

Friday, 6 October 2023

(10.00 am)

(Proceedings delayed)

(10.10 am)

RICHARD DUNCAN ATKINSON KC (continued)

Questioned by MR BEER (continued)

MR BEER: Good morning, sir, can you see and hear me?

SIR WYN WILLIAMS: Yes, I can, thank you.

MR BEER: Apologies for the delayed start, down to me entirely and a problem with my computer.

SIR WYN WILLIAMS: Well, I'm not entirely surprised that occasionally there can be problems with computers!

MR BEER: Yes. The problem was identified very quickly and remedied.

SIR WYN WILLIAMS: Thank you.

MR BEER: Sir, can we turn to charging decisions. We were in your report, Mr Atkinson -- good morning -- at page 55.

A. Yes.

Q. So that's EXPG0000002, and page 55, please. Thank you.

From this paragraph, paragraph 118 onwards, right up to paragraph 132 of your report, you

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heading there, so we can see what we're looking at, just scroll up a tiny bit please, thank you -- "The Director's Guidance on Charging".

Between this paragraph and 131 you address and cite extensively from the *Director's* -- that's the Director of Public Prosecutions -- *Guidance on Charging*. Can you help us, when was the *Director's Guidance on Charging* first issued?

A. I haven't been able to identify a first version but the requirement that the director should introduce such guidance was brought into the Police and Criminal Evidence Act by the Criminal Justice Act of 2003, so it would have been shortly after that.

Q. I've been able to track down a 2nd Edition dated 2005, so that would sound about right.

A. Yes.

Q. So after 2003 --

A. Yes.

Q. -- but certainly before 2005, because we were on a 2nd Edition?

A. Yes, and just to explain, the Police and Criminal Evidence Act, as originally enacted, in the main put the decision as to charge on the

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consider the charging decision process and the charging decision process at the Post Office, as reflected in policy documents.

A. Yes.

Q. You essentially address two questions, would this be right -- and I'm drawing this from the document -- rather than you expressly stating it, was the structure of the charging decision-making process sufficiently well defined in the policy so as to ensure consistency, rigour and fairness, according to the law?

A. Yes.

Q. That would be one question.

A. Absolutely.

Q. Secondly, did the structure provide for sufficient oversight at a senior and/or independent level?

A. Yes.

Q. Thank you. Before we get to the answers to those questions, can I briefly address, if I may, the comparators and the sources of material that you identify. Firstly, can we go to paragraph 128 of your report, which is on page 59. You address -- if we just get the

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part of a Custody Officer at a police station.

Those was then an increasing move away from the decision being taken by the police and more taken by the CPS and that's what the change in the Criminal Justice Act 2003 was designed to achieve.

Q. Yes, and I think there was a Section 37A into PACE --

A. Yes.

Q. -- which introduced a requirement to issue guidance?

A. Yes.

Q. So the *Guidance* has been in existence for some but not all of the relevant period that we're looking at?

A. Yes.

Q. Can you tell us in summary what is the *Director's Guidance on Charging*?

A. What it seeks to do is to make clear the process by which the police should carry out -- once they've carried out an investigation, then seek advice, either during the course of that investigation or certainly before a charging decision is reached from the Crown Prosecution Service, the duty on the prosecutor to assess

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1 that investigation, and then to apply the Code
 2 for Crown Prosecutors to it.
 3 So it sets out the process and underlines
 4 the independence of the decision to charge from
 5 the decisions made during the course of
 6 an investigation.
 7 **Q.** Thank you. Would you agree that it's
 8 a recognition that even the Code for Crown
 9 Prosecutors does not provide every insistence as
 10 to those who must make decisions about charging
 11 a person with a criminal offence and that more
 12 assistance was needed?
 13 **A.** Yes.
 14 **Q.** In any event, we -- can we take what you say
 15 about the *Director's Guidance* from your
 16 paragraph 132, which is on page 62, at the foot
 17 of the page. You tell us:
 18 "In summary, therefore, in cases involving
 19 the police and CPS as the investigator and the
 20 prosecutor, the structure of responsibility is
 21 clear. That is that in all but the least
 22 complex or serious of cases, the decision to
 23 charge is a decision independent of the
 24 investigator, and by reference to a clearly
 25 defined two stage test taken by reference to

1 **A.** No, that's right.
 2 **Q.** But, thirdly, a range of organisations and
 3 agencies have decided to bind themselves in
 4 their decision making, doing so by reference to
 5 the Code, including the DWP, the Environment
 6 Agency and the Health and Safety Executive?
 7 **A.** Yes.
 8 **Q.** Fourthly, the Full Code Test, which is what's
 9 relevant for our present purposes, involves two
 10 stages: firstly, an evidential stage; and then,
 11 secondly, consideration of whether the
 12 prosecution is in the public interest?
 13 **A.** Yes.
 14 **Q.** Ordinarily, such tests are to be approached in
 15 that order: evidential stage first; public
 16 interest, second?
 17 **A.** Yes.
 18 **Q.** Thank you. Can we turn, then, to page 68 and
 19 paragraph 145. I'm going to slow down and deal
 20 with this in slightly more detail.
 21 You tell us here that:
 22 "At the evidential stage, the prosecutor
 23 must be satisfied that there is sufficient
 24 evidence to provide a realistic prospect of
 25 conviction. Consideration must be given to what

1 clearly defined material. The structure also
 2 makes clear where the final decision lies."
 3 **A.** Yes.
 4 **Q.** You'll appreciate that I've skipped a lot of
 5 material. I've skipped the material that you
 6 have helpfully included in your report about the
 7 development of the move away from charge within
 8 a police station by a Custody Sergeant, the
 9 increasing role of the Crown Prosecution Service
 10 in either making decisions on charge, advising
 11 on charge and the division of responsibility as
 12 it now is?
 13 **A.** Yes.
 14 **Q.** So that's the *Director's Guidance*.
 15 Next, in paragraphs 133 -- so over the page,
 16 please -- to 154, you address the Code for Crown
 17 Prosecutors. Again, the material is quite dense
 18 here. May I summarise it and see whether you
 19 agree with my summary of what you said.
 20 Firstly, the Code has a statutory basis, see
 21 Section 10 of the POA 1985?
 22 **A.** Yes.
 23 **Q.** Secondly, the Code does not apply directly by
 24 reason of Section 10 to those undertaking
 25 prosecutions outside of the CPS?

1 the defence case may be, and how it is likely to
 2 affect the prospects of conviction. A case
 3 which does not pass the evidential stage must
 4 not proceed, no matter how serious or sensitive
 5 it may be. There is a realistic prospect of
 6 conviction if 'an objective, impartial and
 7 reasonable jury or bench of magistrates or judge
 8 hearing a case alone, properly directed and
 9 acting in accordance with the law, is more
 10 likely than not to convict the defendant of the
 11 charge alleged'.
 12 Then you set out the questions that
 13 a prosecutor should consider in answering this
 14 question and you say that they are "identified
 15 as". Is that identified in the 2018, 8th
 16 Edition of the *Code*.
 17 **A.** Yes, and equally in the earlier editions that
 18 I've been able to identify.
 19 **Q.** We're going to look at those very briefly in
 20 a moment because I think the number and nature
 21 of pointers changed over time, I'm not sure
 22 relevantly, but I just want to look back at the
 23 earlier iterations.
 24 In any event, in this edition of the *Code*,
 25 the questions identified:

1 "Can the evidence be used in court?
 2 "Is the evidence reliable?
 3 "Is the evidence credible?
 4 "Is there any other material that might
 5 affect sufficiency of evidence?"
 6 Can we look at the 2004 edition, please, and
 7 go to RLIT0000171. So this is the 2004 edition
 8 of the *Code*, as reprinted in an appendix to
 9 *Blackstone's*.
 10 **A.** Yes.
 11 **Q.** If we look, please, at the second page, under
 12 the heading "The Evidential Stage" and look at
 13 paragraph 5.4, the guidance back in 2004 was:
 14 "When deciding whether there is enough
 15 evidence to prosecute, Crown Prosecutors must
 16 consider whether the evidence can be used and is
 17 reliable."
 18 **A.** Yes.
 19 **Q.** "There will be many cases in which the evidence
 20 does not give any cause for concern. But there
 21 will also be cases in which the evidence may not
 22 be as strong as it first appears. Crown
 23 Prosecutors must ask themselves the following
 24 questions:
 25 "Can be evidence be used in court?"

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1 closely at it when deciding if there is
 2 a realistic prospect of conviction."
 3 Then if we can turn, please, to RLIT0000170.
 4 Thank you. Turn to the third page, please.
 5 This is the 2010 edition of the *Code*, and
 6 paragraph 4.7 is similarly worded, by way of
 7 introduction, as the previous edition of the
 8 *Code*.
 9 Then under the cross-heading "Is the
 10 evidence reliable?" you'll see a slightly
 11 expanded section:
 12 "What explanation has the suspect given? Is
 13 a court likely to find it credible in the light
 14 of the evidence as a whole? Does the evidence
 15 support an innocent explanation?
 16 "Is there evidence which might support or
 17 detract from the reliability of a confession?
 18 Is its reliability affected by factors such as
 19 the suspect's level of understanding?"
 20 Then the question about identity:
 21 "(g) Are there concerns over the accuracy,
 22 reliability or credibility of the evidence of
 23 any witness?
 24 "(h) Is there further evidence which the
 25 police or other investigators should reasonably

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1 I'm going to skip over that. Then, under
 2 the heading "Is the evidence reliable?":
 3 "Is there evidence which might support or
 4 detract from the reliability of a confession?"
 5 Reading on:
 6 "What explanation has the defendant given?
 7 Is a court likely to find it credible in the
 8 light of the evidence as a whole? Does it
 9 support an innocent explanation?"
 10 A question about identity, and then (e):
 11 "Is the witness's background likely to
 12 weaken the prosecutions case? For example, does
 13 the witness have any motive that may affect his
 14 or her attitude to the case, or a relevant
 15 previous conviction?
 16 "Are there concerns over the accuracy or
 17 credibility of a witness? Are these concerns
 18 based on evidence or simply information with
 19 nothing to support it? Is there further
 20 evidence which the police should be asked to
 21 seek out which may support or detract from the
 22 account of the witness?
 23 "Crown Prosecutors should not ignore
 24 evidence because they are not sure that it can
 25 be used or is reliable. But they should look

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1 be asked to find which may support or undermine
 2 the account of the witness?
 3 "(i) Does any evidence have any motive that
 4 may affect his or her attitude to the case?
 5 "(j) Does any witness have a relevant
 6 previous conviction [et cetera].
 7 "(k) Is there any further evidence that
 8 could be obtained that would support the
 9 integrity of evidence already obtained?"
 10 Then scroll down, please. Then at 4.9
 11 exactly the same guidance as before.
 12 So in both of these editions of the *Code* and
 13 in the present 2018 edition of the *Code*, which
 14 you've cited, prosecutors were asked to ask
 15 themselves a range of questions that went to the
 16 central issue of reliability. Would that be
 17 fair?
 18 **A.** Yes.
 19 **Q.** Can we turn back to your report, please, and
 20 look at page 68, and it's paragraph 146 at the
 21 foot of the page. So picking up where we left
 22 off, 146, you tell us that:
 23 "It follows that the reliability of the
 24 evidence is identified as being a central
 25 consideration to whether there's a realistic

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1 prospect of a conviction ..."
 2 Is that a theme that has run through every
 3 iteration of the *Code for Crown Prosecutors*.
 4 **A.** Yes. Certainly all that I've seen.
 5 **Q.** So what's that telling a prosecutor to do?
 6 **A.** Clearly, it will tell them different things,
 7 depending on the nature of the case that they're
 8 dealing with. If it's a case with eyewitnesses
 9 then it's all about the reliability of the
 10 eyewitness accounts and whether there is
 11 material that supports or undermines that. But,
 12 at a fundamental level, it is telling the
 13 prosecutor that they need to consider not just
 14 what the evidence in front of them says but
 15 whether it is reliable in doing so and whether
 16 there is either material available or material
 17 that needs to be obtained that will affect or
 18 may affect its reliability, because they need to
 19 be satisfied that that which because forward, if
 20 they charge, is a reliable case.
 21 **Q.** So one can't say simply because the words on the
 22 page or the figures on a page --
 23 **A.** No.
 24 **Q.** -- are in front of me I need only look at those,
 25 and decide whether there's a realistic prospect

1 that a prosecution will automatically take place
 2 once the evidential stage is met. A prosecution
 3 will usually take place unless the prosecutor is
 4 satisfied that there are public interest factors
 5 tending against prosecution which outweigh those
 6 tending in favour. In some cases the prosecutor
 7 may be satisfied that the public interest can
 8 properly be served by offering the offender the
 9 opportunity to have the matter dealt with by
 10 an out-of-court disposal rather than bringing
 11 a prosecution'.
 12 Then at paragraph 149, you tell us that:
 13 "The prosecutor is required to consider the
 14 factors identified at paragraph 4.14 [being]:
 15 "a) The seriousness of the offence.
 16 "b) The level of culpability of the suspect
 17 [and] the *Code* lists relevant factors including
 18 'the suspect's level of involvement; the extent
 19 to which the offending was premeditated and/or
 20 planned; the extent to which the suspect had
 21 benefited from criminal conduct; whether the
 22 suspect has previous criminal convictions and/or
 23 out-of-court disposals and any offending whilst
 24 on bail or whilst subject to a court order;
 25 whether the offending was or is likely to be

1 of a conviction?
 2 **A.** No, that's right.
 3 **Q.** One needs to apply a probing mind to look at the
 4 issue of reliability?
 5 **A.** Yes, so if you have a case where a witness says,
 6 "I saw the defendant do it", you don't just say,
 7 "Oh, well, that's fine". You have to consider
 8 whether that person is reliable, whether there's
 9 material that might undermine their credibility
 10 or reliability in assessing whether there's
 11 a realistic prospect of a conviction based on
 12 what they say.
 13 And, in the same way, if you have a computer
 14 spreadsheet that says, effectively, that the
 15 defendant did it, you have to be satisfied that
 16 that is a reliable basis for asserting that.
 17 **Q.** Thank you. Can we move on to the public
 18 interest stage, please?
 19 **A.** Yes.
 20 **Q.** That's over the page to page 69, and
 21 paragraph 148 of your report. You tell us that:
 22 "If the evidential stage is satisfied, the
 23 prosecutor must consider whether the prosecution
 24 is in the public interest. As the *Code* observes
 25 (paragraph 4.10): 'It has never been the rule

1 continued, repeated or escalated; the suspect's
 2 age and maturity'.
 3 "c) The circumstances of and the harm caused
 4 to the victim.
 5 "d) Whether the suspect was under age of 18
 6 at the time of the offence.
 7 "e) The impact on the community.
 8 "f) Whether the prosecution is a
 9 proportionate response.
 10 "g) Whether sources of information require
 11 protecting."
 12 So that is a developed list of factors that
 13 is not exhaustive --
 14 **A.** No.
 15 **Q.** -- is that right?
 16 **A.** That's absolutely right.
 17 **Q.** But they're pointers?
 18 **A.** Yes, and in each iteration of the *Code* that
 19 I have seen there has been a list. It's never
 20 been just a question of consider the public
 21 interest, full stop. It's always been a whole
 22 series of factors.
 23 **Q.** Once the Full Code Test has been applied and
 24 it's been decided to prosecute, is that the end
 25 of the matter or is there yet a further question

1 that arises, namely what charges should in fact
2 be --

3 **A.** Yes.

4 **Q.** -- preferred or what information laid?

5 **A.** It's not the end of the process in two ways:
6 firstly, that once it has been identified that
7 there is a realistic prospect of conviction on
8 the basis of the evidence and in the public
9 interest to do so, you'd then have to determine
10 what charges should be laid, but you'd then also
11 have of the continuing obligation, which, as
12 I've read it, has been consistent throughout the
13 iterations of the Code to keep that process
14 under review, both as to whether you've got the
15 right charges and as to whether it remains in
16 the public interest and it remains a realistic
17 prospect of a conviction.

18 **Q.** Can we look, please, at page 71, paragraph 154
19 of your report, at the foot of the page, which
20 addresses one of those two ways in which the
21 satisfaction of the two elements of the test is
22 not the end of the matter, and you tell us that:

23 "The Code also addresses the determination
24 of what offences to charge where the Full Code
25 Test has been applied and prosecution has been

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1 **A.** So the charges should not be chosen so that
2 a defendant feels they have to plead to
3 something to avoid the risk of being convicted
4 of something more. So, just to take an example,
5 one should not charge false accounting as well
6 as theft to make a defendant feel they have to
7 plead to false accounting because they don't
8 want to be convicted of theft.

9 **Q.** Thank you. Can we turn, then, to the adoption
10 of the Code by the Post Office in its policies
11 and can we turn to page 72 of your report,
12 please, and paragraph 155. You tell us that:

13 "The Post Office has at least purported to
14 apply the Code for Crown Prosecutors. That is
15 demonstrated by the following ..."

16 You list five policy documents that, in
17 different ways, I think, represent the Post
18 Office saying that it will either apply or have
19 regard to the Code for Crown Prosecutors; is
20 that right?

21 **A.** Yes, so either expressly. So, for example, that
22 in paragraph (a) refers to the Code, that in
23 paragraph (b) doesn't refer to the Code but does
24 refer, in general terms, to the test from the
25 Code. So I took it as being a reference to the

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1 determined upon. At paragraph 6.1, it is stated
2 that the charges should 'reflect the seriousness
3 and extent of the offending; give the court
4 adequate powers to sentence and impose
5 appropriate post-conviction orders; allow
6 a confiscation order to be made in appropriate
7 cases, where a defendant has benefited from
8 criminal conduct; and enable the case to be
9 presented in a clear ... way'."

10 You add:

11 "It follows from this analysis that the
12 interests of justice do not always require the
13 charging of the most serious potential charge."

14 You cross-refer us to paragraph 6.2 of the
15 Code:

16 "The prosecutor should never seek to
17 pressure a defendant into pleading guilty
18 through the charges chosen ... and should [as
19 you said] keep the charge under review
20 [paragraph 6.3 and 6.5 respectively]."

21 The idea that the prosecutor should not seek
22 to pressure a defendant into pleading guilty
23 through the charges chosen, can you give us
24 an example, a practical example of that? What
25 does that mean in practice?

18

1 Code.

2 **Q.** Thank you. Would you agree that, as a private
3 prosecutor, the Post Office was not obliged to
4 apply the Code as a matter of law?

5 **A.** Absolutely.

6 **Q.** But, as you've set out, the Post Office did?

7 **A.** Absolutely.

8 **Q.** So does the fact that the Post Office was not
9 obliged to apply the Code as a matter of law
10 have any continuing relevance in the light of
11 their decision to do so?

12 **A.** No, I don't think so. I think that it was
13 recognised in those cases where it was said that
14 a private prosecutor was not required to apply
15 the Code, that there was, nevertheless,
16 a requirement that a defendant understand the
17 basis for the decision being made to prosecute
18 them and, increasingly, it was recognised that
19 the Code was a clear statement of that, which,
20 however you worded it, would need to be
21 considered by a prosecutor.

22 But it seems to me, once the Post Office had
23 determined that they would apply the Code, that
24 is the standard against which you can judge
25 their decisions because it's the one that they'd

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1 adopted.
 2 **Q.** So the fact they weren't obliged to apply it, as
 3 a matter of law, hasn't got any continuing
 4 relevance in examining whether the Post Office
 5 did, in fact, do what their policy said they
 6 would do?

7 **A.** No.

8 **Q.** Can we go over to page 73, I want to look at
 9 paragraphs 156 and 157 and, as I read this,
 10 you're identifying some outlier policies,
 11 essentially; would that be fair?

12 **A.** Yes.

13 **Q.** Which are not consistent with the policies that
 14 you had identified, the five of them, in
 15 paragraph 155?

16 **A.** Yes.

