

Monday, 18 December 2023

1
2 (10.45 am)
3 **MR BEER:** Good morning, sir, can you see and hear
4 us?
5 **SIR WYN WILLIAMS:** Yes, I can, thank you and can
6 I apologise for keeping everybody waiting.
7 **MR BEER:** Thank you, sir.
8 May I call Duncan Atkinson KC, please.
9 **SIR WYN WILLIAMS:** Yes.
10 **RICHARD DUNCAN ATKINSON KC (sworn)**
11 **Questioned by MR BEER**
12 **MR BEER:** Good morning, again, Mr Atkinson. As you
13 know, my name is Jason Beer and I ask questions
14 on behalf of the Inquiry. Can you remind us of
15 your full name, please?
16 **A.** Yes, Richard Duncan Atkinson.
17 **Q.** Thank you for coming to give evidence to the
18 Inquiry on a second occasion. Since you last
19 gave evidence on 5 and 6 October this year,
20 you've provided two reports to the Inquiry
21 described as your Volumes 2 and 2A.
22 **A.** Yes.
23 **Q.** Can I start with Volume 2, please, that's
24 EXPG000004R. This is a 243-page report,
25 excluding its appendices, revised recently to

1

1 **A.** That's right.
2 **Q.** Then, secondly, Volume 2A, EXPG0000005. That's
3 a 28-page report, again excluding the
4 appendices, addressing two case studies, that of
5 Janet Skinner and Julian Wilson. Does the same
6 expert witness declaration apply to that report?
7 **A.** Yes, it does.
8 **Q.** Are the contents of that report true to the best
9 of your knowledge and belief?
10 **A.** Yes, they are.
11 **Q.** Thank you very much.
12 In terms of your background and experience,
13 has that changed in any material respect since
14 we last saw you at the beginning of October?
15 **A.** No.
16 **Q.** By way of recap, in Volumes 1 and 1A of your
17 earlier reports, and in your evidence on 5 and
18 6 October 2023, you considered, is this right,
19 the legal and policy framework for the
20 investigation and prosecution by the Post Office
21 of criminal offences and, more broadly, the
22 framework relating to the responsibilities of
23 prosecuting authorities, investigating
24 authorities, in making in particular charging
25 decisions and disclosure?

3

1 take into account a small number of additional
2 documents provided to you by the Inquiry. Are
3 the contents of that report true to the best of
4 your knowledge and belief?
5 **A.** Yes.
6 **Q.** Have you included in that report -- it needn't
7 come up now, it's appendix A2 at page 243,
8 an expert witness's declaration?
9 **A.** Yes.
10 **Q.** Does that set out your understanding of your
11 duties in writing the report and in giving
12 evidence?
13 **A.** Yes.
14 **Q.** Does it set out whether you have any conflict of
15 interest of any kind?
16 **A.** Yes.
17 **Q.** Does it set out your understanding of your
18 instructions?
19 **A.** Yes.
20 **Q.** Does it set out whether the matters about which
21 you've expressed opinions are within your field
22 of expertise?
23 **A.** Yes.
24 **Q.** That report, I think, addresses 20 case studies;
25 is that right?

2

1 **A.** Yes.
2 **Q.** The task you've undertaken for us now, leading
3 to your Volumes 2 and 2A reports, concerns the
4 extent to which, is this right, the legal and
5 policy framework that you previously described
6 was or was not complied with in the cases of the
7 22 case studies that we're looking at?
8 **A.** Yes, in so far as that was possible to identify
9 that from the material that I had.
10 **Q.** I'm going to come on in a moment to the
11 limitations of the material that you have been
12 provided with. Is this right, that, in terms of
13 a sort menu of issues, you focused on, firstly,
14 investigations. Was that principally on the
15 duties of an Investigator to pursue reasonable
16 lines of inquiry?
17 **A.** Yes.
18 **Q.** Secondly, in relation to the Horizon system
19 specifically, the application of that duty where
20 a suspect either does not assert a problem with
21 Horizon, either in their interview, in a defence
22 statement or otherwise, and in those cases where
23 a suspect does indicate an issue or a question
24 over the integrity of Horizon data?
25 **A.** Yes.

4

1 Q. Secondly, did you look at prosecutions and was
2 that split into charging decisions --
3 A. Yes.
4 Q. -- and, in particular, the test that
5 a prosecutor seemingly applied when making
6 a charging decision?
7 A. Yes.
8 Q. The evidence that the prosecutor seemingly
9 considered when making such a charging decision?
10 A. Yes.
11 Q. The extent to which such charging decisions
12 appeared to be thorough and diligent agent --
13 A. Yes.
14 Q. -- or conscientious.
15 Then lastly, the approach taken to charging
16 theft and false accounting, in particular as
17 alternatives?
18 A. Yes.
19 Q. Did you look at, under the heading of
20 prosecution, issues concerning the commencement
21 of proceedings?
22 A. Yes, although in terms of summonses and what lay
23 behind the summons, I don't think I saw anything
24 that helped me on that topic.
25 Q. No, that material was particularly lacking --

5

1 A. Yes.
2 Q. Did you look, lastly, at the reliance by the
3 Post Office on expert evidence?
4 A. Yes.
5 Q. You tell us in paragraph 6 of your report, in
6 terms of the material available, that it varied
7 considerably as between cases; is that right?
8 A. Yes.
9 Q. In some cases, it was extensive; is that right?
10 A. Yes.
11 Q. In others, the material was very sparse
12 indeed --
13 A. Very much so.
14 Q. -- with no material relating to some of the
15 topics that I've just described?
16 A. That's right.
17 Q. Where that is the case I think you tell us so in
18 your expert reports?
19 A. Yes, I hope so.
20 Q. I think you've been provided with a document
21 entitled "Gareth Jenkins Chronology", prepared
22 by the solicitors acting on behalf of the Post
23 Office?
24 A. Yes.
25 Q. You have been instructed, is this right, that

7

1 A. Yes.
2 Q. -- how proceedings were commenced and what
3 material was lodged with the Magistrates
4 Court --
5 A. Absolutely.
6 Q. -- in order to commence process.
7 A. Yes.
8 Q. Did you look at the approach taken to
9 disclosure --
10 A. Yes.
11 Q. -- and, in particular, whether there was
12 an identified Disclosure Officer and whether
13 that was also the Investigating Officer?
14 A. Yes.
15 Q. The extent to which prosecutors reviewed the
16 disclosure given, whether in the unused schedule
17 of material or otherwise?
18 A. Well, the extent to which I could see that they
19 had reviewed it.
20 Q. And the extent of any duties of cross-disclosure
21 between prosecutions?
22 A. Yes.
23 Q. Did you look at, lastly, prosecutorial practice
24 and, in particular, the practice of plea
25 bargaining?

6

1 the "Gareth Jenkins Chronology" is not being
2 treated by the Inquiry as evidence --
3 A. That's right.
4 Q. -- or as a source of evidence, and you have not
5 done so either; is that right?
6 A. I took notes where it referred to
7 a communication to the existence of that
8 communication, particularly if I hadn't seen it
9 before. In the wealth of material that I've
10 received in the last week, I have now seen a lot
11 of the communications that were referred to but
12 that was the extent to which I took note of that
13 document.
14 Q. Thank you. In particular, in your report, you
15 were careful to state, is this right, when the
16 underlying material should be consulted --
17 A. Yes.
18 Q. -- in order to see whether what is suggested in
19 the chronology is accurate or inaccurate?
20 A. Yes, and I did not proceed on the basis that it
21 was a complete record of all communication or
22 assume anything of that sort.
23 Q. Thank you very much. Are you able to confirm,
24 in terms of your methodology and approach, that
25 you've not been asked to look at either the

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1 witness statements or the oral evidence of any
2 of the witnesses who have given evidence in
3 Phase 4 of the Inquiry?

4 **A.** No, that's right.

5 **Q.** Instead, you have been asked to, and you have
6 yourself, confined yourself to looking at the
7 documents, the contemporaneous documents with
8 which you have been provided?

9 **A.** Yes.

10 **Q.** Is it right that the majority of those documents
11 relate to the investigations and prosecutions of
12 each of the case studies, ie they're
13 contemporaneous to the events to which they
14 relate?

15 **A.** Yes.

16 **Q.** You say in paragraph 32 of your report that in
17 considering the actions and decisions of Post
18 Office Investigators and Post Office lawyers,
19 the question that you have asked yourself is
20 whether the actions and decisions were
21 reasonably open to the decision maker on the
22 material then available?

23 **A.** Yes.

24 **Q.** Is that right?

25 **A.** Absolutely.

9

1 refer to records of calls to call centres that
2 had been made by the postmaster in question.
3 That material, which had not been sought at the
4 time of the investigation, so far as I could see
5 from the contemporaneous documentation, but the
6 fact that at the Second Sight stage they were
7 able to look at it showed that it existed and,
8 again, therefore, it existed at the time that it
9 was not sought during the investigation.

10 **Q.** So it's subsequent materials that reflect back
11 to either the existence of documents or a state
12 of affairs, contemporaneous to the matters that
13 you're looking at?

14 **A.** Yes, and I should add, in relation to the Court
15 of Appeal, I have taken account of the
16 assessment of the Court of Appeal of their view
17 of what should or should not have been disclosed
18 because it seemed to me that they're a fairly
19 safe body to take into account in that, given
20 that they are the Court of Appeal.

21 But I have, nevertheless, come to my own
22 assessment of what I consider the
23 contemporaneous documentation shows was or was
24 not done and what should or should not have been
25 done but it's a comfort to know that they and

11

1 **Q.** On occasions in your report you refer to
2 documents arising subsequently to those events,
3 either to the investigation or indeed after
4 conviction, for example accounts given by people
5 to the Second Sight investigation --

6 **A.** Yes.

7 **Q.** -- or in civil proceedings or what the Court of
8 Appeal Criminal Division said in the *Hamilton*
9 appeals?

10 **A.** Yes.

11 **Q.** Do you consider that in referring to such
12 material, Second Sight, civil proceedings and,
13 for example, concessions made by the Post Office
14 in the *Hamilton* appeals, you are at risk of
15 judging matters with hindsight?

16 **A.** No. To take an example, where, in the Court of
17 Appeal, the Post Office conceded that they had
18 not obtained ARQ data in a particular case,
19 I took that as a basis to conclude that they had
20 not sought the ARQ data in that case. That was
21 something that, therefore, they had not done at
22 the time and I took it as evidence of what had
23 or had not been done at the time.

24 In the same way, in the Second Sight
25 reviews, in some cases they were able there to

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1 I are of the same view.

2 **Q.** At various points in your report you recognise
3 that your ability properly to assess what
4 happened at the time is limited by the fact that
5 there are only limited papers available to you?

6 **A.** Yes.

7 **Q.** Do you consider that care should be taken in
8 relation to your conclusions in general terms,
9 in that they may be based on incomplete
10 information or incorrect assumptions?

11 **A.** They may, particularly in the older of the
12 cases, be based on incomplete material. I've
13 made that clear in those cases. My conclusions,
14 certainly by the time one reaches the end of my
15 report, are based on a consideration of the
16 cases across the piece and, clearly, there is
17 the possibility that, in the cases where there
18 isn't the material, for example, on disclosure,
19 that that was a completely different disclosure
20 position than in the ones where I have seen the
21 material in relation to disclosure.

22 But it was all of the same kind, in the
23 cases where I saw it, and it didn't seem to me
24 unreasonable to draw conclusions based on what
25 I had seen on that basis.

12

1 **Q.** Thank you. In reaching your conclusions, did
2 you measure the conduct of the Post Office
3 Investigators and the Post Office lawyers
4 against the standards that you would have
5 generally expected to exist at the time in
6 practice or against what the law required under
7 codes, rules and guidance?

8 **A.** Certainly under the latter but because, as we
9 examined when last I was here, those codes and
10 rules had been accepted by the Post Office at
11 the time to apply to them and their
12 investigations and their charging decisions and
13 so on. But, clearly, having been in practice
14 myself through that period, I have an awareness
15 of how such cases were dealt with by, in
16 particular, the police and the CPS, and so that
17 will have also informed by view.

18 But I tried, insofar as I could, to judge
19 what was done by reference to what the law
20 required and what the codes under the law
21 required.

22 **Q.** Is that on the basis that it's not unreasonable
23 to expect a prosecutor to comply with the law?

24 **A.** Absolutely.

25 **Q.** In terms of the approach that I'm going to take,

13

1 for it to come up on the screen. Page 218.

2 If we can start at paragraph 620, please.

3 You say in the second line:

4 "At this stage, I seek to draw the strands
5 together of that analysis [ie the analysis of
6 the then 20 case studies] by topic. I should
7 emphasise, however, that these broader
8 conclusions are to be properly understood by
9 reference to the case-by-case analysis I have
10 set out above. Each case is individual, in that
11 each involved an individual who gave an account
12 to address an audit shortfall, and whose case
13 was then investigated and reviewed for
14 prosecution at different times by different
15 investigators and lawyers and by reference to
16 different evidence."

17 Then you say this:

18 "That said, a number of themes emerge clear
19 and strong across the 20 cases. Indeed, in
20 a number of respects it is unsettling how the
21 same issues were arising in the latter cases,
22 such as Sefton and Nield and Ishaq in 2012, as
23 have raised their heads in early cases, such as
24 Brennan and Yates in 2003."

25 You use the word "unsettling" there. What

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1 I'm going to start at the end, as it were, ie by
2 examining the issues, topic by topic, one after
3 the other, rather than case study by case study,
4 and then drawing conclusions from that
5 examination of the case studies?

6 **A.** Yes.

7 **Q.** So I'm going to ask you to express your overall
8 conclusions in relation to each topic, explore
9 the reasons for those conclusions, and then
10 involve you in some illustrative dipping into
11 the materials to see whether we can exemplify
12 some of the points that you make by reference to
13 the contemporaneous materials?

14 **A.** Yes.

15 **Q.** That will take all of today and some of
16 tomorrow. Then tomorrow, or what time is left
17 of tomorrow, I am going to take you through so
18 many of the case studies, the 22 case studies,
19 time will allow; do you understand?

20 **A.** Yes.

21 **Q.** Thank you. Can we start, please, at page 218 of
22 your report, please --

23 **A.** Yes.

24 **Q.** -- if that can be displayed. This the Volume 2
25 report, EXPG000004R. If we just wait a moment

14

1 was the nature and extent of your concern?

2 **A.** Clearly the rules that the law had developed
3 between 2003 and 2012, the Post Office's own
4 policies had developed with that, so that, for
5 example, they acknowledged the Code for Crown
6 Prosecutors as the basis for their charging
7 decisions, they had, albeit belatedly,
8 identified the requirement to pursue all
9 reasonable lines of inquiry under the CPIA Code,
10 and those changes had not resulted in changes in
11 relation to the approach. Charging decisions
12 were still made in a way that had great concern
13 about, and the pursuit of reasonable lines of
14 inquiry continued to evade those inquiries in
15 2012, as it had in 2003.

16 Perhaps the other area of concern was that
17 it became clear to me, just on what I had read,
18 that issues with Horizon and concerns about
19 various aspects of its operation were developing
20 over that period of time, and one might have
21 expected a more obvious change in the approach
22 of the Post Office to those issues over that
23 period of time, rather than continuing to
24 approach them, in many respects, in the same
25 ways 10 years on from the earlier cases that

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1 I looked at.

2 **Q.** Thank you. Can we start, then, with the topic
3 of investigation -- I'm not going to take them
4 in precisely the same order as you have, I have
5 rejigged them slightly but, in fact, we do start
6 with investigation -- and look at paragraph 621,
7 if we just scroll down, please.

8 Is a summary of what you found in relation
9 to investigation the following: firstly, you
10 found no document which identified which
11 personnel were undertaking the role of
12 Investigator and which personnel were
13 undertaking the role of Disclosure Officer?

14 **A.** No, and, as I say in the report, that may on one
15 level have just been a recording problem that
16 one had to try and work out who was carrying out
17 these vital roles under the CPIA, rather than
18 finding anywhere where it said so. But the
19 concern I had that flowed on from that was,
20 where it wasn't identified, it was more
21 difficult to know what they appreciated as to
22 their role and who was supervising them in doing
23 it.

24 **Q.** That's the second issue. You say that the roles
25 played were not in accordance with the division

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1 both Investigator and Disclosure Officer, and
2 the Post Office position, which recognised that
3 they normally would be the same?

4 **A.** Yes.

5 **Q.** That was in their policy documents?

6 **A.** Yes.

7 **Q.** You said you recognise that that will often be
8 the case in smaller scale investigations by the
9 police and others, ie that they would, in fact,
10 as a matter of practice, be the same person?

11 **A.** Yes.

12 **Q.** But you so:

13 "My concern ... was that a check and balance
14 in the system, with 2 different viewpoints on
15 investigative and disclosure steps, was
16 routinely not being incorporated into Post
17 Office cases. That has been borne out by the
18 materials [that you have now seen]."

19 What checks and balances do you consider
20 were missing here that might not also be missing
21 from equivalent levels of police investigations
22 at the time?

23 **A.** So, so far as the Investigation Team are
24 concerned and the Disclosure Officer's role,
25 clearly the intention, as it seems to me, of the

19

1 of responsibilities set out in the CPIA and the
2 Attorney General's Guidelines on Disclosure, in
3 that they were, I think, always undertaken by
4 the same person?

5 **A.** Yes.

6 **Q.** You say, thirdly, that it was unclear who was
7 supervising or directing the Disclosure Officer
8 and does that mean that there was no evidence
9 that you saw of such supervision or direction?

10 **A.** Yes, there was -- in many, but not all, the
11 cases there were investigation summaries or
12 investigation reports prepared by
13 an Investigator, which was addressed to Contract
14 Managers and persons of that sort. It was not
15 clear who was providing a supervision to the
16 investigation process in the case. There was no
17 material coming from them, for example, that
18 I saw giving instruction to the Investigator as
19 to reasonable lines of inquiry by way of
20 example.

21 **Q.** If we go over the page to paragraph 622, please.
22 You say that, in your first report -- it was
23 paragraph 108 -- you observe that there was
24 a distinction between the CPIA Code which
25 recognised that the same person could act as

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1 CPIA Code is that you have your Investigator and
2 your Disclosure Officer separate so that there
3 is a degree of independence to the disclosure
4 assessment from the investigative one. So that
5 the person making the decisions as to disclosure
6 is not, inevitably, the person who has had to
7 come to an assessment of whether there is --
8 whether the suspect is correctly to be charged
9 within the investigation process.

10 There was no cross-discussion between such
11 persons in these cases, because they would have
12 been talking to themselves, and so the person
13 who had interviewed the suspect, who had
14 acquired the evidence that they considered
15 necessary to prosecute the suspect, was then the
16 person who was deciding whether there was
17 material that undermined the case that they had
18 built in order to disclose it and there was no
19 one that they were talking to within the
20 investigation in relation to that.

21 I appreciate that may not happen either in
22 smaller scale cases investigated by the police
23 and prosecuted by the CPS, but what there is
24 then, in those cases, is a reviewing lawyer
25 within the CPS who has an independent oversight

20

1 of what that investigation has done and what
 2 disclosure is necessary and raises issues in
 3 relation to that. Here, of course, it was done
 4 by the same organisation, albeit the Criminal
 5 Law Division at the Post Office and my concern
 6 there was that I saw, in many of these cases,
 7 very little evidence of any such oversight by
 8 them, of identifying reasonable lines of
 9 inquiry, identifying things that needed to be
 10 disclosed, contrary to a view having been
 11 expressed by the Investigator/Disclosure
 12 Officer.

13 So there wasn't that -- more than one person
 14 looking at it, more than one organisation
 15 looking at it, which, to an extent, the CPIA
 16 Code envisaged.

17 **Q.** What do you understand the purpose or the
 18 rationale for that division of labour, division
 19 of responsibility, to be in the CPIA Code and in
 20 the AG's Guidelines on Disclosure?

21 **A.** Well, it provides a degree of scrutiny of the
 22 process. If it is just done by the
 23 Investigator, who then decides whether the
 24 material they've -- there's any material they've
 25 obtained that they think undermines the case

21

1 **Q.** -- and in the third case something that
 2 Mrs Henderson said. You say:
 3 "It is a concern if that same settled
 4 conclusion informed the disclosure process as it
 5 did the interview."

6 So you're saying, is this right, that these
 7 are real world examples of where an Investigator
 8 appears to have displayed, in the course of
 9 an interview, a settled conclusion as to the
 10 guilt of the suspect, and yet that person is
 11 then asked to review disclosure and give
 12 disclosure of documents that might undermine the
 13 prosecution case or assist that of the
 14 defendant.

15 **A.** Yes. So to take Ms Brennan as an example, the
 16 interviewing officer said to her:

17 "I think it's a question of not whether
 18 you've done it but why you've done it. I think
 19 you've done it deliberately. No one else is
 20 making mistakes like you."

21 That was the person who was also then
 22 required to consider what reasonable lines of
 23 inquiry had to be pursued that might lead away
 24 from the person he believed had done it and then
 25 to undertake the disclosure process to identify

23

1 that they have built, then there's no one to
 2 stand back and ask those very important
 3 questions.

4 There is a responsibility for the lawyer who
 5 becomes involved in the case to do that and, in
 6 some of these cases, that was done. But it just
 7 seems to me that the CPIA Code regime envisages
 8 more than two people being involved in that
 9 conversation, and certainly more than one.

10 **Q.** Thank you. If we go on to paragraph 623,
 11 please. You say -- and you give three examples
 12 here, from the cases of Lisa Brennan, David
 13 Blakey and Allison Henderson -- that:

14 "... the interviewing officer demonstrated
 15 a very clear, settled conclusion adverse to the
 16 defendant at the time of interview. In the case
 17 of Ms Brennan she was told that the officer
 18 believed she had done it, Mr Blakey was told his
 19 account was 'ridiculous' and Mrs Henderson
 20 believed that the Investigator had already drawn
 21 his own conclusions."

22 So there you're referring to, I think in the
 23 first two cases, your reading of the transcripts
 24 of interview --

25 **A.** Yes.

22

1 what undermined his conclusion that she had done
 2 it, and that, where the other checks and
 3 balances weren't there to guard against that,
 4 gave at least the risk that reasonable lines of
 5 inquiry would not be identified and/or
 6 disclosure would not be made.

7 **Q.** So that Investigator said in interview to
 8 Ms Brennan "No one is making mistakes like you",
 9 essentially?

10 **A.** Yes.

11 **Q.** That was also the person who had the
 12 responsibility then to investigate whether or
 13 not anyone was making mistakes like Lisa
 14 Brennan?

15 **A.** Yes, and, I have to say, on the material from
 16 that case that I've seen -- and it's one of the
 17 early cases and so the material is limited --
 18 there wasn't the evidence that checks had been
 19 made before that interview or after that
 20 interview, to identify whether there were other
 21 people making the same mistakes and/or whether
 22 the system was generating similar problems.

23 **Q.** Thank you. Can I turn to topic 2, please, the
 24 Post Office's investigative and prosecutorial
 25 focus.

24

1 In your Volume 1 report you said that
 2 a number of Post Office policies drew attention
 3 to financial and business related factors in
 4 making prosecutorial decisions.

