Neutral Citation Number: [2021] EWCA Crim 25

Cases no: 202001565 B3, 202001567 B3 & 202001571 B3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2021

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE PICKEN
and
MRS JUSTICE FARBEY DBE

- -

IN THE MATTER OF REFERENCES BY
THE CRIMINAL CASES REVIEW COMMISSION
and
IN A MATTER OF POSSIBLE IMPROPER DISCLOSURE

Between:

TRACY FELSTEAD **JANET SKINNER** **SEEMA MISRA**	**Appellants**
- and -	
POST OFFICE LIMITED	**Respondent**

- -
- -

Mr E Henry QC, Mr R Bentwood and Mr G Callus (instructed by **Shaw Graham Kersh Solicitors**) for **Ms Flora Page**
Mr P Lawrence QC and Ms Rachel Scott (instructed by **Clyde & Co LLP**) for **Mr Paul Marshall**
Mr B Altman QC, Ms Z Johnson QC and Mr S Baker instructed by **Peters & Peters for Post Office Limited** for the **Respondent**

Hearing dates: 3 December 2020

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Approved Judgment

Lord Justice Holroyde:

1. Tracy Felstead, Janet Skinner and Seema Misra are three of forty-one persons (collectively, "the appellants") whose cases have been referred to this court by the Criminal Cases Review Commission ("the Commission"). They were represented by counsel Mr Paul Marshall and Ms Flora Page at a directions hearing on 18 November 2020. At the start of that hearing Mr Altman QC, for the respondent, brought to the court's attention what he submitted was the improper provision to a journalist of a document, referred to for convenience as "the Clarke advice", which the respondent had disclosed to those representing the appellants as part of an extensive process carried out in accordance with a Disclosure Management Document ("DMD"). Ms Page informed the court that it was she who had provided that document. Further submissions were heard in that regard on the following day, 19 November. The court was informed that the same document had been provided by Mr Marshall to a police officer. A further hearing was directed. At the conclusion of that hearing, on 3 December 2020, we gave a short oral ruling directing that the question of whether any contempt proceedings are to be initiated against Mr Marshall and/or Ms Page and, if so, whether by the respondent or by the court of its own initiative, must be adjourned for consideration after the appeals have been concluded. We further directed that all further hearings must be before a different constitution. We indicated that our reasons for so ruling would be given in writing at a later date. This we now do.

2. At the hearing on 3 December 2020 Mr Altman QC, Ms Johnson QC and Mr Baker represented the respondent; Mr Henry QC and Mr Bentwood represented Ms Page; and Mr Lawrence QC and Miss Scott represented Mr Marshall. We are grateful to all counsel for their written and oral submissions.

3. We concluded that no contempt proceedings had been initiated, whether by the respondent or by the court, on 18 November. All that happened that day was preliminary to the possible initiation of such proceedings.

4. Nor were any such proceedings initiated on 19 November.

5. We further concluded that our priority must be to ensure that the appeals could proceed in proper course before us, and not be diverted or delayed by issues of possible contempt of court. Those issues were unrelated to the merits of the appellants' cases. They had arisen as a result of the conduct of counsel acting for three of the forty-one appellants. They were an unnecessary, unwelcome and time-consuming distraction from appeal proceedings which are of great importance to many people. There was a clear and substantial risk that further consideration of the issues relating to possible contempt of court, including an issue as to the position of the respondent in any contempt proceedings, would impact upon the resolution of important questions of principle which were listed for hearing on 17 December, and on the timetable for the appeal proceedings generally. That risk outweighed the desirability of dealing speedily with the issues of possible contempt of court. For that reason, we concluded that further consideration of those issues must be adjourned until after the appeal proceedings have been completed.

6. We accepted a submission that the just resolution of the issues of possible contempt will not depend on anything which is peculiarly within the knowledge of the members of this constitution of the court. We concluded that it was in the interests of justice

that further consideration of the issues of possible contempt should be before a different constitution of the court.

7. In order to explain how these issues arose, and to address the submissions of counsel in a little more detail, we shall set out below an outline of the appeal proceedings, and then summarise the sequence of events which led up to the hearing on 3 December. We shall refrain from comment on the issues which a different constitution will in due course have to consider.