17 **Q.** If we just read those, you say that the Crime
 18 and Investigations Policy of September 2008,
 19 October 2009 and April 2011 state:

20 "... 'where a business leader, manager or
 21 employee is the subject of a criminal
 22 investigation and grounds are established to
 23 suspect them of having committed a criminal
 24 offence, breached Royal Mail Group's code of
 25 business standards or subverted business

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1 reference to the *Code for Crown Prosecutors* as
 2 the test and then, less than a year later, this
 3 Crime and Investigations Policy, rather than
 4 referring to the *Code* and a determination of
 5 a sufficiency of evidence for there to be
 6 a realistic prospect of conviction, there was
 7 a reference to a suspicion of someone having
 8 committed a criminal offence being a reason to
 9 put them into the criminal justice system.

10 I just didn't -- I couldn't see readily how
 11 those two things could be reconciled.

12 **Q.** Then paragraph 157, again, something of
 13 an outlier, a "Criminal Enforcement and
 14 Prosecution Policy" dated November 2012"
 15 addressing relevant factors to the application
 16 of the Code simply says, on the evidential side:

17 "... 'evidence of guilt sufficient to give
 18 a realistic prospect of success in criminal
 19 proceedings'", without any development of it.

20 Is that the point?

21 **A.** Yes, yes.

22 **Q.** Then:

23 "In relation to the public interest [test]
 24 a list of factors to be taken into account
 25 [which is] summarised as: 'the seriousness and

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1 systems, controls or policies, they may enter
 2 one or both of the following processes: the
 3 relevant national Criminal Justice System and
 4 the business unit Code of Conduct'."

5 You say:

6 "... the policy goes on to say that 'once
 7 committed to the relevant Criminal Justice
 8 System it is the accountability of the Royal
 9 Mail, its investigators, criminal lawyers and
 10 prosecuting agents to ensure that the case is
 11 present impartiality but with all possible
 12 evidential support and preparation. It is the
 13 function of the relevant court to decide upon
 14 guilt ...'."

15 But you make the point that:

16 "... the policy identifies no more than
 17 [mere] suspicion as a precursor for a case
 18 entering the criminal justice system, and
 19 [doesn't include any] of the guidance for
 20 prosecutorial decisions to be found in the *Code
 21 for Crown Prosecutors*."

22 **A.** Yes, so I found this difficult to reconcile with
 23 the policies that we'd just looked at. So that
 24 in the end of 2007, the Criminal Investigation
 25 and Prosecution Policy had made express

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1 effect of the offence, the deterrent effect of
 2 a prosecution on the offender and others, any
 3 mitigating factors'."

4 What was the issue or problem with that?

5 **A.** Again, that which is there is not in any way
 6 irrelevant from the assessment of the public
 7 interest but nor is it the totality of that
 8 which is irrelevant to the assessment of the
 9 public interest. So, again, it was a more
 10 defined list of public interest considerations
 11 than, in fact, I'd seen in some of the earlier
 12 policies but it was still far from
 13 a comprehensive one.

14 **Q.** Thank you. Can we go to page 75 of your report,
 15 please. Between paragraphs 161 and 163 on this
 16 page, you refer to a draft formulation of policy
 17 written by Andrew Wilson, essentially suggesting
 18 that there be a presumption in favour of
 19 prosecuting those committing dishonest acts
 20 involving acquisition of property or assets from
 21 the Post Office in the course of their duties.

22 **A.** Yes, and, again, I was less than clear as to the
 23 status of this paper. It was -- I highlighted
 24 it because it was December 1997, so it predated
 25 the Inquiry's period of concern, whereas almost

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1 all of the documents that I otherwise saw came
2 from within that period. But it was a fuller
3 exposition of what the prosecuting policy would
4 be than some of those other documents.

5 **Q.** In relation to what Mr Wilson suggested, would
6 you agree that an offence of dishonesty and
7 breach of trust by an employee, involving either
8 theft or the dishonest acquisition of property
9 at the expense of their employer, would be
10 treated as a serious offence by the criminal
11 courts.

12 **A.** Yes, if made out. Yes.

13 **Q.** And that in those circumstances, if a CPS lawyer
14 was to be presented with sufficient evidence to
15 prove such an offence, the lawyer would be
16 likely to conclude that the prosecution is in
17 the public interest, subject to any
18 case-specific or personal circumstances that
19 apply to the particular individual?

20 **A.** If they were satisfied that its sufficiency
21 included its reliability, yes.

22 **Q.** And that, therefore, for the Post Office, it
23 wasn't unreasonable to adopt a position, whereby
24 if there was sufficient evidence to have
25 a realistic prospect of conviction and there

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1 bargaining. We asked you to consider, in the
2 context of the Post Office's charging practice,
3 the decision of the Court of Appeal in *Eden*.
4 That was because, in the light of what appears
5 to be the Post Office's charging practice and
6 because of the high number of cases in which
7 that charging practice had been applied across
8 the relevant period, it appeared to be
9 a relevant consideration.

10 You tell us about the facts of *Eden* on
11 page 76 at paragraph 165. Thank you. Can you
12 just summarise for us, if you can remember, what
13 it was that had come before the court?

14 **A.** Yes, so the defendant was a subpostmaster who --
15 in relation to whom discrepancies had been
16 identified between voucher records, on the one
17 hand, and payments out, on the other, and so
18 they were charged with a series of what were
19 described as twin counts of theft and false
20 accounting. And the issue that led it to going
21 to the Court of Appeal was that the prosecution
22 stance, which was the Post Office's stance in
23 that case, was to invite the jury only to
24 convict of one of those parts of the twin, the
25 theft, if they also convicted of the other, the

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1 were no countervailing personal or case-specific
2 circumstances, prosecution should ordinarily
3 follow?

4 **A.** Ordinarily, yes.

5 **Q.** So what's wrong with Wilson is suggesting?

6 **A.** My concern was that it was a very bald
7 description of a policy that there would be
8 a presumption, if there was evidence of
9 dishonesty by an employee, they would be
10 prosecuted without the nuance that the *Code for
11 Crown Prosecutors*, by way of example, brings
12 that process, in terms of the range of factors
13 that need to be considered, both in deciding
14 whether you have sufficient evidence to
15 establish that dishonesty and whether, even if
16 you have, it's in the public interest to
17 prosecute.

18 **Q.** So it might, would this be right, encourage
19 almost a rubber stamping of decisions to
20 prosecute, without a sort of deep dive into the
21 circumstances?

22 **A.** Yes, if this were all. If this was the policy,
23 then that is the risk that it would run, yes.

24 **Q.** Thank you. Can I turn to charging practice,
25 please, and the related issue of plea

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1 false accounting.

2 And the jury instead convicted of the false
3 accounting, not the theft, and making clear,
4 unusually -- because usually a jury just gives
5 a verdict without giving its reasons -- that
6 they considered that the false accounting was
7 made out on the basis that the postmaster had
8 got in a muddle and falsified things to cover
9 the muddle, rather than to steal money.

10 **Q.** In those circumstances, you tell us in
11 paragraph 166 -- I'm not going to read it out --
12 what Lord Justice Sachs, speaking for the Court
13 of Appeal, said in relation to this part. Given
14 the jury had made clear that there was no
15 dishonesty, the convictions were quashed?

16 **A.** Yes.

17 **Q.** Over the page to page 167, please. Lord Justice
18 Sachs additionally went on to say:

19 "... 'It seems to this Court to be rather
20 off [which was the language of the day] that two
21 counts, theft and false accounting, should be
22 put in parallel setting, if it is the object of
23 the prosecution to secure a conviction on the
24 first only if the second is proved, or on the
25 second only if the first is proved. There would

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1 seem in those circumstances but little point in
 2 putting in two separate counts. It would be
 3 better in future that the prosecution should
 4 make up its mind as to whether or not it really
 5 wants a conviction on a count of false
 6 accounting only if theft is proved: if so,
 7 reliance should be placed on one count only. On
 8 the other hand, there may be cases when it is
 9 wise to have a count of false accounting: where,
 10 for instance, a temporary gain could be the
 11 object of the dishonest act. No such object was
 12 put before the jury in the present case'."

13 If we turn to paragraph 168, you say:

14 "Although those observations were made in
 15 1971, it does not appear that the practice of
 16 charging both theft and false accounting was
 17 altered for almost the whole of the Inquiry's
 18 period of concern."

19 Then you cite from a paper written by Chris
 20 Aujard, and that's the paper we looked at on the
 21 screen yesterday but a different part of it, at
 22 3.1, and it said that:

23 "... the Post Office 'typically' prosecuted
 24 subpostmasters 'for false accounting combined
 25 with theft and/or fraud'."

29

1 **Q.** If we go forwards, please, to paragraph 170, you
 2 tell us that the choice of charges was not
 3 addressed in the various prosecution policies
 4 that you had seen until 2013, nor were the
 5 implications of *Eden* addressed. It was in the
 6 November 2013 Post Office Prosecution Policy
 7 England and Wales that *Eden* was addressed,
 8 where, at paragraph 5.2, it said:

9 "... 'where a suspect is charged with
 10 offences of theft and false accounting arising
 11 out of the basic same facts, those charges will
 12 always be alternative charges. This approach is
 13 not to be regarded as an invitation to plead
 14 guilty to any particular charge(s)'."

15 You were asked, in the context of *Eden*, the
 16 lack of specific Post Office guidance relating
 17 to it and, you say, "no doubt, the observations
 18 in the paper just quoted to consider the
 19 practice of 'plea bargaining' in [that]
 20 context".

21 So, essentially it was only at the end of
 22 the relevant period in 2013, November 2013, that
 23 *Eden* was addressed at all in the documents that
 24 you've seen?

25 **A.** Yes, and so whilst, as the court made clear in

31

1 It then went on to say:

2 "... 'the choice of charge is largely
 3 dependent on whether we have obtained
 4 an admission of guilt, or other compelling
 5 evidence that the Defendant has taken money
 6 directly from us, or have only secured evidence
 7 that the Defendant covered up losses by falsely
 8 recording the branch's financial position ...
 9 typically Defendants plead guilty to a charge of
 10 false accounting, with the charge of theft then
 11 being dropped.'"

12 Carrying on, you tell us in paragraph 169
 13 that a later document -- a "criminal offences
 14 points to prove" document, of December 2008,
 15 which had as its purpose helping investigators
 16 and interviewers to understand the elements of
 17 criminal offences, which was updated in August
 18 2011 and again in June 2012 -- did not address
 19 the *Eden* considerations as to charges.

20 You tell us that, whilst training materials
 21 were produced that address the elements of
 22 offences of dishonesty, those training notes did
 23 not also address charging decisions nor the *Eden*
 24 considerations.

25 **A.** No, that's right.

30

1 *Eden* there will be cases where it's entirely
 2 appropriate to have a charge of false accounting
 3 as an alternative to a charge of theft to
 4 address a different potential scenario, it is
 5 a process that needs to be thought through and
 6 for an understanding as to why the false
 7 accounting is there as an alternative to be
 8 fault through, rather than for it, effectively,
 9 to be treated as a package deal that you would
 10 always have both.

11 **Q.** Which seemed to be the import of what Chris
 12 Aujard said?

13 **A.** Yes.

14 **Q.** Thank you. So it was only at the end of the
 15 period in November 2013, on the documents that
 16 you have seen, which I think is 42 years after
 17 *Eden* was decided, that the issue raised in *Eden*
 18 was addressed?

19 **A.** The only thing that I saw written down, yes.

20 **Q.** What were or what could be the potential adverse
 21 effects of a failure by the Post Office to
 22 follow the guidance in *Eden*?

23 **A.** One potential risk is that, if it is regarded
 24 that you would always have that package deal of
 25 charges there, there might be a lack of scrutiny

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1 of whether, in fact, you had evidence that
 2 established theft and so, if the basis for
 3 a charging decision at the end of
 4 an investigation was that there were shortfalls
 5 in the computer records and, therefore, a charge
 6 of theft on the basis the money had been taken
 7 and of false accounting if it hadn't, that you
 8 would just have the package there without
 9 actually looking to see whether the evidence did
 10 show any also of money, in fact, as opposed to
 11 on the records.

12 And the other risk, as identified, is
 13 a defendant may consider that, because they had
 14 to acknowledge that there were accounting
 15 shortfalls, as shown by the records, that they
 16 had, at least, to plead guilty to false
 17 accounting because there was the risk, if they
 18 went to court, that they would be convicted of
 19 stealing the money, whereas, in fact, that
 20 charge of theft may, in fact, never have been
 21 made out on the evidence at all.

22 **Q.** Because, for example, there was no evidence of
 23 an actual loss?

24 **A.** Yes, and/or an actual gain to the postmaster.

25 **Q.** Would you accept that there can be factual

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1 CPS?

2 **A.** Absolutely.

3 **Q.** Would you agree that, in considering whether to
 4 accept a plea to a lesser or different offence
 5 to the one charged, the CPS would ordinarily
 6 seek and consider, even if they weren't bound by
 7 them, the views of the victim?

8 **A.** Yes.

9 **Q.** Would you agree that, whilst the victim's views
 10 should not be considered determinative, they are
 11 a relevant consideration to bear in mind in
 12 reaching a decision on prosecution --

13 **A.** Yes.

14 **Q.** -- and plea?

15 **A.** Yes.

16 **Q.** Given that the Post Office acted as a perfectly
 17 at prosecutor and was both prosecutor and
 18 victim, would you agree that it was appropriate
 19 for the Post Office's business interests to,
 20 therefore, be a factor when deciding whether to
 21 accept a plea to a lesser offence?

22 **A.** Yes, but with the proviso that, where you are
 23 both the prosecutor and the victim, the need for
 24 that process to be transparent and the criteria
 25 that you're applying to be readily identifiable

35

1 circumstances which make a conviction of both
 2 theft and false accounting appropriate?

3 **A.** Certainly Lord Justice Sachs in *Eden* had
 4 concerns about that and I think I would side
 5 with him.

6 **Q.** Can we turn to plea bargaining, please. In
 7 paragraphs 171 to 177, which is on page 78 --
 8 thank you -- right up to paragraph 177, you
 9 outline the position so far as the CPS is
 10 concerned, in relation to the acceptance of
 11 pleas and, for reasons of time, I'm going to
 12 take that whole section as read.

13 **A.** Yes, I think it's right to say that the guidance
 14 is not just CPS-specific, in the sense that the
 15 proper approach to taking a plea to a lesser
 16 offence than that original charged or the
 17 alternative count on an indictment, the guidance
 18 in relation to that is given in decisions from
 19 the Court of Appeal, it's given in the guidance
 20 from the Farquharson committee, which speaks
 21 beyond the CPS to other prosecutors, as well.

22 **Q.** And, indeed, the *Attorney General's*
 23 *Guidelines* --

24 **A.** Yes.

25 **Q.** -- which speak to prosecutors, other than the

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1 becomes all the more important because, in
 2 a case brought by the CPS, it will be -- they
 3 have a set of criteria, not least in the
 4 *Attorney General's Guidelines* on the acceptance
 5 of pleas, that they will be applying in that
 6 process, of which the victim's view will be only
 7 a clearly defined part.

8 If the process is entirely in-house with the
 9 victim also being you, it -- unless it's
 10 similarly delineated, then it becomes difficult
 11 to be sure that the process is applying the
 12 interests of justice.

13 **Q.** Later in your report -- I'm not going to ask you
 14 to turn it up now -- you noted that the court in
 15 *Asif v Ditta*, made clear that the fact that
 16 a private prosecutor has a motive other than
 17 only the pursuit of justice for their actions,
 18 does not necessarily make it improper for them
 19 to bring a prosecution?

20 **A.** No, absolutely.

21 **Q.** Given that in the cases that the Post Office
 22 prosecuted, the Post Office was also the victim,
 23 are you suggesting that, even if the Post Office
 24 did not allow this to override its other
 25 prosecutorial functions, it was not entitled to

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1 consider whether continuing an investigation or
2 prosecution was in its own business interests in
3 deciding whether to proceed with the
4 investigation?

5 **A.** No, it was clearly entitled to take that into
6 account as a factor but it could not be the
7 reason, either to prosecute or not.

8 **Q.** Is it right that the interests of the business
9 in the relevant policies are identified as only
10 one of the factors to be considered?

11 **A.** Yes. Although often they're the first.

12 **Q.** Thank you. Can we turn to the initiation of
13 proceedings. That can come down from the
14 screen, please.

15 For reasons you explained yesterday, the
16 Post Office did not charge suspects but instead
17 initiated process by laying an information in
18 the Magistrates Court, seeking the issue of
19 a summons?

20 **A.** Yes.

21 **Q.** You address, if we turn up, at page 83, between
22 paragraphs 185 at the foot of the page through
23 to paragraphs 189, the procedural rules --

24 **A.** Yes.

25 **Q.** -- for the issuing of a summons and the laying

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1 a duty of candour. Having reviewed the relevant
2 authorities, he expressed that duty (at
3 paragraph 25) as: '... one of "full and frank
4 disclosure" which "necessarily includes a duty
5 not to mislead the judge in any material way"
6 and which requires the disclosure to the court
7 of "any material which is potentially adverse to
8 the application" or "might militate against the
9 grant" or which "may be relevant to the judge's
10 decision, including any matters which indicate
11 that the issue ... might be inappropriate". As
12 Lord Justice Hughes (as he then was) memorably
13 put it *In re Stamford International Bank Limited*
14 at [paragraph 191]: "... In effect a prosecutor
15 seeking an ex parte order must put on his
16 defence hat scant him what, if he were
17 representing the defendant or third party with
18 a relevant interest, he would be saying to the
19 judge, and, having answered that question, that
20 is what he must tell the judge ...".'

21 So that's the explanation as to the law on
22 the duty of candour when applying for a summons?

23 **A.** Yes.

24 **Q.** Mr Justice Sweeney then considered, in your
25 paragraph 191, you tell us, how the duty

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1 of an information.

2 **A.** Yes.

3 **Q.** I'm not going to ask you to repeat those and I'm
4 not, indeed, going to summarise them. I'm just,
5 instead, going to take those passages of your
6 report as read. But on page 86, you tell us in
7 paragraph 190, about some additional holdings or
8 dicta of Mr Justice Sweeney in the *Kay* case that
9 we referred to yesterday?

10 **A.** Yes.

11 **Q.** Can we look, please, at paragraph 190. You say
12 that:

13 "Having identified that framework ..."

14 That's the legal framework that I've just
15 skipped over.

16 **A.** Yes.

17 **Q.** "... Mr Justice Sweeney then identified the
18 duties of a private prosecutor in relation to
19 the making of such an application ..."

20 That's the application for an issue of
21 a summons?

22 **A.** Yes.

23 **Q.** "... so as to ensure that the Court was able
24 properly to approach those considerations. He
25 observed that any applicant for a summons owed

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1 operated. At paragraph 37 of his judgment he
2 said, quote:

3 "... 'in order to enable the court to
4 properly carry out its duty to consider whether
5 the application was vexatious, an abuse of
6 process or otherwise improper; to consider
7 whether to make further enquiries; to require
8 the claimants to be notified of the application;
9 and to hear the claimants' and the summons that
10 had been issued was quashed. He observed (at
11 paragraph 38): 'As this case demonstrates, the
12 grant of summonses, typically conducted ex
13 parte, can have far reaching consequences.
14 Compliance with the duty of candour is the
15 foundation stone upon which such decisions are
16 taken. In my view, its importance cannot be
17 overstated.'"

18 In paragraph 192 of your report, you address
19 the issue of the extent to which the duty of
20 candour is addressed in any Post Office policy.

21 **A.** Yes.