5 **A.** Yes.

6 **Q.** You said that that was your reading of the
 7 documents that did not instill confidence in the
 8 independence, fairness or transparency of those
 9 decisions?

10 **A.** Yes.

11 **Q.** At various points your Volume 2 report, you
 12 refer to the approach of the Post Office
 13 seemingly being driven by a desire to protect
 14 Horizon --

15 **A.** Yes.

16 **Q.** -- that arising in particular in the context of
 17 disclosure decisions and in pleas --

18 **A.** Yes.

19 **Q.** -- consideration of pleas?

20 **A.** Yes.

21 **Q.** You tell us -- there's no need to turn it up --
 22 for example that -- this is paragraph 414 -- the
 23 prosecution of Mrs Misra had become a battle for
 24 the reputation of the Horizon system with the
 25 prosecution determined to destroy the attacks on

25

1 **Q.** -- or the reliability of the evidence on which
 2 the prosecution was founded?

3 **A.** Yes.

4 **Q.** The cross-references there are paragraphs 217,
 5 423 and 438 of your second report.

6 Did you observe a pattern or a common theme,
 7 through some or all of the case studies, of
 8 a prosecutorial or investigative approach being
 9 driven by a desire to protect the Horizon
 10 system?

11 **A.** In a number of respects, just to give examples
 12 which I suspect we'll come back to in relation
 13 to the acceptance of pleas in a number of cases,
 14 the acceptance of those pleas was explicitly
 15 made, conditional on there being no criticism of
 16 the system.

17 When in 2012, I think, a form of words was
 18 put together to address the fact that issues
 19 with Horizon had come up in a number of cases
 20 around the country, there was a significant part
 21 of that asserting that there were no problems,
 22 and there was, on the face of the disclosure, in
 23 cases, very little that did identify faults
 24 along the way, even where faults were being
 25 understood.

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1 the system?

2 **A.** Yes, and destroy was the word used, albeit after
 3 her conviction, in a memo by someone in the Post
 4 Office talking about her trial.

5 **Q.** You told us in Volume 1 of your reports that
 6 an Investigator was under a duty to pursue all
 7 reasonable lines of inquiry for the duration of
 8 the relevant period we're looking at, including
 9 those that pointed away from the suspect?

10 **A.** Yes.

11 **Q.** But that was not spelt out in any Post Office
 12 policy explicitly until 2010?

13 **A.** Yes.

14 **Q.** That would include, is this right,
 15 consideration, ie the duty would include
 16 consideration, of whether accounting shortfalls
 17 at Horizon terminals might be caused by or lie
 18 with the computer system itself?

19 **A.** Yes.

20 **Q.** In your Volume 2 report, you identified some
 21 instances where individuals in the Post Office
 22 were "rebutting" or were focused upon rebutting
 23 the defence, rather than testing the prosecution
 24 case --

25 **A.** Yes.

26

1 **Q.** Did you form a view as to whether that desire to
 2 protect the Horizon system affected the
 3 independence and fairness of the Post Office
 4 Post Office's investigations and prosecutions?

5 **A.** Well, certainly in the majority, at least, of
 6 these cases, enquiries were not made, for
 7 example, by the obtaining of ARQ data and
 8 looking at it, to identify whether there were
 9 faults in the system, and whether that was
 10 because those investigating did not appreciate
 11 that they needed to, or whether it was because
 12 they chose not to, the fact is that they didn't.

13 In relation to charging decisions and the
 14 supervision by prosecutors of the system, in the
 15 majority of these cases, although if they were
 16 applying the Code for Crown Prosecutors they
 17 were expressly advised to consider the
 18 reliability of the evidence on the basis of
 19 which they were making charging decisions, they
 20 did not raise any question about whether there
 21 was any question as to the reliability of the
 22 Horizon material, which was the basis for their
 23 prosecution decisions, and that's either because
 24 they did not consider they needed to, or they
 25 weren't aware there was any issue with it, or

28

1 they chose not to.

2 But the fact is they didn't and, where
3 issues were coming up, as they did increasingly
4 with postmasters in interview, in defence
5 statements and, thereafter, raising issues, the
6 approach was to say, "You need to tell us
7 exactly what you say happened, when it happened,
8 in relation to what transaction it happened, and
9 then we'll look at it", rather than proactively
10 identifying "This is the evidence that we are
11 relying on. We have to be satisfied that it is
12 reliable and we have to demonstrate that it's
13 reliable and that's for us to do, not for us to
14 ask you to do it for us".

15 **Q.** So if I were to summarise that, you would say
16 that you can't -- or you won't -- say what the
17 motivation was because that's probably for
18 others to judge?

19 **A.** Absolutely.

20 **Q.** Your expert evidence is limited to the fact that
21 the issues that you've identified, the steps
22 that you've mentioned, were not undertaken.
23 Would it be right that, irrespective of the
24 motivation, whether it was because of a lack of
25 understanding, a lack of interest, or something

29

1 people] we were able to destroy to the criminal
2 standard of proof ... every single suggestion
3 made by the defence."

4 I think this was the email to which you were
5 referring earlier --

6 **A.** Yes.

7 **Q.** -- the language of destruction or destroy?

8 **A.** Yes.

9 **Q.** It concludes:

10 "It is to be hoped that the case will set
11 a marker to dissuade other defendants from
12 jumping on the Horizon bashing bandwagon."

13 Did you see these kind of sentiments
14 reflected elsewhere?

15 **A.** Yes.

16 **Q.** Do they reflect, in your view, a disinclination
17 to test the reliability of the evidence on which
18 the prosecutions are founded?

19 **A.** Certainly a disinclination, on one view it
20 speaks of a complacency about the system, that
21 the system must be right and that this is the
22 desperate attempt of someone, who the computer
23 is saying has stolen our money, to identify that
24 as just a defence tactic which needs to be
25 stamped on.

31

1 more malign, what was done was not in accordance
2 with the Post Office's duties as Investigator
3 and prosecutor?

4 **A.** No, absolutely.

5 **Q.** Can I look at some of the material that after
6 goes to motivation and can we start, please, by
7 looking at -- it'll come up on the screen --
8 POL00055590. If we could look at the top half
9 of the page, please. Thank you.

10 This is, for shorthand, known as the
11 "Horizon bashing bandwagon" email, which has
12 been referred to a number of times in the
13 Inquiry, and is a document that I think you saw.

14 **A.** Yes.

15 **Q.** It's post-trial in the case of Seema Misra.

16 **A.** Yes.

17 **Q.** The title of the document is -- or the subject
18 line of the email is "Seema Misra -- Guildford
19 Crown Court -- Trial -- Attack on Horizon".

20 You'll see the contents in there and I think
21 you'll be familiar with them.

22 **A.** Yes.

23 **Q.** It refers to an unprecedented attack on the
24 Horizon system and:

25 "... through the ... work of [a number of
30

1 Or it's an appreciation that, if these lines
2 are pursued, it will generate at least the risk
3 of doubt on the part of a jury about the
4 reliability of this material, and so it's better
5 to stamp on it from the outset, rather than have
6 that risk.

7 **Q.** What about --

8 **A.** Rather than -- sorry, to identify -- because
9 we're here in 2010, and we have people who are
10 copied into this email who'd been making
11 investigative and charging decisions for quite
12 some time by then. Rather than identifying this
13 keeps coming up, this is something we need to
14 look at to be satisfied that we are prosecuting
15 on the basis of reliable evidence.

16 **Q.** What about the view that this is to be regarded
17 as the kind of email that many of us may have
18 seen in practice, a back-slapping email after
19 we've won a case?

20 **A.** I think, going back to what I was just saying,
21 to view a recurrent issue arising in cases
22 through completely separate suspects saying
23 things about the system and saying that there
24 must be something going on here, because I don't
25 understand this, through those various different

32

1 systems, to categorise that as a "Horizon
2 bashing bandwagon" is not, in my view, just
3 being pleased that you've got a good result in
4 Guildford. That's a very protective stance
5 about the source of the evidence that is being
6 used to prosecute people across the country.

7 Q. Thank you. If we can move on, please. No need
8 to turn it up, but in paragraph 567 of your
9 report, your Volume 2 report, you refer to
10 a disclosure form of words --

11 A. Yes.

12 Q. -- about Horizon issues, which was described in
13 the contemporaneous material as a story --

14 A. Yes.

15 Q. -- and which appears to have been partially
16 prepared by the Post Office's Head of Public
17 Relations and Media.

18 A. Yes.

19 Q. I wonder whether we could look at that document,
20 please. POL00058155. If we can start with
21 page 3, please. It's an email from Jarnail
22 Singh to Hugh Flemington, so lawyer to lawyer.
23 "2nd Sight review draft" is the title:
24 "After a number of meetings between Post
25 Office Management and Members of Parliament in
33

1 used up and down the country, when the system
2 has been challenged in criminal courts, it has
3 been successfully defended."

4 If we scroll up, please, we can see that the
5 lawyer, Hugh Flemington, sends the document on
6 to Susan Crichton, Alwen Lyons -- she was then
7 the Company Secretary:

8 "This is the story ... which J [I think
9 that's Jarnail] put together following our
10 meeting last week. Any comments please before
11 we release it?"

12 Then up, please. The Company Secretary
13 sends it on:

14 "Can you go to Alana [who I believe is
15 a person within the Media and Communications
16 Department] as they are the experts with this
17 request for the 'story'."

18 Alana is asked by Simon Baker:

19 "Please can you help us craft our message
20 around the Second Sight review. We need to
21 combat the assertion that the review is
22 an acknowledgement that there is a problem with
23 Horizon.

24 "Jarnail has drafted some words below. Do
25 they strike the right tone?"
35

1 relation to the court cases, it was agreed that
2 the Post Office would undertake a review of the
3 cases which had been raised by the Member's
4 constituents.

5 "In order to provide assurance to the
6 interested parties, Post Office Management
7 proposed the use of independent auditors, 2nd
8 Sight. The review to be undertaken will be
9 specifically restricted to the cases raised by
10 the MPs as well as reviewing the accounting
11 procedures, processes and reconciliations
12 undertaken in relation to the cases in question.
13 Before formal instructions are given to the
14 independent auditors, agreements will be sought
15 from all interested parties, namely the MPs and
16 Justice for Subpostmasters. The subpostmasters
17 have requested a forensic accountant of their
18 choice to be appointed to oversee the cases
19 being reviewed by 2nd Sight.

20 "All the above is accepted based on the
21 terms of the review being carried out, but it
22 must be stressed that this is not
23 an acknowledgement by Post Office Limited that
24 there is an issue with Horizon. The Horizon
25 system is working properly, robust and is being
34

1 Then further up, please. Then further up.
2 We can see Mr Kelleher's reply, if we go further
3 up, back to Simon Baker:

4 "As this message will most probably find its
5 way into the media, we do need to get the
6 message across from the start that we continue
7 to have full confidence in the robustness of the
8 Horizon system and then reinforce it so
9 I suggest the following tweaking to the proposed
10 wording from Jarnail ..."

11 We can see, then, that there are three
12 paragraphs, two on that page -- I'm not going to
13 do a track changes comparison. The last one is
14 a significant amendment:

15 "All the above is accepted based on the
16 terms of the review being carried out, but this
17 is in no way an acknowledgement by the Post
18 Office that there is an issue with the Horizon.
19 Over the past ten years, many millions of branch
20 reconciliations have been carried out with
21 trains and balances accurately recorded by more
22 than 25,000 different subpostmasters and the
23 Horizon system continues to work properly in
24 post offices across the length and breadth of
25 the UK. When the system has been challenged in
36

1 the criminal courts, it has been successfully
2 defended."

3 Then scroll up, please. Mr Baker says:
4 "That works. Thanks."

5 Then it's passed back down to the lawyers:
6 "You have seen the final draft of 'Our
7 story'. Can this now be relieved to our agents
8 and counsel for consistent approach and
9 submissions when there is challenges to the
10 Horizon."

11 I think we can understand the sense of what
12 Mr Jarnail Singh is referring to there.

13 **A.** Yes.

14 **Q.** So did you understand this to be a story that
15 was to be reflected in the approach taken by
16 lawyers, including when submissions are made
17 about challenges to Horizon.

18 **A.** Yes.

19 **Q.** Did you understand that this was to be reflected
20 in evidence in any way?

21 **A.** I certainly understood it was to be reflected in
22 disclosure or response to disclosure. This
23 email I saw, in the context of the case of
24 Ms Sefton and Ms Nield, and it's not altogether
25 clear if and if so when it reached them but,

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1 of material I'd seen from 2010, in the context
2 of the case of Ms Misra, there was material
3 that, from a disclosure point of view, did raise
4 issues about the reliability of Horizon, at
5 least potentially, and this document would not
6 have told you any of that --

7 **Q.** Thank you.

8 **A.** -- quite the opposite.

9 **Q.** Can I show you a document that you may not have
10 seen before. It's something that I snuck in
11 over the weekend and so, if you need time to
12 think about it, then do say so. POL00120723.
13 You'll see this is a letter dated 19 February
14 2013, in relation to the *Post Office v Kim*
15 *Wylie*. That's not one of the cases you have
16 been asked to look at.

17 **A.** No.

18 **Q.** You'll see that it's from Cartwright King to
19 McKeag & Co Solicitors, who were the defence
20 solicitors for Kim Wylie. If we scroll down,
21 please, it's a reply to a letter. I can say
22 that that letter enclosed some expert evidence,
23 some defendant expert evidence. Cartwright King
24 say:

25 "Thank you for your letter dated 14 February

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1 certainly, it was a topic of requests from them
2 for disclosure, that it was in that context that
3 this seems to arise in that case. So I took it,
4 at the very least as being a statement that was
5 going to be provided as disclosure where issues
6 about Horizon arose.

7 So, as it said there, "released to our
8 agents and counsel", that's the people who are
9 doing the prosecuting for them, so that this
10 would be what they would be saying, what they
11 would be disclosing, what they would be
12 submitting when a defendant sought to raise any
13 issues with the operation of Horizon.

14 **Q.** What concern did you have, if any, over this?

15 **A.** Well, it was a press release, rather than
16 a disclosure note. It didn't particularise what
17 issues had arisen in earlier cases, how often
18 they had arisen, in what circumstances they had
19 arisen, over what time period they had arisen,
20 what people were saying in those other cases had
21 happened, what expert evidence had been obtained
22 on either side in relation to them. It
23 certainly does not address whether any actual
24 bugs or problems or flaws had been identified,
25 and this is 2012, and so certainly, on the basis

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1 2013. Please find enclosed a notice of
2 Additional Evidence ..."

3 Amongst those is a statement from Stephen
4 Bradshaw -- and I think you know him to be one
5 of the Post Office Investigators --

6 **A.** Yes.

7 **Q.** -- dated 20 November. Then paragraph 2 we can
8 skip over. Then paragraph 3, Cartwright King
9 say:

10 "The Crown's position on the integrity of
11 the Horizon system is set out in Steve's
12 Bradshaw's statement dated 20 November 2012",
13 ie it's set out in the witness statement that
14 we're serving on a you as an NAE, a notice of
15 additional evidence.

16 Can we look, please, at that witness
17 statement that was attached to this letter.
18 It's page 5.

19 Thank you. We can see Mr Bradshaw's witness
20 statement of 20 November 2012. So that's the
21 NAE that's being served and, if you just read it
22 to yourself, and see whether it starts to become
23 familiar to you.

24 **A.** Yes, it does.

25 **Q.** If we scroll down. Then, over the page, please.

40

1 I think you'll recognise that --

2 **A.** Yes.

3 **Q.** -- as the text of the email --

4 **A.** Yes.

5 **Q.** -- drafted by the Head of Public Relations and

6 Media of the Post Office, and it's now become

7 a witness statement.

8 **A.** Yes.

9 **Q.** If I was to tell you that Mr Kelleher, the Head

10 of Public Relations and Media, had not only been

11 cut and pasted into this witness statement but

12 had been cut and pasted into other witness

13 statements, what would your view be?

14 **A.** Given the timing of this, it's profoundly

15 disturbing that both as evidence in cases, which

16 is advanced to be true to the best of the

17 author's belief, and as the extent of disclosure

18 in 2012 in these cases --

19 **Q.** This is February 2013 --

20 **A.** -- yes --

21 **Q.** -- it's being served, yes?

22 **A.** -- that that is it. That is all that

23 a defendant would be informed as to that which

24 was capable of undermining the prosecution case

25 or assisting them in relation to the operation

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1 experienced in their use of Horizon, it doesn't

2 really reflect, I'd have thought, his own

3 experience, let alone that of the Post Office

4 that he was working for.

5 **Q.** Thank you. That can come down.

6 You tell us in your Volume 2 report -- the

7 cross-references are paragraphs 278 and 458, and

8 paragraphs 34, 35 and 76 of your Volume 2A

9 report -- about focus or seeming focus on the

10 recovery of money by the Post Office.

11 **A.** Yes.

12 **Q.** Did you form a view on whether a focus on the

13 recovery of money was an example of the Post

14 Office acting in a manner that was consistent or

15 inconsistent with its duties as a prosecutor?

16 **A.** As a starting point, clearly where the evidence

17 demonstrated that someone had taken their money,

18 and had been convicted of theft on that basis,

19 then for them to seek to recover that money was

20 entirely consistent with the normal operation of

21 the system. That's what the confiscation

22 process is usually used for. And, equally,

23 voluntary repayments of monies that have been

24 taken and/or have been lost as a result of the

25 action of a defendant, will be a factor that

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1 of Horizon, that was an assertion from,

2 effectively, a press release that the system

3 works well, and that where others have tried to

4 challenge it, they have failed.

5 That last bit, sadly, is true, on the basis

6 of the cases that I've seen but the fact remains

7 that this is not a proper approach to the

8 disclosure on these topics. It's certainly not

9 a proper approach as to the extent of disclosure

10 on these topics and it's a rather disquieting

11 approach to the use of a witness statement.

12 **Q.** Why is it a rather surprising approach to the

13 use of a witness statement?

14 **A.** Well, it's -- clearly, witness statements can be

15 drafted not just by the person who signs them

16 and I'm aware of that. But to sign up to this,

17 unless you really did think this was all that

18 one could say on the topic of the operation of

19 Horizon, it is disquieting, and someone, such as

20 Mr Bradshaw, whose name comes up in a number of

21 the cases I've seen, over a period of time that

22 I'd seen, for him to be signing up to that,

23 knowing that this is -- what issues had come up

24 in cases, what had been said by these completely

25 independent people about what they had

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1 will be taken into account in deciding whether

2 you're going to prosecute them and also in

3 assessing the appropriate level of their

4 sentence for the court to assess that at the end

5 of the process.

6 But here, in a number of cases, pleas were

7 being taken to false accounting, the basis that

8 was advanced from interview on, usually, by the

9 suspect, was that they hadn't taken the money,

10 they didn't know where the money had gone. They

11 couldn't explain why the computer was saying the

12 money had gone but, for various reasons, they

13 had chosen or felt compelled to adjust the

14 records to effectively stave off the day when

15 the accounting errors were held against them by

16 their contracts at the end of the day.

17 And so there was an acceptance of a plea

18 that did not involve financial loss that was

19 caused by the suspect, and yet the suspect was

20 pursued for that financial loss, both on

21 occasions by it being made a condition of the

22 acceptance of their plea, and also through the

23 use of confiscation as a means to get the money

24 back from them.

25 **Q.** Did you form a view as to whether it was a form

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1 of abuse of process to seek confiscation in
2 circumstances where the Post Office could not
3 prove that the money was stolen by the accused
4 and a plea to false accounting had therefore
5 been taken?

6 **A.** Well, on the one hand, I'm conscious that, at
7 least in one of these cases, an argument was put
8 forwarded on behalf of the defendant that it was
9 an abuse of process to and that argument was not
10 successful.

11 **Q.** Yes.

12 **A.** But, equally, I am aware that the Court of
13 Appeal expressed, at the very least, concerns
14 about the tying of the recovery of funds from
15 someone who had pleaded to false accounting
16 rather than theft, that that was a concern that
17 they had in those cases as to whether that was
18 appropriate.

19 I share that concern. It's perhaps a use of
20 the levers of the prosecution process to obtain
21 repayment of the money, where, otherwise,
22 insofar as I understand the contract position --
23 as we touched on last time, I don't understand
24 that very much -- that, rather than using civil
25 recovery under the contract, they were using the

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1 consider that the Post Office complied with its
2 Police and Criminal Evidence Act and the Codes',
3 issued thereunder, obligations in relation to
4 ensuring that the interviewee knew their rights
5 and were given a proper opportunity to be
6 represented if they wanted to?

7 **A.** Yes. My only hesitation on that was one case,
8 and I'm afraid off the top of my head I can't
9 remember, which was, where --

10 **Q.** Was it Thomas?

11 **A.** -- yes -- where Mr Thomas asked to have
12 a particular solicitor and the decision was
13 taken not to wait for the solicitor and they
14 therefore arrested him or got the police to
15 arrest him so that they could carry on with the
16 interview, but with -- but I think, in his case,
17 ultimately he did have his solicitor by the time
18 he was interviewed. So with that one wrinkle,
19 yes, they complied with their PACE obligations.

20 **Q.** In paragraph 623 of your report, which is on
21 page 219, we looked at it earlier, you note,
22 I think critically, the comments and expressions
23 of disbelief by some Investigators in the course
24 of the interviews. In your experience as
25 a prosecutor, looking regularly at interviews in

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1 criminal process and the levers of the criminal
2 process, such as confiscation, such as it being
3 a condition of the acceptance of a plea to get
4 the money back, when they hadn't actually proved
5 that the money had gone in the first place.

6 **MR BEER:** Thank you very much.

7 Sir, given the time we started this morning,
8 I propose to take the morning break now until
9 12.00 and then sit from 12.00 until 1.00.

10 **SIR WYN WILLIAMS:** Yes, that's fine Mr Beer.

11 **MR BEER:** Thank you very much, sir.

12 **SIR WYN WILLIAMS:** 12.00.

13 (11.45 am)

(A short break)

14 (12.00 pm)

15 **MR BEER:** Good afternoon, sir. Can you continue to
16 see and hear us?

17 **SIR WYN WILLIAMS:** Yes, thank you, yes.

18 **MR BEER:** Thank you.

19 Mr Atkinson, can we move on. We've looked
20 at topic 1, investigation. Topic 2, the
21 investigative and prosecutorial focus.

22 Can we turn to topic 3, which is interviews.

23 **A.** Yes.

24 **Q.** From the case studies that you reviewed, do you

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1 the period 2000 to 2012, would you agree that
2 such comments and expressions of disbelief, even
3 if inappropriate, would nonetheless often be
4 seen from police officers or HMRC officers in
5 interview?

6 **A.** I can certainly think of occasions when I've
7 seen them. I wouldn't say it was a routine
8 thing. I can think of cases where such
9 expressions have resulted in applications to
10 exclude the interview in those cases. And the
11 point I was seeking to make here was not
12 a quality check on the quality of interviewing
13 questioning; it was more that this was the
14 person who was making the investigative and
15 disclosure decisions in the case, who was saying
16 this, and that was why I thought it worth
17 identifying.

