

THE POST OFFICE IT INQUIRY

SUBMISSION BY PAUL MARSHALL
RE: SECOND SIGHT

3rd November 2021

ISSUE A

- (i) To what extent should the Inquiry examine the events surrounding Second Sight?
 - (ii) Is it sufficient for the Inquiry to investigate the reasons for the decision to terminate the Post Office Complaint Review and Mediation Scheme?
 - (iii) Should the Inquiry examine whether and to what extent the scope and findings of, and the disclosure made in relation to, the independent investigation(s) undertaken by Second Sight were appropriate?
1. This submission is addressed to Issue A (i) - (iii). To distinguish separately between these, risks creating distinctions that may be little more than labelling and may create false distinctions. The facts and circumstances tend to overlap/feed into each other. Without prejudice to those observations, for reasons explained, the questions are to be answered:
- (i) See below.
 - (ii) No. To do so would be artificial and unduly restrictive.
 - (iii) Yes. In particular, in connection with the Post Office's refusal to disclose prosecution files, and the reasons for that refusal (especially given subsequent concessions made in the course of the appeals in connection with adequacy of disclosure/evidence).
2. This submission is made after the requested time for filing specified, 29 October 2021. It is made now, my having received on 2 November 2021 the "Key Documents" for the hearing fixed for 8 November 2021. It is noted, with some surprise, that Second Sight itself has not made submissions on Issue A *viz*: "*A. Second Sight Investigations Limited ("Second Sight")*" under the Issues/themes circulated on 12 October 2021 by the

Inquiry inviting further submission.¹ So far as none of the other submissions directly address the issue previously canvassed as part of joint written submissions to the Inquiry made with James Christie, Prof. Peter Bernard Ladkin, Prof. Bev Littlewood, Stephen Mason, Prof. Martin Newby, Prof. Harold Thimbleby and Prof. Martin Thomas C.B.E., on 10 September 2021 (*q.v.* paras [23]-[27]), I repeat those below, slightly modified and with some further elucidation/amplification that I believe will be helpful.

3. I make this submission now because of its importance and to be a matter of public record.
4. The submission is made for the purpose of assisting the Inquiry. It is not made on behalf of any particular person or interested party, but I have some familiarity with the circumstances.
5. In mid-December 2020 I was caused, by actions taken by the Post Office's counsel, Mr Brian Altman Q.C., for reasons and in circumstances that are a matter of record, to cease to act on behalf of Ms Tracy Felstead, Mrs Janet Skinner and Mrs Seema Misra in their appeals to the Court of Appeal.
6. Shortly before this, in November 2020, my solicitors had elicited from the Post Office the July 2013 "Clarke Advice", being one of three separate 'Clarke advices' provided by Peters & Peters on 12 November 2020 in response to correspondence from Aria Grace Law of October 2020.
7. By then, it had become apparent to me that Second Sight had performed a decisive role in identifying important issues concerning the Post Office's Horizon computer system. Those issues were among those that many years later were determined by Mr Justice Fraser in his judgment reported as **Bates and ors. v Post Office Ltd ('Horizon Issues') Rev 1** [2019] EWHC 3408. That judgment itself became the foundational document for the CCRC June 2020 s. 9 reference to the Court of Appeal.
8. It will be apparent from the foregoing that, whilst in the course of the Court of Appeal hearing in March 2021 there were various references to there being two Clarke Advices - the second being assumed to be the August 2013 "shredding" advice - there were,

¹ At least no submissions listed under "Key Documents".

including that advice, (at least) four separate “Clarke Advices” (- there may have been others).

