IN THE MATTER OF A PUBLIC INQUIRY
THE POST OFFICE HORIZON IT INQUIRY

LEE CASTLETON, TRACY FELSTEAD
SEEMA MISRA, JANET SKINNER

SUPPLEMENTAL SUBMISSION RE: COMPENSATION CONCEALMENT DELAY AND DAMAGE

Essential reading 2
EXECUTIVE SUMMARY 3
PART I. INTRODUCTION 9
Delay 9
The Post Office's defence to the Bates GLO civil litigation 9
PART II. THE CLARKE ADVICE OF 15 JULY 2013 11
The October 2020 document that led to disclosure of the July 2013 Clarke Advice 11
Key points in the July 2013 Clarke Advice 16
PART III. POST OFFICE MISUNDERSTANDING OF LEGAL PROFESSIONAL PRIVILEGE – 2013 WITHHOLDING OF NOTICE OF INSURANCE RISK 19
Law – legal professional privilege 20
PART IV. THE ALLEGED PRIVILEGED NATURE OF THE CLARKE ADVICE 25
PART V. LAW – LIMITED OR QUALIFIED WAIVER OF PRIVILEGE 30
Directions hearing 18 November 2020 31
Case No. 20201558/B3 and Ors. Judgment re Rule 5.8 of the Criminal Procedure Rules on the application of Mr Nick Wallis (3 December 2021) 32
Felstead and Ors. v Post Office Limited [2021] EWCA Crim 25 (15 January 2021) 33
No express qualification to waiver of privilege – if it can be said otherwise to have attached 35
The Disclosure Management Document (DMD) 35
PART VI. MR CLARKE'S REVIEW OF MRS MISRA'S PROSECUTION 37
PART VII. THE RECEIPTS AND PAYMENTS MISMATCH BUG 44
SUBMISSIONS 52

Essential reading

It is necessary for the following to be read:

a. *Fraser J's treatment of the Receipts and Payments mismatch bug in the Horizon Issues judgment: Bates v Post Office in Bates v The Post Office Ltd (No 6: Horizon Issues) Rev 1 [2019] EWHC 3408 (QB) paragraphs 428-459. and the Horizon Issues judgment Technical Appendix paragraph2 128-140.*

b. *The Second Sight Interim Report of July 2013.*

c. *The Clarke Advice of July 2013.*

d. *The section of Fraser J's Horizon Issues judgment dealing with the absence of Mr Gareth Jenkins as a Post Office witness from the Horizon Issues trial in 2019: Horizon Issues judgment paragraphs [508]-[516]: "The absence of Mr Gareth Jenkins".*

e. *The letter of Fraser J to Max Hill Q.C., Director of Public Prosecutions, dated 14 January 2020.*

2. The Inquiry Chair invited submissions on compensation. In previously filed submissions (31 May 2022) it was submitted that the approach to the fair quantification of losses, whether for "final" compensation (convicted GLO claimants) or "further" compensation (GLO claimants not convicted), should be by analogy to claims for fraud so that ordinary rules of remoteness of harm/damage should have no application in assessing "fair" compensation. These submissions are provided for the purposes of explaining why fraud is an appropriate model for compensation. Because of the length of these submissions, occasioned by the complexity and inter-related nature of the circumstances, the main points are summarised.

3. The circumstances referred to below may not be widely known. Some points are perforce repeated. Some citation is longer than usual, with the intention of assisting the Inquiry. A striking feature of the present circumstances is the sheer length of time that it has taken for Post Office victims to receive justice. These submissions offer an explanation for why it has taken so long.

EXECUTIVE SUMMARY

(1) The essence of fraud is dishonest concealment and withholding of known material facts – i.e. the truth, and the assertion of other facts that the withheld facts falsify. The reason why fraud is an appropriate model for compensation is that the Post Office maintained the fiction of *Horizon* integrity/reliability, but concealed and withheld from its victims its knowledge of important problems with the Horizon system that:

(a) would have enabled convicted defendants to Post Office prosecutions to appeal their convictions from 2013.

(b) Would have had an important and arguably decisive effect/impact upon the *Bates* GLO litigation that gave rise to Mr Justice Fraser's "*Common Issues*" and "*Horizon Issues*" Judgments in 2019. (That litigation was in effect the result of the collapse of the Second Sight mediation scheme, chaired by Sir Anthony Hooper, in 2015 following the February BIS select committee hearing.)

(2) Central to the Post Office's withholding of its knowledge – concealment – of defects and problems in Horizon was its improper reliance upon legal professional privilege as a ground for non-disclosure, and an otherwise systemically constricted, skewed and flawed approach to its disclosure obligations. These had the result that information that would have enabled Post Office victims to seek and obtain redress for the harm inflicted upon them by the Post Office, as long ago as not later than 2013, was successfully withheld from them.

(3) The sole reason for the information emerging was the *Bates* GLO litigation, the scale and resources allocated to which, for the first time (per Fraser J), elicited disclosure of the Fujitsu Known Error Log to claimants, material that could and should have been disclosed on Post Office prosecutions but was routinely withheld. Even in the *Bates* GLO litigation, that disclosure material, considered by Fraser J to be the most important documentary evidence in the

Horizon Issues trial, was strenuously resisted by the Post Office on grounds that the material was (1) doubtful as to its existence, (2) irrelevant to the issues, and (3) not in the Post Office's power to disclose. In retrospect those contentions might appear almost ridiculous, so far removed are they from reality and the true position. But they provided a bulwark against disclosure to Post Office victims until 2019 – well illustrated by the four failed defence applications for disclosure in Mrs Misra's prosecution.[1]

(4) From 2010[2] there were a series of developments that resulted in the Post Office's decision, from October 2013, to cease prosecuting postmasters and employees for "*Horizon* shortfalls". Three critically important factors were only disclosed for the first time on 12 November 2020:

(a) In 2013, the Post Office was advised by external solicitors, Cartwright King LLP, that its principal technical expert witness, who for a long time had been used by the Royal Mail Group, and latterly the Post Office, as their preferred expert witness on prosecutions, was an unreliable witness whose credibility had been wholly undermined by his failure to disclose in his evidence to the court his knowledge of bugs and defects in the *Horizon* system. The effect was that the Post Office was itself put in breach of its duty to the court as prosecuting authority

---

1 That non-disclosure tracks in an *identical timeline* the period of abolition of the former statutory safeguards provided by s. 69(1)(b) of the **Police and Criminal Evidence Act 1984** that was repealed on the recommendation of the 1997 report of the Law Commission *Evidence in Criminal Proceedings: Hearsay and Related Topics*. Computer evidence was considered in Part XIII. Importantly, the Law Commission considered that PACE s. 69 served no useful purpose and proceeded upon the premise that most computer problems are apparent to an operator, a premise that the *Horizon Issues* judgment exposes to be false. The Post Office supported the Law Commissions recommendation of repeal of the statutory protections under PACE.)

2 The Post Office had concerns about the integrity of *Horizon* that were considered at a high level from 2010, notably in the "Ismay Report" (seemingly, an important document not disclosed in the *Bates* GLO litigation). The Post Office then elected against an independent external review of *Horizon* being undertaken, explicitly acknowledging that the conclusions from any such independent review would be disclosable in legal proceedings, including on appeal.

in every one of 5 sampled cases in which Mr Gareth Jenkins had given evidence. (The "Clarke Advice" of July 2013.)

(b) In August 2013 the Post Office's main board was notified of the concerns in relation to (a) above, by other external solicitors, Bond Dickinson LLP (later known as Womble Bond Dickinson LLP).

(c) In August 2013 the Post Office's concerns about the known unreliability of its preferred expert witness and the financial risk that presented to the Post Office (inferentially, flawed prosecutions – the miscarriage of justice) were communicated to the Post Office's insurers as a notifiable risk of claim.

(5) The Clarke Advice was prompted by information that had been received by Second Sight, the Post Office's own appointed independent investigators (explained 30 November 2020). A critical piece of information disclosed to Second Sight in July 2013 was the existence of the *Horizon* system's "Receipts and Payments mismatch bug" – that was not disclosed in Post Office prosecutions when it should have been.

(6) The Receipts and Payments mismatch bug was a bug of fundamental importance. Its *effects* were most important. The bug had the effect that a *Horizon* operator's branch terminal accounts would appear to balance at terminal, but they would not in fact balance on the Fujitsu *Horizon* main servers. So there might be a "shortfall" – i.e. a balancing error - despite a postmaster's belief - *and appearance* - that their Horizon accounts had balanced at the branch terminal.

(7) The Receipts and Payments mismatch bug was discussed in detail between the Post Office and Fujitsu at a meeting in September 2010, including its likely impact on Post Office ongoing legal cases and the requirement for careful management of the communication of information about the bug to postmasters. A memorandum recording the bug's effects was circulated within the Post Office following the September meeting, including to the

head of legal, crime, within the Post Office. Mrs Misra's prosecution took place shortly afterwards. The prosecution's case was that *any* problem with *Horizon* would be apparent to an operator. This was not true and was known both to the Post Office and to Fujitsu not to be true.

(8) In the *Horizon Issues* trial it emerged in cross-examination that the Post Office, in Mr Godeseth's words, took a *decision* as to how the Receipts and Payments mismatch bug was to be managed. The reason was that its existence and known effects were recognised as exposing the Post Office to the risk of fraud (below). Fraser J. concluded that the bug was "kept secret" by the Post Office.

(9) The Receipts and Payments mismatch bug is referred to both:

(a) in the Second Sight Interim Report of July 2013,

(b) in the Clarke Advice of July 2013.

(10) The Clarke Advice was not disclosed to convicted defendants until November 2020. It was then said to be disclosed to appellants in the CCRC appeals "in accordance with" duties owed as a matter of law by a prosecutor to a convicted defendant, post-conviction, as explained by the Supreme Court in **R. (on the Application of Nunn) v Chief Constable of Suffolk Police** [2015] AC 225.

(11) Information in the Clarke Advice gives the lie to the Post Office's explanation given to Fraser J. for Mr Jenkins not having been called as a witness in the *Bates* GLO litigation. The explanation given to the court for Mr Jenkins's absence (which as the judge noted was volunteered and not required) was false and misleading.

(12) Information in the Clarke Advice, and what it revealed about the Post Office's knowledge of *Horizon* problems in 2013, would have had an important, possibly decisive, impact on the *Bates* GLO litigation.

(13) Information about the Post Office's notification of its insurers in 2013 of financial risk associated with incomplete evidence given by Mr Jenkins, as its preferred expert witness, would have had an important impact on the *Bates* GLO litigation.

(14) Information about:

(a) Mr Jenkins's known unreliability as an expert witness;

(b) The Post Office's requirement to notify its insurers of risk associated with the non-disclosure of bugs in *Horizon*;

(c) The receipts and payments mismatch bug and its known effects;

would have enabled convicted defendants to appeal their convictions from 2013.

(15) The critical overarching circumstance was that in 2013 material available to the Post Office revealed the presence of bugs in *Horizon* that showed that the Post Office was incapable of distinguishing between fraud/theft by postmasters, on the one hand, and technical error on the other. That constituted an existential threat to the Post Office's business model.

(16) So, while the Post Office ceased prosecuting from 2014, the reasons for doing so were withheld from those to whom that information was in law disclosable.

(17) The Post Office, between 2013 and 2014, undertook a review of 308 prosecution files in response to the Clarke Advice. As part of that review, Mr Clarke himself, in 2014, had advised the Post Office that Second Sight's July 2013 Interim Report, that identified the Receipts and Payments mismatch bug, should not be disclosed to Mrs Seema Misra.

(18) Mr Jenkins had only given live oral evidence, as an expert witness, once, at Mrs Misra's trial.

