 incident"] and, in addition, on an internal email from Kent Police's Operations Manager, Lee Catling, of 4 December 2014, which stated, "Please note I had very clear instructions from the outset that this WAS NOT a reinvestigation, but a process to discharge the recommendations of the West Midlands Op Abante Report". The label given to what was done however, seems to us to be only a starting point in considering this issue.

82. We have had the advantage of reading the whole of the *Operation Nereus* report. It is our firm conclusion that *Operation Nereus* was an investigation. Although numbers cannot tell the entire story, it is to be noted that during the five years of

Operation Nereus a team of 9 officers completed about 1000 actions and produced nearly 4,500 documents; all evidence obtained in the previous investigation was revisited, and it is apparent that, where it was possible to do so, evidential opportunities were enhanced, potential new lines of enquiry were explored and Simon Bromley's involvement in Mr Balkwell's death was extensively investigated. As identified above, different angles of investigation were considered, witness statements were taken, and expert reports were commissioned and considered. Further, as the *Operation Nereus* report itself noted, the scope of the investigation "significantly widened" from the original terms of reference. Above all, the officers working in *Nereus* met with the CPS and discussed whether there could be a prosecution for murder or manslaughter, a file was submitted to the CPS; matters then proceeded to arrests and ultimately, to the prosecution of Simon Bromley for criminal offences, including an offence of homicide, namely, gross negligence manslaughter. All those activities taken together have the hallmarks of an investigation (rather than a mere review) and an effective one at that.

83. This "no stone unturned" approach as to how Mr Balkwell came by his death, as Mr John Beggs QC for the defendant, describes it, was entirely in keeping with what had led to the setting up of *Operation Nereus* in the first place and with its stated purpose. We have already set this purpose out, but it is convenient to repeat it here, namely to "Conclude the investigative recommendations made by the West Midlands Review Report – Operation Abante and pursue or conclude any other lines of enquiry the [Senior Investigating Officer] and Gold considers reasonable and proportionate in the circumstances. This will be with the clear objective of searching for the truth about what happened to Lee Balkwell leading to his death". The purpose of *Operation Nereus* therefore included discharging recommendation 30 of Operation *Abante* that "all allegations made by [the claimant] at various stages of this enquiry and in there [sic] various forms are to be reconsidered to ensure that no investigative opportunities have been overlooked." As the defendant points out, the claimant's main allegation was that Mr Balkwell had been murdered; and recommendation 30 was then discharged.

84. The crucial question for the defendant in April 2018 and subsequently, was whether, after all that had come before, the new evidence and information provided by the claimant following the conclusion of *Operation Nereus* in 2014 justified a fresh investigation.

85. We have examined the impugned decisions in detail and the factual context in which they were made. We are in no doubt that in reaching those decisions, the defendant articulated and had regard to the proper legal tests and to the material facts. We consider each was a reasonable decision which carefully considered and addressed the relevant issues, and the further material provided, and cogent and rational reasons were given for the policy decisions that were made. The rationality challenge must therefore fail.

86. Focusing in particular on the final decision, we do not accept it was irrational for the defendant to refuse to re-open the investigation in the light of Dr Shepherd's report, having regard to the conclusions of the three other pathologists with concurring views that were contrary to those of Dr Shepherd (two of whom had conducted post mortems on Mr Balkwell, unlike Dr Shepherd, and one of whom,

Dr Swift, had dealt in great detail with the case over many years); and to the further review by Dr Swift that was commissioned. As the final decision pointed out, these reports would be disclosable and could or would be relied on by the defence to undermine the evidence of Dr Shepherd if there was a prosecution. Whilst some criticism is made by the claimant of the brevity of Dr Swift's last report, (the Claimant described it as a retort) his views carried particular weight because of the level of his engagement with the case over many years, his conduct of the second post mortem, the detailed nature of his pathological findings and the answers he had already given to the numerous assertions and hypotheses that had been presented over the years by or on behalf the claimant, which included (cogent) reasons as to why he was unpersuaded by the theories of the claimant, to which Dr Shepherd eventually subscribed.

87. Further, Dr Shepherd's report added to the opinion evidence, but did not give rise to any lines of enquiry beyond those already explored at various stages, up to and including *Operation Nereus*. And as was also pointed out, the evidential difficulties still remained because of the flaws in the original investigation which had led to the loss of the all important first hours of the investigation (as the IPCC described it) where vital evidence had been lost. In the circumstances, we consider Assistant Chief Constable Smith's assessment that there were (and are) no investigative opportunities with any prospect of success to be a reasonable one, as was his conclusion that despite Dr Shepherd's report, there was no realistic prospect of any further investigation obtaining evidence to meet the evidential stage of the CPS's Full Code Test for murder.

