QUEEN'S UNIVERSITY BELFAST

Institute of Professional Legal Studies

Failed Justice – how commercial interests displaced the interests of justice in the Post Office Case

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"… We actually should be worried … that this is the kind of thing that is going on all the time, and that normally you don't have the process of hard-fought, well-funded litigation in which somebody uncovers what actually happened…

So, what this says to me is that we actually have a real problem, and what we have is indications that big firm lawyers who are otherwise outstanding examples in their field and who otherwise we would see no reason to question, who are nevertheless willing to be untruthful when it advances their clients' interests…

For a court that oversees litigation, this is quite worrisome. The common law has a maxim, *Fraus omnia vitiat* - fraud destroys everything - and that's because it does. Accurate information, shared facts, shared understanding, those are the keys to communication, those are the keys to accurate decision-making, those are the keys to how we operate in the world. Without accurate information, we can't do any of those things…

The problems are even bigger for litigation. Litigation largely takes place outside the view of the judge. Discovery takes place almost entirely outside the view of the judge. It is an adversary driven process. For that process to work, lawyers have to be honest about what they are doing in discovery. They have to be honest about what documents and information they have. They have to be honest about what documents and information they are providing. They have to be honest about what documents and information they are withholding. Then when the judge gets involved, I can't conduct my own investigation to figure out what actually went on. I have to rely to a significant degree on what the lawyers tell me about what they did and what they produced. If that information lacks integrity, the entire process breaks down."

The Hon. Justice Travis Laster, Vice-Chancellor of the Court of Chancery, State of Delaware, United States. James Fraser Smith Lecture, University of Iowa College of Law. 17th February 2022.

Falsehood flies, and truth comes limping after it,
so that when men come to be undeceived, it is too late; the jest is over, and the tale hath had its effect.

Jonathan Swift

INTRODUCTION

In a letter written by Mr Justice Fraser in January 2020 to Mr Max Hill Q.C., the Director of Public Prosecutions,[2] the judge wrote that: "*[t]hroughout the period (and indeed until about 2019) the Post Office asserted that there was nothing wrong with the Horizon system. Prior to the group litigation, expert evidence was given to the Crown Court by Fujitsu witnesses, and also to the High Court in at least one case, that there were no widespread or any bugs, errors or defects in Horizon*". The importance of that statement, as the trial judge's perception of the Post Office's position on the group litigation, provides an anchor for much of what I propose to say.

The Post Office scandal represents the most widespread miscarriage of justice in English legal history. It is also arguably the most serious corporate failure in living memory. This is because it concerns the failure of a long-established and hitherto reputable, famous national institution. The scale of the miscarriage of justice exceeds in dimension the sixteenth and seventeenth century witch trials before these were abolished by the Witchcraft Act 1735.[3] Witches were tormented, and their lives blighted and destroyed, by fantastical beliefs about the supernatural. Postmasters were tormented and their lives wrecked by similarly fantastical beliefs held by judges and lawyers about computer evidence and its reliability. (Arthur Miller's *The Crucible*, and the various beliefs with which it is concerned, is an apt literary conceit for the Post Office *Horizon* trials.) The responsibility of the courts for this fiasco - and human tragedy - is insufficiently recognised, still less accepted. The Post Office ruthlessly exploited institutional ignorance in the justice system, and widespread unfounded beliefs amongst lawyers and judges, that made it peculiarly susceptible to error. I shall suggest, however, that the real mischief lies in what happened after 2014 when the Post Office ceased prosecuting its hapless

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2 In connection with evidence given by Fujitsu witnesses called for the Post Office in *other* cases – the criminal trial of Mrs Seema Misra in 2010 and the civil claim against Mr. Lee Castleton in 2006 (below).

3 The Witchcraft Act 1735 abolished the hunting of 'witches'. The last witch trial in England was in 1685 (judges lost their appetite for these trials). Historically, we in England were rather more energetic in pursuing witches - the overwhelming majority of whom were (inevitably) women - than most other European countries. English judges continue to exhibit greater enthusiasm for imprisoning women, in particular for non-violent offences, than is seen in most other European jurisdictions.

postmasters. From then it knew that it had likely been previously doing so on the basis of flawed evidence, and that it could not continue to do so.

Like any decent lawyer, I should start with a disclaimer, I claim no special knowledge of criminal law. I have spent my thirty years at the English Bar mostly concerned with contractual disputes. Disappointing diagnosis of stage-4 metastatic cancer in 2017 meant that I had unexpected time on my hands. I find the law interesting, and I have an eccentric interest in justice. If I was to provide an alternative title it would be "*Investing in Justice*". Initially, I looked at the group civil litigation concerning the Post Office and the only other reported civil case of 2007.[4] Having read Mr Justice Fraser's *War and Peace*-length judgments of 2019, I found the judge's analysis and conclusions in Lee Castleton's case baffling, but thought-provoking. As the consequence of an article written by me in February 2020 entitled "*Denialism*",[5] that was posted on the *All Party Parliamentary Group on Fair Business Banking* website, a solicitor contacted me. I was put in contact with some of the victims. When I heard their tales I decided that, knowing a bit of law and having rights of audience, I would do anything I reasonably could to help them, including representing them, should they wish me to do so, in their (then anticipated[6]) appeals to the Court of Appeal Criminal Division.[7] Nick Gould of Aria Grace Law, former chair of the SME Alliance, volunteered his services *pro bono* to help in any way he could. Later, Flora Page, an experienced and able criminal barrister taking time out to do a PhD, volunteered to help without expectation of payment, we became a small team.

I hope to take the opportunity today to explain to you why, welcome as the Court of Appeal's decision of 23 April 2021 was in quashing the unprecedented number of 39 convictions that had been referred to it by the Criminal Cases Review Commission in June 2020 (under s. 9 of the Criminal Appeal Act 1995), the court was only partially right in its approach. The legal analysis is not really persuasive. (The court's dismissal of the three contested appeals remains in my view is open to serious

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4 *Post Office v Castleton* [2007] EWHC 5 QB. https://www.bailii.org/ew/cases/EWHC/QB/2007/5.html.

5 *Denialism, the latest entrants, Lloyds Bank the Post Office, Clausewitz and the tinkling teacups of the English judiciary* https://www.appgbanking.org.uk/wp-content/uploads/2020/02/Denialism-Lloyds-and-the-Post-OfficeFF-10-2-20.pdf.

6 Until June 2020, it was not known for certain that the CCRC would refer any particular cases to the Court of Appeal under s. 9 of the Criminal Appeal Act 1995, in the light of Fraser J's findings in December 2019 but it was thought likely it would do so.

7 Referred to below simply as "the Court of Appeal". In the Post Office appeals it was (and since then, in subsequent Post Office appeals, has been) constituted of Holroyde LJ, Picken and Farbey JJ. (For readers not familiar with the conventional abbreviation: 'LJ' – Lord Justice – a judge of the Court of Appeal/Lord Justice of Appeal. 'J' – Mr Justice or Mrs Justice – a judge of the High Court. Plurals, respectively, LJJ or JJ.) (The Criminal Division of the Court of Appeal typically sits, unlike the Civil Division, with only one Lord or Lady Justice of Appeal.)

doubt.[8]) I shall try to explain why. That is not as great a criticism as it might sound. The court depends largely on submissions by counsel and the quality of reasoned argument, and courts of appeal work under enormous pressure doing the best they can. Nevertheless, the four days allowed for the hearing of the 42 appeals, in what is the most extensive miscarriage of justice in English legal history, was plainly woefully insufficient.[9] (As a result, the judgment of the Court of Appeal in my view is inadequate to the circumstances.) But by March 2021, my junior and I had been caused to withdraw as the consequence of an attack upon us by the Post Office's counsel and the Court of Appeal's, to my mind, unprincipled and over-enthusiastic response to it.

Despite paying lip-service to the desirability of transparency and full disclosure, the English courts tend to have a spasm default reflex response to secrecy and confidentiality, especially if sought by a well-resourced party.[10] This is well-illustrated by the Court of Appeal's invitation to the Post Office on 19 November 2020 to require those who had been in receipt of Post Office disclosure in the appeals, to provide to its lawyers a *written undertaking* against further use of disclosure other than for the appeal. Two things are interesting about this, the first is that the Court of Appeal did this without invitation or request from the Post Office, thereby suggesting that the Post Office was not able to look after its own interests without further assistance being volunteered for that purpose by the court itself. The second point, more serious and unsatisfactory, is that such undertakings were suggested by the court without any consideration having been given by the court to, let alone hearing argument on, the important and very relevant consideration of whether the material disclosed by the Post Office was material to which convicted defendants were *entitled as of right*, unconstrained by any restriction on its use (below) and entirely independently of the existence of the appeal proceedings.[11] As a matter of

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8 For reasons given. It is striking that in subsequent appeals the Court of Appeal has only allowed appeals not contested by the Post Office as prosecutor. That is not to suggest, of course, that the Court of Appeal merely adopts the Post Office's line on these appeals. That would plainly be wrong.

9 On 18 November 2020 I had tried, unsuccessfully, to explain to the Court of Appeal why the recent disclosure of the "Clarke Advice" (12 November 2020) transformed our understanding of what had happened. The Post Office was able to successfully distract the court by other matters. Ironically, the profoundly unsatisfactory quality of the court IT platform (I attended remotely for reasons connected with COVID) did not help (at one point the connection failed because of the number of those attending remotely). It belongs, as the LCJ has suggested, in a museum.

10 If support is needed for this obvious proposition, it can be found for example in the Thalidomide litigation against Distillers (eventually addressed by EU legislation). More recently, see the the widespread use and abuse of NDAs. Of more concern - and recently topical - is the widespread phenomenon of SLAPPs – "*Strategic Litigation Against Public Participation*" – or "Lawfare": see Hansard 20 January 2022 https://hansard.parliament.uk/commons/2022-01-20/debates/4F7649B7-2085-4B51-9E8C-32992CFF7726/LawfareAndUKCourtSystem. This kind of litigation was much favoured by Russian oligarchs. The English courts – and English law firms - thereby indirectly, if perhaps unwittingly, lent their processes to Putin's kleptocratic regime.

11 *q.v. R (on the Application of Nunn) v Chief Constable of Suffolk Police* UKSC [2014] 37 (see under Part IV)..

fact and law, a good deal of the more important material disclosed by the Post Office *ex facie* should have been disclosed to those it had convicted on its prosecutions long ago, regardless of the appeals initiated by the CCRC in 2020, because the material cast doubt upon the safety of convictions (below – Part IV). Any restriction on the use of Post Office of material that was disclosable to convicted defendants as of right, irrespective of any appeal proceedings being on foot, in principle infringed (restricted) common law rights. (Contingently also, ECHR Article 10.)

The unfortunate consequence was that in March 2021 the Court of Appeal received a somewhat sanitised and seriously incomplete version of the factual circumstances. That was a problem fundamentally similar, both to the limited facts[12] that were made available to Mr Justice Fraser in the group civil litigation in 2018-2019 - despite its scale - and also to the highly edited version of *Horizon* material disclosed to defendants and the courts by the Post Office in its prosecutions of postmasters (and others) between 2000 and 2013. Part of the problem in the Court of Appeal, was that the impression that appears to have been received was that *Horizon* was the only problem in the Post Office in connection with data and information reliability and data processing and its management. It was not.

Most of the Post Office scandal can be explained in terms of, on the one hand, disclosure failure by the Post Office and its advisers 'gaming' the relevant law and rules, and on the other, professional and institutional ignorance. To adopt a formulation by the distinguished Australian judge, the Hon. Justice Neville Owen, Commissioner for the Royal Commission on the HIH insurance failure, in personal reflections on corporate governance and ethical failures that he had considered and reported upon, rather than the question addressed having been, *'is this right?'*, all too frequently the actual question was, '*what can we get away with*'? The Post Office almost did 'get away with it'. There are no consequences for the kind of systematic concealment and suppression of facts that was engaged in by the Post Office. There is no accountability.

An impression of the catastrophic impact, and cost in human terms, of the Post Office's conduct is provided by a *Sky News* bulletin from a week ago.[13] The bulletin was concerned with the evidence of my former clients, Janet Skinner, Tracy Felstead, and Seema Misra that was given to Sir Wyn Williams, chair of the statutory public inquiry, on the devastating impact that their prosecution

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12 Critically, the judge received a fundamentally misleading picture of what was happening in the Post Office in 2013-2014 (below). The facts presented to the Court of Appeal in 2021 were somewhat fuller, importantly in connection with the "Clarke Advice", but regrettably still by no means full.