(19) In December 2014 Jo Swinson M.P., the government minister responsible for the Post Office, had told parliament that Second Sight had been appointed to forensically review and forensically investigate Post Office prosecutions. The fact of the extensive review by Cartwright King LLP in 2013-2014 was not disclosed by the CEO of the Post Office to the BIS parliamentary select committee in February 2015. At that hearing the Post Office faced and resisted repeated invitations by the committee members to produce to Second Sight Post Office prosecution files. Less than two months after the select committee meeting in February 2015 the appointment of Second Sight was terminated and the Post Office withdrew from the mediation scheme chaired by Sir Anthony Hooper.

(20) In his *Horizon Issues* judgment, Fraser J. expresses the view that the non-disclosure of the Receipts and Payments mismatch bug enabled the Post Office to continue to assert the integrity of the *Horizon* system despite its knowledge of it and its known effects.

(21) In short, from 2013-2019 and indeed up to 2020, the Post Office engaged in a complex strategy of concealment. A key component of that strategy was the misapplication of legal professional privilege, said to attach both to the Post Office's notification to its insurers of risk in 2013 and, relatedly, the material in the Clarke Advice. The notification to Post Office insurers in 2013 was disclosable, but not disclosed. *Material* in the Clarke Advice, both in connection with (a) Mr Jenkins's known unreliability and (b) the Receipts and Payments mismatch bug was disclosable, but not disclosed, to convicted defendants.

(22) The non-disclosure of material in the Clarke Advice, the non-disclosure of the Receipts and Payments mismatch bug and the non-disclosure by the Post Office, in the *Bates* GLO litigation, of the notification of its insurers in 2013, are closely inter-related circumstances each connected with the maintenance by the Post Office of the fiction of the asserted integrity/reliability of the

Horizon system. In the civil litigation, that was essentially false case. For convicted defendants, their rights of appeal were denied/obstructed.

PART I. INTRODUCTION

Delay

4. Ms Felstead had to wait 19 years for her conviction in 2002 to be quashed. Mrs Misra was suspended from her West Byfleet branch in 2008. Between 2006 and 2007 she received £22,000 from her sister-in-law to pay for and make-up alleged *Horizon* shortfalls. (*Those sums were never repaid by the Post Office, and Mrs Misra was paid nothing at all by the Post Office under the terms of the December 2019 settlement of the civil litigation.*) She was wrongly convicted of theft in October 2010. Her conviction was eventually quashed ten and a-half years later, only in April 2021. Janet Skinner pleaded guilty to false accounting in 2007 in the hope of avoiding a custodial sentence. She was imprisoned anyway. Her conviction was quashed 13 years later in April 2021. **Collectively, Tracy Felstead, Seema Misra and Janet Skinner had to wait a total of 44 years to have their wrongful convictions quashed and their names cleared**. That is an enormity. Lee Castleton was made subject to a civil judgment on seriously flawed and misleading evidence in 2007 and bankrupted as a result. He still has a trustee.

5. A large part of the delay in justice being done is explained by the Post Office's misuse of the law of privilege.

The Post Office's defence to the *Bates* GLO civil litigation

6. The position that the Post Office adopted in the *Bates* GLO litigation was summarised by the trial judge, Mr Justice Fraser. In short, the Post Office defended the 550-odd civil claims made against it on the basis that it believed that the *Horizon* system was reliable and robust and that *the Post Office had no knowledge of any significant errors or problems with it.* The judge expressed his understanding of the Post Office's position in the litigation, as it was understood by him, in his letter to the Director of Public Prosecutions dated 14 January 2020:

> *"From about 2001 onwards, a small number of SPMs reported discrepancies and shortfalls in their branch accounts which they considered were caused by faults in Horizon. The Post Office asserted that the shortfalls were caused by dishonesty – and sometimes carelessness – on the part of the individual SPMs. Many SPMs had their engagements with the Post Office suspended and terminated. Some were convicted of criminal offences, and others pleaded guilty to offences, such as fraud, false accounting and theft. All were pursued by the Post Office for the shortfalls in question, and the total amount of such losses by the claimants in the group litigation was approximately £18 million.*
>
> *Throughout the period (and indeed until about 2019) the Post Office asserted that there was nothing wrong with the Horizon system. Prior to the group litigation, expert evidence was given to the Crown Court by Fujitsu witnesses, and also to the High Court in at least one Case [Castleton], that there were no widespread or any bugs, errors or defects in Horizon."*

7. The Post Office's position in the *Bates* GLO litigation, as understood by the trial judge, was wholly at odds:

   a. with the fact that <u>in August 2013</u> the Post Office main board was advised by its external solicitors, Bond Dickinson LLP of risks associated with the evidence given to the court by its principal Fujitsu expert witness, used by the Royal Mail Group and Post Office for many years[3], that he may have "failed to disclose certain problems in the Horizon system" and of the Post Office's obligation to consider whether further disclosure should be given to defendants to its prosecutions.

   b. With the fact that the Post Office in August 2013 <u>notified its insurers</u> of risk associated with the evidence given by Mr Gareth Jenkins.

8. The issue of financial risk to the Post Office created by the prosecution of its postmasters/employees was thus in 2013 recognised by the Post Office to be a serious risk.

9. The important fact of communication of risk to the Post Office's insurers in 2013 was revealed to Ms Felstead, Mrs Misra and Mrs Skinner and other defendants to Post

---

3 Mr Simon Clarke's "Clarke Advice" July 2013, paragraph 14.

Office prosecutions, appellants in the first 42 appeals referred by the CCRC to the Court of Appeal, for the first time on 12 November 2020 – *i.e.* a year after the settlement of the *Bates* GLO litigation.

PART II. THE CLARKE ADVICE OF 15 JULY 2013

The October 2020 document that led to disclosure of the July 2013 Clarke Advice

10. The information referred to above was communicated by Peters & Peters LLP in a letter to Aria Grace Law dated 12 November 2020. That letter was itself a response to an extensive and detailed letter of request from Aria Grace Law dated 27 October 2020.

11. Aria Grace had written to the Post Office's solicitors in connection with very late disclosure given by the Post Office (after written submissions had been filed with the Court of Appeal for a directions hearing in November 2020 at which a main issue was (originally) to be whether "second category abuse of process" should be permitted by the court to be advanced as a free-standing ground of appeal in the appeals referred by the CCRC). The Post Office's stated position was that the CCRC position on the second ground was weak and insufficiently vouched by evidence. (The CCRC had not seen the July 2013 Clarke Advice, it having not been disclosed, either to defendants or to the CCRC itself.)

12. At page 41 of a schedule of reproduced extracts from various documents, disclosed by the Post Office by Peters & Peters on 23 October 2020, was an entry under the reference *"Note to POL Board from Bond Dickinson LLP (dated 23/08/13) entitled "Post Office Limited Horizon Risks"*. The second paragraph recorded:

> **"Post Office has an obligation to consider whether further discourse** *(sic)* **should be made to defendants. It is of concern to Post Office that the expert evidence of one prosecution witness, Dr** *(sic)* **Gareth Jenkins of Fujitsu, may have failed to**

disclose certain problems in the Horizon system potentially relevant to a case."

13. That entry gave rise on 27 October 2020 to 14 separate numbered requests from Aria Grace Law, on behalf of Tracy Felstead, Seema Misra and Janet Skinner, appellants, for further information.

14. Included in the requests were the requests that the case (singular) referred to be identified together with details of the "certain problems" mentioned. (At the time, given the knowledge that Mr Jenkins had given evidence in Mrs Misra's case, the concern was that the memorandum referred, specifically, to Mrs Misra's case.) The letter elicited the following statement of explanation from Peters & Peters:

> "a. The Document was saved with the name "Insurance Risks 23.08.13 and there are contemporaneous emails (from August-September 2013) which confirm that it was provided by way of notification to POL/RMG's insurers.
>
> b. In a later email dated 12 March 2014, Bond Dickinson (as they then were) indicated that the Document was provided for the dual purpose of "advising the board (its contents were later reflected in a Board paper) and acting as notification to POL's insurers.
>
> d. … It is clear from these minutes that the Board was aware of the insurance notification…".

15. Peters & Peters stated that they considered that, other than the extracted quotation, the remainder of the 23 August 2013 document "does not meet the test for disclosure. We will not therefore be providing the document in its entirety". (It might be said that this constituted impermissible "cherry picking": **R v Secretary of State for Transport Ex p. Factortame Ltd** [1997] 9 Admin LR 591 at 598, **Dunlop Slazenger International Ltd v Joe Bloggs Sports** [2003] EWCA Civ 901.)

16. Peters & Peters explained that there were Post Office board meetings in September and on 31 October 2013. On 15 October 2013 Mr Brian Altman Q.C. had provided to the Post Office a substantial document entitled "General Review".

17. Mrs Paula Vennells CBE, former CEO of the Post Office, in a letter of June 2020 to Mr Darren Jones MP, chair of the BEIS parliamentary select committee, at paragraph 30 stated:

> *"…According to the figures supplied by Post Office, there were 42 prosecutions in 2012/2013; 2 in 2013/2014; none in 2014/2015; 1 in 2015/2016; and none in 2016/2017. This accords with my recollection that the change of approach effectively stopped private prosecutions except in extreme cases…."*

Mrs Vennells explained (paragraph 29):

> *"the Board adopted a new prosecutions policy in February 2014 to focus on the most egregious cases of wrongdoing…".*

18. It is likely that the February 2014 "new prosecutions policy" was informed by the following circumstances (among others – including, most obviously, the *Detica* report of October 2013 and the Helen Rose July 2013 report):

a. The Clarke Advice and what it revealed about non-disclosure of known bugs and faults in *Horizon* in all the prosecutions reviewed by Mr Clarke.

b. The Post Office's requirement to put its insurers on notice of risk of a claim in connection with Mr Jenkins's evidence.

c. The October 2013 "General Review" by Mr Brian Altman Q.C..

d. The onerous requirement for the Post Office to review all prosecutions it had undertaken from January 2010 (308 case files in all), as later explained by Peters & Peters in a note dated 30 November 2020.

19. In his *Horizon Issues* judgment, Fraser J. describes a "*dreadful complacency*" on the part of the Post Office in 2013 (paragraph [219]). There was in fact, anything but

complacency, given what happened between July 2013 and early 2014. Several different firms of external solicitors were engaged, the Post Office engaged leading counsel to advise, including on its disclosure obligations, and hundreds of prosecutions were reviewed between mid-2013 and 2014 as a result of Mr Jenkins's known unreliability as an expert witness and his incomplete disclosure to the court of *Horizon* bugs. A major report by external management consultants, Detica was received (after months of work) in October 2013, at the same time as the October 2013 'General Review'.

20. The Post Office decided to cease prosecuting its postmasters and employees for "*Horizon* shortfalls" because of the events of 2013.

21. It is inconceivable that the collapse in the number of Post Office prosecutions for *Horizon* shortfalls from 42 in 2012-2013 to 2 in 2013-2014 to 0 in 2014-2015 was not a direct result of the requirement for the Post Office to give notice to its insurers about concerns both about Mr Jenkins as an expert witness and the questioned completeness of disclosure of bugs and errors in the *Horizon* system given by the Post Office to defendants to its prosecutions and to the court.

22. It is elementary that the purpose of the (effectively invariable) requirement for an insured to notify its insurer of risk of a claim, is to afford the opportunity to the insurer to investigate the circumstances of its liability to pay an indemnity. Notification suggests recognition of contingent financial liability against which a contractual indemnity would be sought. It is likely that the Post Office's insurers will have made inquiries as to the basis for the notified risk. The duty of utmost good faith owed under contracts of insurance might be expected to have elicited production to insurers of material in the Clarke Advice of July 2013. (The reference by Bond Dickinson to concerns about Mr Jenkins's evidence in "*a case*" is an oddly attenuated summary by Bond Dickinson[4] of Mr Clarke's conclusions in his July 2013 advice.)

