

IN THE COURT OF APPEAL
CRIMINAL DIVISION

REGINA

- v -

HAMILTON & OTHERS

**RESPONSE TO DISCLOSURE SKELETON ARGUMENT
SUBMITTED ON BEHALF OF APPELLANTS REPRESENTED
BY EDWARD FAIL, BRADSHAW & WATERTON**

1. This is a response to the skeleton argument, dated 25 February 2021, submitted on behalf of the Appellants represented by Edward Fail Bradshaw & Waterson (referred to hereafter as “the Appellants”).¹

The Relevant Period

2. The Respondent adopts paragraphs 3 to 7 of the response, dated 11 February 2021, to the Appellant’s document dated 1 February 2021.
3. The Appellants’ approach is misconceived. Whilst the Respondent evidently agrees with the proposition that, when reviewing material, any disclosable material should be disclosed, this does not amount to agreement to the Appellants’ proposition that the scope of what should be reviewed should be extended beyond that set out in the Disclosure Management Document dated 19 August 2020 (“the DMD”) and the addendum DMD dated 13 January 2021 (“the ADMD”).
4. The Court of Appeal has repeatedly emphasised that in large cases where there is a huge quantity of potential unused material, as is evidently the case here, the interests of justice

¹ Scott Darlington, Stanley Fell, Peter Holmes (Deceased), Rubina Shaheen and Pamela Lock.

require disclosure to be subject to clear and transparent parameters of scope in order to prevent an open-ended and disproportionate exercise.²

5. In compliance with its obligations, the Respondent has transparently set out in some detail the scope of material that would be reviewed in the DMD. The scope was approved by the Court at the directions hearing on 18 November 2020. The Appellants did not disagree with the scope of the disclosure exercise either in advance of that directions hearing, nor at any time prior to their document of 1 February 2021. On the contrary, at the hearing on 17 December 2020, the Appellants specifically opposed the Court considering limb 2 abuse, for which they now seek this extension to the Relevant Period, on the basis that they did not want to endanger the listing of their appeals in March 2021.
6. The Respondent does not consider that it requires additional time to consider further material in order to comply with its duty of post-conviction disclosure. The Respondent considers that it has complied with its disclosure obligations in accordance with the DMD. The Respondent further considers that the Appellants' application for an extension of the Relevant Period would be unnecessary and disproportionate for the reasons set out in paragraph 5 of its response of 11 February 2021.
7. It is noted that none of the other 37 Appellants in this appeal has submitted that the Relevant Period requires extension, nor that the interests of justice require a delay to the hearing of the appeals in order properly to advance the grounds for which leave to appeal has been given.³

Privilege

8. At paragraph 10 of their skeleton argument, the Appellants request written confirmation "that privilege will not and has not been used as a barrier at any time by the POL (*sic*),

² See, for example, the judgment of the President in *R v R & Others* [2015] EWCA Crim 1941; [2016] Cr App R 20

³ It is noted that Aria Grace Law, who represent the only Appellants who positively sought to argue limb 2 abuse, wrote to the Court on 17 February indicating that they did not support the disclosure application by the Appellants, and that their "*first priority is that the appeal hearing date starting on 22^d March 2021 should not be placed in any jeopardy, whether by reasons of issues relating to disclosure or otherwise.*" No other Appellant has indicated that they support the Appellants' application. The representatives of all Appellants, including those in whose names the skeleton is submitted, made clear at the hearing on 17 December 2021 that their primary priority was to maintain the March hearing dates for the appeals

and/or its agents, in the disclosure process.” The Respondent’s position is contained at paragraph 79 of the DMD, and adherence to this statement has been repeatedly confirmed by the Respondent both orally⁴ and in writing⁵.

9. Within the section of their skeleton under the heading “Privilege”, the Appellants appear to raise three concerns that the Respondent is allowing privilege to prevent disclosure:
 - (i) The Appellants note the fact that disclosed document 421005965 identifies discussions between Fujitsu and POL in 2009, but that the full details of those exchanges have not been disclosed. The Appellants extrapolate that this could only be because the documents have been destroyed or because privilege has been used to prevent disclosure;
 - (ii) The Appellants note the fact that disclosed document BRS0000419265 refers to documents being shredded in a particular instance, but there has been no disclosure as to the attitude taken to this practice at Board/managerial level; and
 - (iii) The fact that the Appellants consider it inconceivable that the Horizon issues throughout the Relevant Period were not discussed at Board level and yet there has been no disclosure of such material.
10. The Appellants’ concerns are misconceived and we address these three matters in detail below.