18 **Q.** Thank you. The Inquiry has heard that
19 pre-interview disclosure was given to
20 an interviewee's legal representative, prior to
21 the interview but that, if the interviewee was
22 not legally represented, then they wouldn't be
23 provided with pre-interview disclosure. Was
24 that in accordance or not in accordance with
25 practice as you understood it?

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1 A. Home Office guidance, which I was given a copy
 2 of, amongst many other things last week, did
 3 quote from a police approach, which was to that
 4 end: that the -- when not represented, documents
 5 wouldn't be handed over to a suspect, albeit
 6 that the same guidance made clear that the
 7 suspect should nevertheless be put in a position
 8 to understand why they were being interviewed,
 9 what they were being interviewed about. So,
 10 even if they didn't get physical documents in
 11 the way that a solicitor would, they did get
 12 an understanding of what was going on.

13 Q. I think the guidance that you're mentioning --
 14 there's no need for us to turn it up -- is Home
 15 Office guidance --

16 A. Yes.

17 Q. -- dated 31 August 2023 --

18 A. Yes.

19 Q. -- ie from this year --

20 A. Yes.

21 Q. -- quoting from a national police document --

22 A. Yes.

23 Q. -- that tends to suggest that the purpose of the
 24 provision of pre-interview disclosure is to
 25 allow the legal representative to understand the

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1 would quote the key parts in full.

2 Q. Is it right that, as part of disclosure in
 3 a police and CPS case, what ought to be given is
 4 an interview transcript, if one is available,
 5 and the tape recording or digital recording of
 6 the interview --

7 A. Yes.

8 Q. -- if available?

9 A. Yes.

10 Q. The defence would, therefore, have the
 11 opportunity to check the accuracy of the
 12 transcript of interview?

13 A. Yes.

14 Q. Is it right that one of the standard forms of
 15 directions that courts would issue in
 16 a contested case would be for the parties to
 17 agree interview edits in advance of trial?

18 A. Yes, and certainly there was a stage at which
 19 the form that was completed at the first
 20 substantive hearing in the Crown Court of the
 21 case -- and its acronym changed over time -- but
 22 at that hearing, one of the questions on the
 23 form was whether the tapes had been provided to
 24 the defence, and then a follow-on question as to
 25 the agreeing of an accurate transcript between

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1 nature of the case --

2 A. Yes.

3 Q. -- and provide appropriate advice to the
 4 suspect, in particular on whether to answer
 5 questions or not?

6 A. Yes, and certainly, within my experience well
 7 before 2023, I'm aware that, where a suspect was
 8 unrepresented, they were not given copies of
 9 documentation, albeit that they were then asked
 10 about that documentation during interview, and
 11 that would accord with the approach in the Home
 12 Office document.

13 Q. Thank you. Was it your experience in police and
 14 CPS cases that, following an interview conducted
 15 under PACE, following a charging decision, it
 16 would be normal for a full transcript to be
 17 prepared of the interview, so that a CPS lawyer
 18 could review it?

19 A. Certainly at the very least, the reviewing
 20 lawyer would have more than a paragraph's worth
 21 of summary of an interview before making
 22 a charging decision. I certainly can think of
 23 cases, particularly the smaller end of cases,
 24 where the document that you would have would be
 25 more of a summary than a full transcript but it

50

1 the parties.

2 Q. That process would include checking whether the
 3 transcript is accurate versus the tape --

4 A. Yes.

5 Q. -- agreeing if possible any summaries of parts
 6 of the interview --

7 A. Yes.

8 Q. -- and excluding any material that it was agreed
 9 to be inadmissible or identifying if there was
 10 a dispute over the admissibility of dispute
 11 material?

12 A. Yes.

13 Q. Would there then be an attempt to agree between
 14 counsel the edits?

15 A. Yes.

16 Q. Was that, so far as you can see, an approach
 17 that was adopted in the Post Office
 18 prosecutions?

19 A. I can't, off the top of my head, think of
 20 an example of seeing discussion in the
 21 paperwork, which is all I can go on, about that,
 22 one way or the other.

23 Q. In the case of Mr Brennan -- I'm not going to
 24 ask for these to be turned up -- but there are
 25 two versions available to us of the ROTI, the

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1 Record of Taped Interview.
 2 **A.** Yes.
 3 **Q.** The first, POL00047322, contains the expressions
 4 of incredulity that you mentioned. The second,
 5 POL00047320, has them excised, and the metadata
 6 from that second version appears to suggest that
 7 it was created shortly before trial?
 8 Would you expect that sort of comment from
 9 an interviewing officer to be excised at before
 10 interview at the request of the defence?
 11 **A.** At the request of the defence, yes.
 12 **Q.** But do I understand that the point you were
 13 making in paragraph 623 to have a different
 14 object or different target?
 15 **A.** Yes.
 16 **Q.** It wasn't about the editing of interviews?
 17 **A.** No.
 18 **Q.** It was about the identity of the investigating
 19 and then Disclosure Officer?
 20 **A.** It was to the mindset of the investigating and
 21 Disclosure Officer, particularly the Disclosure
 22 Officer.
 23 **Q.** Thank you. Can we move on to topic 4, please,
 24 which is a substantial topic: charging
 25 decisions. If we can split this up, please, and

1 actually looked at.
 2 **Q.** And what reasoning was included in that decision
 3 maker's record --
 4 **A.** Yes.
 5 **Q.** -- of decision making?
 6 **A.** Yes. If any, yes.
 7 **Q.** Over the page to paragraph 633. You say:
 8 "The advices relating to charge that I have
 9 seen produced in the main by lawyers working for
 10 the Post Office Criminal Law Division do give
 11 rise to real concerns."
 12 So I think the closest you came to
 13 a reasoning for charge, even if it was not the
 14 decision to charge -- and I'm using "charge" as
 15 a shorthand for initiating process by summons --
 16 **A.** Yes.
 17 **Q.** -- were these advices from Criminal Law Team
 18 members?
 19 **A.** Yes.
 20 **Q.** You say they gave rise to real concerns. Can
 21 you explain why these advices gave rise to real
 22 concerns, please?
 23 **A.** They were always very short, and brevity is
 24 a fine quality but not where it means you cannot
 25 actually discern from the charging advice what

1 start with some general points about charging
 2 decisions. I'm at page 223 of your report.
 3 **A.** Yes, thank you.
 4 **Q.** Paragraph 632. I think it's right that, in
 5 relation to charging decisions, you struggled to
 6 identify who had taken the final decision in any
 7 case to charge a suspect with a criminal offence
 8 or offences?
 9 **A.** Yeah, and this follows on from the concern
 10 I expressed when last I was here that there were
 11 a number of documents, policy documents from the
 12 Post Office that at least suggested that
 13 business managers or, indeed, I think in
 14 a couple of cases, HR personnel, would be making
 15 decisions in relation to prosecution. So I was
 16 very keen to see evidence of who actually made
 17 the decision and who they were and what their
 18 position was. I didn't see anything like that.
 19 I saw advices from lawyers, internal advices in
 20 the first instance, but it was not clear who
 21 acted on those advices.
 22 **Q.** So that's an identity of decision maker issue?
 23 **A.** Yes, and whether the person who was making the
 24 decision was applying the Code for Crown
 25 Prosecutors, for example, what factors they

1 the basis for the conclusion reached in that
 2 advice is, what test has been applied, what
 3 factors have been taken into account, what
 4 evidence it is -- has been identified as
 5 underlying the conclusion.
 6 In the main, the documents set out the
 7 conclusion and that was it. So they didn't show
 8 their workings in any way and where,
 9 particularly, decisions were being made to
 10 charge an offence of theft where, on what I had
 11 seen, it was far from clear what basis there was
 12 for reaching a conclusion that there was
 13 a realistic prospect of a conviction for theft,
 14 the lack of any such analysis was troubling.
 15 **Q.** You mentioned in paragraph 633, as well, that
 16 they took as read the evidential position set
 17 out in the Investigator's summary.
 18 **A.** That was my assumption, on the basis that there
 19 was nothing else and that it was -- the advice
 20 was usually addressed to the person who'd
 21 written the summary and so an Investigator had
 22 put together their assessment of the evidence,
 23 had sent it, as far as I could see, to a lawyer
 24 in the Criminal Law Division and the Criminal
 25 Law Division lawyer had sent it back with the

1 conclusion as to whether they considered there
 2 was a realistic prospect of a conviction,
 3 without anything else. There was no suggestion
 4 in any of these that they had seen anything
 5 else, before making their -- giving their
 6 advice.

7 **Q.** Just concentrating on the question of what
 8 information was included in that charging
 9 advice, rather than the merits of the decision
 10 reached, based on your knowledge of the Crown
 11 Prosecution Service and bringing into account
 12 the fact that I think your practice, even in
 13 2000 to 2012, might have been concentrating on
 14 cases of significance or unusual complexity. If
 15 you were to review a sample of CPS charging
 16 decisions made by CPS lawyers in that period, in
 17 the ordinary run of criminal cases of
 18 an equivalent seriousness to these, do you think
 19 you would find, on the file, an advice which set
 20 out or which explained how the evidence met the
 21 Code evidential test?

22 **A.** Clearly, they -- those that I saw varied in the
 23 degree of analysis but, even in the period 2000
 24 to 2013, I saw charging decisions across a whole
 25 range of offences and there was a real adherence

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1 **A.** I don't think I am at all. I think,
 2 particularly once the Post Office had expressly
 3 said that it was going to apply the Code for
 4 Crown Prosecutors, that then I don't think it's
 5 unreasonable to expect to see an analysis by
 6 reference to that test. Long or short, but
 7 an analysis, and where you are making a decision
 8 about particular offences that involve
 9 particular elements that are the elements that
 10 you'll need to consider. So for example, in
 11 relation to the offences we are generally
 12 concerned with in these cases, a question of
 13 dishonesty, there ought, in my view, to be at
 14 least a reference to the fact that you need to
 15 prove it, and perhaps the evidence that you rely
 16 on to do so.

17 **Q.** You wouldn't say that's not asking too much?
 18 **A.** No.

19 **Q.** What about in a theft case, identifying that
 20 you've got to prove an appropriation and asking
 21 oneself the question: how do we prove
 22 an appropriation?
 23 **A.** Absolutely.

24 **Q.** What is the evidence of appropriation?
 25 **A.** Yes, what is the evidence that the money has

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1 to the Code for Crown Prosecutors, in that they
 2 would set out "These are the things we have to
 3 go through, and these are how we have gone
 4 through them", and that did usually -- I'm not
 5 going to say always but usually -- involve
 6 an analysis of the evidence.

7 There would be reference, for example, to
 8 the account in interview. There'd be reference
 9 to the loser statement, if that was the type of
 10 offence, or the complainant's statement. There
 11 would be an analysis of the -- anything that
 12 might undermine the credibility of the
 13 complainant.

14 Those things would be there. Whether they
 15 would be all there, whether they were in
 16 themselves always sufficient is perhaps
 17 a separate question, but there would certainly,
 18 in those that I saw, be an analysis of the
 19 evidence. There would at least be a reference
 20 to aspects of the evidence in those decisions.

21 **Q.** Put shortly, are you holding the Post Office to
 22 an ideal standard, rather than reflecting the
 23 reality of the standards that were applied by
 24 other prosecutors, in making the criticism of
 25 these charging decisions that you have?

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1 gone and has gone to the --

2 **Q.** And gone at the hands of this person?

3 **A.** Yes, yes.

4 **Q.** If we turn up, please, page 224 of your report.

5 EXPG000004R, thank you, page 224. If we
 6 look at the last three sentences on the
 7 substance of paragraph 633 there, you say:

8 "In particular, this involved consideration
 9 of the evidential basis to establish dishonesty,
 10 evidence to show where the money had gone, and
 11 whether the evidence was reliable."

12 I think you told us last time that all
 13 iterations of the Code for Crown Prosecutors
 14 directed the CPS lawyers, or those who were
 15 applying the Code, to consider reliability; is
 16 that right?

17 **A.** Yes.

18 **Q.** You say:

19 "By way of example:

20 "In the case of Lisa Brennan, she was
 21 charged with theft even though the internal
 22 memorandum sent by the lawyer to the
 23 Investigator account whether there was evidence
 24 of stealing as opposed to the covering up of
 25 shortages, and whether there was evidence that

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1 she was dishonest rather than incompetent."

2 **A.** Yes.

3 **Q.** I think if we track that document down -- we're
4 not going to do it now -- we'll find that that
5 was the very advice that said there's
6 a realistic prospect?

7 **A.** It was as near as I could find to one, in that
8 case, and that -- again, it was an early case
9 but there was nothing to suggest that there was
10 anything else, and so it wasn't that the
11 investigator provided evidence to show evidence
12 of stealing, as opposed to covering up shortages
13 or evidence of dishonesty, rather than
14 incompetence, before any decision was made to
15 charge; it appeared that the decision was made
16 when there was no answer to those questions.

17 **Q.** How concerning is that -- well, I should say: is
18 that concerning?

19 **A.** Yes, it is, because the lawyer in that case
20 identified the right questions. They were
21 absolutely the things to ask before you charge
22 someone with theft but they went ahead and
23 charged, as far as I could see, not knowing what
24 the answers were and that seems the wrong way
25 round to me.

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1 report to come to their view on charge, in that
2 case, they were being told that the offence
3 couldn't be proved and then they charged it.

4 **Q.** Was that a concern?

5 **A.** Yes.

6 **Q.** The Inquiry has heard evidence from a range of
7 Investigators and prosecuting lawyers who have
8 told the Chairman that they believed at the time
9 that the evidence showed that Horizon was
10 reliable. If that was their state of mind --
11 and putting aside the fact that we now know that
12 to have been incorrect -- would that make any
13 difference to your view as to the reasonableness
14 of the charging decisions?

15 **A.** It would almost certainly depend on the
16 particular case. If it were a case where
17 nothing had been said by the suspect to give
18 rise to any concern about the accuracy of the
19 Horizon data being relied on, and you -- you had
20 evidence -- as opposed to a belief, you had
21 evidence that the system was working properly,
22 then that would -- to charge on that basis,
23 providing everything else was made out, would
24 not be inappropriate.

25 But if you had a suspect who was raising

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1 **Q.** "In the case of Oyeteju Adedayo [you say at (b)]
2 the lawyer correctly identified dishonesty as
3 the likely defence, but didn't address what
4 evidence there was to prove that element of the
5 false accounting offences" --

6 **A.** Yes.

7 **Q.** -- "that she [nonetheless] advised be
8 prosecuted."

9 **A.** Yes, and under the Code the lawyer is enjoined
10 to identify what likely defences are and what
11 evidence there is that addresses those defences,
12 and it wasn't just a defence, it's an element of
13 the offence that had to be proved and so, both
14 in assessing whether the elements of the offence
15 were proved on the evidence and whether any
16 defence that was raised was likely to succeed or
17 not, that was the right question to ask, but you
18 needed the answer to it before you could come to
19 a conclusion.

20 **Q.** Then, lastly, in the case of Josephine Hamilton,
21 she was, you say, charged with theft on the
22 basis of an investigation report which said,
23 "I was unable to find evidence of theft".

24 **A.** Yes, and so, if my understanding was correct and
25 the lawyer was looking at the investigating

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1 issues in relation to their post office and the
2 Horizon system in their post office, then you
3 the fact that you might have evidence that the
4 system generally was operating properly would
5 not absolve you of the need at least to consider
6 whether there may have been a problem at that
7 post office and its operation there, that needed
8 to be investigated because it may be that the
9 evidence, in relation to the system at that post
10 office, was not reliable, even if the system
11 more generally was.

12 **Q.** Can I summarise it that a generalised belief in
13 the mind of the lawyer, based on rumour, chatter
14 or messages from senior management, would in no
15 case be sufficient?

16 **A.** No. You would --

17 **Q.** You needed evidence?

18 **A.** You needed evidence. Absolutely.

19 **Q.** The nature of that evidence might differ, is
20 that right, between a case where a subpostmaster
21 had raised Horizon reliability as an issue, as
22 against the case where they had not?

23 **A.** Yes.

24 **Q.** You draw these threads together over the page,
25 please, in paragraph 634, and it's the first

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1 sentence. You say:
2 "As a result, to adopt the wording of the
3 Inquiry's question ..."

4 We had asked whether the charging decisions
5 were thorough and/or conscientious. You have
6 said that:

7 "... they were neither thorough nor
8 conscientious."

9 **A.** No, they were brief and, in some cases,
10 perfunctory.

11 **Q.** Can I turn to the second issue, please, which is
12 the test that was applied by the charging
13 lawyer, the reviewing lawyer?

14 **A.** Yes.

15 **Q.** You picked this up in paragraph 635, which is
16 further down the page. Thank you. You say:

17 "The test that was applied by the lawyer in
18 giving such advice varied."

19 As you said in your first report the Code
20 was not acknowledged as the basis for charge
21 until 2007 -- that's adopted or acknowledged by
22 the Post Office until 2007 -- when it was said
23 that that the sufficiency of evidence to
24 prosecute and the public interest would be
25 considered by reference to the Code.

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1 **Q.** Can we go over the page to page 226, please, and
2 look at paragraph 637. You say:

3 "Even more concerning is the evidence in
4 a number of cases that [you] reviewed that the
5 test of a realistic prospects of a conviction
6 ... was not the test or the only test, being
7 applied ...

8 "In the case of Mr Blakey in 2005, whilst
9 the realist particular prospects of success for
10 charges of theft and false accounting were
11 asserted, they were accompanied by the
12 assessment that there was a low prospect of
13 success for theft, but a high prospect of
14 success for false accounting.

15 "In the case of [Mr Thomas] in 2006,
16 a different lawyer considered there to be
17 a realistic prospect of success for charges of
18 theft and false accounting, but this was
19 accompanied by the assessment that there was
20 a medium prospect of success.

21 "In the case of Peter Holmes in 2008, the
22 same medium prospects of success test was added
23 to the assessment of the realistic prospects of
24 conviction."

25 **A.** Just to add to that the case of Mrs Skinner, in

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1 You observed in your first report there was
2 little assistance provided in the Post Office
3 documents until 2013 as to how the Code was to
4 apply to the cases prosecuted by the Post
5 Office, in relation to either limb of the test.

6 Then you say this:

7 "In fact, on my review of these 20 cases
8 I confess to not having identified any
9 significant change in the way that charging
10 decisions appear to have been approached before
11 2007 and after, or as the Code for Crown
12 Prosecutors developed with new editions in 2004
13 and 2010."

14 **A.** Yes.

15 **Q.** Can we extend that to the 22 cases that you
16 looked at?

17 **A.** Yes.

18 **Q.** It didn't improve in the case of Janet Skinner
19 or Julian Wilson?

20 **A.** No, there continued to be no analysis of the
21 factors identified under the Code, particularly
22 in relation to the public interest, and there
23 was still cases, across the piece, where the
24 test was set out in ways that didn't reflect the
25 test.

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1 my Volume 2A, the same issue of medium prospects
2 of success was -- appeared there, as well.

3 **Q.** Would you agree that the evidential limb of the
4 Full Code Test is simply whether there's
5 a realistic prospect of conviction or not?

6 **A.** Yes.

7 **Q.** Is it right that some cases may pass the
8 evidential limb of the Full Code Test, ie there
9 is a greater than 50 per cent prospect of
10 a conviction but, nonetheless, have a relatively
11 low prospect of conviction?

12 **A.** In the sense that they're nearer 50 per cent
13 than not, yes.

14 **Q.** Some who have passed the 51 per cent threshold
15 may have a very high prospect of conviction,
16 ie near the 99 per cent?

17 **A.** Yes.

18 **Q.** For the purposes of the Code test, does it
19 matter whether it's 51 per cent or 99 per cent?

20 **A.** Not so far as the evidential test is concerned.
21 That may have an impact at the public interest
22 stage but not at the evidential stage.

23 **Q.** Why might it have an impact at the public
24 interest stage of the assessment?

25 **A.** Because if it is a borderline case and there are

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1 other public interest considerations that might
 2 tend against prosecution, then the fact that the
 3 case is a weak one will add to the weight of
 4 those public interest considerations.

5 **Q.** In a private prosecution where a prosecutor is
 6 not obliged to prosecute, even if both the
 7 evidential threshold is met and the public
 8 interest test is met, might the relative
 9 strength of the evidential case be a factor that
 10 the prosecutor would take into account in
 11 deciding to commit time and resources to
 12 prosecuting?

13 **A.** Yes.

14 **Q.** Is that how you read these memoranda?

15 **A.** No, I confess I wasn't really very sure as to
 16 how I should read these memoranda because there
 17 were so few clues in their brevity as to how
 18 I was meant to read them, and that it may have
 19 also puzzled anyone who was receiving them at
 20 the time as their advice.

21 On the one hand, taking the case of
 22 Mr Blakey as an example, it was saying there's
 23 a realistic prospect of conviction for theft but
 24 a low prospect of success for theft and, on one
 25 reading, those two things cancel each other out.

1 **Q.** In any of the 22 cases that you looked at, did
 2 you see any analysis of that kind?

3 **A.** No. Well, in fairness, in very few of the cases
 4 did I see any reference to the public interest
 5 at all.

6 **Q.** That's the third topic under this heading that
 7 I was going to turn to, the public interest
 8 test. Before we move to that, in paragraph 638
 9 at the foot of the page there, you said that you
 10 expressed a concern in your first report about
 11 the lack of assistance for prosecutors as to the
 12 tests to apply.

13 **A.** Yes.

14 **Q.** You referred, I think, to policy documents that
 15 there was an incantation of the adherence to the
 16 Code for Crown Prosecutors but nothing that
 17 helped individuals to carry that into effect in
 18 the context of the likely offences being
 19 prosecuted by the Post Office.

20 **A.** Yes.

21 **Q.** You say that those examples would tend to show
 22 that concern to be well founded. Are you
 23 drawing a link there between the absence of Post
 24 Office policy and guidance with decisions made
 25 in practice?

1 **Q.** Were you concerned that the gloss that was put
 2 may have undermined or vitiated the assessment
 3 that there was a realistic prospect of
 4 a conviction for theft?

5 **A.** Yes, especially when considered against what
 6 evidence there was of the elements of theft in
 7 that case. If it were intended as a "You could
 8 but I wouldn't if I were you", then it needed to
 9 be spelt out in terms, rather than left to the
 10 intuition or guesswork of someone else. If it
 11 were seeking to address, "It's made out but you
 12 may not want to prosecute because the prospects
 13 of success are low and, therefore, the public
 14 interest factors might outweigh it", then it
 15 would have been helpful if it had said any of
 16 that, but it didn't.

17 And so it just suggested to me a lack of
 18 confidence in there being a realistic prospect
 19 of conviction and, if that were the case, in
 20 coming to a decision on an offence that would,
 21 on the face of it, involve theft in breach of
 22 trust by an employee of long record and previous
 23 good character, then it really needed to set it
 24 all out, rather than just say "low prospect",
 25 whatever that meant.

1 **A.** Yes, so the concern I expressed last time was
 2 that simply telling someone that there was
 3 another thing that they could go away and look
 4 at that would help them make their decisions did
 5 put the onus on them to correctly understand
 6 what that meant and what it required of them,
 7 whereas if it was spelt out in terms for them in
 8 the policy by the Post Office, then there was
 9 less risk of them getting it wrong and a greater
 10 chance of there being a consistent application
 11 of the policy.