---

[4] It is possible of course that the reference to "a case" came from Bond Dickinson's instructions.

Non-disclosure of notice of risk to insurers in the *Bates* GLO litigation

23. Importantly, Aria Grace in their October 2020 letter requested *"Please confirm that this document was disclosed to the claimants in the Bates v Post Office Limited litigation"*. Peters & Peters' response was as follows:

> *"We understand that the Document was not disclosed in the group litigation. The Document attracts legal professional privilege, and as you will no doubt be aware, material attracting legal professional privilege does not fall to be disclosed in the context of civil litigation…."*.

24. It follows that disclosure of the fact of Post Office notification of its insurers in 2013 was withheld from disclosure in the *Bates* GLO civil litigation.

25. This is a matter of grave seriousness, because of the implications that knowledge of such notification would have had for the GLO claimants, and its likely impact and effect upon the group civil litigation. It is of particular gravity, given the underlying consistent theme of non-disclosure that emerged both:

a. in the civil litigation – see for example the unsatisfactory history of disclosure of the Fujitsu Known Error Log the request for which was described by the Post Office's leading counsel to Fraser J. as a "red herring" (and see also denial of 'remote access' (raised as an issue in Second Sight's 2013 Interim Report) denied by the Post Office until Mr Roll's second statement of 2019);

b. and by the non-disclosure in Post Office prosecutions of *Horizon* records established by judgment in 39 appeals in the Court of Appeal on 23 April 2021 - and in more than 38 subsequent appeals since then.

26. It is not open to sensible dispute that disclosure of the fact that the Post Office, as long ago as 2013, had felt constrained to notify its insurers of recognised financial risk to the Post Office in connection with incomplete evidence given by its principal Fujitsu expert witness on *Horizon* issues, and associated concern about the completeness of

disclosure given by the Post Office to defendants to its prosecutions of bugs/errors in *Horizon*, would likely have had a major impact upon the *Bates* GLO civil litigation.

27. Further, that the Post Office in 2013 notified its insurers of risk in connection with non-disclosure to the court of knowledge of the most important Post Office technical expert witness on *Horizon* issues, apart from anything else, gives the lie to the Post Office's explanation for Mr Jenkins's not being called as a witness by the Post Office at the *Horizon Issues* trial – a circumstance to which Fraser J. devotes an entire section of his *Horizon Issues* judgment under the heading: "The absence of Mr Gareth Jenkins" (paragraphs [508]-[516]). Much of the technical evidence given for the Post Office at the Horizon Issues trial emanated indirectly from Mr Jenkins, though was not attributed to him.

28. The trigger for Bond Dickinson being engaged to advise the Post Office main board of risk in connection with Mr Jenkins's evidence was, plainly, receipt by the Post Office of the 15 July 2013 Clarke Advice, that itself was a response to information received by the Post Office from Second Sight, prior to delivery of their Interim Report that was formally submitted on 8 July 2013. Its content had been communicated prior to that date.

29. Peters & Peters have said that the Post Office had intended to disclose the Clarke Advice, but it was to be disclosed only in December 2020, that is to say, envisaged as *subsequent* to the Court of Appeal hearing on directions for disposal of the CCRC appeals.

Key points in the July 2013 Clarke Advice

30. Mr Simon Clarke, a barrister then employed by Cartwright King LLP, in his July 2013 written advice for the Post Office, recorded that both Royal Mail Group and the Post Office "*[f]or many years*" had relied upon Mr Gareth Jenkins "*for the provision of expert evidence as to the operation and integrity of Horizon*". He recorded that Mr Jenkins "*has provided many expert statements in support of Post Office and Royal Mail Group prosecutions*".

31. Mr Clarke considered 5 sample prosecutions in which Mr Jenkins had given evidence between 5 October 2012 and 3 April 2013. These were selected because they represented *"recent examples of the evidence being given in support of [Post Office] prosecutions"* and because they took place "*after it became known that there were defects in Horizon which materially affected the presentation of data and the provision of false balance figures*" (emphasis (italics in original) Mr Clarke's).

32. Under paragraph 36 of his July 2013 advice, Mr Clarke adverts to a number of problems/bugs/errors in the operation of *Horizon* that were known to Mr Jenkins, or were problems with *Horizon* and its integrity with which he was concerned, none of which were mentioned in his evidence to the court in any of the 5 prosecutions reviewed by him.

33. Mr Clarke's conclusions are set out at paragraph 38 of his advice. His principal conclusions were:

    a. That Mr Jenkins *"failed to disclose material known to him but which undermines his expert opinion. This failure is in plain breach of his duty as an expert witness".*

    b. That Mr Jenkins's *"credibility as an expert witness is fatally undermined".*

    c. That *"[n]otwithstanding that the failure is that of Mr Jenkins and arguably, Fujitsu Services Ltd, being his employer, this failure has a profound effect upon [Post Office] and [Post Office] prosecutions, not least because by reason of [Mr] Jenkins' failure, material which should have been disclosed to defendants was not disclosed, thereby placing [Post Office] in breach of their duty as a prosecutor."*

    His advice was that the Post Office should cease to use Mr Jenkins as an expert witness.

34. The context of Mr Clarke's advice was that Mr Jenkins had given evidence in support of Post Office prosecutions, where Mr Clarke observed:

    a. "*… the inevitable conclusion to which the reader is driven is that "… if that is right, there must be no bugs""*

b. *"Plainly therefore [Mr] Jenkins is attesting to the then integrity and robust nature of Horizon – there is nothing wrong with the system. Unfortunately that was not the case, certainly between the dates spanned by the statements I have extracted here, the 5th October 2012 and the 3rd April 2013".*

35. Mr Clarke had concluded that, as a matter of fact, in every one of the prosecutions reviewed by him from 5 October 2012 to 3 April 2013, Mr Jenkins had given incomplete and misleading evidence to the court and had put the Post Office in breach of its obligations to the court as prosecutor.

36. One of the bugs which Mr Clarke refers to by reference to the Second Sight Interim Report of July 2013 (the contents of which had been communicated to the Post Office in June, and which appears to have been the trigger for the instruction of Cartwright King) was the Receipts and Payments Mismatch bug, the most important and first of the bugs identified by Fraser J. in his Horizon Issues judgment. The importance of this bug, in particular to Mrs Misra and her prosecution, is considered in further detail below under Part VII.

37. Information about the Receipts and Payments mismatch bug in both the Second Sight Interim Report of July 2013 and in the Clarke Advice of 15 July 2013 was disclosable under principles identified by the Supreme Court in **R. (on the Application of Nunn) v Chief Constable of Suffolk Police** [2015] AC 225. The known effects of the bug, identified and discussed between the Post Office and Fujitsu in September 2010, contradicted and were wholly inconsistent with the way in which the Crown's case at Mrs Misra's trial was put.

38. So two important facts were revealed by the Clarke Advice:

a. Mr Jenkins was known to be a wholly unreliable witness of truth who had given incomplete evidence in every case sampled in which he had given evidence.

b. Horizon had a bug in it the effect of which was fundamentally at odds with the prosecution case at Mrs Misra's trial.

Both cast doubt upon the safety of Mrs Misra's conviction. It was accepted by leading counsel for the Post Office in March 2020 that the Receipts and Payments mismatch bug *should have been* disclosed at Mrs Mira's trial. But there were missed opportunities for its disclosure after that.

PART III. POST OFFICE MISUNDERSTANDING OF LEGAL PROFESSIONAL PRIVILEGE – 2013 WITHHOLDING OF NOTICE OF INSURANCE RISK

39. The extent of the misunderstanding/misuse of legal privilege by the Post Office and its legal advisers, over a long period of time, contributed to and greatly exacerbated the harm suffered by the Post Office's victims by the denial to them of justice. Not least, rights of appeal were obstructed and defendants' ECHR Article 6 rights to an appeal within a reasonable time were infringed and violated.

40. Privilege is a substantive right (not a rule of evidence) that provides a ground for objecting to and resisting compulsory disclosure: **B v Auckland District Law Society** [2003] 2 AC 736, [67].

41. Notification by the Post Office given to its insurers of risks in connection with Mr Jenkins's evidence was not, contrary to Peters & Peters' letter of 12 November 2020, subject to legal professional privilege. No reasonable lawyer properly directing themselves on the law could have concluded otherwise.

42. The fundamental misunderstanding of the law of privilege is apparent in Peters & Peters' letter of 12 November 2020. The misunderstanding is revealed in paragraph 1(a) and paragraph 4:

> *"1(a). The Document was saved with the name "Insurance Risks 23.08.13" and there are contemporaneous emails (from August-September 2013) [not disclosed] which confirm that it was provided by way of notification to POL/RMG's insurers."*

> *"4. We understand that* ***the document was not disclosed in the group litigation. The Document attracts legal professional privilege****."* (Emphasis supplied.)

43. The statement at paragraph 4 is simply wrong, given the statement at paragraph 1(a). The document, in the hands of Post Office's insurers and as a communication with them, was not privileged (below).

44. The subject of the statement by Peters & Peters *"it was provided by way of notification to POL/RMG's insurers"* can only refer to the document from which the extracted quotation in disclosure given on 23 October 2020 was taken – consistent both with the name given to the document and the statement at 1(b) *"the Document was provided for the dual purpose of "advising the board… and acting as notification to POL's insurers""*.

45. The document communicated by the Post Office to its insurers notifying risk in August 2013 was disclosable, in its entirety, in the *Bates* GLO litigation. But it was withheld from disclosure.

Law – legal professional privilege

46. The legal position can be simply stated and is elementary: **it is not possible to claim privilege for communications between lawyer and anyone other than the client**. If, therefore, a lawyer communicates with a third party (not being his client) where no litigation is anticipated, the client may not claim privilege for such communications. The point is explained by Lord Justice Longmore in **Three Rivers District Council (No5) v Governor and Company of the Bank of England** [2003] QB 1556 [2003] EWCA Civ 474 at paragraphs [17]-[18]. These merit citation:

> [17] *The last of the three cases is Wheeler v Le Marchant (1881) 17 ChD 675 which was a case of legal advice privilege not litigation privilege. In that context it was held that documents obtained from a third party to be shown to a solicitor for his advice did not fall within the privilege. Advice was given to the defendant trustee of the will of a Mr Brett in the course of its administration in the Chancery Division; for the purpose of that advice information was sought from both the former and the current estate-agent and surveyor. Part of the estate consisted of land in respect of which the defendant made an agreement with Mr Wheeler that he (Mr Wheeler) was*

to erect certain buildings and then be granted a lease of that land. The parties fell out. Mr Wheeler brought an action for specific performance and the defendant trustee claimed privilege for the reports of the estate-agent/surveyor made to the solicitors in the course of the administration of the estate. It was held that while the communications between the defendant and the estate's solicitors were privileged, the reports of the estate-agent/surveyor were not. Cotton LJ is reported to have intervened in argument at page 680 to say:-

> *"Your proposition is that all communications by a solicitor with third parties, for the purpose of enabling him to give advice, are privileged. Has any case protected them except when made post litem motam?"*
>
> *Counsel responded, after a little prevarication:-*
>
> *"The question is whether the rule, though not distinctly carried to such a length by any of the cases, ought not to be extended to meet this case . . ."*

[18] *Once again it is necessary to cite a little extensively from the judgments in order to get their flavour. Sir George Jessel MR, now presiding in the Court of Appeal, recognised the two categories of privilege saying this (pages 680-1):-*

> *"As regards the main question in dispute, this appears to be an attempt on the part of the present Respondents to extend the rule as to protection from discovery. It was fairly admitted by their counsel that no decided case carries the rule to the extent to which they wish it carried, but they urged that as a matter of principle it ought to be so extended. What they contended for was that documents communicated to the solicitors of the Defendants by third parties, though not communicated by such third parties as agents of the clients seeking advice, should be protected, because those documents contained information required or asked for by the solicitors, for the purpose of enabling them the better to advise the clients. The cases, no doubt, establish that such documents are protected where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence, but it has never hitherto been decided that documents are protected merely because they are produced by a third person in answer to an inquiry made by the solicitor. It does not appear to me to be necessary, either as a result of the principle which regulates this privilege or for the convenience of mankind, so to extend the rule."*
>
> *And (pages 681-2):-*

". . . it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently."