8. Each of the forty-one appellants was a former sub-postmaster, sub-postmistress or Post Office employee. Between 2001 and 2013, each was convicted in the Crown Court of one or more offences of false accounting, theft or fraud. The prosecutions were brought by the respondent, the Post Office (now Post Office Limited), and in most cases relied on records kept by the Post Office's Horizon accounting system, which was in use in branches from about 2000 onwards. In essence, the prosecutions were based upon apparent discrepancies between the cash held at the relevant Post Office branch, and the figures recorded by the Horizon system. The Horizon system was asserted to be accurate and reliable, and the appellants either pleaded guilty or were convicted on that basis. In particular, Tracy Felstead was convicted of offences of theft and false accounting; Janet Skinner pleaded guilty to false accounting; and Seema Misra pleaded guilty to false accounting and was convicted of theft. All three were sentenced to, and served, terms of imprisonment.

9. The reliability of Horizon has subsequently been called into question. In a nutshell, the concern was that underlying faults in the Horizon system caused it to overstate the amount of cash or stock which should have been held at a particular branch, thus causing what appeared to be an unexplained shortfall.

10. Civil proceedings, relating amongst other things to deficiencies in the Horizon system, were commenced by hundreds of former Post Office employees. A Group Litigation Order was made. The proceedings were heard by Fraser J, who delivered a number of detailed judgments, in the course of which he made adverse findings about the Horizon system. He also expressed grave concern about evidence given by some employees, or former employees, of Fujitsu, the company which designed and maintained the Horizon system. At the conclusion of the civil proceedings, he wrote to the Director of Public Prosecutions inviting consideration of whether there should be a prosecution or prosecutions for perjury. The court has been informed that a police investigation into two Fujitsu employees has very recently been commenced.

11. The Commission, pursuant to the power granted to it by section 9 of the Criminal Appeal Act 1995, referred the forty-one cases to this court. Its reasons for those referrals, which take effect as grounds of appeal against conviction, raised two well-established categories of abuse of process: first, that a defendant could not have a fair trial ("Ground 1"); and secondly, that his or her trial was an affront to the conscience of the court ("Ground 2").

12. On 16 November 2020, Mr Marshall and Ms Page filed detailed grounds of appeal on behalf of each of these three appellants.

13. The respondent has indicated the following response to the appeals:

i) In the cases of thirty-four appellants – including Tracy Felstead, Janet Skinner and Seema Misra – the appeal is not opposed on Ground 1 but is opposed on Ground 2.

ii) In three cases, the appeal is opposed on both Grounds 1 and 2.

iii) In the remaining four cases, for reasons which are said to be fact-specific, the appeals are not opposed on either Ground 1 or Ground 2.

14. That very brief outline is sufficient to show the importance of these appeal proceedings. Many years have passed since the appellants were convicted and sentenced, in circumstances which the respondent accepts involved an abuse of the process of the court.

15. The respondent has undertaken an extensive process of post-conviction disclosure of unused material. The DMD set out very clearly the process to be followed and the sequence of work. In paragraph 80 of the DMD, the respondent said that material disclosed as part of the process was disclosed "solely for the purposes of the preparation for and conduct of appeal proceedings". It went on to assert, in paragraph 81 –

> "The unauthorised use or onward transmission of any disclosed material for any purpose, other than the preparation for and conduct of appeal proceedings, is a breach of the common law obligation not to use the material for any purpose other than for the proceedings in which it is disclosed, and constitutes a contempt of court punishable by a fine or imprisonment or both"

16. In a footnote to that paragraph, the respondent stated that where, as in this case, disclosure is being made in connection with a CCRC reference, it is governed by common law principles rather than by the Criminal Procedure and Investigations Act 1996 ("CPIA"). Relying on Harman v Secretary of State for the Home Department [1983] AC 280, the respondent asserted in the footnote that the prohibition in the CPIA on the collateral use of disclosure made under section 17 of that Act, breach of which is an offence under section 18, is mirrored in the common law.

17. The forty-one cases were listed for a directions hearing on Wednesday 18 November 2020, before the present constitution of the court. In preparation for that hearing, the parties had put in written submissions. The respondent's submission questioned whether the court should hear argument on Ground 2 in the cases of appellants whose appeals were not resisted on Ground 1 and could therefore be expected to succeed on that ground. Mr Marshall and Ms Page submitted that Ground 2 should be argued in the cases of these three appellants, even though their appeals were not opposed on Ground 1. Counsel for other appellants made written submissions to the effect that they did not at present actively seek to argue Ground 2 but that they reserved their positions in that regard. One of the matters to be considered on 18 November, therefore, was an issue as to whether Ground 2 should be argued in the cases of those appellants whose appeals were not opposed on Ground 1.