12 Just pausing there and going back to the
 13 last topic, if you'll forgive me for a moment,
 14 it's interesting that I found, when I was
 15 preparing Volume 1, that there were more policy
 16 documents on interviews and the appropriate way
 17 of dealing with an interview than almost
 18 anything else, and it's interesting that the
 19 Investigators, generally speaking, complied with
 20 their obligations under PACE in relation to
 21 interviews when they had lots of policy help as
 22 to how to do that.

23 Here, we have prosecutors who were just told
 24 "Apply the Code for Crown Prosecutors", full
 25 stop, and we have these charging advices where

1 the guidance given in the Code for Crown
 2 Prosecutors, as to the things you need to
 3 consider in relation to each stage of the test,
 4 are not referred to and you have a number of
 5 cases where the test that is set out in the Code
 6 has a gloss on it that is not explained by the
 7 Code or indeed anything else.

8 **Q.** Thank you. Can we then turn to the third
 9 subtopic, then, the public interest. At
 10 paragraph 639 at the foot of the page there, you
 11 express concern that the charging memoranda
 12 rarely addressed the public interest at all.
 13 You said that they were disturbingly few in
 14 number; is that right?

15 **A.** Yes.

16 **Q.** You say that the 2004 iteration of the Code
 17 identified 17 public interest factors favouring
 18 prosecution, nine to the contrary; and the 2010
 19 iteration identified 19 factors favouring
 20 prosecution -- then over the page -- and 11 to
 21 the contrary.

22 I think in none of the 22 cases that you saw
 23 was there any analysis of those features at all.

24 **A.** No. Indeed, in the majority of them, the words
 25 "public" and "interest" together didn't appear

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1 this was an aberration in an otherwise
 2 distinguished career.

3 These wouldn't necessarily trump the fact
 4 that they had stolen from their employer but
 5 they would be things that would be thought about
 6 in deciding whether it was in the public
 7 interest to prosecute or not and, here, there
 8 was no analysis of that at all.

9 **Q.** In any of the cases that you looked at, had you
 10 been satisfied that the evidential test had been
 11 satisfied for a charge of theft by an employee
 12 in breach of trust, were there, nonetheless,
 13 factors which would have led you to conclude
 14 that the public interest was not met or weren't
 15 you in a position to say one way or the other?

16 **A.** I think because I struggled in many of these
 17 cases to identify what the basis for concluding
 18 that there was a realistic prospect of
 19 conviction for theft, how they had got there,
 20 I'm not sure that I got beyond that to consider
 21 the public interest but, clearly, where you have
 22 the suspect in interview, and this was then
 23 relied on as the basis or for prosecuting them,
 24 saying that this was not deliberate financial
 25 benefit that was driving them: this was things

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1 at all.

2 **Q.** So an entire absence of evidence that that had
 3 been considered on the face of the papers?

4 **A.** Yes.

5 **Q.** You say that you recognise -- this is the third
 6 line:

7 "... where a prosecutor was satisfied there
 8 was a realistic prospect of proving there had
 9 been theft by an employee in breach of trust,
 10 that would be a strong factor in favour of there
 11 being a public interest in prosecution.
 12 However, the nuances to that test, by reference
 13 to the list of factors for and against ...
 14 underline that such an analysis may be
 15 oversimplistic."

16 Can you explain why, please?

17 **A.** Clearly, where the evidence demonstrates that
 18 an employee has stolen from their employer in
 19 breach of trust, that is the type of situation
 20 where it would often be in the public interest
 21 to prosecute, but it would not necessarily
 22 follow that that were the case if, for example,
 23 it was clear that the person had been acting
 24 under duress at the time that they had done
 25 that, if they were ill, if they were old, if

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1 coming up in the system that they couldn't
 2 explain and sought to cover up -- so more of
 3 a mistake rather than premeditated -- that's the
 4 kind of thing that the Code would tell you that
 5 you need to take into account in the public
 6 interest, weighing against prosecution,
 7 potentially, the fact that someone has a good
 8 record is a factor that is taken in account in
 9 assessing the public interest weighing against
 10 prosecution.

11 And, indeed, I appreciate it's a very
 12 different document, but the audit guidance, the
 13 approach to audit shortages that Contract
 14 Managers were asked to consider with a whole
 15 list of factors, including record, whether this
 16 was a one-off, et cetera, whether there'd been
 17 voluntary repayment, and so on, those are the
 18 kind of things that I would have taken into
 19 account if I'd been making one of these
 20 decisions as weighing against the public
 21 interest being in favour of prosecution, even if
 22 I were satisfied that there was evidence of
 23 theft.

24 **Q.** So even if you'd been able to -- suspending
 25 disbelief for a moment, that there was evidence

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1 of theft, you would nonetheless have found, or
 2 potentially found, the factors that pointed
 3 against, in the public interest, prosecution?
 4 **A.** Yes, and where I would have ended up it's rather
 5 difficult to say because it would have depended
 6 on my assessment of what the evidence of theft
 7 was. But, certainly, there would have been
 8 factors going both ways that needed to be
 9 thought about, not least because that's what the
 10 Code told you to.

11 **Q.** You mentioned just now voluntary repayment and,
 12 in your paragraph 639 here, in the last four
 13 lines, you say "factors such as ... whether they
 14 have made reparation" were relevant, albeit they
 15 were rarely addressed.

16 So the extent to which a suspect had made
 17 reparation, would you agree, was a relevant
 18 factor to be considered in relation to the
 19 prosecutorial assessment of the public interest
 20 limb?

21 **A.** Yes.

22 **Q.** I think in the 2010 edition of the Code, amongst
 23 the public interest factors that were listed,
 24 was the extent to which the suspect had put
 25 right the loss or harm --

1 than that, ie in primary or secondary
 2 legislation?

3 **A.** I'm not sure I'm following you.

4 **Q.** Yes. In order to impose a caution, was some
 5 legal basis setting up the machinery necessary
 6 to do so or, if that wasn't an issue that you
 7 looked at, then please do say?

8 **A.** I don't think it was. I'm sure there must be
 9 but I can't think of it off the top of my head.

10 **Q.** Can you recall, as a result of the Criminal
 11 Justice Act 2003, in the context of public
 12 prosecutions, a mechanism, a vehicle, known as
 13 conditional cautioning?

14 **A.** Yes, yes, and there was -- I know there was, for
 15 example, CPS guidance in relation to how they
 16 should approach that.

17 **Q.** Could such conditions attached to a conditional
 18 caution include repayment of money, ie the
 19 payment of compensation?

20 **A.** Yes.

21 **Q.** Did you examine whether that legislative scheme
 22 was one that was available to the Post Office?

23 **A.** No.

24 **Q.** Thank you.

25 Can we turn to topic 5, please -- that can

1 **A.** Yes.

2 **Q.** -- albeit it noted that a suspect should not
 3 avoid prosecution solely because they had repaid
 4 a loss?

5 **A.** No, absolutely.

6 **Q.** In the context of a case where there that
 7 already been a finding, an assessment, there was
 8 sufficient evidence to prosecute for
 9 a dishonesty offence, and a prosecutor is
 10 considering whether a prosecution is in the
 11 public interest or whether a caution might be
 12 sufficient and proportionate disposal, would the
 13 fact that the suspect has repaid the amount be
 14 a legitimate factor to take into consideration?

15 **A.** Yes, it could be, yes.

16 **Q.** You noted in the case study of Bailey that the
 17 administering of a caution was made conditional
 18 on the undertaking to make repayment when funds
 19 became available?

20 **A.** Yes.

21 **Q.** Did you identify any legal basis for the
 22 imposition of cautions by the Post Office?

23 **A.** There was a Post Office policy that dealt with
 24 cautioning.

25 **Q.** Yes. I'm thinking about something higher level

1 come down from the screen -- which is reasonable
 2 lines of inquiry and, in particular, how they
 3 impacted on the disclosure that it was necessary
 4 for the Post Office to give.

5 **A.** Yes.

6 **Q.** Back in your first report, the cross-reference
 7 is paragraphs 366 to 370, you set out some
 8 conclusions in relation to the requirement to
 9 pursue all reasonable lines of inquiry. I'm
 10 just going to remind you of them.

11 **A.** Thank you.

12 **Q.** Firstly, you said:

13 "In the present circumstances, the
 14 requirement in the particular circumstances
 15 involved consideration of whether the
 16 investigation included whether accounting
 17 shortfalls at Horizon terminals might lie with
 18 the computer system, either as a matter of
 19 course or where such a possibility was raised by
 20 a suspect in interview."

21 In Volume 2 of your report, you identify
 22 some failures on the part of the Post Office to
 23 pursue such reasonable lines of inquiry and
 24 resulting in disclosure failings. Can we look,
 25 please, at page 219 of your second report,

1 starting at paragraph 624 --
 2 **A.** Yes.
 3 **Q.** -- so page 219. Thank you.
 4 It's the fourth line at the end there. You
 5 say:
 6 "In my review of these 20 cases there were,
 7 consistently, failures by the Investigators to
 8 identify and pursue a number of reasonable lines
 9 of inquiry."
 10 Can we expand that to in the 22 cases that
 11 you reviewed, there were consistently failures
 12 by the investigators to identify and pursue
 13 a number of reasonable lines of inquiry?
 14 **A.** Yes.
 15 **Q.** So, in relation to the "consistently", do you
 16 mean by that that it didn't depend on the
 17 identity of the Investigator or the lawyer?
 18 **A.** No. That's right.
 19 **Q.** Do you mean consistently by reference to the
 20 fact that it remained the case across the piece?
 21 **A.** Yes.
 22 **Q.** I think you tell us about that in the next
 23 sentence:
 24 "That remained the position, without any
 25 obvious or significant change, after the 2010

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1 **Q.** You give three examples of what you call a trend
 2 there: the absence of financial investigation;
 3 the absence of investigation of training and
 4 calls to helplines; and the absence of
 5 investigations into the operations of Horizon.
 6 **A.** Yes.
 7 **Q.** I want to deal with each of those in turn,
 8 please. The absence of investigation into
 9 financial records or financial issues. You
 10 address this in your paragraph 625. You tell us
 11 that:
 12 "... where a suspect denied in interview
 13 that he or she had taken the money, and/or had
 14 sought to make good unexplained losses
 15 identified by [Horizon], it would be
 16 a reasonable line of inquiry to obtain their
 17 financial information to see if there is
 18 evidence of unexplained monies appearing in bank
 19 accounts, or payments out of those accounts to
 20 cover shortfalls. Such evidence is of direct
 21 relevance to the question of whether they have
 22 appropriated ... money, for the purposes of
 23 theft, and whether they have acted dishonestly
 24 for both theft and false accounting."
 25 So following the money, if I can call it

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1 amendment to the Post Office disclosure policy
 2 document."
 3 **A.** Yes, and that meant expressed the duty to pursue
 4 all reasonable lines of inquiry, which had been
 5 absent from the earlier version of the
 6 disclosure policy. Even though it was
 7 acknowledged in writing, it was not reflected in
 8 the approach, as I saw it, in these cases.
 9 **Q.** You tell us that:
 10 "There were lines of inquiry common to these
 11 cases, the relevance of which was repeatedly
 12 engaged by the explanations advanced interview
 13 by suspects and/or by the circumstances of the
 14 shortfall being investigated, which were either
 15 not pursued at all, were only pursued in
 16 a limited or supervision manner, or were only
 17 pursued as a result of requests ... by reviewing
 18 lawyers or, much more commonly, by the defence.
 19 The following are examples of this trend."
 20 So, irrespective of the circumstances,
 21 whether it was a defendant raising it, whether
 22 the circumstances of the case demanded it, there
 23 was a failure, in your view, to pursue
 24 reasonable lines of inquiry.
 25 **A.** Yes.

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1 that, is relevant in a case of alleged theft, to
 2 both the appropriation question and the
 3 dishonesty question.
 4 **A.** Yes.
 5 **Q.** Can you explain why it's relevant to both the
 6 appropriation question and the dishonesty
 7 question?
 8 **A.** It's relevant to appropriation for evidence that
 9 they have appropriated the money, they have got
 10 the money and taken the money. It's relevant to
 11 dishonesty because, if the evidence of their
 12 bank account, firstly, shows they haven't taken
 13 the money and, secondly, shows that they were
 14 not in a financial position where they needed to
 15 take the money and, thirdly, where it was
 16 appropriate, where it showed they had sought to
 17 try to repay losses that had been identified by
 18 the system in accordance with their contracts
 19 until a point where, as they explained in their
 20 interview, they couldn't afford to do it any
 21 more, and that that in turn was borne out by
 22 their bank accounts, then those factors would
 23 all be relevant to the assessment of whether
 24 they'd been dishonest or not, because they would
 25 bear them out in their explanation of what had

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1 happened, insofar as they understood it.
 2 **Q.** What about the suggestion that it was always
 3 open to the defendant to say, at trial, "Well,
 4 look, there's no evidence adduced by the
 5 prosecution of me having a speed boat on my
 6 drive, or a holiday in the Bahamas or
 7 unexplained entries into my bank account. The
 8 prosecution hasn't shown any of those things".
 9 **A.** They can say that. They can say that with a far
 10 greater degree of emphasis, if the jury know
 11 that the prosecution have looked and where they
 12 have looked and what they have found or what
 13 they haven't found.
 14 **Q.** So is that why it's a reasonable line of inquiry
 15 to pursue, amongst others?
 16 **A.** It's one of the reasons but it's not the only
 17 one.
 18 **Q.** How serious an omission or failing did you
 19 regard this?
 20 **A.** In the first of the cases I considered, that of
 21 Lisa Brennan, the lawyer absolutely rightly
 22 asked the question of the Investigator as to
 23 whether there was any evidence to show that she
 24 had stolen the money before then going on to
 25 charge her with theft anyway. But the fact that

1 same approach taken on the same evidence by the
 2 Post Office.
 3 **Q.** In relation to a case of false accounting, what
 4 relevance does the financial enquiry that you're
 5 suggesting ought to have been made, potentially
 6 have?
 7 **A.** You would want to consider why the suspect had
 8 done what they admitted doing, where they
 9 admitted doing it, in relation to the accounting
 10 records. And where they were explaining that
 11 they had -- a loss had come up on the system
 12 that they couldn't explain, that they knew they
 13 were ultimately going to be reliable for, but it
 14 was nothing to do with them, in the sense they
 15 hadn't benefited from it, they couldn't afford
 16 to pay it back, all of that would be addressed
 17 by their financial records that would show
 18 whether those things were correct or not.
 19 And that would weigh both on whether the
 20 elements of the offence were made out but also
 21 on the public interest in that kind of case.
 22 **Q.** In any of the 22 cases that you looked at, did
 23 you see any written explanation in the papers as
 24 to why that line of inquiry was not pursued?
 25 **A.** No, and, in fairness, in some of the cases they

1 that question was raised does underline how
 2 fundamental a question it was to raise because,
 3 if you are accusing someone of appropriating
 4 money, then it is, it seems to me, incumbent
 5 upon you to see whether they have or not.
 6 And a good place to look for that, not the
 7 only one, but a good place to look for that
 8 would be to see if there's any evidence that
 9 they've got it.
 10 **Q.** Did you see any explanation in the papers that
 11 you saw as to why this line of inquiry was not
 12 pursued?
 13 **A.** No. I think it was the case, if I remember
 14 rightly, of Carl Page, which started out as
 15 an investigation with other investigators,
 16 I think the police and Customs were both
 17 involved at one point, if I'm remembering the
 18 case correctly, and the police investigation, in
 19 relation to what was then an allegation of
 20 a conspiracy in relation to funds from the Post
 21 Office, did investigate whether they could find
 22 any evidence of the money.
 23 They couldn't and the police concluded that
 24 they weren't going to take the matter any
 25 further because they couldn't. That was not the

1 asked the suspect at the time of interview
 2 whether they could have access to their bank
 3 accounts, whenever they asked, they were told
 4 that they could and, in some of those cases they
 5 did obtain some financial material, but it was
 6 never a very deep dive into the finances.
 7 And that perhaps was illustrated in some of
 8 the cases where confiscation followed on, that
 9 a lot of the investigation of the suspect's
 10 finances came about at the stage after they'd
 11 been convicted, with a view to getting the money
 12 from them, rather than earlier.
 13 **Q.** Thank you. Can we turn to the second example
 14 that you give of a reasonable line of inquiry
 15 not being pursued, and that's paragraph 626.
 16 You tell us about training and calls to
 17 helplines:
 18 "... Where a suspect described issues with
 19 their operation of the Horizon system, by
 20 reference to their training, and/or recounts
 21 their attempts to get help at earlier stages
 22 [you say] it would be reasonable to make
 23 enquiries as to their level of training, and to
 24 ascertain whether, how often and in what
 25 circumstances they had contacted the relevant

1 helplines."
 2 **A.** Yes.
 3 **Q.** What issues might that go to in a prosecution?
 4 **A.** Again, to take the analysis from the lawyer in
 5 the case of Lisa Brennan, the other question
 6 that she asked of the Investigator in that case
 7 was whether this was deliberate or the result of
 8 incompetence and, to put that in a slightly
 9 different way, you would want to understand
 10 whether that which was being done to the system
 11 was being done because the person knew what they
 12 were doing, or whether it was, at least,
 13 possible that it was the result of them not
 14 knowing what they were doing, and a way of
 15 assessing that would be to identify how much
 16 training they'd had to know what they were doing
 17 or not.
 18 And that would be all the more necessary,
 19 where, as was often the case in these cases, the
 20 person being interviewed said that they'd had
 21 limited training or no particular training in
 22 relation to Horizon. And, in either situation,
 23 but certainly in the latter, it would be
 24 a reasonable line of inquiry to ascertain what
 25 training they'd had -- relevant training, they'd
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1 you had evidence that they had called to ask
 2 what they should do, it underlined the fact that
 3 this was a problem that they were having to deal
 4 with that they didn't understand, and that would
 5 be relevant to an assessment of whether they
 6 were acting dishonestly or not, whether this was
 7 accidental or deliberate, and so on.
 8 **MR BEER:** Thank you very much. I was going to move
 9 on to the third subtopic here, but it's 1.00.
 10 Sir, I wonder whether we might come back at
 11 1.50, please.
 12 **SIR WYN WILLIAMS:** All right, 1.50.
 13 **MR BEER:** Thank you very much, sir.
 14 **(1.00 pm)**
 15 **(The Short Adjournment)**
 16 **(1.50 pm)**
 17 **MR BEER:** Good afternoon, sir. Can you continue to
 18 see and hear me?
 19 **SIR WYN WILLIAMS:** Yes, thank you.
 20 **MR BEER:** Thank you very much.
 21 Good afternoon, Mr Atkinson.
 22 Can we turn to the third subtopic of the
 23 fifth topic. The fifth topic was reasonable
 24 lines of inquiry and the third subtopic was
 25 Horizon and obtaining from Fujitsu data, in
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1 had, as to whether this may be the result of
 2 mistake, rather than dishonesty.
 3 **Q.** So in both theft and false accounting
 4 allegations, it went directly to the issue of
 5 dishonesty?
 6 **A.** Yes.
 7 **Q.** Can I turn to the third reasonable line of
 8 inquiry that you identify, and that's over the
 9 page, please.
 10 **A.** Sorry, just in relation to the second half of
 11 paragraph 626 and the calls to helplines.
 12 Again, the managing shortage at audit guideline
 13 identified that, whether the person had earlier
 14 been seeking help in relation to what had gone
 15 wrong, was a relevant factor for a contract
 16 manager in deciding what to do with the person
 17 who -- where there was an issue on an audit.
 18 It was identified as relevant in a number of
 19 these cases, but only a few of them, to
 20 understand whether the type of problems that had
 21 been thrown up in -- as a description in
 22 interview were ones that had been borne out at
 23 the time. So where you had suspect saying,
 24 "This problem kept arising when I was using the
 25 system and I called to ask what I should do", if
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1 particular ARQ data. You address this on
 2 page 221 of your report at paragraph 628.
 3 **A.** Yes.
 4 **Q.** If we scroll down to 628, thank you, you say:
 5 "Where a suspect described issues with the
 6 Horizon system, unexplained losses, recurrent
 7 error notices or simply asserted that they could
 8 not explain what had happened when confronted
 9 with a Horizon record of a shortfall, then
 10 a reasonable line of inquiry is to identify what
 11 the root cause of that shortfall is ... That
 12 involved firstly the obtaining underlying data,
 13 and its assessment for bugs, errors or issues."
 14 You say that:
 15 "The failure to undertake such enquiries was
 16 almost routinely identified by the Court of
 17 Appeal in *Hamilton* as a serious investigative
 18 deficiency ... In these, and many other cases,
 19 there was no enquiry for bugs or errors, and the
 20 ARQ data was not obtained."
 21 I think earlier in your report you say that,
 22 in some cases, the failure to pursue this
 23 reasonable line of inquiry was picked up by
 24 a prosecution lawyer but the prosecution lawyer
 25 did not wait for the outcome of the
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1 investigative steps before positively finding or
2 advising that a prosecution should be pursued;
3 is that right?

4 **A.** Yes.

5 **Q.** That was paragraph 230 of your report.

6 Can I seek to exemplify some of those
7 conclusions in relation to specific case studies
8 and this will take a while but I'm going to
9 devote some time to it because of the
10 importance, potentially, of the issue.

11 In paragraphs 37 to 50 of your report,
12 I think that starts at page 21 -- if we scroll
13 down -- 37 onwards, you're addressing here the
14 investigation and charging decision in relation
15 to Lisa Brennan?

16 **A.** Yes.

17 **Q.** If we go forwards to 43 and 44 -- that's
18 paragraphs 43 and 44 -- on page 23, you say that
19 there was some engagement by the reviewing
20 lawyer with the identification and pursuit of
21 reasonable lines of inquiry?

22 **A.** Yes.

23 **Q.** Yes? You cross-refer us, in footnote 30, to
24 POL00047331. Then you tell us, over the page at
25 page 24, in paragraphs 45 and 46, that the

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1 errors or defects in the Horizon system?

2 **A.** No.

3 **Q.** Nor contacting Fujitsu with regard to the
4 integrity of Horizon data?

5 **A.** No.

6 **Q.** Then, if we can look to the response,
7 POL00047335, Mr Bradshaw's reply, as you say,
8 about a fortnight later, "Your memo [Teresa
9 Berridge] refers", and then a series of
10 responses to the questions that she asked, all
11 numbered paragraph 1 but I think we can see, if
12 we compare them side by side that they are
13 responses to her paragraphs.

14 None of those lines of inquiry involved the
15 reviewing of Horizon data, including ARQ data --

16 **A.** No.

17 **Q.** -- the identification of bugs, errors or defects
18 in the Horizon system, nor contact with Fujitsu
19 in relation to the integrity of Horizon data?

20 **A.** Yes, and the second paragraph down, in relation
21 to error notices, was perhaps as near as it got
22 to considering whether there had been issues
23 with the system that had been flagged up but
24 that was -- that's not the same thing as what
25 you've just been asking.

