

Witness name: Paul Marshall

Statement No: WITN0674_01

Exhibits: WITN0674_01/1 – WITN0674_01/6

Dated: 25 October 2022

POST OFFICE HORIZON IT INQUIRY

FIRST WITNESS STATEMENT OF PAUL MARSHALL

My name is Paul Marshall, I am a barrister in private practice at the bar of the courts of England & Wales, of Cornerstone Barristers, 2-3 Gray's Inn Square, Gray's Inn, London WC1R 5JH.

1. I have been invited by the firm Hodge Jones & Allen, solicitors for Ms Tracy Felstead, a core participant in this Inquiry, to make a written statement in connection with a draft unsigned witness statement made by Mr Michael Turner, a copy of which I was provided with by Hodge Jones & Allen on 14 October 2022 [WITN0674_01/1, WITN06740101].
2. In this statement I set out a little of the background to my connection with Mr Turner, who was for a time a possible witness in the Post Office appeals that were

referred by the CCRC pursuant to the Criminal Appeal Act 1995 in the first tranche of 42 appeals determined by the Court of Appeal on 23 April 2021. I explain how the draft statement came into my possession in 2020 as well as the present circumstances.

3. On 28 February 2022 I wrote to the Inquiry in connection with Mr Turner, following the evidence that Ms Tracy Felstead gave to the Inquiry on the impact that her prosecution, wrongful conviction and imprisonment had upon her. For convenience, I attach a copy of that letter to this statement [WITN0674_01/2, WITN06740102]. (Shortly before this, I had emailed Mr Turner on 22 February 2022. I received no response.) In her evidence to the Inquiry Tracy Felstead referred to the fact that Mr Michael Turner had been instructed on her behalf as an expert witness in her prosecution by the Post Office in 2002. Tragically, he was not called as a witness.
4. In the appeals/CCRC referrals, I was instructed on behalf of Tracy Felstead, Janet Skinner and Seema Misra, until December 2020. I then felt constrained to withdraw from representing them. I ceased acting for them in the face of threats made against me of proceedings for contempt of court, made by the Court of Appeal Criminal Division, over the five-month period December 2020-April 2021. The basis for those threats was never clearly articulated other than having some vague ostensible connection with my having passed a copy of the July 2013 "Clarke Advice" to the Metropolitan Police on 17 November 2020, the evening before a hearing on directions in the Court of Appeal. I continue to hold the view that those threats by the Court of Appeal, made against my junior and me, had no foundation in fact nor connection with any identifiable (still less identified) legal principle. (The material in the Clarke Advice was material to which my clients were entitled, as of right as a matter of law – later accepted by the Post Office (the disclosure was said to be given by the Post Office pursuant to the principles identified by the Supreme Court in R (on the Application of Nunn) v Chief Constable of Suffolk Police UKSC [2014] 37.)) The Court of Appeal almost fatally damaged the appeals and potentially adversely affected the appellants, because

I very nearly resigned from practice at the bar in November 2020 in protest against the Court of Appeal's in my view unprincipled treatment of my junior. I was persuaded not to. Had I then done so, any argument on "second category abuse of process", as a discrete ground of appeal, without doubt would have come to an abrupt end because no one else was interested in pursuing it and the consensus view of all other lawyers involved in the appeals was that my analysis was wrong, as was my clients' concern to pursue that ground of appeal. (Each had received extensive and detailed separate advice on the advantages and risks.)

5. For a number of years, from the summer of 2017, I was unwell. For that reason, I largely withdrew from my ordinary practice which was mainly in business law. As a result of time on my hands, I wrote some articles on issues of law that engaged my interest. Some of this was informed by the way that the courts in my experience tend to treat small businesses rather badly in comparison with large institutions. This perception in part was from my experience of swaps litigation with banks. I was especially interested in the emergence of the odd doctrine of 'contractual estoppel'. I found the courts' approach to these cases resonated with Lee Castleton's civil trial in High Court proceedings brought by the Post Office in 2006 (a seemingly uncritical deference to a large, well-resourced, public institution).
6. In the winter of 2019-2020, having read Fraser J's judgments and the only other reported civil decision, viz Lee Castleton's case in 2006-7: Post Office v Castleton [2007] EWHC 5 (QB), I became interested in Post Office miscarriages of justice. That, in turn, caused me to become very interested in how the provisions under s. 69(1) of PACE 1984, and the parallel civil evidence protections under the Civil Evidence Act, had been repealed by parliament at the turn of the century on the recommendation of the Law Commission. I found the timing to be of particular interest, because it coincided exactly with the Post Office's introduction of Horizon and its energetic prosecution of its postmasters.

