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By Post and email

29th April 2022

Dear Mr Hill,

**RE: THE POST OFFICE – PROSECUTIONS AND APPEALS**
**PERVERTING THE COURSE OF JUSTICE**

On 14 January 2020 Mr Justice Fraser wrote to you following the conclusion of civil claims against the Post Office, HQX16X01238, HQ17X02637 and HQ17X04248.

For some time I was instructed on appeals to the Court of Appeal on behalf individuals whose convictions were referred by the CCRC following Fraser J.'s judgment *Bates and Others. v Post Office Ltd (No. 6 "Horizon Issues") Rev 1* [2019] EWHC 3408. Together with my learned junior and my instructing solicitors, I was responsible, in the face of opposition from the Post Office, for the Court of Appeal acceding to hearing as a discrete ground of appeal 'second category abuse of process'. That ground was accepted as arguable (*Hamilton v Post Office Ltd* [2021] EWCA Crim 21, 17th December 2020) and upheld in 39 appeals on 23rd April 2021: *Hamilton v Post Office Ltd* [2021] EWCA Crim 577 ("*Hamilton*").

I write to you out of a sense of public duty and because I have the advantage of knowing more than perhaps most about the circumstances of the Post Office's prosecutions and the appeals to the Court of Appeal. Logically, this letter might be read as a continuation of Fraser J.'s letter of January 2020. An extended account is to be found in a paper that I gave at Queen's University Belfast, Institute of Professional Legal Studies, on 30th March 2022. I attach a copy.

After careful consideration, I have concluded that I should communicate to you my concern that the Post Office's manifestly seriously incomplete disclosure, (a) given to those it brought proceedings against and prosecuted, and (b) after 2013 given to those against whom it had secured convictions (example given by Fraser J., Mrs Seema Misra), was animated by an over-arching, long-term commercial imperative. That is to say, for the avoidance of doubt, the Post Office's non-disclosure, over time, was not by inadvertence or oversight, but was intentional and integral to a commercial strategy.

The Post Office received its "Horizon" computer system in 1999 from the government, by Fujitsu, under a facilities management contract. The computer system was known to present a commercial risk (recognised in a BIS Select Committee hearing in 1999) because it was insufficiently tested. That was one reason it was not used to run the state benefits system through the Post Office, as originally envisaged and intended.

It is apparent from the Court of Appeal's 23rd April 2021 judgment, that the commercial imperatives were not recognised or fully grasped by the court. This is perhaps explicable by a mere four days' being allowed for the hearing of 42 appeals. One is driven to asking the questions:

(1) Why did the Post Office consistently and repeatedly fail to give proper disclosure of records of known bugs and errors in Horizon in its prosecutions between 2000 and 2013 (when it ceased to prosecute for 'Horizon shortfalls')? (Specifically, the crucially important Fujitsu Known Error Log – see *Horizon Issues* judgment.)

(2) Why, from 2013, did the Post Office not disclose to those convicted on its prosecutions, extensive material from then in its possession that: (a) cast serious doubt upon the integrity of Horizon; and (b) was the cause of the Post Office ceasing to prosecute for 'Horizon shortfalls' after 2013 (*q.v.* Mrs Vennells's (Post Office's former CEO's) letter to the chair of the BEIS Select Committee of June 2020)?

The answer to those questions is, I believe, of the utmost simplicity and it is the same. The reason is that, had the Post Office's prosecutions failed in other than a tiny minority of cases, and had the Post Office from 2013 disclosed material and knowledge *that it then had* to those whom it had prosecuted and convicted, the inescapable conclusion would have been that *the Post Office was unable to distinguish between fraud, on the one hand, and a Horizon 'shortfall' caused by technical problems with the Horizon system itself, on the other*. That is to say, the truth. Acknowledgment of this fact would have undermined the Post Office business model (below).

That conclusion would have been commercially unsustainable with prospectively ruinous financial implications for the Post Office – a risk that has now in fact eventuated. The Post Office could not have continued to prosecute (for a similar recognition, in connection with the possible external evaluation of Horizon, see 'Ismay', below), and it would have had no mechanism to protect against fraud, given that Horizon was fundamental to all its accounting processes. The Post Office could not in the short-term readily have replaced Horizon – at 13,000 or so branches.