18. On 12 November 2020 the respondent disclosed further material to those representing these three appellants, including the Clarke advice: an advice written by Mr Simon Clarke, a barrister employed as an in-house advocate by Cartwright King, solicitors who either acted or had previously acted for the Post Office (or its predecessor) in criminal prosecutions in the courts below.

19. On 16 November Mr Marshall and Ms Page submitted a further Note to the court, to which they appended a copy of the Clarke advice. They submitted that grounds of appeal could not be settled until all key disclosure had been made, that further disclosure was necessary before the appeals could fairly be concluded, and that the court should set an end date for all disclosure before hearing argument as to whether the appellants should be permitted to argue grounds other than those conceded by the respondent.

20. Having regard to the number of appellants, and the number of issues to be considered, the directions hearing on 18 November was listed for a full day.

21. There is, of course, considerable press interest in these appeals. At the start of the hearing, we directed that counsel for the respondent should read aloud certain paragraphs of the Commission's two statements of reasons for the referrals, and that the whole of both references should then be deemed to have been read in full. Journalists would then be able to ask for copies of those documents – which amount, collectively, to well over 1,000 pages and contain a great deal of detail - to assist them in accurate reporting. We expressed our provisional view that in accordance with established principles it would be necessary to wait and see to what extent any other documents were referred to in open court during the hearing, to see whether they became disclosable. No counsel made any submission against that approach.

22. Mr Altman QC, for the respondent, then informed the court that on the evening of 17 November the Communications Department of the Post Office had received an email from a Telegraph journalist, Mr Lewis Page, who is the brother of counsel Ms Page. Mr Page said in his email that he had been "talking with the legal team" representing the appellants Tracy Felstead, Janet Skinner and Seema Misra. He said that they had let him see a document which had recently been passed to them "by the PO's lawyers under disclosure rules". He summarised the nature of the document concerned, namely the Clarke advice, and commented upon it. He concluded by saying:

> "The Clarke report will be mentioned in court tomorrow and probably in The Telegraph also. It will become public very soon. Naturally the PO should have right of reply. Apologies for the timing but I've only just seen the document and pitched the story myself. I'll keep you informed of publication etc as I know more."

23. It is clear from that email that Mr Page, the day before a hearing which was listed for directions only, expected that the Clarke advice would be mentioned in court and would "become public".

24. Mr Altman also provided the court with copies of an article by Mr Page, published in the Telegraph on 17 October 2020, in which he named, and quoted, the solicitor who

acts for these three appellants. Later in the article he referred to what the Telegraph had been told by "legal sources", but did not name or identify those sources.

25. Mr Altman referred to Harman and to Taylor v Director of the Serious Fraud Office [1999] 2 AC 177. He submitted that the provision of the Clarke advice to a journalist was a serious breach of the terms of the DMD, a breach of an implied undertaking at common law and arguably a contempt of court. The Clarke advice was a document covered by legal professional privilege, and the respondent had waived privilege only for the purpose of meeting its disclosure obligations. Given that one matter to be considered at the directions hearing was the possible imposition of reporting restrictions, a particular vice of what had happened was that the Clarke advice referred to persons who were now the subject of a live police investigation.

26. We asked if Mr Altman made any submission as to how the court should proceed in relation to the issue which he had raised of a possible contempt of court. Mr Altman said that he and his team had had little time to consider the issue, but submitted that the court should as a minimum

> "hear from Mr Marshall and Ms Page to see what they want to say about it."

27. We agreed with that submission, but emphasised that it was a question of whether Mr Marshall and/or Ms Page wished to say anything about what was potentially a serious matter, which might have to be investigated.

28. Mr Marshall said that he wanted to say two things: first, on instructions, that it was not his instructing solicitors who had disclosed the document to Mr Page; and secondly, that it was Ms Page who had provided it to her brother Mr Page, who was unable to attend the hearing. He added that Ms Page recognised that it was not appropriate for her to have done so and that she unreservedly apologised. He concluded:

> "… more than that I would not wish to say at the moment."

29. Ms Page then addressed the court, confirming that she did unreservedly apologise. She had been aware that her brother would not be able to attend the hearing, and was also aware that he would not publish anything "unless this document was fully enunciated in court". She repeated her apology and said

> "it should have waited until today, but it was a pragmatic decision based on the fact that if there were to be no reporting restrictions, and if the document was fully mentioned in court today, then it would be a document which, potentially, could be reported upon."