22 **Q.** You tell us that the:

23 "Post Office Conduct of Criminal
24 Investigations Policy, dated August 2013,
25 addressed the obtaining of a summons as the

40

1 mechanism for initiating proceedings [but] there
 2 is no reference ... to the duty of candour ..."
 3 **A.** No.
 4 **Q.** "The 'Summons and Cautioning' policy, dated
 5 October 2001, also addressed the obtaining of
 6 a summons to initiate criminal proceedings.
 7 That did not address the duty of candour ..."
 8 **A.** No.
 9 **Q.** You say:
 10 "This remained the case in the November 2005
 11 revision of the policy."
 12 Then, again:
 13 "... the Royal Mail 'Magistrates and Crown
 14 Courts Procedures' policy, issued in May 2013,
 15 and the 'Casework ...' policy, issued in June
 16 [2013] the procedure for obtaining a summons [is
 17 described], and the circumstances in which this
 18 is appropriate, but [neither refers] to the duty
 19 of candour."
 20 **A.** No, and so what I have done in paragraph 192 is
 21 set out as best I can every reference I could
 22 find to the initiating of proceedings by summons
 23 or the process of obtaining a summons, and so
 24 those are the examples I could find, and in none
 25 of them was there any reference to that

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1 who is performing the prosecution undertaking
 2 their duties properly because it's a judicial
 3 process not a tick-box exercise.
 4 **Q.** Can you calibrate the level of your concern for
 5 us that the foundation stone, whose importance
 6 could not be overstated by Mr Justice Sweeney,
 7 was not referred to in any of the policy or
 8 training material that was shown to you?
 9 **A.** Well, clearly the central question is whether
 10 that foundation of the process was recognised by
 11 the Post Office in undertaking this task.
 12 That's to be judged by what they actually did
 13 but the fact that nowhere in the materials that
 14 I had seen did they reference that duty at all
 15 is a very real concern but because it's
 16 difficult, where it's not written down anywhere,
 17 to be satisfied that they understood that's what
 18 they were meant to be doing or were doing.
 19 **Q.** Thank you. Can I turn to a separate topic,
 20 please. It will be out of order?
 21 **A.** Can I just mention, because it's been weighing
 22 on my conscience, that I corrected you as to the
 23 year of *Belmarsh Magistrates Court v Watts* and
 24 I was looking at two other cases, where they'd
 25 got it wrong and you'd got it right; it was 1999

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1 foundation stone duty.
 2 **Q.** The same applied to all of the training
 3 materials that addressed the issue of
 4 proceedings?
 5 **A.** Such that I saw, yes.
 6 **Q.** Yes. So does it follow that, in none of the
 7 documents that you have seen, was the duty of
 8 the Post Office to be candid with the court
 9 addressed?
 10 **A.** That's right.
 11 **Q.** Was that of concern?
 12 **A.** It was. The risk is that the obtaining of
 13 a summons is viewed as a purely procedural or
 14 administrative function, rather than being, as
 15 it is, a judicial exercise by a court and the
 16 court, to carry out that exercise, needs to
 17 consider the whole of the relevant
 18 circumstances. That is what the rules require
 19 of the court. But there's only one party
 20 involved in that process with the court and
 21 that's the prosecution, unless, exceptionally,
 22 the court itself decided to hear from the other
 23 side but they would only do that if they
 24 realised there was a need to.
 25 And so again, that goes back to the party

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1 and not 1992, I'm very sorry.
 2 **Q.** 8 February 1999, I think.
 3 **A.** I'm not going to argue with that on -- with you
 4 on that again.
 5 **Q.** Thank you. In fact, I think your argument was
 6 with Mr Justice Sweeney for a misquote?
 7 **A.** Yes, and I'll apologise to him in due course!
 8 **Q.** Yes, thank you. Can we turn to the separate
 9 topic of expert evidence and I'm taking this out
 10 of order. It's in your second report and we're
 11 interleaving it, essentially?
 12 **A.** Yes.
 13 **Q.** It comes more in the process sequence of events.
 14 Your expert report is at EXPG0000003.
 15 What I'm going to do if I may, Mr Atkinson,
 16 is seek to draw out from the report, rather than
 17 take you to passages within it --
 18 **A.** Yes.
 19 **Q.** -- some themes --
 20 **A.** Yes.
 21 **Q.** -- if I may. So the first topic is the duty of
 22 a prosecutor in first instructing an expert.
 23 **A.** Yes.
 24 **Q.** So we're here focusing on the prosecutor not the
 25 expert themselves.

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1 Before considering what duty a prosecutor
2 may have to ensure that the expert understands
3 his or her duties, would you agree that the
4 prosecutor must provide the expert with
5 instructions upon what it is that his or her
6 opinion is sought --

7 **A.** Yes.

8 **Q.** -- and should set out issues or questions that
9 the expert is expected to answer --

10 **A.** Yes.

11 **Q.** -- and should set out the material upon which
12 reliance has been placed in the prosecution,
13 concerning that particular issue or issues, and
14 which may be relevant to the questions which the
15 expert is expected to answer?

16 **A.** Yes.

17 **Q.** So they should describe the material, or list
18 it, and provide it?

19 **A.** Yes.

20 **Q.** Would you agree that, throughout the relevant
21 period, a prosecutor intending to rely on expert
22 evidence in criminal proceedings was under the
23 following obligations: firstly, to satisfy
24 themselves as to the expert's relevant
25 qualifications and expertise?

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1 court?

2 **A.** That is the question that I wrestled with in
3 this report. It is my view, borne out by the
4 practice of, by way of example, the Crown
5 Prosecution Service and the Health and Safety
6 Executive, that that is part of the prosecutor's
7 duty, because it is unquestionably part of the
8 prosecutor's duty to ensure that that is done by
9 an expert that they rely on.

10 **Q.** Fourthly, would there be a duty on a prosecutor
11 to satisfy themselves that the expert had,
12 firstly, understood and, secondly, complied with
13 their relevant duties to the court?

14 **A.** Yes, both because the Criminal Procedure Rules,
15 as I read them, required them to and, secondly,
16 because it was necessary for them to make sure
17 that had been done for them to be satisfied that
18 the evidence was going to be admissible, and
19 there was little point obtaining evidence from
20 an expert that wasn't actually going to go
21 anywhere near a courtroom.

22 **Q.** Fifthly, the prosecutor was under a duty, would
23 you agree, to satisfy themselves that any
24 material or literature, of which they are aware
25 and which may undermine the expert's

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1 **A.** Yes.

2 **Q.** Secondly, to satisfy themselves that the expert
3 had been appropriately instructed, including by
4 the provision of a relevant and detailed letter
5 of instruction or terms of reference?

6 **A.** Yes.

7 **Q.** You hesitated slightly?

8 **A.** I hesitate because, clearly, the instruction
9 needs to provide the expert with explicit
10 guidance as to what it is they're being asked to
11 do and what material they're being asked to
12 consider in doing it, and that clearly is
13 detail. It would be in a form of letter of
14 instruction. It wouldn't have to necessarily be
15 in a conventional letter. It could be done in
16 an email format but it would need to be done in
17 a written format, because the expert, in due
18 course, would have a duty to make clear what
19 their instructions had been, and so, just by way
20 of a personal example, setting out, as I do at
21 the beginning of my report, what it was I was
22 being asked to report on.

23 **Q.** Yes. The prosecutor would be under a duty,
24 would this be right, to inform the expert as to
25 their, ie the expert's, relevant duties to the

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1 conclusions, has been reviewed by the
2 prosecution and, if appropriate, disclose to the
3 defence and the expert?

4 **A.** Yes.

5 **Q.** Would you agree that a prosecutor was under
6 a duty to bring to the attention to the defence
7 and to the court any material of which the
8 prosecutor was aware, which was reasonably
9 capable of undermining the expert's opinions --

10 **A.** Yes.

11 **Q.** -- and that might be matters concerning the
12 expert's qualifications and experience --

13 **A.** Yes.

14 **Q.** -- the factual basis on which the expert had
15 reached his or her opinion --

16 **A.** Yes.

17 **Q.** -- and, more generally, the expert's
18 credibility?

19 **A.** Yes, and so, by way of example, if an expert who
20 you proposed to rely on has been criticised
21 for -- in ways that undermine their expertise or
22 their credibility in a previous court case, you
23 are required to disclose that.

24 **Q.** So drawing those threads together, if a party is
25 obtaining expert opinion and proposes to call

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1 a person as an expert witness, the purpose of
2 that is to obtain their opinion on an issue or
3 a question which has been identified to the
4 expert?

5 **A.** Yes.

6 **Q.** Can we turn to the duty to ensure that experts
7 understand their duties. I think you address
8 this in paragraph 63 of your report. Page 30,
9 paragraphs 62 and 63. You tell us that:

10 "There is no question but that the law does
11 impose duties on expert witnesses, and the
12 expert owes their duty to the court to ensure
13 their compliance with these duties.

14 "This was well established in the civil
15 context through, for example, the *Ikarian Reefer*
16 case, and in the criminal context", and you name
17 couple of other decisions.

18 **A.** Yes.

19 **Q.** You say:

20 "It follows that by at least 2005-2006" --

21 **A.** Which is the date of those cases.

22 **Q.** Yes, of *Harris* and *B(T)*.

23 **A.** Yes.

24 **Q.** -- "any investigative or prosecutorial authority
25 should have been aware that any expert

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1 **A.** Yes, and the first is because of the second.

2 **Q.** Then, does it follow that they, the prosecutor,
3 is therefore duty-bound to inform them of their
4 duties --

5 **A.** Yes.

6 **Q.** -- because, otherwise, there's a risk that the
7 expert may not know what their duties entail?

8 **A.** No, and the bedrock of that is -- so it is
9 understood -- is that the expert is
10 an independent voice. They are there to bring
11 their expertise, independent of who is
12 instructing them, to bear on the issue they're
13 instructed to give their expertise about. And
14 they owe their duty not to the person who has
15 instructed them but to the court in which
16 they're giving evidence. And it is a particular
17 position that carries with it particular
18 responsibilities, and they are of such
19 importance that it's essential that they
20 understand them.

21 **Q.** Was there any different approach or any added
22 duty where the proposed expert was not
23 functionally independent from one of the parties
24 in the case?

25 **A.** I think, in that situation, the requirement to

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1 instructed owed their primary duty to the court,
2 and that they were required to meet a series of
3 requirements as to the content of their report,
4 their underlying material and their conclusions.

5 This was supplemented, following the
6 introduction of the 2010 Criminal Procedure
7 Rules, by the duties of experts," was set out
8 therein.

9 You say:

10 "I have not identified in any Post Office
11 policy documents with which I have been provided
12 any analysis of these obligations, or their
13 implications for Post Office investigations."

14 Does that include both policy documents and
15 training documents?

16 **A.** Yes. There's very little reference to expert
17 evidence at all in the material that I've seen.

18 **Q.** Would you go further and say that, if
19 a prosecutor wishes to rely on an expert, the
20 prosecutor is bound to ensure that the
21 individual concerned actually understands that
22 they are to give evidence in the capacity of
23 an expert --

24 **A.** Yes.

25 **Q.** -- and that that carries with it special duties?

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1 make sure they understood the role that they
2 were being instructed in and the role that they
3 would be performing in the proceedings was all
4 the more important, because their independence
5 in such circumstances needed properly to be
6 understood by them. They were not helping their
7 employer; they were giving independent evidence
8 to a court that it owed -- that they owed a duty
9 to.

10 **Q.** So dealing with issues at a level of generality
11 at the moment, without going to the facts of any
12 of the 20-odd cases that you're to come back to
13 speak about --

14 **A.** Yes.

15 **Q.** -- in the case of the Post Office seeking to
16 call witnesses from Fujitsu Services Limited to
17 provide opinion evidence, would you say whether
18 they were subject to that added duty or
19 particular duty that you've just mentioned to
20 ensure that such individuals knew that they were
21 being called in the capacity of expert and,
22 therefore, the duties to which they were
23 subject?

24 **A.** Yes.

25 **Q.** Would that be because witnesses from Fujitsu

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1 wouldn't be akin to a conventional expert who
2 was accustomed and trained to providing expert
3 evidence and was part of, for example, an expert
4 witness institution or a professional body, and
5 so forth?

6 **A.** Well, it would be proper practice with that
7 latter category of person to make sure, even if
8 you were preaching to the choir, to make sure
9 they understood what their duties and
10 obligations were, even if that's what they did
11 for a living and they knew them already. You
12 were duty-bound to make sure they did, by
13 telling them.

14 And where there was a risk that they may not
15 appreciate that that is the capacity in which
16 they are being asked to give an opinion, then
17 it's all the more reason to make it absolutely
18 crystal clear to them that that is the capacity
19 in which they're being asked for their opinion
20 and that they have duties, as a result of that.

21 **Q.** Might that risk be triggered, especially where
22 the person involved, their day job is not being
23 an expert witness, they weren't a conventional
24 expert in the sense that they were completely
25 independent of the subject matter that they were

53

1 you.

2 This is from the current 2023 edition --

3 **A.** Yes.

4 **Q.** -- I should make clear.

5 Can we turn to page 14, please -- I'm told
6 it's only nine pages. Can you scroll forward,
7 please, to the bottom page number, which is
8 1694. At the bottom of the page there's a page
9 number, 1694. I think what that means is
10 somebody has scanned in every other page, just
11 the odd pages, not the even ones. I'm looking
12 at an even page number.

13 **A.** I have the page as well, if that helps.

14 **Q.** I'll read it out. I'm reading from page 1694,
15 one of the odd page numbers in Archbold, at
16 paragraph 10.25, and it says:

17 "It is the duty of an expert instructed by
18 the prosecution to act in the cause of justice.
19 It follows that if an expert has carried out
20 a test which casts doubt on his opinion or if
21 such a test has been carried out in his
22 laboratory and is known to him, he's under
23 a duty to disclose this to the solicitor
24 instructing him, who has a duty to disclose it
25 to the defence. This duty exists irrespective

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1 going to speak about --

2 **A.** No, that's right.

3 **Q.** -- and, indeed, that they were going to speak
4 about some of their own work?

5 **A.** Yes.

6 **MR BEER:** Sir, I wonder whether we could take the
7 morning break there. I appreciated we started
8 seven or eight minutes late this morning but
9 that would be a convenient moment.

10 **SIR WYN WILLIAMS:** That's fine, Mr Beer. What time
11 shall we recommence?

12 **MR BEER:** 11.40, please.

13 **SIR WYN WILLIAMS:** Very well, fine.

14 **MR BEER:** Thank you.

15 (11.23 am)

(A short break)

16 (11.40 am)

17 **MR BEER:** Sir, good morning. Can you continue to
18 see and hear us?

19 **SIR WYN WILLIAMS:** Yes, I can, thank you.

20 **MR BEER:** Thank you.

21 Mr Atkinson, can we turn up, please,

22 RLIT0000172. This is an extract from *Archbold*
23 *Criminal Pleading Evidence and Practice*. It's
24 going to come up on the screen for you. Thank

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1 of any requests by the defence. It is not

2 confined to documentation on which the opinion
3 or findings of the expert are based. It extends
4 to anything which might arguably assist the
5 defence.

6 "Moreover, it is a positive duty which, in
7 the context of scientific evidence, obliges the
8 prosecution to make full and proper enquiries
9 from forensic scientists to ascertain whether
10 there is discoverable material (see *Ward [1993],*
11 *96 Criminal Appeal Reports 1*)."

12 That statement of the law, although it's
13 included in a 2023 edition of *Archbold*, would
14 you help us, does that statement of the law
15 cover the entirety of the relevant period?

16 **A.** Yes.

17 **Q.** So it tells us that an expert instructed by the
18 prosecution has a duty to act in the cause of
19 justice. What do you understand that to mean?

20 **A.** That the -- an expert owes their duty to the
21 court to do what they can through their
22 expertise and their opinion, to ensure that that
23 court performs its function correctly in terms
24 of the acting, where it's a criminal court, in
25 the interests of justice. And so, if the expert

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1 is aware of material that would undermine either
2 their own expert opinion or the premise, as
3 communicated to them in their instructions, of
4 the prosecution, then they're duty bound to say
5 so.

6 **Q.** Secondly, it tell us that the prosecution has
7 a duty to make full and proper enquiries --

8 **A.** Yes.

9 **Q.** -- of prosecution expert witnesses, in order to
10 ascertain whether there is any discoverable
11 material. Are you aware of any Post Office
12 policy guidance or training, which reflected
13 either of those two principles, in the documents
14 that you have seen?

15 **A.** No, not that I can think of.

16 **Q.** Can I turn, please, to the necessary contents of
17 an expert report. Page 8 at paragraph 15 of
18 your Volume 1A report, so that's EXPG0000003.
19 Page 8, thank you.

20 You cite a summary of the duties of experts
21 that originally appeared in the *Ikarian Reefer*
22 case --

23 **A.** Yes.

24 **Q.** -- a civil case --

25 **A.** Yes.

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1 in 2006; they were recognised already.

2 **Q.** One of the seven requirements was a statement to
3 the effect that the expert had complied with his
4 or her duty to the court to provide independent
5 opinion by way of objective unbiased opinion in
6 relation to the matters within his or her
7 expertise; is that right?

8 **A.** Yes, number 6 on the list.

9 **Q.** So by this time, at least 2006, there ought to
10 have been set out on the face of the report
11 a statement by the expert that they had complied
12 with these duties?

13 **A.** Yes.

14 **Q.** Would you agree that these requirements aren't
15 related to the format of an expert report but go
16 instead to whether substantively the report and
17 the expert have conformed to the fundamental
18 requirements of an expert and an expert report?

19 **A.** Absolutely.

20 **Q.** So they're issues of substance and not form?

21 **A.** Yes.

22 **Q.** Given the characterisation of the matters to be
23 included was that they were necessary
24 inclusions, would that mean that a failure to
25 include them and a failure to comply with them

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1 **Q.** -- as essentially transposed into the common
2 law, insofar as it affects criminal proceedings;
3 is that right?

4 **A.** Yes.

5 **Q.** So what are described as the necessary
6 inclusions in an expert report, and there are
7 seven of them that are then set out. From what
8 date were these necessary inclusions in
9 an expert report in criminal proceedings?

10 **A.** The *Ikarian Reefer* case, which was a civil
11 decision but was a decision in 1993, was seeking
12 to set out that which it was already recognised,
13 in effect, were the necessary inclusions but it
14 conveniently set them out together. They were
15 then picked up on by the Court of Appeal in 2005
16 in a case called *Harris*, which was a decision of
17 Lord Justice Gage, who referred to them as being
18 established as the necessary inclusions and then
19 in this case, *B(T)* in a meeting of minds, Lord
20 Justice Gage, who had given the decision in
21 *Harris* was sitting with Mr Justice Cresswell who
22 had given the decision in *Ikarian Reefer*, and
23 they restated them.

24 So, certainly, by this time, by 2006, these
25 were necessary inclusions, but they were not new

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1 may render a report inadmissible or at least
2 capable of being excluded from evidence under
3 Section 78 of the Police and Criminal Evidence
4 Act?

5 **A.** Yes, and I should say that, if they were not
6 included in written form but it was possible for
7 the party seeking to rely on the expert to
8 demonstrate that they had, nevertheless, been
9 complied with, then that may not result in the
10 exclusion of the evidence. So it is both the
11 substance of it and the form of it.

12 **Q.** So the significance of *Harris* and *B(T)*, *Thomas*
13 I think is the full name of the case, lies not
14 just in the reiteration of the application of
15 the *Ikarian Reefer* principles to the criminal
16 law, but also that they became required to be
17 stated content in an expert report --

18 **A.** Yes.

19 **Q.** -- and emphasise the need for the expert to
20 demonstrate an understanding of what their duty
21 of interpreters entailed?

22 **A.** Yes, and the fundamental nature of them is
23 underlined by the fact that they were then
24 incorporated into the next major review of the
25 Criminal Procedure Rules, so it was considered

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1 that these were fundamentals that needed to be
 2 included in any expert report.