Accordingly, it was necessary that Horizon prosecutions should succeed and that no serious doubt about the functional integrity of Horizon be effectively raised. (See *e.g.* conditions imposed upon defendants of not making criticism of Horizon in exchange for accepting guilty pleas to less serious offences.)

Similarly, the implications of accepting that the Post Office's systems were incapable of distinguishing between fraud and technical error resulted in the Post Office's determination, from not later than early 2014, that the possibility of Horizon as the source of accounting discrepancies should be denied. Such a determination must have been strategic and likely made at board level. The risk was existential for the Post Office. The default position of denial appears in the response of the Post Office

CEO, when the possibility of unauthorised remote access to postmaster accounts and editing of data was postulated: "*What is the true answer? I hope it is that we know this is not possible and that we are able to explain why that is. I need to say no it is not possible*…". (*Horizon Issues* judgment paragraph [530], underlining by Fraser J.). The Post Office did say it was not possible. That was untrue. (*Horizon Issues*, paragraph [535].)

That the risk presented to the Post Office was "existential" was adverted to by leading counsel for the Post Office in opening at the *Common Issues* trial: *Bates and Others. v Post Office Limited (No. 3 "Common Issues")* [2019] EWHC 606 QB paragraphs [28], [32]. The dimension of risk to the Post Office goes some way to explaining the extraordinary decision of the Post Office to consult Lord Neuberger of Abbottsbury, a former President of the Supreme Court, on the Post Office's decision to apply to invite Fraser J. to recuse himself as trial judge. That was a decision taken by the Post Office board: *Bates v Post Office Limited* [2019] EWHC 871.

I believe that the following circumstances are of profound importance and of cumulative significance.

(1) The "Ismay report" of 2010 (*Hamilton* paragraph [101]) appears not to have been disclosed by the Post Office in the *Bates* group civil litigation.

(2) The "Detica report" (October 2013) appears not to have been disclosed by the Post Office either to convicted defendants or in the *Bates* group civil litigation. ("…*Post Office systems are not fit for purpose in a modern retail and financial environment. Our primary concern here relates to the difficulty in reconciling information from multiple transaction systems both in terms of timelines, structure and access.*") Detica independently confirmed misgivings expressed by Helen Rose.

(3) A report by Helen Rose (a specialist fraud investigator) of 2013 was not disclosed by the Post Office to convicted defendants. It recorded her concern: "*I don't think that some of the system-based correction and adjustment transactions are clear to us [Post Office/fraud investigators] on either credence or ARQ logs. However, my concerns are that we cannot clearly see what has happened on the data available to us and this in itself may be misinterpreted when giving evidence and using the same data for prosecutions*".

(4) The Post Office's notification of risk to its insurers in August 2013 (revealed in November 2020) appears not to have been disclosed by the Post Office in the *Bates* group civil litigation. Notification of insured risk was of importance for what by necessary implication it recognised.

(5) The *material* in the Clarke Advice from July 2013 was *ex facie* disclosable by the Post Office to convicted defendants on established common law principles summarised by Lord Hughes JSC in *R (on the Application of Nunn) v Chief Constable of Suffolk Police* UKSC [2014] 37. This is regardless of any legal advice given to the Post Office in respect of that *material* to which LPP might arguably attach. The material, plainly of obvious importance and relevance, was withheld from disclosure to convicted defendants (e.g. Seema Misra at whose trial Mr Jenkins had given live testimony for the Post Office - it appears, *uniquely* (*per* the Post Office's leading counsel in March 2021).

(6) The Post Office undertook a review of 308 prosecutions from 2013-2014. That important fact was not disclosed by the Post Office (Mrs Paula Vennells C.B.E. and Mrs Angela van den Bogerd (director)) to parliament in the BIS Select Committee in February 2015. At the

committee hearing the key issue was the refusal by the Post Office of the request by the Post Office's appointed independent forensic accountants, Second Sight Support Services Ltd, to have access to and to review Post Office prosecution files. The Post Office's own review of the 308 prosecutions (post-January 2010) had itself been prompted by the July 2013 Clarke Advice, of which Second Sight knew nothing.

(7) The Post Office's statement, from 2015 (thereafter repeated), that "*Horizon does not have functionality that allows Post Office or Fujitsu to edit or delete the transactions as recorded by branches*" without postmaster knowledge or consent, was false and misleading.