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1 Investigator, and it's Mr Bradshaw again,
2 responded to what the reviewing lawyer had said
3 two weeks later, indicating that further
4 investigations had been conducted but that you
5 conclude, in 46, that there was no evidence that
6 any enquiries were made as to whether the
7 Horizon system on which the case depended was
8 operating correctly?

9 **A.** Yes.

10 **Q.** Can we just look, please, then at the two
11 documents that found those conclusions, to start
12 with POL00047331.

13 I think this is the memorandum that you were
14 referring to.

15 **A.** Yes.

16 **Q.** If we just scroll down a little bit further, we
17 can see what Ms Berridge, a senior lawyer in the
18 Criminal Law Division was advising, "I would
19 like to know", and then 1 to 10.

20 I think it's right, isn't it, that none of
21 those lines of inquiry identified by the
22 reviewing lawyer address expressly reviewing
23 Horizon data or obtaining ARQ data --

24 **A.** No, that's right.

25 **Q.** -- identifying the potential for any bugs,

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1 **Q.** No. Was there any evidence in Lisa Brennan's
2 case that Fujitsu were contacted for information
3 or provision of data that you saw?

4 **A.** No.

5 **Q.** I don't think any witnesses from Fujitsu were
6 ever called in Ms Brennan's trial; is that
7 right?

8 **A.** No.

9 **Q.** Can we move on, then, to your report, so back to
10 the main report, please, at page 30 and
11 paragraphs 63 to 69. You're here dealing with
12 David Yates' case, yes?

13 **A.** Yes.

14 **Q.** You note in paragraph 69, which is on page 32,
15 if we scroll down, there is no evidence that any
16 checks were made on the Horizon system for
17 evidence of faults or other errors that might
18 have impinged on the records that Mr Yates'
19 described in his interview, or otherwise?

20 **A.** No, that's right. That was a case where
21 Mr Yates was describing errors appearing on what
22 he was doing that he couldn't understand.

23 **Q.** The Court of Appeal concluded that there was
24 nothing to indicate that any ARQ data was
25 obtained at the time of the criminal proceedings

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1 in Mr Yates' case?
 2 **A.** No, that's right.
 3 **Q.** That's *Hamilton* at paragraphs 330 and 331. Was
 4 that observation or finding one that accorded
 5 with your review of the papers?
 6 **A.** Yes.
 7 **Q.** Again, was there any evidence that you saw that
 8 Fujitsu was ever contacted for the provision of
 9 data or information in relation to Mr Yates'
 10 case?
 11 **A.** No.
 12 **Q.** Was there any evidence that any witness
 13 statements from Fujitsu employees were ever
 14 prepared or provided to the Post Office prior to
 15 Mr Yates' guilty plea?
 16 **A.** No.
 17 **Q.** Thank you. Can we move in to David Blakey's
 18 case, please, and that's relevantly paragraph 87
 19 onwards on page 38 of your report. You address
 20 the investigation between paragraphs 87 and 94.
 21 If we go to paragraph 94, which is on page 40,
 22 at the foot of the page, you say:
 23 "... despite Mr Blakey's account of issues
 24 with its operation [that's Horizon's operation]
 25 there were no enquiries made of Horizon data, or
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1 to Mr Blakey as part of the investigation?
 2 **A.** No, not that I've seen, no.
 3 **Q.** Can we look, please -- because this is a case in
 4 which Jarnail Singh advised -- at POL00044820.
 5 Can we see that this is a memorandum in the case
 6 of the prosecution of Mr Blakey, if we go to the
 7 second page, please, and just scroll down.
 8 We'll see that it's signed off by Jarnail Singh.
 9 **A.** Yes.
 10 **Q.** If we go back to page 1, please, and if we just
 11 scroll down so we can see the body of the text,
 12 thank you. Mr Singh says:
 13 "In my opinion there is sufficient evidence
 14 to afford a realistic prospect of conviction of
 15 Mr Blakey for an offence with theft with a low
 16 prospect of success and for false accounting
 17 with a high prospect of success."
 18 We've addressed that issue this morning.
 19 Is that kind of sentence that we see there
 20 the bald statement of the sufficiency of
 21 evidence that you saw in many charging memos?
 22 **A.** They usually stopped after identifying the
 23 offence. The low prospect of success part is
 24 something that is less common.
 25 **Q.** So a bald statement, in my submission, "There's
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1 the operation of the Horizon system, to see if
 2 this could explain the issues that Mr Blakey
 3 described. This significant limitation to
 4 investigation was well identified by the Court
 5 of Appeal", and you set out a citation from the
 6 Court of Appeal's judgment in *Hamilton* at
 7 paragraph 351.
 8 **A.** Yes.
 9 **Q.** So, again, was there any evidence that Fujitsu
 10 was ever even contacted for information for
 11 assistance or anything else in relation to
 12 Mr Blakey's case?
 13 **A.** No, and, in his case, he did identify that there
 14 were discrepancies arising in the system that he
 15 couldn't explain. He was clear that he was not
 16 responsible for them; he was clear that his
 17 staff were not responsible for them; he couldn't
 18 explain how they had happened. He was told by
 19 the Investigator that what he was saying sounded
 20 ridiculous and no check was made to understand
 21 what it was he was saying, to the extent that he
 22 was able to describe it.
 23 **Q.** I think this is a case in which there is no
 24 evidence that any witness statements from
 25 Fujitsu employees were ever prepared or provided
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1 sufficient evidence to afford a realistic
 2 prospect of conviction?"
 3 **A.** Yes.
 4 **Q.** Full stop?
 5 **A.** Yes, and it's of note, in just taking this as
 6 an example, that the lawyer here identified that
 7 a reasonable line of inquiry would be to rule
 8 out that others working in the branch had been
 9 responsible, and so he asked for statements to
 10 be taken from them. He didn't go on to consider
 11 whether statements needed to be taken to deal
 12 with whether it could have been a computer
 13 error, rather than the responsibility of
 14 Mr Blakey.
 15 **Q.** So, in this case, would you agree that Mr Singh
 16 did not advise or failed to advise as to
 17 reviewing of Horizon data including ARQ data --
 18 **A.** Yes.
 19 **Q.** -- and that he ought to have done?
 20 **A.** Yes.
 21 **Q.** Identifying the potential for any bugs, errors
 22 or defects in the Horizon system, and that he
 23 ought to have done?
 24 **A.** Yes, and, even if Mr Singh didn't understand ARQ
 25 data or what it was, one would have looked to
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1 see, as a reasonable line of inquiry, that
 2 checks ought to be made to understand that the
 3 material that was being relied on -- namely the
 4 Horizon records -- was reliable, given that the
 5 defendant in his interview was raising issues
 6 with the operation of the system.

7 **Q.** So, even though he, Mr Singh, might not have
 8 broken it down as I have, a question to Fujitsu,
 9 "Can you assure us as to the operation of the
 10 integrity of the system, can you supply us with
 11 ARQ data, can you identify whether there are any
 12 bugs, errors or defects that might impinge on
 13 the reliability of the data", you would expect,
 14 am I understanding this correctly, some general
 15 statement of request that was focused on the
 16 reliability of the material that the --

17 **A.** Yes.

18 **Q.** -- prosecution was relying on?

19 **A.** Yes, and how detailed it was would depend on how
 20 much he knew and you might then expect to see
 21 a discussion between Investigator and lawyer as
 22 to what needed to be done about that and that
 23 would be an entirely appropriate dialogue to
 24 have.

25 **Q.** Did you see any of that healthy dialogue between
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1 contacted for information or assistance in
 2 relation to Mr Mahmood's case?

3 **A.** No.

4 **Q.** Was there any evidence that any witness
 5 statements from Fujitsu employees were deployed
 6 in Mr Mahmood's case?

7 **A.** No.

8 **Q.** Can we look at how the reviewing lawyer
 9 approached it, POL0052884. We can see, if we go
 10 to the second page, if we scroll down -- sorry
 11 third page -- this is signed by Juliet
 12 McFarlane, a principal lawyer in the Criminal
 13 Law Division?

14 **A.** Yes.

15 **Q.** If we go back to the first page, we will see
 16 it's dated 27 May 2005. We can see how she
 17 advises:

18 "In my opinion the evidence is sufficient to
 19 afford a realistic prospect of conviction of the
 20 above named on the charges set out on the
 21 attached Schedule."

22 Is that the more common formulation?

23 **A.** Yes.

24 **Q.** I think, without reading this in detail, would
 25 you agree that Ms McFarlane did not advise as to
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1 lawyer and Investigator on Horizon reliability
 2 in any of the cases?

3 **A.** No.

4 **Q.** Can we turn, please, to page 46 of your report.
 5 Between paragraphs 109 and 115 of your report
 6 you address the investigation of Tahir Mahmood?

7 **A.** Yes.

8 **Q.** In paragraph 114, which is on page 48, you note
 9 that there is no evidence or awareness of issues
 10 with Horizon in the investigation?

11 **A.** No. The only place that questions of any errors
 12 in Horizon arose was in the interviews of
 13 Mr Mahmood, where he described, as best he
 14 could, the problems that he was encountering and
 15 what they had led to.

16 **Q.** The Court of Appeal observed in *Hamilton*, it was
 17 paragraph 322 of the court's judgment, that:
 18 "There is nothing of any ARQ data to
 19 indicate that any ARQ data was obtained at the
 20 time of the criminal proceedings", in
 21 Mr Mahmood's case.

22 Did that accord with your examination of the
 23 materials?

24 **A.** Yes.

25 **Q.** Was there any evidence that Fujitsu was
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1 any reasonable lines of inquiry that required to
 2 be pursued, relating to reviewing ARQ data or
 3 any other Horizon data --

4 **A.** No.

5 **Q.** -- identifying the potential for any errors,
 6 bugs or defects in the system, or contacting
 7 Fujitsu in relation to the reliability or
 8 integrity of Horizon data upon which reliance
 9 was to be placed?

10 **A.** She took account of the fact that the error
 11 notices that have been obtained didn't accord
 12 with this all being the result of a mistake.
 13 She then went on to consider that theft was not
 14 to be pursued because there were other
 15 candidates who could have carried out the theft
 16 and to rely, instead, on false accounting on the
 17 basis of a covering up of losses in the records,
 18 whether they'd been caused by Mr Mahmood or not,
 19 without having actually carried out or advising
 20 that there should be carried out any checks
 21 either, as to where the money that gone or as to
 22 what had happened on the computer.

23 **Q.** Was that adequate or not adequate?

24 **A.** No. It wasn't adequate.

25 **Q.** Thank you.
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1 Can we turn to the case of Carl Page,
2 please, that's page 59 of your report. Between
3 paragraphs 149 and 152 of your report, you look
4 at Horizon issues in relation to the prosecution
5 of Mr Page, and you note that, in the course of
6 the retrial, a defence expert report from
7 Timothy Taylor of KPMG was served on behalf of
8 the defence, which raised the prospect that the
9 £282,000 deficiency "could in practice be the
10 result of unidentified errors or differences in
11 Horizon" and that the prosecution case depended
12 on Horizon "working correctly throughout the
13 indictment period".

14 Yes?

15 **A.** Yes.

16 **Q.** In the light of that defence expert report
17 suggesting that the £282,000 could, in practice,
18 be the result of unidentified errors or
19 deficiencies in Horizon, was there any evidence
20 that the Post Office sought to investigate the
21 existence of any such unidentified errors or
22 deficiencies?

23 **A.** No, and the -- taking on board all the need to
24 be careful about material generated after the
25 event, the Second Sight review didn't point to
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1 please, at what the reviewing lawyer advised at
2 POL00052990. 10 March 2006, in the case of
3 Suzanne Lesley Palmer. If we go to the second
4 page, please, we'll see this is one of
5 Mr Jarnail Singh's charging advices.

6 **A.** Yes.

7 **Q.** Then back to page 1:

8 "I am of the opinion there is sufficient
9 evidence to afford a realistic prospect of
10 conviction of Ms Palmer for the offences of
11 false accounting."

12 Then, if you look at the remainder of the
13 page, and then over the page, is it right that
14 Mr Singh did not advise when he ought to as to
15 any further reasonable lines of inquiry,
16 including reviewing Horizon data --

17 **A.** Yes.

18 **Q.** -- identifying the potential for bugs, errors or
19 defects in the Horizon system --

20 **A.** Yes.

21 **Q.** -- and, lastly, contact with Fujitsu regarding
22 Horizon integrity?

23 **A.** Yes. On the contrary, he said that there was
24 nothing further that needed to be done.

25 **Q.** We can see that, if we go back a page, please --
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1 any which accorded with the lack of any evidence
2 of contemporaneous material in that regard.

3 **Q.** The Court of Appeal observed, it's paragraph 284
4 of the Court of Appeal's judgment, that there is
5 nothing in the Post Office case papers to
6 indicate that any ARQ data was obtained at the
7 time of the criminal proceedings in Mr Page's
8 case, whether at the initial trial or upon
9 retrial. Did that observation accord with your
10 examination of the case papers?

11 **A.** Yes.

12 **Q.** Can we turn, please, to paragraph 223 onwards in
13 your report, that's page 85, where you're
14 addressing the investigation in relation to
15 Suzanne Palmer. This is paragraph 223 to 227.
16 In relation to that case, Ms Palmer's case, did
17 you see any evidence that Fujitsu was ever
18 contacted for information or evidence in
19 relation to Ms Palmer's case?

20 **A.** No.

21 **Q.** Was there any evidence that any witness
22 statements from Fujitsu employees were ever
23 served on Ms Palmer?

24 **A.** No.

25 **Q.** Therefore none called at trial. Can we look,
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1 if we scroll down -- the line "No further
2 statements need to be obtained at this stage".

3 **A.** Yes.

4 **Q.** But then, conditionally, if there's an election
5 for trial or refusal of jurisdiction, or if
6 a not guilty plea is entered, then the following
7 statements are necessary, but none of those
8 address the three points that I've asked you
9 about?

10 **A.** No, and the statements that are listed there are
11 all tidying up the evidence for presentation to
12 a jury. I don't read number 4 there, "Any other
13 statements the Officers consider relevant", to
14 be identifying to an Investigator that they
15 needed to go and obtain ARQ data.

16 **Q.** Page 114, please -- sorry, my mistake.

17 Yes, page 114 of your report, please.

18 You're dealing here, between paragraphs 312 and
19 320, with the investigation concerning Mr Peter
20 Holmes?

21 **A.** Yes.

22 **Q.** In paragraph 316, please, which is on page 116,
23 you're addressing, in 316, the interview and you
24 summarise what happened in the course of the
25 interview.

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1 A. Yes.

2 Q. He asserted, second line, that:

3 "... shortages could be an issue with

4 Horizon or with malfunctioning equipment."

5 Then fourth line:

6 "... believed that the shortfall on each

7 occasion was something that the computer had

8 done, or failed to do."

9 A. Yes.

10 Q. Seventh line:

11 "He also raised specifically issues with the

12 Horizon system for three months about nine

13 months previously."

14 A. Yes.

15 Q. Tenth line:

16 "He denied, emphatically, stealing the money

17 ..."

18 A. Yes.

19 Q. I think, if we look, at POL00052178, we can see

20 his defence statement, "Name of Accused: Peter

21 Holmes", his solicitors and the date of it.

22 Then if we scroll down to what his defence

23 statement said, second sentence:

24 "I believe that either the Horizon system

25 has on occasion been at fault and ultimately

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1 results of any such contact or, indeed, any

2 document that set out such contact.

3 Q. Let's look at this in more detail then because

4 you're rightly pointing out that there is some

5 mention of the possible pursuit of an enquiry as

6 a result of something mentioned in interview --

7 A. Yes.

8 Q. -- or defence statement. Can we see how that

9 came about and can we start please with whether

10 it was the reviewing lawyer that caused this

11 enquiry to be made. POL00046488.

12 That's the wrong document. That's

13 Ms Rudkin's.

14 A. Yes.

15 Q. There's obviously a ghost in the machine at my

16 end here. I'll skip that and come back in

17 a moment, if we can. If we go to your report at

18 page 117.

19 A. The document might be POL00050912, that's the

20 reference I give in the report for the charging

21 decision but I was grappling with a lot of POL

22 references.

23 Q. Thank you. POL00050912. Thank you.

24 This is the memorandum in the case of

25 Mr Holmes, dated 16 February 2009. If we look

111

1 created the shortfall by creating incorrect

2 entries."

3 Would you agree that, both in interview and

4 in his defence statement, Mr Holmes was squarely

5 raising the operation of the Horizon system as

6 being responsible for the shortfalls?

7 A. Absolutely.

8 Q. Is there any evidence that Fujitsu was ever

9 contacted for information or evidence in

10 relation to Mr Holmes' case?

11 A. It's not absolutely clear. There was a degree

12 of Horizon material that the investigation did

13 obtain, and transaction logs, for example,

14 although it wasn't clear where those had come

15 from and they may have come from the branch,

16 rather than from anywhere else. And the

17 Investigator's report, there were two versions

18 of it in this case, and the updated version made

19 reference to faulty equipment and asserted that

20 "This has been checked and the allegations are

21 unfounded". It wasn't clear from the report how

22 they'd been checked or with whom.

23 So I can't say positively that nothing was

24 done in terms of contacting Fujitsu. What I can

25 say is I didn't see any the evidence of the

110

1 over the page, please, and scroll down, and

2 page 3. It's a Juliet McFarlane case.

3 A. Yes.

4 Q. If we go back to the beginning, please. She

5 advises:

6 "In my opinion the evidence is sufficient to

7 afford a realistic prospect of conviction ... on

8 the charges set out in the Schedule. There is

9 a medium prospect of success."

10 I suppose the second paragraph might be

11 a nod to the public interest test, might it?

12 A. Yes. Though not an analysis of it.

13 Q. So it doesn't mention the words "public

14 interest"?

15 A. No.

16 Q. Nor does it explain how that position has been

17 arrived at?

18 A. No.

19 Q. "No further statements need to be attained at

20 this stage", in the sixth paragraph.

21 Then, if we scroll down, if those conditions

22 are met, the following statements should be

23 obtained.

24 Then, over the page. Is there anything in

25 there that suggests that the reviewing lawyer

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1 advised as to a reasonable line of inquiry
2 relating to the operation of the Horizon system?

3 **A.** No.

4 **Q.** Can we go back to your report, please, and look
5 at the case of Lynette Hutchings. That is
6 page 152. At paragraph 423 at the foot of
7 page 152, you tell us that:

8 "... Jarnail Singh ... advised that it was
9 likely that the defence would assert that
10 Horizon was not working, and therefore 'it would
11 be more prudent for the officer to complete his
12 enquiries and further investigations and produce
13 the evidence" ... listed in the advice
14 [including] 'evidence rebutting the allegations
15 and criticisms made in the pre-prepared
16 statement' and 'statements dealing with the
17 integrity of the Horizon and call logs to the
18 Horizon Support desks'."

19 Then you say:

20 "It is of note that it identified approach
21 was to rebut the assertions ... not to
22 investigate whether or not those assertions
23 might be true."

24 **A.** Yes.

25 **Q.** Are you focusing on the formulation of the
113

1 King on 4 January 2012. Then back to the
2 beginning. If we just scroll through and look
3 at what Mr Smith says. The audit, in his first
4 paragraph:

5 "... very strong evidence to support the
6 allegation that Mrs Hutchings had inflated the
7 amount of cash held in the branch, usually by
8 inflating the figure for cash held in £50
9 notes."

10 Third paragraph, if we scroll down:

11 "In interview ... a prepared statement was
12 read out ... she admitted to altering the cash
13 declarations and suggested she had done so only
14 since the migration to Horizon Online ..."

15 Over the page:

16 "Furthermore she said that at the time of
17 migration, all accounts balanced which was
18 clearly untrue. She also gave problems which
19 she alleged she had experienced with the Horizon
20 system ... Whilst Mrs Hutchings has denied
21 stealing any money, she has not put forwards any
22 explanation as to how the deficit has arisen."

23 Then further down, "Defence Case":

24 "It is not known whether [she] will admit or
25 deny wrongdoing ... However given the evidence
115

1 request --

2 **A.** Yes.

3 **Q.** -- the phraseology used?

4 **A.** Yes.

5 **Q.** What do you take from that?

6 **A.** Well, in terms of identifying a reasonable line
7 of inquiry, that's a line of inquiry that leads
8 to or from, that implicates or exculpates, and
9 this was effectively saying "The defendant said
10 he was encountering problems on the system, we
11 need to disprove that". And that's not -- I'm
12 not saying that it was wrong to say we need to
13 pursue that, because clearly they did need to --
14 that was a reasonable line of inquiry to pursue,
15 but I found the way it was put, perhaps less
16 than helpful.

17 **Q.** In paragraph 425 of your report, further down
18 the page, please, you tell us that on 4 January
19 2012 Martin Smith of Cartwright King produced
20 a charging advice recommending that Ms Hutchings
21 be charged?

22 **A.** Yes.

23 **Q.** If we can look at that, please, POL00057341, and
24 if we go to the last page, please, we can see
25 this is produced by Martin Smith of Cartwright
114

1 and the admissions ... it is difficult to see
2 how she could successfully argue that her
3 actions had not been dishonest and that she had
4 not the intention to make a gain ...

5 "I have seen the [memorandum] of 17 June
6 2011 ..."

7 That's the one in which Mr Singh has advised
8 Horizon related integrity issues should be
9 pursued.

10 **A.** Yes.

11 **Q.** He says:

12 "[I have seen] numerous statements have ...
13 been taken. No further statements need to be
14 taken at the present time", and that she should
15 be charged, in the last paragraph on the page.

16 **A.** Yes.

17 **Q.** Would you agree that the statements which
18 Mr Singh had recommended be obtained were not,
19 in fact obtained, going to the Horizon integrity
20 issue?

21 **A.** Not that I saw.

22 **Q.** Mr Smith in this memorandum dismisses
23 Ms Hutchings' allegations concerning the Horizon
24 system, which he says they "do not appear to be
25 of any reliance"?
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1 A. Yes.
 2 Q. Is that a view with which you agreed or
 3 disagreed?
 4 A. Disagreed.
 5 Q. By reference to the fact that the lines of
 6 inquiry that Mr Singh had recommended be pursued
 7 and what was said in this charging memorandum,
 8 was it appropriate or inappropriate for
 9 a charging decision to be taken in Ms Hutchings'
 10 case without the Post Office having, at that
 11 stage, obtained statements "dealing with the
 12 integrity of Horizon"?
 13 A. One of the things that she had said in her
 14 prepared statement was that she had not been
 15 responsible for the loss, that the loss had
 16 arisen on the system and that what she had been
 17 doing was to adjust the figures in the hope that
 18 it would balance out in itself in due course,
 19 that the system that had created a problem would
 20 sort the problem out, and that clearly was
 21 relevant to the assessment of her honesty or
 22 otherwise, which was dismissed by Mr Smith in
 23 his advice.

24 And so just testing that alone required
 25 an understanding of whether these were

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1 was -- did not have glitches and, in her second
 2 interview, told her that any issues with Horizon
 3 were down to carelessness or incompetence by the
 4 operator, and then carried out no investigations
 5 that I could identify to test whether what she
 6 was doing her best to describe might be an error
 7 in the system.

