

IN THE COURT OF APPEAL
CRIMINAL DIVISION

REGINA

- v -

HAMILTON & OTHERS

ADDENDUM TO THE DISCLOSURE MANAGEMENT DOCUMENT

1. This addendum to the disclosure management document (the “Addendum”) is intended to update the Court and Appellants¹ on the progress of the post-conviction disclosure exercise (“PCDE”) to date and how it is proposed to continue the PCDE hereafter. It should be read together with the Disclosure Management Document (“DMD”) dated 19th August 2020.
2. As with the DMD, the Addendum is also intended to give an opportunity to Appellants, potential future Appellants and those representing them to highlight issues or areas not already addressed in the PCDE undertaken to date to ensure that relevant material and issues are considered and reviewed, and that appropriate disclosure is made.

OVERVIEW OF THE PCDE CONDUCTED TO DATE

The team conducting the PCDE

3. The disclosure team conducting the PCDE² has been expanded since the date of the DMD in August 2020:
 - Charlotte Brewer has joined the team of instructed senior junior counsel;

¹ Unlike in the DMD, the term “Appellants” is used in the Addendum to refer solely to those Appellants referred to the CACD by the CCRC. Although this Addendum is also of significance to potential future appellants (including those whose applications are yet to be determined by the CCRC), they are referred to distinctly within it.

² As set out at §19 of the DMD.

- The team of junior counsel engaged as first and second level reviewers was expanded such that a total of approximately 70 junior counsel have been instructed to assist with the review (with between 54 and 60 junior counsel engaged on the PCDE at any one time since September 2020)³; and
- An additional 3 Associates and 2 paralegals have joined the team assisting with disclosure within P&P, although 2 of the Associates on the team at the time of the DMD have since left it.

Material reviewed to date

4. The approach adopted to date has been in accordance with that outlined in the DMD.
5. All Appellants were invited to identify additional search terms⁴, but no such suggestions have been provided. The sole representation received in relation to POL's approach in the DMD was a request made in November 2020 by Aria Grace for the relevant period to be extended to beyond 2013. For reasons outlined below, this request has not been acceded to.
6. To date, in excess of 3.8⁵ million documents have been uploaded to the CCRC Relativity platform for the PCDE⁶. As outlined in the DMD, relevant repositories have been subject to electronic search review using the agreed search terms⁷ and/or reviewed in full. This includes:
 - (i) The case files and documents identified as relating to prosecuted individuals⁸ that are currently in the Respondent's possession have been reviewed;
 - (ii) The trial bundles from the Group Litigation have been reviewed and all data repositories within the "GLO dataroom" that were considered to be relevant and to

³ This is in addition to Queen's Counsel, and 4 instructed senior counsel who have been overseeing disclosure and making disclosure decisions.

⁴ See §10 & §67 of the DMD.

⁵ Many of the 3.8m documents run to tens or hundreds of pages. Moreover, this figure does not include files or boxes of papers that have been reviewed in hard-copy (including "Oasis" boxes and files).

⁶ This figure does not include the documents subject to searches within relevant repositories within the GLO dataroom save where those searches resulted in positive hits in which case the documents were copied into the CCRC dataroom.

⁷ The search terms include both the GDR search terms (as set out in tab 1 of the appended spreadsheet) and also the names of all Appellants and potential future appellants. In total, tens of millions of pages have been subject to search and review.

⁸ Subject to the recently received material outlined in Tab 2 of the appended spreadsheet. There are some third party law firms' files relating to potential future appellants that have not yet been reviewed.

potentially contain disclosable material have been subject to search terms with review of material identified through such searches now being largely complete. This includes all materials from the Second Sight review and the Initial Complaint Review and Mediation Scheme (“ICRAMS”);

- (iii) Almost all potentially relevant hard-copy files currently within the Respondent’s possession⁹ have been reviewed;
- (iv) All PEAKs & KELs identified as being relevant from the group litigation and Horizon Issues Trial have been reviewed (and disclosed);
- (v) The Security and Intel Team Sharepoints have been subject to search terms with review of material identified through such searches now being largely complete;
- (vi) All NBSC call logs for 478 prosecuted individuals for whom call logs exist (including all but 4 of the Appellants) have been fully reviewed and disclosed by schedule;
- (vii) Material provided by FSL has been fully reviewed and disclosed where disclosable;
- (viii) Material provided by RMG to date has been fully reviewed and disclosed where disclosable;
- (ix) Files provided by Cartwright King and other third party law firms instructed by RMG/POL have been fully reviewed for Appellants and disclosed where disclosable save for a number of further files received recently¹⁰; and
- (x) Some Board papers and minutes from the Company Secretary files have been reviewed.