3 **Q.** On that, it might be a footling point, but in
 4 your report you say that Criminal Procedure
 5 Rules Part 24 was replaced by Criminal Procedure
 6 Rules Part 33 in 2010. I'm not going to go
 7 through all of the detail but might it be the
 8 case that Criminal Procedure Rules Part 33 was
 9 introduced with effect from 6th November 2006,
 10 ie immediately after -- the year after *Harris*
 11 and *B(T)*?

12 **A.** Certainly, again by the time -- again, this was
 13 an area where I was reliant on what I could
 14 find, certainly by 2010 Rules 33 were there,
 15 which incorporated this. I am perfectly willing
 16 to accept that they appeared earlier than that.
 17 Indeed, it would make sense that they did.

18 **Q.** For aficionados, it's Schedule 1 of the *Criminal*
 19 *Procedure (Amendment Number 2) Rules 2006/2636*,
 20 which introduced by their Schedule 1 the new
 21 Criminal Procedure Rules part 33, coming into
 22 force on 6 November 2006.

23 **A.** (*The witness nodded*)

24 **Q.** Thank you. That can come down from the screen,
 25 thank you.

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1 helpfully included, and tell me whether you
 2 agree or disagree with my summary or want to
 3 supplement it.

4 Firstly, the relevant provisions of the
 5 CPIA, the Act itself, relating to disclosure,
 6 and that's principally part 1 of the CPIA, are
 7 of deliberately wide application, so that they
 8 apply to, they capture, any criminal
 9 investigation and they therefore apply directly
 10 to the Post Office's criminal investigations and
 11 prosecutions at all times throughout the
 12 relevant period?

13 **A.** Yes.

14 **Q.** Secondly, the golden rule, as it was described,
 15 was that the Act and fairness required full
 16 disclosure of all material held by the
 17 prosecution that weakened its case or
 18 strengthened the case for the defence?

19 **A.** So, as originally enacted, it focused on
 20 material that would undermine the prosecution or
 21 that might undermine the prosecution case. From
 22 at least 2005, it also addressed material that
 23 might assist the defence case.

24 **Q.** Thank you for that qualification. Then,
 25 thirdly -- and we can turn up a paragraph for

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1 Can we turn to the topic of disclosure --

2 **A.** Yes.

3 **Q.** -- moving away from expert evidence. Can we go
 4 back to your first report, EXPG0000002, and turn
 5 to page 95, please. It's at the foot of the
 6 page under the heading "Disclosure", and you
 7 tell us in paragraph 213 that:

8 "The prosecution's obligations as to the
 9 disclosure of unused material to the defence is
 10 governed through a combination of the CPIA, the
 11 Code issued under the CPIA and the *[Attorney*
 12 *General's] Guidelines*."

13 **A.** Yes.

14 **Q.** Then in paragraphs 214 to 217, you tell us about
 15 the history which led to that position,
 16 including instances of injustice caused by
 17 material non-disclosure by the prosecution?

18 **A.** Yes.

19 **Q.** I'm going to take those paragraphs as read, if
 20 I may.

21 **A.** Yes, of course.

22 **Q.** Then from paragraph 218 onwards, on page 98, you
 23 tell us about the application and operation of
 24 the CPIA. Again, can I try and summarise this
 25 to cut through the material that you've

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1 this because it is best that I read it, rather
 2 than try and summarise it, it's on page 99.
 3 Paragraph 224, at the foot of the page.

4 "It follows ... that the prosecutor's duty
 5 arises from material in his or her possession,
 6 rather than material in the possession of
 7 a third party. The prosecutor's obligation to
 8 disclose material in the hands of third parties
 9 thus only arises if and when that material has
 10 come into the possession of the prosecutor and,
 11 at this early stage, when, in the opinion of the
 12 prosecutor, it might undermine the prosecution's
 13 case. That is the clear import of section 3.
 14 The procedure for ... seeking to obtain material
 15 from third parties is governed not by the CPIA
 16 itself but, as will be seen, by the *[Attorney*
 17 *General's] Guidelines*. The Act does not,
 18 therefore, identify the test to be applied when
 19 consideration is given to whether third party
 20 material should be obtained."

21 **A.** Yes.

22 **Q.** Then, fourthly, the Act made provision for
 23 continuing duties of disclosure in slightly
 24 different terms as before 4 April 2005, as
 25 opposed to all times after that --

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1 A. Yes.
 2 Q. -- including in response to a defence statement?
 3 A. Absolutely.
 4 Q. But there was a continuing duty of disclosure
 5 throughout the relevant period?
 6 A. Yes, and so the presumption being, therefore,
 7 that, after disclosure had been made by
 8 prosecution, the defence would set out the
 9 nature of their case in a document, the defence
 10 statement, and that the prosecution would then
 11 respond to that with any disclosure that arose
 12 from it, but that, whether that defence document
 13 was received or not, there was still a duty on
 14 the prosecution to keep their disclosure under
 15 review.
 16 Q. Thank you. Then the second source of obligation
 17 is the Code?
 18 A. Yes.
 19 Q. I think you tell us that the Code makes three
 20 additional points that you identify in your
 21 paragraph 232 to 235. That's page 103, please.
 22 232 at the foot of the page. You tell us:
 23 "The Code [this is the Code under the CPIA]
 24 then addresses the interaction between the
 25 investigation and the prosecution, and between

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1 "The second area is once a schedule of
 2 material has been produced. The disclosure
 3 officer is required [see paragraph 7.1] to
 4 provide that schedule to the prosecutor when
 5 submitting the case to them and to draw to the
 6 prosecutor's attention 'any material
 7 an investigator has retained (whether or not
 8 listed on a schedule) which may satisfy the test
 9 for prosecution disclosure in the Act, and
 10 should explain why he has come to that view.'
 11 A. So this is, in the three Rs that we talked about
 12 yesterday -- and I'll try and get them right
 13 this time -- of record, retain and reveal, this
 14 is the reveal stage where the investigator is
 15 setting out the material that might fall to be
 16 disclosed for the prosecutor to then carry out
 17 a review of, and it's an essential audit and
 18 safeguard to make sure that disclosure is
 19 undertaken properly, and that the investigator
 20 has been doing their job properly.
 21 Q. Over the page, please, at 233, you make a third
 22 point:
 23 "Additionally, the disclosure officer is
 24 required to provide any of the following not
 25 otherwise included in the above submission:

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1 those responsible for each ... The first area is
 2 in relation to the obtaining of advice.
 3 Paragraph 6.1 ... states 'The officer in charge
 4 of the investigation, the disclosure officer or
 5 an investigator may seek advice from the
 6 prosecutor about whether any particular item of
 7 material may be relevant to the investigation'.
 8 So what's a point that you're making there,
 9 by reference to the Code?
 10 A. So what the Code seeks to do in this respect is
 11 to make the disclosure process identified in the
 12 Act work by identifying those who are playing
 13 roles in that process and how they should work
 14 with each other and, in this particular respect,
 15 is dealing with the situation where those
 16 involved in the investigation, who have duties
 17 in terms of the identification of material that
 18 may be relevant and therefore may be
 19 disclosable, should have recourse to the
 20 prosecutor to get their advice about anything
 21 they're uncertain about, so that there is that
 22 dialogue and that they should understand that
 23 uncertainty should result in the seeking of
 24 advice.
 25 Q. You continue:

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1 'information provided by an accused person which
 2 indicates an explanation for the offence with
 3 which he has been charged; any material casting
 4 doubt on the reliability of a confession; any
 5 material casting doubt on the reliability of
 6 a prosecution witness; any other material which
 7 the investigator believes may satisfy the test
 8 for prosecution disclosure in the Act'.
 9 Then you comment:
 10 "This is an important requirement, because
 11 it envisages that material that undermines the
 12 investigation in important respects, such as
 13 undermining the reliability of a key aspect of
 14 the case against an accused, will be volunteered
 15 to the prosecutor at the outset, and flagged up
 16 as such."
 17 A. Yes, and because the prosecutor needs to assess
 18 the reliability of evidence as part of their
 19 decision as to charge and their continuing
 20 review of that and because the prosecutor has to
 21 ensure that there is disclosure of material that
 22 undermines or might undermine the prosecution
 23 case to the defence, the upfront nature of this
 24 requirement, that the investigation is
 25 volunteering material in those categories or

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1 relevant to those categories, the prosecutor is
 2 of central importance.

3 **Q.** Thank you. Can we go to the third source of law
 4 or the third obligation, namely the *Attorney*
 5 *General's Guidelines* on disclosure. You address
 6 these at page 110 of your report --

7 **A.** Yes.

8 **Q.** -- under the heading "The AG's Guidelines".
 9 This is a very substantial section of your
 10 report.

11 **A.** Yes.

12 **Q.** It runs right up until paragraph 290. Again,
 13 some summaries, if I may --

14 **A.** Yes.

15 **Q.** -- to see if you agree or disagree, before
 16 looking at some of the content of each iteration
 17 of the *Guidelines*. Firstly, the *Guidelines* were
 18 introduced in 2000 and applied throughout the
 19 relevant period being examined by the Inquiry?

20 **A.** Yes.

21 **Q.** Secondly, would you agree that the purpose of
 22 the *Guidelines* was stated to be improving the
 23 operation of the arrangements for disclosure
 24 and, in particular, addressing the roles of the
 25 participants in the disclosure process, and that

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1 of what the requirements were and why they
 2 mattered, just serves to underline how important
 3 the *Guidelines* have always been as a central
 4 part of the disclosure framework.

5 **Q.** If we can turn, then, and look at some content
 6 of the *Guidelines*. Starting with the 2000
 7 iteration, and that's page 112, and between
 8 paragraphs 254 and 264, you address the content
 9 of the 2000 *Guidelines*?

10 **A.** Yes.

11 **Q.** Are there any particular points that you would
 12 wish to emphasise content of the 2000
 13 *Guidelines*?

14 **A.** Perhaps the most striking thing about them is --
 15 which I suppose in one sense is unsurprising,
 16 given they're written by the Attorney General,
 17 who has a supervisory role in relation to
 18 prosecutions -- that they are very clear as to
 19 the responsibilities and duties of prosecutors
 20 in order to make sure that disclosure works
 21 properly, which involves not only their own
 22 decision making but their superintendence and
 23 supervision of those who have undergone the
 24 investigation before it reaches them.

25 **Q.** Thank you. I'm going to take the content as

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1 statement was made after research had been
 2 undertaken as to the operation or misoperation
 3 of the CPIA?

4 **A.** Yes, and so it had been recognised, and the CPIA
 5 had not been operating for that long, but it had
 6 been identified that that it in itself, and the
 7 Code under it in itself, were proving not to be
 8 sufficient to make sure that its objectives were
 9 being satisfied and proper disclosure was being
 10 made.

11 **Q.** The third point is that the *Guidelines* applied
 12 to prosecutions commenced at the instigation of
 13 the Post Office, just as they did to
 14 prosecutions commenced by other prosecutors?

15 **A.** Yes.

16 **Q.** Fourthly, the importance of the compliance with
 17 the *Guidelines* with the emphasised in a series
 18 of cases, time and again, throughout the
 19 relevant period?

20 **A.** Yes.

21 **Q.** I'm not going to take you to the purple prose
 22 used by the courts on each occasion but is that
 23 summary sufficient?

24 **A.** Absolutely, and the fact that the courts had so
 25 much recourse to the *Guidelines* as an exposition

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1 read in the interests of time.

2 **A.** Yes, of course.

3 **Q.** Can we move to the 2005 iteration of the AG's
 4 *Guidelines*, that's page 117?

5 **A.** Yes.

6 **Q.** You address the 2005 *Guidelines* between
 7 paragraphs 265 to 274 and, again, I'm afraid
 8 it's a rather open question: are there any
 9 particular points that you would emphasise about
 10 the 2005 iteration of the *Guidelines*?

11 **A.** So the 2005 *Guidelines* was brought in because
 12 the test for disclosure had been changed by the
 13 Criminal Justice Act 2003, so that it involved
 14 both material that might undermine the
 15 prosecution case and material that might assist
 16 the defence case, and so it was designed to
 17 address that.

18 It was designed also to engender a greater
 19 dialogue in relation to disclosure, so that it
 20 wasn't just a matter of prosecution decisions in
 21 abstract but also prosecution decisions taking
 22 account of the defence case as identified, for
 23 example, in a defence statement.

24 And thirdly, it was the beginnings of real
 25 attempts to grapple with the difficulties of

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1 disclosure, where there's material held on
2 computers and, therefore, the review of that
3 material for disclosure is a more arduous task.

4 **Q.** Thank you. Again, I'm going to take the content
5 of the *Guidelines* as read.

6 I think the next version was 2013, which is
7 right at the end of our relevant period --

8 **A.** Yes.

9 **Q.** -- and you address that at paragraph 285 and
10 following. I'm therefore not going to ask you
11 for any supplemental views on that. I think
12 it's right that, between the second and the
13 third edition, *Supplementary Guidelines* on
14 digitally stored material were issued --

15 **A.** Yes.

16 **Q.** -- in 2011?

17 **A.** Yes.

18 **Q.** You address those at page 120, at paragraph 275
19 and following. Again, the open question:
20 anything in particular on the *Supplementary*
21 *Guidelines* that you would wish to emphasise
22 beyond that which is in your report?

23 **A.** So again, this is specific guidance which is
24 designed to address how an investigator and how
25 a prosecutor are to go about complying with

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1 connected to the offence' to be included in the
2 investigation report."

3 Just stopping there, could you ascertain
4 from the policy whether the investigation report
5 was itself a disclosable document?

6 **A.** There was debate within the paperwork that I've
7 seen as to whether it was or not. It's
8 a feature of many of the 20-odd cases that I'll
9 be coming back to talk about in relation to
10 Volume 2 but it's effectively the document that
11 went from the investigator to those who made
12 decisions as to whether the person under
13 investigation should be suspended and whether
14 the person under investigation should be
15 prosecuted, and was usually the document that
16 appeared to be relied on by the person making
17 the charging decision.

18 And it's not clear from what I've seen as to
19 whether it was regularly disclosed and there are
20 certainly instances where it wasn't, and
21 a decision was taken that it wasn't disclosable.

22 **Q.** Thank you. You continue that the policy adds:
23 "... 'the issue of dealing with information
24 concerning procedural failures is a difficult
25 one. Some major procedural weaknesses, if they

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1 their obligations, where there is a very large
2 amount of material stored on a computer. It's
3 designed to be practical to make that achievable
4 but underlying, of course, that there is the
5 obligation to do it and to ensure that a fair
6 result drives from that process.

7 **Q.** Thank you. So we've looked at the three sources
8 of law, as I've described them. Can we turn to
9 the Post Office's policies.

10 **A.** Yes.

11 **Q.** You address these from paragraph 237 onwards at
12 page 105, please. If we can look at page 105.
13 You address the Post Office policies between
14 paragraphs 237 and 243?

15 **A.** Yes.

16 **Q.** In 237, you tell us that the Post Office
17 Casework Management policy of March 2000 makes
18 reference to the CPIA at a number of points:
19 "It is of note that paragraph 3.3
20 specifically refers to the retention periods for
21 evidential material ... Both in the 2000
22 iteration and the February 2002 [iteration],
23 this policy required full details of any
24 'failures in security or operational procedures
25 are identified which may or may not be directly

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1 become public knowledge, may have an adverse
2 effect on our business. They may assist others
3 to commit offence against our business,
4 undermine a prosecution case, bring our business
5 into disrepute, or harm relations with major
6 customers. Unless the offender states that he
7 is aware that accounting weaknesses exist and
8 that he took advantage of them, it is important
9 not to volunteer the option to the offender
10 during interview."

11 Just in relation to the sentence that "if
12 weaknesses become public knowledge they may have
13 an adverse effect on our business because they
14 may undermine a prosecution case", is that
15 a reason not to reveal them?

16 **A.** No, if there's material that undermines
17 a prosecution case then it is disclosable rather
18 than the contrary.

19 **Q.** Is the fact that making public knowledge "may
20 bring our business into disrepute" a reason for
21 non-disclosure?

22 **A.** No.

23 **Q.** Is the fact that "revelation may harm relations
24 with major customers" a reason for
25 non-disclosure?

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1 **A.** No, and so there are situations, taking a step
 2 back from this, where there can be competing
 3 public interests where, for example, revealing
 4 failings in an investigative technique would
 5 have the consequence of revealing what that
 6 investigative technique was, which might
 7 frustrate its use in other cases, and it would
 8 a decision as to where the public interest lay.
 9 And that might involving recourse to a judge for
 10 the judge to decide whether the interests of
 11 justice required its disclosure.

12 But you are there talking about things that
 13 might undermine the effectiveness of the
 14 criminal investigation process generally. You
 15 are not talking about issues of reputation or
 16 customer relations.

17 **Q.** Moving to paragraph 238, you tell us that the
 18 "Disclosure of Unused Material -- Criminal
 19 Procedure and Investigations Act 1996 Code of
 20 Practice" that was issued in May 2001 was three
 21 pages long. It addressed the roles of the
 22 investigator and disclosure officer, without
 23 specific cross-reference to the CPIA Code. You
 24 tell us that:

25 "An investigator (paragraph 3.2) is someone
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1 should be identified to the defence."

2 Lastly:

3 "The disclosure officer should ensure the
 4 description of unused material is sufficient for
 5 the prosecutor to review it, and should draw the
 6 prosecutor's attention to any material about
 7 which they are in doubt."

8 In relation to the point that the disclosure
 9 officer and the investigator will normally be
 10 the same person, would you agree that the CPIA
 11 Code does allow for this --

12 **A.** Yes.

13 **Q.** -- and allows the officer in the case and the
 14 disclosure officer to be the same person?

15 **A.** Yes.

16 **Q.** Would you agree that, even in cases investigated
 17 by the police and prosecuted by the CPS, for
 18 many cases, and perhaps the majority of more
 19 minor or smaller cases, the disclosure officer
 20 would regularly be the officer in the case?

21 **A.** Yes.

22 **Q.** Given that it may be common practice for the
 23 functions to be performed by the same police
 24 officer in many cases, prosecuted by the CPS --
 25 and we're here dealing with a private prosecutor

1 [who is] 'involved in the conduct of a criminal
 2 investigation involving Consignia', who has
 3 a duty in particular to record and retain
 4 information. They share a duty to the
 5 disclosure officer to 'be fair and objective and
 6 must work together with prosecutors to ensure
 7 that disclosure obligations are met'."

8 Over the page:

9 "The disclosure officer is the person
 10 'responsible for examining material retained
 11 during an investigation, revealing material to
 12 Legal Services during the investigation and ...
 13 certifying to Legal Services that he has done
 14 this'."

15 You say, and it's a point you made
 16 yesterday, that, by contrast to the CPIA:

17 "... the policy proceeds on the basis that
 18 the investigator and disclosure officer will
 19 'normally' be the same person".

20 **A.** Yes.

21 **Q.** The policy states that:

22 "The disclosure officer should inspect, view
 23 or listen to all material retained, saved where
 24 a large amount has been seized. In those
 25 circumstances, the existence of the material

1 and there's nothing in the CPIA to prevent it --
 2 would you accept that having the function of
 3 disclosure officer held by the investigating
 4 officer is neither contrary to the law nor
 5 practice, applicable to these private
 6 prosecutors during the relevant period?

7 **A.** Yes. What it -- I highlighted it because, first
 8 that it was predicated here as being normal
 9 rather than an option and, secondly, because of
 10 a concern that, in a case brought by the Crown
 11 Prosecution Service on the basis of
 12 an investigation by the police, there are still
 13 those two separate agencies involved, and so
 14 there is that independent scrutiny of the
 15 disclosure process by the CPS in those cases.

16 Where it is all being done by the same
 17 organisation, that there would be merit in there
 18 being more of a delineation of roles to ensure
 19 a proper scrutiny exercise, that was my only
 20 concern.

