

Tuesday, 11 June 2024

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 2 (9.45 am)
 3 MR BEER: Good morning, sir, can you see and hear us? Good
 4 morning, sir, can you see and hear us?
 5 SIR WYN WILLIAMS: Yes, thank you very much.
 6 MR BEER: Thank you. May I call Anthony de Garr Robinson
 7 KC, please.
 8 SIR WYN WILLIAMS: Yes, of course.
 9 ANTHONY JOHN DE GARR ROBINSON KC (sworn)
 10 Questioned by MR BEER
 11 MR BEER: Good morning, Mr de Garr Robinson.
 12 A. Good morning.
 13 Q. My name is Jason Beer and I ask questions on behalf of
 14 the Inquiry. Can you tell us your full name, please?
 15 A. Anthony John de Garr Robinson.
 16 Q. Thank you for attending the Inquiry today to give
 17 evidence. You've previously provided us with two
 18 witness statements, the first of which is a very
 19 detailed and long witness statement. Can we start,
 20 please, by looking at that.
 21 A. Yes.
 22 Q. It will come up on the screen, and you should have
 23 a hard copy in front of you. It is 63 pages long and
 24 dated 14 May 2024.
 25 A. Yes.

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1 A. Yes.
 2 Q. Your practice focuses on and, at the time that we're
 3 talking about, focused on commercial work, commercial
 4 Chancery work, banking and finance, company and civil
 5 fraud work; is that right?
 6 A. Yes.
 7 Q. You acted, relevantly to this Inquiry, for the Post
 8 Office in the group litigation brought against it by
 9 subpostmasters concerning both their contractual
 10 relationship with the Post Office and then subsequently
 11 the operation of the Horizon system?
 12 A. Yes.
 13 Q. In the counsel team, I think Owain Draper was one of
 14 your juniors -- is that right --
 15 A. That's correct.
 16 Q. -- alongside, subsequently, Simon Henderson later in the
 17 proceedings --
 18 A. That's correct.
 19 Q. -- and then Rebecca Keating later still?
 20 A. Yes.
 21 Q. So far as you are concerned, was that the full
 22 complement of the counsel team for your part of the
 23 case?
 24 A. For my part of the case, yes. There was another junior
 25 called Gideon Cohen, who acted in relation to the common

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1 Q. If we go to page 63, please.
 2 A. I've done that.
 3 Q. Is that your signature?
 4 A. That is.
 5 Q. Thank you. Then yesterday you made a second witness
 6 statement which is four pages long, which corrects
 7 a number of passages in the first witness statement.
 8 That's WITN10500200.
 9 A. Yes.
 10 Q. If you turn to the fourth page of that, is that your
 11 signature?
 12 A. Yes, it is.
 13 Q. Are the contents of that second witness statement true
 14 to the best of your knowledge and belief?
 15 A. Yes.
 16 Q. Bearing in mind the corrections that you make in the
 17 second witness statement to the first witness statement,
 18 are the contents of the first witness statement true to
 19 the best of your knowledge and belief?
 20 A. Subject to those corrections, yes.
 21 Q. Thank you very much.
 22 Can we start, please, with your background. I think
 23 you were called to the Bar in 1987; is that right?
 24 A. Correct.
 25 Q. You took silk in 2006; is that right?

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1 issues, in -- but he was acting at a time which, to the
 2 best of my recollection, was a time when I wasn't
 3 heavily involved.
 4 Q. Thank you. I should make it clear at the outset of my
 5 questioning of you that the authoritative, factual and
 6 legal position in relation to the issues addressed by
 7 them is established, for the Inquiry's purposes, by
 8 Mr Justice Fraser's Common Issues judgment, that's his
 9 judgment number 3, dated 15 March 2019; by his Horizon
 10 Issues judgment, that's judgment number 6, dated
 11 16 December 2019; and, insofar as it's relevant, by the
 12 Court of Appeal's decisions refusing permission to
 13 appeal against the recusal judgment, dated 10 May 2019
 14 and against the Common Issues judgment dated 16 November
 15 2019. So I'm not going to ask you about the substance
 16 of the issues addressed by those judgments.
 17 A. I understand.
 18 Q. Can I turn to your first instruction, then, please. You
 19 tell us, if we turn up, please, in your first witness
 20 statement, at paragraph 10, which is on page 3 -- it
 21 will come up on the screen -- if we scroll down to
 22 paragraph 10, you deal with your first instruction and
 23 you say:
 24 "My first involvement in this case occurred in May
 25 2018."

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1 Then about four lines in you say:
 2 "On 18 May 2018, my clerks forwarded me copies ..."
 3 Then you talk about a meeting in paragraph 11 taking
 4 place on 20 May 2018. I think that should be 2016,
 5 shouldn't it?
 6 **A.** I'm so sorry, I couldn't tell you now, sitting here now.
 7 I thought the 20th. If I've made a mistake on the date,
 8 then it's a mistake on the date. I couldn't -- I'd need
 9 a document to remind me. Maybe it was a typo.
 10 **Q.** Yes, it's the year, I think, for all of those?
 11 **A.** Oh, I see.
 12 **Q.** I think it's 2016 for all --
 13 **A.** Yes, 2016, you're quite right.
 14 **Q.** -- three of those years?
 15 **A.** Oh, yes.
 16 **Q.** So we should additionally correct those three years to
 17 2016, rather than 2018?
 18 **A.** Yes, I'm so sorry.
 19 **Q.** No, that's all right. In any event, as to the
 20 substance, you say:
 21 "My first involvement in this case occurred in May
 22 [2016]. As I recall, I was told that the Post Office
 23 was having a series of meetings with several counsel
 24 with a view to instructing one of them to act in
 25 a dispute in which it was involved. I was to be one of

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1 access'). [The Post Office] now knew that this was
 2 possible, and the question was how to manage this
 3 problem. I said that [the Post Office] should be open
 4 about it, and not try to hide anything."
 5 Now, you refer there to what happened in this beauty
 6 parade and one of the big issues, you say, was remote
 7 access.
 8 **A.** Yes.
 9 **Q.** Did that remain one of the most significant issues in
 10 the case?
 11 **A.** I don't mean to cavil, it would depend upon -- it
 12 remained a significant issue, certainly, but whether it
 13 could be called the most significant issue, I'm not so
 14 sure. I'm not trying to be difficult with words. It
 15 certainly remained a significant issue and the
 16 embarrassment was that Post Office had said things
 17 suggesting that it couldn't happen when, in fact, it
 18 turned out it could, and that was a significant -- very
 19 significant issue throughout.
 20 **Q.** I think that happened successively, didn't it, ie the
 21 Post Office kept saying things that it then corrected?
 22 **A.** Yes. It was very frustrating at times.
 23 **Q.** Yes. Can we look, please, at a document to orientate us
 24 at this time. POL00103200. We will see that this is
 25 an email from Jane MacLeod to Paula Vennells of 23 May

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1 the counsel [with] whom [Post Office] would be meeting."
 2 So is that kind of a beauty parade, essentially, for
 3 barristers to be selected by the client?
 4 **A.** Exactly.
 5 **Q.** You continued:
 6 "On 18 May 2016, my clerks forwarded me copies of
 7 a Letter of Claim written by the [subpostmasters']
 8 solicitors ('Freeths'), a copy of a claim form and
 9 a briefing note containing a high level summary of the
 10 dispute prepared for the purpose of these meetings."
 11 That's so you can be asked some questions about the
 12 substance in the course of the beauty parade; is that
 13 right?
 14 **A.** Yes.
 15 **Q.** Thank you:
 16 "The meeting with me took place on 20 May 2018.
 17 I do not remember much about the meeting but I think
 18 that Jane MacLeod, [the Post Office's] General Counsel,
 19 was present. I also recall a discussion about a point
 20 which involved some real concern for [the Post Office].
 21 This was the fact that, on the basis of information
 22 provided by Fujitsu, [the Post Office] had on several
 23 occasions formally confirmed that it was not possible
 24 for anyone to use Horizon to alter branch transaction
 25 data remotely (something which became known as 'remote

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1 2016, so a few days after the beauty parade. You're not
 2 copied in on it, it's not something you would have seen
 3 at the time but it says something about you, which is
 4 why I want to ask you about it.
 5 **A.** Right.
 6 **Q.** If we go down to the third paragraph, Ms MacLeod says:
 7 "We have instructed Bond Dickinson to act as our
 8 solicitors on the basis that they have advised us
 9 throughout on Sparrow and have a very deep understanding
 10 of the history, the individual cases and the political
 11 sensitivity of Sparrow. They are a highly ranked firm
 12 with the depth of resource and experience to represent
 13 Post Office in this litigation. In addition we have
 14 retained leading commercial barrister Tony Robinson QC
 15 who has extensive experience with group litigation and a
 16 wide background in civil litigation", and then there's
 17 a link to your webpage at One Essex Court:
 18 "Tony will be key to developing and implementing the
 19 litigation strategy and when we interviewed him on
 20 Friday he had already grasped the political significance
 21 of the case."
 22 Then it goes on to explain why Linklaters aren't
 23 being used and Bond Dickinson are.
 24 The sentence that "on Friday" showed that you had
 25 already grasped the political significance of the case,

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1 firstly, is that right? Had you, at this early stage,
 2 grasped the political significance of the case?
 3 **A.** I am not entirely clear what's meant by "political
 4 significance". I'd certainly grasped the point that
 5 you've already averted to, namely there was a sense of
 6 embarrassment and concern about the fact that statements
 7 had been made regarding remote access. I find it
 8 difficult to think that there would have been other
 9 issues that I also would have grasped, whether they were
 10 to be regard as political, though, is something that
 11 isn't really for me to say. I'm not trying to be
 12 difficult, I just am not entirely clear what Jane
 13 MacLeod meant by "political".
 14 **Q.** Taking it out of Jane MacLeod's mouth, would you, at
 15 this early stage, have regarded the case as involving
 16 any political issues?
 17 **A.** I'm trying to think back. No, I would have --
 18 I regarded this as a piece of commercial litigation,
 19 a dispute between two groups of people. So I would have
 20 regarded the issues more as litigation issues rather
 21 than political issues. But, of course, in any
 22 litigation, your client may have concerns about things
 23 which have a wider ramification for them.
 24 **Q.** Would you have -- again, taking the words out of Jane
 25 MacLeod's mouth -- thought that the case held political

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1 that.
 2 **Q.** So the fact that the Post Office discharged functions of
 3 a public nature and might, for some purposes, be
 4 regarded as a public authority, didn't affect any of the
 5 decision making?
 6 **A.** In relation to the matters on which I was instructed,
 7 the claims that were made were claims of a private
 8 nature. There was a claim, as I recall, for misfeasance
 9 in public office. You would have to take me back to the
 10 Letter of Claim to remind me but -- certainly in
 11 relation to the common issues. In relation to the
 12 conduct of the litigation thereafter, as you've already
 13 reminded me, there was a Common Issues trial and then
 14 there was a Horizon Issues trial. Those trials were the
 15 primary focus of much of my attention during the
 16 relevant period and those -- the issues raised by those
 17 trials were, as I recall, private law issues.
 18 They didn't -- the fact that the Post Office
 19 conducted public functions didn't -- I don't recall them
 20 impinging on any particular issue. If I'm wrong about
 21 that then I'm happy to be reminded but I don't recall.
 22 **Q.** Mr de Garr Robinson, I wasn't thinking particularly in
 23 your approach to the narrow legal issues involved. It
 24 might be said by some that, when acting for
 25 an organisation which is a public authority or

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1 significance?
 2 **A.** Well, to me, the word "political" suggests government
 3 issues, issues for politicians. If that's the meaning
 4 of the term, I don't recall that -- I mean, I was aware
 5 that Post Office was owned by the Government, it was
 6 a Government company and, therefore, any embarrassment
 7 for Post Office would, I suppose, have potentially
 8 involved embarrassment for the Government as well but
 9 I don't remember thinking along those lines at the time.
 10 I'm trying to reconstruct, rather than giving you
 11 a recollection of anything specific.
 12 **Q.** Yes. Did the fact that the company was Government owned
 13 affect any of your decision making subsequently in the
 14 litigation?
 15 **A.** No.
 16 **Q.** Did you, as you've suggested already, approach all other
 17 issues as if this was an ordinary piece of commercial
 18 litigation?
 19 **A.** I think so. I mean, I brought to the case the skillset
 20 that I had and my skillset is one of advising on and
 21 conducting substantial commercial litigation. I cannot
 22 recall an occasion in which I tailored any of the advice
 23 I gave or altered any judgement I made about the conduct
 24 of the case because Post Office was owned by the
 25 Government. I can't think of an occasion when I did

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1 a quasi-public authority, whether or not dealing with
 2 issues that involve its status as a public authority or
 3 not, a different approach to litigation may be called
 4 for?
 5 **A.** I don't believe that I did apply a different approach
 6 because Post Office undertook functions that you've
 7 described as public. I'm not clear which functions
 8 you're referring to which might have led me to have
 9 taken a different view.
 10 **Q.** So, for you, this was an ordinary piece of commercial
 11 litigation?
 12 **A.** Yes.
 13 **Q.** Thank you. If we scroll down to 2, please:
 14 "The [Post Office] Legal team ... and myself will
 15 work with [Bond Dickinson]. As set out in the [General
 16 Executive] Board paper, and as discussed and approved at
 17 the [General Executive] meeting on 13 May, Tom Moran
 18 will be the internal 'client' for these purposes and his
 19 role will be to ensure that the overall strategy of the
 20 litigation protects [the Post Office], its network and
 21 attractiveness to future agents/postmasters. Both in
 22 this and in the management of the litigation, he will be
 23 supported by a Steering Group which will comprise
 24 representatives from across the business. At [General
 25 Executive] we discussed the following as proposed

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1 members: Tom Wechsler (representing you) [that's
 2 representing the CEO, Paul Vennells], Angela van den
 3 Bogerd, Mark Davies, Patrick Bourke, a representative
 4 from Finance ([to be confirmed]), as well as Rod,
 5 myself, representatives from [Bond Dickinson] and when
 6 necessary, Tony Robinson [KC]. Key/strategic decisions
 7 will be discussed at [the General Executive]."

8 Did you sit on the steering group that's referred to
 9 here?

10 A. No.

11 Q. Did you attend the steering group as necessary, as is
 12 referred to here?

13 A. I attended on occasions and I have dealt with those
 14 occasions in my witness statement. I don't recall any
 15 other occasions in which I attended and, as you'll see
 16 from my witness statement, there were very few.

17 Q. That was when you were called in, essentially, rather
 18 than you saying, "I need to be on the steering group on
 19 this occasion to contribute"?

20 A. Absolutely.

21 Q. Thank you. Can we look at the next substantive event
 22 that occurred which is right at the beginning of June
 23 2016. POL00140216. If we look at the bottom half of
 24 the page, please, we can see an email of 1 June 2016,
 25 from you to Andrew Parsons. Was he your main point of

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1 the postmaster's failure to do all the reconciliations
 2 he or she was required to do when required to do them,
 3 or perhaps because the helpline told the postmaster to
 4 accept an incorrect balance -- it is not now possible to
 5 tell whether the loss is real? If so, does that raise
 6 a question as to the propriety of our basic approach
 7 to recovering losses from postmasters and summarily
 8 terminating their contracts? If not, why not?"

9 Then if we scroll down, please. If we go to the
 10 bottom of the page, question 2:

11 "When did we become aware of the possibility of
 12 remotely altering branch data on Horizon, and why did we
 13 not become aware of it long ago? Is it the fact that we
 14 consistently claimed the opposite our fault, or
 15 Fujitsu's? Does it mean that the expert evidence that
 16 we have previously relied on from Fujitsu was
 17 wrong/misleading? And have we already embarked on an
 18 exercise to determine whether this makes any or all of
 19 the previous convictions unsafe, as we did with the
 20 previous exercise with the previous revelation about the
 21 Fujitsu bugs? If not, why not?"

22 Question 3, further down:

23 "I understand that, for 42/60 days, postmasters had
 24 the ability on Horizon to check each and every
 25 transaction done from his or her branch in order to

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1 contact at Bond Dickinson?

2 A. Yes.

3 Q. You say:

4 "The second box of files you sent to my chambers has
 5 just arrived ... I'm still hard at work reading the two
 6 files you sent last week -- it is much slower going than
 7 I expected.

8 "I already have lots of questions and will have more
 9 by the time my reading is all done."

10 You talk at the bottom paragraph on that page about
 11 bringing a junior in, yes?

12 A. Yes.

13 Q. Then, if we go over the page, please. You say:

14 "PS. In the meantime, I have a few questions ..."

15 I ought to have said that Mr Parsons replies to this
 16 email and his writing is in the red.

17 In any event, let's look at the questions you had.

18 So this is 1 June. You were instructed no earlier than
 19 20 May. So you're eight/ten days into your period of
 20 instruction here, then you have these questions. I just
 21 want to look at the questions that you asked:

22 "1. Is it possible that there are cases where human
 23 errors at branches cause Horizon to record losses which
 24 do not really exist but for which [subpostmasters] are
 25 then held liable (eg because -- perhaps as a result of

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1 explain discrepancies. But what about discrepancies
 2 appearing after that period, eg as a result of late
 3 transaction corrections? On what basis do we claim that
 4 postmasters had the data they needed to explain those
 5 discrepancies, even though they could no longer do line
 6 by line transaction checks?"

7 Question 4:

8 "Why did we refuse to mediate some cases the Working
 9 Group recommended for mediation? Would I be right in
 10 inferring that in the working group we were in the
 11 minority of one and everyone else tended to take the
 12 Second Sight view of things?"

13 Question 5, over the page:

14 "I'm biased, but it does seem to me that Second
 15 Sight's final report is one sided. How high can
 16 we/should we/do we dare go in our criticisms of Second
 17 Sight? This may depend on the extent to which the
 18 conclusions in its final report [are] dependent on
 19 fundamental errors that are demonstrably -- what is your
 20 view about that? And what are those errors, exactly?"

21 "6. In their final report, Second Sight claim that
 22 we stopped them completing their investigation, partly
 23 by not providing documents and info they wanted and
 24 partly because we cut their work short by requiring
 25 their report by 10/04/15. Did we know we were doing

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1 that but carried on regardless? If so, why?"
 2 Now, you pose there number of very direct questions
 3 to Andrew Parsons --
 4 **A.** Yes.
 5 **Q.** -- that had become evident to you within a week or so of
 6 reading in?
 7 **A.** Yes.
 8 **Q.** The questions that you posed, do you agree, were
 9 important, if not fundamental, to the merits of the Post
 10 Office's defence in the litigation?
 11 **A.** I'd need to -- I'd say the first -- may I just look at
 12 that? What page number is this?
 13 **Q.** You want to look in hard copy, do you?
 14 **A.** Yes.
 15 **Q.** It's the first file, and it's tab B2.
 16 **A.** Thank you. That's kind, thank you.
 17 So the first question is a question about paper
 18 losses that were not real.
 19 **Q.** Yes.
 20 **A.** I agreed that that was important in relation to the
 21 litigation. The second --
 22 **Q.** Sorry, if we're just going to do it one by one, just go
 23 back. If you look at the answer that you've got, would
 24 you agree that it's a relatively cursory response by
 25 Mr Parsons?

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1 previously relied on from Fujitsu was wrong or
 2 misleading, and you wanted to know whether there was
 3 an equivalent exercise, looking at the safety of past
 4 convictions.
 5 **A.** That's fair, yes. Thank you for the -- for drawing my
 6 attention to that. And then 3 --
 7 **Q.** Again, the answer, relatively cursory, isn't it?
 8 **A.** All of these answers were relatively cursory, I would
 9 say.
 10 **Q.** Yes.
 11 **A.** Then 3, that was an important question. There was
 12 an answer to it, which was, as I understand it now, it's
 13 probably what Andy Parsons says in his answer, that
 14 where late transaction corrections were suggested by
 15 Post Office, there would have been evidence attached to
 16 the suggestion and, if the postmaster wasn't happy, then
 17 he would -- could phone the helpline and get further --
 18 and speak to the relevant individual. Then -- but it --
 19 3 was a significant issue.
 20 And then 4, why did -- decisions made about
 21 mediation, I wouldn't say that was an important issue
 22 for the litigation.
 23 **Q.** Yes.
 24 **A.** 5, whether Second Sight's report was one sided or not.
 25 I wouldn't say that was an important issue for the

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1 **A.** I would agree but my -- it was a very early -- to be
 2 fair to him, it was a very early stage in my
 3 instructions and I was still reading in. I suspect --
 4 I mean, I don't know, but I suspect I wasn't expecting
 5 some massive answer and detailed answer at that stage.
 6 So the first issue, yes I agree.
 7 The second issue: when did Post Office become aware
 8 of the possibility of remote access? That was --
 9 I wouldn't say that was a critical issue in the
 10 litigation; it went to the question of -- possibly the
 11 question of limitation because there was an issue about
 12 deliberate concealment but it wasn't one of the primary
 13 issues. It was an issue but I wouldn't say it went to
 14 the heart of anything.
 15 3 -- 3 was --
 16 **Q.** Just before you go back to 3, just look at 2.
 17 **A.** Yes.
 18 **Q.** The second part of the question, you'd spotted that
 19 there had been an exercise to determine whether what
 20 Second Sight had discovered about the two bugs --
 21 **A.** Oh, yes. Oh, you're right.
 22 **Q.** -- had led to a review of past convictions --
 23 **A.** Yes.
 24 **Q.** -- and you had spotted that the remote access point
 25 might mean that the expert evidence that had been

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1 litigation.
 2 And 6, whether Second Sight was stopped from
 3 completing all their work. I wouldn't say that was
 4 an important issue for the litigation, certainly insofar
 5 as my -- insofar as it -- the litigation that had been
 6 conducted by the end of the Horizon trial.
 7 **Q.** Thank you. These answers which you've accepted, given
 8 the circumstances, were relatively cursory. You didn't
 9 probe these in more depth at this stage because you were
 10 reading in?
 11 **A.** I think that's probably right but I'd be reconstructing,
 12 rather than directly recollecting.
 13 **Q.** If we just go back to the top of page 3, you had asked
 14 whether the client had embarked on an exercise on
 15 whether the remote access issue made any or all of the
 16 previous convictions unsafe, as had previously been done
 17 in relation to the revelation of the Fujitsu bugs. Just
 18 look at the answer that you were given. Thank you.
 19 It's those five paragraphs in red at the top of the page
 20 there.
 21 Mr Parsons doesn't answer your question directly,
 22 does he, as to whether there had been an exercise
 23 conducted looking at the safety of the previous
 24 convictions in the light of the fact that the Fujitsu
 25 evidence may have been false?

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1 A. No. I see that.
 2 Q. At this stage, I don't suppose you remember whether he
 3 contacted you by any other means to speak about what I'm
 4 going to call the Gareth Jenkins issue, at this early
 5 stage, to give an answer to the very direct question
 6 that you'd asked?
 7 A. I have no recollection of discussing Gareth Jenkins at
 8 any time during this very early period. I would be
 9 surprised if I did but I have no direct recollection, so
 10 it probably would be wrong for me to speculate.
 11 Q. Thank you. That can come down and you can put the file
 12 away for the moment.
 13 A. Thank you.
 14 Q. By the time you were instructed in the High Court
 15 proceedings, I think you knew that the CCRC was also
 16 engaged in consideration of possible appeals to the
 17 Court of Appeal Criminal Division?
 18 A. That must be right, yes.
 19 Q. Did you personally give any advice concerning the
 20 retention of documents obtained or generated in the
 21 litigation for the purpose of possible disclosure to the
 22 CCRC?
 23 A. No, I'm -- I've never been involved in any criminal
 24 proceedings in my life. I'm a civil lawyer. My
 25 expertise and my experience is only in relation to civil

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1 the Post Office --
 2 A. I don't think so no.
 3 Q. -- ie there are concurrent criminal proceedings, or
 4 possibly concurrent criminal proceedings, appeals to the
 5 Court of Appeal, although the documents we create or in
 6 some cases obtain in the civil proceedings may be
 7 protected by privilege in the course of the civil
 8 proceedings, the information in them may, in fact, be
 9 disclosable in the criminal proceedings?
 10 A. That's not something I thought about.
 11 Q. Were you aware of anyone giving advice of the substance
 12 or to the effect that I have just set out?
 13 A. Not that I recall, no.
 14 Q. Thank you. I think, generally, your experience of the
 15 process of disclosure given by the Post Office in the
 16 Group Litigation was that, in terms of its quality, it
 17 was extremely poor and, professionally, for you, it was
 18 rather maddening; would that be fair?
 19 A. That would be a fair summary of my witness statement,
 20 yes.
 21 Q. And, therefore, a fair summary of the facts?
 22 A. Yes.
 23 Q. If we just look at your witness statement, then, please,
 24 can we start at page 48, please, and paragraph 133. You
 25 say:

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1 litigation. I was aware that Post Office had instructed
 2 criminal lawyers, including a criminal silk, Brian
 3 Altman, as you say. I would have left questions of that
 4 sort entirely to that side of things. It was entirely
 5 outside my -- the scope of my expertise.
 6 Q. Were you conscious of the fact that documents obtained
 7 or generated in the course of the civil litigation might
 8 fall to be disclosed in criminal proceedings?
 9 A. I can't remember thinking that thought. I'm not saying
 10 I didn't but I just don't remember that being something
 11 I considered.
 12 Q. Were you aware of any other person in the civil counsel
 13 team giving advice about the retention of documents
 14 generated in the civil -- or obtained in the civil
 15 litigation for disclosure to the CCRC?
 16 A. Not that I recall, no.
 17 Q. Were you aware of the civil solicitors giving such
 18 advice?
 19 A. As I say, I simply -- it wasn't my role to be concerned
 20 with such things and I wasn't -- that would not have
 21 been something I would have been told about. Sorry,
 22 that's a very conditional way of expressing myself.
 23 I think the answer to your question is no.
 24 Q. Were you aware of the fact of any such advice being
 25 given by any of the criminal barristers instructed by

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1 "The story of [the Post Office's] disclosure of KELs
 2 [Known Error Logs], is summarised [in Mr Justice Fraser]
 3 judgment. It is an extraordinary story."
 4 Then, if we go to page 50, paragraph 142, you say
 5 that, after the trial, it became necessary to give
 6 disclosure of, amongst other things, some 5,000 KELs
 7 that were discovered. That's described by Mr Justice
 8 Fraser in those paragraphs of his judgment:
 9 "It is another extraordinary story."
 10 Then paragraph 147, on page 51, you're dealing here
 11 with PEAKs. You say you:
 12 "... do not recall much about the PEAKs that were
 13 disclosed late. There were many occasions when
 14 additional Fujitsu documents were found after the
 15 relevant documents should have been disclosed. To say
 16 that these problems were frustrating would be
 17 an understatement, but this was not something that was
 18 within counsel's control."
 19 Then same page, paragraph 149, you say:
 20 "Paragraph 617 [of the judgment] indicates that,
 21 soon after these PEAKs [the ones you were discussing
 22 earlier] were disclosed, it was revealed that one of
 23 them was dated 21 August 2019. It was thus clear that,
 24 on instructions, I had unintentionally misled the court.
 25 As will be clear from the rest of this statement, this

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1 was not the first occasion on which such a thing
 2 happened, and nor was it the last. It is a horrifying
 3 experience [ie unintentionally making a misleading
 4 statement to the court]."
 5 Then, lastly, paragraph 155 on page 52:
 6 "During the trial, a question arose as to [the Post
 7 Office's] failure to disclose some Royal Mail audit
 8 reports that the claimants wanted. On instructions,
 9 I informed the court that the Royal Mail had refused to
 10 produce these reports to [the Post Office] for onward
 11 disclosure. I then discovered that the Royal Mail had
 12 not even been asked to provide them. When I discovered
 13 this, I made haste to correct the position and to
 14 apologise. Not surprisingly, [the Post Office] was
 15 ordered to provide a witness statement explaining how
 16 this had come about."
 17 I'm not going to go to each of these disclosure
 18 issues and explore the facts underlying each issue but
 19 instead deal with the matters generally.
 20 Would I be right in thinking that the whole process
 21 of representing the Post Office, in terms of the
 22 disclosure exercise, was a very uncomfortable experience
 23 for you?
 24 **A.** Towards the end, when the errors became apparent, if
 25 I can call them errors, yes, it was -- very much so. In
 25

