POL00142409

IN THE COURT OF APPEAL, CRIMINAL DIVISION

REGINA

- v -

HAMILTON & OTHERS

UPDATED DISCLOSURE NOTE IN RELATION TO THE CONTEXT FOR 'THE CLARKE ADVICE'

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1. This note is intended to assist the Court and all parties by providing the background and context for the Advice dated 15 July 2013 from Simon Clarke (in-house counsel at Cartwright King) in relation to the use of Gareth Jenkins as a prosecution witness in future prosecutions ("the Clarke Advice").

2. The Clarke Advice had been considered for disclosure and deemed to be disclosable as a part of Tranche 3 of the GDR (due for disclosure on 4 December 2020). As a result of disclosure requests made by Aria Grace solicitors in a letter dated 27 October 2020[1], the Clarke Advice (and a number of other documents that would also otherwise have been disclosed on 4 December 2020) were disclosed early on 12 November 2020. In the interests of fairness, the same material was also disclosed to all other Appellants at this time or very shortly after.

Chronology of events

3. In placing the Clarke Advice in context, the following chronology may assist:

12 June 2013	Helen Rose's report in respect of Horizon issues at the Lepton Branch ("the Helen Rose Report"). A version of this note was

[1] The Aria Grace letter of 27 October post-dated the determination that the Clarke Advice was disclosable and would be disclosed within Tranche 3

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	disclosed as part of Tranche 2 GDR disclosure on 29/30 September 2020 (Document ID 310054939)[2].
27 June 2013	POL contacted Cartwright King solicitors, who had acted as prosecuting agent for many of POL's prosecutions, indicating that it understood that the Second Sight Interim Report, which was due to be published shortly, contained information that suggested that Horizon may not be "bug free", and that it appeared to POL that someone within the organisation had been aware of bugs affecting branches.
28 June 2013	Gareth Jenkins informed Simon Clarke and Martin Smith of Cartwright King during a telephone conference that he had told Second Sight about two possible Horizon Bugs (the Receipts and Payments Mismatch and Local Suspense Account bugs).
Late June/early July 2013	Cartwright King Solicitors were instructed to advise POL on their post-conviction disclosure obligations, in particular, whether the Helen Rose Report and/or the Second Sight Interim Report needed be disclosed to individuals convicted in POL prosecutions conducted since 1 January 2010[3].
8 July 2013	The Second Sight Interim Report ("the SS Interim Report") was released. It was published on the POL website on the same day. A copy has been disclosed to all Appellants as part of Tranche 2 GDR disclosure on 29/30 September 2020 with Document ID 136025457.
8 July 2013	Simon Clarke advised on the need to conduct a review of all POL prosecutions so as to identify those who ought to have had the material disclosed to them, as well as a review of current cases where there had been no disclosure where there ought to have been. Mr Clarke indicated that the existence of bugs needed to be disclosed to defendants where the test for disclosure was met, and he set out the scope of the exercise

[2] A copy had been provided to the CCRC on 2 April 2015

[3] This date was used because the bugs known of at that stage were believed only to apply to Horizon Online rather than Legacy Horizon, and 1st January 2010 was the earliest date on which Horizon Online was migrated into all Post Office branches.

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	to be conducted. This post-conviction disclosure exercise is referred to as the "CK Sift Review".
9 July 2013	Cartwright King provided their first case specific advice in relation to post conviction disclosure.
15 July 2013	The Clarke Advice on the continuing use of Gareth Jenkins as a prosecution expert. This was disclosed in the circumstances described above with Document ID 136028107.[4]

The CK Sift Review

4. It has been suggested that POL improperly failed to take any action to disclose the matters dealt with in the Clarke Advice until forced to within these proceedings. This is simply factually incorrect.

5. As outlined above, in mid-2013, when these matters became known to POL, Cartwright King Solicitors (a leading criminal law firm who had acted as prosecution agents for POL in a significant number of cases) were instructed to conduct an independent review to ensure that proper post-conviction disclosure was made in appropriate cases.