7. In relation to GDR Category 1 (Knowledge within POL of problems with Horizon)¹¹:

- (i) The FIs¹² have been concluded using the material obtained to date, and the material generated has either been, or is in the process of being, disclosed. In relation to the material obtained and reviewed, this disclosure will be completed by 5th February 2021;
- (ii) In relation to Strand 2¹³, where case specific reviewers have identified material of generic disclosability, it has been referred to the GDR review team. In relation to

⁹ The only hard-copy files that have yet to be reviewed are some of those within the recently discovered “Oasis” boxes and files (see below), and the limited number of hard-copy files (from third-party law firms and the Postal Museum) specifically identified with in Tab 2 of the appended spreadsheet.

¹⁰ See Tab 2 of the appended spreadsheet

¹¹ see §36 et seq in the DMD.

¹² see §39 et seq in the DMD and tab 2 of the spreadsheet at annex 1 to the DMD

¹³ see §51 & 52 in the DMD.

the material obtained and reviewed to date (see above), this disclosure will be completed by 5th February 2021; and

- (iii) In relation to Strand 3¹⁴, the generic search terms have been applied to all material held to date, and all material obtained from those search terms (approximately 88,644 documents as at 7th January 2021) has been, or is being, reviewed and, where appropriate, disclosed.
8. As envisaged within the DMD¹⁵, the search terms have been kept under review and have been refined over time better to focus on relevant material. An updated list of search terms is set out at Tab 1 of the spreadsheet appended to this Addendum¹⁶.
 9. In relation to GDR Category 2 (POL investigation and prosecution policies)¹⁷, all such policies have been reviewed and, where appropriate, disclosure has either been made or will be made by 5th February 2021.
 10. In relation to GDR Category 3 (Conduct of POL investigation and prosecution teams)¹⁸, all documents flagged by the case specific review teams have been reviewed, together with an additional 67,994 documents (primarily drawn from the legal and security files) identified by FI search terms.

Disclosure made to date

11. The following material has been disclosed to date:

- (i) Tranche 1 was provided on or around 25th August 2020, comprising of:
 - (a) Case specific disclosure, including the Appellants' case files (a total of approximately 6,575 documents); and
 - (b) GDR disclosure of 155 documents and a Schedule of extracts containing disclosable extracts from a further 62 documents.
- (ii) Tranche 2 was provided on or around 29th September 2020, comprising of:
 - (a) Case specific disclosure (179 documents); and

¹⁴ see §53 to 57 in the DMD.

¹⁵ see §48 in the DMD.

¹⁶ It should be noted that search terms will remain under review and new search terms may be added in the event of Appellants or potential future appellants raising new issues.

¹⁷ see §58 to 60 of the DMD.

¹⁸ see §61 to 70 of the DMD.

- (b) GDR disclosure of 302 documents and a Schedule of extracts containing disclosable extracts from a further 123 documents¹⁹.
- (iii) Tranche 3A was provided on or around 4th December 2020, comprising of GDR disclosure of 432 documents and a Schedule of extracts containing disclosable extracts from a further 48 documents.
- (iv) Tranche 3B was provided on or around 18th December 2020, comprising of:
 - (a) Case specific disclosure (305 documents); and
 - (b) GDR disclosure of 416 documents, a Schedule of extracts containing disclosable extracts from a further 38 documents, and a Schedule of NBSC logs (summarising the NBSC logs for all 47 Appellants referred by the CCRC either to the Court of Appeal or Crown Court, and a further 431 further potential Appellants).