13 https://news.sky.com/video/post-office-scandal-how-the-effects-of-one-of-britains-biggest-miscarriages-of-justice-are-still-felt-today-12569365.

and imprisonment has had upon them and upon their families. A "miscarriage of justice" is not merely a lawyer's abstract concept – it can ruin lives, both metaphorically and literally.

Knowing what by the summer of 2020 I knew, I considered that the quashing of their convictions would be something of a formality. Little did I then know of the can of worms that I would eventually peer into. If I knew then what I was going to experience I am not sure I would have done it. But it's a fair surmise[14] that had it not been for my meddlesome decision to do what I could to help my poor clients, the second ground of the Court of Appeal's judgment would not have been argued on the appeals in March 2021. That ground was that the Post Office's abusive conduct subverted the integrity of the criminal justice system and presented a risk to public confidence in it. Further, that ground of appeal would not have been upheld for *all* the 39 successful appellants' convictions quashed on 23 April 2021 - and in every one of the 31 successful appeals since then. The number is unprecedented. There are likely to be upwards of 600 more.

Without the court of appeal's finding on "second category abuse of process" (- in substance, that the Post Office had engaged in conduct that subverted the integrity of the criminal justice system - below), the inquiry now being conducted by Sir Wyn Williams would almost certainly not have been elevated by the government, immediately following delivery of the Court of Appeal's April 2021 judgment, to a full statutory inquiry.[15] I would also hazard that the government would not last week have resiled from its previously asserted position, that the £57.75 million settlement of the civil litigation in 2019, out of which some 80% went to the lawyers, the funders (Therium) and to the insurers, was in full and final settlement (only the balance of some £11 million went to the 550 claimants[16]) – and that no further compensation was available. The government has very recently agreed that all the group litigation claimants should be properly compensated.[17] So to every cloud there is, indeed, a silver lining. In saying that, I do not detract from the point that it was a team effort, and our clients were brave in maintaining their independent line. Each took an individual decision to 'go it alone' on the basis of separate lengthy advice as to the merits and risks. They received a deal of personal criticism from other appellants for doing so. They were particularly brave after Flora Page

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14 In fact, a certainty.

15 It became a statutory inquiry on 1 June 2021. The next working day after delivery of the Court of Appeal's judgment, the Post Office's former CEO, The Rev. Paula Vennells C.B.E., resigned both her several corporate and also her ecclesiastical appointments.

16 A fact that elicited great surprise when announced by the government (Lord Callanan) in response to a parliamentary question in the House of Lords.

17 This is because it was a condition of the settlement agreement that the Post Office would set up what is known as the "Historic Shortfall Compensation Scheme" for those affected by the Post Office's misconduct. It has received more than 2,400 claims. The oddity is that those who claim under that scheme will do better in compensation than those who were claimants. The government, to its credit, has recently acknowledged the obvious fact that this is both unsatisfactory and unjust.

and I were required to withdraw following the Post Office's meritless[18] (though strikingly successful) attack[19] upon us in November 2020.

The Post Office scandal has attracted comparatively limited legal, let alone scholarly[20] commentary, despite extensive recent media[21] coverage. An exception is the research work undertaken by Professor Richard Moorhead of Exeter University and his colleagues Dr Karen Nokes[22] and Dr Rebecca Helm.[23] This, despite its scale and the very long period over which the state, by the Post

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18 The legal basis has never been properly identified – still less established. The ostensible stated basis was almost certainly wrong in law. (I may, in due course, provide an analysis and explanation.) It undoubtedly made for good theatre – but it didn't feel like it at the time. It did make me appreciate how it must have felt for the victims of the Post Office, to which the courts habitually deferred, regardless of the unsatisfactory and unreliable evidence and that defendants typically were guilty of no wrongdoing – as the Court of Appeal eventually found on 23 April 2021.

19 Seema Misra, with some feeling, gave evidence to Sir Wyn Williams that she felt that the Post Office behaved "like the Mafia" and she felt, personally, in fear. Evidence to the Williams' Inquiry: https://www.postofficehorizoninquiry.org.uk/hearings/human-impact-hearing-25-february-2022.

20 A notable exception is the work of Stephen Mason, co-author with Prof. Daniel Seng *Electronic Evidence and Electronic Signatures* 5th Edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2021 https://www.sas.ac.uk/publications/electronic-evidence-and-electronic-signatures. Mason, at his own expense, obtained and published the transcripts of Seema Misra's 2010 trial in 2015, so concerned was he about the absence of any evidence of dishonesty at her trial and the seemingly undue weight given to the Horizon evidence. His perception in 2015 was prescient and the earliest academic commentary I have been able to identify on what was to become the 'Post Office scandal'. He has campaigned for years for the education of lawyers in digital/electronic evidence.

21 Notable exceptions, to 'recent' journalistic interest, include the extensive and penetrating commentary by the journalist Tony Collins. Also, Karl Flinders of *Computer Weekly*. *Computer Weekly* has covered the story from the off – but it speaks to an audience, that unlike lawyers and the judiciary, tends to be alive to the vulnerability/latent unreliability of computer systems. *Computer Weekly*, by the journalist Rebecca Thomson and Tony Collins, broke the story. Rebecca Thompson was the first journalist to identify what was going on. She interviewed Lee Castleton. She was subject to threats and warnings. She first got on to the story in 2008. It is striking that it took until 2021 for the truth to start to emerge – and then not fully.
The journalist Nick Wallis has covered the story since 2010 when he was contacted by Seema Misra's husband. He covered and commented upon every day of the civil group litigation and the appeals in the Court of Appeal (and other courts) and has written the definitive narrative account – *The Great Post Office Scandal* (see under Further Reading). It is a harrowing account of the consequences of when justice fails.

22 UCL.

23 https://evidencebasedjustice.exeter.ac.uk/current-research-data/post-office-project/ (*The evidence-based justice lab.*) Their first report "*Issues arising in the conduct of the Bates litigation*", Professor Moorhead, Dr Karen Nokes and Dr Rebecca Helm (downloadable on the website) makes for disturbing reading – the way in which large-scale litigation is conducted by lawyers and well-resourced clients. See *e.g.,* the reference (below) to the Post Office's consultation with Lord Neuberger in connection with the Post Office's attempted recusal of the trial judge for alleged bias, below, a circumstance unknown to Professor Moorhead and his colleagues at the time of the publication of their first report.

Office as prosecuting authority, inflicted grievous harm upon, and denied justice to, an unprecedented number of defendants to false charges of dishonesty. I will suggest one reason, there are no doubt others.

The practical reason is that it takes so long - enormously long - to get on top of the facts, and, indeed, the law. Mr Justice Fraser's "*Common Issues*" judgment[24] (contractual and related issues), the first of his two major judgments (the other being the "*Horizon Issues*" judgment), is a landscape all of its own. By the time the Court of Appeal threatened me with vague and unformulated allegations of contempt in November 2020, which caused me to withdraw from representing my clients - that it only quietly dropped five months' later, I had spent more than a thousand hours studying the documents, analysing the multitude of issues, and considering the applicable law. The only reason I could do that was that I had time on my hands - and I was not charging for the work that I did. I've probably done the same again since.

Access to justice

An important issue, worthy of academic study, is that the Post Office debacle reveals an uncomfortable truth. It's well-known but not frequently so starkly exposed. The Post Office scandal squarely raises the question of access to justice. A fundamental question is what is a justice system for? On the one hand the conviction of the guilty of offences and the acquitting of the innocent; in the civil context, the righting of, or compensation for, wrongs. It merits a talk on its own. Briefly, I'll give two examples.

Tracy Felstead

In 2001, Tracy Felstead was a recent school-leaver and young Post Office employee, proud to be employed at a Crown Post Office, that is to say a substantial branch operated by the Post Office itself, rather than subcontracted to a sub-postmaster. After repeated experiences of discrepancies at her till, an £11,500 shortfall against receipts was shown by the Post Office computer accounting system known as '*Horizon*'. Tracy wasn't troubled, there had been lots of glitches before. She thought the problem would be resolved. What happened in fact, was that former law enforcement professionals, employed by the Post Office's investigations branch, demanded of her what she had done with the money. She had not the slightest idea about how the balancing error had arisen. In the course of one of her interviews she was asked by Post Office investigators to show how she did not steal the money (a circumstance referred to by the Court of Appeal in 2021). She was charged with theft. She couldn't believe what was happening to her. Her family raised the £11,500 that she had allegedly stolen and paid it over to the Post Office. In the course of her prosecution, a technically skilled expert was instructed on her behalf. His name is Michael Turner. I have spoken with him. He is very experienced. I have seen the detailed request for disclosure he prepared and provided to Fujitsu and the Post Office that, remarkably, he still retains. The response of the Post Office to his requests, at a

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24 *Bates and Others. v Post Office Ltd ('Common Issues')* [2019] EWHC 606 QB https://www.bailii.org/ew/cases/EWHC/QB/2019/606.html

meeting, was to ask who was expected to pay for the *Horizon* disclosure he wanted to see? It was suggested that it would cost £20,000 to produce. Mr Turner was not called at Tracy's trial. In 2002 Tracy was convicted and imprisoned in Holloway women's prison. She was 19 years' old.

I am entirely satisfied that had Mr Turner's lines of inquiry been pursued, Tracy would not have been convicted. She defended her prosecution, for all practical purposes, defenceless. She had no means to test, let alone to effectively challenge, the Post Office's unsatisfactory *Horizon* computer evidence. The judge was impatient when she declined to apologise. The Court of Appeal in April 2021, 19 years after Tracy's conviction, concluded that there "*is no evidence of any investigation into the root cause of the shortfall*" and recorded that the Post Office "*is prepared to accept that there was no proof of an actual loss*". You should find that troubling for an offence where the gravamen is dishonesty. Tracy Felstead went to prison because some marks on bits of paper, that suggested a shortfall at her till, were treated by the judge, jury and prosecution, as reliable evidence, and proof of the fact that there was – and drew the further inference that the only possible explanation was that Tracy had stolen the sum represented by the "shortfall". Everything was inference and speculation.[25] That is bad practice and bad law.

Lee Castleton

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25 In the course of her imprisonment, engaged on tea rounds, Tracy encountered a fellow inmate, hanged. She was 19 years' old. In 2020, following settlement of the group litigation in December 2019, Tracy received out of the £57.75 million settlement, an award of compensation of just £17,000. When she very reluctantly told me this when we first spoke, long ago in the late spring of 2020, I was unable to speak I was so appalled. (In fact, the terms of the settlement deed with the Post Office provided expressly that the Post Office was paying her, and other convicted claimants in the group litigation, no compensation at all but they had contingent rights to claim malicious prosecution preserved (all other claims being stated to be surrendered by them under the terms of settlement). The sum Tracy (and other convicted claimants) received was paid *ex gratia* by other claimants – *i.e.,* those not convicted of offences. The lawyers, funders and ATE insurers of the group litigation took some £46 million out of the settlement. That raises important and difficult questions about substantive justice. Shortly before the directions hearing in the Court of Appeal, in November 2020, Tracy was admitted to hospital with a suspected stroke, having collapsed. It was not a stroke, but stress-induced nervous collapse, the result of accumulated tension and anxiety over 18 years. Tracy is clever. For her entire adult life until 2021 her employment prospects have been blighted by the wrong inflicted on her by the Post Office. Tracy re-paid her family the £11,500 paid over to the Post Office in the hope of avoiding imprisonment. That sum remains with the Post Office. In April 2021 the Court of Appeal held both her prosecution and conviction to be an affront to the conscience of the court.
The judges of the Court of Appeal had nothing to say about the 20 years that it had taken to arrive at that conclusion, the serious violation of her ECHR Article 6 rights, nor the reason for this (below), a failure in the court's judicial function (below).
Initially, remarkably, the terms of the settlement deed were withheld from the group individual claimants by their solicitors on grounds that it was confidential. In May 2020 I asked Lee Castleton if he had a copy of the settlement. He did not have (and had not seen) a copy – six months' after the December 2019 settlement was agreed.

I shall illustrate my point with a civil claim. Lee Castleton invested several hundred thousand pounds, his life savings, in acquiring a branch Post Office in Bridlington in Yorkshire in 2003.

He had called the *Horizon* technical 'helpline'[26] and Post Office management very many times (91 in all), complaining that he had problems balancing his accounts. In 2006 Lee Castleton was sued for a shortfall shown at his *Horizon* terminal of some £26,000. He was careful and knew he had not made mistakes. He had had some experience as a stockbroker. Lee defended the claim but was unrepresented by lawyers at his 6-day High Court trial in 2006. He had run out of money to pay for his legal representation. He obviously couldn't afford to instruct a computer software engineer as an expert witness – and without legal representation would not have known how to do so. By the time he got to trial he had incurred more than £60,000 in legal costs.