7. I wrote a couple of articles entitled, respectively "*The harm that judges do, Lee Castleton's story*", published by the University of London School of Advanced Study's open platform journal, the *Digital Evidence and Electronic Signature Law Review* (DEESLR (2020) 25), and "*English law's presumption that computer systems are reliable: time for a rethink?*" published by *Butterworths Journal of International Banking and Financial Law* ((2020) 7 JIBFL 433). (Professor Steven Murdoch has pointed out, further to the discussion of the repeals in the article on Castleton's case, that the Post Office in the Commission's consultation supported the Law Commission's recommendations.) Additionally, at the invitation of Alex Chalk M.P., then Under-Secretary of State for Justice, to me in August 2020, in the course of a telephone discussion facilitated by Mr Kevin Hollinrake M.P., in November 2020 I submitted a paper to the minister entitled "*Recommendations for the probity of computer evidence, background and critical recommendations*". The other contributors and signatories were James Christie, Professor i.R. Peter Bernard Ladkin, Professor (Emeritus) Bev Littlewood, Stephen Mason, Professor (Emeritus) Martin Newby, Dr Jonathan Rogers, Professor Harold Thimbleby, Professor (Emeritus) Martyn Thomas C.B.E.. I mention these things because they were issues in which Michael Turner expressed to me his professional interest and matters in which he separately also expressed an interest in collaborating in efforts for law reform.
8. Separately, as a result of introductions made by individuals who had read an earlier article entitled "*Denialism: The latest entrants – Lloyds Bank the Post Office, Clausewitz and the tinkling teacups of the English Judiciary*", that I had written in February 2020 and that was published on the All Party Parliamentary Group on Fair Business Banking website, I had been put in contact with Ms Tracy Felstead.
9. I was so appalled by what Tracy told me in the course of a telephone call, that I told her I would do everything I could to help her. When she told me, I should say very reluctantly indeed - for her only stated interest was in clearing her name, that for her imprisonment at the age of 19, for her experience of prison and for her

entire adult life that was blighted by her conviction, she had received from her solicitors/the GLO steering committee by way of distribution, out of the £57 million-odd settlement sum in the *Bates* GLO litigation, the sum of £17,000, for a couple of minutes I could hardly speak I was so shocked. If this was what passed for justice, I then reflected, there was something profoundly wrong with it. (This was before I discovered that the payments to the 'convicted claimants' in the GLO litigation were *ex gratia* payments paid out of compensation paid by the Post Office to the other claimants.)

10. I told Tracy Felstead that, although I was not a criminal practitioner, I knew a bit of law and it seemed to me that she had a very strong case for an appeal. She explained that her case was one of the cases being considered by the CCRC. Since I had rights of audience, I told her that if she wished me to, I would represent her in her appeal and would not charge her anything for doing so. (I told her semi light-heartedly (in writing) that if her appeal did not succeed, I would chain myself to the railings of Parliament in protest.) It appeared to me that she had suffered a monstrous injustice, but that once the position was explained to a competent tribunal her conviction would be readily and speedily quashed.
11. I could not then have anticipated either the procedural quagmire or the friction and drag in the Post Office's approach to disclosure that I encountered in the Criminal Division of the Court of Appeal (disclosure to my surprise was provided in a non-searchable format, so every document required to be located and individually and separately read). I did, however, start to identify that there was quite a lot more to the Post Office's prosecution of its postmasters than at first glance appeared. It was that interest that, in late disclosure given by the Post Office in October 2020, elicited the disclosure on 12 November 2020 of the July 2013 "Clarke Advice". This was largely as a consequence of my detailed study of Seema Misra's trial and the extraordinary delay in her appeal coming on for hearing – some aspects of which are still little known. (For example, the decision to prosecute her for theft was taken by the Post Office despite her willingness to plead guilty to false accounting. This was because it was considered by the Post

Office's lawyers that a confiscation order against her property would not be runnable on a conviction for false accounting alone and also because the Post Office considered that it was £70,000 'down' on the alleged "shortfall". (This suggests that there was recognition amongst lawyers for the Post Office that a charge of theft was more serious than a charge (merely) of false accounting.) A charge of theft was necessary and seen by the Post Office's lawyers (including external counsel) as required to be pursued to get a POCA 2002 confiscation order. (That fact sits rather uneasily with the Court of Appeal's, in my view probably erroneous, conclusion at paragraph [136] of the Hamilton judgment of 23 April 2021 that it was unpersuaded that there was a commercial motivation in Post Office prosecutions. Seema Misra's prosecution in 2010 was accepted by the Post Office's leading counsel, in the Court of Appeal in March 2021, to be the most important ("high point") of the Post Office prosecutions; her conviction was then regarded as a landmark and triumph by the Post Office's lawyers: Hamilton [91(iii)] (a somewhat sanitised quotation from the memorandum). It is also perhaps telling that Lee Castleton's case is the only reported civil judgment against a postmaster – a civil claim that ostensibly incurred costs for the Post Office of £321,000 - which Mr Castleton was unable to pay and for which he was bankrupted.)