9. The Second of the Clarke Advices concerned a review of Mrs Seema Misra’s prosecution undertaken by Mr Simon Clarke, then employed by the firm Cartwright King LLP, for the purposes of addressing the possible requirement for post-conviction disclosure to be given to Mrs Misra (i.e. disclosure that might cast doubt upon the safety of a conviction). I refer to this below for reasons that will become apparent.
10. It was Second Sight’s Interim Report of 2013 (whether in draft or final form) that caused the Post Office to take steps to procure from Cartwright King LLP the July 2013 “Clarke Advice”, a key document, arguably *the* key document, in the first tranche of Post Office appeals determined by the Court of Appeal in **Hamilton and ors. v Post Office Ltd** [2021] EWCA Crim 577.
11. An important fact, in connection with the circumstances in which the July 2013 ‘Clarke Advice’ eventually emerged in November 2020, is that the document that stimulated interest was a selected quotation from a memorandum from Bond Dickinson LLP to the Post Office main board provided to the board by Bond Dickinson in August 2013. The quotation referred to Mr Gareth Jenkins and recorded concern about evidence that Mr Jenkins had given in “a case” (factually inaccurate, in the use of the singular) and further expressed concern about sufficiency of disclosure given by the Post Office. At the time (November 2020) I was instructed on behalf of Mrs Seema Misra - the occasion for particular interest in Mr Jenkins about which I already entertained misgivings given Mr Justice Fraser’s later findings of fact. Mr Jenkins had been the principal technical witness at Mrs Misra’s trial in October 2010. (I am not aware of other prosecutions in which Mr Jenkins gave live oral evidence, and, as I recall,² at Mrs Misra’s trial, Mr Jenkins confirmed that that was the first occasion on which he had given oral evidence to the court as an expert witness.)
12. A remarkable fact that emerged, in connection with the Bond Dickinson memorandum of August 2013, is that the Post Office’s solicitors explained that the memorandum served two purposes:

² I have not checked the transcript.

- a. advising the board about Mr Jenkins’s evidence and related concerns (its contents were subsequently subject of a board paper³).
 - b. Notification to the Post Office’s insurers.⁴
13. The second of these purposes might appear to give rise to (at least) two further considerations, most obviously:
 - a. the purpose and nature of the risk notified to the Post Office’s insurers.
 - b. The absence of any reference to the Post Office notifying its insurers of risk (in connection with Mr Jenkins/disclosure) in 2013 in Mr Justice Fraser’s December 2019 judgment **Bates and ors. v Post Office Ltd (‘Horizon Issues’) Rev 1** [2019] EWHC 3408.
14. There is an issue as to whether the Post Office, in the ‘*Bates*’ group litigation, disclosed documents recording communications with its insurers concerning notification of risk in 2013. (Plainly, separate from any advice as to the requirement to give notice in respect of which LPP might have been asserted.)
15. Having some experience of commercial litigation, given the nature of the issues determined by Mr Justice Fraser in his December 2019 judgment, more particularly the nature of the Post Office’s defence, I would have expected the notice of risk to insurers in 2013 in connection with Mr Jenkins/his evidence, had it been disclosed to the claimants, to have aroused considerable interest from the claimants’ legal team and to have been explored in some detail in evidence. There is no reference to this circumstance being disclosed or otherwise being anywhere referred to (save in connection with the disclosure of the July 2013 Clarke Advice in November 2020) that I have seen. It is of course possible that the insurance notification was disclosed but that the claimants’ legal advisers simply failed to identify it or its (possible) importance/relevance.

³ Peters & Peters’ letter 12 November 2020.

⁴ *Ibid.*

16. As a matter of ordinary common sense, the notification of the Post Office’s insurers in 2013 may not perhaps be unrelated to the subsequent express acknowledgement by the Post Office, through its leading counsel in 2019 before Mr Justice Fraser, that the claimants’ claims then represented an existential threat to the Post Office’s mode of conducting its business – a submission that Fraser J described as “unhelpful”: “[h]owever, a party (here the Post Office) threatening dire consequences to national business should their case not be preferred is not helpful, and this seemed to me to be an attempt to put the court in terrorem.” It is not difficult, to put it no higher, to speculate that, in 2013, the Post Office may have recognised the risk to its business represented by the known facts as revealed by the (July 2013) Clarke Advice of a kind similar to the risk much later acknowledged by the Post Office in its submissions before Fraser J in 2019. (It is a matter of public record that the Post Office is unable to meet the level of claims made under the ‘Historic Shortfall’ compensation scheme.)
17. Further reasons for considering the role of Second Sight are that Second Sight had identified several important issues.
- a. The first is what became known in **Bates and ors. v Post Office Ltd (‘Horizon Issues’) Rev 1** [2019] EWHC 3408 as the “Receipts and Payments Mismatch” bug. It is referred to by Second Sight in their Interim Report at p 6 paragraph [6.5]. Fraser J in his judgment describes that bug as having been kept “secret” by the Post Office. The timing of that bug is of peculiar importance because:
- i. it and its known effects were discussed at a high-level meeting between senior employees of Fujitsu (including Mr Gareth Jenkins) and the Post Office in September 2010, immediately prior to Mrs Seema Misra’s criminal trial in October 2010 (at which Mr Jenkins gave evidence).
- ii. A written memorandum concerning that bug was sent by email to Mr Jarnail Singh, the solicitor then employed by the Post Office with conduct of Mrs Misra’s prosecution and appears to have been printed-off at his printer on the Friday immediately before her trial the following Monday 10 October 2010 (Respondent’s Notice, Court of Appeal).