That cut no ice with either the Post Office or with the judge, His Honour Judge Richard Havery Q.C. sitting as a High Court judge. Before his trial, Lee Castleton has said that the solicitor acting for the Post Office told Lee that if he persisted in defending the Post Office's claim against him, the Post Office would ruin him. (The Post Office delivered on that promise, it rendered Lee and his family effectively destitute.) The firm was then called Bond Pearce, later known as Bond Dickinson LLP. In 2013 the firm provided an important memorandum to the Post Office board in connection with Mr Gareth Jenkins, an employee of Fujitsu. Later, named Womble Bond Dickinson LLP, it would act for the Post Office in the catastrophic group civil litigation 2016-2019.[27]

Lee was doomed from the outset. He was invited to accept that, contractually, the sum claimed by the Post Office was by way of an "*account stated*"– a term of art.[28] He did so. I doubt that he had the slightest understanding of the legal consequences of that concession. You will know that that is the equitable analogue of what in common law is termed "*an account*" (typically, an acknowledgement of a

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26 It emerged in the litigation that it was anything but a 'helpline'.

27 The settlement negotiations of that litigation were eventually taken over by Herbert Smith Freehills LLP. That firm now administers the Historic Shortfall Scheme established after 2019 - it has received more than 2,400 claims for compensation.

28 Per Judge Richard Havery Q.C., paragraph [1] of the judgment against Mr Castleton: "*The statement of the account, though not its validity, is admitted. Accordingly, the burden of proof lies on Mr. Castleton to show that the account is wrong. On that point the law is clear.*" https://www.bailii.org/ew/cases/E WHC/QB/2007/5.html
Everything after that statement by the judge had the inevitability of Greek theatre. But the judge was wrong – on this and much else. The concession made by Lee was not subject to any examination as to whether correctly made or not. (Though Fraser's judgment on the point is only a collateral decision by a High Court judge it is carefully reasoned and the contractual term objectionable both on grounds given by Fraser J and for other reasons also.) There is quite a good argument for judgments against unrepresented parties not being capable of being relied upon as precedents, for reasons too obvious to state. They should have similar status as decisions on permission to appeal (not classed as judicial decisions).

debt).[29] It throws the legal and evidential burden upon the person stating it (*i.e.,* the debtor), in order to successfully challenge/dispute the account, to show *why* the amount stated in the account is wrong (*viz* why they should not pay the debt/account). That placed an evidential burden on a postmaster in Lee Castleton's position that was simply *impossible* for him to discharge. That is not hyperbole – literal impossibility.[30] I wrote a very lengthy article about his case. After he read it, Lee told me that for the first time in 13 years he understood what had happened to him. Perhaps unkindly, the article is entitled, "*The harm that judges do*".[31] Thirteen years later, in his *Common Issues* judgment[32] of 2019, Mr Justice Fraser concluded that a postmaster's stated balance was *not* an account in law (whether as a matter of contract with the Post Office,[33] or at common law) – a conclusion that Lord Justice Coulson, in an unusually detailed decision, refused permission to appeal.[34]

Accordingly, Lee Castleton's civil trial in 2006 proceeded upon a fundamental premise that was wrong in law – that's quite apart from everything else. It skewed his entire trial. He still has a trustee in bankruptcy. Fifteen years' later, Judge Havery's flawed judgment is yet to be set aside.

Judge Havery Q.C., without hearing any expert evidence, rejected Mr Castleton's defence. Lee had explained that he believed that the *Horizon* computer system might not have been working properly and the reasons for this. The judge found as a fact that it *was* working properly because the

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29 I consider the law and Fraser J's approach to the issue of 'an account' in Lee Castleton's case "*The harm that judge's do*" *Digital Evidence and Electronic Signature Law Review* 17 (2020) 25. https://journals.sas.ac.uk/deeslr/article/view/5172/5037. The law is to be found in the judgment of Romer J in *Anglo-American Asphalt Co v Crowley Russell & Co* [1945] 2 All ER 324 at 331. The best commentary is to be found in the outstanding Australian textbook (it is rather more than that – a rare repository of immense learning and wisdom): J. D. Heydon, M. J. Leeming and P. G. Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th edn LexisNexis Butterworths, 2015). See also the Privy Council decision in *Siqueira v Noronha* [1934] AC 332 at 337 and *Camillo Tank Steamship Co Ltd v Alexandra Engineering Works* (1921) 38 TLR 134 at 143.

30 My own view is that this was likely intentional by the lawyers who drafted the contract for the Post Office. It had the effect of *transferring commercial risk* in the known unreliability of Horizon on to (no doubt) unsuspecting sub postmasters who believed they were joining in a collaborative, not adversarial, venture, in taking a Post Office branch.

31 Mr Justice Fraser's decision on contractual and related issues *Bates and Others. v Post Office Ltd ('Common Issues')* [2019] EWHC 606 QB https://www.bailii.org/ew/cases/EWHC/QB/2019/606.html

32 See under Further Reading below.

33 Though this conclusion raises some contractual issues beyond the scope of this paper. It may be that the true reason it failed in contract is that the term operated, on its true construction, as an exclusion clause as analysed in connection with 'basis clauses' in *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA 1396. (Not merely because there was no agreement – because arguably the contract provided that – *s.q.*.)

34 Coulson LJ's decision, and much else in the Post Office litigation, is published on the London University School of Advanced Study website for the *Digital Evidence and Electronic Signature Law Review:* https://journals.sas.ac.uk/deeslr/article/view/5363/5161

arithmetic worked.[35] The report of the High Court judgment of Judge Havery, suffused as it is with patronising condescension to Lee Castleton and his efforts at defending the claim against him, is to be found in *Post Office Ltd v Castleton* [2007] EWHC 5 QB.[36] In the light of the later 2019 meticulous and rigorous judgments of Mr Justice Fraser in the Post Office group litigation, virtually every material finding of Judge Havery, both of fact and law, is now shown to have been wrong.[37] The Post Office obtained a costs order against Mr Castleton on its £26,000 claim against him, in the sum of £321,000.[38] It resulted in his bankruptcy. You may speculate as to how the Post Office will have relied upon that judgment, and the impact it will have had on anyone contemplating challenging *Horizon* in the civil courts – given the judge's finding of fact that *Horizon* was working perfectly. As a matter of fact, the judgment *was* used by the Post Office as a deterrent. Not surprisingly, in the circumstances, it is the only reported civil judgment on Post Office *Horizon* claims until 2019,[39] when the wheels eventually fell-off for the Post Office.[40]

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35 Unfortunately, there exist *dicta*, at the highest level, that provide some support for this kind of approach. See, for example Lord Justice Lloyd in *R v Governor of Pentonville Prison Ex p Osman (No 1)* [1990] 1 WLR 277 at 306H "Where a lengthy computer printout contains no internal evidence of malfunction, and is retained, e.g., by a bank or a stockbroker as part of its records, it may be legitimate to infer that the computer which made the record was functioning correctly." In effect, 'I can't *see* anything wrong and therefore it must be right' (below).

36 https://www.bailii.org/ew/cases/EWHC/QB/2007/5.html.

37 Mrs Anne Chambers, an employee of Fujitsu was called by the Post Office as a witness and gave evidence against Lee at his trial in 2006. In January 2020 Mrs Chambers was referred by Fraser J to the Director of Public Prosecutions. He was concerned that in her evidence to the court in 2006, known problems with the *Horizon* system, and bugs in it, were not revealed by her. Her knowledge of the true circumstances is considered by Fraser J in his *Horizon Issues* judgment. Judge Havery Q.C. said this of Ms Chambers (judgment of January 2007 para [23]): "*I found Mrs. Chambers to be a clear, knowledgeable and reliable witness, and I accept her evidence*". Mr Justice Fraser did not share that view. At paragraph [413] of his *Horizon Issues* judgment he says this: "This shows the following important points. At least Anne Chambers in early 2006, and all those with whom she was corresponding, knew that this problem – now admitted to be a software bug – had been around "for years". Horizon Support were telling the SPM, whose branch accounts were affected by discrepancies, that "they cannot find any problem". The SMC – the part within Fujitsu responsible for providing corrective action for the "event storms" – would not always notice these had occurred in time and by then "the damage may have been done". I find that by "the damage" this can only mean impact upon branch accounts." This was the same year as Lee Castleton's trial, at which Anne Chambers gave evidence to Judge Havery.

38 Solicitors (Mr Stephen Dilley) and counsel for the Post Office (Mr Richard Morgan), until very recently, on their respective websites, advertised their success for the Post Office against unrepresented Mr Castleton, whose life and whose family's life have been blighted by the Post Office for the past 14 years.

39 Something that initially – until I discovered the costs order and the impact of the case on Lee Castleton and his family, I found puzzling.

40 The costs order resulted in Lee Castleton's bankruptcy. He still has a trustee. For several years he and his family were rendered effectively destitute. They lived in accommodation without a hot water boiler because he could not afford one. The judgment against Lee Castleton given by Judge Havery Q.C. in 2007 is yet to be set aside.

Lee Castleton recovered in the group litigation compensation less in its amount than he had expended on legal fees for his trial. The litigation against him from the time of his suspension from his Post Office has blighted his life and that of his family. His claim against the Post Office, including what on the face of it appears to me to have been a viable claim for malicious prosecution,[41] was worth millions.

Both Tracy Felstead's and Lee Castleton's experience suggest systemic failure and invites the question, what is a justice system for? Whatever it's for, it was not delivered to Tracy Felstead or to Lee Castleton. But their experiences are mere samples from among hundreds. Lee after years of litigation recovered in compensation less than he had originally expended on legal fees. I could tell you about the impact of his experience on his family. It would take too long, and it would be too distressing. If these things were done to people outside of court processes, the perpetrators would go to prison for it. Somehow, institutionally, it appears that it's considered to be 'one of those unfortunate things'. There is no accountability, and it exposes widespread systemic failure. Were I the Lord Chief Justice, which the sharper-eyed of you will notice that I am not, I would make a public statement for the purpose of trying to restore public confidence.

The Bar Council of England and Wales, on 16 July 2020, perhaps overshadowed by COVID, published a short but devastating paper entitled "*Small Change for Justice*".[42] The report pointed out that funding of the justice system in England and Wales, between 2010 and 2019, had been cut in real terms (inflation adjusted) by 24%. That is extraordinary. It the largest reduction in spending of any European comparator. The government appears to be not particularly interested in the administration of justice (or in the rule of law), and perhaps sees it as just another claim/drain on the public purse (with few votes in it). In truth, it is what everything else depends upon.

In contrast with Tracy Felstead's and Lee Castleton's impaired and restricted ability to effectively defend themselves, for want of the necessary financial resources to do so, the Post Office, in an attempt to cause the trial judge to recuse himself, was able in 2019 to consult a former President of the Supreme Court.[43] The recusal application incurred costs of around £500,000. This was consistent with a strategy by the Post Office, the claimants said, that was intended to incur such high levels of costs to the claimants that it would become impossible for them to continue with the group litigation – irrespective of it being funded. That was a contention with which Lord Justice Coulson expressed some sympathy, though he made no finding. The Post Office separately, but similarly unsuccessfully, sought to appeal the *Common Issues* judgment (in an application dismissed by the Court of Appeal as seriously misconceived and wholly lacking in merit).

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41 The intentional tort of malicious prosecution, perhaps counterintuitively, is available for civil claims, not only criminal prosecution: *Willers v Joyce* [2016] UKSC 43 (Lords Neuberger, Sumption and Reed JJSC dissenting).

42 https://www.barcouncil.org.uk/resource/small-change-for-justice-report-2020-pdf.html.

43 The judgment on the recusal application is at https://www.bailii.org/ew/cases/EWHC/QB/2019/871.html. See the commentary by Professor Richard Moorhead: https://lawyerwatch.wordpress.com/2022/03/14/can-retired-judges-advise-on-live-cases/

There are thought to have been more than 900 *Horizon* prosecutions by the Post Office from 2000. Some 308 of these occurred from 2010-2013. After that date, the Post Office ceased prosecuting, in circumstances that I shall describe later. The overwhelming majority resulted in convictions. The prosecutions were almost exclusively private prosecutions.[44] Last week, the number of appeals against those that have been heard crossed the 100-mark. The appeals started by a referral of 42 appeals by the Criminal Cases Review Commission in June 2020. Six years before, in 2014, the Criminal Cases Review Commission had commenced its investigation, to which the Post Office then responded. Because of constraints on resources, it suspended its investigations and (in my view, arguably wrongly (below)) decided to wait until the outcome of group civil litigation brought by some 550 former postmasters and employees. That was provided by Mr Justice Fraser by his judgment on two preliminary issues in 2019. These brought the litigation, that by then had incurred costs of around £150 million, to an abrupt end.

