

IN THE COURT OF APPEAL CRIMINAL DIVISION

(On referral by the CCRC)

**202001568-B3
202001569-B3
202001575-B3
202001576-B3
202002979-B3**

**Scott Darlington (SD)
Stanley Fell (SF)
Peter Holmes (deceased) (PH)
Rubina Shaheen (RS)
Pamela Lock (PL)**

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Post Office Limited

SKELETON DISCLOSURE ARGUMENT

Introduction

1. This skeleton argument is filed on behalf of the above-named who will, collectively, be referred to as the “Appellants”.
2. On 2 February 2021, the Appellants served a Disclosure Management Document (“the Document”) on the Court and the Respondent.
3. On 12 February 2021, the Respondent served their response to the Document on the Court (the Response”) and the Appellants and all other parties.
4. As a result of the response, on 15 February 2021 the Appellants asked the Court to list this matter for a hearing so that the remaining areas of dispute in relation to disclosure could be ruled on.

5. The Court has the Document which sets out the substance of the arguments made on behalf of the Appellants. We attach an amended copy of the Document which has removed elements of specific disclosure which are no longer relevant.

The Relevant Period

6. It is clear from paragraph 4(v) and footnote 5 of the Response that the Respondents agree with our proposition that if relevant material falls to be disclosed then it should be disclosed.
7. If the Respondent's need further time to properly search databases for the disclosable material, then that is something it is incumbent upon them to ask for as part of their prosecutorial duty.
8. In our submission any such request from the Prosecution would be in the interests of justice as it would allow for the disclosure exercise (which has been impacted on by the Covid-19 pandemic) to be reasonably and proportionately completed; this would also have added benefit of allowing Appellants to attend court in person as: (a) it is likely that there will be reduced COVID-19 travel restrictions; and (b) those Appellants to whom it applies should have been vaccinated.

Privilege

9. It is accepted that the Respondents have never indicated that there was a general waiver of privilege. During the 18 November 2020 hearing we indicated to the Court that any argument about waiver would be held in abeyance until the Appellants had completed most of the disclosure exercise.
10. We understand that the Respondents position is that privilege will not and has not been used as any barrier at any time by the POL, and/or its agents, in the disclosure process. Given the history of this case it would assist if this were specifically confirmed in writing.

11. As the Court knows, the timeframe for disclosure was extended on request of the Respondent. The extensions were for good reason and not opposed by the Appellants.
12. The Appellant's Document was served on the Respondent before the disclosure process was complete but at a time when the Appellants could see that there was a category of documentation that had not, in any meaningful sense, been part of the disclosure exercise. Even after the service of the Appellant's disclosure document the Respondents were suggesting that the next tranche of material may assuage our concerns regarding disclosed material. That tranche did not assuage our concerns.
13. That category of documents missing which can be categorised as the Post Office board and senior management level communications/meetings in relation to the identified problems within the Horizon system. This category includes discussions with Fujitsu in relation to complaints about Horizon; operational decisions as to the faults in Horizon (for example there is nothing meaningful in the disclosure as to the discussions that took place between the Post Office and Fujitsu in relation to the implementation of each iteration of the Horizon system. Such discussion would have identified Horizon failings and improvements that were needed and whether, for costs purposes, the Post Office decided that various bugs/errors could be allowed to continue.
14. It is within the context of paragraph 13 above that the arguments about the transaction principle need to be applied. If we use 421005965 from tranche 4B as an example; this email chain clearly shows that there have been ongoing discussions between the Respondents and Fujitsu about a service that has critically changed.
15. What has not been disclosed to the Appellants (or if it has it is not in a way that is readily identifiable) are the discussions that took place between the Post Office and Fujitsu as a result of this finding – such document would assist the Appellants in their limb 2 arguments as they tend to show that, contrary to the current suggestion that the Post Office was not aware of Horizon problems, they had Information Security teams that monitored Horizon.

16. Document 421005965 is an example where a document has been disclosed which reveals that the Post Office was aware of a Horizon problem but there is no further disclosure to show what the decision makers at the Post Office did about the issue. In our submission such documents would clearly be disclosable, and the only reason why they have not been disclosed must be (a) for some reason the documents have been destroyed; or (b) because someone has claimed they should remain privileged; if so then the transaction principle would suggest that those further documents should be disclosed.
17. Document 421005965 was used as an example of where there seems to be incomplete disclosure of an issue that could assist the Appellants. If there are no further documents arising out of Document 421005965 (and further documents below) we would draw the Court's attention to document BRS0000419265_redacted which clearly show that in relation to three conference calls in 2013:
 - (a) an instruction was given, by an unidentified person to unidentified post office personnel, to destroy any emails and minutes of those meetings;
 - (b) handwritten emails were to be sent to POL Head of Security; and
 - (c) advice had been given to POL which was to the effect that if it is not a discussion/meeting in the 'minutes' then it is not in the public domain.
18. On behalf of the Appellants, it is important to know if it was a common practice, in the Post Office, for documents recording meetings and decisions in relation to faults/problems in the iterations of Horizon "to be shredded". If documents were destroyed, this would explain why there has been so little disclosure in relation to the managerial/Board level decision making, commercial monitoring and operation of Horizon.
19. We repeat we have nothing at this stage within the disclosed materials which demonstrates how the Post Office dealt with, decided and referred the recurring problems with the Horizon bugs to the prosecution handlers. It is inconceivable that between the implementation of the Horizon Legacy system and the prosecutions vaunting the reliability of the Horizon system, that the POL internal management staff and board members were unaware of these problems.