12. Where it has been helpful to expedite the provision of material in response to specific disclosure requests, disclosure has been made on an ad hoc basis. Where material considered to be of generic disclosure value is requested by any Appellant, it is disclosed as a matter of course to all Appellants.

Data sources, repositories & custodians

13. As indicated within the DMD²⁰, the review process has prioritised those repositories and custodians deemed most likely to hold relevant material. In particular:
- (i) All material within the data repositories within the “GLO dataroom” that were considered to be relevant and to potentially contain disclosable material ²¹ has been subject to search and review;
 - (ii) All material within the data repositories within the “CCRC dataroom” ²² has been subject to search and review;

¹⁹ Although the schedule of extracts formed part of Tranche 2, due to a technical issue it was not disclosed until 23rd October 2020.

²⁰ See §47 of the DMD.

²¹ As summarised at §21(i) of the DMD and set out in greater detail within Tab 4 of the spreadsheet appended to the DMD.

²² See Tab 5 of the spreadsheet appended to the DMD

- (iii) All files and records held by POL in relation to the review of Horizon undertaken by Second Sight²³ between 2012 and 2014, and the ICRAMS have been subject to search and review;
- (iv) Almost all potentially relevant hard copy files held by POL from investigations and prosecutions conducted by or on behalf of POL²⁴ have been reviewed²⁵;
- (v) All material in relation to CCRC Applicants obtained from Courts, the CCRC and other third parties has either been reviewed or will be reviewed by 5th February 2021;
- (vi) All records from FSL obtained as part of the PCDE have been reviewed²⁶;
- (vii) All records obtained from RMG as part of the PCDE, including Board papers and minutes from the Company Secretary files, have been reviewed;
- (viii) All data from the Security and Intel Team SharePoint as downloaded in 2015²⁷ and material migrated to the current Legal Team SharePoint relevant to prosecutions has been reviewed; and
- (ix) All Mimecast data from the initially prioritised²⁸ legal, security and investigation personnel who have been considered to be likely to be in possession of relevant material has been reviewed²⁹. During the course of review, a number of further legal, security and investigation individuals who were not initially prioritised were identified as potentially holding relevant material. The Mimecast data for these 27 individuals has been obtained, and the data is still being reviewed³⁰.

14. A schedule of outstanding data sources, repositories and custodians is set out at Tab 2 of the spreadsheet appended to this Addendum, which provides an update to Tab 6 of the spreadsheet annexed to the DMD. This spreadsheet does not include the “Oasis” boxes

²³ The Second Sight review was conducted under terms of reference agreed between Post Office Ltd, the JFSA, a number of MPs representing the interests of SPMs (including James Arbuthnot MP) and Second Sight.

²⁴ Some recently received files are currently subject to review (see Tab 2 of the appended spreadsheet), and hard copy files from investigations and prosecutions not resulting in conviction have not been reviewed.

²⁵ Either by direct review of files by counsel or by way of application of electronic searches with the search product directly reviewed.

²⁶ The material received from FSL includes material obtained for the test case and also HSD logs for all Appellants for whom such logs exist. A number of non-Appellant HSD call logs have yet to be provided by FSL, but this material is not considered to be necessary for the purposes of disclosure for these appeals.

²⁷ Although see Tab 2 of the appended spreadsheet in relation to the 2020 download of SharePoint material

²⁸ For the reasons outlined in the DMD, individuals within the legal/security teams who were believed to be most likely to hold relevant data were prioritised. The review of all Mimecast data from such individuals has been completed.

²⁹ For the reasons set out below, Mimecast data from lower priority custodians outside of legal and security/investigation has not been reviewed and it is not considered to be necessary or proportionate that it should be

³⁰ See Tab 2 of the appended spreadsheet

and files (see below) as a separate repository as they had not been identified by the time of the DMD and were therefore not included within Tab 6.