The commonality in the claims, that enabled group litigation and made pursuit of the claims against the Post Office feasible, was that the claimants asserted that the source of their misfortune was not their incompetence or dishonesty, as the Post Office had alleged in terminating their contracts and in prosecuting for criminal offences, the cause of their problems, they contended, was that the Post Office *Horizon* computer system was riddled with technical problems and apt to produce false transactional records. The Post Office defended the litigation on the basis that in 2019 it knew of no serious problems, and it contended that the *Horizon* system was fundamentally robust[45] and reliable. Mr Justice Fraser famously derided *Horizon's* asserted robustness as the 21st century equivalent to the contention that the earth is flat. It was essentially a false defence. The Post Office, as I shall explain, knew the true position from, at the latest, 2013. That is important.

The genesis of Horizon

I must touch on the genesis of *Horizon*. The *Horizon* computer network was introduced by the Post Office under a facilities contract with the Japanese tech giant Fujitsu in 1999. *Horizon* was the unintended illegitimate progeny of a vast failed government PFI IT project that, by the time of its

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44 One of the remarkable features of the Post Office fiasco, is that there are no proper centrally held records of private prosecutions, the identity of the prosecutor or the outcome. Had there been, a curious pattern might well have been apparent. A pernicious aspect of Post Office conduct was that defendants were invariably told, untruthfully by the Post Office investigators, that they were alone in experiencing difficulties with balancing errors on *Horizon*. When Alan Bates first assembled victims he knew of, they were amazed to hear others had had identical experiences. The dishonesty of the investigators was institutional. That it was necessary to mislead defendants raises the question of why this was considered necessary? The obvious answer is that the Post Office recognised the implications of the widespread incidence of similar issues.

45 Professor Peter Ladkin has written a paper explaining that the way that the word "robustness" was used by the Post Office's leading counsel in the Post Office group litigation in a way that it would not be understood or recognised in the computer software industry: "*Robustness of Software*" Digital Evidence and Electronic Signature Law Review 17 (2020) 15. https://journals.sas.ac.uk/deeslr/article/view/5171 "*This article sets out that the vocabulary deployed by Mr de Garr Robinson is not used in this way in computing, whether or not it is conceptually clear*."

abandonment in 1999, had already incurred wasted costs to the taxpayer variously estimated at £700 million. It was a conventional project of its kind, wasteful and badly managed. The project had been to run the entire government social benefits system through the Post Office which, at the time, had some 17,000 branches nationwide. At a parliamentary select committee hearing in 1999, three cabinet ministers, including the future Chancellor Alistair Darling, gave evidence that the project, if implemented, presented the government with the risk of a "fiasco". A fiasco did indeed eventuate, if not of the kind contemplated. *The IT platform was recognised to be insufficiently tested and proven.* The project was abandoned, but the IT system was provided by the government through Fujitsu, a much-favoured government tech contractor, to the Post Office to digitise its accounting systems. At the time of its introduction, it was thought to be the largest non-military IT network in Europe. There was nothing like it. Further, in 2013, consultants, hired by the Post Office to review its systems, in their report observed that an average Post Office branch provides many more services than an ordinary retail bank branch. Some of these are complex and extend to the selling of insurance products. A commercial objective of the Post Office was to compete with the high street banks.

With that introduction, I shall address four issues:

(1) Misunderstanding computer Evidence – the Hoffmann/Tapper fallacy (the problem before 2014).

(2) The emergence of the 'Clarke Advice' as a game-changer.

(3) There's more to this than meets the eye – the sacking of Second Sight in 2015.

(4) Doubting the Court of Appeal.

I. MISUNDERSTANDING COMPUTER EVIDENCE – "THE HOFFMANN/TAPPER FALLACY" (THE PROBLEM BEFORE 2014)

Prior to its repeal, s. 69(1)(b) of the Police and Criminal Evidence Act 1984 provided that: "*In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown … that at all material times the computer was operating properly*."

You may ask yourself, when you read the judgment of the Court of Appeal in *Hamilton v Post Office Limited* [2021] EWCA Crim 577,[46] how it is that every one of the 39 appeals allowed on 23 April 2021 have a common feature. That common feature is that the Post Office gave inadequate disclosure of documents concerning the known unreliability of the *Horizon* system. The evidence given by the Post Office was incomplete and presented a false and misleading impression of *Horizon's* reliability. What the Post Office did not disclose was what's known in computing as the 'Known Error Log'. The

46 https://www.bailii.org/ew/cases/EWCA/Crim/2021/577.htm

log, that is not a single document, comprises the full record of errors, malfunctions in *Horizon*, of bugs discovered in the software and fixes implemented, that was maintained by Fujitsu from the outset in1999, when the Post Office started to roll-out *Horizon* to its then 17,000 branches.

That the KEL was not disclosed reveals widespread misunderstanding of IT amongst courts and lawyers. Two things are remarkable. The first is that a Known Error Log is kept for *every* computer system of any size. It will be kept *in every case for a maintained system*, that is to say, a system such as *Horizon* was (and is) that is supplied under a facilities management contract. It will be capable of being readily produced and inspected, not least for evaluating performance – both of the system and also of the FM contract.

The second thing is that, remarkably, in the *Bates* civil group litigation brought by the 550 group claimants in the High Court, when the claimants requested disclosure of the Fujitsu Known Error Log, Womble Bond Dickinson LLP, the Post Office's solicitors, in correspondence questioned whether the Known Error Log existed as a matter of fact. By then they had been engaged for the Post Office for more than 12 years, going back at least to Lee Castleton's civil trial in 2006. Mr Justice Fraser described the questioning of the factual existence of the log as "troubling". Second, leading counsel for the Post Office formally submitted to Mr Justice Fraser that the claimants request for the KEL was a "*red herring*". One wonders how a formal submission to the court of that kind came to be made. In truth, the Fujitsu Known Error Log was considered by the judge to be the most important of all the documents disclosed in the group civil litigation. Once disclosed, in the teeth of sustained objection by the Post Office, the KEL revealed tens of thousands of records of *Horizon's* failure, from 1999, of bugs and their effects, and the fixes implemented to resolve identified problems. In his judgment Mr Justice Fraser records that the log had not been disclosed prior to that litigation.

Ask yourself the question, why it was that routinely, indeed habitually, lawyers and judges failed to identify that the evidence relied upon by the Post Office was incomplete and misleading? It is not as though the courts and lawyers dealing with these cases were especially incompetent or dull-witted (though some no doubt will have been). There was, and indeed I suggest there is, a systemic and institutional problem. Save where issues are of pure law or where facts are not in issue, evaluating evidence is *a*, if not *the*, core function of a court. In every successful appeal that evaluation was wrong. The question '*what went wrong?*' in those trials is urgent and demands an answer. To my knowledge, it has nowhere been addressed, still less answered.[47] Surely this is remarkable? Were there to have been 700 aeroplanes that malfunctioned causing injury to passengers, the public demand for urgent remedial action would be irresistible and immediate. Relevant aircraft would be grounded, and no one would be willing to fly. We've recently seen it with the Boeing 737 Max crashes.[48] I've elsewhere

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47 The response that this is what Sir Wyn Williams will be looking at in the public inquiry, would be wrong. Sir Wyn is not mandated by his terms of reference to inquire into judicial failure/ lack of understanding of computer evidence nor to widespread ignorance of computer evidence amongst members of the legal profession (*q.v.* submissions made by leading counsel for the Post Office to Fraser J.).

48 For example: https://www.belfercenter.org/publication/boeing-737-max-crashes

suggested that, were the English criminal justice system to be an airline, no one would fly it, such is the incidence of repeated failure.[49]

For the origin of the problem, you have to go back to 1997 and to the speech of Lord Hoffmann (universally recognised as clever) in the House of Lords' decision in *DPP v McKeown and Jones*[50]. The judge expressed his frankly bizarre opinion that: *"[i]t is notorious that one needs no expertise in electronics to be able to know whether a computer is working properly"*. His point is that when a computer malfunctions, you will know about it. In the sense of complete failure, or a 'crash', that is correct. But in popular pseudo-scientific language, of the kind that George Orwell liked to criticize, his perception was that whether a computer is working properly or not is a 'binary' issue. That very widely held misperception lies at the root of much that went wrong in the Post Office prosecutions, as I shall explain.

Professor Norman Dixon, lately a professor of psychology of London University in his illuminating book entitled "*On the Psychology of Military Incompetence*"[51] considered factors that contribute to military disasters. He wrote his book, not because he had any *animus* towards military leaders (and he himself had seen service as a soldier in the Far East), but because of his concern that when military errors are made they are uniquely damaging and costly.[52] At one point he considers what he classifies as the propensity of senior military commanders, and indeed others in positions of public authority, to "pontificate". That is to say, a propensity to make statements on issues on which the maker has no knowledge or insight. By virtue of the office of the speaker, such statements may be invested with unmerited authority and accorded misplaced deference. Lord Hoffmann could not have been more wrong. His (mis)perception, as you will see, is shared by many.

The origin of the problem – 1997 Law Commission Paper

In 1997 the Law Commission Paper in its report to parliament numbered 216 entitled *Evidence in Criminal Proceedings Hearsay and Related Topics*[53] under Part XIII considered the requirement under s. 69(1)(b) of PACE for evidence that a computer from which evidence was derived was working properly.

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49 Quoted by Nick Wallis in *The Great Post Office Scandal*. On 16 September 2020 Robert Buckland M.P., Lord Chancellor and Secretary of State for Justice, wrote in the *Daily Telegraph* that "[s]ince starting out as a criminal barrister thirty years ago it's been apparent to me that faith in the criminal justice system has been declining".

50 [1997] 1 WLR 295 at 301C-D.

51 There is no judicial analogue I am aware of. There is a gap in the literature on this. The tendency to/incidence of authoritarian personality traits is obviously common. Dixon's book would be a useful text on judicial studies courses.

52 The melancholy truth of Dixon's perception is being vividly demonstrated in Europe in a way neither Dixon nor most others could have imagined, as this paper was delivered.

53 1997 Law Com. No. 216.

The Law Commission expressed its view that: "*section 69 fails to address the major causes of inaccuracy in computer evidence. As Professor Tapper has pointed out, "most computer error is either immediately detectable or results from error in the data entered into the machine"*". [54] Unfortunately, that is simply wrong. It is most unfortunate that statements of this kind, made by those without any relevant technical qualification, were (and are) accorded weight and given effect.

Most people are aware of the disasters that occurred with the crashes of the Boeing 737 Max aircraft. Lion Air flight 610 crashed into the Java Sea after departing from Jakarta, Indonesia on October 29, 2018. Less than a year later, on March 10, 2019, Ethiopian Airlines flight 302 crashed near Ejere, Ethiopia, six minutes after take-off. Both flights were flying the Boeing 737 Max 8 plane. Both crashes were the consequence of computer software errors. The problem did not arise while the aircraft were flying, the problem with the computer coding existed (and was embedded in the aircraft flight systems and safety training logs) years before. The problem, and its catastrophic potential and consequences, was *latent*. It was plainly not observable to the pilots. The first crash was not identified as the consequence of computer software error until long after the crash. The second crash suggested too great a coincidence.

The Law Commission expressed its view "*Our provisional view was that section 69 fails to serve any useful purpose*". The Commission recommended its repeal without replacement. It noted that without replacement, a common law presumption comes into play: "*In the absence of evidence to the contrary, the courts will presume that mechanical instruments were in order at the material time*". So, the Commission concluded, a party would not need to lead evidence that a computer was working properly on the occasion in question *unless there was evidence that it might not have been*. If there was such evidence, the Commission noted, the prosecution would have to prove beyond reasonable doubt that the computer was working properly. I'll pause there to observe that a computer is not a mechanical instrument. A computer works on instructions contained in coding that is the product of human agency. To illustrate the importance of this, in practical terms, Professor Harold Thimbleby[55] has observed that it requires many years of training for a hospital consultant anaesthetist to qualify to use a hospital ventilator on a patient. There is at present no mandatory technical qualification for the person who writes the software code that determines how the ventilator operates – and how it may fail. Many will consider that to be unsatisfactory.