8 Q. Thank you. Can we move on to page 170 of your
 9 report please. From paragraphs 483 -- in fact
 10 it's over the page, thank you -- to 488 of your
 11 report you address the investigation undertaken
 12 in Ms Allison Henderson's case?

13 A. Yes.

14 Q. The Court of Appeal observed in the *Hamilton*
 15 appeals -- their paragraph 158 -- that there was
 16 nothing to suggest that any ARQ data was
 17 obtained in Ms Henderson's case. Did that
 18 observation accord with your examination of the
 19 case papers?

20 A. Yes, it's right to note that this was one of the
 21 cases where I didn't have a report from the
 22 Investigator but, on what I did have, I didn't
 23 see anything that rang contrary to the finding
 24 the Court of Appeal had reached.

25 Q. Was there any evidence that you saw that Fujitsu

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1 regularities as a result of the system and the
 2 way it was operating or not. But, beyond that,
 3 there was the wider need to test the reliability
 4 of the evidence being relied on rather than to
 5 proceed from the basis that Mr Smith did, that
 6 it was reliable, without more.

7 Q. Thank you. Can we turn to Joan Bailey's case,
 8 please. This is page 159 of your report.

9 Between, if we scroll down, paragraphs 444
 10 and 452, you address the investigation that was
 11 undertaken in the case of Joan Bailey.

12 A. Yes.

13 Q. Was there any evidence that Fujitsu was
 14 contacted for information or assistance in
 15 relation to Joan Bailey's case?

16 A. No.

17 Q. Were there any witness statements obtained from
 18 Fujitsu served on Mrs Bailey before she accepted
 19 a caution?

20 A. No, and it's right to say in her case she, in
 21 interview, did raise the question of, and her
 22 belief that there were, problems in the Horizon
 23 system that were giving rise to issues. The
 24 Investigator, Mr Bradshaw again, in her first
 25 interview reassured her that the Horizon system

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1 was contacted for information or evidence in
 2 relation to Ms Henderson's case?

3 A. No.

4 Q. Can we look, please, at the reviewing lawyer's
 5 advice, POL00047159. 21 May 2010, Allison
 6 Henderson. If we go over the page, please, and
 7 scroll down, we can see that it's the Head of
 8 Criminal Law, Mr Wilson's, advice memo?

9 A. Yes.

10 Q. Back to page 1, please. We can see the
 11 formulation that he uses:

12 "In my opinion the evidence is sufficient to
 13 afford a realistic prospect of conviction of the
 14 above named on a charge of theft as set out on
 15 the attached Schedule. I have not drafted
 16 a commencement date in the theft as I am not
 17 clear when we are saying that the losses
 18 started. Can you fill in such a date and
 19 explain to me your rationale for relying on this
 20 particular date.

21 "... it does not seem appropriate to
 22 consider false accounting charges. It would be
 23 helpful if we could obtain some evidence to
 24 refute the possibility that the money she
 25 alleges must have gone missing was not, in fact,

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1 in the account during the last accounting period
2 prior to the audit."

3 Do you understand what that means?

4 **A.** Not altogether, no.

5 **Q.** In any event, in this advice -- we can scroll
6 down the rest of the page and look over to
7 page 2 -- do you agree that Mr Wilson did not
8 advise as to a line of inquiry existing
9 concerning the review of data, including ARQ
10 data --

11 **A.** No, that's right.

12 **Q.** -- the potential for bugs, errors or defects in
13 Horizon to be investigated or, indeed, any
14 contact with Fujitsu in relation to the
15 integrity of Horizon data?

16 **A.** I have a vague memory that there was
17 a suggestion at one stage in Ms Henderson's case
18 that they might, if the matter went to trial,
19 need to get a statement from Mr Jenkins, who
20 they had started to get statements from by then,
21 but it never got that far. But, certainly, in
22 the time that this was being investigated,
23 I didn't see any issue with -- any steps being
24 taken to get such ARQ data, for example, or
25 contacting Fujitsu more generally.

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1 "It is not clear whether there were
2 enquiries as to calls to the Horizon Helpdesk or
3 the NBSC as would be a standard line of inquiry
4 in these cases."

5 Do you mean by that "as should be a standard
6 line of inquiry"?

7 **A.** Yes, yes.

8 **Q.** "There was no evidence of awareness of Horizon
9 issues in the course of the investigation, and
10 there does not appear to be any context on the
11 accuracy of Horizon information relied on" --

12 **A.** No.

13 **Q.** -- "or checks as to whether there had been any
14 faults."

15 **A.** The Court of Appeal observed that they couldn't
16 see any suggestion that ARQ data had been
17 obtained.

18 **Q.** Thank you. Can we move on, please, to the case
19 of Khayyam Ishaq, which is page 211 of your
20 report. If we scroll down to "Disclosure",
21 turning to a slightly different issue here,
22 which is where there has been some
23 investigation. Because we've looked at a slew
24 of cases now where there has not, I want to look
25 at some cases where there has been

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1 **Q.** If we look at page 172 of your report, you
2 address the interview in paragraph 484. In 485,
3 you say:

4 "The interview was ... combative and was
5 indicative of a disciplinary approach as opposed
6 to an investigative [approach]."

7 Just whilst we're on that, taking it out of
8 turn, what do you mean by "it was indicative of
9 an disciplinary approach"?

10 **A.** It was -- it read as if this was a case of prove
11 a misconduct that Ms Henderson was being asked
12 to justify, rather than an investigation with
13 her of how it was that losses identified by
14 Horizon might have arisen, and I -- certainly
15 she felt it to be that because she said so, that
16 she felt that the investigators had drawn their
17 own conclusions before they'd spoken to her.

18 **Q.** You tell us in 486 that bank statements were
19 obtained. Can you recall what the reason was
20 for the obtaining of bank statements in this
21 case, as opposed to others?

22 **A.** That, I think, was to see whether there was any
23 evidence that the money had gone to her, and
24 there wasn't.

25 **Q.** You say in the third line:

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1 an investigation of sorts.

2 **A.** Yes.

3 **Q.** Between paragraphs 602 and 606, you tell us
4 about the approach that was taken by a lawyer at
5 Cartwright King, called Rachael Panter, to
6 disclosure in the case. Is this a fair summary:
7 that she advised that it was sufficient for
8 Mr Jenkins to address Horizon integrity issues
9 on a generic basis because the subpostmaster had
10 not raised a specific issue with the Horizon
11 system itself; they've all been generic to date?

12 **A.** Yes.

13 **Q.** If we look at that underlying document, please,
14 POL00059402 and, if we go to the last page in
15 this chain, please, we can see this email is
16 signed off -- if we scroll up, please -- by
17 Rachael Panter -- if we scroll up, keep going.
18 It's an email to Mr Jenkins of 16 November 2012,
19 and she says:

20 "As you may already be aware, your expert
21 report detailing the reliability of the Horizon
22 system has been served as evidence in a number
23 of Post Office cases that are at various stages
24 of the court process, most of which are listed
25 for trial in the early part of next year.

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1 "It should be noted that to date, most, if
2 not all cases raising the Horizon system as
3 an issue, have been unable/not willing to
4 particularise what specific issues that they
5 have with the system, and how that shapes the
6 nature of their defence.

7 "As we already have your detailed report,
8 I would like to serve it in each case listed
9 below. All of the following cases have raised
10 issues with the reliability of the Horizon
11 system."

12 Then Khayyam Ishaq's is listed:

13 "I would like to serve your report in the
14 remaining cases and have attached a case summary
15 of each case listed above so that you may
16 familiarise yourself with the facts of each
17 case.

18 "I ... stress that I do not anticipate that
19 all of the above cases will reach trial ...
20 could you read the case summaries attached, and
21 send 5 original signed and dated copies of your
22 report to me as soon as possible."

23 Then some other material.

24 Can we go back to your report, please, at
25 page 213. At page 213, you tell us at

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1 it wasn't necessary for Mr Jenkins to address
2 the data in a particular case, such as that as
3 of Mr Ishaq, because defendants, such as
4 Mr Ishaq, had not spelt out what it was that had
5 caused the problem on Horizon in their case, why
6 the losses had been shown on the system in their
7 case.

8 But that, of course, required the defendant
9 to understand why the errors had arisen in their
10 case and, certainly by this point, at the end of
11 2012, it had been repeatedly clear from repeated
12 suspects that they didn't understand what the
13 problem was, they just knew there was a problem
14 and they described what they had encountered in
15 their interview, as Mr Ishaq did here.

16 And so, rather than testing the reliability
17 of the evidence that the case was founded on,
18 and where they had someone who could do that
19 testing for them in the shape of Mr Jenkins,
20 asking Mr Jenkins to test it, to understand
21 whether the system had been working properly in
22 this branch at this time, instead, because the
23 postmaster couldn't give chapter and verse as to
24 what was causing the problem, it was deemed
25 sufficient to have a generic report that simply

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1 paragraph 605 that Mr Jenkins replied asking if
2 his existing report from Patel could not be
3 used, raising the question of whether contact
4 with him should be by the Post Office rather
5 than their solicitors:

6 "Ms Panter commented to a colleague at
7 Cartwright King, 'I can clarify with Gareth that
8 it doesn't matter that specific cases are not
9 quoted in his report as not one of them has
10 raised a specific issue with the Horizon system
11 itself, they have all been generic to date'."

12 Then you offer your view in paragraph 606 as
13 to this.

14 **A.** Yes.

15 **Q.** You say:

16 "As an approach to disclosure, the obvious
17 difficulty with it is that it makes disclosure
18 dependent on a defendant understanding what has
19 gone wrong, what issue with the Horizon system
20 had led to according imbalances, when a reason
21 for the defendant seeking to cover unexplained
22 losses was that they did not understand why they
23 were happening."

24 Can you explain what you mean there, please?

25 **A.** So the approach that Ms Panter adopted was that

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1 asserted that the system was all right.

2 **Q.** You make that point that you've just made there
3 in the last two sentences of paragraph 606:

4 "As his approach in the case of Gareth Allen
5 shows, it was possible for Mr Jenkins to access
6 Horizon data for a particular post office to
7 check if there were any issues. The approach
8 identified by Ms Panter did not facilitate such
9 an approach, and yet it was that approach that
10 was required."

11 Would you agree that, in addition to having
12 the effect of restricting the analysis which
13 Mr Jenkins might undertake, the effect of the
14 approach that Ms Panter adopted to disclosure
15 was that, in many of the cases you have
16 reviewed, including this one, Fujitsu were never
17 asked to analyse the transaction data at all?

18 **A.** That's right, and the case of Mr Allen that
19 I referred to there was a case where Mr Jenkins
20 has said that it was possible to look at ARQ
21 data in relation to Mr Allen and see what it
22 showed. So it was made clear to him, in his
23 discussions with the lawyers who were dealing
24 with these cases, that this was something that
25 could be done.

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1 Q. The Court of Appeal observed that ARQ data was
2 provided for the indictment period to the
3 defence on the 26 October 2012, shortly before
4 trial was due, but that it was unclear what, if
5 any, analysis was performed on it and that there
6 was no examination of that data for bugs, errors
7 or defects, or indeed for evidence of theft?

8 A. Yes.

9 Q. Did that accord with your own observations --

10 A. Yes.

11 Q. -- of the case papers here?

12 A. And as other cases where experts were instructed
13 on behalf of the defence demonstrated, the
14 difficulty of just giving a collection of data
15 to the defence is that, unless they had the
16 necessary expert understanding of how Horizon
17 worked, it was a very large job for them to
18 analyse, to understand, even begin to understand
19 how the system worked, let alone how it wasn't
20 working, whereas someone with knowledge of the
21 system had that advantage, and a subpostmaster
22 I wouldn't include on what I read in that
23 category to understand the technical aspects of
24 the Horizon system.

25 Q. Just going back to paragraph 532 of your report,
129

1 Office Investigator and/or lawyer decided that
2 it was sufficient to serve a general statement
3 in place of Mr Jenkins examining the underlying
4 data?

5 A. There were various reasons given in various
6 different cases. Insofar as Mr Allen's case is
7 concerned, I'm not sure that I did see a reason
8 beyond the position which had already been
9 stated, that it was for the defendant to
10 identify what had gone wrong and that they would
11 then look at it, rather than for them to
12 investigate whether the system had been reliable
13 or not.

14 What was interesting, just while we're on
15 this paragraph and in this case, is that another
16 lawyer involved, Andrew Bolc, did appear here to
17 be noting that the retrieval of the data from
18 Fujitsu for these purposes would not cost the
19 Post Office anything and, in other cases, cost
20 was given as a reason for not doing things, but
21 that -- what Mr Bolc, was saying here did tend
22 to suggest that that wasn't right.

23 Q. It wasn't operative, at least in this case?

24 A. Yes.

25 Q. What view, if any, did you take of the fact that

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1 as you mentioned Mr Allen's case, it's on
2 page 188, you tell us in this context that the
3 failure to examine detailed data logs in order
4 to investigate the specific issue was, to quote
5 you, "an unfortunate failure in the evidence"
6 but that appeared to be a Post Office decision;
7 would that be right?

8 A. Yes. Yes, he'd -- he, meaning Mr Jenkins, had
9 indicated that it could be done but he wasn't
10 asked to do it.

11 Q. So Mr Jenkins was offering to examine the data,
12 in addition to making a general statement about
13 Horizon reliability?

14 A. Yes.

15 Q. But the Investigator and the prosecutor decided
16 that the general statement was enough; is that
17 right?

18 A. Yes.

19 Q. Would the course of action that Mr Jenkins was
20 offering to undertake have been more in line
21 with the Post Office's duties as a prosecutor,
22 both in terms of reasonable lines of inquiry and
23 disclosure?

24 A. Yes.

25 Q. Did you ascertain why it was that the Post
130

1 a witness was suggesting the possibility of
2 a line of inquiry being pursued, identifying
3 that examination of the underlying data, the
4 logs, might be the appropriate course of action,
5 but the Investigator and the prosecution were
6 saying not to?

7 A. Well, it goes slightly further than that. This
8 is the expert, as they perceived him to be, that
9 they had gone to for his expert knowledge of the
10 system, saying to them that this would be the
11 appropriate way forwarded and for the
12 Investigator and lawyer to say no to that which
13 their expert was telling them would be the
14 logical next thing to do, which, in any event,
15 it should have been clear to them needed to be
16 done.

17 Q. Was that of concern?

18 A. Yes.

19 Q. In that paragraph, 532, and indeed elsewhere in
20 your report -- other paragraphs include 545 and
21 663 -- you are critical of the use of so-called
22 generic statements concerning the reliability of
23 Horizon being presented as expert evidence, and
24 as a collateral point placing an obligation on
25 a defendant to specify particular issues with

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1 Horizon before any further investigation of
2 those issues would take place?

3 **A.** Yes.

4 **Q.** Have I summarised --

5 **A.** Yes.

6 **Q.** -- that concern correctly?

7 Did you form a view who was controlling this
8 exercise, the extent to which specific enquiries
9 were made: on the one hand, the Post Office,
10 and, on the other, Fujitsu, including
11 Mr Jenkins?

12 **A.** Insofar as I could see from what I had, there
13 was this instance here of Mr Jenkins
14 volunteering that something further could be
15 done in relation to the ARQ data and, in this
16 instance, it was the Investigator and the lawyer
17 who said that that wasn't required.

18 In other instances, it was lawyers such as
19 Ms Panter, who were saying a generic statement
20 will do, and so, insofar as I could judge from
21 what I could see, it was the Post Office side of
22 things saying "This is enough", rather than
23 their expert or the company that he worked for
24 telling them that it didn't need to be done.

25 **Q.** I think you're nonetheless critical of the
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1 case of Ms Misra, he was identified an expert.
2 An expert is someone who is expressing their
3 opinion on a matter that is outwith the
4 knowledge of the jury. He was being called to
5 express his opinion as to the operation of
6 a computer system that had been produced by the
7 company that he worked for and about the
8 operation of which the jury were unlikely to
9 know anything at all.

10 **Q.** In the light of that fact, did you identify --
11 again this is generally -- any instructions in
12 any case to Mr Jenkins, which instructions
13 identified to him the duties of an expert
14 witness?

15 **A.** No, none at all and I should say, in relation to
16 that, that I'm not, in that sense, relying on
17 the "Gareth Jenkins Chronology" document.
18 I have been fortified since 4.00 on Friday, when
19 I received them, by two lever-arch files of
20 correspondence between the Post Office and
21 Gareth Jenkins, which shows a lot of contact
22 between them, in not a single one of which were
23 his duties as an expert hinted at.

24 **Q.** Was that of concern to you?

25 **A.** Oh, yes.

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1 failure to make reference within the generic
2 statement of material directly relevant to
3 Horizon reliability that Mr Jenkins was aware of
4 at the time that he made the October 2012
5 generic statement?

6 **A.** Yes, because, as an expert, and bound by the
7 rules in relation to what was required of expert
8 evidence, he was required to identify that which
9 was relevant to and potentially undermining of
10 any opinion he expressed and, if he was
11 expressing an opinion that the system worked
12 properly and he was aware of material that might
13 suggest to the contrary, then he had a duty to
14 disclose that in his report, even if he hadn't
15 been asked to.

16 **Q.** You began that sentence with the words "As
17 an expert"?

18 **A.** Yes.

19 **Q.** Can I ask you please an open question as to why
20 you described Mr Jenkins as an expert --

21 **A.** Firstly --

22 **Q.** -- and what you mean by that?

23 **A.** Firstly, that was how he was treated in the
24 sense that, when his statements were served in
25 these various cases, when he was called in the

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1 **Q.** What level was the concern that you felt?

2 **A.** Well, as I touched on in my Volume 1A, the
3 responsibility of someone instructing an expert,
4 as to what they have to tell their expert, has
5 evolved over time. Certainly now, and for
6 a period of years before now, it's very clear
7 from, for example, the CPS or the Health and
8 Safety Executive that they recognise the
9 importance of making clear to an expert what
10 their duties are, the rules now make clear that
11 they should do that.

12 But the rules for an expert have been clear
13 for quite some time, and the duty on a party to
14 make sure that others involved, such as
15 an expert they're instructing, comply with the
16 rules, made it, in my view, obvious that they
17 ought to have told someone who they were
18 instructing as an expert what their duties were,
19 particularly where they were aware, not least
20 because he told them, that he hadn't done this
21 kind of thing before.

22 **Q.** We're going to come perhaps tomorrow to the
23 detail of that. You're referring, I think, to
24 an email where he asks expressly for help --

25 **A.** Yes.

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1 Q. -- and says, "I've not done this before" --
 2 A. Yes.
 3 Q. -- "what should happen?"
 4 A. Yes.
 5 Q. "What do I need to do?"
 6 A. Yes.
 7 Q. In this context, the present context I'm asking
 8 you, which is the preparation of the generic
 9 statement, do you agree that it was important
 10 for the Post Office prosecutors to tell
 11 Mr Jenkins, remind him of his duties to the
 12 court, in particular in relation to the
 13 disclosure of any information that undermined
 14 the views that he was expressing, when proposing
 15 that he should provide a generic statement
 16 concerning Horizon?
 17 A. Yes.
 18 Q. That didn't happen?
 19 A. No.
 20 Q. Can we look, please, at POL00026567. You'll see
 21 from the first page here that this is a case
 22 concerning Kim Wylie. Again, it's not one of
 23 the case studies but it's the beginning of the
 24 trail, which leads to the generic statement,
 25 I think. We'll see that this is an advice by
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1 proof system. We can expect this to go viral in
 2 that any competent defence solicitor advising in
 3 a case such as this will raise the integrity of
 4 the Horizon system and put us to proof as to its
 5 integrity. As all of our cases depend on the
 6 system to compute the alleged losses this is
 7 likely to affect a considerable percentage of
 8 our cases.
 9 "4. The extra evidence which we will be
 10 obliged to gather will be as nothing in
 11 comparison to the potential disclosure problems
 12 we may face. Until the Second Sight ... is
 13 concluded we will be in limbo. It is essential
 14 that this ... is completed as soon as possible
 15 and we can live by its findings. We will have
 16 to find out when this enquiry will report in
 17 order that we choose our strategy. If it is
 18 a matter of weeks, then cases can be put over
 19 until after it reports. If we are talking
 20 months then the courts will not wear such
 21 delays.
 22 "I assume we will contend that the system is
 23 foolproof in which ... we should defend it
 24 aggressively. I understand the manufacturers
 25 have not been helpful up until now. My
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1 Harry Bowyer of Cartwright King?
 2 A. Yes.
 3 Q. It's after Second Sight have been announced as
 4 investigators and, if we just scroll through it,
 5 please, paragraph 1:
 6 "In my earlier advice I advised we would
 7 need to prove the integrity of Horizon as there
 8 was apocryphal evidence on the Internet and
 9 elsewhere that the system was leading to
 10 injustice.
 11 "The position of the Post Office has, up
 12 until now, always been very robust. When the
 13 system has been challenged in the criminal
 14 courts the system has always been successfully
 15 defended."
 16 Second Sight has been announced:
 17 "Whether this announcement was well
 18 considered or not is not an area that I intend
 19 to address but the bell cannot be unrung and
 20 there will be consequences ..."
 21 Then if we scroll on, please:
 22 "... we have now given ammunition to those
 23 attempting to discredit the Horizon system. The
 24 argument will be there is no smoke without fire
 25 and we would not have needed to audit a bomb
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1 understanding is they will not provide expert
 2 evidence without large fees being sought. This
 3 will not do. If the integrity of the system is
 4 compromised then the consequences will be
 5 catastrophic for all of us including them. The
 6 financial consequences of convictions and
 7 confiscation orders being overturned and
 8 confidence in the Post Office bookkeeping being
 9 restored for future prosecutions will be
 10 astronomical. They should be made to understand
 11 that this is a firefighting situation and it is
 12 not just our house that will be burned down if
 13 the system were compromised."
 14 Then on to 6, please.
 15 "... we should attend to the following:
 16 "... identify the contested cases, both
 17 criminal and civil, in which Horizon has been
 18 challenged ... identify areas of challenge and
 19 how we neutralised them. Any expert report
 20 should be retained for evaluation. An expert
 21 should be identified and instructed to prepare
 22 a generic statement which confirms the text of
 23 the system and why the attacks so far have been
 24 unfounded. This expert should be deployed in
 25 all cases where the Horizon system is challenged
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1 and he should be prepared to be called to reply
2 to defence experts on a case-by-case basis."

3 Just stopping there, and putting aside
4 Mr Bowyer's turns of phrase, did you identify
5 anything problematic with the approach set out.

6 **A.** Well, the first point that occurs is that
7 Mr Bowyer is there identifying a need to
8 consider earlier cases, where issues with
9 Horizon had arisen with a view to an expert now
10 explaining how -- why those earlier attacks had
11 been unfounded, rather than there being any
12 consideration here of whether the material
13 generated by earlier cases where Horizon had
14 come into attack was material that was capable
15 of undermining the prosecution case, assisting
16 that of another defendant and, therefore, it
17 being material that ought to have been disclosed
18 to them.