20. The Respondents claim that POL was ignorant of the extent of the Horizon issues and pass the buck to Fujitsu on the basis that they do not have material which shows anything different.
21. The Respondents state in the DMD dated 19th August 2020 that due to the various issues which arise from the separation of POL and RMG that “there is limited email data pre-dating the separation in 2012”. Further it is suggested that some data is no longer available due to RMGs document retention policy and historically POL had a 7-year retention policy in relation to documents and records (paragraph 22 i-iii).
22. In the Appellant’s disclosure document we have already argued that the limitation on the disclosure period to, effectively 2013, is wholly inconsistent with what is known about the Horizon issues and how the Post Office has reacted to the Horizon system issues over time.
23. Even the Respondents have believed that there would be a need for consideration of disclosure over a longer period; see for example the footnote at p. 11 of the first disclosure management document:

“For example, where sufficient material has been identified to identify a relevant matter (such as knowledge of issues with Horizon), but only in relation to a limited time period, further review and disclosure may be necessary if it demonstrates the conduct over a more extended period”

24. The extent to which the wider organisation within the POL knew about the Horizon issues has also been recognised if the initial focus on POL investigation and prosecution team “not prove determinative of the issue” then (paragraph 42) the first disclosure document states:

“this strand will also seek to confirm the extent to which there was knowledge in the wider POL organisation, for example on the part of the IT team responsible for liaising with Fujitsu or of senior individuals within the IT, finance, legal or senior management teams”.

25. As yet there has been disclosed no material where 'senior individuals, finance, legal or senior management teams' ever considered these issues, to dismiss them, explain or lie about them.
26. This means that to find and trace material which will inform the Court of Appeal without any question what the state of knowledge and attitude was within the Respondent organisation to the disclosure process cannot be the subject of an arbitrary limit.
27. To consider this process in any other way would to sanction, in the future, the failure of disclosure of materials which, post-conviction, would or might prove the innocence of an individual wrongfully convicted.
28. Another way of looking at the same issue is to remind the Court that the problems with disclosure in these cases has been in the public sight since 2009. On the 17th of May 2010 Mrs Van Den Bogerd, then a senior figure in the PO, met with MPs James Arbuthnot and Oliver Letwin. This meeting included the Chairman and CEO of the PO. Given the pressure and attention being paid to these issues it is inconceivable that there are no senior management reviews briefings, board agendas, papers and minute which deal with these issues.
29. After 2010 there is then the Rose report, Second Sight reviews and reports, Simon Clarke advice in 2012 -2013 all of which must have been the subject of high-level discussion and concern within POL and, yet again, there has been no disclosure of material dealing with how the POL reacted to these concerns.
30. At present the Respondent's argue that there is insufficient evidence to show that within POL there was sufficient knowledge of the problems with Horizon to allow for the conclusion that the behaviour of POL falls within the second limb of abuse. But the disclosure process is incomplete, there is missing material that must exist and missing material which will inform the Court (in the absence of some of the contemporaneous materials said to be no longer available) how POL reacted to knowledge of the bugs and errors in the Horizon system.

Missing areas of disclosure

31. The following general areas of disclosable material are missing:
- i. There is nothing in the disclosure to indicate that the Post Office Board or senior management ever reviewed the operational integrity of Horizon because of concerns arising from the complaints of the SPM's.
 - ii. There are no management and/or board papers, reviews, briefing and discussions which demonstrate how the POL as an organisation reacted to the bugs and errors in the Horizon system.
 - iii. There are no papers and no material which demonstrate how these matters were escalated and discussed (honestly or dishonestly) within the POL to the Department for Business, Energy and Industrial Strategy (BEIS), the government department with ownership and control of POL.
 - iv. There is no explanation how and why at various times POL, in the years leading up to and throughout the Civil Proceedings claimed that Horizon was robust.
 - v. There is no explanation as to how and why the High Court was misled about the reason why Jenkins was not called to give evidence before Mr Justice Fraser even though his opinion and views were relied upon by other witnesses.

Conclusion

32. Unless the Court rules in favour of limb 2 abuse of process, which based even on the evidence served it clearly should, no ruling against limb 2 can be made because the disclosure process is incomplete. The Respondent has failed and continues to fail in its most fundamental duty of disclosure to disclose all relevant material which might support the arguments for the Appellants case.

33. Given that failure, obfuscation and claims to ignorance have been the party line throughout POL's dealing with SPMs and these issues it seems that the same lines are being repeated before the Court of Appeal.
34. The suggestion that proportionality has anything to do with these failures is a simple smokescreen; the duty of the Respondents is to complete the disclosure process and if it cannot do so within the timetable set by the court then the consequence is to review the timetable and not to give up and say it cannot be done.

Sam Stein Q.C.

Lynton Orrett

Nexus Chambers
25th of February 2021