30. In answer to a question from the court, seeking clarification of the sequence of events, Ms Page added that the Clarke advice had been "discussed yesterday in anticipation of today's hearing" and that she had not disclosed any other document to her brother.

31. There were many matters to deal with at the directions hearing, and many parties whose hearing had already been delayed by an hour. We therefore put further consideration of this matter back to 4pm, which gave Ms Page an opportunity to make appropriate arrangements if she wished someone to speak for her. We warned her that

> "amongst the matters to be considered are whether Her Majesty's Attorney General should be invited to consider a possible contempt of court and/or whether there should be a report to a professional body."

32. It is convenient to note here that later in the day, we varied our order to provide for a hearing to take place at 1015 on the following day, 19 November. We indicated that Mr Marshall, and any other party or counsel, could attend if they wished but were not required to do so. Ms Page at that stage helpfully indicated that she had spoken to her brother, who had told her that he would destroy the document.

33. The directions hearing proceeded. No reporting restrictions were imposed. Counsel for all of the appellants made submissions as to what directions should be given, both generally and in relation to individual cases. We indicated that the issue of whether Ground 2 could be argued, even if an appeal was not opposed on Ground 1, raised important questions of principle which should be determined before the end of term so that all parties would know the basis on which they should prepare for the full appeal hearing. Mr Marshall submitted that such a hearing should take place but that it would not be practical for it to do so before the end of term. Mr Marshall sought to make a submission about the significance of the Clarke advice, but was stopped by the court on the basis that it was not relevant to the question of whether the issues of principle should be considered at a separate hearing.

34. The directions given at the conclusion of the hearing included the following:

i) The cases of all appellants whose appeals are uncontested on Ground 1, but contested on Ground 2, will be listed on 17 December 2020 (with a time estimate of one day) for the hearing of submissions on two questions of principle: Is each appellant entitled as of right to argue Ground 2? If not, on what principles should the court act in deciding whether to permit argument on Ground 2?

ii) Any party who wishes to make submission at that hearing must not later than 4pm on 11 December 2020 file a skeleton argument. The court will invite HM Attorney General to consider appointing an advocate to the court to make submissions.

iii) The prosecution must complete disclosure by 5 February 2021.

iv) The appeals of all appellants, other than the three whose appeals are contested on both grounds, will be listed for final hearing on 22 March 2021, with the contested appeals of those three appellants to follow and the total time estimate to be 4-5 days.

35. On 19 November 2020 Ms Page attended. She was represented by Mr Bentwood. Her brother was also present. We understood that Mr Marshall did not wish to attend.

36. Mr Altman submitted that the court could if it wished deal with the matter summarily as a civil contempt. If so, the next stage would be for the allegation against Ms Page to be formulated, so that she could say whether she admitted it.

37. Mr Bentwood began his submissions by repeating Ms Page's apology for her lapse of judgement, and for causing the appeal proceedings to be distracted by an extra issue. He then began to make submissions about the various routes open to the court. He was however interrupted when the court associate reported that he had received an email from Mr Marshall indicating that he wished to join the hearing via CVP: we now understand that Mr Marshall may have expected the hearing to start rather later than it did. We adjourned so that the necessary technical steps could be taken. After some minutes, we were informed that Mr Marshall no longer wished to attend.

38. Mr Bentwood resumed his submission that any potential contempt issue should be considered by a different constitution. He submitted that summary consideration of possible contempt would not be appropriate: although the factual matrix was "both relatively straightforward and admitted", there was an issue of law which was not straightforward, as to whether Ms Page had been under any obligation not to disclose the Clarke advice, and whether paragraph 81 of the DMD could impose such an obligation if one did not otherwise exist. He referred to Mahon v Rahn [1998] QB 424. He stated that Ms Page accepted that her error of judgement was a serious one, but emphasised that it was never her intention to make public something which would not otherwise have become public. He submitted that the Clarke advice would become public at some stage, though he accepted that a breach of undertaking – if in law there was an implied undertaking – could not retrospectively be validated. He submitted that the body best positioned to deal with the matter and, if necessary, to impose any sanction was the Bar Standards Board, to which Ms Page would refer herself. He spoke of the impact of that referral on her otherwise unblemished professional career.