1 **A.** For some of them, it was fairly obvious, PEAKs
 2 discovered late, and so on. That would have been --
 3 I feel sure that that would have been as a result of
 4 Post Office, or rather WBD, discovering that Fujitsu had
 5 had categories of documents that weren't previously
 6 known about.
 7 **Q.** Did your enquiries, did your tentacles, stretch down
 8 into finding out, for example, whether the Post Office
 9 had asked Fujitsu for those documents and, if so, when,
 10 and in what terms they'd asked and, if so, what the
 11 reply was and in what terms?
 12 **A.** I don't recall making -- I don't recall conducting
 13 investigations into what had -- I didn't conceive it to
 14 be my job to conduct detailed investigations into what
 15 had gone wrong, I would have been told that new PEAKs
 16 had been produced by Fujitsu and that they therefore
 17 needed to be disclosed quickly. My apprehension would
 18 have been -- I think I would have been told that it was
 19 a result of Fujitsu not performing the disclosures, the
 20 searching exercise, the collection exercise, properly
 21 not being aware of pockets of documents in various parts
 22 of its system and I would have taken that at face value.
 23 I wouldn't have -- I wouldn't then have probed for
 24 further information.
 25 In relation to some of these issues, I appreciate
 27

1 the early stages, at CMCs, and so on, when the parties
 2 were seeking to agree orders for disclosure and the
 3 court then made orders, I wouldn't -- I wouldn't have
 4 been frustrated or found that difficult then. But it's
 5 later on --
 6 **Q.** Because you didn't know the true position then?
 7 **A.** Yes.
 8 **Q.** When you subsequently found out what you were told was
 9 the true position -- and it happened, I think, on more
 10 than one occasion, indeed, on a repeated basis -- it
 11 must leave you not trusting your clients or your
 12 solicitors?
 13 **A.** I wouldn't -- the -- there are two categories -- I'm
 14 going to give you a long, complicated answer. I'm sorry
 15 not to be clear. I know it would be easier for you to
 16 have a clean one.
 17 There's a question of trusting my client and then
 18 there's a question of trusting my instructing
 19 solicitors. In relation to trusting -- in relation to
 20 trust, a significant portion of these problems were
 21 problems caused by difficulties at Fujitsu. I'm using
 22 a deliberately portmanteau term because I really don't
 23 understand what those difficulties were.
 24 **Q.** Just stopping there, who told you that the
 25 responsibility rested with Fujitsu?
 26

1 there are lots of different examples, not all of them of
 2 the same nature but, in relation to some of these
 3 problems, witness statements would have been produced by
 4 Andy Parsons. I think the court would have -- did
 5 require on occasion some witness statements, where
 6 explanations would have been given. I'm sure I would
 7 have asked questions and I'm sure I would have been
 8 anxious to know what I wouldn't have sought, for
 9 example, to test what I'd been told in relation to
 10 contemporaneous documents.
 11 **Q.** So, in your witness statement, you, in a number of
 12 places, blame Fujitsu for the disclosure issue. That's
 13 based on what you were told by your solicitor or your
 14 client?
 15 **A.** Yes.
 16 **Q.** Thank you. It wasn't your function to test that, to see
 17 whether what you were being told was itself true,
 18 ie that this disclosure issue arose as a result of
 19 a fault by Fujitsu?
 20 **A.** I'm sure I would have wanted -- every time it occurred
 21 I would have wanted to know what occurred but I wouldn't
 22 have conceived it to be my function to challenge and
 23 insist on evidence supporting what my instructions were
 24 on that point.
 25 **Q.** Thank you. Can we just look briefly at the KEL issue,
 28

1 the Known Error Log issue, and do so by reference to
2 your witness statement. Can we turn up, please, page 48
3 and, in particular, between paragraphs 134 and 137, you
4 deal with the KEL story, which you say is extraordinary.
5 You tell us that your:

6 "... original instructions were that the KEL
7 database ... was irrelevant and not within [Post
8 Office's] control. Its irrelevance was asserted more
9 than once in [Womble Bond Dickinson's] correspondence
10 with Freeths. And in the Generic Defence and
11 Counterclaim, we [that's you and Owain Draper] pleaded
12 both that it was irrelevant and that it was not in [Post
13 Office's] control."

14 Those were your instructions, you note that
15 Mr Parsons made a witness statement for that CMC which
16 maintained the points and that that reflected your
17 understanding at the time.

18 Then 135, taking your facts from the judgment, you
19 say that:

20 "... at the CMC, [you] suggested that the parties'
21 experts be permitted to inspect the Known Error Log so
22 that they could determine whether it was relevant.
23 [You] do not [remember] making that suggestion but [you]
24 do remember the outcome: the experts determined that the
25 Known Error Log was definitely relevant", and you say

29

1 words, "We need to establish clearly the control point".

2 **Q.** Let's look at that email.

3 **A.** Oh, right.

4 **Q.** WBON0000505.

5 **A.** Is that in the core documents or the additional
6 documents --

7 **Q.** The additional documents at tab E35.

8 **A.** E35.

9 **Q.** But it's on the screen.

10 **A.** Oh, right.

11 **Q.** It's your email to Mr Parsons of 14 September 2017. If
12 we just scroll down a little bit so we get the full
13 email on the page. Thank you. You say in the second
14 paragraph:

15 "I'm a little concerned that we may be being into
16 their hands by invoking the [Civil Procedure Rules part
17 31.14] application for inspection of the [Known Error
18 Log]. Unless we play our cards right, this could give
19 them the chance to portray us as unnecessarily (and
20 therefore suspiciously) defensive, obstructive and
21 possibly even evasive about the KEL.

22 "Could you send over [a letter, please] -- if their
23 summary of it is fair (which I doubt) I would like to
24 understand why we seem to have claimed that the Known
25 Error Log is not a document, when it plainly is, and why

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1 that you were "very surprised" when you learnt about
2 this.

3 Then you say:

4 "My previous instructions would have been based on
5 what Fujitsu had told [the Post Office]. It was hard to
6 understand how Fujitsu came to give such a misleading
7 account on such a fundamental point."

8 Were you privy to the discussions between the Post
9 Office, Womble Bond Dickinson and Fujitsu about the
10 irrelevance of the KEL database and the fact that it was
11 not within Post Office's control.

12 **A.** No. The first point would have been something that
13 would necessarily, I think, have been discussed between
14 WBD, POL and Fujitsu. The second point was a point that
15 would have been dependent upon the contract that existed
16 between Post Office and Fujitsu. The -- I would have
17 expected WBD to look at that contract in order to
18 confirm that it wasn't in Post Office's control. In
19 other words, that it didn't have the right to inspect or
20 take copies and I believe -- I may be going too fast,
21 faster than you want me to -- but I believe that I was
22 provided with some documents quite recently which
23 included an email in which I said something like, at the
24 time, earlier on in the story, "We need to be very clear
25 that this isn't in Post Office's control", in other

30

1 we don't seem to have mentioned that it is not in our
2 control, which seems ... to be a critical point."

3 Then the third paragraph, which is the one you
4 mentioned a moment ago, Mr de Garr Robinson:

5 "On the question of control, we need to be
6 absolutely clear that we have no right to inspect or
7 take copies of the [Known Error Log], either under the
8 Fujitsu contract or under the law of agency ... and that
9 there is no practice under which we are habitually or
10 usually allowed to inspect documents of this sort if we
11 want to see them."

12 Why was it that you had previously thought that
13 Known Error Logs were not in the Post Office's control?

14 **A.** I would have been in -- that would have been my
15 instruction. It would not have been something I would
16 have thought up for myself.

17 **Q.** No and that would have come from Womble Bond Dickinson,
18 would it?

19 **A.** Yes.

20 **Q.** This is you saying, "Well, hold on, we actually need to
21 look at the contract to work out whether that's true or
22 not"?

23 **A.** Yes.

24 **Q.** The point about the KEL not being a document, do you
25 know who raised that?

32

1 A. I haven't -- I don't -- I'm -- I don't recall this
 2 exchange. It refers to a letter from Freeths of
 3 1 September --

4 Q. Yes.

5 A. -- which, on my reading, as I read this email, I appear
 6 to have read it as suggesting that WBD's letter, earlier
 7 letter, had claimed that the Known Error Log was not
 8 a document, and I'm expressing doubt that we can
 9 possibly have said that because --

10 Q. Because that would be absurd.

11 A. Yes, because it was plainly wrong. But I don't know
 12 whether that was said in -- what I'm asking in that
 13 email is "Did we really say that?"

14 Q. Did you get the impression that the Post Office was
 15 straining not to disclose the Known Error Log?

16 A. I don't -- I can't -- I don't have a specific
 17 recollection of this exchange, this email. So if I were
 18 to answer that, I'd be reconstructing on the basis of
 19 inferences drawn from this document, which you're
 20 probably in as good a position as I am to make but I --

21 Q. Just taking a step back, Mr de Garr Robinson, the
 22 document contents aren't relevant, "It's not a document,
 23 it's not within our control", all three things seem to
 24 have been asserted and all three things are wrong.

25 A. Well, I'm doubting that one of those things was asserted

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1 work on another case, you do something else, you work on
 2 three or four other cases and then you come back to the
 3 first case and you deal with the next problem that's
 4 arisen or the next hearing, and so on.

5 And so what can sometimes happen is that you --
 6 you're dealing with the issue that you're facing at the
 7 moment without remembering precisely what you'd been
 8 told and how the matter had come up on previous
 9 occasions. Certainly in relation to the discovery that
 10 the Known Error Log was highly relevant, that would,
 11 I would have -- I imagine I would have -- I remember
 12 being surprised. I forget what your question is, but
 13 I would have been concerned also that such a fundamental
 14 point could have been so wrong.

15 That would -- I imagine -- I'm afraid I'm
 16 reconstructing -- but I imagine that the focus of my
 17 concern would have been Fujitsu, rather than Post
 18 Office.

19 In relation to control, control didn't really come
 20 up again until after the trial and so, during 2018,
 21 which is I think the period you're asking me about,
 22 I don't think I'd have considered control further.

23 Q. Thank you. That document can come down.

24 Can we turn to the Swift Review and its
 25 recommendations, please, and we're now going back to

35

1 and I don't know whether it was or not. The other two
 2 things, at the time, I didn't know that they -- well,
 3 they were wrong. My instructions --

4 Q. I'm not suggesting that you did for --

5 A. No, but you're asking about my mental state at the time.
 6 My mental state at the time was that I believed my
 7 instructions so I wouldn't have -- I don't think I would
 8 have inferred from my instructions that there was any
 9 particular attitude on my client's part.

10 Q. What about as events moved on into 2018 and 2019, when
 11 you actually got to look at some of the Known Error Logs
 12 yourself in the course of the litigation? Did you ever
 13 think, "Goodness me, how could we assert that these
 14 aren't relevant"?

15 A. The answer to that question may surprise you somewhat,
 16 but that would have been two years later. The -- this
 17 is an email exchange -- oh, no, I'm wrong. It's in
 18 2017, not 2016. The --

19 Q. Were you essentially going to say the caravan had moved
 20 on?

21 A. I think what I was going to say was it's a funny thing
 22 but, when you're involved in large and complex
 23 litigation, the litigation tends to operate in phases.
 24 You -- you're very intent upon one particular point or
 25 a series of points at one time and then you go away and

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1 mid-2016 --

2 A. Right.

3 Q. -- by looking at POL00242402. Thank you. Turn to
 4 page 4, please. There's a long email from Mr Parsons to
 5 you and others of 8 June 2016, so relatively early in
 6 your instruction, so a couple of weeks into your
 7 instruction. Mr Parsons, the partner at Womble Bond
 8 Dickinson, says:

9 "Tony, I met with the [Post Office] litigation
 10 steering group yet. Their approach to the [Jonathan
 11 Swift Queen's Counsel] recommendations has shifted
 12 slightly.

13 "Tim Parker, [the Post Office's] Chairman, feels
 14 that he has made a commitment to Baroness Neville-Rolfe
 15 (Minister at [the Department of Business, Innovation and
 16 Skills]) to follow through on the [Swift]
 17 recommendations unless he is presented with a persuasive
 18 case not to do so.

19 "[The Post Office] are therefore looking to us (and
 20 quite frankly you with your magic QC seal!) to give them
 21 some reasons for why Tim completing the [Swift]
 22 recommendations would be ill advised.

23 "Just to recap, the recommendations we are talking
 24 about are:

25 "1. Investigation into remote access/meddling with

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1 Horizon data (initially it was proposed that this was
2 done by Deloitte).

3 "2. Investigating the suspense account (again to be
4 done by Deloitte).

5 "3. Reviewing the prosecutions where theft and
6 false accounting were charged to confirm that there was
7 sufficient evidence to support the theft charge (Brian
8 Altman's review).

9 "My view is that these recommendations plainly
10 overlap with issues in the litigation. I can
11 immediately see three reasons why Tim should not
12 'conduct' the above investigations:

13 "1. We, the litigation team, will need to
14 investigate these points (in some form) in any event.
15 We will probably need to do this on a different
16 timetable to Tim (we having a degree of time pressure;
17 Tim under less time pressure). We will also probably
18 require a more robust investigation given that these
19 points could be tested in court. Two parallel reviews
20 would be wasteful and could cause unknown complications
21 should they reach contradictory results.

22 "2. If these investigations are conducted by Tim
23 there is a greater risk that this work is not privileged
24 (the investigations not being conducted for the purposes
25 of litigation but for some other purpose). It would be

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1 Chairman of the company and he had made a series of
2 recommendations and three of them are highlighted here,
3 yes?

4 **A.** Yes.

5 **Q.** Those recommendations had been made, I think you will
6 have known, in part to ensure the correction of any
7 potential miscarriages of justice?

8 **A.** Yes.

9 **Q.** The Chairman of the company, Tim Parker, wanted to do
10 those things?

11 **A.** Apparently, yes.

12 **Q.** But POL, whoever that is, wanted the lawyers to come up
13 with reasons for not doing them --

14 **A.** Yes, so it would seem.

15 **Q.** -- saying that they would be ill advised?

16 **A.** Yes.

17 **Q.** Who did you understand "POL" to be? The Chairman of the
18 company wanted to do things that a leading silk had
19 recommended were relevant to discovering potential
20 miscarriages of justice but the Post Office did not want
21 to?

22 **A.** I don't recall this email exchange, so I'm afraid
23 I can't answer that question from my recollection and
24 I'm afraid nor can I reconstruct an answer from what
25 I know now. I have no idea why there'd be two POLs, as

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1 much safer for these investigations to be conducted as
2 part of the litigation.

3 "3. Even if the risk in 2 above could be guarded
4 against (eg by classing it as part of the [Swift]
5 ongoing advice to [Tim Parker] -- questionable???),
6 I cannot see how [Tim Parker] could disclose the results
7 of these investigations to [the Department of Business,
8 Innovation and Skills] without a risk of waiving
9 privilege (particularly where there is a possibility
10 that [Baroness Neville-Rolfe] may then speak to James
11 Arbuthnot or the [Post Office]/BIS could be subject to
12 a Freedom of Information request).

13 "If we can give [Post Office] a piece of advice that
14 says that [Parker] should stop any further work,
15 [Parker] would then feel empowered to say to BIS that,
16 on the basis of legal advice, he is ceasing his review.
17 I'm conscious this feels somewhat unpleasant in that we
18 are being asked to provide political cover for [Tim
19 Parker]. However, putting aside the political
20 background, shutting down [Tim Parker's] review is, in
21 my view, still the right thing to do."

22 Just stopping there, and we will come to your reply
23 in a moment, the situation is that a silk, a leading
24 public law silk at the time, Jonathan Swift, had
25 conducted a rather exhaustive review on behalf of the

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1 it were, a Tim Parker POL and a different POL. I have
2 no idea what that's about.

3 **Q.** But, anyway, some part of the company didn't want to do,
4 you were told in this email, what the Chairman wanted to
5 do, which was to enact some -- carry into effect some
6 legal advice, the purpose of which was to discover any
7 potential miscarriages of justice?

8 **A.** So it would seem, yes.

9 **Q.** The second reason that Mr Parsons gave -- and he's in
10 favour of the idea, reading this email, yes --

11 **A.** So it would seem, yes.

12 **Q.** -- ie Tim Parker needs to stop his work, yes?

13 **A.** Yes.

14 **Q.** The second reason is given: if Tim Parker does this
15 work, there's a greater risk. It isn't privileged:

16 "It would be much safer for these investigations to
17 be conducted as part of the litigation", he says.

18 Did you understand who it would be safer for?

19 **A.** I don't recall this email but I imagine I would have
20 understood it to mean safer for the party who had the
21 right to privilege, namely Post Office.

22 **Q.** Hmm. That implies, doesn't it, it necessarily means
23 that, if the results of the investigation are negative
24 to the Post Office interests, it's safe because they
25 will be protected from privilege and we needn't reveal

40

1 them?

2 **A.** That's what privilege means. That's always the position
3 with privilege. Privilege is quite a fundamental
4 principle that protects the interests of parties in
5 civil litigation and that is the effect of it, yes.

6 **Q.** But this contemplates it being safe because it may be
7 that the results of these three pieces of work are
8 negative. They will harm the Post Office's interests
9 and, therefore, it's safe if they're protected by
10 privilege because we won't have to tell anyone about
11 them?

12 **A.** Yes, although I'm not sure that's true of the criminal
13 work. I mean, if -- I'm not a criminal expert but, if
14 a view had been taken as to the third piece of advice
15 that Andy Parsons refers to, there may have been
16 an obligation to disclose regardless of privilege.

17 **Q.** That's why I asked those earlier questions about the
18 extent to which you knew what was being done by any
19 criminal lawyers, or criminal solicitors, for example
20 when an issue like this came up, whether you were
21 applying your narrow civil litigator's focus to the
22 question?

23 **A.** Yes, and I was.

24 **Q.** Let's just look at this email first to see what you make
25 of it. Would you agree that this approach proposed by

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1 **A.** Yes, I suppose that's probably right, yes.

2 **Q.** Can we look at your reply, please, by going to the foot
3 of page 2. Thank you. So same day, 8 June, replying to
4 Mr Parsons and you pick up what he said in his last
5 paragraph, which, just to remind us, had been "It feels
6 somewhat unpleasant that we are being asked to provide
7 political cover for Tim Parker". You say:
8 "I'm not here to provide political cover, but I am
9 concerned that the client should protect its interests
10 as a defendant to this substantial piece of litigation."
11 So, again, that's a shorthand way of saying, "I'm
12 looking at this through the narrow perspective of
13 a commercial litigator and what's in the interests of
14 this defendant in this litigation"?

15 **A.** Yes, it's also -- as I say, I don't remember this email
16 exchange but I know my style, and for me to say I'm not
17 here to provide political cover, I would have written
18 that -- usually I try to be diplomatic and I would have
19 written that I think because I wanted to make it clear
20 I'm not interested in your --

21 **Q.** Yes, it's a bit terse, isn't it?

22 **A.** Your political -- your shenanigans. I'm not interested
23 in that at all. What I am concerned about is the
24 client's interests as a defendant to a substantial piece
25 of civil litigation.

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1 Mr Parsons is classically advice given by a civil
2 litigator, "I'm looking at this with my civil
3 litigator's hat on, I have a narrow perspective of
4 what's best for the Post Office in the litigation"?

5 **A.** Absolutely.

6 **Q.** That, of course, is not the only perspective, is it, for
7 a company such as this?

8 **A.** Absolutely and, to the extent there are other
9 perspectives, then other advice needs to be taken.

10 **Q.** Well, was it made clear, to your recollection, that,
11 when the civil lawyers advised, they expressly raised
12 the fact, "We're looking at this with a specific hat on,
13 we've got a narrow perspective, what's good for the Post
14 Office in the litigation but you, Chairman, should look
15 much more broadly than this. What might be safer for
16 us, isn't really safe for the people whose lives are
17 affected by potential miscarriages of justice"?

18 **A.** I'm afraid I have no idea. I don't recall this exchange
19 at all and -- but I wouldn't have been aware of what was
20 then said directly to Post Office or wasn't. I just
21 wouldn't have known.

22 **Q.** Would you agree that it's an obvious point that what's
23 good for the Post Office in the litigation is not
24 necessarily good for the Post Office or indeed thousands
25 of subpostmasters, or the public, out in the real world?

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1 **Q.** The context in which that sentence arose was Mr Parsons
2 saying, "This feels somewhat unpleasant in that we are
3 being asked to provide political cover for Tim Parker,
4 the Chairman".

5 **A.** Yes, and I'm saying I'm not interested in that --

6 **Q.** No.

7 **A.** -- don't even in -- don't drag me into it. I'm
8 interpolating but, you know, don't do that.

9 **Q.** "Don't use me, don't deploy me for that purpose"?

10 **A.** Yes.

11 **Q.** The question, or the way it was put by Mr Parsons, would
12 you agree, suggests that it wasn't Tim Parker, on the
13 one hand, wanting to go ahead with the Swift
14 recommendations and this other part of Post Office not
15 wanting to go ahead with them, providing political cover
16 for Tim Parker makes it sound as if he doesn't want to
17 go ahead with them and that the lawyers were being
18 brought in to provide support, doesn't it?

19 **A.** It's quite possible but it's just interpreting an email,
20 that you're in as good a position as I am to do.
21 I don't have a recollection.

22 **Q.** You carry on:
23 "As you know from our discussion yesterday, the
24 consideration which seems to me to be overriding is
25 privilege point [number 2]. Your point numbered 3

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1 involves some murky questions to which I don't have
2 an immediate answer (remember all those difficult cases
3 in Three Rivers regarding the Bank of England's inquiry
4 to the BCCI scandal?) ..."

5 That's about claiming legal advice privilege as
6 an adjunct to the Tim Parker review:

7 "... but I strongly suspect that the factual
8 investigations we are talking about would not be the
9 subject of any legal advice privilege and so would not
10 be privileged in his hands in any event. But is that
11 something we even need to consider -- even if they were
12 privileged, what would be the point of undertaking dual
13 investigations into the same things anyway?"

14 "All of this assumes that we will be carrying out
15 the recommended investigations. But what [if] we don't
16 [I think that should have an 'if' in it]? Yesterday,
17 you suggested that the litigation team may be instructed
18 not to do a full investigation of the remote access or
19 suspense account points because the cost is
20 disproportionate in the context of the claims being
21 brought. If so, where would this leave [Tim Parker] --
22 back at square one? Putting the point another way, if
23 our advice is that he should not do the investigations
24 he was advised to do because this is something the
25 litigators should do, and if it is then decided that the

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1 umbrella just to cover off a political issue (or at
2 least that is my view ...).

3 "The critical point is preserving privilege and the
4 risk of [Tim Parker] doing further potentially
5 unprivileged work. This alone strikes me as a good
6 enough reason to shut [Tim Parker] down."

7 In your view, was the critical point the
8 preservation of privilege or would you accept that
9 that's perhaps turning the world upside down, putting
10 privilege as the central point?

11 **A.** From my perspective, the -- as the barrister acting in
12 a civil claim, my concern was to preserve privilege in
13 relation to that claim.

14 **Q.** In the course of this discussion, we don't see any
15 reference to the fact that this leading public law silk
16 had recommended doing three things that have the focus
17 of uncovering potential miscarriages of justice. The
18 Chairman needs to consider whether that's the right
19 thing. Is that because, again, you were looking at this
20 with the narrow civil litigator's hat on?

21 **A.** Yes.

22 **Q.** Hence, the critical point for the pair of you is just
23 about maintaining privilege in civil litigation?

24 **A.** Yes, so far as I can tell from this email exchange, yes.

25 **Q.** Yes. Did you agree with the sentiment that the

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1 litigators will not do the investigation he was advised
2 to do, would he then have to do them himself, or
3 instruct us to do them, after all."

4 Just summarising that, because it's quite dense, you
5 were saying, "Well, hold on, I've had some other
6 information that we may not be doing two of these three
7 things in the litigation anyway. So all of this debate
8 about whether we should do them in the litigation or
9 whether Tim Parker should cause them to be done outside
10 the litigation may be irrelevant, because I've been told
11 that we're not going to get on with two of them anyway";
12 is that a fair way of describing it?

13 **A.** That we might not --

14 **Q.** Yes.

15 **A.** -- get on to them anyway? Yes.

16 **Q.** Can we go on to how Mr Parsons responded, which is
17 bottom of page 2, top of page 3. If we get the bottom
18 of page 2, so we can see. Response, same day:

19 "Tony

20 "We can only say we might cover the [Swift]
21 recommendations through the litigation process but this
22 will depend on how the litigation process goes. [The
23 Post Office] will just have to accept that risk -- the
24 work is either required for the litigation or it is not.
25 We can't artificially squeeze work under the litigation

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1 preservation of privilege alone is a good enough reason
2 to shut the Chairman down?

3 **A.** I wouldn't have put it that way, I don't think. I would
4 have considered that, given my focus as a barrister
5 acting in a civil claim, it was important to retain
6 the -- a litigant's right to privilege.