21 **Q.** Thank you very much. Can we just scroll forward
 22 to paragraph 240, please. Here you're dealing,
 23 as opposed to policies, with training material
 24 and you say that you have seen a range of
 25 training workbooks, along with the an undated

1 document entitled "Criminal Investigation",
 2 which addresses nine e-books, which represent
 3 the theoretical learning from the investigation
 4 foundation course. You say that, in
 5 combination, they show that there was no
 6 specific training in that package in relation to
 7 the CPIA or to disclosure. There was a workbook
 8 about investigators' notebooks.

9 Just stopping there, do investigators'
 10 notebooks seem to be a particular issue that
 11 crops up again and again in these policies?

12 **A.** Yes.

13 **Q.** It seems to be a particular focus of attention?

14 **A.** Yes.

15 **Q.** In any event, that did not refer to the duty of
 16 retention. It didn't refer to the CPIA, nor did
 17 it refer to the 2001 policy document?

18 **A.** No, that's right. I should mention, for
 19 completeness, that I have, in material recently
 20 provided to me, seen some further training
 21 material, including, I think, a 2010
 22 presentation on disclosure, although it was not
 23 clear to me who that presentation was intended
 24 for.

25 **Q.** Did that improve upon this training material

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1 Attorney General has issued new *Guidelines* on
 2 disclosure of unused material, the *Guidelines*
 3 clarify the responsibilities of investigators,
 4 disclosure officers, prosecutors and defence
 5 practitioners."

6 And that was the extent of the application
 7 of a detailed document in that policy -- of
 8 course, I don't know because I don't know what
 9 was on the database as to whether the guideline
 10 was there. When that disclosure of unused
 11 material policy was updated, the reference to
 12 the *Guidelines* was removed.

13 **Q.** So that's slightly counterintuitive?

14 **A.** Yes, and so there's -- I couldn't detect
 15 evidence of explicit updating of policy to
 16 reflect the *Guidelines* but I did detect the
 17 removal of the *Guidelines* from the policy.

18 **Q.** That can come down from the screen, thank you.

19 So is a summary, a high level summary, of
 20 the position that, although you have seen Post
 21 Office policies in relation to disclosure in
 22 investigations, you have not seen any
 23 prosecutorial policies in relation to
 24 disclosure?

25 **A.** There is reference within, both the 2001 and

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1 that you summarise in paragraph 240?

2 **A.** It took whoever it was given to through the CPIA
 3 obligations, in terms of the duty of disclosure,
 4 and so on, and made reference to the Code. It
 5 didn't, though, refer to the *Guidelines*, the
 6 *Attorney General's Guidelines*.

7 **Q.** Then lastly on this topic, if we can go forward,
 8 please, to page 120, and look at paragraph 274,
 9 this is after you've summarised the 2000 and
 10 2005 *AG's Guidelines*?

11 **A.** Yes.

12 **Q.** You then turn in this paragraph to see how well
 13 were they reflected in Post Office material and
 14 you tell us that, although the "Disclosure of
 15 Unused Material, CPIA 1996 Code of Practice"
 16 issued in May 2001 did allude to the original
 17 version of the *AG's Guidelines*, you hadn't seen
 18 any amended version of that policy following the
 19 2005 *Guidelines* until the 2010 revision. That
 20 2010 document referred to the 2005 *Code of*
 21 *Practice* but not the *AG's Guidelines* alongside
 22 it. No materials addressed this important
 23 revision to the *Guidelines*.

24 **A.** No, so the 2001 document said:

25 "In the light of the Human Rights Act, the

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1 2010 Disclosure of Unused Material policies, to
 2 what it described as "prosecutor's guidelines".
 3 They're half a page of bullet points which
 4 reflect aspects of that which is contained in
 5 a combination of the CPIA and the Code
 6 thereunder, but there is no separate, that I
 7 saw, separate prosecution guide -- policy as to
 8 how prosecutors were to undertake their
 9 disclosure responsibilities, their
 10 responsibilities for the supervision of the
 11 investigation and ensuring that disclosure was
 12 undertaken appropriately and fairly.

13 **Q.** We -- to update you -- now have a witness
 14 statement from a senior member of the Criminal
 15 Law Team, Rob Wilson, who in his statement says
 16 that:

17 "No guidance in relation to disclosure
 18 obligations was given in any prosecution policy
 19 documents. I believe that the policy and
 20 standards team within the Post Office Security
 21 were responsible for providing written guidance
 22 and training with input from me. It was felt
 23 that as the *Code for Crown Prosecutors* did not
 24 provide guidance on disclosure, that this should
 25 be dealt with in a separate document."

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1 Firstly, have you seen any policies that
2 were provided by the Post Office Policy and
3 Standards Team concerning disclosure obligations
4 to be discharged by prosecutors.

5 **A.** I don't think so. I can't think of any.

6 **Q.** Yes, thank you.

7 Can I turn to the topic of third-party
8 disclosure, please. You address this issue
9 between paragraphs 294 and 332 of your report,
10 starting on page 128. Again, some high level
11 points, if I may: is it right that you did not
12 identify any Post Office policies in the
13 relevant period that addressed the obtaining of
14 third-party disclosure --

15 **A.** That's right.

16 **Q.** -- and that applies both to investigative duties
17 and prosecutorial duties --

18 **A.** Yes.

19 **Q.** -- or duties owed by an investigator and
20 duties --

21 **A.** Of course.

22 **Q.** -- owed by a prosecutor?

23 **A.** Yes.

24 **Q.** Was that a concern?

25 **A.** Yes. The -- it was recognised that, as one of
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1 that because you need to ensure the process is
2 fair.

3 If there is nowhere written down for you as
4 an investigator or for you as a prosecutor that
5 that is what you need to do, there is every risk
6 that you will overlook it, that you will think
7 "I have done what I'm required to do because
8 I have looked at the schedule that the
9 investigators provided me. I have reviewed the
10 material that my investigation has generated,
11 and I have done what is required by the Code and
12 by the Act in relation to that". That would not
13 be the end of your job but if there's no
14 reference in your policies to it being a part of
15 your job, you may think it is.

16 **Q.** Can we turn to paragraph 306 of your report,
17 which is on page 133, where you cite a passage
18 from the speech of Lord Bingham in of the House
19 of Lords in the case of *R v H and C.*, where he
20 said:

21 "... 'If material does not weaken the
22 prosecution case or strengthen that of the
23 defendant, there is no requirement to disclose
24 it'."

25 But then this:

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1 the things that the CPIA in its Code did not
2 address, that to ensure fair proceedings in the
3 interests of justice, it is not enough for
4 a prosecution to make disclosure of that which
5 it already has, because there may well be
6 material that is beyond what it has that will
7 nevertheless undermine its case, or assist that
8 of the defendant, or that might undermine its
9 gates or assist that of a defendant.

10 So what the *Attorney General's Guidelines*
11 sought to do was to make it absolutely clear
12 that there was that obligation on investigators
13 and prosecutors to think outside the box of what
14 they already had as to what they might need and
15 to ensure that they were doing all they could to
16 make sure that the proceedings were fair, by not
17 blinkering themselves as to just looking at what
18 they already had but to think what else might be
19 necessary.

20 And that's what third-party disclosure is
21 all about, that process of thinking about
22 whether there is material beyond what you've got
23 that you ought to obtain, if you can, and then
24 review that material for disclosure in the same
25 way as what you have already got. And you do
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1 "For this purpose, the parties' respective
2 cases should not be restrictively analysed'."

3 Is that a feature of the conduct of criminal
4 investigations and prosecutions, that when
5 making decisions on disclosure, the prosecutor
6 must not restrictively analyse the case of the
7 defendant?

8 **A.** Absolutely. It may be -- to take a case away
9 from any that we're concerned with here -- that
10 there's an allegation of assault, and the
11 defendant is saying, "I was acting in
12 self-defence". If there is material that would
13 not just undermine the prosecution case or
14 support his case in relation to that, but also
15 calls into question whether proper procedures
16 had been followed and fair practices adopted in
17 relation to some other aspect of the case
18 against him, or if there was material that
19 undermined the credibility of the prosecution
20 witness in other respects, or other material
21 that could provide the defence with a completely
22 different layer of argument as to the
23 admissibility of evidence or the fairness of the
24 proceedings, then those are all things that the
25 prosecution need to be including in their
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1 process of assessment as to whether material
2 undermines its case or assists the defence, not
3 least because the defence may not identify as
4 something that will assist them something that
5 they don't know anything about.

6 **Q.** Thank you. That passage or that report can come
7 down from the screen. Thank you.

8 Is it right that the concept of corporate
9 knowledge operates in respect of material which
10 may meet the disclosure test and which is within
11 the knowledge of any arm of the prosecution
12 authority?

13 **A.** In the sense that a prosecuting or investigative
14 agency knows something, because of other cases
15 that it has dealt with, but which has
16 a relevance to the case they're now dealing
17 with, yes.

18 **Q.** Would that concept operate in the context of the
19 Post Office acting as private prosecutor to mean
20 that the Post Office's disclosure obligations
21 extended to material within the control of the
22 Post Office, whether or not that material was
23 actually in its possession or not?

24 **A.** Yes.

25 **Q.** That phrase that I've used, "material within the
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1 of the Post Office, pursuant to a contract, as
2 material that it had an obligation to obtain and
3 to disclose, rather than being a case of
4 third-party disclosure?

5 **A.** It certainly had the obligation to obtain it.
6 It then had to apply the disclosure test to it.
7 And the point I was seeking to make at this
8 point -- the point we were just looking at in my
9 report, is that there are those two stages.
10 What the *Attorney General's Guidelines* makes
11 clear is that where an investigator or
12 a prosecutor identifies that a third party might
13 have material that might prove to be relevant to
14 the issues in the case, they have a duty to seek
15 to get it so that they can then decide whether
16 it's disclosable or not.

17 **Q.** Thank you. Are you aware of any Post Office
18 policy, guidance or training document which
19 addressed the issue that we've just discussed,
20 ie material within the Post Office's control but
21 not within its physical possession?

22 **A.** No, I don't think so.

23 **Q.** Are you aware of any Post Office policy guidance
24 or training document that you've seen which
25 assisted in the application of the parties'

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1 control of the Post Office", would that require
2 any legal obligation on the party that
3 physically possesses it to deliver or provide it
4 to the Post Office?

5 **A.** It would depend on the nature of the control
6 that the Post Office had, if it was something
7 that that other party were obliged to provide to
8 them if they asked for it, for example --

9 **Q.** Under a contract, for example?

10 **A.** -- under a contract, for example, then it is
11 material that the Post Office would be easily
12 able to obtain and therefore should obtain.
13 There are always complications in relation to
14 third-party material that the only route that
15 you, as a prosecution, have to access, is where
16 you obtain a witness summons against that third
17 party to hand over the material because there
18 are particular and specific criteria for the
19 obtaining of a witness summons, and that third
20 party would be able to litigate, whether you had
21 met those criteria or not.

22 But that, on the scenario you're positing,
23 wouldn't arise. This is separate from that and
24 therefore easier.

25 **Q.** So one might regard material within the control
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1 cases not being restrictively analysed
2 principle?

3 **A.** No.

4 **Q.** Would you agree that the disclosure obligations
5 that arise under Sections 3, 7 and 7A of the
6 CPIA are imposed upon and are personal to the
7 prosecutor?

8 **A.** Yes.

9 **Q.** Therefore, responsibility for ensuring
10 compliance with the obligations that arise rests
11 with the prosecutor, who, in one of the cases,
12 is said to be in the driving seat --

13 **A.** Yes.

14 **Q.** -- at the stage of disclosure?

15 **A.** Yes.

16 **Q.** Even in the case of third-party material, the
17 decision as to whether such material is to be
18 obtained and is to be disclosed must be taken by
19 the prosecutor?

20 **A.** There is an expectation that that process will
21 have already been gone through once by the
22 investigator, but the prosecutor's role is both
23 to check that it's been done and, either where
24 it's not been done at all or properly, or they
25 identify a wider pool of potential material for

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1 them to do it as well.

2 **Q.** If it had got to the stage that the investigator
3 had not done it, for example, the prosecutor,
4 would this be right, would not be able to, in
5 effect, subcontract out to the third party the
6 question of whether material is relevant and
7 falls to be disclosed?

8 **A.** No, and one of the cases that I refer to in my
9 report, a case called *Alibi*, was a case very
10 much on that topic, which was where
11 a prosecution was predicated on material from
12 a company. There was a difference between how
13 the prosecution went about getting material from
14 that company, on the one hand, and what it then
15 did in terms of its disclosure obligations, on
16 the other. And the disclosure obligations were
17 for them, not the company.

18 **Q.** Would you agree that, if the Post Office
19 required information about the operation and
20 functioning of the Horizon System, in a case
21 where a postmaster, for example, made
22 allegations about its faulty operation in
23 a given case, the correct approach would be for
24 a formal request at an organisational or
25 an institutional level being made to the

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1 **A.** Yes.

2 **Q.** Is the cost of obtaining material a relevant
3 consideration in deciding whether to seek
4 material from either a third party or
5 an organisation, over which you have control, in
6 terms of the disclosure of documents?

7 **A.** Not in those bald terms, no.

8 **Q.** Why not?

9 **A.** Because your obligation is to undertake
10 appropriate and fair disclosure and that is not
11 a cost benefit analysis. That is a hard and
12 fast obligation. How you go about it -- because
13 there is always a margin of appreciation as to
14 exactly how it is done, providing the result is
15 fair, you may be able to take account of cost
16 where there are different routes that will
17 achieve the same ultimate objective. But only
18 if they achieve the same ultimate objective.

19 And the cost may come into play in the sense
20 that, if you come to the conclusion that to
21 satisfy your disclosure obligations will be
22 enormously costly, you may make the decision not
23 to prosecute for that reason but that is the
24 decision you would have to make. You can't go
25 ahead and prosecute knowing that you haven't

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1 operator of that system, Fujitsu?

2 **A.** It would depend on what the set-up was. One
3 could envisage that where, on the scenario you
4 posit, a postmaster has said something to that
5 effect in interview, that it would be for the
6 investigator, as part of the investigation, to
7 make contact with whatever their liaison was
8 with Fujitsu to make enquiries of them.

9 If there was a comparable liaison
10 arrangement at a prosecutorial level, for that
11 to be used, but if that route either was not
12 available or was not working then, yes,
13 absolutely, at a higher level.

14 **Q.** In any event, in the case of Post Office
15 prosecutions, the Post Office, would you agree,
16 was required to consider whether Fujitsu was in
17 possession or likely to be in possession of
18 disclosable material and request that material
19 from Fujitsu --

20 **A.** Yes.

21 **Q.** -- either pursuant to any contractual
22 arrangements -- and I think we'll come back to
23 those in Part 2 -- but, if necessary, by issuing
24 a witness summons or even seeking a production
25 order?

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1 undertaken your disclosure obligations properly
2 because it costs too much.

3 **Q.** Thank you. Can I turn, before the lunch break,
4 to a separate topic, which is Section 69 of the
5 Police and Criminal Evidence Act 1984. In broad
6 terms, can you confirm that the purpose of
7 Section 69 was to enable the admission into
8 evidence of a statement contained within
9 a document where that document had been produced
10 by, for example, a computer?

11 **A.** Yes.

12 **Q.** That might include something like a readout from
13 an Intoximeter or even a receipt produced from
14 a till?

15 **A.** Yes.

16 **Q.** I think it's right that concerns were expressed
17 by the Court of Appeal before the repeal of
18 Section 69 that its operation had been
19 misunderstood; is that right?

20 **A.** Yes.

21 **Q.** As you have included in your report, the Law
22 Commission made a recommendation for the repeal
23 of Section 69?

24 **A.** Yes, so Section 69 had created certain
25 precursors before a statement in a document

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1 produced by a computer could be admissible. It
 2 was recognised by the Law Commission that that
 3 was -- particularly if misread as meaning if
 4 you're relying on anything to do with the
 5 a computer you needed to go through that
 6 process, had become incredibly cumbersome. So
 7 they looked to see whether it was actually
 8 necessary and concluded that it was not.

9 **Q.** The Law Commission undertook a consultation
 10 exercise --

11 **A.** Yes.

12 **Q.** -- the nature of which you set out from page 90
 13 onwards of your first report.

14 **A.** Yes.

15 **Q.** So EXP0000002.

16 **A.** It was a consultation on a wider range of topics
 17 than just Section 69; it was dealing with
 18 hearsay --

19 **Q.** It was mainly about hearsay?

20 **A.** -- but it included a section on whether
 21 Section 69 was fit for purpose or not.

22 **Q.** It's paragraph 200 at the bottom. So there was
 23 a consultation exercise commencing in May 1995,
 24 with the Law Commission's Consultation Paper
 25 138, yes?

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1 prove the case solely on the ground of being
 2 unable to satisfy the technical requirements of
 3 Section 69 ... Computers are now being used
 4 within branch offices, Parcelforce depots and
 5 Royal Mail Sorting Offices'."

6 You comment, over the page, please, at
 7 paragraph 207, that this submission is of note
 8 because it's predicated on the basis that the
 9 person best placed to attest to the operation of
 10 the Horizon System was the subpostmaster, rather
 11 than the operators of the system at any higher
 12 level. At the time at which that was written,
 13 October 1995, it couldn't have referred to
 14 Horizon?

15 **A.** No, I now appreciate that. Yes.

16 **Q.** It's right I think, as you say in paragraph 208,
 17 to note that the Post Office was far from unique
 18 in its support for the repeal of Section 69?

19 **A.** No, that's absolutely right.

20 **Q.** I think since you've written this report, you
 21 have received a high number of additional
 22 submissions from consultees which, save for one,
 23 supported reported the repeal of Section 69?

24 **A.** Yes.

25 **Q.** I'm not going to examine any of those in detail

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1 **A.** Yes.

2 **Q.** The problems with Section 69 were summarised by
 3 you in your (a) and (b) there; is that right?

4 **A.** Yes.

5 **Q.** One of the respondents to the Commission was the
 6 Post Office --

7 **A.** Yes, it was.

8 **Q.** -- and you addressed that in your paragraph 206
 9 on page 92, with a letter, the author of whom is
 10 redacted in the copy that both you and I have,
 11 from the Post Office to the Law Commission,
 12 which said:

13 "... 'a large number of subpostmasters now
 14 complete their cash accounts and other
 15 accounting records by [using] a computer. The
 16 subpostmaster is often the only person working
 17 in a sub post Office or the only person who uses
 18 the computer. In the event of the subpostmaster
 19 being prosecuted for theft or false accounting,
 20 the Post Office may need to rely on the
 21 computerised accounting records. The
 22 subpostmaster is frequently the only person who
 23 can give the evidence required by Section 69 ...
 24 In the absence of admittance or other direct
 25 evidence the Post Office may not be able to

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1 because that may be a matter we come back to
 2 later in the Inquiry. That material has been
 3 obtained by the Inquiry from the Law Commission
 4 itself?

5 **A.** Yes.

6 **Q.** The one exception, was that a company that
 7 specialised in the operation of computers and
 8 computer forensics?

9 **A.** Yes.

10 **Q.** Can you summarise what the opposition was, if
 11 you can remember?

12 **A.** So this was an organisation called Computer and
 13 Systems Telecommunications Limited and their
 14 position was that computer evidence was always
 15 to be regarded as legally unreliable and the
 16 question was only the extent to which it was
 17 unreliable, and that that was apparently because
 18 of its -- and this I quote without necessarily
 19 entirely understanding it -- "its inherent
 20 non-linearity in determinability and insecurity
 21 of the architecture of computer systems and
 22 software".

23 And so the predicate of this submission was
 24 that it was necessary for there to be expert
 25 evidence to demonstrate that a computer system

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1 was reliable against a presumption that it would
2 otherwise not be, because there was always the
3 risk of faults within a computer system that
4 anyone other than an expert might not be able to
5 identify, and including the operators of
6 a particular computer as being amongst those who
7 wouldn't necessarily know that it wasn't
8 operating properly in a material respect.

9 **Q.** Thank you. In any event, despite that
10 opposition, the Law Commission recommended
11 repeal and repeal occurred?