39. We interpose to note that Ms Page subsequently withdrew from acting for these three appellants.

40. As Mr Altman was concluding his brief submissions in reply, the court was passed by the associate an email which had been sent at 1045 that morning by Detective Sergeant Broom, an officer in the Metropolitan Police Service who has been involved in the police investigation relevant to these appeal proceedings. DS Broom stated that Mr Marshall had sent a copy of the Clarke advice to her on the afternoon of 17 November 2020, saying -

> "This is what we filed with the court yesterday for the hearing tomorrow. I am confident you will find the advice and its conclusion very interesting."

DS Broom went on to state that Mr Marshall had sent a further copy of the Clarke advice to her at 0652 that morning, saying –

> "this document was referred to in court yesterday."

41. There was a short adjournment to allow counsel time to consider this email. Mr Altman, acknowledging the need to be circumspect because Mr Marshall was not present, indicated that his instructing solicitors were in contact with the Metropolitan Police in relation to disclosure, which was being dealt with through a proper process. Mr Marshall's voluntary provision of the Clarke advice to DS Broom, he submitted, was a breach of the implied undertaking –

> "But that may perhaps be for another day for the court to determine, for the reasons given, and Mr Marshall may have to find himself in the same position as Ms Page has."

42. Emphasising the need for caution in Mr Marshall's absence, we noted that he had not mentioned on 18 November that he had sent a copy of the Clarke advice to another third party the previous afternoon. Whilst the message which he sent to DS Broom hours before the present hearing was factually accurate, the Clarke advice had been referred to on 18 November because of the need to investigate the circumstances of its disclosure to Mr Page.

43. Mr Bentwood submitted that this potential added layer of complexity was a further reason why the court should not deal with matters summarily.

44. Mr Page, in response to questions from the court, stated that he had received the Clarke advice from his sister only in electronic form; that he had deleted it; and that he would make no use of what he had read in it unless and until a stage was reached at which any journalist could properly refer to it. He added that his sister had only let him see the Clarke advice on condition that he would not write about it unless it became public.

45. In the light of the submissions made by Mr Altman and Mr Bentwood, it was clear that there were issues as to whether or not counsel and solicitors who receive disclosure of unused material in criminal proceedings not governed by sections 17 and 18 of the CPIA come under any, and if so what, duty limiting the use they may properly make of that material, and as to the effectiveness or otherwise of disclosure being made under cover of a statements such as that contained in paragraph 81 of the DMD. We ruled:

> "That, in our view, is an issue which must be resolved by the court. If there be such a duty as the prosecution contend for, and if there be here a breach of it, then that would, on the face of it, be a civil contempt of court, which is a matter for the court. We are therefore unable to accept Mr Bentwood's submission that the court need take no action and may properly and sufficiently leave these questions to be dealt with by the Bar Standards Board."

46. We therefore adjourned to a later hearing consideration of whether there had been a civil contempt of court, and whether any future proceedings should be heard by the same or a different constitution. We requested the assistance of the respondent in drafting a provisional formulation of the charge or charges against Ms Page and in seeking to agree with Mr Bentwood a summary of the relevant facts. We went on to indicate that we wished Mr Marshall to assist the court in relation to his emails to DS

Broom. We wished that assistance to be given as soon as practicable, in part because of our concern for the position of the three appellants represented by Mr Marshall and Ms Page, who wanted to make submissions on the questions of principle which were to be considered on 17 December. We indicated that the nature of the next hearing would be to establish whether the court (be it this constitution or another) would thereafter be concerned with Ms Page alone or also with Mr Marshall. We suggested that in considering the formulation of a charge and statement of facts, the respondent would be able to work "with one eye to the possibility that there may be charges to be considered against two rather than one".

47. On 23 November 2020 Mr Marshall sent a letter to the court in which he stated that he had provided the Clarke advice to DS Broom on 17 November 2020 because he considered it was right and in the interests of justice and the suppression of crime to do so and in anticipation that its contents would become part of the court record on 18 November. He said that he had initially thought that he would wait until after the hearing before sending the Clarke advice to DS Broom but had done so on 17 November "because of its seeming importance".

48. The respondent drafted Particulars of Conduct against Ms Page, alleging that she had acted in breach of an undertaking implied at common law not to use the Clarke advice for any purposes other than the proper conduct of these appeal proceedings, and a draft summary of relevant facts.