7 **Q.** Can we look at how you reply to this, then, please, by
8 scrolling up to the bottom of page 2. You say:

9 "Quite right. What I meant to do with my second
10 paragraph was raise the question of whether the present
11 context -- including Swift advising [Parker] that these
12 investigations be undertaken, [Parker] naturally doing
13 what he's been advised to do etc -- might mean that the
14 client is less deterred by cost and difficulties
15 associated with these investigations than it might
16 otherwise have been. If so, I would welcome it. From
17 a pure litigation perspective, these investigations are
18 highly desirable -- the less evidence we have to rebut
19 the suggestion that remote data tampering at
20 our/Fujitsu's end could be responsible for inflicting
21 any false losses on any claimants, the more awkward our
22 position is on this difficult point (a point which
23 provides a basis of allegations of deceit, for arguments
24 that claims are not time-barred because of deliberate
25 concealment and for arguments that monthly accounts

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1 signed by subpostmasters should not be given significant
 2 evidential weight)."
 3 So, essentially, you were saying there in this email
 4 you want the investigations to be undertaken somehow,
 5 because you want to know the true answer?
 6 **A.** Yes, and I'm saying, in that context, the Swift
 7 recommendations are a good thing because they increase
 8 the incentive of Post Office to do them, even though
 9 they would cost money.
 10 **Q.** You were saying you didn't want Mr Parker's
 11 investigations to be stopped on the grounds that they
 12 will be undertaken for the purposes of litigation and
 13 then that doesn't happen?
 14 **A.** Yes.
 15 **Q.** Mr Parsons, however, was, would you agree, rather
 16 straightforwardly suggesting that the legal proceedings
 17 should provide cover for not taking the course
 18 recommended by the Swift Review?
 19 **A.** I think -- I'd need to look back but I think he was in
 20 his first email to me, I think -- my recollection is
 21 that in his second email, the one responding to my
 22 reply, he adopted a slightly different tone. But I'm --
 23 but I don't have it in front of me, so I can't --
 24 **Q.** That's the top of page 3. Scroll down. Thank you.
 25 That's the one you're referring to?
 49

1 money to pay for the investigations so long as they see
 2 the value in doing so. We could tackle these three
 3 lines of enquiries as follows:
 4 "1. Investigation into remote access/meddling with
 5 Horizon data (Bond Dickinson do this rather than
 6 Deloitte as it's mainly making factual enquiries of
 7 [Fujitsu] -- this will save some money as [Bond
 8 Dickinson] is cheaper than Deloitte).
 9 "2. Investigating suspense account (get this done
 10 by Deloitte as this is a proper accounting issue).
 11 "3. Reviewing the prosecutions where theft and
 12 false accounting were charged to confirm that there was
 13 sufficient evidence to support the theft charge. There
 14 are 9 claimants in the litigation that fit this profile.
 15 We get [Brian Altman] to review these 9 cases (one is
 16 done already -- Jo Hamilton). [The Post Office] have
 17 confirmed me already they are happy to pay for this
 18 work.
 19 "This approach strikes me as proportionate but also
 20 should give us a high degree of assurance on these
 21 points. This is however subject to us keeping the work
 22 under review -- if the litigation changes, the approach
 23 might change.
 24 "The above work largely duplicates what [Tim Parker]
 25 would have been doing. Add in the privilege risk and
 51

1 **A.** Yes. I mean, he says the critical point is preserving
 2 privilege and the risk of Parker doing further
 3 potentially unprivileged work --
 4 **Q.** And the next sentence too.
 5 **A.** Well, I suppose, yes, I see what you mean. The first
 6 sentence I completely -- I would have agreed with. The
 7 second sentence, "This alone strikes me as a good enough
 8 reason to shut TP down", that does sound a bit
 9 political I suppose, yes, which I wasn't -- from this
 10 email, it's clear I wasn't interested in.
 11 **Q.** I mean, given the significance of the recommendations
 12 and their object being potentially to uncover
 13 miscarriages of justice, shouldn't they have been
 14 carried out, in any event, as quickly and as
 15 transparently as possible?
 16 **A.** That would be a matter -- I'm sorry to look as if I'm
 17 trying to kind of deflect any kind of blame but that
 18 would be a matter for criminal lawyers, not something
 19 that was within my -- within the scope of my
 20 instruction.
 21 **Q.** If we carry on in the exchange, go to the foot of
 22 page 2 -- sorry, the foot of page 1. Thank you.
 23 Mr Parsons's reply to you, if we scroll down on to
 24 page 2:
 25 "I think that [the Post Office] will stump up the
 50

1 there are good grounds to shut down [Tim Parker's
 2 review] and just do the ... work under the litigation
 3 umbrella."
 4 I think you agreed, in the event, that, from the
 5 narrow civil litigation perspective, this was the
 6 appropriate way forwards?
 7 **A.** Yes, the work should be done but it should be done with
 8 the protection of litigation privilege.
 9 **Q.** Can we look, please, at the bottom of page 1. Your
 10 reply.
 11 "Very good.
 12 "Fingers crossed we get useful evidence from Fujitsu
 13 on balancing transactions from Horizon inception and
 14 Fujitsu's (non-)use of its privileged access rights to
 15 manipulate branch data from Horizon inception.
 16 "Might we be instructing Deloitte as our expert
 17 witness in due course? If so, this could affect the way
 18 we instruct them and how closely we work with them."
 19 This exchange happened all on 8 June 2016, right up
 20 until the time we can see there, just after 5.00. We
 21 know that there was a conference between you and
 22 Mr Parsons on 9 June 2016, the next day.
 23 **A.** Yes.
 24 **Q.** We don't have an attendance note of that conference.
 25 I don't suppose you remember whether a final position
 52

1 was reached at that conference?
 2 **A.** I have no recollection of what was said at that
 3 conference. I have no recollection of this email
 4 exchange. In some of my answers I may not have -- I may
 5 have talked as if I did but I had no recollection. I'm
 6 just working on the basis of the documents I see here.
 7 **Q.** Can we look, please, at what Mr Parsons says about this.
 8 He's going to give evidence to us later in the week.
 9 WITN10390100.
 10 **A.** Okay.
 11 **Q.** Then it's page 238. He says:
 12 "I do not recall the specifics of the discussed
 13 instruction about the implementation of the Swift Review
 14 at the conference on 9 June ..."
 15 Then if we go to 420.
 16 **A.** Can I just read the rest of 419, please?
 17 **Q.** Yes, sure.
 18 **A.** I don't mean to be difficult, I just ...
 19 **Q.** Yes.
 20 **A.** Oh, I see that he refers to a document in which
 21 I apparently say, "do all the Swift actions now and
 22 thoroughly".
 23 **Q.** Yes.
 24 **A.** I'm sorry. 420, yes, carry on.
 25 **Q.** "My email records show that I had a more detailed
 53

1 this email exchange were substantially the same as mine.
 2 He agreed that he was 'concerned that the client should
 3 protect its interests as a defendant to this substantial
 4 piece of litigation', in relation to which he thought
 5 the 'overriding [consideration was] the privilege
 6 point'.
 7 I think that's correct, is it?
 8 **A.** I think so too.
 9 **Q.** "At the same time, he strongly agreed with the approach
 10 of subsuming the investigations recommended by Jonathan
 11 Swift into the Group Litigation workstreams: 'From
 12 a pure litigation perspective, [he's quoting] these
 13 investigations are highly desirable", et cetera.
 14 Were you doing that by the quote that is set out
 15 there, "strongly agreeing with the approach of subsuming
 16 the investigations into the Group Litigation work
 17 streams"?
 18 **A.** I think that would be one way of describing -- I was
 19 saying that, for the purposes of the litigation, it
 20 would be highly desirable to do all this work. I may
 21 not be grappling with your question or understanding
 22 your --
 23 **Q.** It's a tiny point. The extract that he's cited there is
 24 you saying the desirability of conducting the
 25 investigations full stop; they need to be done, these
 55

1 exchange ..."
 2 So that's the next day, after 7 June?
 3 **A.** Oh, yes.
 4 **Q.** "... with Tony Robinson ... prior to our conference the
 5 following day. During that exchange I made the
 6 following points."
 7 Then, after 420, and then point 1, and then over the
 8 page, point 2, point 3 -- scroll down, scroll down, keep
 9 going -- point 4, point 5, point 6, point 7.
 10 **A.** I've not seen this document before.
 11 **Q.** No, I understand. In those subpoints, Mr Parsons
 12 summarises the email exchange that we have just looked
 13 at.
 14 **A.** Right.
 15 **Q.** I am not going to read it out or ask you to read it,
 16 because we've actually read the chain ourselves,
 17 a moment ago, and I'm not going to look at how
 18 Mr Parsons compartmentalises it, uses quotes to make
 19 a point, use extracts to make a point and adds
 20 commentary as he goes along --
 21 **A.** Yes.
 22 **Q.** -- because that's not going to assist us, we've looked
 23 at the exchange itself. But can we go forward, please,
 24 to paragraph 421 on page 241, thank you. He says:
 25 "The views [that you] expressed in the course of
 54

1 investigations. Not, by this is extract, saying they
 2 need to be done in the litigation?
 3 **A.** I'm saying, from a pure litigation perspective, these
 4 investigations are highly desirable.
 5 **Q.** Yes.
 6 **A.** I'm really -- I'm afraid I'm -- I'm probably not
 7 listening carefully enough to your question. You're
 8 making a subtle distinction which I haven't quite
 9 grasped.
 10 **Q.** Yes, if we go back to the email exchange.
 11 **A.** I'm so sorry, I'm not trying to be difficult.
 12 **Q.** No, that's all right. If we go back to the email
 13 exchange, POL00242402, bottom of page 2. This is the
 14 email, your email, in which that quotation appears. You
 15 can see it from halfway through, yes?
 16 **A.** Yes.
 17 **Q.** By this email, you were saying, weren't you, that it's
 18 important that the investigations are carried out, and
 19 it's important to the outcome of the civil litigation
 20 that they are carried out.
 21 **A.** Yes, I'm saying it's highly desirable for the purposes
 22 of the civil litigation that they be carried out.
 23 **Q.** Ie that we find out the true answers?
 24 **A.** Yes.
 25 **Q.** You were saying this in the context of having been told
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1 "We might not do these things"?

2 **A.** Yes, I'm responding by saying I think we should. I'm
3 interpreting an email I don't remember but that's how
4 I would summarise my understanding of these documents.

5 **Q.** You weren't saying by this email, "It's important that
6 we do them within the litigation", ie protected by
7 privilege?

8 **A.** Oh, I see what you mean. You mean artificially doing
9 them --

10 **Q.** Yeah?

11 **A.** -- even though the litigation doesn't require them?

12 **Q.** Yes.

13 **A.** No, I wasn't -- I don't believe I was saying that.
14 That's not how I read what I say there.

15 **Q.** Thank you. Then just lastly on this topic can we look,
16 please, at POL00243170. If we look, please, at page 2.,
17 at the foot, please. This is an email exchange not
18 concerning you. It's 11 July, Jane MacLeod to Rodric
19 Williams, Patrick Bourke and Mark Underwood, and she
20 says:
21 "Here is my starter for 10 ..."
22 Then if we look at the third, fourth and fifth
23 bullet points:
24 "As set out in my letter ... Jonathan Swift
25 identified areas where he believed further work could be

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1 MacLeod to take forwards the Swift recommendations to
2 the Chairman should come to an immediate end?

3 **A.** You may be seeking to make a subtle distinction again.
4 I think it's a fair summary that I took the view that,
5 for the purposes of the civil litigation, the relevant
6 work should be undertaken and that -- but it should be
7 undertaken for the purposes of the civil litigation.
8 I wasn't concerned with the distinction you made in your
9 previous question about -- which I now find difficult to
10 replicate or summarise. I hope that's a clear answer.

11 **Q.** Yes.

12 **A.** I'm not trying to be evasive.

13 **Q.** Can we go, lastly on this topic, to POL00006601. This
14 is a letter from Mr Parsons to Post Office, of 21 June
15 2016. This is, I think, the best record we have got of
16 what happened at the conference on 9 June. He says in
17 the second paragraph:
18 "In late 2015, Tim Parker ... began a review to
19 consider whether any further action [should] be taken by
20 Post Office to address the claims raised by postmasters
21 in relation to [Horizon]. Jonathan Swift was engaged by
22 Post Office to inform the Chairman on the review. His
23 mandate was to conduct an independent investigation on
24 the work which had been done already ... and to provide
25 advice as to whether there were any further steps that

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1 beneficial and [the Post Office] commissioned further
2 work to explore those. Some of these areas are
3 necessarily complex and are dependent on third parties
4 (such as Deloitte and Brian Altman) to deliver. While
5 progress had not been as fast as I had hoped, good
6 progress was being made in all areas.

7 "However, in April [the Post Office] was notified
8 that proceedings had been commenced against it in the
9 High Court on behalf of [about] 92 postmasters ... While
10 the proceedings have not been formally served on [Post
11 Office], the legal advisers for both sides are in
12 discussion to better understand the nature of the
13 issues. At this stage there is still no information
14 available [to us] as to quantum ...

15 "[Post Office] has briefed lawyers and external
16 counsel [including you] to advise on the claims."
17 Then this:
18 "[The Post Office] has received very strong advice
19 from its external legal advisers that the work being
20 undertaken under the aegis of my review should come to
21 an immediate end, and instead these issues should now be
22 addressed through equivalent work taken forward under
23 the scope of the litigation."
24 Is that an accurate summary of the advice that you
25 had given, that the work being undertaken by Jane

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1 might reasonably be taken by Post Office.

2 "In February 2016, Mr Swift provided his advice and
3 made eight recommendations for further work that could
4 be undertaken. We understand that Post Office is
5 considering those recommendations: some have been
6 implemented already; others are under way but not yet
7 complete.

8 "In April 2016, the ... claim was issued by
9 91 postmasters ... The subject matter of the Group
10 Action overlaps with the scope of [Parker's] review and
11 the subject matter of the recommendations made by
12 Mr Swift.

13 "In May 2016, Post Office instructed [you] to advise
14 on the Group Action. As part of his instructions,
15 Mr Robinson reviewed the advice and recommendations put
16 forward by Mr Swift."
17 Just stopping there, is that right: that you
18 reviewed Jonathan Swift QC's advice and his
19 recommendations?

20 **A.** I am -- in the light of the emails that I've seen, I'm
21 sure I would have done.

22 **Q.** "At a conference [this is the conference on 9 June]
23 attended by Post Office's Legal Team ... Mr Robinson was
24 asked to advise on, amongst other matters, whether
25 Mr Parker should continue his review and/or implement

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1 Mr Swift's recommendations."
 2 The top of the next page.
 3 "Mr Robinson's 'very strong advice' was that
 4 Mr Parker's review should cease immediately."
 5 Does that accurately record the advice you gave?
 6 **A.** I don't recall 9 June. As I understand what I was
 7 saying on the 8th, in the email exchange, I was saying
 8 that this work should be done but it should be carried
 9 on under the protection of litigation privilege.
 10 **Q.** "Given the overlap of issues between Mr Parker's review
 11 and the Group Action, [you] advised that it would still
 12 be prudent ... to implement [4, 5, 6 and 8 of the]
 13 recommendations of Mr Swift to the extent that these
 14 were required to advance Post Office's case in the Group
 15 Action and as appropriately adapted to meet the needs of
 16 the litigation."
 17 Is that right; is that what you advised?
 18 **A.** I don't recall the meeting, I'm terribly sorry. I just
 19 don't recall. All I can go on is the email exchange of
 20 8 June and --
 21 **Q.** This records that, of the eight recommendations, you
 22 advised that only four of them should be taken forwards,
 23 and that they should be taken forwards in the context
 24 of, or within the aegis of, the Group Litigation?
 25 **A.** Yes, I see that said. As I say in my witness statement,
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1 **A.** I suppose you could say that. I wish I could remember
 2 what was said on 9 June. As I say, I find it difficult
 3 to -- on the basis of what I understand from the emails
 4 that I've seen --
 5 **Q.** Doesn't really match this, does it?
 6 **A.** -- I find it difficult to understand how I would have
 7 ended up saying those things.
 8 **Q.** Within a day?
 9 **A.** Yes.
 10 **Q.** This is a different presentation than the exchange of
 11 views in your email exchange of the 8 June, isn't it?
 12 **A.** I -- it seems to me that what I'm saying in those
 13 emails, the 8 June emails, are rather -- a bit
 14 different, rather different, from what's being said in
 15 this email, and I'm not sure --
 16 **Q.** It's a letter, sorry.
 17 **A.** -- in this letter, and I'm not sure why. I mean, I make
 18 some suggestions in my witness statements as to why that
 19 might be. It may be that this isn't a full account of
 20 what I said. It may be that the other four had been
 21 done already. I just don't know.
 22 **Q.** The letter concludes:
 23 "This work should however be instructed and overseen
 24 exclusively by Post Office's Legal Team (or by others
 25 instructed by Post Office's Legal Team) so as to
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1 I don't quite understand it. I mean, the other four, to
 2 the extent that they hadn't been done already, I don't
 3 understand why I would say, in order to retain
 4 litigation privilege, don't do this work, because the
 5 litigation doesn't need it. I don't understand what my
 6 thinking -- what thinking would have resulted in my
 7 saying that.
 8 So I'm -- I find it difficult to understand -- to
 9 reconcile what's said here with my understanding of the
 10 8 June email.
 11 **Q.** Then, even in relation to these four, it's put to the
 12 Post Office that you advised that they should be taken
 13 forward "to the extent they were required to advance the
 14 Post Office's case".
 15 **A.** Yeah, as --
 16 **Q.** That puts a spin on it, doesn't it?
 17 **A.** Possibly but, as I say, I can't remember what was in
 18 the -- what was said in this meeting, but I -- I do know
 19 what Jane MacLeod said in the email you took me to
 20 previously, which has a different implication.
 21 **Q.** Then another caveat or rider that, even those four, to
 22 the advance they are required advance the Post Office
 23 case, should be done as appropriately adapted to meet
 24 the needs of the litigation. There's quite a lot of
 25 watering down going on here, isn't there?
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1 maximise the prospect of assert interesting privilege
 2 over this work and protect against the risk that
 3 material related to these actions could be disclosed to
 4 the claimants in the Group Action, undermining the Post
 5 Office's prospects of success and/or negotiating
 6 position."
 7 I think that is consistent with the email exchange,
 8 isn't it?
 9 **A.** Yes, that's consistent with the principle of litigation
 10 privilege.
 11 **Q.** Thank you.
 12 Sir, that's the end of that topic, I wonder whether
 13 we might break until 11.30, please.
 14 **SIR WYN WILLIAMS:** Yes, of course.
 15 **MR BEER:** Thank you, sir.
 16 (11.18 am)
 17 (A short break)
 18 (11.30 am)
 19 **MR BEER:** Good morning, sir, can you see and hear us?
 20 **SIR WYN WILLIAMS:** Yes, thank you.
 21 **MR BEER:** Thank you very much.
 22 Mr de Garr Robinson can we turn to a separate topic
 23 please. It's the Simon Clarke Advice and the reasons
 24 for not calling Gareth Jenkins in the Group Litigation.
 25 Can we start, please, with the Simon Clarke Advice, by
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1 looking at it. POL00006357. You'll see that it's
2 headed that it is an "Advice on the Use of Expert
3 Evidence Relating to the Integrity of the Fujitsu
4 Services Limited Horizon System". If we go to page 14,
5 please, and the foot of the page, we will see that it
6 was written by Simon Clarke, a barrister, senior counsel
7 at Cartwright King Solicitors and is dated 15 July 2013.
8 We're going to discover in a moment that you were
9 provided with copy of this advice in 2018.

10 If we go back to paragraph 1, please. By way of
11 introduction, he says that he's:

12 "... Asked to advise Post Office on the use of
13 expert evidence in support of prosecutions of allegedly
14 criminal conduct committed by those involved in the
15 delivery of Post Office services to the public through
16 sub post office branches. By and large these
17 allegations relate to misconduct said to have been
18 committed by [subpostmasters] and/or their clerks."

19 Then if we can go forward, please, to page 13,
20 please, at paragraph 37, and I am cutting straight to
21 his conclusions rather than to the build-up to them:

22 "What does all this mean? In short, it means that
23 ..."

24 I'm going to add in the correct description of the
25 person to whom reference is being made:

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1 evidence. Rather, we should seek a different,
2 independent expert to fulfil that role.

3 "Notwithstanding that the failure is that of [Gareth
4 Jenkins] and, arguably, of Fujitsu being his employer,
5 this failure has a profound effect upon [the Post
6 Office] and [its] prosecutions, not least because by
7 reason of [Gareth Jenkins'] failure, material which
8 should have been disclosed to defendants was not
9 disclosed, thereby placing [the Post Office] in breach
10 of their duty as a prosecutor.

11 "By reason of that failure to disclose, there are
12 a number of now convicted defendants to whom the
13 existence of bugs should have been disclosed but was
14 not. Those defendants remain entitled to have
15 disclosure of that material notwithstanding their now
16 convicted status (I have already advised on the need to
17 conduct a review of all [Post Office] prosecutions so as
18 to identify those who ought to have had the material
19 disclosed to them. That review is presently under way).

20 "Further, there are also a number of current cases
21 where there has been no disclosure where there ought to
22 have been. Here we must disclose the existence of the
23 bugs to those defendants where the test for disclosure
24 is met ..."

25 In an appropriate case the Court of Appeal will

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1 "... it means that [Gareth Jenkins] has not complied
2 with his duties to the court, the prosecution or the
3 defence. It is pertinent to recall the test under which
4 a prosecution expert labours: '... an expert witness
5 possessed of material which casts doubt upon his opinion
6 is under a duty to disclose the fact to the solicitor
7 instructing him, who in turn has a duty to disclose that
8 material to the defence. The duty extends to anything
9 which might arguably assist the defence. Moreover, it
10 is a positive duty'.

11 "The reasons as to why [Gareth Jenkins] failed to
12 comply with this duty are beyond the scope of this
13 review. The effects of that failure however must be
14 considered. I advise the following to be the position:

15 "[Gareth Jenkins] failed to disclose material known
16 to him but which undermines his expert opinion. This
17 failure is in plain breach of his duty as an expert
18 witness.

19 "Accordingly [Gareth Jenkins'] credibility as
20 an expert witness is fatally undermined; he should not
21 be asked to provide expert evidence in any current or
22 future prosecution.

23 "Similarly, in those current and ongoing cases where
24 [Gareth Jenkins] has provided an expert witness
25 statement, he should not be called upon to give that

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1 consider whether or not any conviction is unsafe. In
2 doing so they may well inquire into the reasons for
3 [Gareth Jenkins'] failure to refer to the existence of
4 bugs in his expert witness statement and evidence."

5 So that's what the advice said, by way of reminder
6 to you. Can we turn, please, to WITN10500105, and look
7 at the foot of the page, please. This is an email of
8 7 September 2018, from Mr Parsons to you. It's part of
9 a chain. I'm not going to read the chain because it
10 concerns a discussion about other matters in the run-up
11 to a conference that you were to hold, but he,
12 Mr Parsons, says:

13 "The meeting with the criminal guys has just been
14 confirmed for an 11.00 am at [One Essex Court].

15 "It will be Simon Clarke [and then he gives you
16 a link to his webpage] and Martin Smith, solicitor.

17 "Rod Williams from [Post Office] will also be there.

18 "Simon and Martin have done lots of prosecutions for
19 Post Office over the years so understand how branches
20 work and the role of Horizon. I've attached an advice
21 note Simon did 5 years ago ..."

22 Stopping there, that's the advice note we have just
23 read:

24 "... about why [Post Office] should be wary about
25 relying on Gareth Jenkins, which sets the context for

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1 the meeting.
 2 "In terms of what we may need from [Gareth Jenkins],
 3 it covers broadly two things:
 4 "1. Information about remote access -- see attached
 5 note to [Fujitsu] to start the discussions about this
 6 evidence.
 7 "2. Evidence responding to particular bugs in the
 8 system that [Gareth Jenkins] directly dealt with."
 9 So here we're September 2018 -- that email can come
 10 down, thank you -- in advance of a meeting with the
 11 "criminal guys", as they're called, on Monday,
 12 10 September 2018. Did you, when you received the
 13 Clarke Advice, five years after it had been written and
 14 more than two years after you had been instructed, feel
 15 any surprise that you were only being provided with it
 16 at that stage?
 17 **A.** I can't say that I remember. One thing I would say now,
 18 that occurs to me now, and I suspect would have occurred
 19 to me then, is the meeting I had was on 10 September.
 20 The first round of Post Office's evidence was due,
 21 I think, on 27 September. So this was being presented
 22 to me 17 days before the client was due to serve
 23 complete witness statements in relation to the Horizon
 24 issues. It occurs to me now, and I suspect it occurred
 25 to me then, that it was very late to be engaging on
 69

1 the question of why it was, two years into your
 2 instruction, you were being told about a problem
 3 concerning Gareth Jenkins. Before this time, had you
 4 been informed of any problem concerning the evidence
 5 that Gareth Jenkins had previously given?
 6 **A.** I think I might have been, informally. I think there
 7 may have been informal chats, discussions, with Andy
 8 Parsons where it was mentioned. I put it no higher.
 9 I can't be sure but it wouldn't surprise me if there had
 10 been brief references to it along the way but I am
 11 afraid I can't be more specific than that.
 12 **Q.** Nothing as startling as this, though?
 13 **A.** No, no, nothing --
 14 **Q.** This must have been very concerning indeed?
 15 **A.** Yes, I think -- it was concerning, certainly.
 16 **Q.** Now, as we have discussed, there was a conference on
 17 10 September 2018 and, much like the conference of
 18 9 September 2016, there isn't an attendance note --
 19 **A.** Right, okay.
 20 **Q.** -- for it, despite the number of lawyers that were
 21 present at it. So we've got to reconstruct, by
 22 fragments of other evidence, what happened at the
 23 meeting. I think you'll appreciate that it's quite
 24 an important occasion, the 10 September 2018 conference?
 25 **A.** From your perspective, I can certainly see that, yes.
 71

1 these questions. One would have expected these
 2 questions to have been considered and decided long
 3 before that stage.
 4 **Q.** That's something that you refer to in your witness
 5 statement Mr Generally, that you were disappointed at
 6 the process by which witness statement evidence was
 7 created in terms of the stage of the process at which it
 8 was created.
 9 **A.** Yes, I refer to it as "firefighting" and, indeed, having
 10 read the bundles properly now, I see that there's one
 11 email in which -- I think from February 2019 -- where
 12 I actually use that expression, in that counsel are not
 13 being used to their best advantage if they're presented
 14 with drafts and asked to advise on the hoof,
 15 particularly during the ground rush before a trial,
 16 which is how this tended to happen.
 17 After the first round of evidence, there was a huge
 18 amount of work being done and it was very difficult to
 19 look at the evidence, as well as deal with the experts,
 20 as well as look at the contemporaneous documents that
 21 were beginning to be identified as relevant for the
 22 trial. I mean, it was awful. I do remember finding the
 23 process just exquisitely painful and it made it very
 24 difficult to do our job properly.
 25 **Q.** Aside from that more general concern, I'm focusing on
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1 From the perspective of the Inquiry, yes.
 2 **Q.** Can we start, in looking at the fragments of evidence,
 3 begin with paragraph 95 of your witness statement
 4 itself, which is on page 33. That'll come up on the
 5 screen for you. You say in 95:
 6 "My recollection of this meeting is not clear --
 7 indeed, until I saw the above email [that's the one I've
 8 taken you to] I thought that we had a telephone call.
 9 But the upshot was that I was told in emphatic terms
 10 that Mr Jenkins was not a reliable witness. The
 11 solicitors said that Mr Jenkins had given misleading
 12 evidence."
 13 The solicitors that you're referring to there, would
 14 that be the people from Cartwright King?
 15 **A.** Yes, one of whom I now realise was a barrister.
 16 **Q.** Okay, so that is not your own solicitors --
 17 **A.** No.
 18 **Q.** -- any of the Wombles -- telling you that?
 19 **A.** Correct.
 20 **Q.** Okay:
 21 "They suggested in no uncertain terms that I should
 22 be very cautious about calling him as a witness."
 23 **A.** Yes.
 24 **Q.** Had you met, as they are described in the email, the
 25 "criminal guys" before?
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1 A. I don't think so, no. I can't imagine why I would have
 2 done.
 3 Q. Can you confirm that you hadn't previously spoken to any
 4 of the criminal lawyers about Mr Jenkins' reliability or
 5 unreliability?
 6 A. I have no recollection of having done so.
 7 Q. Did you ever speak to Mr Jenkins about the Clarke Advice
 8 or the opinions formed in it?
 9 A. Oh, no, I'm not sure I ever met Mr Jenkins.
 10 Q. Did you ever speak with Mr Jenkins?
 11 A. Not that I recall, no.
 12 Q. Thank you. Can we look at some other fragments of
 13 evidence, POL00043284. If we go to page 5, please,
 14 you'll see this is signed off by Womble Bond Dickinson
 15 on 14 November 2019.
 16 A. Yes.
 17 Q. So, just to orientate yourself, that's after the Horizon
 18 Issues trial had concluded but before the draft judgment
 19 had been received.
 20 A. Right.
 21 Q. Yes?
 22 A. Yes.
 23 Q. So it's in that period between the end of evidence and
 24 before an embargoed judgment was received. Can we go
 25 back, please, to page 1, "Post Office Group Litigation,

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1 identified, either by checks referred to or otherwise.
 2 The inevitable conclusion is that '... if that is right,
 3 then there must be no bugs'.
 4 Then scroll down to 2.7:
 5 "The Second Sight Interim Report dated 8 July 2013
 6 also indicated that [Gareth Jenkins] had prior knowledge
 7 of Horizon issues. It appears that between 2010 to
 8 2012, there were some 'defects' which impacted a number
 9 of branches. Post Office conducted an investigation in
 10 2012 which failed to reveal any Horizon system defect.
 11 It was not until 2013 that Fujitsu looked into the
 12 matter and then corrected the defect. [Gareth Jenkins]
 13 disclosed on 28 June 2013 to Cartwright King that he had
 14 informed Second Sight of the existence of two bugs which
 15 had affected Horizon as set out in the Second Sight
 16 Interim Report."
 17 2.8:
 18 "In July 13, Post Office obtained advice from
 19 Cartwright King on the reliability of [Gareth Jenkins]
 20 evidence. The conclusion was that [Gareth Jenkins] had
 21 attested to the integrity and robust nature of
 22 Horizon -- ie there was nothing wrong with the system.
 23 Unfortunately that was not the case at the time he was
 24 giving evidence as he knew there were issues with
 25 Horizon as early as 2010."