12. In the course of our discussions, Tracy mentioned to me that she had had an expert witness who in the end was not called at her trial. His name was Michael Turner MA FBCS CITP MAE FEWI.
13. From early June 2020 Michel Turner and I had a number of discussions, both by telephone and by email. He told me that, although he was not called to give evidence at her trial, he never was told why not. Early in our discussions, Mr Turner told me that he always had considered Tracy Felstead's conviction to have been a miscarriage of justice.

14. I attach a copy of Mr Turner's C.V. that he provided to me in July of 2020: [WITN0674_01/3, WITN06740103]. It will be seen that he was an experienced and well qualified expert witness.
15. In connection with references in some of what I had published to the House of Lords' decision in R v Shephard [1993] AC 380, Mr Turner sent me some letters that he had had published in 1992 and 1993. They rather succinctly and very presciently put the (to my mind, important) point. (One of these was published in *Computer Weekly*, the trade/professional journal that subsequently first broke the story of what became the 'Post Office scandal'.) I exhibit these to this statement marked [WITN0674_01/4, WITN06740104].
16. Mr Turner offered to assist/contribute to the discussion and commented in favourable and flattering terms on the articles that I had published on the (serious) mischief caused by the repeal of s. 69(1)(b) of PACE 1984.
17. He confirmed to me that he would be willing to assist, if it would be helpful for her, in Tracy Felstead's appeal.
18. To my considerable surprise, Mr Turner told me that he still retained some of his papers from 2002.
19. On 23 June 2020 Mr Turner wrote to me an email saying:

"I have had a peep in the documentation of my second Horizon case (CPS pros of Julia Richards at Winchester, 2011) that is much more complete than for TF. Included is a CPS letter and attached Fujitsu quotation) inviting the Defence to agree to fund the (minimum) cost of £13,000 for Fujitsu to produce three schedules of Horizon version releases and resolved issues relating to one sub post office. Its (sic) interesting that the same technique was being used then that I recall so vividly from my day attending Kingston CC in TF's case."

20. On 9 July 2020 Mr Turner told me (by email) that: *"I don't have any documents relating to my day at Kingston CC other than my Disclosure Requests (that I assume had prompted the court/parties to arrange the meeting), my time-record and invoice."*
21. After October 2020, when the Post Office by its Respondent's Notice conceded (from recollection on 6 October 2020) (or, more strictly, did not resist an appeal on) "first category abuse of process", Michael Turner's possible role in an appeal for Tracy Felstead seemed to me to be less important, but we discussed the possibility of him giving evidence again in December 2020.
22. I should add that previously, in summer of 2020, Mr Turner had expressed some doubt/anxiety about the wisdom of some criticisms I had made of the settlement of the *Bates* litigation, about which I believe the journalist Nick Wallis had written. At the time of writing this statement I haven't reviewed this, but I believe it was because I had publicly questioned that, while the convicted claimants had received no compensation at all from the Post Office under the terms of the December 2019 settlement, they had nevertheless surrendered under those terms all their heads of claim against the Post Office - save for a possible (contingent) claim for malicious prosecution (but only in the event of a successful appeal against their conviction). It seemed to me that the convicted claimants would have been much better served by not being parties to the litigation at all. I still hold that view. They never stood to gain an order in their favour in the civil litigation (because it would be said to be a collateral attack on jury verdicts/guilty pleas in the criminal proceedings) but nevertheless had surrendered most of their claims. I still find it difficult to see the sense in that.
23. Despite our differences of view on the foregoing, Michael Turner and I continued to have a cordial and constructive dialogue up to and including in December 2020. That came to an end after I felt compelled to withdraw from representing my clients, following threats made against me by the Court of Appeal of possible proceedings for contempt of court that I have referred to. (The Metropolitan

Police had informed the Court of Appeal, in the course of a hearing but in my absence (by an email that 11 days later was eventually provided by the Court of Appeal to solicitors acting for me in the possible contempt proceedings - though only upon my specific request for a copy), that I had provided a copy of the July 2013 "Clarke Advice" to Detective Sergeant Broom (with whom I had had a previous dialogue) the day before the hearing on directions on 18 November 2020. (I was surprised to see that it had been incorrectly asserted by the Met that the Clarke Advice had been (wrongfully – the Act makes disclosure an offence) disclosed under the Criminal Procedure and Investigation Act 1996 – but the Act has no application subsequent to a criminal trial.))