12 **A.** Yes.

13 **MR BEER:** Thank you very much.

14 Sir, I think that's an appropriate moment to
15 break for lunch, if it is convenient to you. As
16 you know, sir, we're aiming to finish by 3.15
17 today and so if we broke now until 1.45, that
18 would certainly give sufficient time to go
19 through Mr Atkinson's conclusions, which is the
20 last and remaining topic for us.

21 **SIR WYN WILLIAMS:** Yes, that's fine, Mr Beer.

22 There is just one point that I'd like to
23 clarify my mind with Mr Atkinson, arising out of
24 the questions you asked him about what I'll call
25 third-party disclosure.

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1 **A.** Yes.

2 **SIR WYN WILLIAMS:** -- and if they don't like the
3 effect of the contractual position, they have to
4 review whether or not to prosecute and, in
5 an appropriate case, not prosecute?

6 **A.** Absolutely.

7 **SIR WYN WILLIAMS:** Fine. Thank you very much.

8 **MR BEER:** Thank you, sir.

9 **SIR WYN WILLIAMS:** Sorry, that's eaten two minutes
10 into your lunch break. If you want to make it
11 1.50, that's fine by me. Did you say 1.45?

12 **MR BEER:** I now say 1.50.

13 **SIR WYN WILLIAMS:** Fine.

14 **MR BEER:** Thank you.

15 **(12.50 pm)**

(The Short Adjournment)

17 **(1.50 pm)**

18 **MR BEER:** Good afternoon, sir, can you see and hear
19 me?

20 **SIR WYN WILLIAMS:** Yes, thank you.

21 **MR BEER:** Thank you.

22 Good afternoon, Mr Atkinson. Two follow-up
23 questions, if I may, from issues that we
24 discussed this morning.

25 **A.** Yes.

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1 I think I know what you're telling me,
2 Mr Atkinson, but, if I put it in rather crude
3 terms, it will help me to be certain about that.
4 It's this, really: if an investigator or
5 a prosecutor gets to the point where they think
6 it appropriate, in order to comply with
7 disclosure duties, that they seek disclosure
8 from a third party, the fact that their
9 contractual position with that third party might
10 make disclosure expensive or difficult or
11 whatever other word you might wish to use, is
12 irrelevant once they've determined that it's
13 appropriate to seek disclosure.

14 **A.** Yes --

15 **SIR WYN WILLIAMS:** Is that correct?

16 **A.** -- and so, sir, they would -- once they had
17 determined it was something that needed to be
18 done, then they needed to do it, and if they
19 couldn't do it, they then needed to review
20 whether the prosecution was viable without that
21 having been done.

22 **SIR WYN WILLIAMS:** But the simple point for me to
23 keep in my mind is that the duty to seek
24 disclosure in those circumstances overrides any
25 contractual position --

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1 **Q.** Firstly, I asked you some questions about the
2 cases that established that a prosecutor is
3 under a duty to disclose material that otherwise
4 falls within the disclosure test that's within
5 the knowledge of "any arm of the prosecution",
6 and you answered to the effect that a prosecutor
7 must include, within their consideration for
8 disclosure, material obtained or generated in
9 other cases in which they had been involved.

10 **A.** Yes.

11 **Q.** I mean, I'm summarising.

12 **A.** Yes, yes.

13 **Q.** Can I ask you about a slightly different aspect
14 of the "any arm of the prosecution" principle.
15 Can you confirm that, as a single organisation,
16 which was a victim, a witness, an investigator
17 and a prosecutor, the Post Office's disclosure
18 duties applied across the whole of the Post
19 Office?

20 **A.** Yes.

21 **Q.** In other words, all departments or divisions
22 within the Post Office were subject to a duty to
23 retain and record information that was or might
24 be relevant to the Post Office's function of
25 bringing prosecutions?

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1 A. Yes.

2 Q. So the "any arm of the prosecution", in this
3 different context I'm referring to, relates to
4 across the Post Office and the duty of retention
5 and recording and then revelation applied not
6 just to one department that happened to be
7 conducting the prosecutions?

8 A. Yes, absolutely.

9 Q. Thank you. Secondly, the *Attorney General's*
10 *Guidelines* apply a test of reasonable
11 practicability in obtaining disclosure from
12 a third party and that has been interpreted in
13 the case law as meaning or referring to
14 a "persistent prosecutor who does not readily
15 accept no for an answer" --

16 A. Absolutely.

17 Q. -- and who is prepared to take the initiative
18 and to apply to the court to enforce disclosure
19 obligations against a third party?

20 A. Yes.

21 Q. In general terms, what obligation is there on
22 an investigator and a prosecutor in testing the
23 answers that they receive from a third party as
24 to whether or not the third party holds relevant
25 material?

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1 Q. So if a suspect in a particular case says "I'm
2 suspected of theft or false accounting, based on
3 data produced by a computer system that shows
4 a discrepancy, a loss, which I can't account
5 for, but I can tell you this isn't a real loss,
6 the loss that is shown on your documents, Post
7 Office, is an artefact of the computer system
8 that produced the document. I haven't been
9 dishonest, I took no money. I think the error
10 is in the system; there's a bug, error or defect
11 in the system", would it be sufficient for the
12 prosecutor or investigator who was relying on
13 the data from the system to prove its case to
14 ask the third party "Are there any bugs, errors
15 or defects within your system?"

16 A. No, because you would, as a prosecutor, need to
17 understand how that process was undertaken by
18 the third party, to understand how reliable
19 an answer it was. So if you said, "Have you got
20 any bugs in your system?" and they say, "No",
21 that would not be enough. You'd need to
22 understand what process of evaluation and
23 testing had gone -- been gone through so that
24 they're able to come to that answer, so that you
25 are satisfied it was a reliable answer.

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1 A. One would assume that they would start from
2 a position of having identified that third party
3 as likely to have relevant material. If they
4 received an answer back "We don't have
5 anything", they would not just take that at face
6 value and say "Thank you very much", and go
7 home. They would need to test that against
8 their earlier expectation and be persistent in
9 asking questions about the type of things that
10 they had in mind, so that they drilled down
11 into -- in more detail what that third party has
12 or has not got and the reasons they're given as
13 to why, if they say they haven't got it, why
14 they haven't got it.

15 Q. So the duty might extend to asking the third
16 party "Who is giving you your information within
17 the third party? What searches have been made?
18 Where have you looked? What criterion has been
19 applied" --

20 A. Yes.

21 Q. -- to satisfy themselves as to the completeness
22 and reliability of the answer received?

23 A. Yes, and so, effectively, asking -- if they say
24 they haven't got it, exploring why they haven't
25 got it and to test whether that's right or not.

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1 Q. So there is, to that extent, a duty to go behind
2 the "No"?

3 A. Yes.

4 Q. Thank you.

5 Can we turn to your conclusions, please, and
6 it's Volume 1, which is EXPG0000002. At
7 page 145, please, starting at paragraph 333 --
8 so it's the page before, thank you.

9 In this part of your report, from
10 paragraph 333 right through to 391, so over the
11 course of 20 pages, you set out your conclusions
12 by reference to the questions that we asked you
13 in your instructions.

14 A. Yes.

15 Q. In an attempt to try to draw the threads
16 together, I'm going to use this as the basis for
17 my questions of you.

18 In relation to the first question,
19 an explanation of the law and practice of the
20 conduct of private investigations or
21 prosecutions between 2000 and 2013, I have taken
22 you to these passages earlier in your evidence,
23 and I wouldn't, therefore, propose to repeat
24 those now, unless there was anything you wanted
25 to say about all of those paragraphs up to 343.

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1 I realise that's putting the onus on you to
2 identify matters but it seemed to me that, one
3 way or another, we had addressed all of the
4 issues that you mention there?

5 **A.** Yes, I agree.

6 **Q.** Can we go forwards, please, to page 149, please,
7 and to the second question, which raised issues
8 as to non-independent investigations. You tell
9 us in paragraph 344 that:

10 "In [your] judgment, special difficulties
11 can arise where the same body is the victim,
12 a witness, the investigator and the prosecutor."

13 As we discussed briefly earlier:

14 "It has been recognised ... in *Asif v Ditta*,
15 that the fact that a private prosecutor has
16 a motive other than the pursuit of justice for
17 their actions does not necessarily make it
18 improper for them to been a prosecution."

19 But that case made it clear that the
20 motivation of a private prosecutor carries with
21 it a risk that proceedings are brought that
22 aren't in the public interest or the interests
23 of justice.

24 The roles of investigator and prosecutor are
25 roles that carry with them significant

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1 forth between the two to ensure that, between
2 them, they have complied with their obligations
3 to ensure full and proper investigation and full
4 and proper disclosure and proper and rigorously
5 reached prosecuting decisions.

6 Other agencies either do the same thing
7 through there being independent parties involved
8 or by having very clearly defined, separate
9 entities that do different things and with
10 requirements as to how one monitors the
11 activities of the other.

12 In contrast, I find it much more difficult
13 to glean from that which I saw how that
14 distinction was drawn and enforced within the
15 Post Office, so that investigations were
16 undertaken in such a way that they were
17 transparent to the prosecutor and that the
18 prosecutor was then able to reach an independent
19 decision with a degree of superintendence of the
20 investigation upon which it was based, in the
21 way that other agencies had achieved.

22 **Q.** Thank you. If we go over the page to 347, you
23 say that:

24 "There is a risk that may arise from a lack
25 of such a statutory structure in that there is

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1 responsibilities and, if they are to be
2 undertaken properly, have to be undertaken
3 dispassionately, objectively and fairly.

4 That's the point of principle that you
5 raise --

6 **A.** Yes.

7 **Q.** -- concerning non-independent investigations.

8 In paragraph 346 you draw a contrast and
9 describe it as a significant one between the
10 Post Office as an investigator and prosecutor on
11 the one hand, the police, the CPS and other
12 prosecutorial and investigative agencies on the
13 other.

14 **A.** Yes.

15 **Q.** Can you just summarise the significant
16 differences, please?

17 **A.** Yes. So the -- by statute and by a barrage of
18 policies issued under statute, the Crown
19 Prosecution Service is absolutely a prosecuting
20 organisation that is independent of those who
21 have investigated the cases that reach it and it
22 has a superintendent role, in relation to those
23 investigations, as opposed to a role actually in
24 the direction of the investigations themselves,
25 which means that there is that testing back and

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1 a lack of clarity and transparency as to areas
2 of responsibility, routes to accountability and
3 considerations relevant to the making of
4 necessary decisions both in investigative and
5 prosecutorial terms."

6 **A.** Yes.

7 **Q.** So you're saying that, because the division of
8 responsibility and the inclusion of routes of
9 accountability that a statutory structure gives
10 you, the absence of them gives rise to the risks
11 that you mention?

12 **A.** Yes, and those are risks that can be addressed,
13 and other organisations, where I was able to see
14 their structure, do address it. My concern was
15 that looking at policies that ought to have made
16 crystal clear that prosecution decisions were
17 being taken independently of both the business
18 and the investigation side of the business,
19 those policies were not making that clear.

20 **Q.** You tell us at 348, at the bottom, that:

21 "A solution to the difficulty ..."

22 That's the absence of an express statutory
23 regime that hardwires divisions of
24 responsibility and accountancy into the
25 organisation:

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1 "... is arguably presented ... (at least
2 now) by the [Health and Safety Executive, whose]
3 Enforcement policy entrusts the decision of
4 whether to commence a prosecution to the
5 Approval Officer, who should not be closely
6 involved in directing, or identified with, the
7 investigation process."
8 **A.** Yes.
9 **Q.** So an attempt at least to separate the
10 prosecution decision from --
11 **A.** Yes.
12 **Q.** -- the conduct of the investigation.
13 You had previously highlighted -- we had
14 skipped over it in 347 there -- seven or eight
15 lines from the bottom of 347, you say:
16 "In areas such as disclosure this is
17 important because the structure depends on the
18 prosecutor providing advice as to and
19 undertaking a second review of decisions by the
20 investigator to ensure that the correct
21 decisions are reached. No such safeguards are
22 built inherently or transparently into the
23 system where the same organisation performs each
24 role, even more so where the organisation is
25 also the victim of the alleged offending."

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1 by a non-lawyer?
2 **A.** Yes, I mean, that, I say, is predicated on not
3 knowing whether the Director of Security was
4 a lawyer or not but, certainly, the Director was
5 required to obtain legal advice. He or she was
6 required to consider it. They weren't required
7 to follow it and, in part, they were applying
8 tests that were legal tests without being
9 lawyers.
10 **Q.** Then lastly, at the end of that paragraph, you
11 say, thirdly:
12 "... the involvement of Human Resources,
13 which has a role in the consideration of
14 employment and disciplinary issues in the making
15 of decisions as to criminal proceedings is of
16 concern, as it might be suggested that
17 prosecution was a part of the disciplinary
18 process rather than independent of it."
19 **A.** Yes, and that where the persons being
20 investigated were employees is a particularly
21 acute consideration.
22 **Q.** You move on in paragraph 351 to advert to
23 a different concern; is that right?
24 **A.** Yes.
25 **Q.** You say that a number of the Post Office's

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1 **A.** Yes.
2 **Q.** Did you find an absence of those measures in the
3 case of the Post Office policies when you turned
4 to them?
5 **A.** Yes.
6 **Q.** Can we turn to those, then, over the page at
7 151. You tell us:
8 "In that regard here the wording of the
9 relevant policies operated by the Post Office
10 [gives] rise to concern."
11 Then in 350, you identify, I think, three
12 slightly different issues. You say in the March
13 2000 Investigation and Prosecution Policy it
14 identifies that investigations undertaken in
15 part by Security and Investigation Services,
16 which is to be superintended by the Director of
17 Security also takes -- he also or she also takes
18 prosecution decisions.
19 **A.** Yes, and so, rather than being a separation, it
20 appeared that the same person superintended
21 investigations and then took the decisions at
22 the end of them.
23 **Q.** Secondly, building on that concern, the Director
24 was enjoined to obtain legal advice but, as you
25 read the documents, the decision was then taken

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1 policies drew attention to the fact that
2 financial and business-related factors are
3 relevant in the investigative and prosecutorial
4 process --
5 **A.** Yes.
6 **Q.** -- and in decision making in relation to each of
7 them.
8 You give, I think, three examples of that:
9 a policy in 2001, which says:
10 "... 'factors that influence as to whether
11 certain actions are required [in the context of
12 an investigation] are based on the following:
13 the potential loss to Consignia business in
14 value, reputation and customer retention;
15 quality ... of the information (intelligence)
16 and the level of incident, of probability;
17 timeliness as to whether the incident reported
18 is recent or not; a named suspect!'"
19 Secondly, the Royal Mail Group Criminal
20 Investigation and Prosecution Policy included as
21 a consideration the "priorities of the
22 business", and I think you told us yesterday it
23 didn't say what they were.
24 **A.** No.
25 **Q.** Then lastly, over the page, the policy that

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1 we've looked at, or seen you look at, in the
2 past in three iterations, four iterations,
3 identify that prosecution may be appropriate
4 where a business leader, manager or employee is
5 the subject of criminal investigation and
6 grounds are established to suspect them of
7 having committed a criminal offence, breached
8 the group's Code of Business Standards or
9 subverted business systems controls and
10 policies.

11 So, overall, what was your concern here
12 about the identification of financial and
13 business-related factors in investigative and
14 prosecutorial decision making.
15 **A.** I'm not necessarily saying that a business is
16 not entitled to take account of business
17 considerations at all when it takes on the roles
18 of an investigator and prosecutor but, where the
19 policies were either very limited or silent as
20 to, for example, the kinds of criteria for the
21 assessment of the public interest that are set
22 out in the *Code for Crown Prosecutors* or the
23 *Attorney General's Guidelines*, but were explicit
24 about business considerations, the reader of the
25 policy -- be it me reading them for the purposes

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1 versed in that degree of independent assessment,
2 by reference to a wholly different set of
3 criteria that an independent, fair and
4 transparent prosecution decision would require.

5 **Q.** You make the point, by way of caveat, at the
6 beginning of paragraph 353, that you hadn't
7 actually, at the time of writing, looked at any
8 case-specific information -- and that will
9 follow --

10 **A.** Yes.

11 **Q.** -- in December -- but you make the point that
12 any such assessment ought to start with the
13 policy and guidance framework in place?

14 **A.** Yes. I was asked to look at law and practice
15 and, as I said yesterday, practice I, at this
16 stage, gleaned from what the policies inform me
17 as to the practice.

18 **Q.** Thank you.

19 Can we turn to the second part of our second
20 question to you, namely Post Office
21 investigations policy. At paragraph 354, you
22 say:

23 "The terms, and adequacy, of Post Office
24 policy documents concerning the conduct of
25 investigations falls to be judged in a number of

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1 of this report or be it those working in the
2 business at the time -- would take away from it
3 that the business considerations were the
4 considerations that mattered, rather than ones
5 that weren't there, or only there in very
6 abstract or bare terms.

7 **Q.** Thank you. You essentially set that conclusion
8 out in paragraph 353, if you scroll down, thank
9 you, five lines from the bottom. You say:

10 "On the review I have undertaken ..."

11 That's of the policies?

12 **A.** Yes.

13 **Q.** "... one proper reading is that the same
14 personnel were involved in dealing with
15 decisions whether to start a disciplinary
16 process, a criminal investigation and a criminal
17 prosecution and at each stage taking account of
18 business priorities and financial
19 considerations. That is not a reading that
20 instils confidence in the independence, fairness
21 or transparency of those decisions."

22 **A.** Particularly if the situation is that the person
23 taking, ultimately, a decision to prosecute is
24 someone who is well versed in the business
25 considerations through their job, less well

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1 categories, by reference to the iteration of the
2 policy being considered, and the statutory and
3 other extra-Post Office guidance that applied to
4 the areas addressed by those policies."

5 **A.** Yes.

6 **Q.** Essentially, to decode that a bit, are you
7 saying that the policies changed over time, as
8 did the regulatory landscape over time?

9 **A.** Yes, or, perhaps more accurately, given the
10 situation as I found it to be, the landscape was
11 changing on a fairly regular basis over time.
12 Policies changed from time to time with the
13 effect of giving some effect to that changing
14 landscape.