And (pages 682-3):-

"But what we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants. The idea that documents like these require protection has been started, if I may say so, for the first time to-day, and I think the best proof that the necessities of mankind have not been supposed to require this protection is that it has never heretofore been asked. It seems to me we ought not to carry the rule any further than it has been carried. It is a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety. That rule does not, in my opinion, require to be carried further, and therefore I think this appeal ought to be allowed . . ."

Brett LJ said (page 683):-

"The proposition laid before us for approval is, that where one of the parties to an action has in his possession or control documents which passed between his solicitor and third parties, they are protected in his hands from inspection, on the ground that they were documents which passed between the solicitor and the third party for the purpose of enabling the solicitor to give legal advice to his client, although such information was obtained by the solicitor for that purpose at a time when there was no litigation pending between the parties, nor any litigation contemplated. It seems to me that that proposition cannot be acceded to. It is beyond any rule which has ever been laid down by the Court, and it seems to me that it is beyond the principles of the rules which have been laid down. The rule as to the non-production of communications between solicitor and client is a rule which has been established upon grounds of general or public policy. <u>It is confined entirely to communications which take place for the purpose of obtaining legal advice from professional persons</u>. It is so

confined in terms, it seems to me it is so confined in principle, and it does not extend to the suggested case."

Cotton LJ said (pages 684-5):-

"It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word "representatives." If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the Respondents comes to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. Hitherto such communications have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected. But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these."

Here Cotton LJ, unlike in his judgment in Southwark v Quick, considers each of the two categories of legal professional privilege and decides in terms that the documents in question do not fall within the first category because they are not communications between solicitor and client and not within the second category because litigation is not contemplated. This case thus makes clear that legal advice privilege does not extend to documents obtained from third parties to be shown to a solicitor for advice… ." (Underlining supplied.)

47. The law is clear and well-established. In **Three Rivers District Council (No6) v Governor and Company of the Bank of England** [2005] 1 AC 610, [111] the House of Lords identified the *scope* of legal professional privilege:

> *"… all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client."*

48. Legal professional privilege is distinguished from litigation privilege is that, in order for litigation privilege to apply, there must be a confidential communication between client and lawyer or lawyer and agent or between a client or lawyer and a third party for the dominant purpose of use in litigation; that is, to seek or provide information or evidence to be used in, or in connection with, litigation in which the client is or may become a party, and when litigation is either in process or reasonably in prospect.

49. On no possible legal basis or legal analysis was the Post Office's notification of its insurers by the document from Bond Dickinson *"saved with the name "Insurance Risks 23.08.13""* that was *"provided by way of notification to POL/RMG's insurers"* subject to/protected from disclosure by legal professional privilege, as asserted by Peters & Peters in their letter of 12 November 2020 at paragraph 4. The document, as communicated to the Post Office's insurers, did not "attract legal professional privilege". Such communications (between the Post Office and its insurers in connection with risk associated with Mr Jenkins and evidence given by him in Post Office prosecutions) were disclosable and should have been disclosed in the *Bates* GLO litigation.

50. Further, as is suggested by the contents of paragraph 1(a) of Peters & Peters' letter of 12 November 2020, it is very likely that there will have been a whole series of documents passing between Post Office and its insurers generated by the Post Office putting its insurers on notice of risk. It is likely that the insurer will have made inquiry/sought clarification. It is strongly arguable that the duty of utmost good faith (full disclosure) required disclosure to the insurer of material in the Clarke Advice. No

such communications, still less the insurance notification itself, were disclosed in the *Bates* GLO litigation. That was an egregious disclosure failure.

51. It is difficult to overstate the impact of the unfounded and misconceived claim by the Post Office to privilege in the notification given to its insurers of known risk in connection with evidence given by Mr Jenkins in 2013.

52. The notification of risk to insurers by necessary implication recognised the financial risk (contingent liability) of the Post Office in connection with failure to disclose Mr Jenkins's knowledge of bugs and errors in the Post Office *Horizon* computer system. It is not without irony that widespread and systemic disclosure failure by the Post Office was the very issue that eventually became the key issue and first ground of appeal in the Court of Appeal in 2021 – the financial consequences of which are in process of still being worked-out. The Post Office's most recent published accounts[5] confirm that the government has set aside £780 million for OHC (overturned historic convictions).

53. 'Ground 1' or 'first category' (abuse of process by non-disclosure) was, in 39 of the first tranche of appeals, conceded by the Post Office. It was there to be seen/known in 2013 and was a risk by necessary implication recognised in the Post Office's notification of its insurers of risk.

PART IV. THE ALLEGED PRIVILEGED NATURE OF THE CLARKE ADVICE

54. In written submissions to the Court dated 30 November 2020, filed for the hearing on 3 December 2020 of the application by Mr Nick Wallis for disclosure of the Clarke Advice, Mr Altman Q.C., Ms Zoe Johnson Q.C. and Mr Simon Baker on behalf of the Post Office submitted to the cout that:

> "17.3 Although disclosed in accordance with the Respondent's disclosure obligations in **Nunn**, it should be kept in mind that

5 https://corporate.postoffice.co.uk/media/tu1dd5v1/post-office-limited-ara-2021_signed-pwc.pdf

> the Clarke Advice is and remains a document to which privilege attaches. Any waiver is expressly limited to its use within the appeal proceedings."

55. The Post Office's counsel expressed their hope that "… *it may be that the Clarke Advice will never be a document referred to during legal argument, as it would be unlikely to be relevant to any submissions advanced under the CCRC's first ground* [of appeal]" (paragraph [17.7]).

56. No explanation was offered by the Post Office as to why, on 12 November 2020, the Clarke Advice had been disclosed in accordance with principles re-stated by the Supreme Court in **R. (on the Application of Nunn) v Chief Constable of Suffolk Police** [2015] AC 225, but had not been disclosed before then.

57. Peters & Peters subsequently (30 November 2020) explained that it was intended to disclose the Clarke Advice in December 2020. That it was held back is unsatisfactory.

58. Peters & Peters LLP on 30 November 2020 explained that Mr Brian Altman Q.C. provided to the Post Office a document entitled "General Review" *"dated 15 October 2013 which, amongst other matters, extensively referred to the Clarke Advice and its contents and conclusions".* That being the case, it remains both unexplained and extraordinary that the Clarke Advice itself was disclosed, pursuant to the common law continuing duty of disclosure identified and restated by the Supreme Court in **Nunn**, only in 2020 – 5 months after referral by the CCRC of the first tranche of appeals in June 2020 and 8 years after it was first considered by the Post Office's leading counsel.

59. There was plainly a change in the Post Office's perception of the disclosable nature of the Clarke Advice between 2013 and November 2020. The change remains unexplained and is unsatisfactory given the importance of the material revealed in the Clarke Advice and its relevance to the safety of a defendant's, specifically Mrs Misra's, conviction.

60. The duty of post-conviction disclosure owed by a prosecutor to a convicted defendant explained by the Supreme Court in **R. (on the Application of Nunn) v Chief Constable of Suffolk Police** [2015] AC 225 is not a qualified, but is rather an

unqualified, duty. Lord Hughes JSC, with whom Lord Neuberger, Lord Reed, Lord Clarke and Lord Carnwath JJSC agreed, referred to the Attorney General's guidelines, and said this:

> *"[30] All the stages thus far considered are ones at which the criminal justice process remains afoot, with either trial or sentence or appeal to be catered for. When it comes to the position after the process is complete, the Attorney General's guidelines deal specifically with disclosure of something affecting the safety of that conviction. The relevant paragraph in the most recent edition (2013), echoing the same principle in earlier editions, says this:*
>
> > *"Post conviction.*
> >
> > *72. Where, after the conclusion of proceedings, material comes to light that might cast doubt upon the safety of the conviction, the prosecutor must consider disclosure of such material."*
>
> *The guideline must mean that not only should disclosure of such material be considered, but that it should be made unless there is good reason why not. Thus read, it is entirely consistent with the principle reflected in the position set out in the paragraphs above in relation to the pre-Crown Court stage, to the pending sentence stage and to the pending appeal stage. …".* (Underlining supplied.)

61. Even where the appeal process has been exhausted, there remains a continuing duty of disclosure of material that comes into the possession of the prosecution that might afford arguable grounds for contending that a conviction is unsafe. Lord Hughes said:

> "[35] *There can be no doubt that if the police or prosecution come into possession, after the appellate process is exhausted, of something new which might afford arguable grounds for contending that the conviction was unsafe,* ***it is their duty to disclose it*** *to the convicted defendant. Simple examples might include a new (and credible) confession by someone else, or the discovery, incidentally to a different investigation,*[6] *of a pattern, or of evidence, which throws doubt on the original conviction. Sometimes such material may appear unexpectedly and adventitiously; in other cases it may be the result of a re-opening by the police of the enquiry. In either case, the new material is likely to be unknown to the convicted defendant unless disclosed to him.* ***In all such cases, there is a clear obligation to disclose it****. Para*

6 *Viz* inquiries/investigations by Second Sight of knowledge of bugs in *Horizon*.

72 of the Attorney General's guidelines, quoted above, correctly recognises this… .

[36] *Miscarriages of justice may occur, however full the disclosure at trial and however careful the trial process. …Quite apart from the defendant's interest, the public interest is in such miscarriages, if they occur, being corrected. There is no doubt that there have been conspicuous examples of apparently secure convictions which have been demonstrated to be erroneous through the efforts of investigative journalists, or of solicitors acting on behalf of convicted persons or, sometimes, of other concerned persons.*

[39] *The safety net in the case of disputed requests for review lies in the CCRC. That body does not, and should not, make enquiries only when reasonable prospect of a conviction being quashed is already demonstrated. It can and does in appropriate cases make enquiry to see whether such prospect can be shown. It has ample power, for example, to direct that a newly available scientific test be undertaken. R v Shirley [2003] EWCA Crim 1976, a DNA case not unlike Hodgson, appears to be a case in which it did exactly that. What it ought not to do is to indulge the merely speculative. It is an independent body specifically skilled in examining the details of evidence and in determining when and if there is a real prospect of material emerging which affects the safety of a conviction. This exercise involves a detailed scrutiny of the other evidence in the case and a judgment on the likely impact of whatever it is suggested the fresh enquiries may generate. Whilst in principle the court retains control, via the remedy of judicial review, of the duty laid upon the police and prosecutors after the appeal process is exhausted, it is likely to determine, unless good reason for not doing so is provided, that relief by that route is inappropriate until the CCRC has had the opportunity to make a reasoned decision."* (Emphasis supplied.)

62. The discovery by the Post Office and its lawyers, in 2013, that the principal technical expert called in prosecutions (over a long period of time) to attest for the Post Office *qua* prosecutor the reliability of *Horizon* (and its freedom from bugs capable of causing losses of the kind of which defendants complained) had repeatedly and consistently, *in every case* sampled in which he had given evidence, given incomplete evidence of his knowledge of bugs, with the effect that his credibility as an expert witness was "fatally undermined", lies squarely within Lord Hughes' formulation at paragraph [35] of **Nunn**.