In its conclusion under Part XIII, the Law Commission stated that it was "*satisfied that section 69 [of PACE 1984] serves no useful purpose. We are not aware of any difficulties encountered in jurisdictions that have no equivalent. We are satisfied that the presumption of proper functioning would apply to computers, thus throwing an*

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54 Paragraph 13.7.

55 *Fix IT*, Professor Harold Thimbleby, Oxford University Press (2021). He is See Change Fellow in Digital Health, based at Swansea University, Wales, Expert Advisor on IT to the Royal College of Physicians, a member of the World Health Organization's Patient Safety Network, and an advisor to the Clinical Human Factors Group and to the UK Medicines Healthcare products Regulatory Agency. Although a professor of computer science, he is an Honorary Fellow of the Royal College of Physicians, the Edinburgh Royal College of Physicians, and of the Royal Society of Arts. Harold is also a fellow of the Royal Society of Medicine.

evidential burden on to the opposing party… We believe, as did the vast majority of our respondents, that such a regime would work fairly". (Underlining mine.) That latter statement was an aspiration (mere hope) that the Post Office fiasco shows has not been achieved in practice. It is likely that there are very many other cases where group litigation, costing in excess of £100 million, was not available.[56] The legal "presumption" of the reliability of computer evidence, introduced by parliament on the recommendation of the Law Commission, had been discussed and shown to be unsound as long ago as 2010, in the second edition of the practitioner's text *Electronic Evidence*.[57] I will pause here to make a couple of observations. (It's worth noting that the Post Office was a respondent to the Law Commission consultation.[58])

First, Professor Tapper is a professor expert in the law of evidence. He is not a computer scientist/engineer and professes no relevant technical expertise. Second, in November 2020 I submitted a paper to Alex Chalk M.P., then Under-Secretary of State for Justice, in response to his invitation (later published under "*Recommendations for the probity of computer evidence*"[59]). In August 2020 he had invited me to address the difficulties with disclosure under the rules of court that I had described to him in connection with computer-derived evidence. Of the contributors to that paper, five were professors of computer engineering/science. There was consensus among all of them that Professor Tapper's statement was simply wrong. Most computer errors are *not* readily apparent to an operator. Further, it is also wrong that most computer error is the result of operator error. We have received no substantive response to the paper or to our observations and recommendations.

Professors Ladkin, Littlewood, Thimbleby and Thomas C.B.E., in a paper entitled '*The Law Commission presumption concerning the dependability of computer evidence*',[60] published in 2020, noted that the industry evaluation of software reliability is in its infancy and only properly established in areas of safety-critical applications such as aircraft. They commented:

> "Humphrey considered data derived from more than 8,000 programs written by industrial software developers. He wrote, "We now know how many defects experienced software developers inject. On average, they inject a defect about every ten lines of code." The

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56 *q.v.* The disturbing words of the Hon. Justice Travis Laster quoted above.

57 Mason and Seng. Professors Ladkin, Littlewood, Thimbleby and Thomas C.B.E. have acted as peer reviewers for successive editions. Now published as *Electronic Evidence and Electronic Signatures* Stephen Mason and Prof. Daniel Seng, 5th edn, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study University of London, 2021.

58 Something that I had previously overlooked but has been helpfully pointed out by Prof. Steven Murdoch.

59 *Recommendations for the probity of computer evidence,* Marshall, Christie, Ladkin, Littlewood, Mason, Newby, Rogers, Thimbleby, Thomas C.B.E., *Digital Evidence and Electronic Signature Law Review* 18 (2021) 18 https://journals.sas.ac.uk/deeslr/article/view/5240/5083

60 *The Law Commission presumption concerning the dependability of computer evidence,* Ladkin, Littlewood, Thimbleby, Thomas, *Digital Evidence and Electronic Signature Law Review* 17 (2020) 1. https://journals.sas.ac.uk/deeslr/article/view/5143

> average number of defects per kLOC[61] was about 120. The best 20% of programmers managed 62 defects per kLOC; the best 10%, 29 defects per kLOC. Even the top 1% still injected 11 defects per kLOC. Typical Operating Technology and IT software have many kLOCs, even thousands of kLOCs, and hence very many defects. *The evidence implies that all software can be considered to have multiple faults.*"[62] (Italics mine.)

That last sentence is impossible to reconcile with the Law Commission's recommendations. An important insight in the article is that:

> "[A computer] will therefore fail from time to time when a combination of circumstances lead to an erroneous path of execution through the software – and such failures may not be obvious, and may even be perverse. In assessing the weight to be placed on specific computer evidence, it follows from this that the trier of fact should ask 'how likely is it that this particular evidence has been affected in a material way by computer error?' Providing an answer to this question involves, first, reviewing *any available evidence for the number, frequency and nature of errors that have been reported in the particular system previously*." (Italics mine.)

It is worth observing that that was precisely the approach adopted by Mr Justice Fraser in his *Horizon Issues* judgment, in the course of which he tersely dismissed the Post Office's, by then routine, urging upon the court a statistical analysis of Horizon errors. It is surprising how susceptible courts remain in their adherence to doubtful statistical analyses. We have been there before with the late, tragic, Sally Clark, and the flawed statistical evidence of Professor Roy Meddows.[63] In the only Court of Appeal judgment in Post Office cases prior to 2021, the court refers, uncritically and seemingly

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61 kLOC – thousand lines of code – a very small (tiny) program.

62 The authors continued: "McDermid and Kelly reported on the defect densities in safety-critical industrial software: "There is a general consensus in some areas of the safety critical systems community that a fault density of about 1 per kLoC is world class. Some software … is rather better but fault densities of lower than 0.1 per kLoC are exceptional. The UK Ministry of Defence funded the retrospective static analysis of the *Hercules* C130J transport aircraft software, previously developed to civilian aerospace software standard, and determined that it contained about 1.4 safety-critical faults per kLoC (the overall flaw density was around 23 per kLoC…. whilst a fault density of 1 per kLoC may seem high, it is worth noting that commercial software is around 30 faults per kLoC, with initial fault injection rates of over 100 per kLoC)."

63 *R v Clark (No 2)* [2003] EWCA Crim 1020 and see also *R v Cannings* [2004] EWCA Crim 1.

with approval, to the Post Office's evidence as to how many transactions *Horizon* appeared to process reliably.[64]

In our paper submitted to the Under-Secretary of State for Justice in November 2020 we wrote:

> "While the convenience that was sought to be achieved by repeal of s. 69(1)(b) of the Police and Criminal Evidence Act 1984 is understandable, a presumption that a computer 'works correctly' is unsafe because it suggests a binary question of whether the computer is working or not. The reality is more complex. All computers have a propensity to fail, more or less seriously. That is to say, they will not function as intended.
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> A significant problem arises when there is a serious imbalance in information and data available to a party. In many cases, no doubt, the kind of problem to which disclosure may be relevant in any given legal proceedings may be apparent from the factual circumstances. This may well not apply where an issue arises in connection with the reliability of a computer system, because the cause of failure may well not be obvious, as it was not with the Post Office's *Horizon* computer.
>
> *Thus, where a person challenging evidence derived from a computer is required to identify the issue to which the disclosure is relevant, they may typically be unable to do so*,[65] because they will not have been privy to the circumstances in which the system in question is known to fail or to have failed. General or unfocussed disclosure requests tend to be rejected by the courts in these circumstances on grounds of their being 'fishing expeditions'. There is a risk, in such circumstances, of a party with access to relevant data and disclosable material being able to successfully 'stonewall' and thereby avoid giving relevant disclosure."

I cite those passages because the authors included Professors Peter Ladkin, Bev Littlewood, Martin Newby, Harold Thimbleby and Martyn Thomas C.B.E., all of them expert in the relevant

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64 In the Court of Appeal, *R v Butoy* [2018] EWCA Crim 2535, the Post Office's position, recorded by the court, was: "*whilst, as with any computer system, errors from time to time may crop up, Horizon is considered to be largely reliable. [The Post Office] say the proportion of alleged and detected defects related to post office branch accounting is minuscule in comparison with the overall operation of the system which is used in some 11,600 post offices and multiple in branch users daily to provide financial services and counter operations on a national scale*" (para [11]). Crudely, the point has the same intellectual respectability as if a washing machine retailer was to tell me, in response to my complaint that my machine is not working, that many machines that they had sold in my area were working without any apparent problem. The similar unsound observation was made by prosecuting counsel for the Post Office at Mrs Misra's trial. Mr Justice Fraser rightly rejected that analysis/argument in 2019, dismissing it in trenchant terms as being of *no evidential value whatever*. The book to read is the late Sir Richard Eggleston's excellent "*Evidence Proof and Probability*". More judges, perhaps with benefit, might read it.

65 My emphasis – see contrast with the Law Commission's perception.

field. It is not clear that the Law Commission paid much heed to technical expertise, and one gets the impression that its conclusion may have been the desired outcome.

The practical effect of the Law Commission's questionable recommendation

Let me tell you how this works out in practice. It works out in two ways. I shall take as my example the case of Seema Misra. She was prosecuted for theft of £70,000 from her West Byfleet post office branch in 2010. There are three aspects to her prosecution that ought to cause discomfort and anxiety. Her prosecution ought to become a standard study on how things go wrong. The transcripts of her trial have been publicly available on the web since 2015, as the result of the diligence and industry of Stephen Mason.[66] There are things that are merely errors, but there are circumstances that are more serious than mere error. I shall merely touch upon the latter.

(1) Obvious error

The first point is a practical illustration of Lord Hoffmann's erroneous observation, it might be called the "obvious error point". Prosecuting counsel for the Post Office in his opening and closing speeches to the jury said this:

> Prosecution opening speech: "… *So [Horizon] has got to be a pretty robust system and you will hear some evidence from an expert in the field as to the quality of the system.*[67] *Nobody is saying it is perfect and you will no doubt hear about a particular problem that was found, but the Crown say it is a robust system and that if there really was a computer problem the defendant would have been aware of it.*
>
> *That is the whole point because when you use a computer system you realise there is something wrong if not from the screen itself but from the printouts you are getting when you are doing the stock take*."[68]
>
> Prosecution closing speech: "… *the whole point of Calendar Square and indeed any computer problem is that the operators can see that something is going wrong.*"[69]

Both statements are wrong, both in principle (i.e., in general) and (in the particular) in the light of the findings by Mr Justice Fraser in his seminal December 2019 *Horizon Issues* judgment. Prosecuting counsel was merely articulating the widely held *belief* more authoritatively stated by Lord

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66 Mr. Mason (see under Further Reading) was acutely concerned about Mrs. Misra's trial, and the paucity of the evidence against her, from 2015. The full transcripts are available: https://journals.sas.ac.uk/deeslr/article/view/2217. Stephen Mason has for years been campaigning for better understanding amongst lawyers and the judiciary of digital evidence – and the requirement for education.

67 That "expert" was to be Mr Gareth Jenkins, whose (later) evidence about the quality of *Horizon* was to be, in July 2013, the subject of the 'Clarke Advice' – below.

68 Transcript Day 1 Monday 11 October 2010, 21A-C, 23H-24A. The statement is simply wrong.

69 Transcript Day 7 19 October 2010 p 24H.

Hoffmann. You might have thought that in England we had stopped prosecuting people on the basis of beliefs, however strongly held and genuine the belief, long ago. If you smile, Mrs Misra went to prison because of this. It was her son's tenth birthday. She and her husband for years had experienced fertility problems. She was eight weeks pregnant on the day she was sentenced in November 2010. She collapsed with shock, knowing she had not improperly, let alone dishonestly, taken anything from the business or the Post Office. She was admitted to hospital before being imprisoned.

(2) Applications for Horizon disclosure

My second point concerns requests for proper disclosure. Mrs Misra made four separate applications for disclosure of *Horizon* documentary material/records, both before and during her trial.

(1) *First application and for a stay of the theft charge 10 March 2010.* Mr Recorder Bruce gave directions for disclosure to be given by the Post Office by 28 April 2010. That disclosure was not in fact given.

(2) *Second disclosure application 7 May 2010.* The Post Office's response was that the material sought in a long list of disclosure requests was "*completely irrelevant*".[70] Judge Critchlow is recorded as having been concerned that it would take 45 hours' work to review the Horizon material requested. He dismissed the application.[71]

(3) *Third disclosure application 11 October 2010 (Day 1 of trial).* Mrs Misra's counsel (presciently) stated: "The defendant cannot have a fair trial until this material is disclosed." Judge Stewart dismissed the application saying "A vast quantity of material has been disclosed and considered and *the defence have ample material I am quite satisfied to test the integrity of the Horizon system*[72] … the trial will proceed and it is not an abuse of the process for it so to do." [73] He was wrong in both statements, as the Court of Appeal, eleven years later, held.