Document 421005965

11. This document is an internal POL IT e-mail discussing an incident on 29 October 2009 in which a file containing Horizon transaction data for Credence failed to process due to a corrupted transaction. The e-mail explicitly refers to discussions between POL IT and Fujitsu in relation to resolving this issue.
12. The Appellants, at paragraph 16 of their skeleton, submit that the lack of disclosure “to show what decision makers at the Post Office did about the issue” can be attributable only

⁴ Both in discussions outside of Court and also on the record during the directions hearing on 18 November 2020, at which time both Holdroyde LJ and Picken J specifically drew Mr Stein QC’s attention to paragraph 79 in answer to his submissions on this issue.

⁵ See, for example, paragraph 10 of the Respondent’s response of 11 February 2020 and also paragraph 44 of the ADMD.

to either the documents having been destroyed⁶ or because someone is withholding material on the grounds of privilege.

13. It is regrettable that the second of the two inferences sought in paragraph 16 of the Appellants' skeleton,⁷ and possibly also the first,⁸ impute bad faith to those representing the Respondent. For the avoidance of doubt, each of the Respondent, Peters & Peters and the counsel who are responsible for disclosure decisions wholly refute any such suggestion of bad faith.

14. It is particularly difficult to see how the Appellants' accusations could be levelled in circumstances where they are based on a document, disclosed by the Respondent, which demonstrates on its face both the fact of this Horizon problem and of the fact that it was known to POL (the IT department) and discussed between them and Fujitsu.

15. There is no material that we have seen to suggest that this issue was escalated to Board/management level and we have no reason to think it would have been.

Document BRS0000419265

16. This document is a privileged Advice that has been disclosed by the Respondent to the Appellants and so is not in fact an illustration of the Appellants' concerns that the Respondent is not abiding by its stated position that disclosable material will be disclosed irrespective of privilege.

17. Moreover, the Appellants' summary of this issue at paragraph 17 of the skeleton does not reflect the considerable quantity of material disclosed in relation to the issue and, as a result, the Appellants' submission in relation to this document is inaccurate and potentially misleading:

⁶ The cross-reference in paragraph 17 of the skeleton indicates that the Appellants are suggesting that the destruction must have been deliberate and malicious "shredding". For the reasons given in response to their submissions on BRS0000419265, this suggestion is misconceived.

⁷ Given that disclosure decisions are taken by those representing the Respondent, the suggestion that material has been withheld due to privilege would necessarily have required those representing the Respondent to have misled the Court in relation to their adherence to paragraph 79 of the DMD.

⁸ If, as appears to be the inference from paragraphs 17 and 18 of the Appellants' skeleton, it is being suggested that those representing the Respondent are aware of destruction of documents which has not been disclosed but have failed to disclose this fact, that would necessitate bad faith on the part of those making disclosure decisions.

- (i) The issue in relation to the taking or retention of minutes related specifically to the weekly hub meetings which had recently been established to discuss Horizon issues;
- (ii) Contrary to the statement in paragraph 17(a) of the skeleton, the person who gave the instruction that typed minutes of the weekly Horizon issues meetings be “scrapped” is not “unidentified” but rather was John Scott of POL Security;⁹
- (iii) Upon discovering the instruction, Jarnail Singh (senior criminal lawyer at POL) phoned Martin Smith of Cartwright King on 31 July 2013.¹⁰ On 1 August 2013, Jarnail Singh sent an e-mail to Martin Smith seeking formal advice to confirm his view that even if there was any truth to the “common myth” that there need not be disclosure in civil proceedings if no written record existed, that was certainly not the case in relation to criminal cases;¹¹
- (iv) The Advice¹² was provided on 2 August 2013, and was sent to Hugh Flemington (POL Head of Legal) and Susan Crichton (POL General Counsel);¹³
- (v) It is clear from correspondence that POL Legal explicitly supported Jarnail Singh and unequivocally directed that no documents should be destroyed, and that minutes of the weekly Horizon issues meetings should be taken, centrally retained and disclosed where appropriate.¹⁴ A formal protocol was put in place to this effect;¹⁵
- (vi) Most importantly, notwithstanding John Scott’s instruction, written copies of the minutes were retained, as evidenced by the fact that the Appellants have received disclosure of the very minutes of the meetings to which the instruction related.¹⁶ The Appellants have also received disclosure of minutes from subsequent meetings (where disclosable);¹⁷
- (vii) The assertion at paragraph 17(c) of the skeleton that POL had received advice that if minutes were not written then they were not disclosable, is based on a misreading of the paragraph of the Advice and a failure to read the other disclosure on the subject:

⁹ This is evident from document BRS000419223.

¹⁰ Document BRS000419223.

¹¹ Document BRS000419233.

¹² Document BRS000419265.

¹³ Document BRS000419267.

¹⁴ See, for example, Susan Crichton’s response at documents 415005331 and 452000004, Jarnail Singh’s e-mail at document BRS0000383764.

¹⁵ Document 145002983.

¹⁶ See Documents 452000001, 452000002 and 452000003.

¹⁷ For example, documents BRS0000383823 and 145002986.

- (a) Paragraph 17(c) of the Appellants' skeleton is based on paragraph 5(iii) of the Advice;
- (b) As is clear from reading paragraph 5 fully, it is simply a summary of the information conveyed to the author of the Advice. The Appellants have received disclosure of the source of this information, namely the e-mail from Jarnail Singh;¹⁸
- (c) Why John Scott gave the instruction he did is not known, but the review has not identified any such legal advice ever having been provided either to POL by any external lawyer or from any lawyer within POL. Rather, the reaction of POL's lawyers to John Scott's instruction strongly suggests that no such advice was ever given or received.

18. Had those conducting the PCDE on behalf of the Respondent seen any material suggesting that documents or other records were improperly destroyed, this would have been disclosed (exactly as it has been in this instance). No other such material has been identified as part of the PCDE, and there is no proper basis for the inference contended for by the Appellants that important material was destroyed to thwart disclosure. Indeed the quantity and nature of disclosed material demonstrates that the Appellants' suspicion is wholly unfounded.

The lack of Board minutes etc

- 19. The Appellants assert that the absence of disclosure of POL Board minutes demonstrating Board awareness of issues with Horizon demonstrates that disclosure is defective.
- 20. Contrary to the Appellants' assertions, numerous examples have been disclosed of POL Board minutes and Board sub-committee minutes¹⁹ relating to knowledge of Horizon issues.²⁰ Moreover, reports on the subject of Horizon integrity and reliability instigated by and reported to the POL Board have also been disclosed.²¹ Furthermore, disclosure has

¹⁸ Document BRS000419233.

¹⁹ Including the executive committees and the Audit & Risk Committees.

²⁰ Examples include documents BRS0000001304 (disclosed in tranche 2 in September 2020), BRS0000001254, BRS0000001323, BRS0000001327, BRS00000030117 (all of which were disclosed by extract in tranche 2 in September 2020), 152003685 (disclosed in tranche 3 in December 2020), 404000005 and 404000006 (both disclosed by extract in tranche 3 in December 2020).

²¹ For example, the Ismay Report (document 131002268) and the Detica Report (document 172000004), both of which were disclosed in tranche 2 (in September 2020).

been made of privileged legal advice to the Board in relation to insurance risks arising out of Horizon issues and the Gareth Jenkins non-disclosure.²²

21. In the circumstances, it is difficult to see how the Appellants can credibly suggest that the Respondent has failed to disclose material relating to Board knowledge whether on the grounds of privilege or otherwise.²³
22. The Respondent clearly identified its approach to disclosure in the DMD, and as a result Board Minutes which were not identified as a result of the application of the agreed search terms were not reviewed. However, the approach in the DMD was designed to identify any relevant material going to the issues in these appeals, and no Appellant took issue either with the approach or with the search terms despite repeated invitations by the Respondent to suggest further search terms that any Appellant considered to be necessary or appropriate.²⁴

The Appellants' Conclusion

23. For the reasons set out above, the Respondent does not accept the suggestion that it has failed properly to make disclosure, and the serious criticisms levelled at the Respondent and those representing it are rejected. On the contrary, as is set out in the ADMD, an extremely substantial PCDE has been conducted, involving careful review closely overseen by senior and experienced counsel. The PCDE has resulted in a very significant quantity of disclosure having been made (including disclosure of material that the Appellants claim to be missing).