15. In relation to the repositories of data outlined in Tab 2 of the spreadsheet that have only recently become available for review by the Respondent (because they have only recently been either identified or received)³¹, this material is being reviewed as quickly as possible. As the Appellants are aware, the process of obtaining, scanning and reviewing this material has been delayed by the Covid-19 lockdown³². Insofar as material is identified which is deemed disclosable (either case specific or generic), it will be disclosed even if this needs to be after 5th February 2021.

The “Oasis” boxes and files

16. In or around September 2020, POL was conducting an assurance exercise to ensure that no relevant repositories had been missed. During a review of an Oasis archive that had not previously been thought to contain relevant material for these proceedings, potentially relevant boxes and files were identified. These were immediately brought to P&P’s attention. Following further investigation during October, November and early December, this archive was found to contain 103,401 boxes or files relating to POL. A review of the descriptions on the indices to the boxes suggested that approximately 350 boxes or files had the potential to include material relevant to these appeals. Those boxes and files have either been reviewed or are in the process of being reviewed³³ and any disclosure from them will be made by 5th February 2021 or shortly thereafter.

17. A number of boxes that have been reviewed were found to contain branch audit records. A small number of these records related to audits at the branches of any Appellants. These

³¹ The recent receipt is despite the material having been requested from third parties as soon as its existence became known and, in some cases, such requests were made many months ago

³² In particular, the scanning of hard copy material has been severely impacted by the Tier 4 lockdown which has meant that P&P’s offices are closed other than for essential work with a significantly reduced number of staff able to attend the workplace in London. In addition, arrangements for staff to attend to carry out scanning are subject to strict social distancing arrangements (which make on site scanning and reviewing extremely limited). A combination of the effect of the lockdown (which has increased demand for digital scanning of hard copy files to facilitate remote working) and the Christmas period has also meant that third party scanning firms either have no capacity or are subject to considerable delay. As such, ensuring expeditious scanning of hard copy files has been substantially slower than would ordinarily be the case.

³³ There were further 6 boxes which appeared from the index to be relevant, but these are missing from the archive.

records have been scanned and reviewed as case specific material. Some further records relate to branch audits of potential future Appellants. Those records are being scanned and will be subjected to case specific review. In relation to the balance of the records, which relate to SPMs who were either not prosecuted or not convicted, it is considered that it is neither necessary nor proportionate to review these records for GDR purposes³⁴.

18. In addition to the above, a dip-sample exercise is being conducted in relation to 96 other indexed boxes/files to confirm the reliability of the index. Furthermore, a dip-sampling exercise is being undertaken in relation to boxes/files for which the indexing does not assist on whether they might contain relevant material. A total of 94 boxes/files have been selected for dip-sample review. The dip-sample review exercise is ongoing, but no relevant material has been identified to date.

REVIEW OF APPROACH TO DISCLOSURE

The Relevant Period

19. For the reasons set out in the DMD³⁵, the Relevant Period for the purposes of the PCDE is 1999/2000 to 2013.
20. Aria Grace Law (representing three of the Appellants) have requested that the Relevant Period should be extended beyond 2013³⁶. From correspondence and submissions³⁷, it is understood that it is suggested that the Relevant Period should cover POL's conduct during the Second Sight review, evidence being given to the Select Committee and during the post-conviction disclosure exercises undertaken by Cartwright King. This request has been considered, but the Respondent does not intend to extend the Relevant Period:

³⁴ The only issue that these records could realistically go to would be Horizon reliability (i.e. either the existence of a purportedly "unexplained shortfall" or a record of a specific criticism of Horizon levelled by the SPM and/or knowledge of the same. As noted at §35 of the DMD, it is not considered necessary to review/disclose a document where substantial quantities of other examples of the same type of issue has already been disclosed. Since a substantial number of examples of "unexplained shortfalls" and criticisms of Horizon by SPMs are already disclosed, it is not considered reasonable or proportionate to incur the cost and delay associated with reviewing these audit files.

³⁵ See §5 of the DMD.

³⁶ Correspondence from Aria Grace Law dated 24 November 2020.

³⁷ Including for the hearings of 18 November 2020 and 17 December 2020.