24. On 18 November 2020 in oral submissions I had tried, notably unsuccessfully, to explain to the court that the Clarke Advice, disclosed to my solicitors Aria Grace Law only a few days before, had completely transformed our understanding of the nature of the appeals. I attach to this statement the brief written submission that my junior Flora Page and I provided to the Court of Appeal, that attached a copy of the July 2013 Clarke Advice [WITN0674_01/5, WITN06740105]. (It was a précis of a previous much longer draft written submission on the Clarke Advice and its apparent relevance and importance.) The court was wholly uninterested in the implications of the advice, becoming distracted by procedural issues raised by the Post Office. (The to my mind very significant point in connection with the notification of the Post Office's insurers in August of 2013 was not subsequently pursued after I ceased to be involved in the appeals.)
25. My last communication with Michael Turner in connection with the appeals was in December 2020. After that I had no further involvement in the appeals after I wrote to the Court of Appeal explaining the reasons for my withdrawing from representing my clients. Ms Lisa Busch Q.C. agreed to take over from me and to represent my former clients. This was very shortly before the hearing on 17 December 2020, the decision on which was later handed down by the court in January 2021: Hamilton and Ors v Post Office Ltd [2021] EWCA Crim 21. (The Court of Appeal, after obvious initial reluctance, acceded to hearing argument on

second category abuse of process, notwithstanding that first category abuse of process was not resisted by the Post Office in 39 appeals. The court acceded to this in its judgment as matter of *discretion* and not as of right. (Though a comment, given that second category abuse of process, if successful, offered the prospect of *complete exoneration* to an appellant whose conviction might be quashed on that ground (- that not only did they not receive a fair trial (first category abuse), but they should never have been prosecuted (second category abuse)), I hold the view that the court's determination that this was a matter of discretion, rather than of right on the part of an appellant, is seriously questionable. (None of the lawyers on the hearing on 17 December 2020 contended the issue was a matter of right, so the point wasn't argued and my written submission was disregarded.))

26. Nevertheless, Mr Turner continued to be in contact from time to time. My last communication from him was in June 2021 when he told me that he had got a virtual seat at a talk I was to give as part of a discussion panel at UCL in early June.
27. Since then, I once or twice sought to communicate with Mr Turner by email, but without success. (Hitherto he was good at getting back to me.) I had misgivings that Mr Turner might have died.
28. It seemed to me that what Hodge Jones & Allen had asked me to do potentially engaged with issues of confidentiality or privilege, where these were not mine to waive, and that this might give rise to issues, potentially of some delicacy.
29. Whilst reviewing some of the documents that I hold in connection with this, on the evening of Sunday 16 October 2022 I lighted upon a mobile number that Mr Turner had given me in June 2020: **GRO**
30. At 9.15 pm on Sunday 16 October 2022 I rang the number, half expecting it not to be working.

31. The call was answered by Mrs Katharina Turner. I was saddened to be told that, as I had apprehended, Michael Turner had died in November 2021. His death came after a short illness with complications. I expressed my condolences and explained to Mrs Turner the reason for my call. She confirmed to me (as I had anticipated) that she was the executrix of Mr Turner. I said that I had concerns that, while I had been asked about a draft unsigned statement, that Mr Turner had prepared in 2020, there were in my opinion some possible legal issues in connection with confidentiality or privilege. Mrs Turner told me that she was familiar with my name. She told me that she had not felt able to open any of Mr Turner's emails since his death. (She said to me that she just "did not know what to do".) Mrs Turner told me that "right up until the end" Michael Turner was troubled by Tracy Felstead's conviction and that he had wished he had known more of how he might have done something to help. She told me that she was sure that Michael would have wanted to provide any information or assistance that he could to this Inquiry.
32. I asked Mrs Turner if draft documents that he had provided to me might be used and provided to the Inquiry. She assured me that she was certain that Michael would wish this to be done and that, so far as she was able to do so, she would authorise and approve this being done by me.
33. In the circumstances, I am content that confidentiality or privilege, so far as hitherto vested in Mr Turner, is now waived by Mrs Turner as Mr Turner's executrix in the documents that I exhibit to this statement for the purpose requested (but not for any other or wider purpose, nor for the avoidance of doubt, generally).
34. In my view the Inquiry may be assisted by information provided to me by Mr Turner.
35. On 11 June 2020 Mr Turner sent me an index to documents in his possession from the time of Tracy Felstead's trial: [WITN0674_01/6. WITN06740106].