²² Document BRS0000023685 was disclosed by extract in tranche 2 (September 2020). The Respondent confirmed in correspondence that although the Board was made aware of the content, it was unclear whether the Board received the Advice or a summary in a Boardpaper.

²³ It is further noted that in addition to the review within the PCDE, the POL Board's knowledge of BEoDs was extensively litigated within the group litigation. The Appellants have the findings of Fraser J in the CIJ and HIJ.

²⁴ It should be noted that the Appellants' reliance, at paragraph 24 of the skeleton, on paragraph 42 of the DMD ignores that clarification that was provided at paragraphs 27 and 28 of the ADMD. However, the fact that the Respondent has focussed on knowledge within POL's investigative and prosecution function (given that these have been recognised by the Court to be the functions that are relevant to limb 2 considerations) does not mean that disclosure has not been made of properly disclosable Board material where it has been identified by the search terms.

24. The Court was clear in exercising its discretion to allow limb 2 to be argued that any such argument would have to be within the scope of the existing approach to disclosure set out in the DMD. That approach has been adhered to by the Respondent, and none of the other 37 Appellants has suggested that disclosure has been inadequate or insufficient to enable them to advance the grounds for which leave has been given, nor do any of the other 37 Appellants seek to extend the scope of the PCDE in the manner sought by these Appellants.

Additional matters raised in e-mail of 2 March 2021

25. Although not addressed in the Appellants' skeleton, an e-mail was received from Edward Fail Bradshaw & Waterson on 2 March raising the following further complaint:

"We are very concerned about the Royal Mail Group acting as a disclosure officer in this matter particularly taking into account their previous history of non-disclosure and that they are not an independent body.

The only way to remedy this is either for Peters and Peters to inspect the material that they have flagged up as potentially relevant or if you are unwilling to do so then either the Appellants legal teams should be able to inspect the documentation or a person independent of both sides."

26. Royal Mail Group ("RMG") does not act as a disclosure officer. RMG is a third party which holds potentially relevant material. This is because, prior to separation in 2012, the Respondent was a wholly owned subsidiary of RMG.²⁵

27. As is the case with any third-party holding potentially relevant material, the Respondent has requested all relevant material from RMG. RMG has provided the Respondent with details of what material it holds, and the Respondent has requested such material as appears to be relevant and requiring review. RMG has voluntarily provided assistance in this regard. Had RMG refused to provide material when requested, whether on the grounds of privilege or otherwise, the Respondent would have given consideration to the need for applications to the Court for third-party disclosure orders.²⁶ No such applications have been required.

²⁵ See paragraph 3 of the DMD.

²⁶ See paragraph 22(ii) of the DMD

28. The only outstanding instance of material not having been provided by RMG relates to material held at the Postal Museum. The Respondent has outlined the issues with obtaining material from the Postal Museum in the ADMD²⁷ and in subsequent correspondence.²⁸ The difficulties relating to the Postal Museum do not arise from RMG refusing to provide material requested, but rather to practical difficulties in retrieving material from a museum which is closed due to the pandemic.
29. As has been outlined in the ADMD and correspondence, the Respondent, with the assistance of RMG, is in the process of obtaining and reviewing the outstanding material from the Postal Museum. In addition, the Respondent has recently become aware that the museum had not identified and provided some historic minutes in the archive from the period prior to 2002. The Respondent is in the process of obtaining those minutes and will review them and make disclosure of any disclosable material therein.
30. For the reasons set out above, the Appellants' concerns are unfounded. Disclosure decisions are being made by the Respondent in accordance with the DMD, and the Respondent has no reason to believe that RMG is withholding material. Save in relation to the particular issues with the Postal Museum, which are not the consequence of RMG preventing access to the material requested by the Respondent, all relevant material is being reviewed by the Respondent and disclosed where appropriate.

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3 March 2021

²⁷ See tab 2 of the spreadsheet appended to the ADMD.

²⁸ Particularly the letter accompanying tranche 4B of disclosure on 19 February 2021.