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1 Gareth Jenkins". Then if we skip over paragraph 1,
 2 which is all about prosecutions, at paragraph 2, they're
 3 still calling him Dr Gareth Jenkins, Bond Dickinson say:
 4 "... Gareth Jenkins of Fujitsu was the single expert
 5 for Post Office (and Royal Mail Group) for many years
 6 who provided opinion evidence in prosecutions where
 7 shortfalls and other irregularities were, in broad
 8 terms, alleged to be caught by deficiencies in the
 9 Horizon system."
 10 We can skip 2.2. 2.3:
 11 "Dr Jenkins provided witness statements; expert
 12 evidence; joint reports and conclusions with the
 13 defence's experts and attended court on at least one
 14 occasion to give evidence (prosecution of Seema Misra)."
 15 2.4:
 16 "A common feature of [Gareth Jenkins] evidence was
 17 that Horizon was accurately recording and processing
 18 data. In his evidence [Gareth Jenkins] repeatedly
 19 stated that failures will only occur '... as a result of
 20 a bug in the code or by somebody tampering with the data
 21 in BRDB and this check is included specifically to check
 22 for any such bugs/tampering' or that a problem can '...
 23 only happen as a result of a bug in the code and this
 24 check is included specifically to check for any such
 25 bugs'. He does not say that any bugs have been

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1 3.1:
 2 "Why is this a problem?
 3 "[Gareth Jenkins] did not comply with his duties to
 4 the court, the prosecution or the defence. He failed to
 5 disclose material known to him but which undermined his
 6 expert opinion. That failure was a serious, and
 7 possibly criminal, breach of his duty as an expert
 8 witness."
 9 3.2:
 10 "The effects of that failure set out by Cartwright
 11 King in 2013 were:
 12 3.2.1:
 13 "[He] failed to disclose material known to him but
 14 which undermined his expert opinion. This failure was
 15 in plain breach of his duty as an expert witness.
 16 2:
 17 "His credibility as an expert witness was fatally
 18 undermined; he should not be asked to provide expert
 19 evidence in any current or future prosecution.
 20 3:
 21 "Material which should have been disclosed to
 22 defendants was not disclosed which placed Post Office in
 23 breach of their duty as a prosecutor."
 24 Then over the page, please, to paragraph 4.5, the
 25 sift review, which is discussed in those earlier

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1 paragraphs:
 2 "... has let to the Lepton Report being cited in
 3 Second Sight's Report and referred to repeatedly in the
 4 Horizon Issues trial. However, in both instances the
 5 focus has been on the Lepton Report's comment on the
 6 accuracy of another system called Credence, rather than
 7 it shows Mr Jenkins's state of knowledge. As far as we
 8 are aware, nobody outside of Post Office has alighted on
 9 the significance of this document in relation to
 10 Mr Jenkins' historic evidence."

11 Then 5.1 to 5.4:

12 "Calling Gareth Jenkins as a witness in the [Horizon
 13 Issues Trial].

14 "Consideration was given to calling Gareth Jenkins
 15 as a witness for the Post Office in the [Horizon Issues
 16 Trial].

17 "We originally assessed that we required evidence
 18 from Fujitsu in relation to three broad areas:

19 "the general operation of Horizon;

20 "the allegation that Post Office remotely edits ...
 21 data; and

22 "the specific bugs identified by the claimants.

23 "Fujitsu suggested there were parts of the second
 24 and third areas that [Gareth Jenkins] would be best
 25 placed to give evidence on (such as the historic bugs

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1 place reliance; and (3) he was said to have given false
 2 evidence in criminal proceedings?

3 **A.** Yes. He'd breached his duty as an expert in criminal
 4 proceedings.

5 **Q.** Well, and was said to have given false evidence?

6 **A.** Misleading evidence, yes. I'm not cavilling, I'm so
 7 sorry.

8 **Q.** I'm sorry?

9 **A.** I'm not fencing with you.

10 **Q.** Of course. So those were the reasons why Gareth Jenkins
 11 was not called as a witness in the Group Litigation,
 12 agreed?

13 **A.** Yes, the reason was he had said things and not said
 14 things in criminal proceedings which would have
 15 undermined his credibility as a witness.

16 **Q.** And that he had given misleading evidence in those
 17 proceedings?

18 **A.** Yes, that's what I meant. Yes.

19 **Q.** He had breached his duty to the court?

20 **A.** Yes.

21 **Q.** And he had been regard as such by the Post Office?

22 **A.** Yes, because Post Office had received Mr Clarke's note
 23 in -- back in 2013, so if it didn't know it previously,
 24 it knew it by then, yes.

25 **Q.** That can come down for the moment. Thank you.

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1 that he dealt with). Given that [Gareth Jenkins] had
 2 previously appeared as an expert witness in prosecutions
 3 and because of the above issues, we set up
 4 a consultation with Leading Counsel to discuss the risks
 5 of using [Gareth Jenkins] as a witness in the [Horizon
 6 Issues Trial].

7 "The [conference] took place on 10 September and was
 8 attended by [you], Simon Henderson, Andy Parsons, Rodric
 9 Williams and Martin Smith and Simon Clarke from
 10 Cartwright King. During the [conference], Cartwright
 11 King advised strongly against Post Office calling
 12 [Gareth Jenkins] as a witness in the [Horizon Issues
 13 trial] on the basis of the above problems. The decision
 14 was taken that [Gareth Jenkins] could not be called and
 15 we need to look for a viable alternative witness."

16 Just stopping there, is that account given in this
 17 note of what occurred in the conference at 10 September
 18 accurate?

19 **A.** I think it's a fair summary.

20 **Q.** The reasons for not calling Gareth Jenkins as a witness
 21 in the Horizon Issues trial were on the basis of the
 22 above problems and that was, would you agree, that he
 23 was first said by the criminal solicitors to be
 24 an unreliable witness; secondly, he had been treated by
 25 the Post Office as a witness upon whom they could not

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1 In the course of this meeting of 10 September 2018,
 2 at which allegations were made to you about the expert
 3 evidence that Gareth Jenkins had given, did any of the
 4 lawyers discuss the extent to which Mr Jenkins had been
 5 properly instructed as an expert.

6 **A.** No. Absolutely not.

7 **Q.** Okay. Did anyone explain that, as a matter of fact, he
 8 had not been properly instructed as an expert or the
 9 duties of an expert witness explained to him?

10 **A.** No.

11 **Q.** Okay. Was there any discussion about broader questions
 12 of the Post Office's own conduct of those prosecutions,
 13 in which Mr Jenkins had given evidence?

14 **A.** Not that I recall, and I would be very surprised if
 15 there had been. That's not the purpose of the meeting.

16 **Q.** Did you ask to see or were you shown any of the
 17 underlying material upon which Mr Clarke's analysis and
 18 advice was based?

19 **A.** Oh, no. I took Mr Clarke's note as read.

20 **Q.** Did you ask to speak to anyone at Fujitsu or suggest
 21 that your solicitors should speak to anyone at Fujitsu,
 22 to discuss the concerns that had been raised about
 23 Mr Jenkins' reliability?

24 **A.** No. The purpose of the meeting was to allow the Legal
 25 Team to take a tactical decision as to how they

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1 should -- as to the preparation of evidence for the
2 Horizon trial.

3 **Q.** Was there any discussion over whether anyone had spoken
4 to Mr Jenkins about the allegations or the assessment
5 that the criminal lawyers had made about him?

6 **A.** I do not believe so and I can't think why there would
7 have been.

8 **Q.** Was there any discussion over whether the Post Office
9 ought to inform Mr Jenkins of the opinion which had been
10 formed about him in the course of the criminal and then
11 civil litigation?

12 **A.** Same answers as before. I don't believe so.

13 **Q.** In any event, the reasons, and all of the reasons, for
14 not calling him as a witness related to Mr Clarke's
15 assessment of him as to his performance in past criminal
16 proceedings?

17 **A.** Yes, it related to what Mr Clarke had to say about what
18 Dr Jenkins did and did not do in those criminal
19 prosecutions, or rather did or did not say in those
20 prosecutions.

21 **Q.** Was there any discussion in the meetings, so far as you
22 recall, as to what had been explained to Fujitsu for the
23 reason not to call Mr Jenkins as a witness?

24 **A.** I'd be very surprised if there had been. I don't have
25 a -- as I say, my recollection of that meeting is not

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1 ambiguous, so as to allow the person informing Fujitsu
2 not to be specific about it.

3 **Q.** Appreciating this wasn't you doing the informing, it's
4 a bit more than ambiguous, on the face of this page,
5 isn't it? The explanation being given to Fujitsu was
6 "We didn't want to mix civil and criminal evidence" --

7 **A.** I think that --

8 **Q.** -- whereas the true reason is "because we regard him as
9 an unreliable witness who had misled the court"?

10 **A.** I suppose that's fair, yes.

11 **Q.** "We do not believe that Fujitsu are aware of the issues
12 in this paper."
13 Was that your state of understanding back on
14 10 September 2018 --

15 **A.** I don't --

16 **Q.** -- they, Fujitsu, didn't know about the issues with
17 Gareth Jenkins?

18 **A.** I don't believe so. I don't think I knew anything about
19 what Fujitsu knew or did not know.

20 **Q.** Then reading on at 5.6:
21 "Post Office's witness evidence was served in
22 September and November 2018. On 30 January ... Freeths
23 wrote to us asking why [Gareth Jenkins] was not being
24 called as a witness. We responded on 12 February 2019,
25 pointing out that [Gareth Jenkins] had acted as

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1 particularly clear. The upshot of it is clear in my
2 mind but the details are not clear.

3 **Q.** Okay.

4 **A.** But I -- that would not have been the purpose of -- it
5 was about -- it was allowing the Legal Team to come to
6 a decision about how to prepare their evidence for the
7 case. It wasn't about wider considerations of, for
8 example, the relationship between Post Office and
9 Fujitsu. That wasn't our concern or my concern.

10 **Q.** Can we go back to the note, please, POL00043284, and
11 forward to page 3, and back to 5.5 at the foot of the
12 page.
13 We'd left off by reading 4.4. Carrying on at --
14 sorry, we'd left off at 5.4. Reading off again at 5.5:
15 "It was explained to Fujitsu that Post Office did
16 not wish to call [Gareth Jenkins] because we did not
17 wish to mix civil and criminal evidence."
18 Just stopping there, if that explanation was given
19 to Fujitsu as the reason for not calling Gareth Jenkins,
20 that would be a false explanation, wouldn't it?

21 **A.** I would say so. The next sentence indicates that there
22 was a desire -- it seems to indicate there was a desire
23 to keep from Fujitsu the issues discussed in this paper.

24 **Q.** Yes. The next --

25 **A.** So a form of words clearly was used, which was

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1 an expert witness in relation to a number of
2 prosecutions that are being reviewed by the CCRC and it
3 was therefore not appropriate to call him."

4 Appreciating, again, you were not the provider of
5 that information but, again, if that was the explanation
6 provided, that would be a false explanation too,
7 wouldn't it?

8 **A.** It would be economical with the truth, yes, in effect.

9 **Q.** And therefore false?

10 **A.** Yes, I think, yes.

11 **Q.** Can we move on, please, to POL00363775. If we begin,
12 please, with page 8, and I'm still on fragments of
13 evidence that help us to establish what the decision
14 making was in particular at the conference on
15 10 September 2018?

16 **A.** Okay, understood.

17 **Q.** You'll see an email of 12 November 2018 from Jonathan
18 Gribben, a managing associate at Womble Bond Dickinson,
19 to you and to Simon Henderson, copied to Mr Parsons:
20 "As you know, Fujitsu are in the process of
21 analysing [KELS and Robert Worden's] sample of 50 KELS."
22 In the second paragraph:
23 "The analysis is being carry out by several people
24 in Steve Parker's team plus Gareth Jenkins. It would
25 not have been possible for Steve to review all of the

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1 KELs himself in the time available and by his own
2 admission he has been in management since 2010 so his
3 technical knowledge is not as it once was."

4 That's a reference to Stephen Parker, yes?

5 **A.** Yes.

6 **Q.** If we scroll up, please, to the bottom of page 7 and the
7 top of page 8, we see Mr Henderson's reply:

8 "I haven't had a chance to discuss this with [you]
9 but my view is that the overall approach, ie recording
10 that he has asked his team to do the work, is fine but
11 that it is very likely that privilege (if indeed there
12 is any privilege) will be waived. This is an exercise
13 which a third party witness is saying he has asked his
14 team to perform, ie it is not something which, at least
15 on the [face] of the [witness statement, Post Office's]
16 lawyers have asked for -- and even if they have, by
17 including the output of that exercise in a [witness
18 statement], I think any privilege, eg in how the
19 exercise was carried out, is likely to be waived. It
20 certainly cannot be assumed that we can pick and choose
21 what we present (since that could plainly be misleading)
22 and more generally I think it will have to be assumed
23 that the way in which the investigation is carried out
24 and the detail of its findings, will be disclosable."

25 So here Mr Henderson is focusing on the extent to

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1 "They are also reasons for not having him as
2 a source of evidence -- ie as a source of information
3 for our witnesses and/or as a person providing analyses
4 on which our witnesses will rely. Where he is acting as
5 a source the claimants will know this and they will
6 waste no time in arguing (1) the fact that we have not
7 called such a natural witness demonstrates that he not
8 a reliable witness, (2) we recognise this fact and want
9 to protect him from any cross-examination, and (3) if he
10 is not a reliable witness, he can't be a reliable source
11 of evidence, either and (4) as the claimants are being
12 prevented from cross-examining him the information he
13 proves to other witnesses is even less reliable than
14 a witness statement from him would be. The argument
15 will undermine the evidential value of any witness
16 statements that are based on information that Jenkins
17 has provided."

18 You were essentially saying here that the three
19 reasons that we've isolated for not calling Gareth
20 Jenkins apply with equal force for not relying on
21 Mr Jenkins behind the scenes as a provider of
22 information or evidence?

23 **A.** Yes.

24 **Q.** Is that because, if he is an unreliable witness but not
25 called, he may, nonetheless, be providing unreliable

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1 which privilege might have been maintained or it might
2 have been waived by the conduct of the exercise of
3 examining the KELs by a Fujitsu team, including
4 Mr Jenkins?

5 **A.** Yes, he's also saying it's fine to record that Mr Parker
6 has asked his team to do the work.

7 **Q.** Yes, then your reply, if we scroll up, please -- keep
8 going, thank you -- you say you agree with Simon's view
9 below. I'm going to skip over the first main paragraph
10 because that's all about the privilege issue. Then you
11 say this:

12 "Second, I see that Gareth Jenkins is part of the
13 team doing the analysis. We all know the reasons why we
14 have decided not to have Jenkins as a witness."

15 Are they, just stopping there, the reasons we
16 discussed: he was said by the criminal solicitors to
17 have been an unreliable witness; he had been treated by
18 the Post Office as being unreliable; and he was said to
19 have given misleading evidence in the criminal
20 proceedings?

21 **A.** Yes.

22 **Q.** You say, "We all know" because this is November '18 and
23 you had discussed these at the September '18 conference?

24 **A.** Yes.

25 **Q.** You continue:

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1 information to people who are being called?

2 **A.** It may be argued that he -- what I'm reciting is what
3 the -- the claimants will waste no time in arguing.

4 **Q.** Yes. Well, in fact, in summary here, you predict rather
5 accurately what the judge went on to find, didn't you?
6 This almost reads as if it is part of the judgment in
7 due course?

8 **A.** I'm not sure that is a fair summary of what the judge
9 said but, nevertheless -- I'm -- I'd have to go back and
10 remind myself.

11 **Q.** Would the reasons for not relying on him as
12 a behind-the-scenes source of evidence be that, if he is
13 thought to be an unreliable witness but not called, then
14 asking him to speak about the very same subject matter
15 as has been found by the criminal lawyers to be
16 misleading evidence, pollutes the stream of evidence of
17 the witnesses who may be being called?

18 **A.** I suppose you could be -- that's one way of describing
19 it. From my perspective, we had made a tactical
20 decision that it would be better if he were not called
21 as a witness and the logic of that decision also meant
22 that it would be better if we didn't rely on him -- our
23 other witnesses didn't rely upon him as a source of
24 information. And so I go on to say in the next
25 paragraph:

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1 "It follows that we should limit Jenkins'
 2 involvement as a source of evidence as much as possible,
 3 essentially to those areas where there's no alternative
 4 source of information."
 5 **Q.** In the next paragraph you, say:
 6 "... We should limit [his] involvement ... as much
 7 as possible ... However, the man seems to be popping up
 8 on [every] technical question -- as a source of
 9 information for Torstein Godeseth and now as a member of
 10 the team providing analysis for Steve Parker.
 11 I appreciate his unique position and there may be some
 12 areas where we have no alternative but to use him as
 13 a source of information. But are we sure that we are
 14 limiting his involvement as much as possible?
 15 I entirely recognise the need to be realistic about the
 16 sort of evidence we can get from Fujitsu in the time
 17 available. But I need to make clear the risk we could
 18 be running of adducing evidence which could turn out not
 19 to be very useful to us."
 20 So you are here, in the words of your witness
 21 statement, expressing dissatisfaction at the fact that
 22 Mr Jenkins keeps popping up in the evidence.
 23 **A.** Yes.
 24 **Q.** Having regard to this email chain, were you aware that
 25 there were number of people who were contributing to

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1 **Q.** To what extent were these issues addressed at the
 2 meeting of 10 September, ie Dr Jenkins, as you called
 3 him, is an unreliable witness or regarded as
 4 an unreliable witness but we, nonetheless, need to use
 5 him, or was that not addressed at the conference?
 6 **A.** I don't recall it being addressed. My recollection
 7 is -- and this is six years ago, so my recollection is
 8 necessarily limited -- my recollection is that we had
 9 another witness in the form of Mr Godeseth, who was also
 10 very knowledgeable. His job title was General
 11 Architect, I think.
 12 **Q.** Chief Architect.
 13 **A.** Chief Architect. And, although his knowledge on certain
 14 issues was not as great as Dr Jenkins -- he was
 15 a Doctor. Gareth Jenkins --
 16 **Q.** He wasn't.
 17 **A.** Oh, I'm so sorry. I thought he was a Doctor. So Gareth
 18 Jenkins, although there were certain limited matters on
 19 which his knowledge was not as great, he was still very
 20 knowledgeable and, however, having -- and that was the
 21 basis upon which the decision was made as to the
 22 evidence that we prepared -- I say "we" -- that Womble
 23 Bond Dickinson prepared, with comments from counsel.
 24 Then, once we saw the witness statements, I saw, we
 25 all saw, how much reliance there was on Mr Jenkins. He

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1 Mr Godeseth's witness statement, including Gareth
 2 Jenkins?
 3 **A.** I was aware that Mr Godeseth's witness statements
 4 identified a number of people as sources of his
 5 information, including, in numerable examples, Mr --
 6 Dr Jenkins himself.
 7 **Q.** You were willing, would you agree, to accept Mr Jenkins'
 8 involvement and assistance where there was no one else
 9 who was able or willing to provide it?
 10 **A.** Yes. If there was evidence that needed to be adduced
 11 and the relevant evidence was, in part, based upon
 12 information that could only come from Jenkins, then we
 13 would have to rely on that information, but I wanted to
 14 make it clear that it should be kept to a minimum and we
 15 shouldn't be doing it if we could avoid doing it.
 16 **Q.** Would you agree that that prospective use of him made it
 17 all the more important to ensure that Mr Jenkins was
 18 aware of the position that he was being put in,
 19 ie although he was being regarded by Post Office as
 20 an unreliable witness, nonetheless, his assistance would
 21 be sought and relied upon where it was important for the
 22 Post Office for that to happen?
 23 **A.** That's not something that I considered for a second at
 24 the relevant time. I had no idea what Dr Jenkins was or
 25 was not aware of.

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1 was referred to everywhere and it was quite a surprise
 2 and quite disappointing.
 3 **Q.** Did that get worse during the course of trial, ie the
 4 onion was peeled back a little bit further in that, in
 5 the course of the trial, previously unrevealed reliance
 6 on Mr Jenkins was itself revealed?
 7 **A.** I don't recall but it's possible. I just don't recall.
 8 I'm sorry.
 9 **Q.** Can I turn to the extent to which Mr Jenkins was
 10 involved in the creation of the Post Office's witness
 11 evidence and its expert evidence, and the extent to
 12 which that involvement was revealed to the claimants and
 13 to the court. That document can come down, thank you.
 14 I'm not going to go through all of the emails that
 15 we've now got which show the extent of Mr Jenkins'
 16 involvement, which witnesses it relates to, the extent
 17 of the reliance placed on him in the creation of
 18 a witness account, what Mr Jenkins told them or didn't
 19 tell them. I just want to look at one example, please.
 20 It in fact comes out in the judgment itself. So it's
 21 something that emerged in the course of the trial and is
 22 not something that we now know, because we've got a lot
 23 more privileged information.
 24 POL00022840. Can we turn, please, in the judgment
 25 to page 275, and paragraph 870. This is the section of

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1 the judgment concerning the judge's conclusions on
2 expert evidence and he introduces it by saying:

3 "I prefer the expert evidence and approach of
4 Mr Coyne to that of Dr Worden. That is for the
5 following reasons."

6 Then can I go to one of the reasons given, page 277,
7 paragraph 880:

8 "He [that's Dr Worden] also relied -- in my judgment
9 heavily -- upon information from Mr Jenkins. Mr Jenkins
10 was not even identified as one of his sources of
11 information in section 1.3 of this report, headed
12 'Sources of information'. This means that Dr Worden was
13 given access to information that was not made available
14 to his opposite number ... Although there were some
15 references throughout the text of the report to
16 Mr Jenkins, Dr Worden did not routine any identify where
17 he had relied upon Mr Jenkins. He also provided a great
18 deal more information about this contact with Mr Jenkins
19 in his oral evidence than he did in his written reports.
20 In his cross-examination, he identified, when asked
21 about a passage, that he had obtained that information
22 from Mr Jenkins, which plainly took place before the
23 first report was served as he accepted on his first day
24 in the witness box it was 'a year ago'. This was not
25 clear on the report itself. One example of this was

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1 **A.** Yes, and I'm cross about this. To say I'm cross is
2 an understatement.

3 **Q.** Cross with who?

4 **A.** I'm cross that it happened. At an early stage, there
5 was discussion about the fact that Dr Worden wanted
6 direct access to Fujitsu, and this was raised with
7 counsel -- with me and with Simon Henderson, possibly
8 with Mr Draper as well -- and we advised that there
9 should be a protocol drawn up to deal precisely with
10 information coming from Fujitsu to Dr Worden. And, as
11 a result of that advice, a lengthy document was drawn
12 up, I forget how many pages but it was a significant
13 number of pages and, amongst other things, in fact, at
14 the beginning, it made it clear that that to the extent
15 that any information was provided to Dr Worden, this
16 should be recorded, so as to ensure that there was
17 equality of information between the experts.

18 There would be a full record of the information
19 provided to Dr Worden, kept by WBD, so that that
20 information could also be provided to Mr Coyne, who was
21 the expert for the claimants.

22 That was the whole purpose of that protocol process,
23 and so what Mr Justice Fraser describes here should
24 never have been possible. There should have been
25 disclosure of everything that anyone at Fujitsu said

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1 paragraph 654.2, where the report was dealing with the
2 effect of the [RPM] bug and Dr Worden stated 'Because
3 the operation involved was apparently not a double entry
4 operation on the BRDB, the countermeasure of checking
5 the double-entry constraint DEA did not catch it'. This
6 information came from Mr Jenkins, but until Dr Worden
7 was asked this in cross-examination, no reader would be
8 able to tell this. The involvement of Mr Jenkins in
9 this explanation in his report was simply hidden.
10 Nowhere was there a note or summary of all the
11 information that had been given to Dr Worden by
12 Mr Jenkins. In this litigation in particular, and given
13 the involvement of and information provided by
14 Mr Jenkins, who knew so much about the Horizon system,
15 such a note or summary was, in my judgment, essential.
16 This was particularly important given that there was no
17 witness statement from Mr Jenkins. Dr Worden had been
18 provided with, and had used, information from Mr Jenkins
19 in addition to the witness statements served by the
20 parties."

21 So I think it's fair to say that this is
22 a conclusion that the judge's view of Mr Godeseth and
23 his evidence was adversely affected by the involvement
24 of Mr Jenkins and the non-revelation of that
25 involvement.

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1 to -- any information, any new information that was
2 provided by Fujitsu to Dr Worden, that should have been
3 recorded -- identified, recorded, and then given to
4 Mr Coyne as well, and I'm astonished and cross that that
5 didn't happen.

6 **Q.** You gave that advice to Womble Bond Dickinson?

7 **A.** Yes. Actually, I believe that there's a --

8 **Q.** There's an email chain setting it out --

9 **A.** In the documents you've provided, there's an email where
10 I talk about the need for a protocol.

11 **Q.** Yes. Do you know whether Womble Bond Dickinson carried
12 that advice into effect with their client, the Post
13 Office?

14 **A.** I believed that they did. I had no reason to think that
15 they hadn't. What would be the point? I'm sorry to ask
16 rhetorical questions when I'm giving evidence but what
17 would be the point of preparing a quite a lengthy and
18 detailed protocol document if it was then ignored in
19 practice?

20 **Q.** Do you know whether that was the witness's,
21 ie Dr Worden's refusal, to carry that into effect or
22 Post Office's refusal, or failure to carry it into
23 effect, that caused it not to be carried into effect?

24 **A.** I -- the basic thrust of the protocol was that there
25 would never be any contact between Dr Worden and Fujitsu

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1 without WBD being present and taking a note and,
2 therefore, WBD should always have been present and
3 taking a note of any information that was provided. To
4 the extent -- I don't know if there was any contact
5 between Dr Worden and Fujitsu without WBD being present,
6 there certainly shouldn't have been and, if there was,
7 that shouldn't have been allowed. That should have been
8 prevented by WBD.

9 Assuming, as I did, and I still do assume, that any
10 contact would have been with WBD being present, then any
11 failure to record the information that was provided, and
12 provide that information to Mr Coyne, would have been
13 WBD's failure, not Dr Worden's. It wasn't his job to
14 set it all out in writing and to provide it to Mr Coyne;
15 that was my instructing solicitor's job.

16 **Q.** Is the long and the short of it, irrespective of who was
17 at fault or who was to blame for the protocol that you
18 envisaged not being carried into effect, that that
19 failure compounds the use and reliance on Gareth Jenkins
20 as a behind-the-scenes source of evidence?

21 **A.** I'm not sure what your question means. It just -- it
22 meant that there was a respect in which Dr Worden expert
23 evidence was rendered less reliable in circumstances
24 where that was avoidable. It need not have happen.

25 **Q.** It applied not just to Dr Worden; it applied to Torstein
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1 a witness in the Post Office litigation and with the
2 contributions that he made to witness and expert
3 evidence outside of the courtroom, and with the extent
4 to which that was revealed to the claimants and to the
5 court on the face of the witness statements and expert
6 evidence.

7 Can we turn to how Mr Jenkins' role was addressed in
8 the Post Office's closing submissions, please. Can we
9 turn up POL00026925. We can see that these are the Post
10 Office's closing submissions in writing, for the
11 purposes of the Horizon Issues trial. They are 545
12 pages long, including the appendices.

13 Can we look, please, at the body of the submissions,
14 where they end, at page 392. If we scroll down, and if
15 we just look at the top of the next page, we can see
16 they're dated 27 June 2019 and we can see that they're
17 signed off by you and your three juniors.

