

LEGALLY PRIVILEGED AND CONFIDENTIAL

**INTERIM REVIEW OF CARTWRIGHT KING'S
CURRENT PROCESS**

Introduction

1. I am asked to provide an interim review of Cartwright King's ('CK') current process. I have been provided with:
 - (1) A document headed "Draft Paragraphs for Insertion into Reply to CCRC", which was a document designed by CK to assist POL in replying substantively to a letter of 12 July 2013 from the CCRC; and
 - (2) An Advice dated 15 July 2013 by Simon Clarke, a CK in-house advocate, who has advised about the future use of expert evidence relating to the integrity of the Fujitsu Services Ltd. Horizon system.
2. The first document is informative of the processes that CK is currently adopting to identify cases for review. The second document focuses on the problems of disclosure associated with the evidence of Dr Gareth Jenkins in past POL prosecutions and the approach to be adopted towards them and pending prosecutions.
3. I accept that given the intended nature of the first document, the detail of the review process CK is embarking on may be incomplete, and so any views and recommendations I express below should not be taken as anything more than constructive suggestions in light of the information currently available to me.
4. I have also been provided with two copy prosecution files (Hutchings and Ishaq), which have been reviewed by Simon Clarke. They have helped me understand the review process. Simon Clarke has reviewed both cases and his opinions are set out in formal case review documents. (Any views I have about those reviews, and the opinions expressed in them, I consider to be

LEGALLY PRIVILEGED AND CONFIDENTIAL

outwith the ambit of the instant document, but will have to be the subject of my own review.)

5. The Hutchings file contains a document headed ‘Initial Sift Result Sheet’ which is absent in the Ishaq file. The Hutchings Initial Sift Result Sheet shows the initial sift was conducted by ‘AB2’. This appears to be a code for a lawyer at CK, I suspect, other than Simon Clarke.
6. CK’s “Draft Paragraphs for Insertion into Reply to CCRC” document confirms, in the round, that “Once such a case is identified, Senior Prosecuting Counsel will fully review the case”.¹ Each of the two cases I have seen was prosecuted, so far as I can tell, by members of the independent Bar, so that the initial sift and the final review are conducted by two different people who did not prosecute, and are independent of, the case at court at first instance, thus, at first blush, the important elements of independence and objectivity are built into the review process.
7. I am proceeding on the basis that the sole focus of possible complaint is the Horizon system, which is manufactured, maintained and supported by Fujitsu Services Ltd., and the single expert witness, Dr Gareth Jenkins, who provides opinion evidence in POL prosecutions where shortfalls and other irregularities are, in broad terms, alleged to be caused by deficiencies in the Horizon system.
8. I have assumed also that all POL prosecution work in England and Wales is outsourced to CK, and that no prosecutions either at Magistrates’ Court or Crown Court level are prosecuted by POL in-house, or by any other firm of solicitors. I am however unsure of the position in Northern Ireland, and indeed Scotland.

¹ Page 2 “Draft Paragraphs for Insertion into Reply to CCRC”

LEGALLY PRIVILEGED AND CONFIDENTIAL

CK's process

9. In summary:
 - a) CK have identified the sole issue as one of non-disclosure, which is the question that is said expressly to have defined their approach.
 - b) CK are in the process of identifying every criminal case prosecuted by POL (and RMG prior to their separation), and in any event over the past three years, so as to determine, in each case, whether POL's duties of disclosure have been met.
 - c) Following the identification of such a case, they ask their in-house counsel to review the case in full so as to determine the proper approach.
 - d) CK state that the threshold for answering the question has been set at a very low level.
 - e) CK has set deliberately inexact criteria to identify cases, which come within the scope of its review.
 - f) The scoping includes those who have pleaded guilty as well as those who pleaded not guilty but were convicted.
 - g) All cases identified in this way are subjected to a full written case review conducted by counsel.
 - h) The scoping includes both Crown Court and Magistrates' Court convictions.

CK's review results

10. In summary:
 - a) CK's review process began on Monday 8 July (the date of Second Sight's interim report).
 - b) CK has so far examined approximately 90 cases, of which some 20 have been allocated to counsel for full review.

LEGALLY PRIVILEGED AND CONFIDENTIAL

- c) Of those cases identified for full review, approximately 10 have been fully reviewed by counsel.
- d) In two cases counsel has advised that there may be grounds for an appeal.²
- e) Counsel is also reviewing current cases, which has resulted in advice to terminate two prosecutions.
- f) Where counsel has “advised the possibility of grounds of appeal”, letters have been written to defence solicitors, informing them of the issues and providing copies of the Second Sight interim report and such other material as they ought to have received during the currency of the prosecution, had CK been possessed of it at that time.
- g) It is then for the defendant and his lawyers to determine whether or not they wish to launch an application for leave to appeal out of time, which application CK will support.
- h) CK say that so far the review has identified no case where the defendant has sought the permission of the Court of Appeal to appeal against conviction.
- i) One case has been identified where the defendant sought, and was refused, permission to appeal against his sentence. That case was one of the two identified by counsel as being susceptible to appeal against conviction.³