49. At the hearing on 3 December, Mr Altman stated that the respondent on 18 November had brought matters to the attention of the court but had not made any application for committal for contempt. In the intervening period, all counsel and solicitors representing the appellants had given undertakings which sufficed to meet the respondent's concerns as to any further inappropriate use of disclosed material. He suggested that the court might consider appointing fresh counsel to assist it in potential contempt proceedings before this or another constitution.

50. Mr Henry QC referred to Ms Page's impressive professional record and personal character. He emphasised that she had given the Clarke advice to her brother purely to assist him to prepare an accurate and fair report of proceedings. She had acted mistakenly in giving the document to him, but she had done so in the knowledge that he would be bound by the court's decision.

51. Mr Henry referred to rule 48 of the Criminal Procedure Rules, which, so far as is material for present purposes, provides –

> "GENERAL RULES
>
> **When this Part applies**
>
> **48.1.**—(1) This Part applies where the court can deal with a person for conduct—
>
> (a) in contempt of court; or
>
> (b) in contravention of the legislation to which rules 48.5 and 48.9 refer.

…

CONTEMPT OF COURT BY OBSTRUCTION, DISRUPTION, ETC

Initial procedure on obstruction, disruption, etc.

48.5.—(1) This rule applies where the court observes, or someone reports to the court—

(a) in the Court of Appeal or the Crown Court, obstructive, disruptive, insulting or intimidating conduct, in the courtroom or in its vicinity, or otherwise immediately affecting the proceedings;

(b) in the Crown Court, a contravention of—

(i) section 3 of the Criminal Procedure (Attendance of Witnesses) Act 1965 (disobeying a witness summons), or

(ii) section 20 of the Juries Act 1974 (disobeying a jury summons);

(c) in a magistrates' court, a contravention of—

(i) section 97(4) of the Magistrates' Courts Act 1980 (refusing to give evidence), or

(ii) section 12 of the Contempt of Court Act 1981 (insulting or interrupting the court, etc.);

(d) a contravention of section 9 of the Contempt of Court Act

1981 (without the court's permission, recording the proceedings, etc.); or

(e) any other conduct with which the court can deal as or as if it were, a criminal contempt of court, except failure to surrender to bail under section 6 of the Bail Act 1976.

…

CONTEMPT OF COURT BY FAILURE TO COMPLY WITH COURT ORDER, ETC.

Initial procedure on failure to comply with court order, etc

48.9.—

(1) This rule applies where—

(a) a party, or other person directly affected, alleges—

(i) in the Crown Court, a failure to comply with an order to which applies rule 33.70 (compliance order, restraint order or ancillary order), rule 47.9 (certain investigation orders under the Police and Criminal Evidence Act 1984, the Terrorism Act 2000, the Proceeds of Crime Act 2002, the Proceeds of Crime Act 2002 (External Investigations) Order 2014 and the Extradition Act 2003), rule 47.41 (order for retention or return of property under section 59 of the Criminal Justice and Police Act 2001) or rule 47.58 (order for access under section 18A of the Criminal Appeal Act 1995),

(ii) in the Court of Appeal or the Crown Court, any other conduct with which that court can deal as a civil contempt of court, or

(iii) in the Crown Court or a magistrates court, unauthorised use of disclosed prosecution material under section 17 of the Criminal Procedure and Investigations Act 1996; or

(b) the court deals on its own initiative with conduct to which paragraph (1)(a) applies.

(2) Such a party or person must—

(a) apply in writing and serve the application on the court officer; and serve on the respondent—

(i) the application, and

(ii) notice of where and when the court will consider the allegation(not less than 10 business days after service).

(3) The application must—

(a) identify the respondent;

(b) explain that it is an application for the respondent to be dealt with for contempt of court;

(c) contain such particulars of the conduct in question as to make clear what is alleged against the respondent; and

(d) include a notice warning the respondent that the court—

(i) can impose imprisonment, or a fine, or both, for contempt of court, and

(ii) may deal with the application in the respondent's absence, if the respondent does not attend the hearing.

> (4) A court which acts on its own initiative under paragraph (1)(b) must—
>
> (a) arrange for the preparation of a written statement containing the same information as an application; and
>
> (b) arrange for the service on the respondent of—
>
> (i) that written statement, and
>
> (ii) notice of where and when the court will consider the allegation (not less than 10 business days after service)."