63. That was by necessary implication expressly recognised by the Post Office's three counsels' statement in their 30 November 2020 written submissions.

64. As to the "safety net" of the CCRC referred to by Lord Hughes, the Post Office's position is that the CCRC knew of the existence of Clarke Advice but failed to ask for it pursuant s.17 of the Criminal Appeal Act 1995: paragraph [10] of Peters & Peters *"Disclosure Note in Relation to the Context for the "Clarke Advice""* dated 30 November 2020.

65. The Post Office's contention that the CCRC could have requested, but failed to request, disclosure to it of the Clarke Advice under s. 17 CAA 1995 is impossible to reconcile with the submission to the Court of Appeal that the Clarke Advice was disclosed on the appeals in accordance with "the Respondent's disclosure obligations in **Nunn**" – i.e. the Post Office is accepted to have had *a duty* to disclose it to convicted defendants.

66. Remarkably, in a separate advice in connection with Mrs Misra's prosecution, Mr Clarke, by an advice dated 7 December 2015, advised the Post Office that "*all matters relating to issues of disclosure now fall to be determined by the CCRC and not by the [Post Office]*". There is no proper basis in law that a prosecutor's disclosure obligation to convicted defendants is superseded/displaced by the intervention of the CCRC. It was noted that the Post Office was the subject of a s. 17 order from the CCRC in respect of Mrs Misra's case. Mr Clarke provided another advice (referred to in his 7 December 2015 advice) on disclosure of documents to the CCRC or to any other party. The 7 December 2015 advice was also disclosed by Peters & Peters on 12 November 2020.

67. So far as the Post Office was under *a duty to disclose* the Clarke Advice (as expressly accepted by the Post Office's three counsel on 30 November 2020) it cannot be said that privilege simultaneously attaches. There cannot be privilege in material in respect of which a *duty to disclose* is owed under the **Nunn** principles of post-conviction duty of disclosure *regardless or not as to whether there are legal proceedings on foot or in contemplation*. (The point about the required disclosure is that it may enable an appeal to be brought.)

68. Further, it is similarly wrong to speak of *waiver of privilege* in relation to material that falls within **Nunn** disclosure obligations of the kind referred to by Lord Hughes JSC.

A convicted defendant is entitled in law as a matter of fairness to that material, as of right (**Nunn** paragraph [35] – and the decision generally). For that reason, it is wrong to speak of constraints upon the use of the material. The Post Office could not and cannot be heard to say, for example of Mrs Misra's prosecution: "*we will tell you about our knowledge of Mr Jenkins's failure to comply with his obligations/known fundamental unreliability as an expert witness and his consistent and repeated failure to disclose his knowledge of bugs and errors in Horizon, specifically the Receipts and Payments mismatch bug, but only on condition that you use that information solely for the purpose of an appeal and for no other purpose*". (e.g. "*and you don't tell anyone else*").

PART V. LAW – LIMITED OR QUALIFIED WAIVER OF PRIVILEGE

69. It is convenient to state the applicable legal principles of limited or qualified waiver of privilege. It is elementary that a party disclosing a document to another party, in the ordinary course of events, waives any privilege in the document by producing a copy of the document in question. The waiver of privilege is in the *act of producing* the document. That much is trite law. (It is the against *production* (for inspection) of the document that the right of privilege protects.)

70. **Al-Fayed v Commissioner of the Police for the Metropolis** [2002] EWCA Civ 780 [16] establishes that:

a. A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.

b. Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.

c. A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.

71. In some circumstances privilege may be waived for a particular limited and specific purpose. That is by way of exception to the rule that privilege in material that is disclosed is waived generally: **Goldman v Hesper** [1988] 1 WLR 1238; **British Coal Corporation v Dennis Rye Ltd** (No 2) [1988] W.L.R. 1113; **B v Auckland District Law Society** [2003] UKPC 38, [68]; **British Coal Corpn v Dennis Rye Ltd** (No 2) [1988] 1 WLR 1113; **Bourns Inc v Raychem Corpn** [1999] 3 All ER 154.

72. For waiver of privilege, exceptionally, to be limited and restricted to a particular purpose, as a matter of law it is necessary for the limited purpose to be clearly identified at the time that the disclosure and inspection is given. Otherwise, waiver is general where a document has been disclosed to another party and no qualification or limited purpose is identified by the disclosing party: **Al-Fayed v Commissioner of the Police for the Metropolis**. Unless such a limitation is communicated clearly to the recipient of disclosed material they are entitled to treat the disclosure as a general waiver of privilege.

73. No limitation, qualification, or restriction was stated to apply to waiver of privilege in the Clarke Advice at the time of its disclosure and inspection by provision of copy on 12 November 2020.

74. There is no express limitation or qualification to waiver of privilege in the Clarke Advice disclosed pursuant to the provisions of paragraph 79 of Peters & Peters' Disclosure Management Document ("DMD") (it otherwise satisfying the prescribed disclosure criteria for disclosure under paragraphs 27 and/or 28).

Directions hearing 18 November 2020

75. On 18 November 2020 Mr Altman Q.C., in oral submissions, told the Court of Appeal:

> "Now, that Advice [the Clarke Advice] was disclosed by letter last week on Thursday 12th November. It was disclosed to Arial Grace, (*sic* - transcript) together with other documents which I need not go into now,

in answer to a letter Arial Grace had sent Peters and Peters (the solicitors on behalf of the Post Office) on 27th October, making various enquiries about a piece of disclosure, which led to this disclosure. **Although, of course, the Advice itself is privileged, this is not a waiver of privilege by the Post Office; it is a limited waiver for the purposes of disclosure**. We submit that the provision by the legal representative (or representatives, we know not which) of Arial Grace (*sic* – transcript), as openly stated by Lewis Page in his email yesterday, to a member of the press, disclosed in these proceedings, in breach of the clear terms of the disclosure management document under which it was provided,[7] and in breach of the implied undertaking at common law[8] amounts, arguably, to a contempt of this court…**So, put in the hands of a journalist is a privileged document** disclosed **for the purposes of these proceedings**, dealing with the very subject matter of one of the two individuals currently under investigation by the Metropolitan Police". (Emphasis, in each instance, supplied.)

76. But the Clarke Advice was not disclosed "*for the purpose of these proceedings*", it was disclosed because, in accordance with the principles in **Nunn**, convicted defendants were entitled to material that might cast doubt upon the safety of their convictions, this the Clarke Advice assuredly did.

Case No. 20201558/B3 and Ors. Judgment re Rule 5.8 of the Criminal Procedure Rules on the application of Mr Nick Wallis (3 December 2021)

7 The term of the DMD relied upon for alleging "breach" is not identified. In any event the DMD was not a contract, unilateral or otherwise. Further, it was subsequently acknowledged that the disclosure of the Clarke Advice was in accordance with Nunn principles (i.e. duty to disclose).

8 There is no implied undertaking at common law in connection with the use of documents disclosed on **Nunn** principles/obligation/duty nor is there any implied undertaking. Any restriction on their use vis a vis a journalist would likely engage with ECHR Article 10.

77. In the Court of Appeal's ruling Holroyde LJ said this:

> "[16] Mr Altman **submitted that the Clarke Advice is itself a legally privileged document, with legal professional privilege having been waived only for the limited purpose of disclosure in these appeals**. He submitted that the provision of a copy of it by a legal representative of some appellants to a member of the press was a breach of the terms of the disclosure management document, a breach of an undertaking implied at common law and arguably a contempt of court… . …
>
> [33] ... First, it was mentioned by **Mr Altman in order to explain to the court the concern which had arisen as to possible improper disclosure of a privileged document** provided to defence legal representatives for the limited purposes of their preparation and conduct of the appeals… ."

78. Mr Wallis was unrepresented on the hearing. No *Amicus* was appointed. There was no argument on the allegedly privileged character of the Clarke Advice.

79. In principle and as a matter of law, if the Clarke Advice was disclosed "in accordance with" the duty of post-conviction disclosure in **Nunn**, which the Post Office by its counsel acknowledged that it was, the information and material was not disclosed for the limited purpose of the appeals, because the duty of disclosure was owed whether or not there were appeals on foot. Put another way, the disclosure obligation was owed independently of the appeals.

Felstead and Ors. v Post Office Limited [2021] EWCA Crim 25 (15 January 2021)

80. Holroyde LJ, giving judgment, said this:

> "[25] **Mr Altman … submitted** that the provision of the Clarke advice to a journalist was a serious breach of the terms of the DMD, a breach of an implied undertaking at common law and arguably a

> contempt of court. **The Clarke advice was a document covered by legal professional privilege, and the respondent had waived privilege only for the purpose of meeting its disclosure obligations…** ."[9] …
>
> [58] … It would also mean that the court would be prevented from taking any steps to enable it to make an informed decision as to what to do **when told that a legally privileged document had been passed to a journalist**." (Emphasis, including double, supplied.)

81. This is, with respect, similarly confused. There is no implied (usually referred to as 'collateral') undertaking in connection with documents disclosed in accordance with duties owed under **Nunn**. That is because the implied (or collateral) undertaking at common law is derived from the protection given to a party who only discloses a document/information that is disclosed by compulsion by virtue of the existence of legal proceedings – i.e. disclosure by compulsion of law: **Home Office v Harman** [1983] AC 280. As to breach of the DMD, see below. (The DMD was not a contract, and further, if there was a duty to disclose, as is accepted, then it wasn't subject to terms of use unilaterally imposed.)

82. Further, there is no room, in the circumstances, for the implication of some limitation on waiver outside of legal proceedings of the kind identified by the Court of Appeal in **Berezovsky v Hine** [2011] EWCA Civ 1089 where there was no express limitation on waiver of privilege but the court nonetheless held there was an *implied* limitation (the relevant statements were *obviously intended to remain confidential and were disclosed for a limited and defined purpose* – and were intended to be used for that purpose and no other purpose unless Mr Berezovsky assented).

---

9 A statement that remains somewhat puzzling.

No express qualification to waiver of privilege – if it can be said otherwise to have attached

83. In their letter of 12 November 2020, covering the disclosure of the Clarke Advice Peters & Peters said:

> *"In addition, on 15 July 2013 Cartwright King Solicitors advised on the use of Gareth Jenkins as a prosecution expert witness in ongoing cases. We enclose a copy of this advice (Document ID 136028107_redacted) [the Clarke Advice], which is disclosed to you as part of generic disclosure."*

84. At the end of their letter, Peters & Peters stated: "Doc ID 136028107_redacted, which is part of generic disclosure, will also be provided now to the other appellants for consistency."

85. Nowhere, in their letter of 12 November 2020, do Peters & Peters state that the disclosure of Document ID 136028107 (*viz* the Clarke Advice) entails a limited, restricted or otherwise qualified waiver of privilege (below). The letter is a careful and extensive letter to which considerable thought and care had been given.

86. The assertion of maintained/partially waived privilege in a document said by the Post Office (30 November/3 December 2020) to have been disclosed to convicted defendants in accordance with the law as re-stated by the Supreme Court in **R. (on the Application of Nunn) v Chief Constable of Suffolk Police** [2015] AC 225 is, in any event, simply unarguable.

The Disclosure Management Document (DMD)

87. The July 2013 Clarke Advice was disclosed under Peters & Peters' Disclosure Management Document ("the DMD") of August 2020.

88. The DMD provided:

> "27. In addition to disclosing the 'defence case file', ***POL will disclose material which might reasonably be considered capable of undermining the safety of the conviction or assisting the Appellants in advancing a ground or grounds of***

appeal **(which includes identifying any new ground(s) of appeal)**. [Emphasis supplied.]