36. On 7 July 2020 Mr Turner sent me a schedule of cases that he was then considering: [WITN0674_01/7, WITN06740107].
37. In July 2020 Mr Turner told me that he had had a telephone conversation with Bob Colover, whom I understand to have been Tracy Felstead's defence counsel on her prosecution in 2002. Mr Colover was described by Mr Turner to me as having been cautious but courteous in their discussion, but he wanted any communication to be authorised by the Bar Council.
38. On 23 July 2020 Mr Turner wrote to Aria Grace Law confirming that he would accept instructions as an expert witness to act for Tracy Felstead on her appeal to the Court of Appeal.
39. On 5 August 2020 I sent to my solicitor an email in which I wrote:
- "Michael and I had a half-hour discussion last evening about various matters and Michael's provisional view of certain things. Important amongst them is that in his view it was impossible, given what he now knows about the Horizon system, to attribute shortfalls at counter to any particular individual because of, inter alia, password sharing. Another important issue was Fujitsu's objection to giving disclosure without a substantial payment for this.... a theme right up to 2017."*
40. On 11 September 2020 Mr Turner provided to me a draft statement concerning his involvement in Tracy Felstead's case. That is the document that was sent to me by Hodge Jones & Allen referred to at the start of this statement. It was also provided to Tracy Felstead directly. The covering email stated: "Please find attached a note of my involvement with the Tracy Felstead case in case this is of assistance for her appeal. Best wishes Michael".
41. On 3 December 2020 I sent an email to Mr Turner, following an earlier email from him to me at the end of November. I explained to him that any witness statement by him would likely be filed at the beginning of March.

42. My next contact with him was in May 2021 when he wrote me an email requesting:
“Can I please have a copy of DENYING JUSTICE: THE POST OFFICE, VIOLATING HUMAN RIGHTS AND QUESTIONING THE COURT OF APPEAL?” I believe that I spoke with Michael at about this time, but I am not certain and cannot in any event recall the nature of the discussion.
43. I had no further contact with Mr Turner after the beginning of June 2021.
44. I have other documents, but in the very short time available the foregoing provides a reasonable summary of my engagement with Mr Turner in connection with Tracy Felstead’s appeal and the documents that he provided to me.
45. I am entirely satisfied, from the information provided to me and my conversations with Mr Turner that, had Mr Turner been called as an expert witness at Tracy Felstead’s trial in 2002 she would not have been convicted of any offence but would have been acquitted of the offences with which she was charged.
46. I infer from the circumstances that the reason Mr Turner was not called to give evidence at Tracy Felstead’s criminal trial was connected with the asserted expense of providing the disclosure that he had requested from the Post Office and Fujitsu. (A matter that, in more general terms, is referred to by Fraser J, some 17 years later – see e.g. Horizon Issues judgment [922]-[924].)
47. I may be permitted to observe that the delay in these matters being fully and properly considered, responsibility for which lies with the Post Office and its lawyers and Fujitsu, has denied to this Inquiry, by death, evidence from a witness whose direct evidence in my view would likely have been of considerable assistance and value.
48. It is to be hoped, and Mrs Turner hopes, that Mr Turner’s concerns and anxieties about the injustice of Tracy Felstead’s prosecution and conviction, an anxiety that burdened him for almost 20 years, right up until his death in November 2021, may now be properly considered by this Inquiry.

Statement of Truth

I believe that the facts stated in this witness statement are true.

GRO

Signed:

Paul Marshall

Dated: 25 October 2022

Index to first witness statement of Paul Marshall

	<u>Exhibit number</u>	<u>Document Description</u>	<u>URN</u>
1	WITN0674_01/1	Unsigned draft statement of Mr Michael Turner dated 11 September 2020	WITN06740101
2	WITN0674_01/2	Letter from Mr Paul Marshall to the Inquiry dated 28 February 2022	WITN06740102
3	WITN0674_01/3	Curriculum vitae of Mr Michael Turner	WITN06740103
4	WITN0674_01/4	Computer Weekly piece by Michael Turner dated 28 January 1993 (with others)	WITN06740104
5	WITN0674_01/5	Appellants' Note dated 16 November 2020	WITN06740105
6	WITN0674_01/6	Index of documents held by Mr Michael Turner	WITN06740106
7	WITN0674_01/7	Schedule of cases being considered by Mr Michael Turner	WITN06740107