19 And the other point is that this, as it
20 describes, is a generic statement to confirm the
21 integrity of the system, rather than asking
22 an expert to examine the integrity of the system
23 in relation to any case that is going to be
24 prosecuted. So it's a bit like the press
25 release that asserted that the system worked

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1 it may be worth I share his view."
2 Yes?

3 **A.** Yes.

4 **Q.** Then further up the page, please. Mr Singh
5 distributes it:

6 "Hugh -- Cartwright King's lawyer in the
7 case of Wylie has advice on evidence and also
8 how to progress Horizon challenges, in view of
9 its content can this be forwarded to case
10 officer and Dave Pardoe.

11 "[Jarnail Singh]."

12 So it has been distributed around the
13 organisation?

14 **A.** Yes.

15 **Q.** Do you view what had been advised, its adoption
16 by Mr Cash and its promulgation on to the Post
17 Office, as consistent with the duty on
18 solicitors who have the conduct of private
19 prosecutions to discharge their duties to act as
20 ministers of justice?

21 **A.** No, because it didn't identify, nor did anyone
22 who had received Mr Bowyer's advice identify,
23 that it was advising on a bandage, rather than
24 on an investigation of what the illness was, or
25 what the injury was. It was looking at how to

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1 well, that Mr Singh and others had been working
2 on in 2012, rather than meeting the
3 prosecution's obligations, both in relation to
4 the reliability of their evidence or disclosure
5 in relation to their case of material that might
6 undermine that, or at least to look whether it
7 was reliable or not, on a case-by-case basis,
8 rather than through a generic statement.

9 **Q.** So if we go to the last page of this document,
10 if we just scroll on a bit. We'll see it's
11 dated 11 July 2012, and that seems to be the
12 origin of the idea of a generic statement --

13 **A.** Yes.

14 **Q.** -- prepared by an expert. Mr Bowyer doesn't
15 identify that the expert should come from
16 Fujitsu --

17 **A.** No.

18 **Q.** -- or the identity of the expert?

19 **A.** No.

20 **Q.** Can we go to POL00141396. Can we see at the
21 foot of the page, or halfway down, Mr Cash,
22 a solicitor at Cartwright King, sending that
23 advice over to Jarnail Singh from Mr Bowyer
24 saying:

25 "I know it will be unpalatable, but for what
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1 protect the system, rather than to assess the
2 reliability of the fundamental evidence in the
3 prosecution of subpostmasters.

4 **Q.** I should have said that Mr Bowyer was in-house
5 counsel, rather than a solicitor.

6 **A.** Yes.

7 **Q.** Did you regard the advice and its adoption and
8 promulgation as consistent with the proper
9 approach to disclosure, in accordance with the
10 CPIA and the Code of Practice issued thereunder?

11 **A.** No, it's effectively, rather than identifying
12 a reasonable line of inquiry, on the one hand,
13 and material capable of undermining the
14 prosecution case or that, if it was in their
15 possession, might undermine the prosecution
16 case, on the other, it was seeking a statement
17 that would obviate the need for either.

18 So rather than checking whether the system
19 was reliable, they would have a statement that
20 they could just add to the bundle that will
21 assert it was fine without checking and they
22 would have a statement that would close off
23 enquiries of -- on the part of the defendants,
24 or disclosure requests from defendants, in
25 relation to the operation of the system, rather

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1 than identifying there would be material that
2 needed to be investigated as to whether the
3 system was working properly.

4 **Q.** Just before the break, can we look at
5 POL00141416, please. An email -- sorry, if we
6 scroll down, please -- back to the top, please.

7 Can we see this is an email, if you scroll down
8 a little bit you'll see I think it's from
9 Mr Bowyer, Harry, yes?

10 **A.** Yes.

11 **Q.** Then to the top, this is its cut off but it's
12 dated 6 August. The advice we'd seen was July,
13 if you remember.

14 **A.** Yes.

15 **Q.** "This appears to be what we want.

16 "Hopefully Helen will confirm that the
17 Horizon system has never been successfully
18 challenged. I have yet to see any sign of any
19 experts briefed on behalf of the defence.

20 "When she has completed her exercise she
21 should prepare a summary of those cases where
22 there is a proper attack on the system rather
23 than a gripe that the system is at fault
24 (although she should record those cases so that
25 we can say that they have been kept under

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1 If we stop there, remember those four
2 questions, and then come back after the break to
3 see what happened to them and what ended up
4 being produced, as a result of them.

5 Sir, can we break until 3.30, please.

6 **SIR WYN WILLIAMS:** Yes, of course.

7 **MR BEER:** Thank you.

8 (3.16 pm)

(A short break)

10 (3.30 pm)

11 **MR BEER:** Sir, can you see and hear us?

12 **SIR WYN WILLIAMS:** Yes, thank you.

13 **MR BEER:** Thank you.

14 Mr Atkinson, we had just looked at the four
15 questions that Mr Bowyer had prepared in his
16 email of 6 August. Can we move on to September
17 2012 and look at POL00020489. If we scroll to
18 the second email down there. Mr Singh says:

19 "Andy [that's Andy Cash]

20 "Thinking about choice of expert in this
21 case. I have in the past instructed Gareth
22 Jenkins of Fujitsu in the case of *Misra* which
23 incidental was the only challenge on Horizon, he
24 provided expertise in dealing with defences
25 boundless enquiry into the whole Horizon system.

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1 review -- they will become more numerous as the
2 bandwagon and pikes up speed)."

3 Then this:

4 "The expert will need to address the report
5 to the following issues ..."

6 And then four issues are identified; can you
7 see that?

8 **A.** Yes.

9 **Q.** "A description of the Horizon system;

10 "A declaration that it is yet to be attacked
11 successfully;

12 "A summary of the basic attacks made on the
13 system concentrating on any expert reports
14 served in past cases. If there are none, then
15 state that no expert has yet been found by any
16 defence team, civil or criminal, to attack the
17 system (at the moment there seems to be little
18 more than griping by defendants that the system
19 must be at fault without saying how).

20 "4. Plainly, like all accounting systems,
21 there is room for human error (Keying in the
22 wrong amounts etc) but the expert should be able
23 to state that innocent human error is unlikely
24 to produce the types of discrepancies of many
25 thousands of pounds over many months."

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1 Perhaps we need to reconsider whether to
2 instruct him as he may be viewed too close to
3 the system but instruct

4 "Somebody entirely independent? Your
5 thoughts please and also whether you or Harry
6 have anybody in mind.

7 "Thank you."

8 Then further, up the page, Mr Bowyer says:

9 "I would have preferred somebody entirely
10 independent but this is such a specialist area
11 that we would be hard pushed to get a report in
12 the timescale we require -- we might open our
13 expert up to allegations of partiality but his
14 expertise will be unlikely to be challenged."

15 Then there's some timing issues.

16 In the light of that exchange, the Post
17 Office internal lawyers, on the one hand, and
18 the Cartwright King lawyer, on the other, were
19 seemingly aware, would you agree, of Mr Jenkins
20 not being functionally independent?

21 **A.** Yes.

22 **Q.** Given the breathless tones in which Mr Bowyer's
23 memo had earlier been written, as to this being
24 a potential moment of crisis, do you agree that,
25 given that significance that was being attached

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1 to the issue of the instruction of an expert,
2 and this recognition that Mr Jenkins was not
3 functionally independent, it was important that,
4 if Mr Jenkins was instructed, that he should be
5 made to understand that he was subject to a wide
6 range of duties --

7 **A.** Yes.

8 **Q.** -- as an expert witness?

9 **A.** Yes, and, in particular, a requirement that he
10 be independent.

11 **Q.** What do you mean by that?

12 **A.** Well, it was essential that he were -- he
13 understood that he was being asked to give his
14 independent opinion about these things, rather
15 than to provide evidence that was mapped out for
16 him or to give an opinion that he was being told
17 to give, in effect.

18 **Q.** Can we turn to POL00096978. We can see this is
19 an email of 1 October 2012 to Mr Singh -- sorry,
20 from Mr Singh to Mr Jenkins. Also included in
21 the distribution list is Penny Thomas of
22 Fujitsu, Hugh Flemington of the Post Office,
23 Martin Smith of Cartwright King. Subject
24 "Horizon Fujitsu Report Very Urgent":

25 "Welcome from your annual leave and your
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1 our report.

2 "You will need to consider the Disclosure
3 officers document/spreadsheet (see attachments)
4 and need to address in your report the following
5 issues ..."

6 Then cut and pasted into this email is the
7 Harry Bowyer 6 August list of four.

8 **A.** Yes.

9 **Q.** Yes?

10 To the extent that it's possible to
11 understand what Mr Singh was asking to be done
12 by this email, do you agree that the email, on
13 any view, omitted any instructions or guidance
14 to Mr Jenkins as to his duties as an expert?

15 **A.** Yes.

16 **Q.** I think it also omitted reference to any
17 specific prosecution, any specific defendant,
18 any specific branch, nor did it refer to any
19 Horizon data that might be analysed in order to
20 reach conclusions?

21 **A.** Yes.

22 **Q.** The email says that the report, or Mr Jenkins,
23 will need to address the following issues and
24 there are four of them set out. Was this
25 an appropriate means of instructing Mr Jenkins?
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1 assistance advice in the past prosecution cases
2 and I understand you are assisting my colleagues
3 at present. I need your urgent assist judge has
4 this morning ordered the prosecution to have the
5 following report ready to be served within Seven
6 days. On advise Post Office Limited have
7 appointed one of their investigators, Helen
8 Rose, as disclosure officer dealing with Horizon
9 challenges. She has prepared a document/spread
10 sheet detailing all such cases, past and
11 present, approximately 20 in total, although
12 none thus far successfully argued in court.
13 Post Office Limited have been advised to obtain
14 an experts report from Fujitsu UK, the Horizon
15 system developers, confirming the system is
16 robust."

17 Just stopping there, is that the antithesis
18 to the type of instruction that you just
19 mentioned?

20 **A.** Yes.

21 **Q.** "Post Office Limited maintain the system is
22 robust, but in the light of adverse publicity,
23 from legal viewpoint is that defence should be
24 given opportunity to test the system, should
25 they still wish to do so, on consideration of
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1 **A.** As an email as a whole, it was far from
2 an appropriate way to instruct an expert. It
3 didn't set out what Mr Jenkins' responsibilities
4 and duties as an expert were, as we've already
5 touched on. It didn't remind him of his duty of
6 independence, that he owed his duty to the court
7 and not to those who were instructing him.

8 In terms of the four Bowyer points, as cut
9 and pasted into this, the first one, no
10 difficulty with that, and asking him to give
11 a description of the system in layman's terms
12 was not an issue. A declaration that it has yet
13 to be attacked successfully, on the one hand,
14 sounds as if it is telling him what he has to
15 say, which, given that he is being instructed as
16 an independent expert, would not be
17 appropriate --

18 **Q.** It is also false.

19 **A.** -- and that never helps -- and underlines the
20 viewpoint that he's meant to be coming from,
21 which had already been set out rather too
22 clearly in the first large paragraph on the
23 page.

24 A summary of the basic attacks made on the
25 system, and drawing a difference between griping
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1 and anything else, again, was telling him what
2 to say and how to approach it.

3 And the last, point 4, is almost a script
4 for him of what to say.

5 So what would have been appropriate would
6 have been to identify a series of areas on which
7 they were asking for his opinion, as
8 an independent expert rather than telling him
9 what his opinion was on a series of areas and,
10 effectively, telling him that he was being
11 instructed to defend the system and to assert
12 that it didn't have issues.

13 **Q.** Are you able to say whether a person in receipt
14 of such an instruction, if they knew of issues
15 or defects that fell outside the four corners of
16 the four issues that are mentioned, ought
17 nonetheless to have set them out in any written
18 document that was a reply to this email?

19 **A.** Yes, at the very least, you would have expected
20 anyone who was aware of issues with the system
21 to say, "These are the issues with the system
22 that I ought to address in this context". And
23 so if, by way of example, you were aware of the
24 bug in the system that you had had meetings
25 about in 2010, you ought to have been flagging

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1 incomplete or perhaps misleading.

2 **Q.** Would you agree that, in any event, the four
3 specific questions do not ask Mr Jenkins to
4 provide a general overview of software issues?

5 **A.** They're asking him to provide a generic
6 statement about the system. Certainly, my
7 reading of it, I wouldn't see that as excluding
8 software issues but, if it was unclear, then one
9 could ask.

10 **Q.** What about hardware issues: same answer?

11 **A.** Same answer.

12 **Q.** What would you say to the suggestion that the
13 focus of this email requires Mr Jenkins himself
14 to focus on defence-led challenges, in the
15 course of previous litigation, and nothing else?

16 **A.** Well, the -- he was clearly being asked to deal
17 with defence-led issues in relation to question
18 3, but these was also being asked more generally
19 to provided support for the Post Office view
20 that the system was robust. That's clear from
21 the paragraph at the top of the page.

22 He would also, by this point in 2012, have
23 been aware of how wide-ranging defence
24 questioning in relation to the operation of the
25 system could be, because he had been questioned

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1 that up in 2012.

2 **Q.** Even if that wasn't a bug which constituted
3 a successful attack by a defendant upon the
4 system or a bug that had been mentioned in
5 an expert report served in a past civil or
6 criminal case?

7 **A.** Well, at the very least, if you're being asked
8 to put together a report that would go to court
9 and which you would potentially have to answer
10 to, in court, you would be asking for guidance
11 as to what, if anything, you needed to say about
12 X that you were aware of, that was an issue with
13 the system, that was beyond a typing error or
14 griping.

15 **Q.** What would you say to the suggestion that, to
16 the extent that this was an instruction to
17 a witness, it was to produce a report that
18 addressed and only addressed the four specific
19 questions as narrowly formulated by Mr Bowyer?

20 **A.** I think I would say to that that, if you were
21 putting your name to a declaration of truth in
22 relation to this, at the very least, you would
23 be questioning whether a statement that just
24 answered those four points and said nothing
25 else, when you knew there was more, was

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1 in the case of Ms Misra and that had been
2 wide-ranging questioning.

3 So, at the very least, he would have had
4 questions in his mind as to what needed -- this
5 needed to cover, I would have thought.

6 **Q.** Taking a step back, however, for a person that
7 was not, by training or profession, an expert
8 witness, would you agree that, as a letter or
9 document of instruction, this was woefully
10 inadequate?

11 **A.** Yes.

12 **Q.** Mr Jenkins duly produced a draft report
13 responding to the four Bowyer questions, and
14 this was circulated, amongst others, at
15 Cartwright King on 2 October. If we look,
16 please, at POL00096997. If we scroll down,
17 please. Keep scrolling, please. If we just
18 scroll up to get the date. Harry Bowyer to
19 Martin Smith and Andy Cash, so internal to
20 Cartwright King at the moment:

21 "At first sight this/these look like a good
22 base upon which are reports can be based (as
23 most are fishing expeditions they will do in
24 their current form).

25 "I have edited the last report ... because

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1 as it currently stands it is an invitation for
2 requests for further disclosure ... Can you put
3 this past Mr Jenkins.

4 "Can you draft generic Section 9 statements
5 for the witness to produce the report(s). This
6 must set out his expertise to comment on the
7 system both the old and new -- we have to
8 establish his right to speak an expert.

9 "I am in favour of the descriptive words
10 being added to the diagram ...

11 "Beyond that keep it simple -- the secret
12 here will be to respond to the defence expert
13 report rather than try to anticipate every rock
14 to be thrown at us -- unless they be obvious
15 from the defence statement/interviews.

16 "If there is a specific challenge in a case
17 then the statement and the report can be tweaked
18 to cover the eventuality.

19 "My view is that most challenges to the
20 Horizon system should now vanish away before
21 trial."

22 This seems to involve a discussion amongst
23 the Cartwright King lawyers that defence cases
24 that had raised Horizon issues were fishing
25 expeditions?

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1 perhaps you could look at your previous
2 statement and let me have your qualifications,
3 credentials, experiences, knowledge, expertise
4 of the Horizon system. On receipt I will
5 forward draft statement for your approval."

6 So a request to put this in statement
7 format?

8 **A.** Yes.

9 **Q.** Can we look, please, at POL00097008. Then
10 scroll down, please, foot of the page, keep
11 going, please. If we just scroll up to catch
12 the date, please, 4 October. Mr Jenkins to
13 Mr Singh.

14 "Sorry for the delay. I've been in meetings
15 ...

16 "I've made some changes ... to tidy up
17 formatting and add in some text below the
18 diagrams -- mainly pasted from the Referenced
19 [Documents].

20 "In the [document] you sent me you were
21 asking what the 2 [documents] referenced in
22 Section 3 were. They are the 2 brief documents
23 on Horizon integrity and Horizon Online
24 integrity I sent you on Tuesday. I think it is
25 clearer to keep these as separate stand alone

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1 **A.** Yes.

2 **Q.** It appears to proceed on the basis that the only
3 point that needed to be established still
4 further was Mr Jenkins' qualification to give
5 an expert report?

6 **A.** Yes.

7 **Q.** It doesn't ensure or suggest "We now need to
8 ensure that Mr Jenkins was properly instructed
9 as an expert"?

10 **A.** No, and doesn't refer to the need for him to
11 provide a declaration of the kind envisaged by
12 the rules in relation to his duties as
13 an expert, either.

14 **Q.** Can we look, please, at POL00096999. If we
15 scroll down, please, and still further.

16 Mr Jenkins:

17 "Dear Jarnail,

18 "Attached are the two existing reports

19 I mentioned regarding Horizon and Horizon Online
20 integrity."

21 They're a separate issue. Then further up,
22 Mr Singh:

23 "Thank you for forwarding your report. As
24 in previous cases you kindly assisted in your
25 report needs to be put in a statement format,

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1 [documents] which can presumably be presented as
2 part of the witness statement ... You have
3 [also] removed my explicit reference to the
4 *Misra* witness statement. Presumably this will
5 also be available since that is where the main
6 rebuttal of [Professor] McLachlan's hypotheses
7 is covered."

8 Do you understand this to be Mr Jenkins
9 saying, "Although you're making out my
10 references in my witness statement to other
11 documents, I presume that those documents are
12 going to be available" --

13 **A.** Yes.

14 **Q.** -- "in the prosecution in court"?

15 **A.** Yes.

16 **Q.** Then scroll up, please. Martin Smith to
17 Mr Singh:

18 "... I have deleted the first paragraph of
19 Section 3. If the report is served in its
20 [current] form the Defence will ask for copies
21 of the [documents]. However if Gareth, as
22 an expert, feels that the [documents] should be
23 provided, he will need to give them exhibit
24 numbers ..."

25 Scroll up, Gareth:

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1 "I would prefer to present the [documents]
 2 as Exhibits, so can the wording of section 3 be
 3 changed accordingly."
 4 So it appears that Mr Jenkins is saying,
 5 "I want the documents that I previously
 6 prepared, the two reports, to be revealed" --
 7 **A.** Yes.
 8 **Q.** -- "and as exhibits to my witness statement"?
 9 **A.** Yes.
 10 **Q.** Can we look, please, at FUJ00153812.
 11 "Please find draft statement ..."
 12 This the 4th now at 11.43:
 13 "... for you to consider, amend and return
 14 ..."
 15 Then, lastly, FUJ00123982. The 5th,
 16 Ms Jennings:
 17 "Please find attached the Section 9 witness
 18 statement. It was not as simple as just cutting
 19 and pasting ..."
 20 In that final draft of the witness statement
 21 that was sent across, the words "I understand
 22 that my role is to assist the court" had been
 23 added by either the Post Office or Cartwright
 24 King. Would you agree that those words, without
 25 more, were insufficient to satisfy the
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1 "I'm not aware of any outstanding cases
 2 which I might be involved in."
 3 Further up the page, Ms Jennings replies:
 4 "This is the one that you supplied the
 5 expert report and witness statement for the week
 6 before last."
 7 I think that's a reference to the generic
 8 witness statement:
 9 "Apologies for not explaining that properly
 10 in the previous email. It was a blanket email
 11 for all witnesses! It is unclear at this stage
 12 who will be required as witnesses and which
 13 evidence will be accepted without the need for
 14 attendance."
 15 Then the rest of it is concerned with Andy,
 16 and then scroll up the page, please:
 17 "[Thank you] for the clarification. I had
 18 not understood that that related to a specific
 19 case ..."
 20 I think that's the generic witness
 21 statement:
 22 "... I thought that was a general statement.
 23 If I am required to go to court for that,
 24 I think I need to have some more background on
 25 the specific case and exactly what is being
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1 requirements arising on an expert report, either
 2 at common law or under the Criminal Procedure
 3 Rules.
 4 **A.** Yes.
 5 **Q.** The statement as served did not include
 6 a statement that Mr Jenkins had complied with
 7 his duty to the court to provide independent
 8 assistance by way of objective and unbiased
 9 opinion, in relation to matters within his
 10 expertise. Was that cured by the inclusion of
 11 the words "I understand that my role is to
 12 assist the court"?
 13 **A.** No.
 14 **Q.** Can we look, please, at POL00097061, and scroll
 15 down, please.
 16 This is a generic email, it seems, that goes
 17 out from Sharron Jennings to a series of
 18 witnesses in the Patel case, including
 19 Mr Jenkins: the case is up for trial at
 20 Peterborough Crown Court but has been put back
 21 until 14 January and is listed for a seven-day
 22 trial.
 23 Then scroll up, please. Mr Jenkins replies:
 24 "Sorry, but I'm not aware of this case or
 25 what might be required of me ...
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1 alleged. I appreciate that is not covered by my
 2 statement, but if I need to be an expert
 3 witness, I need to understand what is happening.
 4 "Please note that if I am required to do
 5 anything further on this, some commercial
 6 arrangements will need to be made to cover my
 7 time and costs since I am not covered by the
 8 normal Security Service that [the Post Office]
 9 pays for. Perhaps you can sort out the
 10 details", et cetera.
 11 Then up the page, please, we can see that
 12 Ms Jennings replies to Mr Jenkins amongst
 13 a large collection of other people, but most
 14 specifically addresses her reply to Post Office
 15 Security, the generic email address:
 16 "There appears to have been some sort of
 17 confusion regarding the trail of emails below.
 18 Gareth was asked to supply an expert report on
 19 Horizon integrity by the Legal Team and I was
 20 asked to input this onto a Section 9 statement
 21 in order to produce it in court. Gareth was not
 22 aware that this related to a specific case and
 23 was also not aware that he would be required in
 24 court. I have spoken to Gareth and he is happy
 25 to attend but as explained below it is over and
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1 above the [Business As Usual] arrangements that
2 we have with Fujitsu so some extra arrangements
3 are required in order to cover extra costs and
4 time ..."

5 Putting aside for the moment the parts of
6 the emails that concern the extent of the BAU
7 arrangements and the provision of extra costs
8 and time, do you agree that this is a concerning
9 exchange of emails involving Mr Jenkins?

10 **A.** In the sense of his apparently not having
11 understood what he was providing the generic
12 statement for, yes, it is.

13 **Q.** He, would you agree, appears to be under a state
14 of some confusion as to the role that he is
15 performing?

16 **A.** Yes.

17 **Q.** He says:

18 "I thought this was a general statement. If
19 I'm going to come back to court for a specific
20 case, I need more background on the specific
21 case and what is being alleged in that case."