15 **Q.** Thank you. Over the page to page 153, please.
16 You say in those policies, which did seek to
17 address investigative areas otherwise covered by
18 PACE, what was required from them was: firstly,
19 to identify those areas that Post Office
20 investigators could do and could not do for
21 themselves, and those which required the
22 involvement of the police; secondly, to identify
23 how the liaison with the police service was to
24 operate and how its results were to be assessed;
25 and to identify, thirdly, those areas which, by

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1 virtue of Section 67(9) of PACE -- remembering
 2 that's the provision that applied through
 3 a 'have regard' duty --
 4 **A.** Yes.
 5 **Q.** -- all six Codes of Practice to the Post Office
 6 are governed by the codes issued under PACE and
 7 how their requirements are to be met.
 8 **A.** Yes.
 9 **Q.** In paragraph 356, you address the extent to
 10 which those policies complied with those three
 11 requirements. Can you summarise your view?
 12 **A.** Yes, so the position in relation to PACE and the
 13 codes under PACE went very much from nearer
 14 famine to nearer feast over the period of time
 15 that I was considering. So, at the beginning of
 16 the period 2000/2001, there was name checking of
 17 PACE and the codes. By the later policy
 18 documents that I saw, there was a good deal more
 19 detail of how PACE and, more particularly, the
 20 relevant codes under PACE applied in areas, for
 21 example, searches and, in particular,
 22 interviews.
 23 **Q.** Thank you. In paragraph 357 you tell us that,
 24 by reason of those defaults, there was a risk
 25 that there would have been inadvertent

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1 so much more detailed.
 2 **Q.** Turning to the CPIA -- and I think you start
 3 that at paragraph 363 --
 4 **A.** Yes.
 5 **Q.** -- which is at the foot of page 155, thank
 6 you -- you say:
 7 "A similar approach, and similar development
 8 of detailed guidance in policy documents, can be
 9 identified in relation to those investigatory
 10 policies that address the application, by virtue
 11 of Section 26 of the CPIA, of the CPIA and its
 12 Code of Practice to the Post Office. In
 13 policies ... in 2000, 2007, and 2010 there were
 14 references to the need to comply with the CPIA,
 15 without any identification of which parts of the
 16 CPIA were engaged, how compliance was to be
 17 achieved or reference beyond the fact of its
 18 existence to the Code."
 19 **A.** Yes, so it was name checking again, rather than
 20 the detail. It was better in relation to those
 21 aspects of the CPIA specifically relating to
 22 disclosure, although there were fundamental
 23 omissions to that, which I know we're coming on
 24 to, but, in other respects, it was -- there was
 25 more name checking than detail and I saw less

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1 non-compliance or inconsistent compliance with
 2 PACE, albeit you say that was addressed by the
 3 training materials that are copyrighted in 2000
 4 and which did seek to address relevant sections
 5 of PACE codes in relation to, for example,
 6 searches, arrests and interview. But you make
 7 the point that the fact that such training
 8 material could or did address those issues, that
 9 raises the question why the same analysis wasn't
 10 set out in the policies?
 11 **A.** Yes.
 12 **Q.** How deep a level of concern is that?
 13 **A.** I think in the initial period, the post-2000
 14 period, I think it's a real concern because, if
 15 the aim of your policy is to ensure consistent
 16 application of the law and procedure by all
 17 those who are undertaking your investigations,
 18 then it needs to be spelt out in your policy
 19 what it is they're required to do.
 20 If you rely on a bare bone policy and people
 21 are undertaking their own researches or
 22 remembering their own training, then that will
 23 not achieve consistency. And it seemed to me
 24 that the Post Office had recognised that
 25 because, in PACE respects, their policies became

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1 training material in relation to the CPIA to
 2 comfort me in relation to that.
 3 **Q.** You conclude in this section:
 4 "It is difficult to see how compliance would
 5 either be achieved or measured by reference to
 6 such policies, or by the lack of direct and
 7 detailed training, by reference to the training
 8 materials that [you had] seen."
 9 **A.** Yes.
 10 **Q.** You tell us, if we scroll down in paragraph 364,
 11 that:
 12 "Although ... the definition of a criminal
 13 investigation in Post Office policies accorded
 14 with that in the CPIA ..."
 15 That is the point that it is a recognition
 16 by the Post Office that the undertaking of its
 17 criminal investigations triggered the relevant
 18 provisions of the CPIA.
 19 **A.** Yes.
 20 **Q.** "... the rationale and considerations relevant
 21 to those included some of the business related
 22 factors", that you have set out above.
 23 There was a development in the degree of
 24 detail given as to investigative roles and the
 25 three Rs from an adequate starting point in the

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1 disclosure policy of May 2001, but that
2 concerned disclosure rather than investigations.

3 At 365, you set out your conclusion. The
4 policies that you had seen would have been of
5 assistance to those engaged in investigations
6 but would not have been sufficient of themselves
7 to ensure that they understood which aspects of
8 PACE, CPIA and their codes had application, or
9 how to monitor such application. This was stark
10 in relation to disclosure --

11 **A.** Yes.

12 **Q.** -- and the pursuit of reasonable lines of
13 inquiry --

14 **A.** Yes.

15 **Q.** -- which we're about to look at.

16 So looking at this aspect of your work,
17 namely the Post Office investigations policy,
18 how would you describe the adequacy of them
19 across the relevant period?

20 **A.** So in relation to the Police and Criminal
21 Evidence Act and the codes thereunder, it got
22 better as the period went on. In relation to
23 both areas, both PACE and CPIA, I did consider
24 that, in whole or in part, they were not
25 sufficient to ensure that consistent application

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1 saying there's a new code G, there was a limit
2 to the benefit that was to them.

3 But the place that seemed to me one would
4 logically look to find out how you're meant to
5 do your job in an important respect is to look
6 at what the policy was for how your organisation
7 had identified that job should be done and, if
8 that policy didn't tell you, then you were
9 having to work it out for yourself.

10 **Q.** Can we turn, please, to the third part of
11 question 2, namely the duty, the cornerstone
12 duty under the CPIA, placed upon investigator to
13 pursue all reasonable lines of inquiry, whether
14 they point towards or away from a suspect. You
15 tell us at the top of page 157 that that
16 obligation arises in every criminal
17 investigation. It had, as its origin, perhaps,
18 the decision of the Court of Appeal in *Ward*?

19 **A.** Yes, and that I think is important, because it
20 underlines the fact that the duty to pursue
21 reasonable lines of inquiry, including those
22 that exonerate rather than implicate, emerged,
23 to an extent, from a situation where there had
24 been a miscarriage of justice because that had
25 not been done, and so that is the warning from

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1 of what was required. I repeat again the caveat
2 that I have not seen the database and,
3 therefore, can't speak to the extent to which,
4 if it did, that remedied that situation.

5 But, as explained yesterday, it is not
6 enough to tell someone there's a code or even to
7 tell them where they can download the code.
8 They need to understand what they're meant to do
9 with it and that's where policy comes in,
10 particularly if you're a non-police investigator
11 and, therefore, need to understand which parts
12 are the parts that (a) apply to you and (b) that
13 matter.

14 **Q.** So the existence of the database is not
15 a panacea by way of answer to the list of
16 problems that you've identified?

17 **A.** No, I mean, if I am right in my understanding of
18 the database, that it was making available to
19 those charged with investigations and
20 prosecutions, the material that was relevant to
21 their jobs, then it was a good thing that it was
22 there. If they were getting circulars that were
23 telling them about updates to it, then that was
24 a good thing too. If the circulars were such as
25 the ones I have seen and were doing no more than

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1 the beginning: that this is why you have to do
2 this.

3 **Q.** In paragraph 367 over the page, you tell us
4 "Despite this", and the despite is that that
5 requirement was in the Code right from its first
6 iteration in 1997?

7 **A.** Yes.

8 **Q.** "... the duties of an investigator to pursue
9 a reasonable line of inquiry including those
10 leading away from a suspect was not spelt out in
11 any Post Office policy that you have identified
12 until the 2010 revision of the 2001 ... Unused
13 Material policy."

14 **A.** No, that's right.

15 **Q.** You say it follows that there was a significant
16 period of time when, on the documents you have
17 seen, the need to investigate lines of inquiry
18 that might exonerate a suspect was not spelt out
19 as being necessary. It is difficult to
20 conclude, therefore, at a policy level, that
21 such a requirement was recognised or undertaken
22 and no training material cures the omission.

23 **A.** No.

24 **Q.** How significant an issue was that lines of
25 inquiry omission?

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1 **A.** In my judgement, very significant because it is
 2 so fundamental to making sure that
 3 investigations and, therefore, prosecutions
 4 arising from investigations are fair and, if
 5 your policy is not telling your investigators of
 6 the bedrock of what they're meant to be doing,
 7 then your policy is deficient in a way that
 8 could lead to your investigators not
 9 appreciating that, and that can lead to
 10 unfairness and can lead to miscarriages of
 11 justice.

12 **Q.** In paragraph 368 and following, you apply that
 13 general point to cases involving reliance on
 14 Horizon data, and you say:

15 "... in the present circumstances, that
 16 requirement in particular involves consideration
 17 of whether investigations included consideration
 18 of whether accounting shortfalls at Horizon
 19 terminals might lie with the computer system,
 20 either as a matter of course or where such
 21 a possibility was raised by a suspect in
 22 interview."

23 The way you put it there as the possibility
 24 required examination either as a matter of
 25 course or where the suspect had raised it in

1 **A.** Yes.

2 **Q.** -- for example, or other financial accounts of
 3 the suspect to see whether money from
 4 an unascertained source or even from, in this
 5 case, a Post Office source, has been paid in --

6 **A.** Yes.

7 **Q.** -- or, you know, the classic looking for a boat
 8 on the drive type investigation?

9 **A.** And so, if your suspicion is that -- the
 10 computer says there's a shortfall and your
 11 suspicion is that shortfall is caused by the
 12 postmaster stealing the money, then you look to
 13 see if you can find the money. If you can't
 14 find the money, another reasonable line of
 15 inquiry will be to look to see where else it
 16 could have gone.

17 But a further line of inquiry will be to
 18 look to see well, given that I can't see where
 19 the money has gone, I will need to check that it
 20 has gone, and that takes you back to the
 21 computer system. So either, from the outset, by
 22 looking at it as "I'm relying on the computer,
 23 is the computer reliable", or "I can't find the
 24 money, is the computer reliable?" It's
 25 a reasonable line of inquiry. It's a line of

1 interview, why would it be raised as a matter of
 2 course without a suspect saying, "My computer
 3 has a bug with it"?

4 **A.** If, as it seems to me, the basis for your
 5 identification of a shortfall is that the
 6 computer says there is one, it is a reasonable
 7 line of inquiry to ensure that that is right, or
 8 at least to inquire as to whether there is any
 9 risk that it is not, and that is not
 10 a suspect-dependent situation. It is reasonable
 11 line of inquiry, in any case where that is the
 12 basis for your approach.

13 You can test it a number of ways, you can
 14 look to see if there is evidence of a financial
 15 benefit to the suspect, which would show that
 16 what the computer was telling you may be right
 17 because you can see the money, and "follow the
 18 money" is standard investigative cliché but
 19 a standard investigative approach in cases where
 20 there is meant to be a financial benefit --

21 **Q.** Just stopping there, sorry to stop you in
 22 mid-flow, just so that I and others may
 23 understand, when you say "follow the money" is
 24 a standard investigative approach, do you mean
 25 looking in the bank accounts --

1 inquiry that may well lead you away from the
 2 suspect but that is why you need to understand
 3 that that is your job.

4 **Q.** We've heard evidence from Richard Morgan, King's
 5 Counsel, who acted for the Post Office in civil
 6 proceedings brought against the subpostmaster Lee
 7 Castleton, and he said -- and I summarise his
 8 evidence -- that he regarded it as axiomatic
 9 that, if he was to seek to prove a case based on
 10 a shortfall that was calculated by a computer
 11 system, he would be required to prove the
 12 reliability of the computer system.

13 Would the summary that I have just given of
 14 his approach in civil proceedings equally apply
 15 in criminal proceedings?

16 **A.** Yes.

17 **Q.** You continue, in paragraph 368, in the fourth
 18 line:

19 "Until 2013, no policy document that I have
 20 considered addressed the need for such a line of
 21 inquiry to be pursued."

22 Indeed, if anything, there was some
 23 suggestion to the contrary in the Casework
 24 Management policy in 2000 and 2002, which
 25 required full details of any failures in

1 security or operational procedures identified,
2 which may or may not be directly connected to
3 the offence to be included in the investigation
4 report.

5 It added:

6 "... 'the issue of dealing with information
7 concerning procedural failures is a difficult
8 one. Some major procedural weaknesses, if they
9 become public knowledge, may have an adverse
10 effect on our business'. Although the section
11 concluded 'The usual duties of disclosure under
12 the CPIA ... still apply' ... if [your] reading
13 of the policies is correct, the need to be aware
14 of the reliability or otherwise of Horizon data
15 was not identified as a matter to be
16 investigated routinely."

17 **A.** No, and those policies I just highlighted, on
18 one reading, were providing a series of reasons
19 why it would not be desirable to disclose any
20 such problems.

21 **Q.** And that's aside from the answer to my question
22 earlier about whether there was, in the policy,
23 an inbuilt requirement not to disclose the
24 investigation report --

25 **A.** Yes.

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1 operation of Horizon and its operation as part
2 of their investigations.

3 That was an issue particularly after the
4 repeal of Section 69. It didn't encourage
5 prosecutors to consider this topic as a matter
6 of course. It's omission from policy reduced
7 the chances of this being identified as
8 an omission in any supervision or review of
9 investigative steps and lines of inquiry.

10 How serious a concern do you hold in
11 relation to the material that you have read?

12 **A.** The fact that, in 2013, it was thought important
13 to explicitly refer to the need to consider the
14 integrity and reliability of data systems
15 carried with it a recognition that this was, in
16 the Post Office context, a very important factor
17 to be considered because so many Post Office
18 prosecutions of the kind that we're here
19 concerned with related to data and what that
20 data said.

21 If your policies do not address the need to
22 consider the reliability of data, there is every
23 risk that the investigator will not consider it.
24 There will then be every risk that the
25 prosecutor will not consider it and, therefore,

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1 **Q.** -- which may reveal weaknesses in business
2 practices or systems?

3 **A.** Yes.

4 **Q.** You continue:

5 "In the 2013 policy ... there was reference
6 to Horizon in the investigation context.
7 However, there was no reference to consideration
8 of, or either investigation of or disclosure of,
9 anything that might suggest a failure in the
10 operation of the system, as opposed to failure
11 by the subject in its operation. It was in the
12 2013 prosecution policy that there was
13 a reference to consideration of whether there
14 was an issue as to the integrity or reliability
15 of IT and data systems."

16 **A.** Yes.

17 **Q.** So it's only right at the end of our relevant
18 period --

19 **A.** Yes.

20 **Q.** -- in 2013 that that is written into any policy?

21 You tell us that this lack of guidance is
22 a matter for real concern because it did nothing
23 meaningful to address the risk that those
24 engaged in Post Office investigations would not
25 have appreciated the need to consider the

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1 not set the investigator off on a line of
2 inquiry in relation to, that it will not be
3 a facet of the reliability of evidence that will
4 be considered in a prosecution decision and will
5 not be a facet of the material that will be
6 considered for the purposes of disclosure.

7 And so, if you don't write it down anywhere,
8 it becomes all the more difficult for it to be
9 considered and, where it is the evidence that
10 underpins an investigation and a prosecution and
11 its reliability is not something that is being
12 considered, things will go wrong.

13 **Q.** Thank you. Can we turn to charging decisions,
14 which is our third question, and go over the
15 page, please, to paragraph 372. You tell us
16 that the benchmark, the clear benchmark, for the
17 assessment of charging decisions is the *Code for
18 Crown Prosecutors*. You note the two-part test,
19 and then, in the sixth line, you say:

20 "Each of these two criteria, evidential and
21 public interest, is addressed in a series of
22 questions to be considered. This detail is
23 important because it highlights a range of
24 factors relevant to both stages of the test,
25 some of which will have greater import in some

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1 factual circumstances than others."

2 Is the point that you're making there that
3 it isn't sufficient to state that there are two
4 criteria, one evidential and one public
5 interest?

6 **A.** Yes, because you can say to yourself: have we
7 got enough evidence to prove what we suspect?

8 And, if you're just looking at quantity rather
9 than quality, then that will not necessarily
10 lead you to the right conclusion. If you ask
11 yourself the question, is it in the public
12 interest for us to prosecute without
13 understanding what that means or what it may
14 mean, then you can come to a perhaps rather
15 supervision view as to what public interest
16 means or think that it is just a rather
17 straightforward tick box, in the sense that, if
18 they've committed an offence, of course it is in
19 the public interest to prosecute them, without
20 drilling into what is actually a much more
21 nuanced process.

22 **Q.** You make the point that the Code requires
23 consideration of material that might call into
24 question the reliability of evidence that is
25 relied upon.

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1 Post Office were relevant to a charging
2 decision?

3 **A.** Yes, and one could test that, it seemed to me,
4 by comparing the name checking in 2007 with the
5 detail in 2013 and the new prosecuting policy
6 that was derived then, which did spell out, in
7 detail, a whole series of Post Office directly
8 relevant considerations, and would allow for
9 a prosecutor properly to carry out the task of
10 reaching a prosecuting decision in a way that
11 just saying "There's a Code out there" wouldn't.

12 **Q.** Over the page to 374, please. You I think make
13 a point that you made a couple of moments ago:
14 that, although the list of reliability
15 considerations included in a *Code for Crown*
16 *Prosecutors* had to be broad because of the range
17 of the offences --

18 **A.** Yes.

19 **Q.** -- being considered by the CPS, essentially they
20 were directing a prosecutor to consider the
21 reliability of the evidence they proposed to
22 rely on, whatever form that may take?

23 **A.** Yes.

24 **Q.** In this case, logically, where a prosecution
25 depended on Horizon data, it required

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1 **A.** Yes.

2 **Q.** Is that a reference to those variable -- there's
3 five, there's six, there's eight, I think,
4 depending on which iteration of the Code one
5 looks at, which direct prosecutors actively to
6 test the reliability of the evidence that they
7 propose to rely on?

8 **A.** Yes, and, of course, those questions in the Code
9 are designed to address a whole range of
10 offences and so they may, for example, refer to
11 the reliability of a witness but, when you read
12 them as a set and think "What is this asking of
13 me?" it is clear it is asking you to assess the
14 reliability of the material that you are relying
15 on. And so where what you relying on is data,
16 rather than an eyewitness, it reminds you that
17 you need to consider the reliability of that
18 data.

19 **Q.** Moving to paragraph 373, four lines in, you say
20 the earliest reference to the Code in Post
21 Office policies that you could find was in 2007
22 but that policy acknowledged the use of the
23 Code, rather than addressing in any detail at
24 all how it was to be applied or which features
25 peculiar to the offences investigated by the

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1 consideration of whether there was anything that
2 might undermine the reliability of the Horizon
3 data; is that right?

4 **A.** Yes, absolutely.

5 **Q.** Thank you. You say in the first sentence at
6 paragraph 375:

7 "It follows that for almost if not the whole
8 of the Inquiry's relevant period, Post Office
9 policies did not include any detailed
10 application of the *Code for Crown Prosecutors*,
11 to the extent that they recognised its
12 application at all."

13 **A.** Yes.

14 **Q.** How serious an issue is that?

15 **A.** It ties in with my concern that we've already
16 considered of who was making the prosecution
17 decisions, as opposed to what legal advice they
18 might have received along the way. But
19 particularly if considerations -- decisions as
20 to prosecution were being taken other than by
21 lawyers, then the lack of detail as to what they
22 needed to consider in a Post Office context in
23 order to do that ran real risks of decisions
24 that were not properly grounded in identifiable
25 principle.

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1 And a failure to acknowledge, analyse and
 2 set out what a code for Post Office prosecutors
 3 needed to address in reaching prosecution
 4 decisions ran the risk of those decisions being
 5 in error.

6 **Q.** Thank you. In paragraph 376 you allude to the
 7 absence in Post Office policies, all of them, of
 8 any reference to the DPP's Guidance on Charging?

9 **A.** Yes, and really that's because that identifies
 10 the separation of roles, the separation of
 11 decision-makers, where -- on the one hand, and
 12 the lack of clarity as to that in Post Office
 13 policies, on the other. That just concerned me.

14 **Q.** Thank you. You can include at the end of that
 15 paragraph:

16 "This removed the [over the page]
 17 potentially important safeguard of
 18 an independent and ultimately decisive second
 19 opinion before a decision to charge was
 20 reached."

21 **A.** Yes.

22 **Q.** Can we turn to the decision in *Eden*. I'm not
 23 going to ask you about paragraph 377 because we
 24 addressed that this morning. Can we turn to
 25 378. You say that, whether it was Post Office

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1 third part of our question 3. Is it essentially
 2 this: that because proceedings were initiated by
 3 way of laying of an information and the issue of
 4 a summons by the Post Office, a proper
 5 procedure, there was a duty of candour that
 6 required to be complied with, there was no
 7 reference in any document to that duty?

8 **A.** No, and although the case that I point to is
 9 a decision in 2018, it was not plucked out of
 10 the air in 2018. It was founded on a series of
 11 cases over a longer period of time, so
 12 throughout the Inquiry's relevant period.