28. Where POL has identified examples of the following (non-exhaustive) types of material/conduct relevant to potential abuse of process arguments, they will be disclosed:

(i) whether the investigator(s) or Prosecutor(s) acted in a way which could give rise to the risk of an abuse of process or to arguments regarding admissibility of evidence (even if this was not raised by the defendant), based on procedural unfairness, bad faith or improper conduct;

(ii) **knowledge within POL of actual or alleged problems with Horizon;** …

(iv) improper/inadequate conduct of the POL investigation and prosecution teams which may include:

(b) failure to investigate issues expressly or impliedly raised by the defence in connection with Horizon (e.g., issues with the accuracy/reliability of Horizon, remote access, etc.);

(c) claims by investigators or prosecutors that there were no known issues with Horizon or the SPM in question was the only one to experience such issues;

(d) explicitly or implicitly reversing the burden of proof onto the SPM to prove that Horizon was not reliable;

(h) **material non-disclosure, including knowledge on the part of the investigators/prosecutors that Horizon was not reliable**…"

(Emphasis supplied.)

89. Paragraph 79 of the DMD, under the heading *"Approach to Legal Professional Privilege"*, provided:

"79. Where the reviews identify documents (or material within documents) as a part of the case specific or GDR exercise that would have attracted LPP but which are considered by the review team to be disclosable, that material will be disclosed **notwithstanding the LPP**

that might otherwise have attached to them." (Emphasis supplied.)

90. There is no stated restriction or qualification to the waiver of privilege in material disclosed pursuant to paragraph 79 of the DMD. This is important. In that 22-page document, governing disclosure, the only reference to privilege is under paragraph 79. There is no reference to qualified or limited waiver of privilege.

91. The assertion of maintained/qualified waiver of privilege was simply wrong. There was no proper, or any, legal basis for it.

PART VI. MR CLARKE'S REVIEW OF MRS MISRA'S PROSECUTION

92. Given that Mr Altman Q.C. informed the Court of Appeal in March 2021, on two separate occasions, that Mr Jenkins gave live oral evidence in only one case of the many in which he had given evidence to the court in Royal Mail Group and Post Office prosecutions, namely in the prosecution of Seema Misra in October 2010, the information and Post Office's knowledge about his known unreliability as an expert witness and his failure to disclose his knowledge of bugs in *Horizon* was of possible great importance to Mrs Misra and of obvious potential relevance to the issue of the safety of her conviction.

93. The Post Office considered Mrs Misra's prosecution to be a test case for asserting the integrity of Horizon and her successful conviction to be a landmark.

94. The *actual approach* of the Post Office, under the review of 308 prosecutions after January 2010, that it undertook from July 2013, merits being described, especially given the acknowledgement by the Post Office's counsel that the common law post-conviction disclosure principles in **Nunn** applied (pursuant to which the Post Office stated the Clarke Advice was, eventually, disclosed in 2020).

95. While Mr Clarke's review of Mrs Misra's prosecution in January 2014 does not engage with issues of legal professional privilege, the review undertaken suggests that following the receipt of the Clarke Advice in July 2013, the Post Office conducted a very

extensive review but one that was severely constricted and only tangentially related to the information in the Clarke Advice.

96. The Clarke Advice is primarily concerned with Mr Jenkins's failure to disclose in prosecutions his knowledge of bugs and errors in the *Horizon* system, the effect of which was to render him a witness whose credibility was "*fatally undermined*", and to put the Post Office in breach of its duties owed to the court as prosecutor. These were considered, rightly, to be matters of considerable moment for the Post Office by Mr Clarke.

97. The review *actually undertaken* by the Post Office of its prosecutions by Cartwright King LLP was not concerned with disclosing to convicted defendants the Post Office's knowledge that Mr Jenkins's was recognised as/known to have been a wholly unreliable witness of fact whose credibility as an expert was "fatally undermined" by his failure to disclose his knowledge of Horizon problems/bugs. It was not concerned with the effects of the known but undisclosed bugs in Horizon (see below Part VII). The Post Office review of its prosecutions was concerned *the different questions* as to whether two other documents – *not being the Clarke Advice* – should be disclosed to convicted defendants, *viz*:

a. the Second Sight July 2013 Interim Report and

b. the Helen Rose reports of July 2013.

As Peters & Peters put it in November 2020: "*Cartwright King Solicitors were instructed to advise [the Post Office] on their post-conviction disclosure obligations, in particular, whether the Helen Rose Report and/or the [Second Sight] Interim Report needed to be disclosed to individuals convicted in [Post Office] prosecutions conducted since 1 January 2010*". That was not the relevant consideration within Lord Hughes's formulation in **Nunn** but was rather an artificially constricted evaluation of disclosable material.

98. Given the terms of reference of review undertaken by Cartwright King of Post Office prosecutions, it is perhaps unsurprising that, so far as is known, not a single successful appeal resulted, notwithstanding Mr Jenkins's known "fatally undermined" credibility

and that his evidence in every case reviewed by Mr Clarke in 2013 was incomplete. The Cartwright King review, on the face of it, failed to address the relevant issue or material. It was aimed at the wrong target.

99. Mrs Misra's concern as to the safety of her conviction was much less obviously affected by the contents of the Second Sight Interim Report, the nature of which was necessarily provisional, and the Helen Rose report, than it prospectively was by the known and recognised fundamental unreliability of Mr Jenkins as a witness who gave the key technical evidence on *Horizon's* asserted reliability at her trial in October 2010. That information was withheld from her. But it was Mr Jenkins's repeated failure to disclose what he knew about Horizon bugs and his consequent recognised/known unreliability as a witness that was the critical, disclosable, issue. One of the bugs known to Mr Jenkins was very important to Mrs Misra's prosecution, albeit it was only discussed in detail between Fujitsu and the Post Office shortly before her trial, the Receipts and Payments mismatch bug. Albeit identified in "*Horizon online*" introduced from 2010, the critical point was its *known effects*.

100. The Post Office by its counsel (including Mr Altman Q.C. himself) explained in written submissions to the Court of Appeal (30 November 2020) that *"…Mr Altman QC was instructed to conduct a review of the process* [i.e. the Cartwright King review of prosecutions] *(although not the individual decisions in reviewed cases). The resultant document entitled "General Review" by Brian Altman Q.C. dated 15 October 2013 extensively referred, among other matters, to the Clarke Advice and its contents and conclusions".*[10]

101. While a contextual issue, it is to be noted that, in August 2013, shortly after he had written his July advice, Mr Clarke had written a further advice for the Post Office expressing his concern about instruction given that *"emails and minutes should be, and have been, destroyed".* Mr Clarke recorded that *"the word 'shredded' was conveyed to me"*: **Hamilton v Post Office** [2021] EWCA Crim 577 paragraph [88].

---

10 Written submissions of the Post Office on Mr Nick Wallis's application for disclosure of the Clarke Advice, 30 November 2020, paragraph 14.2.

102. Against those circumstances, Mr Clarke provided written advice to the Post Office, dated 22 January 2014, in connection with the Post Office "review" of Mrs Misra's prosecution as part of the Cartwright King review.

103. Mr Clarke, in reviewing Mrs Misra's prosecution, recorded that *"I have not been provided with the prosecution file but have seen a full set of transcripts covering the trial itself… For this reason I have been unable to establish much of the pre-trial process as the transcripts do not deal with these aspects of the case. Necessarily this Full Review takes a different form from the general."*

104. So although Mrs Misra's prosecution was the only prosecution in which Mr Jenkins had given live oral evidence, the review of her prosecution was "different from the general" in the reviewer not being provided with the prosecution file. While noting the fact, Mr Clarke did not find that unsatisfactory nor did he consider that his not having access to the file had, or might have, any bearing on his review.

105. Had Mr Clarke seen the prosecution file he would have seen on the file:

a. In an exchange of internal memoranda in August 2009, a defence request for disclosure of *Horizon* data was met with objections based upon the cost of obtaining such information from Fujitsu. The basis of the objection was that POL's contract with Fujitsu placed limitations upon the number of requests for ARQ data which could be made each year. In short, consideration of the data for disclosure to the defence appears to have been resisted, not on the grounds that it was not required by law, but on the grounds that POL's contractual arrangements with Fujitsu made it costly and inconvenient to comply with its legal obligations as a prosecutor. (**Hamilton v Post Office Ltd** [2021] EWCA Crim 577.)

b. More importantly, a memorandum dated 22 October 2010 written by the senior Post Office criminal solicitor, Mr Jarnail Singh, who had conduct of Mrs Misra's prosecution. The (widely circulated) memorandum stated: *"After a length (sic) trial at Guildford Crown Court commencing on the 11th October 2010 when the Jury came to a verdict on the*

> *21st October 2010 when they found the Defendant guilty of theft. The case turned from a relatively straightforward general deficiency case to an unprecedented attack on the Horizon system. We were beset with (sic) unparallel (sic) degree of disclosure requests by the Defence. Through the hard work of everyone, Counsel Warwick Tatford, Investigation Officer, Jon Longman and* ***through the considerable expertise of Gareth Jenkins of Fujitsu we were able to destroy to the criminal standard of proof (beyond all reasonable doubt) every single suggestion made by the Defence. It is to be hoped the case will set a marker to dissuade other Defendants from jumping on the Horizon bashing bandwagon****…."*. (Emphasis supplied.)

106. The Post Office was in fact able "*to destroy… every single suggestion made by the Defence*" by Mr Jenkins not disclosing his knowledge of *Horizon* bugs. Disclosure of the Receipts and Payments Mismatch bug by Mr Jenkins, *and its known effects*, would have undermined the prosecution case against Mrs Misra (below).

107. In his advice of 22 January 2014, Mr Clarke recorded that: *"[i]t becomes apparent in cross-examination of Mr Jenkins that, whilst he had disclosed material to Professor McLachlan [Mrs Misra's expert witness], he had done so on a piecemeal basis, only when asked to do so and very late"*. Mr Clarke does not consider that in the context of his July 2013 advice nor does he consider his subsequent August advice and the disquiet he had expressed in connection with the risk of the destruction of evidence relating to *Horizon*.

108. Mr Clarke does not recite in detail his instructions but states that ***"The sole purpose of this Review is to determine whether or not the Helen Rose report or the Second Sight Interim Report ought to be served on Mrs Misra's lawyers so as to correct what would have been a failing had POL been possessed of those documents in October 2010."*** He added: *"It is certainly not the purpose of this review to determine whether or not Mrs Misra's convictions i.e. her guilty pleas to False Accounting and her conviction by jury for Theft are unsafe: that decision is reserved to the Court of Appeal only. Issues of whether or not material might cast doubt on the safety of the conviction does however fall to be considered"*.

109. Mr Clarke concluded his review of the issue of disclosure, that he notes was an issue "repeatedly raised" (including under abuse of process), by saying: "*I have considered Mrs Misra's failure to raise Horizon as a defence until so late in the day; her inability or unwillingness to offer anything more than a generalised and incoherent indictment of Horizon; the approach taken by Professor McLaughlan; and the duties relating to disclosure placed upon the shoulders of any prosecutor. I am reminded of the opinion of the House of Lords in* ***R v H; R v C*** *[2004] 2AC 134 where the Committee expressed the view that:*

> *"The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good.""*

The approach is striking, when Mr Clarke was alive to requests for disclosure being a consistent theme in Post Office prosecutions, and his own knowledge of Mr Jenkins's failure to disclose his knowledge of bugs and errors present in *Horizon*.