- b. Second Sight in their 2013 Interim Report refer (Appendix 2 p 12) to what has (inaccurately) subsequently been identified as the issue of “remote access”. This featured in the 2015 BBC *Panorama* programme ‘Trouble at Post Office’. The issue is treated at length by Fraser J in **Bates and ors. v Post Office Ltd (‘Horizon Issues’) Rev 1** [2019] EWHC 3408. Until immediately before the Horizon Issues trial, the Post Office had consistently and publicly denied that ‘remote’ access to postmaster accounts without their knowledge or authority was possible. The evidence of Mr Roll, in his second witness statement, made persistence in that denial untenable.
- c. Second Sight identified the existence of unattributed/unallocated funds/receipts in Post Office suspense accounts. This raises the important, indeed troubling, question as to whether the Post Office had in fact received monies for which it variously prosecuted, or pursued civil claim against, postmasters. That is an issue/question that to my knowledge remains unresolved. See further Second Sight Final Report April 2015 paragraphs [2.15], [2.16].
18. Issues (a) and (b) above anticipate by almost 7 years the findings of Mr Justice Fraser.
19. Of arguably greater importance are the striking, and hitherto unexplained, circumstances in which Second Sight’s appointment was terminated.
20. On 17 December 2014 there was an adjournment debate in Westminster Hall moved by Mr James Arbuthnot MP (now Lord Arbuthnot of Edrom). Second Sight had been appointed two years’ previously. Sir Anthony Hooper, formerly a judge of the Court of Appeal, had been appointed to oversee a mediation process. At the December 2014 debate, Jo Swinson MP, then minister for Postal Services, having heard from MPs a series of disturbing accounts of the treatment by the Post Office of its postmasters, told Parliament:⁵

⁵ House of Commons, Post Office Mediation Scheme Volume 589: debated on Wednesday 17 December 2014, Column 548WH at <https://hansard.parliament.uk/commons/2014-12-17/debates/14121741000002/PostOfficeMediationScheme>.

“...in such a situation what I would normally propose doing is to get a team of forensic accountants to go through every scenario and to have the report looked at by someone independent, such as a former Court of Appeal judge. We have a system in place to look at cases ... If any information comes to light during the course of the mediation or the investigations, that suggests that any of the convictions that have taken place are unsafe, there is a legal duty for that information to be disclosed.... I fail to see how action can be taken without properly looking in detail at every single one of the cases through exactly the kind of scheme that we have set up... . We have to look at the details and the facts, and that has to be done forensically. That is why Second Sight, the team of forensic accountants, has been employed and why we have someone of the calibre of Sir Anthony Hooper to oversee the process.”

21. On 3 February 2015, Ian Henderson of Second Sight gave evidence to the Business Innovation and Skills Parliamentary Select Committee. It included the following statements:⁶

“we have seen no evidence that the Post Office’s own investigators were ever trained or prepared to consider that Horizon was at fault. That was never a factor that was taken into account in any of the investigations by Post Office that we have looked at.

That is a matter of huge concern, and that is why we are determined to get to the bottom of this matter, because we think that there have been prosecutions brought by the Post Office where there has been inadequate investigation and inadequate evidence to support some of the charges brought against defendants ... this ... is why we need to see the full prosecution files.

When we have looked at the evidence made available to us... I have not been satisfied that there is sufficient evidence to support a charge for theft. You can imagine the consequences that flow from that. That is why we, Second Sight, are

⁶ Oral evidence: Post Office Mediation, HC 935, Tuesday 3 February 2015, 37 available at https://www.jfsa.org.uk/uploads/5/4/3/1/54312921/17926_1.pdf.

determined to get to the bottom of this matter, which we regard as extremely serious.”