- (i) 2013 was selected as the end date for the Relevant Period since it marked the time by which POL had ceased prosecuting. The trials of all Appellants were conducted and concluded prior to this time;
- (ii) The basis for the request is the contention that POL deliberately misled the inquiries and/or deliberately failed to make proper post-conviction disclosure at the time. Unless a document or an event produced or occurring post-conviction provides evidence of deliberate conduct or misconduct before or during the proceedings as could render an Appellant's conviction unsafe on grounds of an abuse of process at the time of trial (such as a later confession to past wrongdoing), then it has no relevance to the issues the Court has to evaluate on abuse of process;
- (iii) Additionally, the Respondent has had particular regard to the fact that extending the Relevant Period would necessitate a very substantial expansion of the PCDE which would not be possible within the timetable set down by the Court. Such an extension to the Relevant Period would therefore inevitably delay resolution of the appeals. The Respondent considers that this would be unfair to the overwhelming majority of Appellants who have properly and understandably expressed the clear view that they wish their cases to be resolved as soon as possible³⁸; and
- (iv) The Respondent notes that at the hearing on 17th December 2020, the Court was not prepared to entertain wide-ranging inquiries into POL's conduct, particularly where that conduct occurred after POL had ceased to prosecute cases involving Horizon in 2013.

21. For the avoidance of doubt, some material³⁹ post-dating the Relevant Period has been reviewed (and disclosed where appropriate) where it is relevant to POL's conduct and/or knowledge *during* the Relevant Period. However, where such material is relevant only to POL's conduct/knowledge after the end of the Relevant Period, it is not deemed disclosable.

³⁸ It is noted that the Respondent is not opposing any of the appeals of the three Appellants represented by Aria Grace (albeit the Respondent's concession in their cases relates solely to ground one). The three Appellants whose cases *are* being opposed on both grounds do not seek further post-2013 disclosure or an extension of the Relevant Period. Indeed, counsel for two of those contested Appellants positively argued at the hearing on 17th December 2020 that ground two, which is the only ground to which this later material could be said to be relevant, should not be litigated within these appeals specifically because of the risk of delaying the resolution of their appeals.

³⁹ Including material relating to the Second Sight review, ICRAMS, the group litigation and the previous post-conviction disclosure exercises.

22. The Respondent has recently become aware of material pre-dating 1999 (particularly included within Oasis boxes and files) containing documents relating to the lead up to the implementation of Horizon. However, in accordance with the approach identified within the DMD, material pre-dating 1999 has not been considered for disclosure, and it has not been considered necessary and proportionate to extend the relevant period to include any such material:

- (i) No Appellant has ever requested that the Relevant Period be extended to start earlier than 1999 so as to include the early design and testing phases of Horizon;
- (ii) The early BEoDs (including those which arose during the testing phase) were reviewed in the group litigation, and Mr Justice Fraser has already made findings in relation to them⁴⁰;
- (iii) Even if pre-1999 material contained records or data suggesting problems identified with Horizon during the testing phase that had not already been addressed within the expert review during the group litigation, that would not mean that such problems had not been resolved prior to roll-out and implementation. There would need to be further investigation via FSL as to whether those problems were addressed, and if so how (such context being necessary to assess whether the material is, in fact, disclosable on the basis that it undermines or assists);
- (iv) It would not be possible properly to review this material for disclosure within the timetable set down by the Court. Any extension to the relevant period to enable a review of such material would delay resolution of the appeals which would be wholly unfair to the Appellants;
- (v) It is not believed that this material is likely to affect the outcome of any appeal. Whilst the possibility of material dating from prior to 1999 being disclosable cannot be excluded, the reasonableness of investigating such possibilities (with the necessary cost and delay implications) must be seen in the context that the Respondent is not opposing any appeal in which Horizon reliability was a material consideration within that Appellant's prosecution.

⁴⁰ See, for example, paragraphs 234 to 240 of the HIJ Technical Appendix dealing with Data Tree Build Failure Discrepancies (BEoD 10(i)) and paragraphs 315 to 323 of the HIJ Technical Appendix dealing with Concurrent Logins (BEoD 18).