22 **A.** Yes.

23 **Q.** In your oral evidence to the Inquiry back on
24 6 October, you stated that the cost of obtaining
25 material was not a relevant consideration in

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1 in which the lawyers adopted the view that it
2 was for the defence to identify what the problem
3 was with Horizon?

4 **A.** Yes.

5 **Q.** Did you form a view as to the appropriateness of
6 that approach?

7 **A.** Yes, I thought it wasn't appropriate at all.

8 **Q.** Can we look, please, at POL00059404. If we go
9 down the page, please, and scroll down, please.
10 We get, if we just scroll up a little bit,
11 an email of 16 November 2012, from Rachael
12 Panter, yes?

13 **A.** Yes.

14 **Q.** If we scroll down, please, she says that:

15 "... most, if not all cases raising the
16 Horizon system as an issue, have been unable/not
17 willing to particularise what issues they may
18 have with the system, and how that shapes the
19 nature of their defence."

20 **A.** Yes.

21 **Q.** That's similar to the language I think we saw
22 earlier from Mr Bowyer?

23 **A.** Yes.

24 **Q.** Is that consistent or not consistent with the
25 proper approach of a prosecutor to the issue

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1 deciding whether to seek material from a third
2 party?

3 **A.** In general terms, that's right, yes.

4 **Q.** You identify in various places across your
5 Volume 2 report instances where cost appears to
6 have been a factor in decision making?

7 **A.** Yes.

8 **Q.** Was this exchange amongst those areas of
9 concern?

10 **A.** I don't think I had seen -- in fact, I'm looking
11 at how they're described, I hadn't seen this
12 exchange and so, no, it wasn't.

13 **Q.** That can come down. Thank you.

14 During your oral evidence to the Inquiry,
15 again back on 6 October, you stated that, when
16 making decisions on disclosure, the prosecutor
17 should not restrictively analyse the case of
18 a defendant, not least because the defence might
19 not be able to identify something that they
20 don't know anything about.

21 **A.** No, and the Attorney General's Guidelines, by
22 way of example, make that clear.

23 **Q.** You, I think, have seen a range of
24 correspondence amongst Post Office lawyers and
25 between Post Office lawyers and Investigators,

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1 that you're presently addressing, namely whether
2 it's for the defendant to, in these Horizon
3 cases, identify an issue with Horizon before the
4 prosecutor investigates it?

5 **A.** It's putting the onus on the defence to identify
6 the specific respect in relation to which the
7 Horizon system was not reliable, rather than
8 recognising the obligation on the prosecution to
9 satisfy itself and then others as to the
10 reliability of the system that underpinned its
11 prosecution.

12 **Q.** If we scroll up, please -- thank you.

13 Mr Jenkins says:

14 "Can't you use the report I have already
15 sent you? There is no mention of the case
16 [that's Khayyam Ishaq] on the report.

17 "You should really be addressed such
18 requests through Post Office Limited rather than
19 directly to myself.

20 "... there is no commercial cover in place
21 for me to spend ... time on such activities ..."

22 Then up, please. James Davidson, a delivery
23 executive at Fujitsu, says:

24 "I am concerned at the engagement approach
25 being taken here, we are fully on board to

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1 support but all approaches must come through
 2 Post Office by the correct change process."
 3 Then up, keep going, please, then a reply to
 4 both James Davidson and Gareth Jenkins:
 5 "Apologies if I have approached this in
 6 an unconventional way."
 7 Second paragraph:
 8 "In response to your email Gareth, I do
 9 intend to use the report that you have already
 10 provided."
 11 Then this:
 12 "It doesn't matter that you have not
 13 mentioned a specific case in your report, as
 14 there has not been any specific criticisms
 15 raised by any of the defendants provided in my
 16 list of cases. It would be a different scenario
 17 if there had been specific criticisms made, as
 18 your report would have to respond to that
 19 particular issue."
 20 Does that approach evidence the advice that
 21 you were managing a moment ago?
 22 **A.** Yes, because in any one case a postmaster, while
 23 being interviewed, may have identified that they
 24 were experiencing problems. They may even have
 25 said something about the circumstances in which
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1 disclosure. It's paragraph 666 of your second
 2 report, which is on page 238. You say:
 3 "... there was no real discussion that
 4 I have seen, beyond this discussion as to cost
 5 ..."
 6 This discussion as to cost is referring back
 7 to some previous paragraphs, in particular
 8 concerning the Seema Misra case, where the cost
 9 of obtaining disclosure was a topic of
 10 discussion.
 11 **A.** Yes.
 12 **Q.** "... there was no real discussion that I have
 13 seen, beyond this discussion as to cost, of the
 14 relationship between the Post Office and
 15 Fujitsu, in relation to the obtaining and
 16 disclosure of material held by Fujitsu that was
 17 potentially relevant to the Post Office's
 18 prosecutions."
 19 Are you identifying here that you would have
 20 expected to see some written exchanges, some
 21 communications, between the prosecutor and this
 22 third-party provider of material, about how the
 23 third party is going to provide material?
 24 **A.** Two stages. That is the second stage. The
 25 first stage is, I would have expected to see
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1 they were identifying those problems or the
 2 period during which they were experiencing those
 3 problems and there was then a responsibility on
 4 the investigation and the prosecution to test
 5 that to see if there was something that explains
 6 how that might have been, either to rebut it, or
 7 to identify material that was capable of
 8 supporting it. That is a specific exercise for
 9 a specific case, based on specific facts and
 10 based more particularly on specific data.
 11 It is not something that doesn't matter
 12 because the subpostmaster wasn't able to give
 13 technical chapter and verse as to exactly what
 14 had gone on.
 15 **Q.** Would you consider this to be a further example
 16 of the Post Office restricting its evidence and
 17 its disclosure obligations by reference to the
 18 way in which the defence case was put?
 19 **A.** Yes.
 20 **Q.** Thank you. That can come down.
 21 **A.** It was not identifying a reasonable line of
 22 inquiry and it was not grappling with their
 23 disclosure obligations.
 24 **Q.** Thank you. Can we turn to topic 6, please,
 25 which is a wider issue of third-party
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1 discussion between Investigator and prosecutor,
 2 as recognising the need to obtain material from
 3 the third party, Fujitsu, because it was
 4 potentially relevant, either as evidence or as
 5 disclosure, as to the reliability of the system
 6 that was operated by Fujitsu.
 7 **Q.** Did you identify any examples or occasions on
 8 which the Post Office made clear to Fujitsu the
 9 nature and scope of its, the Post Office's,
 10 disclosure obligations?
 11 **A.** No.
 12 **Q.** As to its, the Post Office's, obligations to
 13 obtain material from third parties such as
 14 Fujitsu?
 15 **A.** No.
 16 **Q.** As to the categories of material that Fujitsu
 17 held and which were potentially relevant for at
 18 least consideration for disclosure in
 19 a prosecution?
 20 **A.** No, and, as part of that, under the Attorney
 21 General's Guidelines, there was a requirement on
 22 the prosecutor and investigation to notify
 23 a third party that might have material that it
 24 might need to seek, to ask it to retain the
 25 material, at the very least.
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1 Q. Well, that's where I was going next, given that
2 requirement of notification under the AG's
3 Guidelines, did you see any communications that
4 at least put Fujitsu on notice as to its
5 retention policies, given that the data that it
6 was producing may be needed in a prosecution?

7 A. No.

8 Q. Thank you. Can we turn to topic 7, please,
9 disclosure and unused material. Way back in
10 paragraph 17 of your report, which is on
11 page 12, you say:

12 "In procedural terms" --

13 Sorry:

14 "There was, in particular, failures of
15 disclosure in relation to Horizon data. This
16 included the failure to close it underlying
17 material to that relied on, including ARQ data,
18 either at all or to the extent necessary. The
19 attitude that appears to have informed
20 disclosure was the belief that the defence
21 should identify with clear focus what the
22 problems [were]."

23 I'm sorry I'm reading from 18.

24 A. Yes.

25 Q. "That was a flawed approach."

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1 defence case and, therefore, necessarily
2 involved consideration of material that might
3 undermine a prosecution?

4 A. Yes.

5 Q. Would you agree that, in the light of those
6 requirements of the Code, it's difficult to see
7 how a prosecutor could apply the Full Code Test,
8 if they haven't seen a Schedule of Unused
9 Material, at the point at which they're deciding
10 on charge?

11 A. Ordinarily, you would expect that they would,
12 and the alternative would be for them to be
13 provided with all the unused material, instead
14 of a schedule of it. But they'd have to have
15 one or the other.

16 Q. Would you, in that alternative way, agree that
17 that would necessarily involve some rigorous
18 means of ensuring that an appropriate search had
19 been carried out by the Investigator, with
20 appropriate diligence, and that the material
21 which might undermine the prosecution case or
22 assist the defence had itself been provided to
23 the prosecutor?

24 A. You would expect them to check what they were
25 given and, if it didn't fulfil the requirements

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1 Then going back to 17:

2 "In procedural terms, the Disclosure
3 Officer, who was usually also the Investigator,
4 usually did prepare Schedules of Unused
5 Material. These were often inadequate in terms
6 of their content and description, and there is
7 little evidence that they were reviewed, as ...
8 required, by the prosecutor. Decisions as to
9 disclosure from the schedules were flawed or
10 overly restrictive. In some cases this position
11 was improved by action from trial counsel."

12 The Full Code Test, under the Code for Crown
13 Prosecutors required, is this right,
14 a prosecutor to consider whether reasonable
15 lines of inquiry had been pursued?

16 A. Yes, the Code in that respect evolved over time,
17 and that requirement became clearer with each
18 iteration.

19 Q. It required the prosecutor to consider whether
20 any further evidence or material was likely to
21 affect the application of the Full Code Test,
22 whether in favour or against the prosecution?

23 A. Yes.

24 Q. The evidential stage -- and I think this applied
25 at all times -- required a consideration of the

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1 that you've just set out, then they should be
2 going back to the Investigator requiring it,
3 rather than making a decision without it.

4 Q. So the point I'm exploring with you is that, at
5 the point of deciding on charge, advising on
6 charge, and we looked at a run of --

7 A. Yes.

8 Q. -- advices on charge earlier, at that point,
9 should the prosecutor either have material
10 equivalent to unused material or a Schedule of
11 Unused Material?

12 A. Yes, or should be asking for it if it's not been
13 provided.

14 Q. And shouldn't advise without it?

15 A. Certainly shouldn't -- yes -- advise as to
16 charge without it. No.

17 Q. Can we look, please, at POL00052884. This is
18 the charging memorandum in relation to the
19 prosecution of Tahir Mahmood. It's dated 27 May
20 2005 and we go to the second page again. Scroll
21 down, and the third page, Juliet McFarlane. If
22 we scroll up, please, paragraph 1 says there's
23 sufficient evidence, yes?

24 A. Yes.

25 Q. But then, if we scroll down, if we see under the

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1 numbered paragraphs, two paragraphs on,
 2 beginning "You will be aware"?

3 **A.** Yes.

4 **Q.** "You will be aware of the provisions of the
 5 [CPIA] concerning disclosure ... paragraph 4.10
 6 of the Security Community Codes of Practice and
 7 also paragraph 5(5.1-5.3) of the Codes. Please
 8 let me have the necessary information on forms
 9 [C, D and E]. The schedules must be signed."
 10 That refers, amongst other things, to the
 11 Schedule of Unused Material, Non-Sensitive,
 12 Schedule of Unused Material Sensitive and the
 13 Disclosure Officer's report, those three form
 14 references?

15 **A.** Yes.

16 **Q.** So it appears, in this case, that advice was
 17 being given as to sufficiency of evidence before
 18 unused material schedules had been provided to
 19 the reviewing lawyer?

20 **A.** Yes.

21 **Q.** We've heard evidence from Mr Utting, that was on
 22 17 November this year, at page 104 of the
 23 transcript, and from Graham Brander, on
 24 29 November 2023 at pages 25 and 26 and 158 to
 25 160, that unused material schedules were only

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1 Hamilton case, I'm going to pick some other
 2 examples here, POL00064235. We can see
 3 a Disclosure Officer's report, if we scroll
 4 down. I think this should be dated 3 January
 5 2007. Ms Hamilton's first appearance in the
 6 Magistrates Court was 6 December 2006, and so it
 7 post-dates it by a month or so.

8 So acceptable from a service upon defence
 9 perspective but not good practice in relation to
 10 a prosecutor; is that right?

11 **A.** That's right, yes.

12 **Q.** You helped us in your first report about
 13 a common law duty of disclosure, which arose
 14 prior to the initial duty of first stage
 15 disclosure under section 3 of the CPIA. Do you
 16 remember a cross-reference to the case of Lee --

17 **A.** Yes.

18 **Q.** -- namely a prosecutor needing to be alive to
 19 the need to make advance disclosure of material
 20 of which he is aware, which might enable
 21 a defendant to make a pre-committal application,
 22 including a pre-committal application to
 23 dismiss. Was there any evidence in the cases
 24 that you saw that that duty was recognised?

25 **A.** No.

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1 ever prepared after committal and then only in
 2 the event that a not guilty plea was indicated.

3 Is that approach consistent or inconsistent with
 4 what the law required?

5 **A.** It would be --

6 **Q.** I should ask that question in a better way.

7 **A.** Yes.

8 **Q.** In terms of provision of the Schedules of Unused
 9 Material, is it right that the law only required
 10 those to be provided to a defendant,
 11 post-committal?

12 **A.** To a defendant, yes.

13 **Q.** In relation to the prosecution approach to
 14 whether there was a sufficiency of evidence, was
 15 that in accordance with or a departure from good
 16 practice?

17 **A.** Sorry, for them to be provided to the
 18 prosecutor?

19 **Q.** Yes.

20 **A.** Good practice would require that they were
 21 provided to the prosecutor, either the schedules
 22 or the material that would otherwise be on the
 23 schedule before a charging decision was made,
 24 rather than after that point in time.

25 **Q.** If we look, for example at the Josephine

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1 **Q.** Was there any evidence in the cases that you saw
 2 that any common law pre-committal disclosure was
 3 given?

4 **A.** It wasn't very clear to me what was provided
 5 pre-committal at all, in terms of what was
 6 provided at the first appearance, if that was
 7 a separate hearing, for example. So, no,
 8 I can't say what was given.

9 **Q.** Is that a cross-reference back to a point you
 10 made very early on, that the material was
 11 relatively lacking in terms of what was created
 12 and served at the point of the initiation of
 13 process against the defendant?

14 **A.** Yes, so there was no material in any of these
 15 cases that I saw as to what was provided to the
 16 Magistrates Courts when the application was made
 17 for a summons or what was provided to the
 18 defence pre-the service of a committal bundle.

19 **Q.** In terms of what the schedules, in fact, looked
 20 like when they were served, you tell us in
 21 paragraph 654 of your report on page 233, you
 22 say:

23 "Such schedules, for example of
 24 non-sensitive unused material (equivalent to
 25 an MG6C) ..."

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1 That's a cross-reference to the Manual of
 2 Guidance series of forms --
 3 **A.** Yes.
 4 **Q.** -- used by the police service and the Crown
 5 Prosecution Service?
 6 **A.** Yes.
 7 **Q.** "... were drawn up by the Disclosure Officer
 8 who, where named, was also the Investigator.
 9 Such schedules were quite short, and mainly
 10 included correspondence and documentation
 11 relating to the interview process. They lacked
 12 any reference to the underlying raw accounts
 13 data (to the extent that this was not included
 14 in the served evidence) ... usually no reference
 15 to any previous complaints or discussions by the
 16 defendants with managers or helplines. This
 17 applied in cases where the defendant complained
 18 about the system, or referred to such complaints
 19 and discussions as much as where they had not."
 20 So schedules were short.
 21 **A.** Yes.
 22 **Q.** The preponderance of material, is this right,
 23 was about the interview process?
 24 **A.** And correspondence at the time of the interview,
 25 yes.

1 But it was a continuum of missed opportunity in
 2 that respect.
 3 **Q.** Thank you.
 4 In terms of review by a prosecuting lawyer,
 5 you address this further down the page in your
 6 paragraph 656. You say:
 7 "In the main, the unused schedules I have
 8 seen did not show on their face any evidence of
 9 a review by the prosecutor having occurred.
 10 This makes it difficult to be satisfied this
 11 important task was undertaken. [You] accept
 12 that this may, at least in some cases, have been
 13 an omission of annotation rather than of
 14 review."
 15 Are you saying there that this may be a case
 16 where reviewing lawyers had reviewed the
 17 schedules but hadn't marked them in a way to
 18 show that they had done so, ie counter signing
 19 them?
 20 **A.** So it varies. There were some cases, in
 21 fairness, where there were annotations on the
 22 face of the schedule that showed that the lawyer
 23 had reviewed it and come to a view as to
 24 disclosure, which is what was required under the
 25 CPIA Code, under the Attorney General's

1 **Q.** Overall, were the contents of the schedules as
 2 you would have expected?
 3 **A.** That which was there, generally speaking, was
 4 correctly there but there was an awful lot that
 5 wasn't there that should have been.
 6 **Q.** Was it a short distance or a very longer way
 7 from what you expected?
 8 **A.** The difficulty in answering that is that it may
 9 well have been that things were not listed as
 10 material in the prosecution's possession that
 11 were not being relied on in evidence, so unused
 12 material that was not being listed because it
 13 didn't exist because they hadn't followed
 14 through the reasonable lines of inquiry that
 15 would have led to them having it. So the two
 16 really are connected.
 17 So for example, they would not include
 18 reference to ARQ data on the unused schedule
 19 because they hadn't asked for the ARQ data, and
 20 so they didn't have the ARQ data, as unused
 21 material but, clearly, they should have followed
 22 that reasonable line of inquiry, therefore they
 23 should have had the data, therefore they should
 24 have included it on the unused schedule and
 25 therefore the unused schedule was deficient.

1 Guidelines. There were other cases where there
 2 was evidence that the lawyer had looked at the
 3 schedule through other documentation, be it, in
 4 the case of Mr Mahmood, there was a memorandum
 5 from the lawyer asking the Investigator what was
 6 disclosable from the schedule, which was
 7 an interesting approach but at least showed that
 8 they had registered they had the schedule.
 9 And there were cases where there was
 10 an accompanying letter that I saw that was sent
 11 to the defence with the schedule that told the
 12 defence that there was nothing on the schedule
 13 that was disclosable, which I took to be
 14 an indication that the lawyer had reviewed it
 15 and come to that conclusion.
 16 But in the majority of cases, there was none
 17 of that and nothing on the face of the schedule
 18 to show, one way or the other, whether they had
 19 reviewed it or not. But, clearly, they should
 20 have done.
 21 **Q.** You say, over the page in paragraph 657, that:
 22 "The stance [that's the stance in the
 23 Josephine Hamilton case that nothing was
 24 disclosable] appears to have been adopted in
 25 a number of other cases, whether on the schedule

1 itself, or more often accompanying
2 correspondence indicated that everything listed
3 in the schedule was clearly not disclosable
4 ('CND')."

5 You say:
6 "In my view, such an assessment was often in
7 error ..."

8 Why was that so?
9 **A.** I identify, when I have a schedule and
10 conclusion in the individual cases, there were
11 instances of material that was within
12 an all-embracing, clearly not disclosable,
13 decision that, seemed to me, on my, I accept,
14 limited reading of the material, clearly was
15 disclosable because it was, on the face of it,
16 material that undermined the prosecution case or
17 assisted the defence case. It included things
18 that now are recognised within the present
19 version of the Attorney General's Guidelines are
20 standard disclosure, for example interview
21 tapes.

22 **Q.** Did this position change across the relevant
23 period, ie did the 2010 policy change have any
24 effect on the practice adopted of saying
25 everything is not disclosable?

INDEX

RICHARD DUNCAN ATKINSON KC (sworn) 1
Questioned by MR BEER 1

1 **A.** Not that I could see, no.

2 **MR BEER:** Sir, thank you. I'm about to move to
3 topic 8, cross-disclosure of Horizon issues.

4 I wonder whether that might be an appropriate
5 moment to break for the day?

6 **SIR WYN WILLIAMS:** Certainly.

7 All right, thank you very much for answering
8 all those questions, Mr Atkinson. I will see
9 you in the morning, 10.00 tomorrow?

10 **MR BEER:** Yes, please, sir. Thank you very much.

11 **SIR WYN WILLIAMS:** Fine.

12 **MR BEER:** Thank you.

13 **(4.31 pm)**

14 **(The hearing adjourned until 10.00 am**
15 **on the following day)**

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MR BEER: [17] 1/3 1/7 1/12 46/6 46/11 46/16 46/19 91/8 91/13 91/17 91/20 147/7 147/11 147/13 186/2 186/10 186/12	177/24 159 [1] 118/8 16 February 2009 [1] 111/25 16 November [2] 124/18 167/11 160 [1] 177/25 17 [3] 73/17 173/10 174/1 17 June [1] 116/5 17 November [1] 177/22 170 [1] 119/8 172 [1] 122/1 18 [1] 173/23 18 December 2023 [1] 1/1 188 [1] 130/2 19 [1] 73/19 19 February [1] 39/13 1A [2] 3/16 136/2	211 [1] 123/19 213 [2] 125/25 125/25 217 [1] 27/4 218 [2] 14/21 15/1 219 [3] 47/21 80/25 81/3 22 [7] 4/7 14/18 66/15 71/1 73/22 81/10 87/22 221 [1] 92/2 223 [3] 54/2 106/12 106/15 224 [2] 60/4 60/5 226 [1] 67/1 227 [1] 106/15 23 [1] 93/18 230 [1] 93/5 233 [1] 180/21 238 [1] 171/2 24 [1] 93/25 243 [1] 2/7 25 [1] 177/24 25,000 [1] 36/22 26 [1] 177/24 26 October [1] 129/3 27 May [1] 176/19 27 May 2005 [1] 103/16 278 [1] 43/7 282,000 [2] 105/9 105/17 284 [1] 106/3 29 November 2023 [1] 177/24 2A [5] 1/21 3/2 4/3 43/8 68/1 2nd [3] 33/23 34/7 34/19	4 4 January [2] 114/18 115/1 4 October [1] 159/12 4.00 [1] 135/18 4.10 [1] 177/5 4.31 [1] 186/13 40 [1] 97/21 414 [1] 25/22 423 [2] 27/5 113/6 425 [1] 114/17 43 [2] 93/17 93/18 438 [1] 27/5 44 [2] 93/17 93/18 444 [1] 118/9 45 [1] 93/25 452 [1] 118/10 458 [1] 43/7 46 [3] 93/25 94/5 102/4 48 [1] 102/8 483 [1] 119/9 484 [1] 122/2 485 [1] 122/2 486 [1] 122/18 488 [1] 119/10 4th [1] 161/12	63 [1] 96/11 632 [1] 54/4 633 [3] 55/7 56/15 60/7 634 [1] 64/25 635 [1] 65/15 637 [1] 67/2 638 [1] 71/8 639 [2] 73/10 77/12 654 [1] 180/21 656 [1] 183/6 657 [1] 184/21 663 [1] 132/21 666 [1] 171/1 69 [2] 96/11 96/14
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