18 **A.** Yes.

19 **Q.** Did you contribute to the drafting of these?

20 **A.** I'm sure I did but, whether I did or not, I certainly
21 approved them.

22 **Q.** So you read them all and signed them off by putting your
23 name to them?

24 **A.** Yes, I'm sure that's right.

25 **Q.** Can we look, please, at page 64 and at paragraph 138.
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1 Godeseth as well, didn't it?

2 **A.** Well, with the witnesses, there were a great number of
3 occasions within the witness statements where Mr Jenkins
4 was specifically identified as a source of information.
5 There were some occasions where he was not and it's
6 absolutely -- I think it's really unfortunate that he
7 wasn't specifically identified on all occasions and
8 there were at least couple of occasions where I think
9 I fell short in -- because I was in a hurry, because
10 I had other things to worry about -- where I didn't, you
11 know, I didn't intervene in the process, so as to ensure
12 that it was done at all times and I think that's
13 something for which I can be justifiably criticised.

14 **MR BEER:** Can we break there for our second morning break
15 until 12.30, please, sir.

16 **SIR WYN WILLIAMS:** Yes. Of course.

17 **MR BEER:** Of course, sir.

18 (12.21 pm)

(A short break)

20 (12.32 pm)

21 **MR BEER:** Good afternoon, sir, can you see and hear us?

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

23 **MR BEER:** We have dealt with the decision making, Mr de Garr
24 Robinson, at the conference on 10 September 2018, and in
25 associated emails, over the use of Mr Jenkins as
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1 I'm going to take you to three parts of the closings
2 before asking questions:

3 "Post Office wanted to provide a simple and
4 uncontroversial overview of Horizon and its relevant
5 features. It recognised that it was not possible for
6 one person to have had a complete understanding of all
7 of the corners of the Horizon system but, on the basis
8 that there would not be room in the timetable for
9 multiple witnesses, it took the view that this overview
10 should be provided by one person. Two possible
11 candidates were Torstein Godeseth and Gareth Jenkins.
12 Taking into account the involvement that Mr Jenkins had
13 in a number of criminal prosecutions that are currently
14 being looked at by the [CCRC] (eg the Misra case), Post
15 Office asked Mr Godeseth to do so."

16 So that's passage 1. Then if we can go forwards,
17 please, to page 66, at paragraph 14:

18 "As was made clear in the statement, in certain
19 respects Mr Godeseth's evidence was based on information
20 provided by others. His account of the Misra trial was
21 based on information provided by [Womble Bond Dickinson]
22 and Mr Jenkins; his accounts of the Callendar Square,
23 receipts and payments mismatch, local suspense and
24 Dalmeington bugs were based online the contemporaneous
25 documents and discussion with Mr Jenkins and on one
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1 point of information provided by Matthew Lenton, [the
2 documents manager]; his accounts of the documents held
3 by Post Office was based on information provided by
4 Steve Bansal, Fujitsu's Senior Service Delivery
5 Manager."

6 Then the third passage is 144:

7 "[The claimants] understandably complain that
8 Mr Jenkins and the other source of Mr Godeseth's
9 information could have given some of this evidence
10 firsthand ...

11 "Taking into account that Professor McLachlan's
12 evidence specifically addressed things said or done by
13 Mr Jenkins in relation to the Misra trial, Post Office
14 was concerned that the Horizon Issues trial could become
15 an investigation of his own in this and other ... cases.

16 "2. Moreover, Post Office was conscious that if it
17 only adduced firsthand evidence in the trial, it would
18 end up having to call more witnesses than could be
19 accommodate within the trial timetable.

20 "3. Furthermore, so far as the Post Office was
21 aware, the relevant parts of Godeseth 2 were most
22 unlikely to be controversial. For example, the Misra
23 trial was a matter of public record, the four bugs were
24 covered by contemporaneous documentation and Post Office
25 had no reason to doubt Fujitsu's account of the

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1 reading paragraph 144.1, in the context of these
2 proceedings, would have realised that was the case.
3 That was being -- in my view, that was being clearly
4 signalled to the judge.

5 **Q.** That was being open and candid, was it, with the court
6 as to the reasons why your client had decided not to
7 call Gareth Jenkins?

8 **A.** The judge was being told that there were -- it was being
9 made clear, in my view, to the judge that there were
10 issues in relation to what Mr Jenkins had said or not
11 said in criminal cases which would have become the focus
12 of attention. Now, I asked this question rhetorically:
13 why is it even relevant to say that? Why would that
14 point even be made? It would only be made because there
15 were previous inconsistent statements that would have
16 been put to Mr Jenkins had he been called. Indeed the
17 judge, in his judgment, says that in one of the
18 paragraphs.

19 In my view, that was a fair -- that gave a fair
20 indication to the judge of the concern that Post Office
21 had, which led to Mr Jenkins not being called as
22 a witness. I don't accept that was misleading at all.
23 It's true that I didn't refer -- that counsel, the four
24 of us, didn't refer to Mr Clarke's note. We wouldn't
25 have been entitled to refer to the note because that was

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1 documents it held."

2 In the three passages I have taken you to, do you
3 accept that the explanation provided to the court did
4 not reflect the true reasons as to why Mr Jenkins was
5 not being called as a witness?

6 **A.** No.

7 **Q.** They did reveal the true position, did they?

8 **A.** What -- if you look at paragraph 144.1, what's being
9 said is that -- what's being flagged to the court is
10 that there were criticisms, there were likely to be
11 criticisms, of things said or done by Mr Jenkins in the
12 Misra trial and other criminal cases.

13 **Q.** Just stopping there, where does it say that there could
14 be criticisms made of Mr Jenkins in the criminal cases?

15 **A.** "Taking into account that Professor McLachlan's evidence
16 specifically addressed things said or done by Mr Jenkins
17 in relation to the Misra trial, Post Office was
18 concerned that the Horizon Issues trial could become an
19 investigation of his role in this and other criminal
20 cases."

21 Now, what that was doing was signalling to the
22 judge -- like any other judge, the judge was
23 an experienced litigator -- it was signalling to the
24 judge that there were things that Mr Jenkins had said
25 and done that would be the subject of criticism. Anyone

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1 privileged. It's true that we didn't say he would have
2 been a terrible witness. But, in circumstances where
3 the judge is being told there are things that he did in
4 relation to criminal cases that would have been the
5 subject of investigation, ie would have been the subject
6 of cross-examination during the trial, in my view, that
7 is sufficient. That is a sufficient indication of the
8 sort of concern that Post Office had that led to
9 Mr Jenkins not being called as a witness. So I don't
10 accept your question.

11 **Q.** The real reasons, we established, I think, three times
12 this morning, that Mr Jenkins was not called, was that,
13 firstly, he was said by the criminal solicitors to be
14 an unreliable witness; secondly, he had been treated by
15 the Post Office as a witness upon whom reliance could
16 not be placed; and, thirdly, he was said to have given
17 false evidence in criminal proceedings. You agree that
18 none of those reasons, the true reasons, were given?

19 **A.** I don't agree that they are three separate reasons. The
20 reasons were that, during the criminal trials, he had
21 said things that were misleading and/or had not said
22 things that he should have said. That -- the inevitable
23 result of that was to the give the claimants material to
24 suggest that he was an unreliable witness. That was the
25 reason why he was not called.

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1 In my view, paragraph 144.1 signals that to the
 2 judge. It doesn't do so with the emphasis that you
 3 would probably suggest is required but I do not accept
 4 that that was misleading. I believe that, in the eyes
 5 of an experienced litigator, that would have signalled
 6 quite clearly what the real concern was, what the
 7 underlying concern was.

8 **Q.** Really? You think that signals quite clearly?
 9 **A.** Yes, I do.

10 **Q.** Is that really what you're saying?
 11 **A.** It would not have been relevant. The point being made
 12 in 144.1 would not have been relevant, unless there was
 13 material which could have been put to Mr Jenkins about
 14 what he'd said or not said during the criminal trials.
 15 It would have been an irrelevant point to make. Why is
 16 it there? Because things clearly were said or not said
 17 which would have been the subject of cross-examination.

18 **Q.** At most, this is saying, "It become a distraction to
 19 your trial, judge. That's why we haven't called
 20 Mr Jenkins".
 21 **A.** Well, I'm -- that is not my view as to what is being
 22 signalled by paragraph 144.1. Not at all.

23 **Q.** Who signed these submissions off within your solicitor
 24 team?
 25 **A.** I have no -- I couldn't tell you that. Obviously, the
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1 reasons?
 2 **A.** No, absolutely not different. You're entitled to say,
 3 if you want, you --
 4 **Q.** Thank you.
 5 **A.** -- we could have been more -- you're welcome -- we could
 6 have been more emphatic. You're entitled to say that.
 7 **Q.** Thank you again.
 8 **A.** But what, in my view, would be quite wrong, would be to
 9 say that is misleading. That was a -- in the -- to
 10 an experienced litigator, it would have been clear what
 11 was being signalled by paragraph 144.1.

12 **Q.** If we go back to paragraph 138, which is on page 64 --
 13 thank you -- the last four lines:
 14 "Taking into account the involvement that Mr Jenkins
 15 had in a number of criminal prosecutions that are
 16 currently being looked at by the [CCRC], Post Office
 17 asked Mr Godeseth to do so."
 18 That's the same point as we subsequently see in
 19 point one, isn't it?
 20 **A.** What is being said there is that there was a concern
 21 because Mr Jenkins had been involved in criminal
 22 prosecutions that the court of criminal -- the Criminal
 23 Cases Review Commission was looking at. In other words,
 24 there were questions as to Mr Jenkins' performance of
 25 his duties as an expert, which were being reviewed.
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1 submissions would have been circulated to WBD for
 2 comment but I don't know how high up the process it
 3 would have gone, how high up the hierarchy it would have
 4 gone. Certainly, Andy Parsons would have approved.

5 **Q.** Do you know who within the client signed the submissions
 6 off?
 7 **A.** I do not know, no.

8 **Q.** Given your long experience as a litigator, what do you
 9 consider would have been the reaction by the judge if
 10 the Post Office had disclosed the three reasons we
 11 discussed this morning why Mr Jenkins had not been
 12 called, albeit he was being used within the litigation
 13 as an important source of evidence given by others?
 14 **A.** I -- you're asking me to answer a question which is
 15 based on a hypothesis that I don't agree with. In my
 16 view, paragraph 144.1 signalled to the judge that
 17 Jenkins said or didn't say things in criminal
 18 prosecutions that would have been the subject of
 19 cross-examination. Previous inconsistent statements
 20 would have been put to him and Post Office wished to
 21 avoid that. In my view, you -- you may be going to take
 22 me to the judge's judgment in a minute -- but, in my
 23 view, that's how the judge must have understood it.
 24 I infer that from his judgment.

25 **Q.** But lurking beneath the surface was a different set of
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1 There were issues about his performance as an expert.
 2 It was not being concealed from the judge that there
 3 were -- that there were reasons for thinking that
 4 Mr Jenkins's performance as an expert were open to
 5 criticism, and that it might be suggested that he had
 6 given evidence that was open to challenge. I do --
 7 I really do refute that suggestion. That's not my view
 8 at all.

9 **Q.** Can we turn forwards, please, to POL00134909. This is
 10 a long attendance note made by Herbert Smith Freehills
 11 of a conference with you on 4 October 2019. You'll see
 12 who is present. Again, just to orientate ourselves,
 13 that's after the end of the trial, after submissions
 14 have been made but before judgment, yes?
 15 **A.** Yes.
 16 **Q.** Then there's a list of questions that Alex, that's Alex
 17 Lerner, I think, wishes to be answered. Question 4, we
 18 can see:
 19 "At trial, did the claimants advance a case that
 20 Post Office suppressed evidence regarding the existence
 21 of bugs? If so, can you point me to the relevant parts
 22 of the closings/the trial transcripts? I want to have
 23 read up on this issue if it is something you think might
 24 get raised in the judgment."
 25 So this is by the time Herbert Smith Freehills are
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1 being involved as solicitors for the Post Office, yes?

2 **A.** Yes.

3 **Q.** Can we see what the answer to that question 4 is. It's
4 page 9, please. Can you see there is a box which says,
5 "The answer to your question is yes", under question 4,
6 they did, that's the claimants, suggest it in a number
7 of ways.

8 Then under one heading, "Gareth Jenkins":

9 "First of all, they made huge complaints that we
10 didn't call Gareth Jenkins, who is a god but
11 an unreliable god. They say the fact that we didn't
12 call Gareth Jenkins is suppression.

13 "And you know what, that might be right."

14 Why did you think that what the Post Office had done
15 may be the suppression of evidence from Gareth Jenkins?

16 **A.** I think you're reading too much into that. I am given
17 sometimes to explaining things in a very colourful way.
18 There was no suppression of evidence. What there was
19 was a decision not to call someone to give evidence on
20 relatively uncontroversial questions because it was felt
21 that what would then happen is that he would get dragged
22 into a cross-examination of -- in relation to his
23 evidence in criminal prosecutions, that would -- that
24 would simply result in a finding that he was
25 an unreliable witness.

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1 Smiths, yes?

2 **A.** Yes. Now, I know almost all of the people in that list
3 very well. I know not just the WBD people but the HSF
4 people as well, Alan Watts and Alex Lerner, I'm very
5 familiar with him. This was a briefing discussion to
6 help them get up to speed. They'd only -- my
7 recollection is that they'd only recently been
8 instructed and I was trying to help them get up to speed
9 so that they were able to field matters arising as and
10 when judgment was given.

11 In that sense, it was an informal briefing of
12 colleagues about issues arising in the litigation, in
13 Alex's four or five questions. In that sense, it was
14 informal.

15 **Q.** So back to page 9, please, question 4, second paragraph:

16 "They [the claimants] say that the fact we didn't
17 call Gareth Jenkins is suppression.

18 "And you know what, that might be right. They would
19 have killed him at trial."

20 You say that is just explained by the use of overly
21 colourful language in the course of an informal meeting?

22 **A.** Yes, "They would have killed him at trial", what I'm
23 saying is they would have cross-examined him up hill and
24 down dale on his performance in and as an expert and
25 things he did and didn't say during criminal

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1 **Q.** Suppression in this context, the suppression of
2 evidence, means to silence, to cover-up, to conceal,
3 doesn't it?

4 **A.** As I say, I think you're reading far too much into that.

5 **Q.** I'm just reading back the words that are recorded in
6 this Herbert Smith Freehills attendance note on you.

7 **A.** Yes, but do remember that this is an informal
8 conversation between litigators and I am speaking -- as
9 I say, I'm trying to do it in an easy to understand, and
10 rather dramatic way, so that Alex Lerner can understand
11 where we stand. If you're going to put to me that there
12 was actually suppression of evidence because Gareth
13 Jenkins was not called, I would refute that suggestion.

14 **Q.** In what respect was this consultation informal?

15 **A.** It was a -- was it an in-person conversation or was it
16 a call? Can you --

17 **Q.** Go back to page 1. It doesn't record on its face --

18 **A.** No.

19 **Q.** -- whether it was in person but it lasted 1 hour and 25
20 minutes.

21 **A.** Yes.

22 **Q.** You've got you and Simon Henderson from the counsel
23 team, Andrew Parsons and Womble Bond Dickinson from
24 the -- sorry, and Katie Simmonds from the Womble Bond
25 Dickinson team, and then four solicitors from Herbert

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1 prosecutions, and they would have had a field day with
2 that. That's what I'm trying to say there. That's
3 another way of -- a rather colourful way, as is my wont,
4 of making that point.

5 **MR BEER:** Mr de Garr Robinson. Thank you very much.
6 They're the questions I ask.

7 Sir, there are some questions I think from, I think,
8 three sets of Core Participants that I anticipate will
9 take until about 1.20.

10 **SIR WYN WILLIAMS:** All right.

11 **MR BEER:** Mr Stein, I think, first.

12 **Questioned by MR STEIN**

13 **MR STEIN:** Mr de Garr Robinson, just dealing with the last
14 matter you were asked by Mr Beer, you said in your
15 evidence that, as regards the explanation that was
16 provided concerning Mr Jenkins, that there was a concern
17 that -- or you were flagging to the judge there were
18 likely to be criticisms of things said or done by
19 Mr Jenkins in the Misra trial and other criminal cases.

20 **A.** Yes.

21 **Q.** Are you trying to say that you were trying to tell the
22 judge that, in the future, that there was going to be
23 issues in criminal cases, possible appeals, that related
24 to Mr Jenkins? Is that what you're trying to say?

25 **A.** I wasn't talking about appeals.

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1 Q. Right. So what criminal cases were you talking about
2 that you were trying to signal to the judge involved
3 Mr Jenkins?
4 A. The Misra trial and other criminal cases in which he had
5 been involved as an expert witness.
6 Q. In what way was that going to be a future event that you
7 were trying to signal to the judge?
8 A. I don't understand your question.
9 Q. Well, you were trying to flag something to the judge.
10 You're trying to say to the judge, "Look, there's
11 a situation here regarding Jenkins and his involvement
12 in criminal cases".
13 A. Yes.
14 Q. You're trying to flag that up, yes?
15 A. Yes.
16 Q. Now, "flagging up" seems to say you're providing some
17 sort of warning for the future. What do you --
18 A. Why do you say that?
19 Q. Well, you explain, then, what you mean by flagging it up
20 to the judge?
21 A. What I was flagging to the judge -- well, what we were
22 flagging to the judge was that there were -- had
23 Mr Jenkins been called as a witness, there would have
24 been questions asked of him relating to the things he
25 said and did not say in criminal prosecutions,

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1 Q. -- did he know that?
2 A. Please let me answer the question. However, I would say
3 this: I have no doubt that Mr Green knew that there were
4 criticisms being made of Mr Jenkins' performance as
5 an expert witness in criminal cases. Of course he knew
6 that.
7 Q. To your knowledge, did Mr Green know or his team know
8 that there had been concerns expressed by criminal
9 lawyers that Mr Jenkins had actively misled courts?
10 A. I've already answered that question.
11 Q. No, you haven't. You've diverted yourself from the
12 answer.
13 A. If I may say so, that is not a proper point to put to
14 me --
15 **SIR WYN WILLIAMS:** Can I stop before you start, Mr de Garr
16 Robinson. I don't want a situation developing where you
17 and Mr Stein have an argument. So I'd be grateful if
18 you both -- first, Mr Stein ask the question and then,
19 secondly, you give your answer without either of you
20 trying to chop down the other, if you see what I mean.
21 **MR STEIN:** Yes, I do, sir.
22 **THE WITNESS:** Very good, my Lord.
23 **MR STEIN:** Did Mr Green know, as you did, that Mr Jenkins
24 had been viewed by criminal lawyers, instructed on
25 behalf of the Post Office, that he had misled the court;

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1 including, in particular, the Misra case because that
2 was actually the subject of evidence from Professor
3 McLachlan. That's what was being signalled to the
4 judge. That's only relevant -- it would only be
5 a relevant thing to signal if there was material to
6 suggest that he had made previous inconsistent
7 statements.
8 Q. Did you explain the signal or this flag to the judge to
9 your opponent? That's leading counsel, Patrick Green QC
10 as he then was, KC as he now is?
11 A. I have no recollection of discussing this with Mr Green
12 at all. That is -- if I may say so, that's a slightly
13 unreal question. We're all -- we were all in that
14 court, we were all experienced litigators. I appreciate
15 I'm using that expression several times now but we all
16 know what's going on. It was adversarial litigation.
17 There is no way in the world that Mr Green thought I was
18 making some reference to some future event. Mr Green
19 would have known precisely what I meant.
20 Q. Did Mr Green know that there had been concerns expressed
21 by criminal lawyers that Mr Jenkins had misled a court;
22 did he know that?
23 A. I have no idea. I would --
24 Q. To your knowledge --
25 A. Please let me answer.

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1 did he know?
2 A. I imagine not.
3 Q. Right. Now, help us understand the overall position.
4 Many of my clients, certainly not all, are people that
5 were involved in the GLO litigation, the High Court
6 litigation, okay, as litigants. Now, help us understand
7 a bit more, using as non-lawyer language as possible,
8 why wasn't disclosed within the litigation that
9 Mr Jenkins had -- was understood to have misled courts?
10 A. The source of my knowledge on that question was some
11 legal advice that had been given five, six years
12 previously, to Post Office. That was privileged. It
13 wasn't in my gift to reveal it to the claimants. That
14 was privileged and I didn't have instructions to waive
15 previously.
16 Q. Right. Did you ever consider that question, this
17 question of privilege, privilege meaning that you would
18 be unable without permission to disclose it? Did you
19 ever look into that and think to yourself: is this
20 actually privileged information; did that occur to you?
21 A. It didn't occur to me that -- I can't imagine it would
22 have occurred to me that it was not privileged. Why
23 would I think it was not privileged?
24 Q. Did you look into the source of the information that led
25 to the view that Mr Jenkins had misled the court? Did

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1 you consider that, in other words whether that source of
2 information was privileged or not?

3 **A.** The -- all I looked at was what was set out in
4 Mr Clarke's note, and that note is privileged, as far as
5 I'm aware.

6 **Q.** So you'd looked at the note, decided that that was
7 privileged because it's a note from a lawyer, drafted by
8 Mr Clarke, a lawyer at Cartwright King, and that, for
9 you, was sufficient to say it's privileged, can't go
10 near it; is that fair?

11 **A.** Yes, and if I made a mistake then I made a mistake, but
12 that's still how I look at it now.

13 **Q.** Right. One last question and then I'll finish: did you
14 consider the criminal exception to privilege, sometimes
15 called the iniquity exception to privilege; did that
16 cross your mind at all?

17 **A.** No, and I just don't remember thinking about these
18 things in those ways. It's not -- it wasn't in my gift
19 to reveal to the court what Mr Clarke had said in that
20 note.

21 **MR STEIN:** No further questions.

22 **SIR WYN WILLIAMS:** Thank you, Mr Stein.
23 Who is next?

24 **MR BEER:** I think it's Mr Henry.

Questioned by MR HENRY

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1 convictions unsafe, as we did with the previous exercise
2 with the previous revelation about the Fujitsu bugs? If
3 not, why not?"

4 So you're drawing a distinction there, aren't you,
5 between the previous exercise, namely the issue of the
6 bugs, with the separate subject of the misleading expert
7 evidence and also the possibility of remotely altering
8 branch data?

9 **A.** Yes.

10 **Q.** Yes. Exactly. Now, so you clearly identified that
11 distinction, what I'm going to call the tainted Fujitsu
12 witness point. This isn't to in any way embarrass you
13 but you were very frank about your having no criminal
14 experience at all, do I take it, therefore, that you've
15 never sat as a Crown Court recorder?

16 **A.** Correct.

17 **Q.** So, notwithstanding all of that and the fact, as you
18 admit, that you've had no practice or practical
19 experience in criminal law, you clearly identified that
20 point: the misleading evidence point from the expert?

21 **A.** Yes, I imagine it -- I did so as a result of something
22 that was said in the claimant's letter before action but
23 I can't be sure about that.

24 **Q.** But you clearly identified it because, otherwise, you
25 wouldn't have written it down as you did.

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1 **MR HENRY:** Hello, Mr de Garr Robinson.

2 Could we go to POL00140216, please, and it's your
3 email of 1 June 2016. While it's being brought up --
4 can we scroll up, please.

5 It's point 2 in your PS that I want to concentrate
6 on.

7 Thank you very, very, very much indeed.

8 Now, you pose in that email a number of interesting
9 questions to Mr Parsons, including whether the expert
10 evidence previously relied upon from Fujitsu was wrong
11 or misleading, and you were drawing a distinction, were
12 you not, between the existence of bugs, which you refer
13 to as "the previous exercise", and the apparently
14 misleading conduct of the expert, which was a separate
15 issue.

16 **A.** I'm sorry --

17 **Q.** Let me read the paragraph to you:

18 "When did we become aware of the possibility of
19 remotely altering branch data on Horizon, and why did we
20 not become aware of it long ago? Is the fact that we
21 consistently claim the opposite our fault, or Fujitsu's?
22 Does it mean that the expert evidence that we have
23 previously relied on from Fujitsu was wrong/misleading?
24 And have we already embarked on an exercise to determine
25 whether this makes any or all of the previous

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1 Now, could I just ask you to consider this. If
2 there had been successful criminal appeals between 2013
3 and 2019 that blew open the existence of Gareth Jenkins'
4 misfeasance, that would have made the Horizon Issues
5 trial much more difficult to defend, wouldn't it?

6 **A.** But by this stage, had there not already been appeals on
7 the basis of -- I'm sorry, I can't now put together the
8 chronologically in my head.

9 **Q.** Don't worry. Let me just put the question to you again.
10 If there had been successful criminal appeals between
11 2013 and 2019 --

12 **A.** Oh, I see.

13 **Q.** -- that had blown open the existence of Gareth Jenkins'
14 misfeasance, that would have made the Horizon Issues
15 trial much more difficult to defend, wouldn't it?

16 **A.** No, I don't think so. It would have made -- it would
17 have reinforced the desirability of not relying on any
18 evidence from Gareth Jenkins, certainly.

19 **Q.** Well, if there had been number of successful criminal
20 appeals exposing that the Post Office had called
21 an expert, the Chief Architect of the Horizon system,
22 who breached his duty to the court and had misled juries
23 and Magistrates orally and in writing, failing to
24 disclose the existence of bugs, errors and defects, that
25 surely would have gravely, perhaps fatally, undermined

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1 your defence?

2 **A.** You overlook what the questions were in the GLO
3 proceedings. The questions were: (1) what were the
4 parties' rights and obligations under the postmaster
5 contracts; (2) were there bugs that had caused
6 deficiencies, shortfalls in postmaster accounts which
7 were lasting, in other words which hadn't been fixed;
8 and (3) were there cases of remote access by Fujitsu
9 which resulted in false shortfalls being created, not
10 generally but in relation to the claimants?

11 **Q.** Well, the --

12 **A.** The question of appeals of -- in certain criminal
13 proceedings, about which I know nothing, being
14 successful and the basis upon which they were
15 successful, would have had no direct impact on those
16 questions. There would still have needed to be evidence
17 about what bugs there were, whether those bugs had any
18 impact on the claimants' accounts, what remote access
19 occurred and whether the relevant acts of remote access
20 had any impact on the claimants' accounts.

21 So I'm afraid I don't accept your -- the point that
22 you're trying to put to me, which is that had the
23 process, the criminal appeals process, taken place
24 quicker than it, in fact, did, that would somehow have
25 meant that Post Office would have had to have admitted

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1 the converse position. Had you called Gareth Jenkins in
2 the Horizon Issues trial, you would have had to have
3 disclosed that he had given false evidence, misleading
4 the jury in written and oral evidence and had breached
5 his duty to the court. That surely can't be
6 controversial?

7 **A.** I'd need to think about that. I'm not -- on what basis
8 would it have been -- I'm not saying that -- it might
9 have been -- there might have been very good reasons for
10 Mr Jenkins to have addressed the matter upfront in his
11 witness statement, rather than it being elicited in
12 cross-examination, but I don't understand the legal
13 basis upon which you advance that proposition.

14 **Q.** Well, it has to be part of the discovery process,
15 surely. You can't call somebody and suppress the fact
16 that he'd given false evidence, misleading the jury in
17 written and oral evidence and had breached his duty to
18 the court. I mean, that can't possibly be right.
19 I mean, are we completely at cross purposes here?

20 **A.** I think we may be because what I -- perhaps it might be
21 helpful if I remind you -- is that in the GLO
22 proceedings, it was one of the early cases in which --
23 that disclosure was ordered in -- under the pilot
24 scheme, which is now PD57, I think, AD. During the GLO
25 proceedings, there was no duty to give standard

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1 defeat in the GLO proceedings. That's not right at all.

2 **Q.** Well, those criminal appeals would have answered points
3 2 and 3, wouldn't they? Because those criminal appeals,
4 based upon an *exposé* of Gareth Jenkins, would have
5 addressed the existence of bugs, errors and defects and
6 whether they were lasting and caused loss, and, also,
7 they would have blown open the issue of remote access.