² In the two case files I have seen (which may not be the two CK had in mind), on review, counsel advised in the case of Hutchings that no disclosure should be made, but in the case of Ishaq advised there should be disclosure of the Second Sight report and a report by Helen Rose (there are two Rose reports which I have seen reference to, but do not have, dated 6 June 2013 and 12 June 2013). In neither case however did counsel advise, “there may be grounds for an appeal.” In fact, reviewing counsel disclaimed the notion that the safety of convictions was the purpose of his review or of the process overall: see Footnote 3 to my Observations on the Terms of Reference. I wonder if CK is merely describing the same process in a different way by equating the advice that disclosure needs to be made with advice that there may be grounds of appeal. The one may not necessarily follow for the other. It may in fact prove to be a distinction without difference

³ This is the case of Ishaq

LEGALLY PRIVILEGED AND CONFIDENTIAL

General issues

11. First, I wonder whether non-disclosure by Dr Jenkins of aspects of the Horizon system is the only potential issue that arises in these cases, or whether there may be other issues, which need to fall within the remit of the review.
12. I question whether the sole issue of non-disclosure is too restrictive an approach to take to the review. I have considered the list of issues, which were reported to Second Sight in the course of their review by multiple SPMRs as being of particular concern. One such concern was “POL investigation and audit teams that have asset-recovery or prosecution bias and fail to seek the root cause of reported problems.”⁴
13. I have also considered Spot Review SR22,⁵ in which, according to the SPMR, the issue was the lack of synchronisation between POL and Camelot records for ‘remmed-in’ scratch cards. The shortfall alleged by POL was £14,842, which, following a plea of guilty to false accounting in the alternative to theft, the SPMR repaid. This case example does not appear to me necessarily to be an issue of non-disclosure but one that may be argued to relate solely to the proper functioning of the system. The Spot Review leaves the reader with the sense that there remains a dispute between the SPMR and POL regarding this case. Has this case, and others like it, fallen within CK’s review?
14. Moreover, it is imperative to know what it is CK is representing to those defendants in writing where possible appeals have been identified. I have seen the post-conviction post-review disclosure letter that was sent out in the Ishaq case, but I have not discovered any other letter in the file that informs him of the issues (if indeed this is different to the post-conviction post-review disclosure letter). I am interested to discover also what material, in addition to Second Sight’s report, and any Helen Rose report, CK is sending to potential applicants.

⁴ §7.2(i)

⁵ Appendix 4 to the report

LEGALLY PRIVILEGED AND CONFIDENTIAL

15. I can conclude on the available information that the approach of CK and counsel appears to be fundamentally sound, but the following issues need addressing by POL and/or CK:
 - a) *The geographical limit of the review*: is CK the only provider of prosecution services to POL? If not, then the approach may leave POL exposed. Does the Horizon issue affect only England and Wales, or does it extend to Northern Ireland and Scotland? If so, what approach is being adopted to any such cases, and by whom? A differential approach would be unhelpful.
 - b) *The temporal limit of the review*: does three years suffice; is the reason for the cut-off date supportable?
16. *Conflict of interest*: I can foresee circumstances where a conflict of interest might arise where Horizon and/or Dr Jenkins are the focus of complaint. A hypothetical example may suffice: in a given case it may be alleged that Dr Jenkins did not properly fulfil his role as an expert witness because he failed to disclose something that Second Sight's interim report has now revealed. If Dr Jenkins were to claim, when confronted by such an allegation, that he had in fact informed counsel and/or a representative of CK of the very thing he is now said not to have disclosed, that would give rise a clear conflict, and, if there were a conflict of recollection about it, then that might lead to real difficulty in CK's further involvement in reviewing the case.
17. CK may argue, possibly with complete justification, that there is little or no scope for such a conflict. I am unclear whether CK always instructs the independent Bar or whether occasionally in-house counsel prosecutes these cases also. Either way there is the potential for conflict between them and Dr Jenkins, especially where conferences take place. In my view CK and its review team should be alive to the possibility of conflict arising in any case, and they must seek to identify any case in which potential conflict might arise. CK should consider devising a process whereby they seek full information from prosecuting counsel about the scope and content of any conference with Dr Jenkins especially where unattended by a CK solicitor. Moreover, if it is

LEGALLY PRIVILEGED AND CONFIDENTIAL

thought that a conflict could arise, CK must ensure that counsel who prosecuted the case originally is not the initial sifter or the reviewer.