110. Mrs Misra was repeatedly criticised at her trial for not being able to point to problems with the Horizon system. The truth was that she was wholly unable to do so in the absence of the Post Office providing relevant disclosure, which it did not do. (That exposes a fundamental flaw in the Law Commission's 1997 recommendation[11] to parliament that rebuttal of the legal presumption of the reliability of computers should be a straightforward matter.)

111. Mr Clarke concluded that *"no meaningful criticism can be made of the disclosure process taken by [Royal Mail Group] during the pre-trial ongoing disclosure phases of the prosecution."* He simply was not in a position to evaluate the issue. The important known effects of the Receipts and Payments mismatch bug appear not to have been communicated to Mr Clarke, even though it was one of the bugs that Mr Jenkins is known to have failed to disclose in the prosecutions that he himself had reviewed. It remains puzzling that having identified the bugs Mr Jenkins failed to disclose to defendants, the effects of those bugs is nowhere, it would seem, considered. (Ordinarily that might be expected,

---

11 *Evidence in Criminal Proceedings: Hearsay and Related Topics*.

not least for the purpose of assurance that the known existence of the bug in question could not have affected/impacted the outcome of a particular prosecution.)

112. On the issues of the Second Sight Interim Report and the Helen Rose Report, Mr Clarke concluded:

a. *"I am of the view that the Second Sight Interim report does not and cannot cast doubt on the safety of the conviction, not least because the vast majority of matters dealt with in the report post-date this trial by several years and those that fit the chronology of this case bear little or no factual resemblance to Mrs Misra's circumstances."*

b. *"As for the Helen Rose report, that matter goes solely to Gareth Jenkins' knowledge of Horizon concerns arising some 5 years after the events considered in Mrs Misra's trial, and his credibility as an expert witness in 2013. An analysis of the events dealt with in that report, and the potential that Gareth Jenkins' credibility as a witness might be undermined in 2013, does not in my view lead to the conclusion that material which might undermine his credibility now ought to be made available so as to do so in relation to a trial which occurred in 2010."*

113. The conclusion under (a) above, in connection with the Second Interim Sight Report, would not have been available to him had Mr Clarke read the prosecution opening and closing statements against the September 2010 Receipts and Payments mismatch bug memorandum, cited by Fraser J. at paragraph [428] of the *Horizon Issues* judgment.

114. In advising against disclosure of the Second Sight Interim Report Mr Clarke wrote: *"applying the test identified by Brian Altman Q.C. as the appropriate approach, I conclude that, on this aspect of the case, the Second Sight Interim report does not fall to be disclosed now."*

115. Mr Clarke's overall conclusion and advice to the Post Office in January 2014 was that *"… neither the Second Sight Interim report nor the Helen Rose report meet the test for disclosure in this case and neither report should be disclosed to Mrs Misra's representatives".*

116. It is not the purpose of this submission to embark on an analysis of Mr Clarke's reasoning. What is striking, and extraordinary, is that the review is for the purpose of

the narrow consideration of the limited issues of whether the (1) Second Sight Interim Report and (2) the Helen Rose report should be disclosed to Mrs Misra. This, where the trigger/occasion for the Cartwright King review was the July 2013 advice written by Mr Clarke where the gravamen of Mr Clarke's advice was that:

a. Mr Jenkins had given misleading and incomplete evidence in every one of the 5 cases reviewed.

b. Mr Jenkins had accordingly, in every case reviewed in which he had given evidence, failed to discharge his duty to the court as an expert witness.

c. Mr Jenkins considered to have put the Post Office in breach of its obligations as prosecutor.

117. Mr Clarke records a test for post-conviction disclosure of material identified by Mr Brian Altman Q.C. that refers to paragraph 127 of his "General Review" document as extending to material "that might cast doubt upon the safety of a conviction".

118. It is not obvious why Mr Jenkins's recognised unreliability as an expert witness and the fact that Mr Jenkins's "credibility as an expert witness is fatally undermined", such that he advised that Mr Jenkins should never be used by the Post Office again as an expert witness, were not considered by Mr Clarke material that satisfied that criterion. It is also difficult to understand, given the occasion for the Cartwright King review (of all prosecutions after January 2010), why Mr Clarke accepted that the limited issues for consideration were whether (1) the Second Sight Interim Report and (2) the Helen Rose report should be disclosed. The issue in the Clarke Advice is (in essence) the failure of Mr Jenkins to disclose his knowledge of bugs and errors in *Horizon*. Mr Clarke's (fairly extensive) reference to the issue of complaints about disclosure being a theme in both Mrs Misra's prosecution and also at her trial serves merely to accentuate how obviously unsatisfactory the terms of the Cartwright King review were.

PART VII. THE RECEIPTS AND PAYMENTS MISMATCH BUG

119. The Receipts and Payments mismatch bug was the most important bug in Horizon considered by Fraser J in his Horizon Issues judgment. He refers to the September

2010 note about the bug as "*a most disturbing document in the context of this group litigation*" (Horizon Issues paragraph [429]). Part of the reason for the judge's concern was that the way in which the Receipts and Payments mismatch bug was dealt with by the Post Office was in contradiction to its case in the Common Issues trial, where it asserted that postmaster Branch Trading Statements were 'settled accounts' in law:

> *"…. The solution explains "even though there is no discrepancy at the branch". This means the Branch Trading Statement would be correct, or in balance. The discrepancy would not be in the Branch Trading Statement, it would be in POLSAP or Credence. That this is correct is shown in an associated document from Mr Jenkins (trial bundle reference F/777/2) where he stated that "the data used for the BTS will also have a zero value for Discrepancies at the end of the period." BTS means Branch Trading Statement. A similar entry is in the document at F/1000/1 which states at /2 "Note that if the bug was not present, then the Discrepancy would have been transferred to Local Suspense and that would have been cleared, so there are a number of things wrong with the BTS." (emphasis added). In other words, the Post Office itself was not considering the BTS as having the status of a settled account, based on these entries."* (Horizon Issues paragraph [431]).

120. The central point, however, is that the Receipts and Payments mismatch bug undermined a central premise in Post Office prosecutions, revealed in prosecution statements in Mrs Misra's trial, namely that errors in the Horizon system ought to be apparent to a Horizon branch terminal operator. The premise of prosecutions *was that all errors were apparent to a Horizon branch terminal operator*. The bug showed that there might be a shortfall but a postmaster's accounts would appear to balance at the terminal. It was explicitly recorded in the September 2010 note (i.e. immediately prior to Mrs Misra's criminal trial in October 2010):

- *"If widely known could cause a loss of confidence in the Horizon System by branches*

- *Potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data".* (Horizon Issues paragraph [428].)

121. Mr Justice Fraser, of the "loss of confidence risk", said this: "***A less complimentary (though accurate) way of putting it would be to enable the Post Office to continue to assert the integrity of Horizon, and avoid publicly acknowledging the presence of a software bug***."

122. The importance of Fraser J's observation is impossible to overstate. Recognition of the effect of the Receipts and Payments mismatch bug did two things that were commercially catastrophic for the Post Office:

a. It raised doubts about the stability of prosecutions conducted on the premise that problems bugs in Horizon would *necessarily* be apparent to a branch terminal operator – a major premise in its prosecutions, as in Mrs Misra's case (below). That is to say, the premise that a "*Horizon* shortfall" would be apparent at branch.

b. As the September 2010 memorandum acknowledged, the recognised effects of the bug presented the risk of fraud because the bug raised the prospect that that **the Post Office could not distinguish between technical failure (i.e. presence of/effects of a bug) and fraud/theft**. It is possible that recognition of this was a major contributing factor to the Post Office's decision to cease prosecuting for Horizon shortfalls from 2014. (If it was not, it should have been.)

123. As to the Post Office's failure to communicate the existence of this bug, Mr Godeseth, the Post Office's chief technical witness of fact on Horizon Issues, gave the following evidence:

> "A. There was obviously a fear that subpostmasters may be looking to exploit this because it gave – there was a fear that people could see this as a way of defrauding the Post Office.

> Q. So concealing it from SPMs who were honest was justified because of the expectation of dishonesty of subpostmasters in the network, in a nutshell?
>
> A. In my view, this was a decision made by Post Office on how to manage this particular bug. You could interpret it the way that you have put it." (Underlining supplied.)

124. The decision not to disclose the Receipts and Payments mismatch bug to postmasters – including those like Mrs Misra it prosecuted, thus appears to have been a policy decision, because of the commercial risk implications for the Post Office in disclosing it.

125. Although it was suggested that the bug was present only from 2010 (only in '*Horizon online*'), Fraser J. rejected Mr Godeseth's evidence on this and concluded the bug had been around for much longer.

126. While it is no purpose of these submissions to evaluate in detail Mr Clarke's "review" of Mrs Misra's prosecution, that neither material in the Clarke Advice of July 2013 nor the Second Sight Interim reports were considered as documents that should be disclosed to Mrs Misra represent serious disclosure failures.

127. A competent lawyer put in inquiry by those documents would have arrived at the conclusion that the known and documented effects of the Receipts and Payments mismatch bug undermined the prosecution opening and closing statements at Mrs Misra's trial. In his letter to the Director of Public Prosecutions in January 2020 Fraser J. said this of the bug:

> *"Mr Jenkins had prepared a report for, and been at a meeting, in September 2010 when the Receipts and Payments mismatch bug was discussed. This records the risk that if this was "widely known [it] could cause a loss of confidence in the Horizon System by branches" and that there was a "potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data".*

Yet notwithstanding this knowledge that the existence and effect of this bug was directly relevant, the existence of this bug was kept secret from the court."

128. Mr Justice Fraser's concern about the secrecy surrounding the Receipts and Payments mismatch bug is expressed in trenchant terms at paragraph [457] of his judgment:

> *"To see a concern expressed that if a software bug in Horizon were to become widely known about it might have a potential impact upon "ongoing legal cases" where the integrity of Horizon Data was a central issue, is a very concerning entry to read in a contemporaneous document. Whether these were legal cases concerning civil claims, or criminal cases, there are obligations upon parties in terms of disclosure. So far as criminal cases are concerned, these concern the liberty of the person, and disclosure duties are rightly high.* ***I do not understand the motivation in keeping this type of matter, recorded in these documents, hidden from view; regardless of the motivation, doing so was wholly wrong. There can be no proper explanation for keeping the existence of a software bug in Horizon secret in these circumstances****."* (Emphasis supplied.)

129. The Receipts and Payments mismatch bug was explicitly identified and referred to by name by Second Sight in their July 2013 Interim Report at paragraph 6.5:

> *"The first defect, referred to as the "Receipts and Payments Mismatch Problem", impacted 62 branches. It was discovered in September 2010 as a result of Fujitsu's monitoring of system events (although there were subsequent calls from branches). The aggregate of the discrepancies arising from this system defect was £9,029, the largest shortfall being £777 and the largest surplus £7,044. POL has informed us that all shortages were addressed at no loss to any SPMR."*

130. The reference to the Receipts and Payments mismatch bug identified by Second Sight is referred to by Mr Clarke in his 15 July advice at paragraph 28.

131. In September 2010, the effects of the Receipts and Payments mismatch bug were minuted by Mr Jenkins and circulated, including to the Post Office's solicitor having conduct of Mrs Misra's trial (Post Office Respondent's Notice, October 2020).

"There will be a Receipts and Payment mismatch corresponding to the value of Discrepancies that were "lost"

… the Branch will not get a prompt from the system to say there is Receipts and Payment mismatch, therefore the branch will believe they have balanced correctly. …

Impact
The branch has appeared to have balanced, whereas in fact they could have a loss or a gain."

Horizon Issues judgment at paragraph [429]:

"…. Potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data

• It could provide branches ammunition to blame Horizon for future discrepancies."