8 **A.** I think you're assuming that there would -- that the
9 Criminal Court of Appeal would have considered whether
10 there were bugs that actually caused specific loss to
11 specific claimants or whether there was actions of
12 remote access that caused specific loss to specific
13 claimants. I find that supposition almost impossible to
14 believe.

15 **Q.** But surely there would have been a risk? I mean, we
16 have just seen the Herbert Smith attendance note:

17 "Anyone who has dealt with Gareth would know that he
18 would kill our case."

19 "Anyone who has dealt with Gareth would know that he
20 would kill our case", and, if that had all been exposed
21 between 2013 and 2019, it would have put the Post Office
22 in a very, very difficult position.

23 **A.** It would have been unpleasant for the Post Office, of
24 course, yes.

25 **Q.** Well, let's just deal with the other side of the coin,

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1 disclosure. What happened is that the parties
2 identified narrow categories of documents in relation to
3 which disclosure should be given. The -- so -- I mean,
4 I wouldn't -- you're raising a question with me which
5 I'd need to consider further but it's not obvious to me
6 that all of those things would have needed to be
7 disclosed.

8 I'm not saying you're wrong; I'm just saying I would
9 need to think about it much more carefully.

10 **Q.** I see. So you need to think carefully about the fact
11 that, if you had called Gareth Jenkins in the Horizon
12 Issues trial, you would need to reflect carefully on
13 whether you would have to disclose that he had given
14 false evidence, misleading the jury both in writing and
15 orally, in Seema Misra's case, and had breached his duty
16 to the court; does that reflect your answer?

17 **SIR WYN WILLIAMS:** Well, Mr Henry, if I can intervene,
18 I know enough about both criminal and civil disclosure
19 to be able to say that there are very significant
20 differences and that we mustn't assume the overlap that
21 you are assuming.

22 **MR HENRY:** I'm so sorry, sir. Well, then I'll leave it
23 there.

24 But could I just ask this: those matters surely --
25 to use your phrase -- even an experienced litigator

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1 would have had to have had telepathic powers to grasp
 2 all that, the courts had been misled, that Jenkins was
 3 in breach of his duties as an expert, et cetera,
 4 et cetera, and so, therefore, the explanation given to
 5 Mr Justice Fraser, as was, was by no means the full
 6 picture?
 7 **A.** I don't accept the proposition that -- from paragraph
 8 144.1, that one doesn't -- one can't see the essence of
 9 what's being -- what's being signalled to the judge.
 10 I'm afraid I just don't agree with you. I could go over
 11 the point again, if you like --
 12 **Q.** No, no need to.
 13 **A.** -- but that is my view.
 14 **Q.** Could I just ask you to consider the words you used to
 15 Herbert Smith that he would have been killed at trial.
 16 How would he have been killed at trial, if none of this
 17 had come out?
 18 **A.** I don't understand your question. He would have been
 19 killed -- what I meant by "he would have been killed at
 20 trial" is that, had he given evidence at trial, he would
 21 have been cross-examined on the statements that he had
 22 previously made in other criminal proceedings and, as
 23 a result of that cross-examination and as a result of
 24 what I'd seen in Mr Clarke's note, the likelihood is
 25 that the court would have come to the view that he was

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1 **Q.** Do you think, on reflection -- and this is my last
 2 subject and topic with you -- that you were, to some
 3 extent, captive to your professional and lay client
 4 advancing again and again, inadvertently no doubt,
 5 misleading submissions to the court and also --
 6 **A.** What -- which submissions are you referring to?
 7 **Q.** Well, for example, the KEL submission, that the KELs
 8 weren't under the control of the Post Office and that
 9 the KELs were irrelevant. I mean, that was hardly
 10 a respectable submission to make. Why didn't you
 11 challenge the Post Office when those instructions were
 12 given to you?
 13 **A.** That is the most extraordinary question. If I could
 14 just unpick it for a moment, the question as to what the
 15 Known Error Log contained was raised at a very early
 16 stage and the relevant paragraph of the defence was
 17 served at a very early stage. It was served on the
 18 basis of instructions from Post Office that would have
 19 been based upon information provided by Fujitsu, that
 20 the Known Error Log was a trivial document that dealt
 21 with issues that had nothing to do with the issues that
 22 the GLO proceedings were concerned with.
 23 Similarly, my instructions that the Known Error Log
 24 was not in Post Office's control would have been based
 25 on instructions I received from Post Office through WBD.

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1 an unreliable witness. That's what I meant by "killed
 2 at trial".
 3 **Q.** I see. So he'd have been dead in the water, if he'd
 4 been called --
 5 **SIR WYN WILLIAMS:** I don't know whether it matters if it is
 6 "killed at trial" or "dead in the water".
 7 **MR HENRY:** But it would have been very public, wouldn't it?
 8 It would have attracted purposes and interested parties
 9 inside and outside the JFSA would have become aware of
 10 his apparent misfeasance?
 11 **A.** Perhaps. That's not something that was in my mind at
 12 the time.
 13 **Q.** All I'm suggesting is, again, that knowledge of this
 14 wrongdoing would have promoted appeals and that would
 15 have been damaging again to the Post Office,
 16 a proliferation of appeals which would have been
 17 politically embarrassing but would also give rise to the
 18 prospect of further civil litigation?
 19 **A.** Again, you're raising issues that were not in my mind
 20 when I -- and the rest of the Legal Team -- came to the
 21 conclusion that it would not be in Post Office's
 22 interests to call him as a witness.
 23 **Q.** Are you sure they weren't in your mind, Mr de Garr
 24 Robinson?
 25 **A.** In my mind, certainly, yes.

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1 Now, I had -- there was absolutely no basis, back in
 2 2017, July 2017, when the defence was served, there was
 3 absolutely no basis to question those instructions, and
 4 you have not suggested a single reason why I should have
 5 refused to accept what I was told and insisted on
 6 cross-examining my clients and insisting on further
 7 evidence. If it's a principle -- if one were to conduct
 8 complex litigation on the basis on every single point
 9 that a client needs to produce evidence to his barrister
 10 to satisfy the barrister that the point is actually
 11 right, it would be impossible ever to draft a defence.
 12 **Q.** But again and again, as is clear from the Horizon Issues
 13 judgment, again and again, in particular, for example,
 14 information received from Mr Parsons was shown to be
 15 wrong?
 16 **A.** Not when the defence was served in July 2017.
 17 **Q.** But, as the case continued, perhaps, did it ever occur
 18 to you that you had been misled?
 19 **A.** I've described my experience of the case and how
 20 unsatisfactory my instructions are in my witness
 21 statement. I think to say "misled" -- I was certainly
 22 misled about whether the Known Error Log was in Post
 23 Office's control and I -- and certainly I would have
 24 thought Post Office as well -- from my perception, Post
 25 Office as well -- was misled about whether it contained

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1 any issues that would have been relevant to the GLO
2 proceedings. So, on that question, yes, I certainly
3 accept that I was misled and, as I say, I was very
4 surprised when I discovered the truth.

5 **MR HENRY:** So at last we can agree on something, Mr de Garr
6 Robinson, thank you very much.

7 **MR BEER:** Sir, the last set of questions are from Ms Dobbin.

8 **Questioned by MS DOBBIN**

9 **MS DOBBIN:** Mr de Garr Robinson, I ask questions on behalf
10 of Gareth Jenkins. My name is Clair Dobbin. I hope you
11 can hear me all right.

12 **A.** I can just about.

13 **Q.** Good. Mr de Garr Robinson, you have been asked number
14 of questions about Mr Jenkins' reliability. May I start
15 by asking you whether or not, in fact, you saw any of
16 the witness statements that he made in any criminal
17 proceedings?

18 **A.** None at all.

19 **Q.** Did you read the transcript of the evidence that he
20 gave --

21 **A.** None --

22 **Q.** -- in the Misra trial?

23 **A.** I'm so sorry, none at all.

24 **Q.** Did you see any of the communications, for example, he
25 had with Post Office lawyers in the course of

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1 without recourse to many, many underlying documents, it
2 is right, isn't it, that there was a number of people in
3 Fujitsu who were providing assistance to those who were
4 giving evidence in the civil proceedings?

5 **A.** Yes.

6 **Q.** It's also right that there was a team of people who were
7 also providing some assistance in relation to the expert
8 evidence that was being given by Dr Worden; is that also
9 correct?

10 **A.** I think there must have been although I was unaware of
11 any -- I didn't know what contact there had been between
12 Dr Worden and Fujitsu. But I was aware that Dr Worden
13 wanted contact, hence the need for a protocol.

14 **Q.** Right. I was going to ask you that: it's your
15 understanding that that contact was, in fact, mediated
16 in the way that your protocol foresaw; is that correct?

17 **A.** That was my understanding of how it worked.

18 **Q.** All right. In terms of the number of people who were
19 assisting from Fujitsu, was that because a number of
20 different people were needed because of the multiplicity
21 of issues that fell to be determined in the trial?

22 **A.** I think it may also -- in part.

23 **Q.** Yes?

24 **A.** Because there were questions about Fujitsu documents,
25 and so on, but also, I think in part because the ground

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1 prosecutions conducted by Post Office?

2 **A.** None at all.

3 **Q.** I think you confirmed, in fact, to my learned friend
4 Mr Beer that you never spoke to Mr Jenkins, I think,
5 throughout the civil proceedings?

6 **A.** I don't recall ever having spoken to him or having met
7 him.

8 **Q.** I think that you said in answer to one question that,
9 whenever the question of relying on Mr Jenkins was
10 raised at an earlier stage, that you didn't give any
11 thought to whether he understood the position that he
12 was in, in other words that he was, on the one hand,
13 subject to a criticism by Post Office in respect of
14 expert evidence that he had given but, on the other
15 hand, Post Office might need to rely on him, correct?

16 **A.** I think the answer is -- it's a long question but
17 I think the answer to it is, yes.

18 **Q.** I'm sorry for asking a long question. This one is
19 shorter. Did that remain the position throughout the
20 litigation, Mr de Garr Robinson, that you never really
21 thought or considered the question of whether or not
22 Mr Jenkins knew the position that he was being put in?

23 **A.** I never considered that.

24 **Q.** All right. In terms of the way that the litigation was
25 conducted -- and I'm going to try and do this shortly

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1 rush leading up to the commencement of the trial was so
2 intensely busy. Initial evidence was served at the end
3 of September 2018, then there was supplemental evidence
4 in mid-November 2018 and then we get into the trial in
5 the beginning of March. During that same process,
6 expert evidence -- enormous expert reports were served.
7 So the result is that the period of the preparation of
8 evidence was extraordinarily intense. There was no time
9 to do anything and, as a result of the lack of time,
10 I think what happened was that more people were pulled
11 into the process for Fujitsu than otherwise would have
12 been necessary. And I think that may have been adverted
13 to in one of Johnny Gribben's emails that I looked at
14 this morning.

15 **Q.** Yes. How sighted were you on that underlying process or
16 were you the recipient of work that was being done by
17 others, that perhaps synthesised, for example,
18 underlying analysis?

19 **A.** I was the recipient, in some cases a quite resentful
20 recipient because there were other things I wanted to
21 get on with.

22 **Q.** All right, so if I wanted to ask you questions, for
23 example, about what you know about Mr Jenkins'
24 correcting some of the evidence that had been given
25 about remote access, is that the sort of work that might

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1 have been going on that you would not have been sighted
 2 on or would you have known about that kind of work?
 3 **A.** I would not have known. All I would have been told was
 4 the outcome of the process by which Fujitsu were -- was
 5 providing relevant information for use by the legal
 6 team. I wouldn't have been aware of information being
 7 produced that was then corrected by any particular
 8 person. It's not -- that's not something I would
 9 have -- would have been of any great interest to me.
 10 **Q.** All right. So does it follow that you didn't know that
 11 Mr Jenkins was, for example, or did work then, to
 12 correct evidence that had been given about remote
 13 access?
 14 **A.** I -- I'm not aware of -- I wouldn't have been aware of
 15 that at the time.
 16 **Q.** Right. I'm grateful. Thank you. Those are my
 17 questions.
 18 **MR BEER:** Sir, that's the end of the questioning of
 19 Mr de Garr Robinson.

20 **Questioned by SIR WYN WILLIAMS**

21 **SIR WYN WILLIAMS:** Mr de Garr Robinson, at the conference of
 22 10 September 2018, which, if I've got my note in correct
 23 order, is the conference at which it was decided that
 24 Mr Jenkins would not be called as a witness, am I right
 25 in thinking that, essentially, the material which

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1 **SIR WYN WILLIAMS:** I haven't misdescribed the practice, have
 2 I, because I think Mr Justice Fraser did go out of his
 3 way to say that no evidence had been given to provide
 4 an explanation in the trial?
 5 **A.** The -- during the course of proceedings, there can often
 6 be occasions when counsel inform the judge as to the
 7 reasons why particular things were and were not done
 8 without the need for a witness statement. I should say,
 9 however, that I don't think that paragraph 144 was
 10 drafted with any expectation that it would provide Post
 11 Office with any enormous comfort. There was no
 12 expectation that the judge would think, "Oh, well,
 13 that's all right then".
 14 It was just -- the intention, I think, probably
 15 would have been to mitigate the point rather than to
 16 sort of explain it away.

17 **SIR WYN WILLIAMS:** That was really my last question: what
 18 was the purpose of it?

19 **A.** I'm not -- to be honest, I'm not really clear. That
 20 must make me seem rather foolish but I look at
 21 paragraph 144 and I ask myself what good was it actually
 22 going to do at the end of the day? And the answer is
 23 I can't actually think of any practical good it was
 24 going to do. It wasn't going to affect the judge -- you
 25 know, cause the judge to change his mind on any relevant

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1 justified that decision was the advice written by
 2 Mr Clarke and such oral elaboration about it which he
 3 gave you at the conference?

4 **A.** That's correct.

5 **SIR WYN WILLIAMS:** So, again, putting it entirely neutrally,
 6 your agreement to that course of action was wholly
 7 dependent on Mr Clarke's assessment of the situation?

8 **A.** Yes.

9 **SIR WYN WILLIAMS:** One other matter.

10 In closing the Horizon Issues trial, it was decided
 11 appropriate to give reasons to Mr Justice Fraser as to
 12 why Mr Jenkins had not been called. Yet, if I read
 13 Mr Justice Fraser's judgment correctly, there had been
 14 no attempt to adduce any evidence about that previously?

15 **A.** That's correct.

16 **SIR WYN WILLIAMS:** I may be a bit out of date, Mr de Garr
 17 Robinson, but I don't actually think that I ever
 18 encountered a situation -- either as a barrister or
 19 a judge -- in which the judge was provided reasons for
 20 a witness not being called which were wholly unsupported
 21 by evidence. Am I being out of date and old-fashioned,
 22 or was this somewhat unusual?

23 **A.** I find it difficult to answer that question. I'm not
 24 aware of any change in the law in recent years which
 25 would change the practice that you have referred to.

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1 issue. So I do find myself scratching my head as to why
 2 we even bothered, why counsel even bothered including it
 3 in the closing submissions. But I appreciate that's --
 4 must sound rather odd to you.

5 It sometimes happens when you're drafting things in
 6 a big rush. You end up including things that, with the
 7 benefit of a cold reflection, perhaps you would have
 8 left out.

9 **SIR WYN WILLIAMS:** All right. Thank you very much.

10 So thank you for providing both your witness
 11 statements and thank you very much for giving evidence
 12 to the Inquiry this morning -- well, into this
 13 afternoon.

14 So we'll adjourn until when, Mr Beer?

15 **MR BEER:** Can we say 2.30, please. So the full hour. We
 16 will be able to fit Lord Grabiner in comfortably.

17 **SIR WYN WILLIAMS:** Fine. Thank you very much.
 18 (1.28 pm)

19 **(The Short Adjournment)**

20 (2.30 pm)

21 **MR BEER:** Good afternoon, sir, can you see and hear us?

22 **SIR WYN WILLIAMS:** Yes, I can, thank you very much.

23 **MR BEER:** Thank you. May I call Lord Grabiner KC, please.

24 **SIR WYN WILLIAMS:** Of course.

25 **LORD ANTHONY STEPHEN GRABINER KC (sworn)**

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Questioned by MR BEER

1
2 **MR BEER:** Good afternoon, Lord Grabiner. As you know, my
3 name is Jason Beer and I ask questions on behalf of the
4 Inquiry. Can you tell us your full name please?
5 **A.** Anthony Stephen Grabiner.
6 **Q.** Thank you very much for the provision of a witness
7 statement to the Inquiry, and for attending the Inquiry
8 today to assist us in our investigation.
9 Can we start with your witness statement, please.
10 It's 13 pages long, it's dated 3 May of this year. Can
11 we have it on screen as well as you looking at the hard
12 copy. WITN10640100. I think there are two corrections
13 you would like to make the first of which appears on
14 page 6, in paragraph 16, six lines in, which reads:
15 "... me of 20 March timed 13.12 and my reply timed
16 14.38 ..."
17 Would you wish to change the time of the reply from
18 14.38 to 11.17?
19 **A.** That's correct.
20 **Q.** Sorry, 11.27.
21 **A.** Forgive me, that's not correct; that is correct, yes.
22 **Q.** Yes, thank you. As we'll see later when we look at the
23 email, that is indeed the case: that the reply is timed
24 before the originating email.
25 Then the second correction, which is to the same

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1 **Q.** You took silk in 1981?
2 **A.** I did.
3 **Q.** You have, and you had at the material times to the
4 Inquiry, a commercial practice specialising in banking
5 and finance, energy oil and gas, civil fraud,
6 competition and merger investigations, and shareholder
7 disputes; is that right?
8 **A.** That's correct.
9 **Q.** You were the head of One Essex Court chambers from 1994
10 until, I think, very recently, so for 30 years?
11 **A.** A couple of weeks ago.
12 **Q.** You acted in the Post Office Group Litigation brought
13 against it by subpostmasters concerning both their
14 contractual relationship with the Post Office and the
15 operation of the Horizon system but yours, is this
16 right, was a limited involvement centring on the
17 application to recuse Mr Justice Fraser?
18 **A.** Yes.
19 **Q.** I'm going to call him Mr Justice Fraser, despite his
20 subsequent elevation. You applied on behalf of the Post
21 Office to Mr Justice Fraser that he should recuse
22 himself as managing judge of the Post Office Horizon
23 litigation?
24 **A.** Correct.
25 **Q.** I should make it clear, Lord Grabiner, that, right at

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1 effect, on page 8 of the witness statement. Do you have
2 that?
3 **A.** Yes, on page 8. It's paragraph 20, yes.
4 **Q.** Top line:
5 "My reply timed at 11.27, and Lord Neuberger's
6 response timed 14.38 ..."
7 Is there any correction you wish to make to that?
8 **A.** I think it's the same correction because it's the same
9 email. It's just a timing issue.
10 **Q.** I think your reply is, in fact, timed at 11.27 so
11 I think that's probably correct.
12 **A.** Yeah.
13 **Q.** Subject to those points, are the contents of that
14 witness statement true to the best of your knowledge and
15 belief?
16 **A.** They are.
17 **Q.** Your signature appears, I think, at the end, at page 13;
18 is that right?
19 **A.** It does.
20 **Q.** Thank you very much. The witness statement can come
21 down.
22 Can I start, Lord Grabiner, with your background,
23 please. You were, I think, called to the Bar in 1968;
24 is that right?
25 **A.** Yes.

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1 the outset, the authoritative factual and legal position
2 in relation to each of them is addressed and established
3 by Mr Justice Fraser's Common Issues judgment, judgment
4 number 3, dated 15 March 2019; and his recusal judgment,
5 judgment number 4, dated 9 April 2019; and, insofar as
6 they are relevant, by the Court of Appeal's decisions
7 refusing permission to appeal against the recusal
8 judgment, that's 10 May '19, and the Common Issues
9 judgment, dated 16 November 2019.
10 So consistently, and consistently with the approach
11 you yourself adopted in your witness statement, I shall
12 not be exploring the legal and factual position that's
13 established by each of those judgments, understand?
14 **A.** I understand.
15 **Q.** Thank you. Can I turn to your first instruction then in
16 the recusal application. Is this right: you were
17 instructed on Friday, 15 March 2019?
18 **A.** That's correct.
19 **Q.** We'll look in a moment at the means by which you were
20 instructed but, just to orientate ourselves in the
21 chronology, the Common Issues trial before Mr Justice
22 Fraser had concluded -- it had concluded on Friday,
23 8 March 2019 -- and he had distributed the draft Common
24 Issues judgment under embargo to the parties; is that
25 right?

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1 **A.** I think that's correct, yeah.
 2 **Q.** Thank you. On Monday, 11 March, so the following
 3 Monday, the Horizon Issues trial had started in the High
 4 Court?
 5 **A.** Yes, that's correct. I think the draft of the judgment
 6 had been delivered on the Friday before 11 March.
 7 **Q.** Yes, on Friday the 8th, yes. You had had no involvement
 8 in the Post Office Horizon litigation before Friday,
 9 15 March 2019?
 10 **A.** None whatsoever.
 11 **Q.** So let's look at your initial instruction, then. Can we
 12 look, please, at WITN10650106, which, if you're using
 13 a hard copy is B2. It will come up on the screen for
 14 you, Lord Grabiner. Can we turn to page 6 of that
 15 document, please. If we just scroll down, we'll see
 16 this is an email from Rob Smith, who I think is your
 17 clerk --
 18 **A.** Yes.
 19 **Q.** -- to you and others, saying:
 20 "Tony,
 21 "The solicitors have confirmed that they would like
 22 you to read up and get fully up to speed on the issues.
 23 They are yet to decide if they will make the application
 24 but want to be in a position to make the application as
 25 quickly as possible if they decide to go.

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1 **Q.** If we just look at those, please. Firstly, the Gideon
 2 Cohen note, POL00023097. That's tab B3, if you're --
 3 **A.** I've got that, thanks.
 4 **Q.** -- looking at it in hard copies. This what you refer to
 5 as "Gideon's document", yes?
 6 **A.** Correct.
 7 **Q.** You'll see it's a note on the background to a possible
 8 recusal application. If we look at page 29, please,
 9 you'll see that it's, in fact, signed off by David
 10 Cavender, Gideon Cohen and is that Stephanie?
 11 **A.** I think so, yes.
 12 **Q.** You refer to it as Gideon's document. Was there
 13 a reason for that?
 14 **A.** Not that I can recall. It may be that he gave it to me.
 15 **Q.** Right. He was the provider of the document to you. We
 16 can see that it's, in fact, signed off by nearly all of
 17 the counsel, to --
 18 **A.** It is the product of the counsel team, yeah.
 19 **Q.** Just go back to page 1. You'll see it walks the reader
 20 into the operation of the Post Office itself and then,
 21 over subsequent pages, the operation of the Horizon
 22 system the procedural background to the common issues
 23 litigation and it gets to, for example, on page 14 --
 24 I'm not going to read it all, if we turn to page 14 and
 25 scroll down, please -- a section between here and the

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1 "David [that's David Cavender], if you have not
 2 already can you bring Tony up to speed on all the goings
 3 on. Gideon [Gideon Cohen] you are the junior to Tony.
 4 If you feel that Stephanie is needed to assist please
 5 let me know."
 6 Was Stephanie another potential junior?
 7 **A.** Yes, a member of my chambers.
 8 **Q.** So that's the morning of 15 March at 10.42. Can we go
 9 forwards to page 4 of the email chain, please. If we
 10 look at that email, timed 11.58 -- thank you -- this
 11 your email, and you say:
 12 "I've read Gideon's note on the background and DN
 13 ..."
 14 Is that David Neuberger, Lord Neuberger?
 15 **A.** It is indeed.
 16 **Q.** "... [I've read Lord Neuberger's] observations note of
 17 14 March. I plan to read the draft judgment between now
 18 and Monday morning but for present purposes I assume the
 19 correctness of the passages in Gideon's note and I also
 20 agree with [David Neuberger's] analysis."
 21 So, by this time -- the following day, Saturday
 22 morning, just before midday -- you'd read two documents:
 23 Gideon Cohen's note and Lord Neuberger's observations
 24 document?
 25 **A.** Correct.

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1 end of the note, so for the remaining 15 pages,
 2 analysing the judge's draft Common Issues judgment.
 3 **A.** Correct.
 4 **Q.** I think you'd agree that the document is not a neutral
 5 document?
 6 **A.** No, certainly not. It's an advocate's document.
 7 **Q.** Yes, it sets out a case --
 8 **A.** Yes.
 9 **Q.** -- ie a case for making an application for recusal?
 10 **A.** Precisely.
 11 **Q.** I think we can see that from, for example, page 25,
 12 under the cross-heading "Vitriol"?
 13 **A.** Yes, but I mean it doesn't follow that that's not
 14 an accurate description.
 15 **Q.** No, but, nonetheless, as you've said I think, that this
 16 was a piece of advocacy?
 17 **A.** Well, it was but, I mean, I know the authors of the
 18 document and I'm sure that they were making arguments
 19 that they thought were properly sustainable.
 20 **Q.** Can we look at the second document that you'd read by
 21 that midday on the Saturday, Lord Neuberger's
 22 observations document of 14 March. That's POL00025910.
 23 **A.** Yes, I have that.
 24 **Q.** That's your tab B4.
 25 **A.** Yes.

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1 Q. In paragraph 1, Lord Neuberger says that his
 2 observations are based on the draft judgment based on
 3 a 'Note on background to possible recusal application'
 4 --
 5 That's the document we've just looked at.
 6 A. I'm sure.
 7 Q. -- and a discussion with David Cavender Queen's Counsel.
 8 He is not going to set out the facts because they are
 9 explained in the note. So he had read the judgment, he
 10 had been provided with the note that you'd been provided
 11 with and he says he'd spoken to David Cavender.
 12 Can we look, please, at what this assessment of the
 13 prospects are, by looking at page 6 of his note, please,
 14 and turn to paragraph 19.
 15 A. Yes, I have that.
 16 Q. Thank you. He says:
 17 "For all of the reasons set out above I consider
 18 that there are reasonable grounds for [the Post Office]
 19 to bring an application to recuse the judge in these
 20 proceedings."
 21 Then he turns to a different issue, yes?
 22 A. Absolutely.
 23 Q. Now, in the scales that lawyers use, would you
 24 understand "reasonable grounds to bring an application"
 25 to mean that it is arguable, it is proper to argue it?

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1 But I take your point. I mean, if this wasn't
 2 a sustainable argument he would have been saying that --
 3 Q. Yes.
 4 A. -- and that's not what he's saying.
 5 Q. You say that, at this point -- this is just before
 6 lunchtime on the Saturday -- that you agreed with Lord
 7 Neuberger. You say, "I agree with DN's analysis", that
 8 is you agreed there were reasonable grounds for
 9 an argument for recusal?
 10 A. Yes, because, of course, at that stage, I don't think
 11 I'd read the judgment.
 12 Q. Correct. I was just about to ask you. In your case,
 13 that's without reading the judgment itself?
 14 A. Absolutely. The difference between us was that he had,
 15 at that stage, read the judgment; I had not. So I was
 16 exclusively relying upon the papers that I'd been
 17 presented with.
 18 Q. That's the Cavender *et al* note and David Neuberger's
 19 observations document?
 20 A. Precisely.
 21 Q. You say that you agreed that there were reasonable
 22 grounds for the argument without reading the draft
 23 judgment but also, is this right, without reading any
 24 transcripts?
 25 A. Yes, that's true.