Generic Disclosure Review

General Approach

23. As was made clear within the DMD, the GDR is not and cannot be an exhaustive review of all potential material⁴¹, and so the proportionate approach set out within the DMD has been adopted which seeks to identify and disclose the most significant material and a sufficient range of material to enable all proper grounds of appeal and submissions to be advanced in these appeal proceedings. As outlined above, approximately 4 million documents running to tens of millions of pages have been subject to search and review, and a substantial quantity of material has already been disclosed.

24. In prioritising repositories and custodians for review, the Respondent has attached particular weight to the following considerations:

- (i) The issues being advanced and relied upon by Appellants in their additional grounds and submissions (both in writing and at Court), including in relation to ground 2;
- (ii) The fact that this exercise relates solely to the criminal appeals and not to collateral civil litigation or any public inquiry into events surrounding Horizon and POL's conduct. Material that might be significant in other proceedings will not be disclosed within the PCDE unless it is relevant and disclosable in relation to the criminal appeals, which are solely concerned with the safety of convictions;
- (iii) The need to comply with the timetable directed by the Court which requires that disclosure is concluded by 5th February 2021. This deadline for disclosure is necessary in order to maintain the current timetable for the appeals to be heard in the week commencing 22nd March 2021. The Respondent is particularly anxious to ensure that the timescale is maintained in order to ensure the resolution to the appeals as soon as reasonably possible;
- (iv) The importance of proportionality with regard to the cost and resource implications of an ever-expanding review exercise.

Accordingly, the Respondent has focused its enquiries and review of the repositories and custodians that are considered most likely to result in disclosable material. It remains a

⁴¹ See §34 of the DMD.

fundamental principle of criminal disclosure, that necessity and proportionality must be kept in mind to avoid an open-ended and unnecessarily wide-ranging investigation⁴².

25. In order to meet the deadline of 5th February 2021 directed by the Court, it was necessary for the primary review of material to be completed by 7th January 2021 in order to allow for the first and second level disclosure review and the compiling of the disclosure schedules and bundles. This timescale has meant that, save for the completion of ongoing reviews of material received only recently, the primary review and almost all of the disclosure review will have concluded prior to receipt of the Appellant's skeletons in relation to ground two (due on 15th January 2021 from Aria Grace Law and 29th January 2021 from all other Appellants).

26. Despite the best efforts of the Respondent, the recently received material⁴³ and the particular effects of the Covid-19 lockdown have meant that some disclosure will have to be made subsequent to the 5th February 2021 deadline. It is hoped that the material currently under or pending review for which it is not possible to make disclosure by the deadline will have been reviewed so as to enable any disclosure from it to be made by 19th February 2021. It is not anticipated that this will materially affect the timetable or the listing of the appeals. The Respondent will, of course, continue to make disclosure thereafter, including in response to specific disclosure requests, in accordance with its continuing duty and such disclosure will continue until the final hearing.

Approach to Category One (Knowledge)

27. For the purposes of the grounds of appeal now being advanced, it is neither necessary nor proportionate to conduct a full review of custodians within POL outside of the legal and/or security/investigative functions:

- (i) The FIs, and disclosure emanating from them, has already addressed the extent to which knowledge of the BEoDs identified in the HIJ had been passed to POL by way of PEAKs, KELs, BIMS reports or otherwise. Such disclosure addresses

⁴² See, for example, *R v R [2016] 1 Cr App R 20*. The principle was reiterated by the Court during the hearing on 17th December 2020.

⁴³ Specifically the Oasis boxes and files and the material identified in Tab 2 of the appended spreadsheet.

knowledge by the organisation but not necessarily where within the organisation that knowledge passed; and

- (ii) It is acknowledged that for the purposes of ground two submissions, it may make a difference where and when such knowledge was vested within the organisation. However, for the purposes of establishing ground two, relevant knowledge would need to vest in the security team dealing with the investigation/prosecution and/or the legal team conducting the prosecution⁴⁴.

28. Whilst it is neither necessary nor proportionate to conduct a full review of custodians within POL outside of the legal and security/investigative functions, data falling outside those POL functions will continue to be obtained and retained for future case specific investigation and review should it be needed.