52. Mr Henry submitted that the respondent on 18 November had failed to assist the court, with the result that there had been confusion as to the nature of the suggested contempt and a failure to follow rule 48. The suggested contempt had first been raised by the respondent, not by the court of its own motion; but the respondent had failed to make the written application required by rule 48.9, and had then diverted the court into embarking upon a summary procedure under rule 48.5. From then on, there had been procedural unfairness: although the court had made clear that Ms Page did not have to say anything, it was difficult for her as a barrister to remain silent when addressed by the court. The safeguards to which she was entitled, namely her right to silence, right against self-incrimination and right not to give evidence, had gone by the board. Mr Henry referred to Douherty v Chief Constable of Essex Police [2019] EWCA Civ 55, in which reference was made at [23] to a checklist set out by Theis J in family proceedings in the earlier case of re L (a child) [2016] EWCA Civ 173. That checklist, he submitted, had been overlooked in the present case. The court, although of course not intending to be unfair, had in fact come to conclusions about Ms Page's conduct on the basis of information which she provided in breach of her rights. Mr Henry submitted that any further hearing should be before a different constitution of the court. The present constitution should not conduct any investigation or play any further role. If the respondent wished to instigate contempt proceedings, it should do so in accordance with rule 48.9. Rule 48.5 is concerned with contempt in the face of the court, and had no application in the present case which is based (if at all) on a contempt arising out of a breach of undertaking. Any contempt of that kind would be a civil contempt.

53. In Mr Henry's submission, what was said by the respondent on 18 November engaged rule 48.9(1)(a)(ii). In particular, he submitted, the manner in which Mr Altman had raised the matter amounted to "a party, or other person directly affected, alleg[ing] contempt". The respondent could not now disavow that approach and leave matters to the court. It was only on 19 November that any steps were taken towards compliance with rule 48.9; but by that time, the procedural flaws on the previous day had caused irremediable prejudice to Ms Page. In re Yaxley-Lennon [2018] 1 WLR 5400 emphasised the need for procedural fairness, and In re Ian West [2015] 1 WLR 109 emphasised the importance of compliance with the Criminal Procedure Rules. In any future hearing, evidence of what was said by Ms Page and Mr Marshall before they were advised as to their rights should be excluded.

54. Mr Henry accepted that in principle the court had been entitled to ask questions in order to elucidate how the document had reached Mr Page, but he contended that

there was a clear allegation of contempt and that accordingly no enquiry should have been made of Ms Page until she had been informed of the charge(s) she faced and had been able to take advice.

55. Mr Lawrence QC pointed out that since the last hearing, no application for committal for contempt had been initiated against Mr Marshall. He too submitted that a barrister in the position of Ms Page or Mr Marshall faced a difficulty: instinctively wishing to assist the court, but owing a duty to their clients and having a self-interest as soon as the matter of concern was raised. It would have been much better if the court had been taken immediately to rule 48, as that would have brought into focus the distinction between a potential summary procedure and the non-summary procedure which is mandatory in cases of civil contempt. As it was, no procedure complying with the Rules had been commenced against either Mr Marshall or Ms Page.

56. Mr Lawrence stated that he would not make any submissions about the facts of the matter: there might in future be properly formulated proceedings to which Mr Marshall would have an opportunity to respond. He submitted that the court should direct the respondent to decide whether it wished to initiate and prosecute an allegation under rule 48. The respondent was the aggrieved party, and it was for the respondent to decide whether it wished to embark upon a process in which an issue would arise as to whether any, and if so what, undertaking was to be implied in the circumstances of this case. He did not say that the court was debarred from initiating its own process, but on the authority of Harman and as a matter of good sense it should be left to the aggrieved party. If such a process was commenced by the respondent, it should be dealt with by a different constitution. If the court was minded to initiate contempt proceedings, it should not be done immediately because of the risk of jeopardising Mr Marshall's ability to continue to represent the three appellants. Mr Lawrence added, however, that undue delay might give rise to an issue of abuse of process.

57. Mr Altman submitted in reply that although the interests of the respondent were engaged, the more important interest was the public interest in there being compliance with the implied undertaking. Further proceedings were therefore not a matter for the respondent, a private prosecutor. No process had been initiated against Mr Marshall, though the court could initiate such process if it wished. As to Ms Page, Mr Henry was wrong to suggest that the respondent had made an allegation against her on 18 November: all the respondent had done was to bring to the court's attention what it knew at that time, as information not allegation. The court was therefore dealing with the matter of its own initiative under rule 48.9(1)(b). The court had asked for a draft to be prepared in accordance with rule 48.9(4), and that had been done; but no contempt proceedings had yet been commenced, and it was for the court to decide whether they should be. The court had been entitled to invite Mr Marshall and Ms Page to speak on 18 November, and had rightly told them that they did not have to say anything; but no one at that stage knew that they would both say it was Ms Page who had provided the document to her brother. The rights of Ms Page and Mr Marshall had been preserved. The checklist put forward by Theis J was appropriate in an application for committal, but the proceedings on 18 November were not such an application.