6. The CK Sift Review referred to above continued for a number of months into 2014, during which Cartwright King reviewed all cases (both Crown Court and Magistrates' Court) in which the primary or main evidence against the defendant was based on Horizon data, and included also those cases involving suggested problems with Horizon training or support. This was undertaken by a sift review process where an initial review was conducted of the case to determine whether it was in scope of the review or not.

7. Once a potentially affected case was identified, senior in-house counsel at Cartwright King carried out a case review to determine the essential question: "Had POL been possessed of the material contained within the Second Sight interim

[4] The advice was taken, and Mr Jenkins' evidence was not relied upon in any further POL prosecution.

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report and Helen Rose reports during the currency of any particular prosecution should/would POL have been required to disclose some or all of that material to the defence?" In cases in which convictions had been obtained, this also meant considering material for disclosure, which might cast doubt on the safety of the conviction.

8. Over the course of a number of months, Cartwright King carried out a sift of 308 case files, a second sift of 229 case, and a full review of 53 cases. Of those cases, Cartwright King advised that disclosure should be made in 26 cases and further advised that a further 4 on-going prosecution cases should be discontinued. That first phase of the sift review concluded on 26 November 2013. A second phase of the sift review was then undertaken, concluding on 9 September 2014, during which a further 238 case files were considered. Of those, 196 files were subjected to a second sift and 30 files were subject to a full review. It therefore appears that a total of 546 case files were subject to review as part of the Cartwright King review in 2013 and 2014. It appears that 7 of the Court of Appeal/Crown Court Appellants referred by the CCRC in March and June 2020 were the recipients of post-conviction disclosure in 2013/14 pursuant to the CK Sift Review exercise.[5]

9. As a part of the 2020 post-conviction disclosure exercise, the CK Sift Review advices have been reviewed. Where the disclosure test is met, the advice has been disclosed to the individual concerned as case specific disclosure.

Disclosure of the Clarke Advice to the CCRC

10. Given the observations made during the directions hearing on 18 November 2020 as to whether the CCRC were aware of the Clarke Advice, it is thought that the following clarification may assist:

    10.1 The CCRC has been on notice of the existence and the contents of the Clarke Advice since at least 27 February 2015. On that date the CCRC were

[5] Seema Misra's case was reviewed as part of the CK Sift Review, and Cartwright King advised on 22 January 2014 that post-conviction disclosure to her was *not* required on the facts of her case. Her case was further reviewed in 2015, resulting in further advice. Both advices have been disclosed to her as case specific disclosure on 12 November 2020.

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provided with a copy of a document entitled 'General Review' by Brian Altman QC dated 15 October 2013 which, amongst other matters, extensively referred to the Clarke Advice and its contents and conclusions[6]. Had the CCRC considered that seeing the actual Clarke Advice would have assisted them, they could have served POL with a s.17 notice (as they did in relation to many other such documents, all of which were provided) [7];

10.2 Any suggestion that the fact of, and substantive content of, the Clarke Advice had not been revealed to the CCRC by POL is therefore factually incorrect.

[6] The CCRC were aware of the existence of Mr Altman QC's General Review, and its content was summarised to the CCRC on 5 June 2014 in correspondence from POL. The CCRC formally requested a copy of the General Review by way of a s.17 notice dated 14 January 2015.

[7] It should not be thought that the fact that no disclosure of the Clarke Advice was made to the CCRC without a s.17 notice is suggestive that POL has resisted disclosure of that advice or any other material that would assist the CCRC. The process that has been agreed and adopted between POL and the CCRC is that the CCRC is made aware of what material POL is in possession of during discussions with POL, and the then CCRC informs POL what documents it wishes to see by way of a s.17 notice. POL has been fully co-operative with the CCRC throughout, informing them of what material is available and providing it whenever requested to do so.