29. In light of the above, the Respondent does not consider it either necessary or proportionate to review recently obtained laptops for GDR purposes where the data they contain relates to teams other than security and legal functions⁴⁵.

30. In relation to Mimecast data:

- (i) The FI search terms have been applied to custodians within the legal, and security/investigation functions of POL;
- (ii) FI search terms will be run across some custodians identified as being potentially relevant notwithstanding that many fall outside the security and legal functions. However, search terms will only be applied in respect of FI's 4, 6, 8, 9, 10, 12, 13, 16, 21, 26 & 28⁴⁶ (since all other FIs relate to issues which pre-date December 2011 which is the earliest date for which we have Mimecast data); and
- (iii) Case specific search terms will continue to be run across all data for legal and security custodians and, for the purpose of the appeals presently before the Court, those who were identified as priority custodians and/or worked on any of the Appellants' cases.

⁴⁴ As the Court observed at §40 of the Judgement following the hearing on 17th December 2020, "*Ground 2 may substantially turn on whether the relevance of that information and material was appreciated at the time by anyone concerned in the commencing of the prosecutions against the appellants*"

⁴⁵ Although any laptop capable of containing case specific material will still be subject to case specific searches.

⁴⁶ The list of FIs is set out at Tab 2 of the spreadsheet appended to the DMD.

Approach to Category Two (Policies)

31. Subject to any additional material arising from recently obtained repositories, Category 2 of the GDR will have been completed and relevant disclosure made by 5th February 2021.

Approach to Category Three (The Conduct of the POL investigation and prosecution teams)

32. The Category 3 review has largely been completed in respect of the repositories reviewed to date.
33. The review of generic material arising from the Category 3 search terms has resulted in large number of hits, many of which are false positives. A very significant number of documents have now been reviewed and it has become clear that almost all the material that has been found relevant to Category 3 would also be captured and considered within the case specific review (covering over 800 cases, including potential future Appellants, right through the Relevant Period). In the circumstances, continuing the generic search terms within category 3 is not considered to be necessary or proportionate.
34. The Category 3 review will continue, but only based on material identified as part of the case specific review. Case specific search terms will continue to be applied to new material as it becomes available, and where any such material is considered to have potential generic disclosure value, it will be tagged and referred for consideration for GDR disclosure.

Case Specific Disclosure Review

35. The Respondent will continue to review material coming into its possession, and the approach to case specific disclosure will continue as before, with any case specific material reviewed and, if meeting the test for disclosure, disclosed.

BEoD Test Case

36. As outlined in the position paper on disclosure provided to all parties and the Court in advance of the directions hearing on 18th November 2020, as part of the PCDE the Respondent conducted an exercise to determine whether it was possible to identify the root

cause of a shortfall on the basis of the underlying data for a particular branch⁴⁷. This was a similar exercise to the one apparently conducted by CCRC, unsuccessfully, with the assistance of Grant Thornton. POL selected a ‘test case’ for this purpose⁴⁸. POL required assistance from FSL to conduct this analysis.

37. Had the test case been successful, the intention was to create data footprints for all BEoDs identified by Fraser J in the Horizon Issues judgment and replicate the analysis across all convicted individuals’ branch data. However, it became apparent that:

- (i) Data footprints could not be created for any BEoD that arose prior to 2007, and pre-2007 branch data could not be analysed, as it no longer existed;
- (ii) Data footprints were unlikely to be (or it was unclear, without extensive research, whether they were) able to be created for the majority of BEoDs that arose between 2007 and 2010, due to the nature of the BEoDs themselves (e.g. they resulted from external factors such as hardware failures); and
- (iii) Whilst data footprints were more likely to be able to be created for most BEoDs post-2010, some of the BEoDs after this date were still incapable of being identified in the underlying data at all.

38. In sum, re-investigation of underlying data for the presence of BEoDs is impossible for all cases prior to 2007; highly unlikely for those prior to 2010; and only possible for some of those that operated after 2010. Thus, this has not been taken any further.