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1 A. Properly arguable but I also know the author extremely
 2 well and he's a very prudent person. I think I'm
 3 probably somebody who's a little bit more aggressive in
 4 my advice normally but he's extremely cautious, and so
 5 I take that to mean that this is a serious case that is
 6 available to be made.
 7 Q. But, just focusing on the words for the moment, even
 8 though you with your knowledge of Lord Neuberger may
 9 think that they mean something than they do on their
 10 face, "reasonable grounds" is an assessment of prospects
 11 which says it's proper to argue this case and that
 12 distinguishes the case from one where the prospects are
 13 fanciful or trivial?
 14 A. Oh, totally, I agree. There are emails where he does
 15 express himself more firmly.
 16 Q. Yes, we're going to come to the firming up. I think
 17 it's fair to say that, if this does mean reasonable
 18 grounds, in the sense that I've described it, the
 19 prospects are hardened up over the course of time.
 20 A. Not because I think there's been any separate
 21 development in the facts, because I think he would have
 22 been focusing upon the judgment, as did I, which is
 23 an immovable subject, but he does regard it as a strong
 24 case, I think. I can't remember the exact words he uses
 25 but I certainly did, and I know that he did as well.

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1 Q. Without reading any orders, submissions, witness
 2 statements, statements of case?
 3 A. Yes.
 4 Q. And, so far as I can see from the papers, your
 5 solicitors had not provided you with any materials in
 6 this case?
 7 A. Correct.
 8 Q. This was just a briefing up by other members of
 9 chambers; is that right?
 10 A. Correct, whose judgment I trust.
 11 Q. You tell us in your witness statement -- there's no need
 12 to turn it up -- it's page 2, four lines from the
 13 bottom:
 14 "I also spent time with Messrs Cavender and Cohen,
 15 who were able generally to educate me, which was
 16 necessary given the time pressure and their background
 17 knowledge."
 18 So, essentially, would this be right, Lord Grabiner,
 19 you were really being briefed by colleagues in chambers
 20 rather than by your solicitors?
 21 A. Correct. That's completely correct.
 22 Q. You were a comparative latecomer to all of this?
 23 A. I was a latecomer, yes.
 24 Q. Who originated the idea of recusal?
 25 A. I don't know. I mean, I suspect it -- well, I just

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1 don't know, is the answer. I think it already figures
 2 in the David Neuberger note and I think it's already
 3 referred to in the counsel note. Certainly, it was on
 4 the table before I was instructed.
 5 **Q.** They are dated 13 and 14 March respectively, so it was
 6 plain that consideration was being given to recusal by
 7 at least those two dates. Do you know whether this was
 8 being driven -- the possible application for recusal --
 9 by the solicitors at this stage?
 10 **A.** I absolutely don't know, I'm afraid.
 11 **Q.** Do you know whether it was being driven by leading
 12 counsel, David Cavender?
 13 **A.** I just don't know.
 14 **Q.** At this stage, did you know whether any of this desire
 15 potentially to apply to the judge for him to recuse
 16 himself came from the Post Office Executive or the
 17 Board?
 18 **A.** I'm afraid I do not know the answer to that question.
 19 **Q.** In these discussions that you had with Messrs Cavender
 20 and Cohen, did you get any feel for how the team felt,
 21 ie whether they felt, in particular, slightly bruised or
 22 slighted by the draft judgment?
 23 **A.** Yes, well, I'm sure they were and I'm sure the clients
 24 were as well -- when I say "clients", I mean the Post
 25 Office -- because I think there is a reference in one of

1 "Ideally, I would like to know by today whether Lord
 2 Grabiner is supportive of the recusal application, and
 3 if so, to what extent. Are we able to gain any insight
 4 on that? Provided that he is, then we should stand up
 5 Lord Neuberger for the Board call, and I will be able to
 6 feed back the outcome of the meeting with Lord Grabiner
 7 (which could be any time from 1.30 [if] that suits
 8 him)."
 9 Then he continues:
 10 "So I think the following issues arise:
 11 "Is Lord Grabiner able to indicate today (email to
 12 you is fine and then you copy on to me ...) if he is in
 13 broad agreement with the statement that he is supportive
 14 of a recusal application and it having prospects of
 15 success."
 16 **A.** Yes.
 17 **Q.** "I think [the Post Office] is seeking to flush out
 18 whether Lord Grabiner is broadly supportive, as Lord
 19 Neuberger was in his note, or whether he takes
 20 a different view. If both are aligned, then there's
 21 a [Post Office] Board decision to be taken. If there is
 22 a difference of view, then we ([the Post Office] and
 23 [Womble Bond Dickinson]) will have to think about how to
 24 guide the [Post Office] Board."
 25 Then there's a passage that's not relevant. If we

1 the emails to the fact -- I think I was told by Jane
 2 MacLeod that the decision from the learned judge came as
 3 a bolt out of the blue and was rather a shock to them
 4 because, according to her telling me, they hadn't
 5 appreciated that he'd taken such a strong view against
 6 their position.
 7 **Q.** Yes. Can we turn on, then, to the Sunday, by looking at
 8 WBON0001768. That's in your other volume of papers at
 9 tab E15.
 10 **A.** E?
 11 **Q.** 15, 1-5.
 12 **A.** This is the core bundle from the other -- from the --
 13 sorry, this is the other bundle --
 14 **Q.** The additional bundle?
 15 **A.** -- from the core parties. Yes. Yes, I've got that.
 16 **Q.** Thank you. If we look at the foot of page 1, we're now
 17 at 9.47 on Sunday, 17 March, and there's an email from
 18 Tom Beezer of Womble Bond Dickinson to your clerk, Rob
 19 Smith, copied to the partner at Womble Bond Dickinson,
 20 Andrew Parsons, and to an associate, Amy Prime. He
 21 says:
 22 "Rob
 23 "Sorry for all this contact over the weekend ...
 24 "I have had an email from the client at Post Office
 25 and they say:

1 go up the document, please, and keep going.
 2 So that email having arrived at 9.46, your clerk,
 3 within five minutes says:
 4 "Morning Tony
 5 "Please see in Red below. Is this workable?"
 6 Then further up the page, you at 10.58, about
 7 an hour later, reply to your clerk and copy Tom Beezer
 8 in saying:
 9 "I agree with David Neuberger's approach and
 10 I support the recusal application proposal."
 11 Then you deal with logistics.
 12 **A.** Yes.
 13 **Q.** So this was the Sunday and Post Office were pressing for
 14 an answer whether you took the same view as Lord
 15 Neuberger as to the prospects?
 16 **A.** Yes.
 17 **Q.** Now, I think you say you agree with his approach. You
 18 don't actually separately answer the question of can you
 19 give a view as to the prospects of success?
 20 **A.** That's correct.
 21 **Q.** Yes. I think the next day, Monday, 18 March, you held
 22 a conference call with other members of the existing
 23 counsel team, a solicitor from Womble Bond Dickinson,
 24 and Jane MacLeod at One Essex Court -- when I say
 25 conference call, I mean a conference -- is that right?

1 A. Yeah, I can't remember, actually, if it was
 2 a physical -- or physically present or if it was a call,
 3 I'm afraid. But we did have --
 4 Q. I think we'll see that it was physically at One Essex
 5 Court by looking at POL00006397. That's B13.
 6 A. Thanks very much. Yes. Well, it says I attended by
 7 phone, you see. It says, "Updated note of" --
 8 Q. Oh, quite right.
 9 A. So, I mean --
 10 Q. Hold on. Just slow down a bit. This is a note of two
 11 things.
 12 A. That's true. You're quite right, that's on 20 March,
 13 I am with you. You're absolutely right. So 18 March
 14 seems that I was physically present at the meeting there
 15 but 20 March, which I'm sure you'll come to, was my
 16 attendance by phone.
 17 Q. Thank you. If we just see the way this document is
 18 constructed, there are two headings right at the
 19 beginning and then, if we scroll down the first page
 20 over to the second page, and keep scrolling, and stop,
 21 we'll see the first one and a half pages are all about
 22 the in-person conference at One Essex Court on 18 March,
 23 and then from one and a half onwards is about the
 24 dial-in Board meeting on 20 March, understand?
 25 A. Yes.

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1 about urgency. I'm not going to read those now. If we
 2 go over the page, please. The next heading is "Duty to
 3 act" --
 4 A. Yes.
 5 Q. -- and then the following heading is "Prospects"; can
 6 you see that?
 7 A. Yes.
 8 Q. Under "Duty to act" you're recorded as saying:
 9 "Lord Grabiner explained that in his view if there
 10 is no recusal application made then Post Office will
 11 lose this series of trials set up in this matter.
 12 Without a recusal application Post Office is stuck with
 13 this Judge. An appeal on the law may correct some of
 14 the very significant errors in the [Common Issues trial]
 15 judgment but then the case will be sent back to this
 16 Judge who has demonstrable apparent bias against the
 17 Post Office and hence the firm conclusion that the Post
 18 Office will lose and the financial impact of that will
 19 be substantial. Recusal is therefore essential and Lord
 20 Grabiner asserted that in the face of legal advice from
 21 Lord Neuberger that recusal should be applied for and
 22 the quantum of damages that Post Office will pay out on
 23 a loss, then it was Lord Grabiner's view that there was
 24 a duty on Post Office to seek recusal. Lord Grabiner
 25 stated that in his view the Board of the Post Office had

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1 Q. Thank you. If we go back then to page 1, we can see who
 2 is present. They're the people I have outlined. Under
 3 the heading "Lord Neuberger's note", it records that you
 4 explained that you had reviewed Lord Neuberger's note,
 5 the David Cavender note, and that you had substantially
 6 reviewed the judgment of Mr Justice Fraser. So, by this
 7 time, you're one document further on than on the
 8 Saturday and the Sunday --
 9 A. Indeed.
 10 Q. -- ie you've substantially reviewed the Common Issues
 11 judgment?
 12 A. Yes.
 13 Q. If we scroll down. You're recorded as saying that you
 14 confirmed that you agreed with the content of Lord
 15 Neuberger's note?
 16 A. Yes.
 17 Q. Yes? Again, is that you saying that you agree with his
 18 assessment that you agree with the prospects of success
 19 of a recusal application as being that there are
 20 reasonable grounds to make the application?
 21 A. I'm not sure that I would have been into that sort of
 22 detail. I think what I was saying was I think this is
 23 an appropriate case for such an application to be made.
 24 Q. You then deal with some procedural issues in the next
 25 paragraph and at the foot of the page, which is all

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1 no option but to seek recusal."
 2 Was that your advice?
 3 A. Yes. I mean, I didn't see this document until you
 4 provided me with a copy in preparation for this hearing,
 5 and that probably explains why there's -- I haven't
 6 signed it off. But, that said, I think that that
 7 accurately summarises the substance of the advice that
 8 I gave.
 9 Q. I mean, in fact, we know that this document was sent off
 10 to Gideon Cohen with a request that he put it before you
 11 to sign it off --
 12 A. Mm-hm.
 13 Q. -- and, as with some good juniors, he said in reply
 14 "I think Lord Grabiner will be busy".
 15 A. Very kind of him.
 16 Q. But he, in fact, signed it off as accurate?
 17 A. I see. Fine.
 18 Q. You're saying to us that that is a fair reflection of
 19 the substance of the advice you gave?
 20 A. I think it is, yes.
 21 Q. Thank you. Were you saying that the Post Office was
 22 under a legal duty to apply for recusal?
 23 A. No, I think that what I was saying was that, if they
 24 didn't apply for the recusal then they would never be
 25 able to make any complaint at all about the conduct of

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1 that trial. There are two separate issues here. One is
2 the content of the judgment, and the issues that might
3 have given rise to an appeal, and the other issue is the
4 complaint that the trial judge had, as I put it
5 elsewhere, I think, trespassed into territory that
6 impacted the other trials. In particular the Horizon
7 trial, which is yet to come. And I think what I was
8 saying was that, if they didn't make that recusal
9 application at that time, it simply, in the real world,
10 wouldn't be open to them to make that complaint
11 subsequently.

12 **Q.** So this, where it says under the heading "Duty to act"
13 and in the penultimate line, there was a duty to seek
14 recusal, that shouldn't be taken to refer to a legal
15 duty on the Post Office Board --

16 **A.** No.

17 **Q.** -- that it might owe, for example, to its shareholder or
18 others?

19 **A.** No, absolutely not. It's a piece of advice given by
20 a lawyer to a Board of directors as to how he thinks, as
21 the adviser, they should proceed, and it was firmly
22 expressed.

23 **Q.** So there wouldn't be any legal consequences for the
24 Board if they decided not to apply for recusal. They
25 wouldn't be in any breach of duty?

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1 **Q.** Your analysis was what needs to be done if you want to
2 win this relation overall --

3 **A.** Yes.

4 **Q.** -- is get rid of the judge because, otherwise, you're
5 stuck with him for the next trial?

6 **A.** Well, you put it rather bluntly but, basically, yes.

7 **Q.** You then turn to the prospects of success.

8 **A.** Yes.

9 **Q.** The note says:

10 "Lord Grabiner stated that:

11 "[1] there were strong arguments in favour of
12 an application for recusal ..."

13 That seems to be harking back to how desirable it is
14 to make the application, rather than its prospects of
15 success, doesn't it?

16 **A.** Well, there may be a difference without a difference
17 there. I'm not sure that -- I didn't draft these words.
18 I mean, those are a fair attempt to record what I said
19 but there's a bit more subtlety in your question than
20 I think is justified by the language of the note.

21 **Q.** The second bullet point is that it was your strong view
22 that a recusal application was the right course of
23 action. Again, that's a different issue as to what the
24 prospects of success are?

25 **A.** That's true but, in a sense, they are bound up together,

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1 **A.** That's right, except that they would end up losing all
2 the trials and, on the face of it, if they had
3 a perfectly good argument to make in relation to the
4 conduct of the first trial, they would have, in effect,
5 blown the possibility of being able ever, subsequently,
6 to take that point.

7 **Q.** Would you agree that it's one thing to say to a client
8 that taking a step in litigation is desirable or
9 important or essential, is one thing, if they wish to
10 win the litigation, but that they're under a positive
11 duty to take that step is very strong indeed?

12 **A.** No, I agree. And I think I've agreed with your point
13 that -- if it was your point -- that they didn't have
14 a legal duty to do that. I'm simply advising them as
15 a lawyer as to what I think they ought to do, and that's
16 what I'm paid to advise them about.

17 **Q.** This first section here, which comes before an analysis
18 of the prospects of success, is all about the
19 consequences for the Post Office if it doesn't seek to
20 get rid of the judge; is that right?

21 **A.** Yes.

22 **Q.** It's all about consequences, not prospects of success?

23 **A.** Well, there is a reference to prospects of success --

24 **Q.** We're going to come to that in a moment.

25 **A.** In the next paragraph, yes.

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1 aren't they?

2 **Q.** Well, sometimes one may advise clients to take a step in
3 litigation, even if it enjoys low prospects of success,
4 because of the consequences if they don't?

5 **A.** No, but I did describe it as the "right course of
6 action", according to this note. So if I thought that
7 there were very slim prospects of success, I'm not sure
8 I would have been saying that was the right course.

9 **Q.** The third bullet point does address head on the
10 prospects of success, doesn't it?

11 **A.** Yes.

12 **Q.** You're recorded as saying there is a serious prospect of
13 success?

14 **A.** That was my view.

15 **Q.** Did that represent any change in view from the agreement
16 that you'd expressed on Saturday and Sunday in the
17 emails to Lord Neuberger's assessment of the maybe more
18 modest reasonable grounds?

19 **A.** Not really. I mean, I had read the judgment by then,
20 and I was satisfied that there were good arguments to be
21 made and that's all that I was saying.

22 **Q.** Lastly, you are recorded as saying that this judge,
23 Mr Justice Fraser had done an unbelievable nonsense and
24 demonstrated apparent bias. Did you say that?

25 **A.** I did. I'm sure I said words to that effect, yes, and

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1 that was my view.

2 **Q.** Can we move on to an email you sent to Lord Neuberger.

3 WITN10650106. That's tab B2 again, Lord Grabiner, and

4 look at page 2 at the bottom, please --

5 **A.** Yes.

6 **Q.** -- the foot of the page. So this is Monday, 18 March,

7 you to Lord Neuberger and others, and you say:

8 "Dear David,

9 "We just met with the solicitor -- Tom Beezer -- and

10 the [General Counsel] from the clients -- Jane

11 MacLeod -- and had a full discussion."

12 That's the meeting we've just read the attendance

13 note on.

14 **A.** Yes.

15 **Q.** "I advised that the clients had no choice but to make

16 the application and that there were strong grounds for

17 doing so."

18 That broadly accords with the note that we've just

19 read.

20 **A.** Indeed.

21 **Q.** One being no choice, ie they were under a duty to do it;

22 and, secondly, there were strong grounds in terms of the

23 merits of it. This is the part of the email you

24 referred to earlier:

25 "Jane [MacLeod] explained that the judgment came as

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1 call] -- the Board seems to think that they will get

2 a more detached view from you in their absence. I make

3 no comment on that bollox [*sic*]."

4 **A.** Yes, indeed.

5 **Q.** Then if we go to page 2, please, and scroll down and see

6 Lord Neuberger's reply. That's --

7 **A.** Can I say that I think that what I'm talking about there

8 is the presence of both of us, he and I, in the same

9 meeting. I'm not talking about anybody else. The --

10 what seemed to me to be a nonsense was the notion that

11 they wanted to get his view but without me being there,

12 and vice versa.

13 **Q.** I'm not sure that's entirely accurate but I don't think

14 much turns on it. If we just go back to the top of

15 page 3.

16 **A.** I'm sure it doesn't, yeah.

17 **Q.** The line "It's possible", which is just at the foot of

18 the --

19 **A.** Yes, I've got that.

20 **Q.** "It's possible that neither David nor Gideon will be

21 asked to participate in your call ..."

22 So that must be neither David Cavender nor Gideon

23 Cohen --

24 **A.** I see, I understand.

25 **Q.** -- will be asked but to participate.

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1 a bolt from the blue for the clients because there was

2 no expectation that the judge had formed such a negative

3 view of the [Post Office].

4 "Her concern is that the Board may not have the

5 stomach for a fight because asking for a judge to recuse

6 himself is [such] a drastic step. [The Post Office] is

7 Government owned and there are Board members who are

8 nervous of the publicity. I [that's you] said that was

9 a matter for the Board and that members who might be

10 conflicted should step out of the process but that is

11 a matter for them -- not me."

12 Just stopping there, were you, when you were

13 advising, did you understand of your client's wish to

14 have impartial views unaffected by the views of those

15 that were already instructed.

16 **A.** Yes, and I think that's the reason why they had come to

17 me and, indeed, to Lord Neuberger, in the first place.

18 **Q.** Can we go back, then, to WITN10650106 that's still tab

19 B2 --

20 **A.** Yes.

21 **Q.** -- and look at page 3 at the top.

22 **A.** That's where we were, I think, already.

23 **Q.** Yes, it was. You continue:

24 "It's possible that neither David nor Gideon will be

25 asked to participate in your call [Lord Neuberger's

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1 **A.** I understand. So I'm saying that they might feel they

2 might get a more detached view from you if they're not

3 present.

4 **Q.** Yes, rather than you versus Lord Neuberger?

5 **A.** I understand but it's the same point.

6 **Q.** If we go back, please, to page 2 --

7 **A.** It's still -- maybe that's description is a bit blunt

8 but it's probably accurate.

9 **Q.** If we go back to page 2, Lord Neuberger's reply to that

10 part of the email.

11 **A.** Yes.

12 **Q.** It's the last paragraph as we can see there.

13 "Excluding them is a bit unfair to David [Cavender]

14 and Gideon [Cohen], but I suppose one can see where [the

15 Post Office] are coming from. I take it that you will

16 be on the call? I am anxious to ensure that nothing

17 I say crosses with what you have said/will say or makes

18 your task more difficult. I have the luxury of

19 expressing a view and then stepping back, whereas you

20 will be presenting the case and are the ultimate

21 adviser."

22 Then if we see what you reply to that, at the top of

23 the page, thank you. You say:

24 "I won't be on the call ..."

25 Then the reason under the GRO is set out for you not

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1 being there.

2 **A.** I think I had a medical appointment. I think that's

3 what's covered up there.

4 **Q.** Yes, we redacted it for your benefit.

5 **A.** I mean, my -- it explains my absence. It was

6 a perfectly proper justification for my not being there.

7 **Q.** "... and the clients are keen to get your view

8 untrammelled by mine and vice versa. For the same

9 reason I think they'll prefer not to have the rest of

10 the team on the call."

11 **A.** Mm.

12 **Q.** So you understood that the clients were keen to get your

13 view untrammelled by Lord Neuberger's?

14 **A.** Well, they wanted to make sure that they knew what

15 I thought and that they knew thought Lord Neuberger

16 thought, and I think that was the -- that was my sense

17 of it anyway.

18 **Q.** But you'd formed your view on the basis of the note

19 written by Messrs Cavender and Cohen and by reading Lord

20 Neuberger's advice?

21 **A.** Indeed.

22 **Q.** So you had reached a view, trammelled by theirs?

23 **A.** Oh, certainly and -- but also forming my own judgement

24 in the process. I want to make it absolutely clear,

25 I would not have made this application unless

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1 paragraph 18(g) --

2 **A.** I've never seen this.

3 **Q.** No, I'm just going to read you what he says:

4 "I was anxious not to give advice which was

5 inconsistent with that of Lord Grabiner, as he would be

6 expressing the case and was the ultimate adviser", which

7 is essentially what's reflected here?

8 **A.** Indeed.

9 **Q.** So is this right, you formed your view on the basis of

10 what David Cavender, Gideon Cohen and Lord Neuberger has

11 said in their notes but then Lord Neuberger was anxious

12 not to tell the Board anything that was inconsistent

13 with your advice?

14 **A.** Well, what Lord Neuberger thought, I think you'd better

15 ask him about. I can't really climb into his mind,

16 beyond what he has said in communications that we had

17 between ourselves that I've made full disclosure of.

18 **Q.** Now, I think you know that Lord Neuberger had a call

19 with the Board. He was in Argentina at the time,

20 indeed, I think, was in Argentina for the duration of

21 this episode, and so was reading papers that had been

22 emailed to him?

23 **A.** He's a workaholic.

24 **Q.** You know that he had a call with the Board after your

25 meeting in One Essex Court on Monday, 18 March?

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1 I personally was entirely satisfied that it was a proper

2 application to make.

3 **Q.** I'm just exploring at the moment how it appeared to the

4 Board. We're going to hear some evidence about --

5 **A.** I understand.

6 **Q.** -- they perceived the opinions had been reached --

7 **A.** I understand.

8 **Q.** -- and whether they were, on each occasion, independent

9 advices unaffected by the advice of the predecessor. So

10 you knew that they wanted to get your view untrammelled

11 by Lord Neuberger's. I think you've answered this

12 already: you had formed your view on the basis of what

13 Messrs Cavender and Cohen had said and on the basis of

14 what Lord Neuberger had said?

15 **A.** And on what I had read from the judgment, based upon --

16 I mean, they had participated -- Mr Cavender, Gideon

17 Cohen, they had participated in the trial, so they knew

18 exactly what had gone on in the trial and were able to

19 assist me in my reading process. But I formed the

20 judgement I did form by reference both to what they said

21 to me and what they showed me and what I read for

22 myself.

23 **Q.** In his witness statement -- I'm not going to display it

24 now but instead just read faithfully the passage from

25 it -- Lord Neuberger, that's WITN10650100, page 9,

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1 **A.** Yes.

2 **Q.** The 5.15 that you were not able to be present at?

3 **A.** Yes.

4 **Q.** Now, I don't think you were ever shown a minute of that

5 Board meeting. Can we have a look at it, though?

6 **A.** No, I've been shown it just before I came in here this

7 afternoon. I've never seen it before but I have read

8 it.

9 **Q.** Can we look, please, at POL00027594. Thank you.

10 "Minutes of a call of the Board of Directors of Post

11 Office ... on 18 March" at 5.15. You can see who is

12 present or is recorded as being present. Then, if we

13 just scroll down to "Conflicts of Interest":

14 "A conflict of interest was noted in relation to Tim

15 Parker as his role as Chairman of [HMCTS].

16 "A conflict of interest was noted in relation to Tom

17 Cooper in his role as UKGI Director, which as

18 an executive part of government, should not be involved

19 in a decision which related to the judiciary.