58. In our view, rule 48.9(1) does no more than specify the circumstances in which the rule as a whole applies. It is only when a party or other person directly affected

makes an allegation of a kind particularised in paragraph (1) (a), or the court begins to deal on its own initiative with conduct of such a kind in accordance with paragraph (1)(b), that the requirements of rule 48.9(2) or rule 48.9(4) come into effect. Any other interpretation would render rule 48.9(1) unworkable: it would mean that as soon as a party, or the court, mentioned the relevant matter, it would already be too late to comply with the requirements of rule 48.9(2) or 48.9(4). It would also mean that the court would be prevented from taking any steps to enable it to make an informed decision as to what to do when told that a legally privileged document had been passed to a journalist.

59. At the time when the matter was first raised in court by Mr Altman, all that was known was that a document which, in accordance with the DMD, had been disclosed to the representatives of these appellants solely in connection with their conduct of the appeal proceedings, had been given or shown to a journalist, apparently by one of those representatives.

60. Mr Altman, in providing information to the court, went no further than stating that whichever legal representative gave the document to Mr Page had acted in breach of the DMD and of an undertaking implied at common law, and had arguably committed a contempt of court. In our view, the respondent did not thereby make an allegation within the meaning of rule 48.9(1)(a).

61. Nor, by our enquiring of Mr Marshall and Ms Page whether they wished to say anything, did the court begin to deal with the conduct of any person, within the meaning of rule 48.9(1)(b). Contrary to Mr Henry's submission, we did not ask either Mr Marshall or Ms Page any question, other than enquiring whether they wished to say anything. Both Mr Marshall and Ms Page volunteered that it was the latter who had provided the document to Mr Page, that she recognised that she had been wrong to do so and that she apologised for doing so. Neither the respondent nor the court had known that Mr Marshall and Mr Page would say that. The matter was adjourned to the following day so that the question of possible contempt proceedings could be addressed at a time when Ms Page had an opportunity to be represented, but without delaying or derailing the directions hearing.

62. In those circumstances, there was no initiation of any contempt proceedings, whether by the respondent or by the court, on 18 November.

63. It should be noted that both Mr Henry and Mr Lawrence accepted that the court, faced as it was on 18 November with an issue which clearly needed to be addressed promptly, was entitled to make some enquiry into how the Clarke advice had come into the possession of Mr Page. Both asserted, rightly, the need for the court to proceed with caution; but both accepted that the court had made clear that neither Mr Marshall nor Ms Page was required to say anything if they did not wish to do so, and neither made any specific submission as to anything else which the court could or should have done in that regard. We understand the point they make about the difficult position of a barrister who is invited to assist the court and instinctively wishes to do so. We observe, however, that it was Ms Page's conduct which gave rise to the situation in which that difficulty arose.

64. We accepted the submission that the respondent should on 18 November have referred the court to the provisions of rule 48. The fact that no such reference was

made did not, however, impact on our decision that no contempt proceedings were initiated on 18 November.

65. Nor were any such proceedings initiated on 19 November. That hearing was listed as a matter of urgency so that Ms Page's position could be considered without delaying the directions hearing. The unexpected arrival of DS Broom's email introduced a new matter, which could not be set entirely aside merely because Mr Marshall was not present. If Mr Marshall had chosen to mention on 18 November that he had sent a copy of the Clarke advice to DS Broom, there would have been an opportunity to consider the matter in his presence. We rejected the suggestion that any finding was made against Mr Marshall in his absence.

66. It was in those circumstances that it became necessary to list, again as a matter of urgency, the further hearing on 3 December. We have indicated earlier in this judgment the reasons for the conclusions which we reached at that hearing. We add for completeness that, although nothing was said at the hearing on 3 December about whether Mr Marshall would or should continue to act for these three appellants, he subsequently informed the court that he had decided to withdraw from doing so. These appellants were therefore represented by fresh counsel at the hearing on 17 December, when their submission that they should be allowed to argue Ground 2 was successful.