Disclosure requests from Appellants

39. Should an Appellant consider that any of the matters set out within this Addendum are inappropriate and/or that further disclosure is required to enable them to advance grounds or submissions that fall outside those envisaged at the hearing on 17th December 2020, the Appellant is invited to contact the Respondent as a matter of some urgency.

40. The Respondent will use its best endeavours to assist with any reasonable request, and where reasonably possible will assist with specific disclosure requests up until the final

⁴⁷ See §72 of the DMD.

⁴⁸ The case of Khayyam Ishaq.

hearings. However, should the request be one which might affect the timescale of disclosure and/or the appeal hearings, the Appellant will need to make application to the Court to revisit the directions made.

USE OF DISCLOSED MATERIAL

41. The Respondent maintains that any material disclosed as part of the PCDE (whether as case specific or GDR material), is disclosed solely for the purposes of the preparation for and conduct of appeal proceedings and is protected by an implied undertaking⁴⁹. The legal basis for the Respondent's position is:

- (i) The statutory prohibition on the collateral use of disclosed material under sections 17 and 18 of the Criminal Procedure and Investigations Act 1996 ("CPIA") does not apply to disclosure made outside of the CPIA regime;
- (ii) Disclosure taking place outside of the criminal proceedings subject to CPIA (i.e. disclosure prior to committal or following conviction and sentence) is therefore made under the pre-CPIA common law⁵⁰;
- (iii) Although a case relating to disclosure in civil proceedings, the common law principles giving rise to the implied undertaking not to make collateral use of disclosed material are conveniently set out in detail by the House of Lords' decision in *Harman v Secretary of State for the Home Department* [1983] AC 280;
- (iv) Those principles were revisited by the House of Lords in the context of criminal proceedings in *Taylor v SFO* [1999] 2 AC 177. The principles in *Harman* were reaffirmed, and their Lordships confirmed that the implied undertaking against collateral use applied to common law disclosure in criminal proceedings;
- (v) Subsequent to the decision in *Taylor*, the Attorney-General published Guidelines on Disclosure in December 2013, which provided at paragraph 70 that "Disclosure of any material that is made outside the ambit of CPIA will attract confidentiality by virtue of *Taylor v SFO* [1999] 2 AC 177";
- (vi) The principles governing post-conviction disclosure are now governed by the Supreme Court decision of *R (on the application of Nunn) v Chief Constable of*

⁴⁹ See §80 & 81 of the DMD, including footnote 29.

⁵⁰ see the Judgment of Kennedy LJ *in ex parte Lee* (1999) EWHC Admin 242

Suffolk Constabulary and another (Respondents) [2014] UKSC 37. In determining that the test for post-conviction disclosure is more restrictive than would be the case for CPIA disclosure during the trial, the Supreme Court emphasised that post-conviction disclosure was to be governed by the common law principles (echoing the decision in *ex parte Lee*) and referring to the 2013 Attorney-General's Guidelines on Disclosure.

42. Despite the above, it has been suggested by the former representatives for one team of Appellants that the implied undertaking may not apply to post-conviction disclosure. This suggestion, if it is to be maintained, may need to be litigated in the contempt proceedings which have been adjourned to be dealt with outside of these appeals. However, at the suggestion of the Court of Appeal, in order to avoid delay in disclosure pending potential litigation of this issue, express undertakings have been provided by lawyers representing those Appellants within these proceedings.
43. Although express undertakings have not been required from individual Appellants, they are reminded that the unauthorised use or onward transmission of any disclosed material for any purpose other than the preparation for and conduct of appeal proceedings is a breach of the common law obligation not to use the material for any purpose other than for the proceedings in which it is disclosed, and constitutes a contempt of court punishable by a fine or imprisonment or both.
44. Furthermore, the material disclosed pursuant to the PCDE includes material to which LPP applies⁵¹. As has been made clear⁵², the provision of material pursuant to disclosure obligations does not amount to a general waiver of LPP, and to the extent that disclosure of such material does amount to a waiver, such waiver is limited to use of such material within these proceedings.

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13 January 2020

⁵¹ See §79 of the DMD.

⁵² Including within the correspondence at the time of disclosure of Tranche 1