The fact that in 2013 the Post Office's head of security introduced a protocol for the "shredding" of (unhelpful) documents (Hamilton paragraph [88]) is also plainly relevant to a policy of protecting the Horizon system against challenge/question. (Disclosed in the appeals in February 2021 before the March appeal hearing.)

Those circumstances are separate from, but related to, two other remarkable circumstances:

(a) The Post Office's strenuous resistance to disclosing the Fujitsu Known Error Log – a log that is kept updated for any maintained computer system of any size – and the Post Office's formal submission to the court in 2018 that the group claimants' request for it was a "red herring". Fraser J. found that the KEL was of fundamental importance. By that time, the Post Office's solicitors had acted for the Post Office from, at the latest, 2006 (Lee Castleton's civil trial (Fraser J.'s letter of January 2020 refers).

(b) The explanation given to Mr Justice Fraser in 2019 as the reason for Mr Gareth Jenkins not being called as a witness for the Post Office, in the light of what is revealed by the Clarke Advice of July 2013, was seriously misleading. That would have been apparent to anyone with knowledge of the contents of the July 2013 Clarke Advice.

Perhaps Mr Justice Fraser came closest to putting his finger on the essential commercial imperative in his judgment on the Horizon Issues, at paragraph [433] (in the context of the important 'Receipts and Payments Mismatch bug' (2010)):

> "The two references – one to "ongoing legal cases", the second to a BBC documentary – show that there was a distinct sensitivity within both the Post Office and Fujitsu about keeping this information to themselves in order to avoid a "loss of confidence" in Horizon and the integrity of its data. A less complimentary (though accurate) way of putting it *would be to enable the Post Office to continue to assert the integrity of Horizon, and avoid publicly acknowledging the presence of a software bug.*" (Italics mine. To be read in the context of the Post Office's "culture of secrecy", as found by Fraser J. – both *Common Issues* and *Horizon Issues* judgments.)

But Fraser J. had a significantly restricted view of the true position, as later revealed in 2020 by the documents to which I have referred above (other than Helen Rose). He only knew the half of it.

The law on perverting the course of justice is stated in *R v Vreones* [1891] QB 360 CCR at 369. Intentionally limiting disclosure of relevant evidence, whether in prosecutions or to convicted defendants post-conviction for the purposes of a possible appeal, where intended to protect against the kind of eventualities to which I have referred, may well fall within the legal principles identified in *Vreones*. ( See *Selvage and Morgan* [1982] QB 372 and *Rafique* [1993] QB 843 as to it not being required that proceedings actually be on foot.) The perversion of the course of justice occurs when the conduct impairs, obstructs, adversely interferes or prevents the court from administering justice *R v Rogerson* (1992) 174 CLR 268 *per* Brennan and Toohey JJ. (280). It might be thought that the events post-2014 and the fact that the appeals were eventually heard by the Court of Appeal only in 2021, in connection with convictions secured by the Post Office before 2014 and in many instances long before then, and that in instances the Court of Appeal had "no hesitation" in quashing a conviction, strongly supports a *prima facie* inference that the course of justice was interfered with – including violation of Article 6 ECHR rights – elaborated in my Belfast paper, though a circumstance in which the Court of Appeal exhibited no interest.

I have no wish to trespass upon issues that Sir Wyn Williams may be considering. Out of courtesy I am copying this letter to him. But people have died as a result of the Post Office's conduct. Many have not lived or will not live to see themselves exonerated. Innumerable lives have been irrevocably blighted. Tracy Felstead waited 20 years, her entire adult life, for the court to conclude that she should never have been prosecuted (and imprisoned) - at the age of 19. My three former clients, Tracy Felstead, Janet Skinner and Seema Misra, waited a combined total of 44 years for their wrongful convictions to be quashed.

I am copying this letter to Lord Arbuthnot of Edrom. Without his concern for his then constituent Jo Hamilton, none of this would have come to light.

Yours faithfully,

**[signature redacted]**

Encl. Paper for Queen's University Belfast, 30th March 2022.

c.c.
John Phipps, Private Secretary to DPP
Lissa Matthews, DPP's Principal Private Secretary
Sir Wyn Williams, Chair, Post Office Horizon Post Office IT Inquiry
Lord Arbuthnot of Edrom