22. Accordingly, Ian Henderson, in February 2015, gave evidence to Parliament that Second Sight wanted to do exactly what Jo Swinson MP, the government minister, in December 2014 had told Parliament that the government considered was *necessary* in the circumstances.
23. Mr Henderson’s evidence before the Select Committee was that he had been told by the Post Office’s then General Counsel that Second Sight would not be provided with the Post Office’s prosecution files: <https://parliamentlive.tv/event/index/d05cb9e7-04d0-4d05-8a43-ddd74b1eccc0?in=10:54:58&out=10:57:51> Video <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-innovation-and-skills-committee/post-office-mediation/oral/17926.html> Transcript.
24. Within a month of Mr Henderson’s evidence to the Parliamentary Select Committee, in March 2015, the Post Office summarily terminated the engagement of Second Sight and withdrew from the mediation process.
25. Two observations may be made:
 - a. it seems implausible that the government, given the assurances given by the minister to Parliament, was not briefed on the decision to terminate Second Sight’s engagement. There is to my knowledge no suggestion that it was not.
 - b. The government/BIS (as it then was) was presumably given either a factually accurate account of the reasons for the decision to terminate Second Sight’s engagement or a factually inaccurate account.
26. A related circumstance, that might seem to merit consideration by the Inquiry, is that it will be noted that Mr Ian Henderson of Second Sight, at the Select Committee hearing in February 2015, repeatedly sought from the Post Office prosecution files. A large part of the hearing was concerned with an explanation of the reason for Second Sight requesting production of the prosecution files and Members of Parliament seeking explanation as to why these could/would not be provided by the Post Office.

27. As a matter of fact, it appears that the prosecution files requested were not provided to Second Sight.
28. It is known that Cartwright King LLP undertook a review (sometimes referred to as a “sift”) of Post Office prosecutions in response, it would appear, to the July 2013 Clarke Advice.
29. One of the Clarke Advices disclosed in November 2020 (referred to above) was a review (undated but seemingly of January 2014) of Mrs Misra’s prosecution by Mr Simon Clarke, albeit the review was for the expressly limited purpose of considering whether Mrs Misra should have disclosed to her:
 - a. the Second Sight 2013 Interim Report.
 - b. The ‘Helen Rose report’.
30. Mr Clarke recorded that, in advising as to whether Mrs Misra should have disclosed to her, *inter alia*, the Second Sight Interim report, he had not been provided by the Post Office with its prosecution file but only the trial transcripts.
31. Relying upon a separate written advice (referred to by Mr Clarke but not disclosed) from Mr Brian Altman Q.C. – referred to as the “General Review”, Mr Clarke concluded that there was no duty on the part of the Post Office to disclose to Mrs Misra either the Second Sight Interim Report or the Helen Rose report.
32. Given that Mrs Misra’s prosecution was one of the most important Post Office prosecutions, at least in the perception of the Post Office’s own lawyers, it is surprising that the Post Office, in obtaining a review from external solicitors of the prosecution for the purposes of determining whether post-conviction disclosure should be given, did not provide to its own solicitors the prosecution file. On any view, the review undertaken by Mr Clarke of Mrs Misra’s prosecution was limited and restricted. He appears to have considered it unexceptionable not to be provided with the Post Office prosecution file.
33. Accordingly, the Post Office provided neither Second Sight nor its own solicitors, with prosecution files (or at least one very important one) in 2014-2015. That raises

obvious questions about the conduct by the Post Office of reviews of its prosecutions in the light of the July 2013 Clarke Advice and the thoroughness of these.

34. Mrs Vennells C.B.E. explained to Mr Darren Jones M.P., Chair BEIS Select Committee, that from 2014 the Post Office effectively ceased prosecuting its postmasters for Horizon ‘shortfalls’. It is possible that these circumstances are not unrelated.
35. In 2015 the Post Office told Parliament that it had received no evidence that the conviction of any applicant to the mediation scheme was unsafe. Lord Arbutnot is on record in 2020 as stating that the Post Office then lied to Parliament. That allegation, to my knowledge, remains uncontradicted.

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