13 **Q.** Thank you. Question 3(d), over the page at 163.
 14 You say in the second sentence that you do have
 15 concerns as to the adequacy of the disclosure
 16 regime erected by the Post Office policies in
 17 the relevant period and there's a real question
 18 as to whether those policies were sufficient to
 19 ensure that disclosure was properly undertaken,
 20 considered and completed in cases prosecuted by
 21 the Post Office in that period?

22 **A.** Yes.

23 **Q.** You tell us in 383:

24 "This is of very real concern because the
 25 risks posed by failures of disclosure were

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1 practice to charge both theft and false
 2 accounting, despite the judicial approval given
 3 to that practice by the Court of Appeal in *Eden*,
 4 can be looked at in Volume 2, because you need
 5 to see the facts?

6 **A.** Yes.

7 **Q.** But it's noteworthy that in the material you had
 8 seen, Chris Aujard's policy document noted that,
 9 typically, that which the Court of Appeal
 10 disapproved was gone?

11 **A.** Yes, and *Eden* is not saying -- and I'm not
 12 suggesting that *Eden* is saying -- that you
 13 cannot have both theft and false accounting on
 14 an indictment.

15 **Q.** No.

16 **A.** What *Eden* is saying is you need to think why
 17 you've got them both on the indictment and what
 18 they're there for.

19 **Q.** Over the page to 379. You say that, whether
 20 there was a practice of plea bargaining needs to
 21 wait for Volume 2.

22 **A.** Yes.

23 **Q.** Is that the long and short of it?

24 **A.** Yes.

25 **Q.** Thank you. "Initiation of proceedings", the

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1 already well understood before the Inquiry's
 2 relevant period commenced."

3 So the miscarriage of justice cases had
 4 already, at least in this respect, passed
 5 through the CACD.

6 **A.** Yes.

7 **Q.** You say in 384 that the Post Office correctly
 8 identified and at least briefly addressed the
 9 duty of disclosure under the CPIA and the
 10 amplification of that duty in the Code from 2001
 11 in its disclosure policy of that date. However,
 12 it did so in outline and without specific
 13 reference to the Code. It took until a decade
 14 later, July 2010, to do so?

15 **A.** Yes, and so if the suggestion is that there's
 16 a policy and outline and one could go away and
 17 read the Code to resolve any questions one had,
 18 it would certainly help someone to do that if
 19 you told them where to look within the Code,
 20 rather than just saying there is one.

21 **Q.** Over the page to 385, please. You say:

22 "Importantly ... my particular concern in
 23 policy terms is the failure of Post Office
 24 policies that [you] have seen to refer to, apply
 25 and address the succession of iterations of the

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1 *Attorney General's Guidelines* on disclosure."

2 A. Yes.

3 Q. That's because they address the pursuit of
4 reasonable lines of inquiry and the important
5 role of prosecutors in advising an investigator
6 on reasonable lines of disclosure and the act of
7 undertaking disclosure?

8 A. And also, as we'll come on to, third party
9 disclosure as well.

10 Q. You make that point in paragraph 386. You say
11 that "critically" -- in what respect was it
12 critical?

13 A. The policies that I saw did not address
14 third-party disclosure. 2001 disclosure policy
15 did acknowledge the existence of a guideline
16 from the Attorney General; the 2010 didn't do
17 that. But, in terms of making it sort of part
18 of the muscle memory of an investigator and
19 a prosecutor that that was a real part of their
20 role, it didn't give them a lot of help and,
21 certainly from 2010, didn't give them any at
22 all.

23 Q. In the third line you say:

24 "This is of great potential importance given
25 that Fujitsu would represent a third party in

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1 Q. -- to the evidence that you gave earlier that
2 I need to illicit.

3 MR BEER: Mr Atkinson, thank you very much for the
4 evidence you've given. They're the only
5 questions that I ask.

6 I know that there's one Core Participant,
7 sir, Mr Stein, who has a small number of
8 questions to ask.

9 SIR WYN WILLIAMS: Over to you, Mr Stein.

10 **Questioned by MR STEIN**

11 MR STEIN: Mr Atkinson, can I take you please to
12 your report, finishing in a considerable number
13 of zeros and 2. In particular, I'll ask you
14 a couple of questions about paragraphs 254 and
15 253, internal pagination, page 112.

16 A. Thank you.

17 Q. Now, this part of your report you're discussing
18 the 2000 version of the *AG's Guidelines*. And
19 then at paragraph 255 you quote from the
20 Guidelines. I'm just going to go through the
21 first paragraph that relates to those quotes
22 that you've set out there in italics:

23 "Generally material can be considered to
24 potentially undermine the prosecution case if it
25 has an adverse effect on the strength of the

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1 possession of material that might have been
2 relevant to prosecution cases by reference to
3 its relevance to the reliability of the Horizon
4 System. There was nothing in the ... policies
5 that [you had] seen explicitly to direct
6 a prosecutor's attention to the need to consider
7 whether material had been sought as to the
8 reliability of the system, or to assist as to
9 how and from where that material should be
10 sought if it was outstanding. That is far from
11 satisfactory position."

12 A. Yes, and I should say that I had approached, for
13 these purposes, Fujitsu as a third party without
14 any consideration of the contractual position
15 and what that might mean. That is for cleverer
16 people than me.

17 Q. Sorry, I missed the last part of that sentence?

18 A. That is for cleverer people than me to
19 understand.

20 Q. Can we turn over the page to paragraph 388. You
21 deal with Section 69 of PACE.

22 A. Yes.

23 Q. I don't think there's anything additional
24 there --

25 A. No.

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1 prosecution case. This will include anything
2 that tends to show a fact inconsistent with the
3 elements of the case that must be proved by the
4 prosecution. Material can have an adverse
5 effect on the strength of the prosecution case
6 (a) by the use made of it in cross-examination;
7 and (b) by its capacity to suggest any potential
8 submissions that could lead to (i) the exclusion
9 of evidence; (ii) a stay of proceedings ..."

10 Now, can we just deal, please, with what you
11 have set out there at numerals (i) and (ii).

12 A. Yes.

13 Q. If you would please, could you explain, no doubt
14 in reference to Section 78 of the Police and
15 Criminal Evidence Act, possibly Section 76, what
16 you mean by the "exclusion of evidence"?

17 A. So Section 78 of the Police and Criminal
18 Evidence Act is a route to the exclusion of
19 evidence that would have an unfair effect on the
20 proceedings, which will include by reference to
21 how that evidence was obtained. And so if, by
22 way of example, there was reliance on computer
23 data as evidence against an accused, if there
24 were material that might show that there was
25 unfairness in that reliance by reference to how

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1 that data had been obtained, whether that data
2 was reliable, whether it was possible properly
3 within the proceedings to explore its
4 reliability, those would all be factors that
5 could be deployed by those acting on behalf of
6 the defendant to exclude the evidence.

7 And, clearly, they can only do that if they
8 are aware of that material, which is why it
9 should be disclosed to them, so that they can
10 then make the decision whether to pursue the
11 argument or not.

12 **Q.** Yes. Those sorts of exclusionary arguments
13 within criminal proceedings can sometimes
14 exclude part of a prosecution case --

15 **A.** Yes.

16 **Q.** -- occasionally, the entirety of the prosecution
17 case --

18 **A.** Yes.

19 **Q.** -- though that is quite rare. So the effect of
20 that can be that it removes from the criminal
21 proceedings, the trial before a Magistrates
22 Courts or a jury, some aspects of a prosecution
23 case; is that a fair description?

24 **A.** Yes, yes.

25 **Q.** Okay. Let's then move on to the next part,
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1 basis for making applications to remove part of
2 a prosecution case or indeed to stay proceedings
3 often actually has to come from the prosecution?

4 **A.** Yes.

5 **Q.** That can often happen in circumstances where the
6 defence have absolutely no knowledge that there
7 could be such an application, either to exclude
8 or indeed to stay the case?

9 **A.** No, that's right.

10 **Q.** So helping put this all together, do you agree
11 it means that prosecutors and investigators need
12 to be aware that their duty extends to the
13 disclosure of information that may thoroughly
14 undermine, effectively ruin their case entirely,
15 that if they were in the job of just winning
16 with no regard to truth or justice, they
17 wouldn't in 1 million years disclose, that
18 actually they have to disclose?

19 **A.** They have to do rather more than that. They
20 have to disclose in that situation that you
21 posit, but they don't have to be -- to think
22 that this is actually going to ruin their case.
23 If they think it is a proper argument for the
24 defence to run, even if they think it's one that
25 they have an answer to, they still have to
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1 which is a stay of proceedings.

2 **A.** Yes.

3 **Q.** Now, a stay of proceedings is a familiar term to
4 people that work within both civil areas of work
5 in law and criminal. A stay of proceedings is
6 a reference to an abuse of process?

7 **A.** Yes.

8 **Q.** Fundamentally, we, working within the criminal
9 justice system, are used to the two different
10 levels of abuse of process, one which is that
11 a trial should not occur because to try
12 an individual in those circumstances is unfair,
13 yes?

14 **A.** Yes.

15 **Q.** And the second, which is where there is some
16 unfairness that, in the circumstances of that
17 particular case, in other words relevant to that
18 case, that may mean that particular trial should
19 not go ahead; is that right?

20 **A.** Yes, either that they cannot, for whatever
21 reason, receive a fair trial or that it would,
22 in any event, be unfair to try them.

23 **Q.** Yes. So we've just analysed the question of
24 exclusion of evidence and then the stay of
25 proceedings. And the evidence that forms the
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1 disclose it to give them the opportunity to try.

2 **Q.** Yes. So if I take you now, please, then to,
3 within the same report, your report, page 117,
4 paragraph 266. Now, to an extent, we're about
5 to emphasise really the same point that you've
6 just made. Paragraph 266.

7 So this is in reference now to the 2005
8 *Attorney General's Guidelines*. So we've moved
9 on slightly in terms of time, fundamentally the
10 basic position remains.

11 **A.** Yes.

12 **Q.** If we look at 266, what's described as primary
13 disclosure is now defined as follows,
14 paragraph 8 within the Guidelines:

15 "... 'Disclosure refers to providing the
16 defence with copies of, or access to, any
17 material which might reasonably be considered
18 capable of undermining the case for the
19 prosecution against the accused, or of assisting
20 the case for the accused, and which has not
21 previously been disclosed'."

22 So if we break this down, in terms of the
23 two points that I've just been asking you about,
24 in other words the ability for the defence to
25 mount an argument to exclude information or
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1 exclude evidence, or the defence to put forward
2 an abuse of process application, the prosecution
3 duty isn't just to disclose it where it is, if
4 you like, a home run for the defence; it is to
5 disclose it where it might reasonably be
6 considered capable of undermining the case for
7 the prosecution or of assisting the case for the
8 accused.

9 So in the two regards, do you agree, that
10 I've been asking you questions about,
11 applications to exclude evidence or stay
12 proceedings, where the words say "or of
13 assisting the case for the accused" we might
14 read that including "or assisting the case of
15 the accused", in terms of putting forward
16 an application to include evidence or to stay
17 the proceedings; is that right?

18 **A.** Yes, yes it is.

19 **Q.** So in adding up the position that you reached
20 when you are the prosecutor, you have to make
21 sure that you are keeping in mind all of the
22 different range of applications that might be
23 made within the trial process and considering
24 those as though you are in the shoes of the
25 defence, if you're aware of the information; is

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1 and including the point of verdict. They would
2 still continue even after that, although,
3 post-conviction, the post-disclosure obligations
4 are slightly different but they still exist.

5 **Q.** So these duties, in relation to the very points
6 that we've looked at regarding disclosure,
7 regarding a possible application for exclusion,
8 stay of proceedings, these are all wrapped up
9 within the continuing duty to disclose?

10 **A.** Yes.

11 **Q.** Okay. Now, the question of consideration,
12 therefore, as we've seen from the 2000 *Attorney*
13 *General's Guidelines*, has been well known to
14 prosecutors since at least the year 2000,
15 probably, in fact, if we look back a bit, before
16 that, that the disclosure duty applies to the
17 stay of proceedings and exclusion of material.
18 This is built in to the system?

19 **A.** Well, I forget off the top of my head when *Ward*
20 was but *Ward* was all about the exclusion of
21 material and material that should have been
22 disclosed to allow for the exclusion of
23 material. So that, certainly, is very much part
24 of the fabric of what a prosecutor should have
25 in their -- mixed metaphor -- but should have

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1 that fair?

2 **A.** Yes, and that's why it is explicitly recognised
3 that it's a continuing obligation, because
4 things will develop and you could not
5 potentially be criticised for anticipating
6 an argument at the very beginning of the process
7 when you first see the papers but, as
8 information comes in, you should always be
9 considering what does this mean and what does
10 this mean for my disclosure obligations?
11 Because it might be that a defence line occurs
12 to you that they should be entitled to explore,
13 and that means you have to disclose them.

14 **Q.** Yes. That's paragraph 267, reference to the
15 continuing duty?

16 **A.** Yes.

17 **Q.** So the continuing duty is both before the
18 proceedings start, so in the run-up to the trial
19 itself; is that right?

20 **A.** Yes.

21 **Q.** Through the trial process?

22 **A.** Yes.

23 **Q.** Just to nail this down, what about when the jury
24 has gone out, if it's a jury case?

25 **A.** Your disclosure obligations would continue up to

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1 available to them.

2 **Q.** So let's go back to paragraph 266, page 117 of
3 your report:

4 "... 'Disclosure refers to providing the
5 defence with copies of, or access to, any
6 material which might reasonably be considered
7 capable ...'"

8 Can I just concentrate on the words "any
9 material" for a moment, please. You've been
10 asked number of questions by Mr Beer today about
11 what sort of information might be useful in
12 terms of useful to be disclosed to the defence.
13 Mr Beer was raising the question in terms of
14 an allegation being made against a postmaster,
15 and the postmaster is saying, "Not me. I did
16 not nick the money, I didn't take that money.
17 There's something wrong with this system".
18 Okay?

19 So I put it in a different anyway to
20 Mr Beer, who did it much more elegantly, but
21 that's roughly what he was saying; do you agree?

22 **A.** Yes.

23 **Q.** All right. Now, help us a little bit further in
24 that. The questions you were asked by Mr Beer
25 was about the situation whereby there are known

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- 1 to be some defects, let's be generous, within
 2 the Horizon System. So knowledge of problems
 3 with the Horizon System, from what you've said
 4 to Mr Beer and in your report, essentially
 5 should be disclosed, yeah?
- 6 **A.** It would always depend to an extent on your
 7 appreciation of what those defects were and so,
 8 just as the concern before they repealed
 9 Section 69 was that there was this
 10 misunderstanding of how Section 69 worked, that
 11 if you were using a computer and there was
 12 anything wrong with it, then the computer
 13 evidence was out, even if it had nothing at all
 14 to do with anything you were relying on. You
 15 would have to -- and so if there were a defect
 16 that had nothing at all to do and could have
 17 nothing at all to do with what was in issue,
 18 then that wouldn't necessarily give rise to
 19 disclosure, but if it might, then you would.
- 20 **Q.** So a non-material defect that related -- I don't
 21 know -- to it taking there were three days to
 22 back-up and, in fact, it should only take two
 23 and a half days?
- 24 **A.** Yeah.
- 25 **Q.** Well, we might consider that as being
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- 1 it would depend on the facts rather more than
 2 I understand them at present -- but it would
 3 potentially depend on how they were putting
 4 their case. If their case was the computer says
 5 this amount of money was stolen by you, that's
 6 what this data shows and, in fact, they can't
 7 prove that there was a loss at all, then that is
 8 something that undermines their case, because
 9 it's directly contrary to what they're asserting
 10 and, on that situation, they should, if they
 11 want to go ahead with the prosecution, be
 12 disclosing the material that shows that.
- 13 **Q.** So the fact that something may not, in fact, be
 14 directly in writing somewhere, in other words
 15 it's corporate knowledge that the Post Office
 16 can't prove a loss using the Horizon System,
 17 that is still perfectly capable of being
 18 disclosed?
- 19 **A.** Depending on the circumstances, yes.
- 20 **Q.** Depending on the circumstances.
 21 I think that the report you're working on at
 22 the moment is going to be looking at individual
 23 cases.
- 24 **A.** Yes, it is.
- 25 **MR STEIN:** Excuse me for one moment.
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- 1 non-material.
- 2 **A.** (*The witness nodded*)
- 3 **Q.** If the machine could cause shortfalls, we're
 4 talking about something quite different?
- 5 **A.** Yes.
- 6 **Q.** Now, help us where there is knowledge within the
 7 Post Office of the fact that it is either very
 8 difficult or impossible to prove a loss. So we
 9 have an individual, a subpostmaster, who is
 10 facing an allegation by the Post Office of
 11 having taken money, essentially taken money,
 12 from the Post Office. The Post Office want to
 13 prove that allegation of theft against that
 14 individual and they may or may not have a false
 15 accounting charge on the charge sheet or
 16 indictment.
- 17 Now, if the Post Office is aware that they
 18 can't or it is extremely difficult and very
 19 expensive to prove the loss through the system,
 20 so in other words proving a negative -- they
 21 can't do this, they can't prove a loss -- should
 22 that material, should that information be
 23 disclosed? So proving, in the sense,
 24 a negative, "We can't do this"?
- 25 **A.** It would potentially and only potentially -- and
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- 1 Thank you, Mr Atkinson.
 2 Sir, no further questions.
- 3 **Questioned by SIR WYN WILLIAMS**
- 4 **SIR WYN WILLIAMS:** Mr Atkinson, *Ward* was decided in
 5 1993, so you tell us at paragraph 366, or at
 6 least the footnote to that paragraph.
- 7 **A.** Yes.
- 8 **SIR WYN WILLIAMS:** I take it that that was the first
 9 authoritative exposition of disclosure in the
 10 way that you have described it following the
 11 Act. The Act was in 1985, was it? Yes?
- 12 **A.** So *Ward* was very much concerned with a failure
 13 of disclosure by the combination of an expert,
 14 and the prosecution relying on the expert, of
 15 material that undermined the expert's
 16 conclusions. And it put into clear focus the
 17 need for there to be disclosure in that kind of
 18 situation, and the fact that if there wasn't
 19 a disclosure in that kind of situation, there
 20 would at least be a risk, and on the facts of
 21 that case, there was a miscarriage of justice as
 22 a result.
- 23 And the whole structure since then, through
 24 things like the CPIA, has been designed to try
 25 and prevent that happening again.
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1 **SIR WYN WILLIAMS:** Yes. My point is I think, all
2 that was going through my mind, really, given
3 that our time period for investigation begins in
4 about 2000, those engaged in the prosecution of
5 suspects -- or the investigation and prosecution
6 of suspects, rather -- would have had plenty of
7 time to digest what the Court of Appeal had said
8 in *Ward*, yes?
9 **A.** Very much so, yes.
10 **SIR WYN WILLIAMS:** Fine. All right.
11 Well, I thanked you yesterday for your
12 evidence and for your clarity and economy of
13 words, and today deserves a very similar thanks.
14 So thank you very much, Mr Atkinson, for all the
15 help you've tried to give me.
16 **THE WITNESS:** Thank you, sir.
17 **SIR WYN WILLIAMS:** I look forward to hearing from
18 you again before Christmas.
19 **THE WITNESS:** Thank you, sir.
20 **MR BEER:** Sir, can Mr Atkinson be released from the
21 embargo on speaking to anyone because we will
22 need to speak to him between now and when he
23 give evidence in December?
24 **SIR WYN WILLIAMS:** Unless anybody jumps up and says
25 that is inappropriate, Mr Beer, I intend to
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1 release him.
2 **MR BEER:** Thank you very much, sir.
3 Sir, we return at 10.00 on Tuesday.
4 **SIR WYN WILLIAMS:** Very well. Thanks very much.
5 See you on Tuesday.
6 **MR BEER:** Thank you very much, sir.
7 **(3.06 pm)**
8 **(The hearing adjourned until 10.00 am on**
9 **Tuesday, 10 October 2023)**
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