(4) *Fourth disclosure application and for stay of the theft charge 18 October 2010 (Day 6 of trial).* Mrs Misra's counsel submitted: "… The defence have not had the

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70 Transcript 11 October 2010 (Day 1) p 4A.

71 Much better that someone be convicted and imprisoned on incomplete and consequently unreliable evidence? – See Tracy Felstead above.

72 This statement is frankly laughable, read against the *Horizon Issues* judgment. One is driven to ask, how could the judge possibly have known? Mrs Misra's expert told the court, in terms, that he had had insufficient opportunity to review *Horizon* error records.

73 Transcript 11 October 2010 (Day 1) pp 26E, 27A.

opportunity to consider the base computer material. It is the base computer material which is still critical to this case."[74] The Post Office's response included the following submission by its counsel: "*The defence have sought to make it a case about the whole Horizon system and have conducted an exhaustive attempted audit into the system, for some reason not asking Mrs Misra what problems she found. …the unfairness complained of if it exists at all is tiny and is easily rectified. The position will be entirely clear one hopes once Mrs Misra has given evidence as to whether there was a computer problem or not …The only person who has any idea about that in fact in this room is going to be her.*"[75] That submission was false, misleading and without foundation, as is made clear by Fraser J's finding on Issue 2 of the *Horizon Issues* judgment. Dismissing the application Judge Stewart held: "*The jury are eminently well suited to form a judgment about the relevance and to put this in its proper context in the case as a whole…The trial is fair.*"[76] The trial was not fair. It has been held by the Court of Appeal not to have been. It took another eleven years to establish this. It is troubling that the trial judge was unable to correctly identify that the trial was unfair – or why. It was unfair because the evidence was incomplete and unreliable. There had been no less than four unsuccessful attempts to show this.

The Receipts and Payments Mismatch bug

My third point on computer disclosure concerns a bug called the "*Receipts and Payments Mismatch* bug". This bug is considered by Fraser J in his *Horizon Issues* judgment *in extenso* from paragraph [428]. It was the most important of the software bugs considered by him. The important effect of the Receipts and Payments Mismatch bug was recorded in a memorandum of a high-level management meeting attended by 10 employees of Fujitsu and the Post Office in around end September/early October 2010 (including Mr Winn of Post Office finance). It is also in a document dated 29 September 2010, of which Mr Gareth Jenkins of Fujitsu was the author. The title of the document was "*Correcting Accounts for "lost" Discrepancies*". It recorded that "any branch encountering the [Receipts and Payments Mismatch bug] problem will have corrupted accounts". The effects of the bug were minuted, including:

> *"There will be a Receipts and Payment mismatch corresponding to the value of Discrepancies that were "lost"*

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74 See Fraser J's comments on 'audit', or ARQ data.

75 Here repeating as a submission and argument against giving disclosure, the proposition that it should have been evident to Mrs Misra what the problem was. What I have called "the Hoffmann/Tapper fallacy".

76 Transcript 18 October 2010 (Day 6) p 27.

… the Branch will not get a prompt from the system to say there is Receipts and Payment mismatch, therefore the branch will believe they have balanced correctly. …

Impact

The branch has appeared to have balanced, whereas in fact they could have a loss or a gain."

It is striking that it was explicitly recognised that the fact of the existence of the bug might impact Post Office "ongoing legal cases"[77].

The Post Office, in its respondent's notice in October 2020, stated that it appears that the solicitor who had conduct of Mrs Misra's prosecution for the Post Office printed-off the copy of the Jenkins' memorandum of 29 September 2010 paper, 9 minutes after it was sent to him. That was on the Friday before the start of Mrs Misra's prosecution on Monday 11 October 2010.

Of the documents concerning the Receipts and Payments Mismatch bug, Fraser J at *Horizon Issues* judgment paragraph [457] said: "*I do not understand the motivation in keeping this type of matter, recorded in these documents, hidden from view; regardless of the motivation, doing so was wholly wrong. There can be no proper explanation for keeping the existence of a software bug in Horizon secret in these circumstances*." Fraser J described the Post Office's conduct as "wholly wrong".

It was accepted by the Post Office on the appeals in March 2021 that "*there is no information to suggest that the receipts and payments mismatch bug was considered for disclosure*". That is a delicately neutral way of putting it.

Had the memorandum of the Receipts and Payments Mismatch bug been disclosed (including to the Post Office's own counsel), prosecuting counsel could not have told the jury that any problem with *Horizon* would be obvious to an operator such as Mrs Misra, nor could he have come close to taunting her for being unable to identify any particular problem that she had experienced with *Horizon* (other than balancing her account). I do not thereby suggest that prosecuting counsel knew about this bug or the documents. But the Post Office did. It was willing to keep important matters from its own counsel. That suggests a high degree of mendacity – quite apart from serious professional impropriety.

The person and Fujitsu employee who wrote the memorandum about the receipts and payments mismatch bug gave evidence against Mrs Misra at her trial. He was the go-to expert for the Post Office for many years until July 2013. Interestingly, Mr Brian Altman Q.C., leading counsel for the Post Office, told the Court of Appeal in March 2021, on two separate occasions, that Mrs Misra's trial in the Guildford Crown Court in 2010 was the only trial in which Mr Gareth Jenkins had given

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77 Horizon Issues judgment paragraph [429]:

"…. Potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data

• It could provide branches ammunition to blame Horizon for future discrepancies."

Underlining the judge's own. In the event, it did not impact on ongoing legal cases, because, as Mr Justice Fraser identifies in his judgment, the bug was kept "secret" by the Post Office.

live oral evidence. That suggests that his evidence in other criminal trials where he had made witness statements went unchallenged and was therefore not tested in cross-examination.[78]

Collateral purpose in Post Office decisions to prosecute

It seems to me at least arguable that the Court of Appeal's analysis of the Post Office's approach to its prosecutions as being affected/skewed by collateral, and therefore impermissible, considerations, was superficial. This may well have been because of constraints on the time allocated to the appeals.

One of the questionable conclusions by the Court of Appeal in its 23 April 2021 judgment is to be found in a single sentence. At paragraph [126] the court held:

> *"We are not persuaded by submissions that POL had an improper financial motivation for pursuing prosecutions with a view to obtaining confiscation or compensation orders."*

It is not at all obvious to me how the court reached that, seemingly surprising, conclusion. The competing submissions and evidence are not rehearsed by the Court of Appeal. It is a conclusion that is quite difficult to reconcile with the facts of Mrs Misra's case. Mrs Misra's case, as I had sought to point out to the court, was quite unusual and it merited careful consideration. One of the facts that made it unusual was that while like many others Mrs Misra was willing to plead guilty to the offence of false accounting, she steadfastly denied theft. The Post Office, unusually, and so far as I have been able to ascertain in the 42 appeals heard in March 2021, *uniquely*, was unwilling to accept a plea to the lesser charge and insisted on prosecuting Mrs Misra for theft. (There was no similar case I have been able to identify among the 42 appeals.) It was considered by the Post Office to be a landmark prosecution for her successful conviction for theft. Her conviction was intended to be used by the Post Office *to dissuade others* from challenging *Horizon*.[79] It did so.

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78 Evidence was given at Seema Misra's trial by the Post Office that 'remote access' to branch accounts was not possible without postmaster knowledge. That was untrue. In 2013, Second Sight (below) reported to the Post Office that there was a conflict of evidence on that issue. *In fact, it was possible* and had been done from the introduction of *Horizon*. (See evidence of Mr Richard Roll – *Horizon Issues* judgment.) No records of remote access to postmaster accounts were kept by Fujitsu for years. That has massive ramifications. The Court of Appeal in its April 2021 judgment devote merely a single sentence to that remarkable circumstance, that has obvious and far-reaching implications, not least for discharge of the burden of proof. Like much else, there was simply no time, and the point appears not to have been the subject of any substantial submissions – at least none sufficient to engage serious attention from the Court of Appeal.

79 See *Hamilton* judgment para [91(iii)] and the memorandum, post-trial, sent by the solicitor in the Post Office having conduct of Mrs Misra's prosecution (see the text of the memorandum, below).

The Post Office's investigator explained to prosecuting counsel for the Post Office in May 2009 that the Post Office's senior investigator was "fairly happy to accept" Mrs Misra's plea to false accounting. But it was pointed out that "*… we [the Post Office] are some 70 odd thousand pounds light at the moment as I understand it and if we just accept the false accountings it is very difficult for us later to obtain a Confiscation Order and subsequently compensation out of the Confiscation*. Could you let me have your views on this…". Prosecuting counsel responded, that he had spoken with the senior Post Office investigator and wrote "… [t]he case for theft is strong and we should not accept the pleas. *Confiscation would also be a non-starter if we did…*".[80] In my view, that rather strongly suggests that the prospect of obtaining a confiscation order was a material, if not the primary, factor in the Post Office decision to prosecute Mrs Misra for theft, and not to accept her plea to the lesser charge of false accounting. Mrs Misra's conviction and imprisonment financially ruined Mrs Misra and her family. (A full account of the desperate circumstances to which the Misras were reduced is to be found in Nick Wallis's book "*The Great Post Office Scandal*".) In my view, the Court of Appeal should at least have explained how it arrived at its one sentence conclusion under paragraph [136] of its judgment.

The issue was a rather important general issue in connection with the Post Office's prosecution strategy. It appears that following the Court of Appeal's quashing of convictions in April 2021, no further consideration was given to the Post Office disgorging to its convicted postmasters, whose convictions had been quashed, property obtained by the Post Office under executed confiscation orders. There appears no publicly available information about the level of confiscation orders obtained by the Post Office or of the value of property it recovered. (That is separate from the contractual consequences of forfeiture of Post Office contracts and attendant financial losses and forfeiture of leases of premises – all of which will have enured to the benefit of the Post Office.)

The law on 'collateral purpose', specifically in the context of a prosecutor taking into account in a decision to prosecute the prospect of recovering property under a confiscation order, is reasonably clear. The law is explained in *Wokingham BC v Scott* [2019] EWCA Crim 205 and *Knightland Foundation* [2018] EWCA Crim 1860. In *Knightland,* Lady Justice Hallett (Vice-Chancellor of the Court of Appeal Criminal Division) (at paragraph [37]) said:

> *"The authority, as a prosecuting authority, is subject to the same duties as other prosecuting authorities. It is obliged to act fairly, <u>independently and objectively</u>".* (My underlining.)

It is curious, in this context, that in *R (Kombou) v Wood Green Crown Court* [2020] 2 Cr App R 28, [2020] EWHC 1529 (Admin), the Administrative Court (Holroyde LJ and Mrs Justice Thornton D.B.E.) held [85] that:

> "The very phrase "Incentivisation Scheme" is one with which lawyers may instinctively be uncomfortable, but it at least serves to highlight the need *for the utmost care to be taken by a prosecuting authority to act in accordance with the principles stated in R (Wokingham BC) v*

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80 Italics supplied. Marshall and Page, written submission to the Court of Appeal on behalf of Mrs Misra, October 2020.

Scott. The authority must be scrupulous to ensure that a decision to prosecute is not motivated, and does not appear to be motivated, by the prospect of financial gain." (Emphases mine.)