20 "Article 82 of [the] Articles of Association

21 permitted the Board to authorise a director in relation

22 to any matter on the subject of a conflict. The Board

23 determined that Tim Parker and Tom Cooper should be

24 involved in the Board discussions but they would not be

25 party to the decision on whether or not to seek the

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1 Judge's recusal."
 2 That had been the subject in broad terms of your
 3 email advice over the weekend?
 4 **A.** Yes, if there was a conflict of interest going on, then
 5 that was something they had to sort out as a Board.
 6 **Q.** If we can go to page 2, please, and scroll down to
 7 paragraph 3, numbered-paragraph 3, where Lord
 8 Neuberger's contribution begins.
 9 **A.** Well, isn't it on page 1 as well, in the second
 10 paragraph?
 11 **Q.** If we just scroll back up.
 12 **A.** "[Jane MacLeod] noted that we had received a written
 13 opinion from Lord Neuberger which had been issued on
 14 14 March and which suggested that Post Office had
 15 grounds for appeal and for recusal.
 16 **Q.** Yes, I'm talking about Lord Neuberger's own
 17 contribution. He only joined for item 3?
 18 **A.** I see. Forgive me, yes.
 19 **Q.** Item 3 then, "Lord Neuberger's overview".
 20 **A.** I see. Forgive me.
 21 **Q.** "Lord Neuberger joined the call and was introduced to
 22 the Board. He set out the main courses of action that
 23 [Post Office] could consider at this juncture:
 24 "1. Accept the judgment
 25 "2. Take an orthodox defensive position and seek to
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1 **A.** I simply can't recall precisely. This is on --
 2 **Q.** This is on Monday, the 18th. You'd been exchanging
 3 emails over the weekend of the 16th and 17th, in which
 4 you informed him of your views of the case.
 5 **A.** Yeah.
 6 **Q.** You'd told him on the afternoon of the 18th what advice
 7 you'd given to the solicitors in consultation that
 8 afternoon and your views as to the prospects of success.
 9 **A.** Well, I'm not sure I can help further on the point.
 10 I mean, it may be that you're right, I mean, the
 11 documents will speak for themselves. I do know that he
 12 then emailed to me about an hour later. I mean, I don't
 13 find this Board minute particularly helpful, or very
 14 clear, actually. But he did email me within an hour,
 15 I think, of this Board meeting and this conversation
 16 taking place, and I think his position is very fairly
 17 and accurately summarised in the email he sent to me,
 18 which I know is in the bundle and I'm sure you're coming
 19 to it.
 20 **Q.** Yes, we'll come to it in a second. He's recorded as
 21 being slightly diffident because he'd not seen all of
 22 the evidence from the other side. Had you seen all of
 23 the evidence from the other side?
 24 **A.** No, of course not. I mean, just in a matter of days,
 25 I mean, I was working as much as I could to try and get
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1 appeal. This was an entirely justifiable approach and
 2 a number of the judge's decisions were open to attack
 3 and appealable from a preliminary reading of the
 4 judgment.
 5 "3. Seek recusal: the most aggressive approach.
 6 "The arguments for not accepting the judgment as it
 7 stood included that the judge had accepted evidence that
 8 wasn't relevant for the case", et cetera.
 9 If we go over to page 3, please. There were some
 10 director's questions. If we see what Lord Neuberger is
 11 reported as saying, question 3 relates to the prospects
 12 of success. It's recorded that Lord Neuberger said:
 13 "Lord Neuberger reported that he did not yet know
 14 Lord Grabiner's view of the case; he thought we had
 15 a strong case but was slightly diffident because he had
 16 not yet seen all of the evidence from the other side."
 17 This record of Lord Neuberger saying that he did not
 18 yet know your view of the case doesn't seem very
 19 consistent with the email traffic that we had looked at
 20 earlier when you'd been exchanging views. Would you
 21 agree?
 22 **A.** I don't think I can comment, really. I mean, it's
 23 his -- this is for him, not me.
 24 **Q.** Would you agree that he had known your view of the case
 25 by this point?
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1 through this stuff.
 2 **Q.** Saturdays and Sundays?
 3 **A.** It was hard work. A lot had gone on.
 4 **Q.** Wouldn't you want to see that, ie see what the other
 5 side of the coin would be before offering strong advice
 6 as to the prospects of success and --
 7 **A.** When you -- I mean, basically all you need to do is to
 8 look at the judgment and find out what the issues were
 9 in the case that was to be decided and whether or not
 10 the judge had gone beyond the matters that were supposed
 11 to be decided and whether he had trespassed upon matters
 12 which were yet to be dealt with in the other trials.
 13 I mean, that doesn't involve, you know, a massive,
 14 massive exercise. Certainly doesn't involve going
 15 through all the materials that were available in the
 16 trial. It does involve a focus upon the judgment
 17 itself, coupled with the particular complaints that were
 18 being made, and that was the help that I was getting
 19 from those who had participated in the trial.
 20 **Q.** So you didn't, at this stage, feel in the same way as
 21 Lord Neuberger is recorded as feeling, namely slightly
 22 diffident?
 23 **A.** Well, he -- as I think I said a little earlier, he's
 24 a more cautious person than I am; he's more prudent;
 25 he's more judicial. But I do know that he felt quite
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1 clearly that this was a strong case and I think that
 2 that is apparent from the correspondence between us,
 3 which I'm sure you're coming to.
 4 **Q.** You just said a moment ago that Lord Neuberger updated
 5 you after this Board call. If we can turn to that
 6 email, please, it's your tab B2, for us it's
 7 WITN10650106.
 8 **A.** I have that.
 9 **Q.** It's the foot of page 1. Just wait for it to come up on
 10 the screen. Foot of the page, thank you. So 6.36 on
 11 the Monday, Lord Neuberger wrote:
 12 "Tony,
 13 "I spoke to the Board for 55 minutes.
 14 "I told them that I thought they would win on
 15 recusal, but couldn't guarantee it, and that, if we were
 16 to run recusal we had to grasp the nettle.
 17 "Their questions were mostly well judged and
 18 understandable, but they are very concerned about the
 19 risks, which, bearing in mind they are a public body
 20 which has just had a very nasty, and I think unfair,
 21 shock, is scarcely surprising.
 22 "They thought my note suggested that unfairness was
 23 a freestanding point: I don't think it is really. It is
 24 linked to recusal obviously, and it is linked to
 25 interpretation only to the extent that findings which

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1 **Q.** The Board decided at the meeting of 18 March that it
 2 wanted to hear a range of expert legal opinion and,
 3 therefore, it wanted to hear from you directly and
 4 I think you then joined a Board meeting on 20 March
 5 2019; is that right?
 6 **A.** I think that's right and I think this must be the one
 7 that I attended not physically but on the phone.
 8 **Q.** Dialled up, yes. POL00269774. That's your tab B13. If
 9 we just look at the third heading down "Updated Note of
 10 Post Office Board Dial-In attended by Lord Grabiner (by
 11 phone) of 20 March". Then if we go to page 2 --
 12 **A.** Yes.
 13 **Q.** -- and scroll down. We'll see the people attended. You
 14 attended the Board meeting by calling in for 25 minutes
 15 between 11.45 and 12.10; can you see that?
 16 **A.** I can.
 17 **Q.** Then if we scroll down, please, at the foot of the page,
 18 to "Advice", you're recorded as saying that you
 19 confirmed your view that:
 20 "Post Office has no option but to seek the recusal
 21 of the judge. Lord Grabiner confirmed that, whilst
 22 guarantees cannot be provided, Post Office does have
 23 a strong case for recusal. [You] confirmed that [your]
 24 strong recommendation to the Board was to seek
 25 a recusal. The sequencing of the trials, ordered by

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1 were irrelevant to interpretation were ones he should
 2 not have made and were therefore unfair. As
 3 a freestanding issue, I think that unfairness does not
 4 relate to any order the judge is likely to make. It
 5 could only be relevant for the purposes of the [Court of
 6 Appeal] being prepared formally to scrub the unfair
 7 findings of fact or unfair assessment of witnesses,
 8 which it has on a rare occasion been prepared to do.
 9 "The only reason not to go ahead is fear of the
 10 judge getting more anti- if we lose and fear of bad
 11 publicity ...
 12 "I think the judge a lost cause and, if he isn't, he
 13 may react better if we stand up to him.
 14 "As to bad publicity, it's seldom a convincing
 15 reason."
 16 So that's the feedback you got from
 17 Lord Neuberger --
 18 **A.** Yes.
 19 **Q.** -- rather than reading the minutes?
 20 **A.** Yes, and you can see that it's much more forcefully
 21 expressed and he's making it perfectly clear that he's
 22 very unimpressed with the judgment and that he thinks
 23 the recusal application is something that we should be
 24 pursuing, "I told them that I thought they would win on
 25 recusal".

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1 this judge, compounds the issue ..."
 2 Read on:
 3 "... that the Post Office faces as this judge will
 4 be looking at the same witnesses and issues in later
 5 trials -- hence there is no other real option but to
 6 seek recusal."
 7 Does that accurately record the substance of the
 8 advice that you were --
 9 **A.** Yes, again, I think it does.
 10 **Q.** Did you gain any sense that the Board was keen to take
 11 this step, applying for recusal of the judge?
 12 **A.** I am afraid I didn't get any sense at all. I mean, no
 13 doubt it will have helped if I'd been in the room but
 14 I obviously wasn't. But I had no sense of what they
 15 thought or if there was any difference of view within
 16 the Board on the subject.
 17 **Q.** I think later you were informed that the Post Office had
 18 decided to seek the recusal of Mr Justice Fraser.
 19 **A.** Yes.
 20 **Q.** Can we look, please, at WITN10650108. That's your tab
 21 E20. That's the supplemental bundle, Lord Grabiner.
 22 **A.** Sorry, I'm being slow.
 23 **Q.** That's all right. E20?
 24 **A.** Yes, I've got it.
 25 **Q.** Email at 13.12, from Lord Neuberger to you.

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1 "Thanks for the information re the [Post Office].
2 I hope that they do not bottle it. Apart from the
3 [public relations] front (where the arguments cut both
4 ways in my view and anyway it's all short-term pizzazz)
5 the argument for having a go at recusal is very strong."

6 Then scrolling up, please, you say:

7 "We've been instructed to proceed. I don't think
8 the clients had any choice but they were reluctant to
9 take such a serious step."

10 **A.** Yes.

11 **Q.** Can you recall on what basis you formed the view that
12 the Post Office, ie the clients, were reluctant to take
13 this serious step?

14 **A.** I think that I was given the impression -- and I'm
15 afraid I have no recollection of how I derived it -- but
16 I was given the impression that, unless they were
17 comfortable with the legal advice, the independent legal
18 advice that they were getting, to the effect that they
19 should apply for recusal, that they wouldn't be
20 comfortable in taking that step. That was my -- that
21 was my sense at the time, I must say.

22 **Q.** So would I be right to characterise the turn of events
23 so far as being that this was essentially a lawyer-led
24 decision?

25 **A.** Well, I just I don't know because I don't know what went

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1 **Q.** You and the judge?

2 **A.** Me and which judge?

3 **Q.** The judge that you were applying to recuse himself?

4 **A.** Absolutely not. My view was that he had made a mess of
5 that case and that was my position, and that was David
6 Neuberger's view as well.

7 **Q.** Now, you went ahead and made the application for recusal
8 on 3 April 2019. We've got a full 397-page transcript
9 of that application. The cross-reference -- no need to
10 display it -- is POL00112150. I'm not going to display
11 that. It's there for us to read. We know that the
12 application was dismissed by the judge in his fourth
13 judgment of the 9 April 2019.

14 Sir, can we take the afternoon break now for ten
15 minutes until 3.40, please?

16 **SIR WYN WILLIAMS:** Yes, certainly.

17 **MR BEER:** Thank you.

18 (3.30 pm)

(A short break)

20 (3.40 pm)

21 **MR BEER:** Good afternoon, sir, can you see and hear us
22 still?

23 **SIR WYN WILLIAMS:** Yes, I can.

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

25 Lord Grabiner, I think it's right that, having

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1 on in the Board. I mean, they were getting the advice,
2 and they took the advice and they did it. It was their
3 decision ultimately, but I have no idea what the
4 individual views were of people on the Post Office
5 Board.

6 **Q.** Thank you. Just before the break, can we turn to
7 WITN10650109.

8 **A.** And that tab-number?

9 **Q.** B20, and it's the second page.

10 **A.** Yes.

11 **Q.** This is after the application has been issued. You
12 email Lord Neuberger and say:

13 "The judge has directed a hearing for next Wednesday
14 week -- typically that was a date that he was told not
15 convenient for me but that case has now settled so his
16 rather pathetic attempt to dodge me has failed. That
17 behave does rather confirm our suspicions about his
18 Smith characteristics."

19 Is that a cross-reference to Mr Justice Peter Smith?

20 **A.** Indeed.

21 **Q.** Was this becoming personalised?

22 **A.** What do you mean by that?

23 **Q.** No more and no less than the question.

24 **A.** Well, what do you mean by -- personalised as between
25 whom and whom?

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1 reviewed the documents that the Inquiry has sent to you,
2 you'll recall that I think in email exchanges, you made
3 a number of criticisms of Mr Justice Fraser in relation
4 to his rejection of your application that he should
5 recuse himself?

6 **A.** Yes, before you go on, I just noticed, the document we
7 were looking at just before we broke for the short
8 adjournment and you were suggesting that I'd developed
9 some kind of problem about the judge, you will have
10 noticed in that document which you showed me, page 2,
11 that what I said to Lord Neuberger was "That behaviour
12 does rather confirm our suspicions".

13 **Q.** About his Smith characteristics?

14 **A.** Yes, it wasn't just my view; it was Lord Neuberger's
15 view as well.

16 **Q.** Thank you.

17 **A.** I certainly had not developed any kind of personal
18 animus against him. It was inclusively concerned with
19 the judgment and what had taken place in the trial.

20 **Q.** Can we look at WITN10650110, please, which is D8. If we
21 scroll down, please, at -- on 9 April, this is the day
22 that the application was dismissed.

23 **A.** Sorry, what's the -- is it B8?

24 **Q.** No, D, delta.

25 **A.** I'm so sorry.

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1 Q. That's all right.
 2 A. Yes.
 3 Q. It's at the foot of the page, so this is the day you
 4 received the recusal judgment. You say:
 5 "As predicted [Mr Justice Fraser] rejected the
 6 application and refused permission to appeal. He's also
 7 directed that the balance of the fact evidence in
 8 Horizon trial should immediately proceed.
 9 "He's a produced a 302-paragraph judgment which at
 10 first glance just confirms our concern that he's not fit
 11 to do the job."
 12 Are you sure you hadn't personalised it a bit?
 13 A. It was my view and Lord Neuberger's view. That's why
 14 I said "our view", and also Lord Neuberger's response
 15 immediately above it sounds like par for the course.
 16 What does that mean, apart from the fact that he and
 17 I are agreed about this? It's not a personal matter;
 18 it's a view about the calibre or quality of the
 19 judgment.
 20 Q. It's not the judgment; it's the quality of the judge,
 21 isn't it?
 22 A. No, I --
 23 Q. It's broadening it out from the quality of the judgment
 24 as a legal instrument --
 25 A. I --

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1 Justice Coulson, former head of the [Technology and
 2 Construction Court] and Fraser [Mr Justice Fraser] is of
 3 course the head of the [Technology and Construction
 4 Court]. Given Fraser's comments at the handing down of
 5 the recusal judgment that he had warned the [Court of
 6 Appeal] that an appeal would be coming it makes us
 7 question whether he lined up/had spoken to [Lord Justice
 8 Coulson -- Coulson, as he's called here] in advance."
 9 Then, if we go back --
 10 A. No, but you've missed the key sentence, which is the
 11 next one:
 12 "I have asked LGQC to think about this."
 13 Q. Yes, and I --
 14 A. Maybe you did it on purpose, I don't know.
 15 Q. No, I was about to come to what you said.
 16 A. Yes, but I did it, whatever I have said we'll come to,
 17 but I did it because I was asked by the solicitor to do
 18 so.
 19 Q. That's the sequence of events. It was spotted by the
 20 solicitor first.
 21 A. Well, spotted or otherwise, I was asked by him to think
 22 about it, as he says in his email. That was the first
 23 time that this issue arose.
 24 Q. Can we look, please, at WITN10650117. That's tab E21
 25 for you, if we go to, I think, page 5 of this document,

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1 Q. -- to whether the man can actually do the job.
 2 A. I don't accept that. My criticisms are about the
 3 quality of the judgment and the subject matter of the
 4 application for recusal.
 5 Q. I think it's right that you know that a number of
 6 documents have been identified in which suggestions were
 7 exchanged that there was an inappropriate relationship
 8 between Mr Justice Fraser and Lord Justice Coulson and
 9 inappropriate communication between the pair of them,
 10 yes?
 11 A. Yes, I was asked to look at that by the solicitors,
 12 actually.
 13 Q. But it's not addressed in your witness statement, so I'm
 14 going to --
 15 A. Well, I didn't think it was relevant. If you think it's
 16 relevant, no doubt you'll ask me about it.
 17 Q. I'm just going to look at some of the documents. Can we
 18 start, please, with POL00270741. That's E8, Lord
 19 Grabiner. POL00270741 at the foot of the page.
 20 A. Yes, I've got that.
 21 Q. It's not an email exchange including you yet but I just
 22 want to see how the point develops. It's 12 April,
 23 an initial order from the Court of Appeal is attached.
 24 If we go over the page, Mr Parsons says:
 25 "One curious point is the order was made by Lord

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1 and if we scroll down.
 2 A. Sorry, page?
 3 Q. Page 5.
 4 A. Ah, yes.
 5 Q. E21, page 5?
 6 A. Yes, I've got that.
 7 Q. We see David Cavender saying:
 8 "Yes!
 9 "It looks very much like this is what Mr Justice
 10 Fraser set up in advance -- with his mate the former
 11 head of the TCC -- unless you believe in coincidences.
 12 This is very bad news."
 13 Then a reply from Gideon Cohen:
 14 "The chance of us not getting permission just went
 15 from negligible to rather high."
 16 Then if we go to page 3, please, we'll see an email,
 17 this is you on 12 April at 5.50. You say:
 18 "I've been following the emails and have discussed
 19 them with David Neuberger."
 20 Then if we scroll down, please:
 21 "4. We share the [views] expressed in the flurry of
 22 emails. It looks as if Mr Justice Fraser has been
 23 speaking either to the listing office or even to Lord
 24 Justice Coulson. Otherwise it would be a remarkable
 25 coincidence that of all the Lord Justices [of Appeal]

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1 presented with the papers they ended up by chance in
2 front of the former TCC judge although this is not a TCC
3 case. I've asked Owain to dig out the references from
4 the transcripts of the recusal arguments and the
5 judgment day because my recollection is that Mr Justice
6 Fraser said on both occasions that the [Court of Appeal]
7 was expecting an appeal application."

8 Then if we go, please, to what Lord Neuberger said
9 on page 1. There's an email to you that sets out
10 a proposed email to your solicitor and he says he didn't
11 want to send it to you without running it past you
12 first. Then if we scroll down, please, he says:

13 "As to Tony's point 4 [can you see that?], I think
14 there is a danger and that our justified belief, and
15 consequent sense of grievance, that the judge has gone
16 badly wrong may have made us oversuspicious of some sort
17 of inappropriate collusion between the judge and the
18 [Court of Appeal]. It would be perfectly proper, indeed
19 sensible, for the judge to have warned the [Court of
20 Appeal] of a possible forthcoming application which
21 someone should look at urgently, although I cannot of
22 course rule out the possibility that more was said (but
23 even if it was, that is not by any means necessarily
24 sinister). Lord Justice Coulson is the LJ responsible
25 for civil procedure, so it is not entirely surprising

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1 you know the facts and we don't know the facts, so it
2 would be entirely inappropriate to reach the conclusion
3 that there had been some inappropriate collusion.

4 **Q.** Thank you. Can we turn to the last topic then, please,
5 by looking at WBON0000169, and it's your tab E12. Can
6 we start at page 3 --

7 **A.** You're ahead of me. Sorry. Hold on a second.

8 **Q.** Lord Grabiner would you mind just bringing the file back
9 onto the main table so that the mics can pick you up.

10 **A.** Sure. I apologise.

11 **Q.** That's all right. So we're at page 3 of E12.

12 **A.** Yes, I've got that.

13 **Q.** If we look at the bottom, please -- sorry, the top. In
14 fact, I was right the first time. It's the bottom, the
15 bottom of page 3:

16 "Now that the counsel team have had a chance to
17 review yesterday's judgment [that's Mr Justice Fraser's
18 recusal judgment] is there anything in that which
19 changes their view of the prospects of on appeal?
20 I have been specifically asked this by the Board so
21 an early answer would be helpful!"

22 Then if we scroll up, please, to the foot of
23 page 2 -- none of these include you -- Mr Parsons' reply
24 to General Counsel is:

25 "Counsel's view on the prospects of success on

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1 that the application ended up before him. The fact that
2 he made an instant decision with regard to a stay is
3 also unsurprising because that was urgent, and the fact
4 that he has asked for the claimant's response is
5 a pretty good indication that he is considering the
6 application on its merits, as one would expect. My one
7 point of concern is that he has ruled in effect that the
8 common issues and the recusal application are separate:
9 again, at least on the face of it, that is a perfectly
10 rational view, although it is questionable whether he
11 should have expressed a firm view on that without
12 raising it with us (but I have not seen our application,
13 so that may be unfair). At any rate, I think that is
14 a point which we should challenge in the reasonably near
15 future if we are proceeding with the recusal aspect."

16 So is it right, Lord Grabiner, that the theory
17 regarding some form of inappropriate relationship or
18 communication between the High Court judge and the Lord
19 Justice of Appeal originated from Mr Parsons' email that
20 we looked at first?

21 **A.** Absolutely.

22 **Q.** And, in the end, Lord Neuberger essentially poured cold
23 water on it?

24 **A.** Yes, well, I mean, very properly. I mean, you can't
25 jump to conclusions about such a serious matter unless

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1 appeal has not materially changed following the recusal
2 judgment. They continue to believe [that] the appeal
3 has a reasonable prospect of success. If anything,
4 Fraser has said a few things in the judgment that may
5 even help demonstrate apparent bias."

6 Was that your view as communicated there by
7 Mr Parsons to the General Counsel?

8 **A.** I think that's -- I suspect that that is accurate, and
9 we had already advised, I think, that we expected that
10 the recusal application would fail and that the best
11 possibility would have been in the Court of Appeal
12 because the judge himself would be unlikely to recuse
13 himself, and so the best prospects of success with
14 a recusal application would be in the Court of Appeal.
15 That was certainly my view and I think there are emails
16 to precisely that effect.

17 **Q.** There are indeed. If we scroll up, please, Ms MacLeod
18 replies to Mr Parsons:

19 "Hi Andy

20 "Sorry to be petty -- [Lord Grabiner QC] told me
21 when I met him (feels like ages ago) that we had 'strong
22 grounds' to bring the application for recusal. When
23 I challenged him on what the prospects of success were,
24 he said (not an exact quote ...) he wouldn't say 'strong
25 grounds to bring the application', unless there were

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1 strong prospects of success ...
 2 "That now seems to be downgraded to 'reasonable' ...
 3 if that is deliberate then I need be able to explain to
 4 the Board why."
 5 Then over the page at page 1, at the foot of the
 6 page, Mr Parsons forwards that chain on to you asking:
 7 "... do you have any comment ... If you read from
 8 the bottom up ... this should hopefully make sense."
 9 Then further up your reply. You say:
 10 "I haven't downgraded anything. 'Reasonable' was
 11 not my word."
 12 Now, of course, it was, in a sense, to start with,
 13 wasn't it, right at the beginning of the --
 14 **A.** Well, that was his summary, not my word. That was his
 15 summary of what he said I'd said. I wasn't a party to
 16 that correspondence, as you've just said.
 17 **Q.** No, I mean right at the beginning when you were
 18 advising --
 19 **A.** Oh, I see.
 20 **Q.** -- on that Saturday and Sunday, when you were adopting
 21 what Lord Neuberger had said.
 22 **A.** I think you're playing with words, with respect.
 23 **Q.** You say, "'Reasonable' was not my word", and you're
 24 referring to the use of that word in the chain below,
 25 yes?

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1 "His latest recusal judgment is an aggressively
 2 strong defence by the judge of his personal position.
 3 This is not surprising. He dug himself into it in the
 4 first place and now he's in the business of digging
 5 himself out. The collective view of the team -- having
 6 observed him during the trial -- was that this is what
 7 he would do and his refusal to recuse himself coupled
 8 with his refusal to give leave to appeal against that
 9 judgment was predicted by the team. As previously
 10 explained I also believe that in all the circumstances
 11 Post Office has no real alternative but to pursue
 12 appeals to the Court of Appeal against both the recusal
 13 and Common Issues judgments.
 14 "All that said, and as previously advised, I cannot
 15 give a guarantee of success in the Court of Appeal.
 16 There are always risks associated with litigation.
 17 I think Lord Neuberger's view on prospects should also
 18 be sought by the clients."
 19 **A.** Thanks very much.
 20 **Q.** Was it your view that the issues of recusal and
 21 substantive appeal against the Common Issues judgment
 22 should be the subject matter of the same application?
 23 **A.** Yes, I think so. Because it seemed to me impossible to
 24 distinguish between the two. There were -- I mean,
 25 I wasn't primarily concerned with the merits or

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1 **A.** Precisely. What I was, I think, being accused of -- and
 2 this is something that you'd be familiar with over the
 3 years as a barrister -- is being accused by the
 4 solicitor that I'd watered down my advice between
 5 point 1 in time and point 2 in time. That wasn't true.
 6 My advice, I think, throughout, has been consistent, and
 7 I was making that clear in this email.
 8 **Q.** You say:
 9 "I believe we have a strong case because the judge
 10 decided more than he should have done or was necessary
 11 for him in to decide at the Common Issues trial",
 12 et cetera.
 13 **A.** Well, perhaps you'd read on. I think it's quite
 14 important, given the line of questioning that you've
 15 been putting forward.
 16 **Q.** "He was asked on many occasions both before and during
 17 the trial to take great care not to trespass into the
 18 territory of future cases and I believe that he wrongly
 19 failed to heed that request. Many of his observations
 20 are expressed as firm conclusions rather than cautious
 21 preliminary expressions of current thinking and that
 22 point was not seriously challenged by the other side in
 23 the recusal hearing. If he had case managed the
 24 litigation in a more disciplined way all of this could
 25 have been avoided.

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1 otherwise of the judgment itself, in terms of the legal
 2 analysis but what I had seen of it seemed to me to give
 3 rise and -- and I know this is Lord Neuberger's view as
 4 well -- that there were points decided in that case that
 5 were the most senior courts in the land to be studying
 6 and looking at the issues, for example, in relation to
 7 relational contracts, and whether or not a good-faith
 8 obligation was to be implied into the contract in
 9 relation to the termination provisions.
 10 I mean, these are serious and very complicated
 11 issues of law that needed to be properly investigated
 12 and ruled upon by a senior court, in my view. But that
 13 was a separate issue from the recusal application, but
 14 it did seem to me that the points were very interrelated
 15 and that, realistically, it was appropriate that the two
 16 matters, if they were to be dealt with in the Court of
 17 Appeal, should be dealt with together.
 18 **Q.** They should be run in tandem?
 19 **A.** Absolutely.
 20 **Q.** I think the Post Office took a different decision?
 21 **A.** I don't know.
 22 **Q.** Well, I think the -- have you read the emails --
 23 I wouldn't blame you if you've forgotten it -- if they
 24 decided on Herbert Smith's advice to run the appeals
 25 separately?

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1 A. That may be. I mean, I've got no memory of any of that.
 2 I don't think I was involved in that. There may be the
 3 odd email when I was being told about it but I wasn't
 4 asked to advise about that point, I don't think.
 5 Q. Can we look, please, lastly, at tab E23, therefore,
 6 which is WITN10650137.
 7 A. 24, did you say?
 8 Q. 23.
 9 A. Yes.
 10 Q. To put this in context, if we look at page 2, this is
 11 an email, we see from the foot of page 1, from Saturday,
 12 11 May, not to you in the first instance, and it says:
 13 "As you will know by now, we received the Court of
 14 Appeal's judgment in relation to Post Office's recusal
 15 application earlier today.
 16 "The Post Office has not been successful in
 17 appealing the trial judge's decision not to recuse
 18 himself", et cetera.
 19 Then, if we go up, that's forwarded on, we see from
 20 the bottom of page 1, to you and to Lord Neuberger.
 21 Then, if we scroll to the top of the page, we see
 22 an email exchange between you and Lord Neuberger.
 23 A. Well, I think it's from Lord Neuberger to me, isn't it?
 24 Q. Yes. He says:
 25 "1. It is simply wrong to refuse [permission to
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1 A. No, I didn't, and this is not something that has even
 2 crossed my mind.
 3 Q. Did you discuss things at all with Lord Neuberger after
 4 the event, after perhaps recriminations started to begin
 5 as to whether or not you needed an out to explain away
 6 the advice that you'd previously given?
 7 A. I have never ever considered that I needed an out in
 8 this case.
 9 Q. No. Did you respond to his suggestion that --
 10 A. No, I didn't.
 11 Q. -- the client rejecting the advice on running the two
 12 appeals together did give you an out?
 13 A. Absolutely not.
 14 MR BEER: Lord Grabiner, thank you very much. They're the
 15 only questions that I ask.
 16 THE WITNESS: I'm tempted to say thank you.
 17 MR BEER: I don't think there are any questions from other
 18 Core Participants.
 19 Sir, those are the questions that I ask on behalf of
 20 the Inquiry. Do you have any questions of Lord
 21 Grabiner?
 22 SIR WYN WILLIAMS: No, I don't. Thank you very much.
 23 My only words, Lord Grabiner, are to thank you for
 24 making the witness statement and for appearing before
 25 the Inquiry to assist me to get to the bottom of various
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1 appeal]: as I always have said, once a Lord Justice
 2 feels that (s)he has to give detailed reasons, (s)he
 3 should realise that there is an arguable case (the
 4 test); quite apart from this, [David Cavender's] email
 5 rightly identifies a number of errors ..."
 6 It's 3 that I'm interested in --
 7 A. I think you should read the lot, actually.
 8 Q. I'm very grateful for your suggestions, and I will do
 9 exactly as you require:
 10 "Particularly as a former member of the judiciary,
 11 I hate seeing judges, especially senior judges, making
 12 a mess of things, and all the more so when it can lead
 13 to the unfortunately understandable view (which I do not
 14 share) of some sort of intra-judicial conspiracy."
 15 Paragraph 3, which is the one I was interested in:
 16 "The client misguidedly refused to follow our advice
 17 about running the two appeals together, which gives us
 18 an 'out' in terms of our advice appearing wrong, but
 19 more importantly it has helped to produce this unfair
 20 result ..."
 21 Firstly, were you party to the advice that the two
 22 appeals should be run together?
 23 A. I must say, I've no memory of that at all.
 24 Q. No. Did you think that the client's failure to follow
 25 your advice gave you an out?
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1 issues, one of which you've been dealing with.
 2 THE WITNESS: Thank you very much, sir.
 3 MR BEER: Thank you, sir.
 4 SIR WYN WILLIAMS: So we'll resume again at 9.45 tomorrow?
 5 MR BEER: 9.45 tomorrow, yes, sir.
 6 SIR WYN WILLIAMS: Fine. Thank you.
 7 MR BEER: Thank you.
 8 (4.04 pm)
 9 (The hearing adjourned until 9.45 am the following day)
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