18. There is, I believe, benefit in CK and its internal counsel identifying and engaging in the review of impacted cases, as they are familiar with their case files and intimate with the process. But it seems to me it will be wise for me to dip-sample some of their work in due course, and I may have to devise criteria of my own for those cases I feel I should review personally.
19. *Guilty pleas*: it is entirely appropriate for the review to embrace those who pleaded guilty, but CK's document does not make clear how they are identifying suitable guilty plea cases for review. Hutchings pleaded guilty on a written basis of plea, which was not agreed by the prosecution but the basis could not be gainsaid. Although this case was undoubtedly suited to review, having read through the file, I am not clear exactly how this case was identified for review. There was no defence statement but claimed deficiencies in the Horizon system and the Helpline were raised in the prepared statement Hutchings provided POL investigators in interview, which inferentially has to be the sole source of identification of this case file for review.
20. As the Hutchings case demonstrates, where the defendant has pleaded guilty there will not necessarily be the type or breadth of information available as in the case of contested trials. It is important that suitable cases for review do not slip through the net, and so while some of the criteria CK identify may be relevant to cases in which there has been a guilty plea, there may be other criteria for identifying suitable cases, which may otherwise escape CK's trawl. CK needs to remain alive to this.
21. *Abuse of process/Public Interest Immunity ('PII')*: I think it highly unlikely but it would be important to know whether there have been any abuse of process hearings at which Horizon has been in issue and/or at which Dr Jenkins has been called to give evidence. Also highly unlikely, but also important to have confirmed, is whether or not there have been any 'PII' applications made in any case to protect commercially sensitive or

LEGALLY PRIVILEGED AND CONFIDENTIAL

confidential aspects of the Horizon system and/or Dr Jenkins' evidence on such grounds.

22. If there have been such cases then it will be essential to know the nature of the applications and the rulings.
23. *Custody cases*: individuals who come within the remit of the CK review who are in custody, whether as a convicted defendant or a defendant awaiting trial, must of course be prioritised.

Interim recommendations

24. On the basis of the information currently available to me, I make the following interim recommendations:
 - a) CK should consider the extent to which non-disclosure by Dr Jenkins of aspects of the Horizon system is the only issue potentially forming any grounds of appeal or whether their review should be broader based to encompass other related issues or potential grounds of appeal. If it is decided that the current review is too narrow, CK should set criteria for the broadening of the review.
 - b) CK should be alive to, and therefore consider their approach to, the potential for any conflict of interest between them and/or prosecuting counsel and Dr Jenkins. If any such conflict does arise, or may be thought to arise in any given case, counsel who prosecuted the case originally should not review the case.
 - c) It is critical that the reasons for the decision, and the decision itself in every case identified and reviewed as part of the process, is properly and fully recorded. The two cases I have seen thus far include full case reviews by Simon Clarke. I am unclear whether he alone is reviewing case files or whether other internal or external counsel is involved in the review. If there is more than one reviewer then there must be a standardised non-differential approach to the process of review.

LEGALLY PRIVILEGED AND CONFIDENTIAL

- d) One of the case files I examined (Ishaq) did not include an Initial Sift Result Sheet. The Initial Sift Result Sheet I have seen in the Hutchings file lists two questions, the second of which is subdivided into three questions. Given the 90 cases, which CK has examined so far, I cannot conceive that one person is performing the sifting process. The composition of the sift sheet attempts standardisation by focusing the sifter's attention on a series of questions. My concern is whether the questions may be too narrow. As the reviewing process continues, experience may provide the answer. However, if the questions do prove to be too narrowly drawn, and require recasting, cases that have already passed through the sift will need to be reconsidered.
- e) In order that the sifting and review process does not overlook suitable cases in which the offender has pleaded guilty, CK should consider setting broader and more focused criteria to identify all such cases, which should come within the review.
- f) To identify cases, if any, in which there have been any abuse of process hearings in which the Horizon system and/or Dr Jenkins has been at issue. If there have been any such abuse of process hearings, CK should provide the reasons for making any such application as well as the detail of any rulings given.
- g) To identify cases, if any, in which there have been claims to PII, seeking, for instance, to protect commercially sensitive or confidential aspects of the Horizon system and/or Dr Jenkins' evidence on such grounds and the detail of any rulings given.
- h) To ensure that any custody cases – convicted defendants and defendants on remand – are prioritised, and to consider setting criteria to ensure such cases are processed expeditiously.
- i) In conjunction with POL, to create a spread sheet audit of all cases under review by CK and counsel: sorted by case name, sub-post or Crown office (if relevant), date of trial and/or plea, court centre (Crown and Magistrates), judge (Crown Court only), prosecutor (internal or external), defence solicitors and/or defence counsel; initial sift result and review result, in all cases identifying in

LEGALLY PRIVILEGED AND CONFIDENTIAL

summary the issue/s which has/have been determinative of the review. I envisage that the spread sheet will encompass on three separate work sheets (1) past relevant POL conviction cases (identify if RMG or POL); (2) pending trials; and (3) cases subject to appeal (application for permission or permission granted) on conviction and/or sentence or on sentence alone (and stage reached).

j) If the letter to which CK makes reference is different to the post-conviction post-review disclosure letter, I would please like to see a copy of a sample letter, together with an idea of the nature of any material CK is sending to potential applicants in addition to Second Sight's report, and any Helen Rose report.

Brian Altman Q.C.
2 Bedford Row
London

2 August 2013