132. The known impact of the Receipts and Payments mismatch bug, known at the time of Mrs Misra's trial (including most obviously by Mr Jenkins himself) is wholly at odds with the way in which the Post Office's counsel put the prosecution case at Mrs Misra's trial:

a. Prosecution opening speech: *"… So [Horizon] has got to be a pretty robust system and you will hear some evidence from an expert in the field as to the quality of the system.*[12] *Nobody is saying it is perfect and you will no doubt hear about a particular problem that was found, but the Crown say it is a robust system and that* ***if there really was a computer problem the defendant would have been aware of it****.*

That is the whole point because when you use a computer system ***you realise there is something wrong if not from the screen itself but from the printouts you are getting when you are doing the stock take****."*[13]

12 That "expert" was to be Mr Gareth Jenkins.
13 Transcript Day 1 Monday 11 October 2010, 21A-C, 23H-24A.

b. Prosecution closing speech: "… *the whole point of Calendar Square* ***and indeed any computer problem is that the operators can see that something is going wrong.***"[14] (Emphasis supplied.)

133. The known effects of the Receipts and Payments mismatch bug, discussed in detail before Mrs Misra's trial between Fujitsu and the Post Office, and then documented and circulated within the Post Office, contradicted and falsified those prosecution statements.

134. The Receipts and Payments mismatch bug should have been disclosed in Mrs Misra's prosecution. Holroyde LJ asked this of Mr Altman Q.C. "Is it accepted by the respondent that this particular bug [the Receipts and Payments mismatch bug] was relevant to an of the appeals?" (T 23 March 2021 p 14/4). Mr Altman Q.C. responded:

> "It was only relevant in the way that we have conceded and accepted as long ago as the respondent's notice, that it should have been considered for disclosure, *ought to have been disclosed in Mrs Misra's trial.* ... But anyone who had or should have applied their mind to the concerns which were expressed and known about in Post Office and in the [inaudible] as we have accepted, they should have applied their minds to it, they should have considered it for disclosure and, our submission is it should have been disclosed in Mrs Misra's trial… The why, the why it didn't happen, we have out, you may recall, in our short response skeleton of 8 January. We don't know. Was it incompetence? Was it individuals not understanding their duties? Or was it deliberate? There is no evidence before the court to say which it was, but the plain fact of the evidence is it was not disclosed ….".

135. Mr Altman Q.C. told the Court of Appeal "*Mrs Misra's trial was the high-water mark of litigation issues of Horizon Integrity*" (23 March 2021 15/25).

---

14 Transcript Day 7 19 October 2010 p 24H.

136. There is no consideration given to the fact that Mr Clarke, having written his July 2013 Advice, then reviewed Mrs Misra's prosecution in January 2014 in the context of the Second Sight Interim Report, where that report refers to the Receipts and Payments mismatch bug that is cross-referenced. Further, Mr Clarke's July advice refers to that bug as a bug that was not disclosed by Mr Jenkins. Plainly, in considering Mrs Misra's prosecution, Mr Clarke was not provided with any information concerning *the effects* of the Receipts and Payments mismatch bug and was only provided with trial transcripts.

137. Mr Clarke like Mr Altman Q.C., may have assumed, wrongly, that "*a bug which appears in Horizon online cannot have any application to a previous iteration of Horizon*" (Transcript 23 March 2021, 14/25). The issue was the *effects* of the bug. (The statement is also simply wrong as a matter of fact, because it assumes that '*Horizon online*' was a *different system* from '*Legacy Horizon'*, which it was not – it was merely modified – Legacy Horizon was migrated into Horizon online in 2010 and the architecture changed: see Technical Appendix to Horizon Issues at Parts B and C.)

138. The effects of the Receipts and Payments mismatch bug were so important that they were withheld from postmasters and those whom the Post Office had prosecuted until disclosure in the *Bates* GLO civil litigation. Fraser J. concluded that the existence of the bug was first formally acknowledged by the Post Office in response to the letter of claim on 28 July 2016: *Horizon Issues*, Technical Appendix paragraph [133].

139. As has been elsewhere noted, the very peculiar terms of the Cartwright King review, of all Post Office prosecutions from January 2010, can be considered, not only against the actual material revealed by the Clarke Advice, but also in the light of the failure of the Post Office to disclose the fact of the wide-ranging review of Post Office prosecutions by Cartwright King, to both Second Sight as its own appointed <u>independent</u> investigators, and, more remarkably still, the failure to disclose the fact to the BIS select committee at the February 2015 hearing - where Mrs Vennells and Mrs Van Den Bogerd steadfastly resisted the invitation by the committee to produce Post Office prosecution files to Second Sight, as they had requested, because of their

stated misgivings about the quality of investigations and prosecution evidence relied upon by the Post Office.

140. The inappropriate constriction/skewed nature of the Cartwright King review 2013-2014 review of Post Office prosecutions, and its terms, is thrown into sharp relief both by the contrasting outcome of the CCRC June 2020 s. 9 reference in the April 2021 judgment of the Court of Appeal and also by the fact that the Post Office *conceded* almost all the appeals on first ground abuse of process – material non-disclosure/denial of a fair trial.

SUBMISSIONS

(1) The discovery by the Post Office of the Receipts and Payments Mismatch bug and its effects in 2010 was a disaster for the Post Office. Its effects were such that there might be a balancing error on Fujitsu's main Horizon servers for a postmaster's account and the postmaster would have no knowledge of it, because their accounts would have appeared to have balanced at branch. Contractually, a postmaster was responsible for payment out of their own funds of any such "shortfall" – of which they would have had no notice or warning at their branch terminal. It was what might be called "the nightmare scenario" for the Post Office.

(2) Mr Godeseth's evidence is of crucial importance. He described the Post Office as having taken a "decision" as to how to manage the problem presented by "this particular bug". The way it was in fact managed was that the Receipts and Payments Mismatch bug was not disclosed to postmasters. Its concealment enabled the Post Office to maintain the fiction of the integrity of Horizon. Fraser J. said "*I do not understand the motivation in keeping this type of matter recorded in these documents, hidden from view; regardless of the motivation, doing so was wholly wrong. There can be no proper explanation for keeping the existence of a software bug in Horizon secret in these circumstances.*"

(3) The irreducible reason for the Post Office's concealment of ("keeping secret" *per* Fraser J.) the Receipts and Payments Mismatch bug, was that it revealed

that the Post Office could not tell the difference between theft and fraud on the one hand, and the effect of a bug in the *Horizon* system on the other. That conclusion was of momentous importance and commercially catastrophic for the Post Office.

a. The Receipts and Payments mismatch destabilised and undermined the main premise of Post Office historic prosecutions. namely, that unexplained "*Horizon* shortfalls" were - and *must* be - the responsibility of postmasters. The bug showed that that was a false premise. Second Sight recorded in their Interim Report that Post Office investigations branch never questioned whether the source of a shortfall might be the *Horizon* system itself, the Receipts and Payments mismatch bug revealed that it might well be. That was a contention that had been advanced, unsuccessfully, by postmasters for years.

b. Not only were branch accounting shortfalls the responsibility of postmasters, they were *contractually bound to make good*, out of their own monies, shortfalls in their closing balances. It is no wonder that it was recorded in September 2010 that widespread knowledge of the Receipts and Payments mismatch bug might undermine confidence in the Horizon system. The making good of *Horizon* inexplicable shortfalls was a running sore amongst postmasters – and the cause of immense distress for many.

c. The Receipts and Payments mismatch bug put in question the thousands of re-payments that the Post Office had been demanding - and receiving - from its postmasters from the date of roll-out in 1999, as in **Post Office Ltd v Castleton** [2007] EWHC 5 (QB).

(4) After the bug was discovered and discussed between Horizon and Fujitsu in September 2010, and its troubling effects were widely circulated within the Post Office, the Post Office continued to prosecute on the explicit premise

that *any problem or error in Horizon would be apparent to a postmaster at their Horizon branch terminal*. That was known by the Post Office (and Fujitsu) to be untrue. Mrs Misra was convicted of theft because the ramifications of the Receipts and Payments mismatch bug were so great that they required to be suppressed ("kept secret").

(5) The position was potentially fatally jeopardised by Mr Jenkins communicating to Second Sight his knowledge of the Receipts and Payments mismatch bug in early 2013. That prompted the instruction of Cartwright King LLP and resulted in the July 2013 Clarke Advice and Mr Clarke's recommendation that all Post Office prosecutions required to be reviewed. This was because the Post Office was on notice that Mr Jenkins had not disclosed his knowledge of bugs to the court and had thereby put the Post Office in breach of its duties as prosecutor. That represented a further management problem for the Post Office. The obvious issues for review were:

a. Whether Mr Jenkins's known fundamental unreliability as a witness should be disclosed to convicted postmasters in prosecutions in which Mr Jenkins had given evidence?

b. Whether the bugs Mr Jenkins had not disclosed might have an impact on the safety of a conviction (as the effects of the Receipts and Payments mismatch bug plainly did in Mrs Mirsa's case)?

Instead, the Cartwright King review from 2013 – 2014 of Post Office prosecutions was restricted to the principal questions of whether the Second Sight Interim Report and the Helen Rose reports should be disclosed to convicted defendants. The review was seriously skewed and constricted and resulted, perhaps as intended, in not a single successful appeal. The question arises as to how such a flawed review can have been devised and by whom? The question of the *effects* of the Receipts and Payments mismatch bug (undisclosed) and its potential impact upon the safety of a conviction, remained, it would appear, unconsidered.

(6) The Post Office's decision to cease prosecuting its postmasters for Horizon shortfalls from 2014 was likely the result of the the July 2013 Clarke Advice and the Post Office's requirement in August 2013 to notify its insurers.

(7) The *Bates* GLO litigation presented similar risks to the Post Office. The lengths to which the Post Office went in resisting disclosure of important relevant documents were extraordinary, most notably in resisting disclosure of the Fujitsu Known Error Log. The Post Office formally by counsel submitted to the court the KEL was irrelevant, a submission presumably based upon instructions.

(8) The entire history of the Post Office's legal proceedings, criminal and civil, reveals widespread, long-term and systemic disclosure failure. The failure to disclose the 2010 *Ismay* report, the *Detica* October 2013 report, the Post Office's notification of its insurers in connection with Mr Jenkins's evidence, and material in the Clarke Advice in 2013 are striking and important examples.

(9) That the Post Office withheld disclosure of its notification of insurers in 2013 on the false basis that it was subject to legal professional privilege was wrong and is inexcusable. Disclosure of that material would have fundamentally changed that litigation. It would have also provided the true explanation for Mr Jenkins not being called as a witness. It would have also led, ineluctably, to the revelation of Mr Jenkins's unreliability as a witness, known to the Post Office in 2013.

(10) It remains unsatisfactory that in November 2020 the Post Office stated that the Clarke Advice was disclosed "in accordance" with **Nunn**, yet in 2013 it had been subject to careful consideration by the Post Office's lawyers but was then withheld from disclosure. Its importance was not only that its principal expert witness was found repeatedly to have given incomplete evidence of his full knowledge of bugs and errors in Horizon, but that a bug that he had not

disclosed was the Receipts and Payments mismatch bug, that undermined main contentions by the prosecution in Mrs Misra's case.

(11) Between 2010 and 2020, the Post Office engaged in an elaborate strategy of suppression and withholding – concealment – of its knowledge of serious problems with *Horizon*, the acknowledgement of which carried prospectively commercially disastrous consequences, consequences that have now in fact eventuated. "Deception" is the appropriate word.

(12) The Post Office's strategy of concealment and deception has caused resultant harm, including inordinate delay in justice that is irretrievable and incapable of being adequately compensated. An approach to fair compensation by analogy with fraud is appropriate.

PAUL MARSHALL

Cornerstone Barristers
Gray's Inn

23nd June 2022