The decision to prosecute Mrs Misra for theft was plainly, on the face of it, motivated by the prospect of financial gain for the Post Office. The Post Office considering that it was "*70 odd thousand pounds light*" and that compensation would *only* be recoverable from a successful prosecution for theft, seem to me to satisfy neither the requirements of independence nor objectivity, and the decision is impossible to square with either *Knightland* or paragraph [85] of *Kombou*. (The Post Office's insistence on prosecuting for theft in Mrs Misra's case was itself unusual in its unwillingness to accept the plea to false accounting. That was itself arguably *unfair,* by treating similar cases differently.) But of course, I am not a criminal lawyer and claim no special knowledge in this regard. But in *Hamilton* the Court of Appeal refers neither to the facts of Mrs Misra's prosecution, in connection with prospective confiscation, nor to the Post Office's unwillingness to accept her plea to false accounting - nor to the reasons for this.[81]

There were a series of circumstances that, cumulatively, raise serious questions about the independence and objectivity of the Post Office *qua* prosecuting authority. These might seem to have received insufficient consideration from the Court of Appeal. Together they go some way to providing an explanation for how wrong the Post Office prosecutions were. The principal factors, that I consider to have been related, were: (i) the repeated disclosure failures in connection with the Fujitsu Known Error Log; (ii) the specific withholding of information about the Receipts and Payments Mismatch bug, and its recognised potential impact upon "ongoing legal cases", that was kept, in Fraser J's word "secret" (including the very concerning fact that the memorandum relating to this was seemingly printed-off by the solicitor having conduct of Mrs Misra's trial on the Friday

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81 There is generic reference to *R (Kombou) v Wood Green Crown Court* [2020] 2 Cr App R 28, [2020] EWHC 1529 (Admin), at para [85] (Hamilton para [111]) (where it was held that a planning authority's decision to prosecute informed by a consideration of recovery was not improper). But that general reference scarcely explains Mrs Misra's prosecution and the *unusual* insistence by the Post Office on prosecuting for theft, when Mrs Misra had offered a plea to false accounting - especially in the context of the "*70 thousand pounds light*" point. The seemingly unsatisfactory nature of the Court of Appeal's consideration of Mrs Misra's circumstances is accentuated by its reference to the solicitor for the Post Office, post-trial, referring to the Post Office being able to "destroy" defence arguments, and the decision offering the possibility of "dissuading" other defendants from challenging *Horizon*. None of this appears to exhibit the requisite independence or objectivity of a prosecutor. The Post Office's solicitor appears distinctly partisan.
Further, other arguably improper collateral purposes of the Post Office in decisions to prosecute/accept pleas in protecting *Horizon* (apparent in Mrs Misra's prosecution) is revealed by the routine attachment of no criticism of the Horizon system as a condition to it accepting lesser guilty pleas from other defendants to its prosecutions: In CCRC reference 00357/2015: "….that there must be some recognition that the Defendant had the money short of theft and that a plea on the basis that the loss was due to the computer not working properly will not be accepted": (Respondent's Notice [46]. The impropriety was accepted). In CCRC reference 00366/2015. "On 29 September 2006, 00366/2015 pleaded guilty to false accounting as an alternative to theft on a basis which made it clear that no blame was attributed to Horizon.": Respondent's Notice [50]. Juliet McFarlane, a solicitor in the Post Office's criminal team, wrote an attendance note: "We discussed whether he would plead to false accounting. I mentioned instructions that we would proceed with false accounting providing the Defendant accepts that the Horizon system was working perfectly".

before her trial started - at which the author of the memorandum gave evidence); (iii) the purpose of the Post Office in *protecting Horizon* being a benefit conferred by it obtaining a conviction (against Mrs Misra) for theft;[82] (iv) the explicit prospect of financial gain as a motivation in prosecuting for theft; and (v) (related to (iii)), the purpose of the Post Office, *ex post* Mrs Misra's trial and her successful conviction for theft, of using that conviction as a *"marker" and to serve as a deterrent* to others, should they choose to challenge *Horizon* as the foundation for criminal proceedings brought by the Post Office against them. The text of the memorandum circulated by the solicitor having conduct of Mrs Misra's trial was in these startling terms:

> *"After a length[y] trial at Guildford Crown Court commencing on the 11th October 2010 when the Jury came to a verdict on the 21st October 2010 when they found the Defendant guilty of theft. The case turned from a relatively straightforward general deficiency case to an unprecedented attack on the Horizon system. We were beset with (sic) unparallel (sic) degree of disclosure requests by the Defence. Through the hard work of everyone, … and through the considerable expertise of Gareth Jenkins of Fujitsu we were able to destroy to the criminal standard of proof (beyond all reasonable doubt) every single suggestion made by the Defence.*
>
> *It is to be hoped the case will set a marker to dissuade other Defendants from jumping on the Horizon bashing bandwagon…."*.

That memorandum, widely circulated by the solicitor concerned within the Post Office, might be thought to exhibit a striking want of independence and objectivity as prosecuting authority. On the contrary, it exhibits a concern to protect *Horizon, and the need to protect it,* from successful challenge and criticism. [83] The theme that emerges is that its concern with *Horizon* infected the Post Office's decision-making, at every stage, and skewed it.

II. THE EMERGENCE OF THE 'CLARKE ADVICE' – A GAME-CHANGER

In June 2020 the Criminal Cases Review Commission, a statutory body established by the Criminal Appeal Act 1995, referred 42 cases to the Court of Appeal in connection with Post Office prosecutions. It is very long. It annexes two judgments of Mr Justice Fraser in what he dubbed his "*Common Issues*"[84] and his "*Horizon Issues*" judgments.[85] The two judgments together run to some 400

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82 Note 81 above.

83 See note 81 above.

84 *Bates and Others v Post Office Limited (No 3)* [2019] EWHC 606, https://www.bailii.org/ew/cases/EWHC/QB/2019/606.html (288 pages, 1,121 paragraphs).

85 *Bates v the Post Office Ltd (No 6: Horizon Issues) (Rev 1)* [2019] EWHC 3408 (QB) https://www.bailii.org/ew/cases/EWHC/QB/2019/3408.html (168 pages, 1,030 paragraphs – the Technical Appendix alone extends to 452 paragraphs).

pages of text in the BAILLI reports. Only one of the cases referred by the CCRC under s. 9 of the Criminal Appeal Act 1995 had been subject to a prior unsuccessful appeal,[86] which otherwise is an invariable statutory requirement under CAA s. 13. The appeals were thus all "*exceptional*" within the meaning of the statutory language. I do not know of another CCRC appeal that has satisfied that requirement. In early October 2020, the Post Office filed and served its respondent's notice.

It was encouraging, but surprising to anyone familiar with the way in which the Post Office had conducted the Post Office's 'scorched earth' approach to its defence of the civil group litigation, that in all but three of the cases referred to the Court of Appeal by the CCRC, the Post Office indicated that it did not intend to oppose the appeals. For those not familiar with the legislation, a reference by the CCRC operates in the same way as if the Court of Appeal had given permission to appeal on the grounds advanced by the CCRC.

The CCRC had provided two grounds for appeal. The first was that, in the light of Mr Justice Fraser's findings in his *Horizon Issues* judgment, the Post Office had failed to give proper disclosure of documentary records of bugs in *Horizon*, in short, the records that emerged following disclosure of the Known Error Log in the civil group litigation. The CCRC submitted the appellants, as a result, had not received a fair trial. This is commonly referred to as "first category abuse of process".

Second category abuse of process

Second, the CCRC advanced a ground of appeal that might be conveniently formulated as the contention that the Post Office prosecuted in bad faith. In terms of legal labelling this was the allegation of what is known as "second category abuse of the process of the court". It is a big deal and, where alleged, rarely made good. For those not familiar with the distinction, in summary, first category abuse of process may be described as the common law analogue of the right guaranteed by the state under Article 6 of the ECHR – that is to say, the right to a fair trial. So, for example, the withholding by the prosecution of relevant evidence, where material, is likely to both violate the Article 6 right and also support a ground of appeal as first category abuse of process at common law. In principle, this provides an unqualified right to have a conviction quashed (English law, like ECHR Article 6, recognises the *right* to a fair trial). The difference, between what is called first category abuse of the process of the court and second category abuse of process, is that the focus is entirely different. The result is also different. With the first kind of abusive conduct, the court is primarily concerned with the impact of the conduct in question on the defendant. "Second category abuse of process" is the abuse of court process by a prosecuting authority that has a tendency to subvert the integrity of the justice system or else to undermine public confidence in it. In considering an allegation of second category abuse of process, the court is, accordingly, primarily concerned with the conduct of the prosecutor and its consequences. Where second category abuse is established, the (discretionary) remedy afforded turns on the *balancing of competing public interests.* The relevant considerations are the

86 *Butoy*, *loc cit*.

nature and effect of the conduct in question on the appellant (or applicant) on the one hand and the implications for/impact upon the proper administration of justice on the other. This entails consideration of the nature and seriousness of the conduct by the prosecutor. Second category abuse of process, where established/proved, does not therefore result in an automatic right for a conviction to be quashed. The issue is the nature of the abuse and its effect/impact being balanced against the wider public interest in offences being prosecuted and the guilty being convicted. The traditional formulation of category two abuse of process, where established and thus its impact in particular circumstances outweighing the general public interest in a prosecution (so as to either stay it, if the prosecution is on foot, or in the context of an appeal to result in a conviction being quashed), is that the prosecution, as a result of the abusive conduct, is "an affront to the conscience of the court".

The Court of Appeal's review of the authorities in its decision in *Hamilton and Ors.. v Post Office* is somewhat superficial. Anyone familiar with the circumstances might receive the impression that the Court was concerned to constrict the ambit of its decision to as limited a compass as possible.

Further, the Court of Appeal has two functions, a reviewing function, and a supervisory function. It did not perform any supervisory function in the *Hamilton* appeals. That is surprising, given the frequency with which the lower courts got the evidence wrong in exactly the same way – which suggests a systemic and widespread problem with the lower courts in understanding computer evidence. The most obvious issue for supervision was the direction given by judges to juries in connection with prosecutions where the sole evidence relied upon was computer data.

By way of brief illustration, Judge Stewart in Mrs Misra's trial directed the jury to consider the question: "*Do you accept the prosecution case that there is ample evidence before you to establish that Horizon is a tried and tested system in use at thousands of post offices for several years, fundamentally robust*[87] *and reliable....".* He thereby directed the jury that it might properly infer from general alleged reliability (itself asserted but not proved) that specific shortfalls experienced by Mrs Misra at her West Byfleet branch Post Office were unlikely to have been caused by Horizon error/malfunction. That approach was wrong in law: *R v Clark* (No 2) [2003] EWCA Crim 1020, *R v Cannings* [2004] EWCA Crim 1. The correct approach was the approach adopted by Mr Justice Fraser. The judge found that 'Legacy Horizon'[88] was "*not remotely robust".*[89] The Respondent's expert in the *Horizon Issues* trial in 2019 accepted that the sheer number of transaction corrections (TCs) were an essential "countermeasure" to this fact. The mischief is that the judge by his direction to the jury impliedly and impermissibly reversed the burden

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87 A central Post Office contention for many years. It is considered by Fraser J in the Horizon Issues judgment at paras [22] and [36] ff. It was *Issue 3* of the Horizon Issues for preliminary determination. For a technical discussion of the term, including as used in the *Bates* litigation, see: Prof. Peter Ladkin, *Robustness of software*' 17 *Digital Evidence and Electronic Signature Law Review* (2020) 15 – 24 (Further Reading).

88 The version of Horizon before upgraded from October 2010.

89 *Horizon Issues* judgment paragraph [975].

of proof: *Woolmington v DPP* [1935] AC 462. The jury were presented with the possibility that they could properly accept the prosecution case that "*there is ample evidence before you to establish that Horizon is a tried and tested system in use at thousands of post offices for several years, fundamentally robust and reliable"* and that that was sufficient to prove the reliability of the documents and *Horizon* data relied upon (i) as evidence of actual (i.e. real) shortfalls in the West Byfleet Post Office accounts from which (ii) the jury, further, might properly *infer* that Mrs Misra, in the absence of other explanation, had stolen money. In effect, the burden placed on Mrs Misra was to explain the shortfalls that she had experienced (a point emphasised by prosecuting counsel's speeches to the jury that I have referred to above). It is very unfortunate that the Court of Appeal did not consider in more detail why and how successful appellants had been wrongly convicted. (Though it had, in any event, allowed insufficient time for this.) The fundamental problem is that judges did not appreciate that they were looking at a highly edited version of the evidence of *Horizon's* reliability – and did not know why. Not understanding the evidence themselves, judges gave, it seems routinely, unsatisfactory directions to juries. It is plainly a widespread problem that requires to be addressed.

To give credit where due to the Court of Appeal, it does advert to the default effect in the Post Office's prosecutions as having been effectively, if not formally, to reverse the burden of proof. But even here the court's analysis and identification of the problem is not wholly convincing. The problem is more fundamental (see Part I) than the one identified by the Court of Appeal in its judgment.[90] The fact that this happened so frequently, without this impermissible effect, it seems, being identified by the lower courts, to my mind demanded and demands that appropriate guidance be given by the Court of Appeal for the assistance of the lower courts. No guidance was provided by the court.

Flora Page and I had sought leave to advance a discrete further/additional ground of appeal in connection with what seemed to us to be an important misdirection to the jury in Seema Misra's case. We considered that the direction given by His Honour Judge Stewart was wrong, having, as it seemed to us, the effect of reversing the burden of proof. On 18 November 2020 the issue was directed by the Court of Appeal to be adjourned to the hearing of the appeals. Once we withdrew from representing out clients no one else was interested in pursuing that issue. It was a lost opportunity, and one of some importance.