88. Ms Brimelow took issue, as we have already said with Assistant Chief Constable Smith's use of the CPS's Full Code test when making his decision not to re-open the investigation. In our view the "evidential sufficiency test" is a proper matter to have in mind, where – as was the case here – the consideration is not whether there is an existing evidential basis, but whether a further investigation is likely to provide one. In this respect, we endorse the approach of Leggatt J (as he then was) in *Al Sadoon* at [281] to [284]:

> "[281] It seems to me that the DSP [the Director of Service Prosecutions] is clearly right to regard this test (the "evidential sufficiency test") as providing a benchmark which determines whether and how far it is necessary for IHAT [the Iraqi Historic Allegations Team] to investigate an allegation that a person has or may have committed an offence and that where a judgment is reasonably made that there is no realistic prosect of obtaining sufficient evidence to satisfy the evidential sufficiency test, there is no duty on IHAT under the Act or at common law to conduct any further investigation.
>
> [282] I think it equally clear that the DSP's proposed approach is compliant with articles 2 and 3. As discussed in section C of this judgment, the duty under those provisions to investigate historic allegations is only to take such steps as it is reasonable in the circumstances to take. Moreover, it is specifically recognised that in assessing what investigative steps it is

> reasonable to take, the authorities are entitled to take into account the prospects of success of any prosecution.
>
> [283] I therefore agree with the DSP that it is appropriate to ask at an early stage whether there is a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence."

89. Turning to the claimant's second ground of challenge, we take as our starting point our earlier conclusion that *Operation Nereus* amounted to an effective investigation.

90. We think the defendant is right to submit that the admitted breach of the article 2 investigative obligation in relation to the original investigation does not place the defendant under an open-ended article 2 investigative obligation, having regard to *Operation Nereus* and the conclusion of Simon Bromley's trial; and that the correct question therefore is whether the new information presented by the claimant from 2017, revived the article 2 obligation.

91. As set out above, the article 2 obligation to re-open an investigation arises where there is credible fresh evidence, but the obligation may be satisfied where the state conducts a review of the credibility and significance of the new material (see *Brecknell*, [71]). The state is allowed to take into account the prospects of a successful prosecution resulting if the case were re-opened, and there is no prescriptive formula that applies.

92. In this case, the 'new' evidence, consisted for the most part of documents that contained nothing new i.e. nothing that had not already been considered and explored during the course of *Operation Nereus*. The TM Eye report, to a great extent, consisted of commentary, supposition, theories and criticisms that had been dealt with by *Operation Nereus*, and what little new evidence it did advance was explored by the defendant. The report of Mr Milne for example, which supports a hypothesis that there were burn marks to Mr Balkwell's arm that may have been caused by a stun gun, is undermined by the reports of Dr Swift. Dr Swift noted in his post mortem report (dated 23 April 2013) that: "[t]here were no thermal or electrical burns to any aspect of the body (including those caused by cigarettes, stunguns or "taser")." The claimant also suggested that further witness evidence might be obtained from an individual named Heathorn, who may have been scared or unwilling to cooperate with the initial investigation. As mentioned at para 55 above however, Heathorn was subsequently spoken to by officers from Kent and Essex Police in April 2018, when Assistant Chief Constable Downing was considering the points raised by TM Eye; and the officers concluded that his account did not take the investigation into Mr Balkwell's death any further.

93. The claimant places most reliance however, on the report of Dr Shepherd, and in this connection there is a significant overlap between the rationality challenge, and the challenge under article 2. We have already explained why we have concluded that it was reasonable for Assistant Chief Constable Smith to conclude

that Dr Shepherd's opinion was insufficient to require the investigation into Mr Balkwell's death to be re-opened, and that a new investigation had no realistic prospect of resulting in murder charges being brought. Having regard to all of these matters, we do not consider his report, or the other 'new' material relied on by the claimant, revived the investigative obligation with respect to Mr Balkwell's death. Even if it did however, the defendant considered the correct legal principles and engaged with the detail of the fresh evidence in a way that was sensitive to the importance of the case but had regard to the other burdens on the police and the prospects of any successful prosecution. Against the much wider factual background we have described, we consider the careful consideration of that evidence at various stages, and the other steps that were taken in relation to it (such as seeking the further views of Dr Swift) were sufficient to meet the defendant's investigative obligations under article 2

Conclusion

94. The claimant suffered the loss of a beloved family member, and his shock and sense of loss were significantly aggravated by the failure of the defendant to conduct a proper investigation in 2002. Nothing that we say is intended to diminish or cast any doubt on the impact these events have had upon the claimant. The task for this court however is to consider the merits of his application for judicial review. For the reasons we have given, the application must be dismissed.