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90 Para [137] "… By representing Horizon as reliable, and refusing to countenance any suggestion to the contrary, POL effectively sought to reverse the burden of proof: it treated what was no more than a shortfall shown by an unreliable accounting system as an incontrovertible loss and proceeded as if it were for the accused to prove that no such loss had occurred. Denied any disclosure of material capable of undermining the prosecution case, defendants were inevitably unable to discharge that improper burden. As each prosecution proceeded to its successful conclusion the asserted reliability of Horizon was, on the face of it, reinforced. Defendants were prosecuted, convicted and sentenced on the basis that the Horizon data must be correct, and cash must therefore be missing, when in fact there could be no confidence as to that foundation." https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Crim/2021/577.html&query=(Hamilton)+AND+(Post)+AND+(Office)+AND+(burden)+AND+(of)+AND+(proof) It will be seen that it is not the Post Office's *refusal to countenance* any suggestion to the contrary – it was the systemic problem confronting postmasters and others in obtaining the relevant - and existing - evidence to show (i.e., prove) this. The problem is institutional.

Abuse of process

An explanation of abuse of process is provided by Lord Dyson JSC in his speech in the Supreme Court in *R v Maxwell* [2010] UKSC 48, a case that concerned an application for a stay of a prosecution for abuse. At paragraph [13] Lord Dyson said:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F)."

'Category two' abuse is by its nature rarely alleged and still more rarely upheld. In *Warren and others v Attorney-General of Jersey* [2011] UKPC 10 at [24] Lord Dyson said that an abuse of the second category requires a discretionary balancing of the particular offence charged, and the particular conduct complained of, with relevant considerations including the seriousness of any violation of a defendant's rights and the seriousness of the offence charged. The judge went on to say that "… the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and *the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute*." (Emphasis mine.)

In the Post Office appeals in *Hamilton and Others* in April 2021 the Court of Appeal held that:

> "… Within the exceptional class of case in which an issue of abuse of process is raised, it will often be abuse in one category only; and where both categories are raised, there may in practice often be a distinction between the matters relied on in each category. It is not possible to generalise. But as a matter of principle we see no reason why the same misconduct cannot provide the basis for a finding of both categories of abuse. *We therefore accept the appellants' submission that, depending on the nature and degree of the abusive conduct, the same acts and/or omissions may both render a fair trial impossible (thus, category 1) and make it an affront to the conscience of the court to prosecute at all (and thus, category 2)*." (My emphasis.)

Pausing there, the direction of travel taken by the court is obvious. It is perhaps understandable, given submissions that were made by counsel for the appellants. But the proverbial elephant in the room was, given the Post Office had ceased prosecuting postmasters for *Horizon* shortfalls in 2013, *why was the Court of Appeal hearing these appeals only in 2021*? The Court of Appeal nods in the direction of Mr Justice Fraser's judgments, but those themselves raise quite big questions.[91] Put another way, what of conduct that may not impact on the fairness of a particular *prosecution* – but is conduct that may nonetheless impact on an appellant's/convicted defendant's *rights* and may have wider implications for the criminal justice system and public confidence in it? This is a consideration that received no attention from the Court of Appeal, that was concerned only with second category abuse conduct of disclosure failings in connection with the *prosecution* of a given appellant. As I shall explain, the Court in March 2021 did not hear argument on Article 6. (Though it had received my written submissions of December 2020 on the point.)

It's fair to say, the circumstances are most unusual, and the Court of Appeal has to grind through a never-ending list and has little time for reflection. The reason for the circumstances being so unusual, that I am not sure I have seen anywhere referred to or properly analysed, is that the Post Office appeals are actually unique and likely to remain so. That doesn't of course affect their seriousness, nor does it mitigate abuse of process where found. The unique feature of the Post Office appeals is that the Post Office was *acutely concerned about the commercial implications* of a successful appeal against conviction, where secured by it as prosecuting authority on the basis of the asserted reliability of the *Horizon* system. I shall develop this a little in a moment. As the Justice Select Committee noted in its report on safeguards in private prosecutions in October 2020,[92] the Post Office had an unusual position and role - as victim, investigator and as prosecutor – and, as the Justice Committee did not then remark, - as respondent to an appeal. No less than four different roles in (or 'hats' for) the one person. The Crown Prosecution Service, the state prosecuting agency, has no direct commercial interest in either prosecutions or appeals.

The Court of Appeal adopted what I consider to be a slightly odd approach to second category abuse. It held:

> "In considering whether the failures of investigation and disclosure which justify a finding of category 1 abuse are so serious as to justify also a finding of category 2 abuse, the following considerations are relevant.
>
> First, we reiterate that [the Post Office] deliberately chose not to comply with its obligations in circumstances in which its prosecution of an SPM depended on the reliability of *Horizon* data. It did so against a background of asserting that SPMs were liable to make good all losses and could lose their employment if they did not do so. It did

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91 Specifically, concerning the fulness/completeness of disclosure given by the Post Office. On one view, that disclosure was seriously incomplete.

92 https://committees.parliament.uk/publications/2823/documents/27637/default/ 2 October 2020.

so despite the fact that [the Post Office] itself had selected the SPMs as suitable persons to hold their position of trust. … We are driven to the conclusion that throughout the period covered by these prosecutions POL's approach to investigation and disclosure was influenced by what was in the interests of POL, rather than by what the law required."

In short, recognition (finding) of a conflict of interest with duty. But I am not convinced that the Court of Appeal was addressing the real problem, which remains hanging in the air. I am also not convinced that a bad case of first category abuse of process causes it to move into second category abuse of process, even where the motive for the abuse was commercial interest (the law is on the whole strikingly unconcerned with motive – save, for example, where malice is relevant[93]). The legal analysis is not in my view convincing – though space does not permit full a discussion. I do not thereby suggest that the Court of Appeal was wrong to find second category abuse of process, only that I am not convinced by its reasoning. There is another route to a similar conclusion - and one that I suggest is more convincing.

The clue is in the Court of Appeal's last quoted phrase: "*throughout the period covered by these prosecutions POL's approach to investigation and disclosure was influenced by what was in the interests of POL, rather than by what the law required*". If you substitute in that phrase the word "appeals" for "prosecutions", a whole lot of new light is shed on the matter that is capable of taking into account the Clarke Advice and its importance. Otherwise, this is difficult (i.e., if the focus is merely on the circumstances of a particular *prosecution*) because, as in Mrs Misra's case, the advice itself was given two and-a-half years' after she was prosecuted.[94]

Hypothetically, a conclusion open to the Court of Appeal on the facts would have been:

"We are driven to the conclusion that throughout the period covered by these appeals, the Post Office's approach to disclosure was influenced by what was in the interests of the Post Office, rather than by what the law required."

I suggest that that was an available conclusion, it would reflect reality, and it would also support a finding of second category abuse because the Post Office's conduct violated legal rights. It might perhaps go beyond that, and it may disclose the offence of perverting the course of justice, for reasons that I shall attempt to explain.

The Clarke Advice and its implications

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93 Note, in this regard, that the only right that was preserved to the convicted claimants in the group civil litigation, under the terms of the December 2019 settlement, all their other rights being otherwise purportedly surrendered for no value, was the right to a contingent claim for malicious prosecution in the event that the Court of Appeal might subsequently set aside their convictions – an eventuality that the Post Office and government appear to have considered somewhat unlikely. It appears, from comments made on handing down of the Horizon Issues judgment, that that preservation of right may have been at the instance of Fraser J himself.

94 Which is not thereby to suggest that the unreliability of Mr Jenkins's later evidence, identified in Clarke, was not potentially directly relevant to her prosecution, given it was the only trial at which, it is said for the Post Office, he gave live oral evidence.

This brings me to my point that I think that discovery of the Clarke Advice was, to use that dreadful cliché, a 'game-changer'. I'll try to explain why.

There was a curious commonality between the Post Office and all the other legal teams with the exception of my junior, Flora Page, and Aria Grace Law, our instructing solicitors.

All but our three clients, among the 42 appellants, wished to accept the Post Office's non-resistance to the first ground of appeal and to 'call it a day', without bothering to argue second category abuse of process. They were in favour of a straightforward quashing of convictions on the first ground of appeal. To use Bernard Shaw's formulation in *Man and Superman*, this was 'the line of least resistance'. It would not be necessary to read either of Fraser J's judgments to follow that approach – and would thus save a lot of time and effort. (Similarly, there would be no need to drill down into the Post Office's extensive disclosure in the appeals – that was (unsatisfactorily) programmed to run past the time by which the appellants were required by the Court of Appeal to file any additional grounds of appeal and supplemental arguments.) It might be said, 'a bird in the hand'. The general consensus was that, in any event, the Court of Appeal would decline to hear argument on second category abuse, given the Post Office's concession on first category abuse, and even if it did hear argument, it would reject it as a ground of appeal. I was told that I did not know how the Court of Appeal Criminal Division did things, which was true, and it was a revelation.

But by this time, I had spent what seemed to me to be an enormous amount of time analysing the civil litigation and how it had developed, and I had a very good idea as to where the Post Office's vulnerabilities lay and how its commercial interests appeared repeatedly to have displaced its obligations as prosecutor, both before and after prosecution. The Receipts and Payments Mismatch bug was a good example of the way in which disclosure was handled. Second Sight first referred to it in 2013 in their interim report. The bug is described in detail by Fraser J. and it would have impacted Mrs Misra's trial, had it been disclosed by the Post Office. The Clarke Advice is a better one.

A clue to the intensity and zeal of the Post Office in its defence to the claims made against it in the group civil litigation has recently been highlighted by a FOI request made by the journalist Nick Wallis. He has covered the Post Office scandal since he first encountered the husband of Seema Misra, not long after her wrongful conviction in 2010. While the Post Office's last witness, Mr Godeseth (who gave the most important technical evidence for the Post Office), was giving evidence, largely under cross-examination assisting the claimants[95] in the (second) technical *Horizon Issues* trial, over the lunch adjournment and without warning the Post Office launched an application to Fraser J to recuse himself (that is to say, invited him to voluntarily withdraw as the judge trying the case) on grounds of

95 "…[Mr Godeseth] one of the Post Office's main witnesses and the Chief Architect of Horizon, was sufficiently damaging to the Post Office's case on the Horizon Issues that they were, essentially, forced almost to disavow him, and the Post Office's closing submissions were highly critical of the accuracy of his evidence…". Fraser J, *Horizon Issues* judgment [927].

alleged apparent bias allegedly exhibited by him in his judgment in the *Common Issues* trial.[96] The two most important findings in the *Common Issues* judgment were that (1) statements by postmasters of their account balances were not 'an account/an account stated' in law – so the burden was *not* on a postmaster to show why the balance was incorrect (above); and (2) the relational contracts between postmasters and the Post Office imported an implied contractual obligation of good faith in performance. Those findings were likely to make life very difficult for the Post Office in continuing to defend the litigation. Belshazzar might have noticed the disagreeable writing on the wall. The Post Office used a new legal team for the recusal application (different from the team conducting the *Horizon Issues* trial) with no less than two of Her Majesty's Counsel, one of whom was Lord Grabiner Q.C., one of the best-known advocates at the commercial Bar. Serious stuff - and not the kind of representation that Lee Castleton or Tracy Felstead could have afforded.

What was not known at the time but was revealed last month,[97] is that the Post Office, in making the application to recuse, had consulted none other than the former President of the Supreme Court, Lord Neuberger.[98] The chair of the Post Office is Tim Parker, who is also (conveniently) chair of HM Courts and Tribunals Service. He was chair of the Post Office litigation steering committee. That committee was separate from the legal team actually running the litigation. It is not of course known what advice was given, but the Post Office told Mr Justice Fraser that not only had the decision to apply to recuse been taken at board level within the Post Office, but that, additionally, a senior legal figure had been consulted by the Post Office in making the application. No information was given at the time about the identity of that figure (a circumstance which Lord Justice Coulson subsequently questioned as to its propriety). Why is this significant? Well, it is significant, because the Post Office at the outset of the *Common Issues* trial, in November 2018, told the judge that the claimants' claims, if upheld, represented an *existential threat* to the Post Office's business.[99] The Post Office was, it's fair to say, *in extremis*. It is now technically insolvent as a result of the scale and number of the claims now against it.

The decision to consult Lord Neuberger in 2019 on the application to remove Mr Justice Fraser as the judge trying the *Horizon* issues suggests institutional recognition in the Post Office, both that things were not going entirely its way in the group civil litigation, a fairly novel experience for the Post Office, and that a prospective adverse judgment would be catastrophic for it – which it was.

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96 The judge's judgment is reported Bates and Ors. v Post Office [2019] EWHC 871. https://www.bailii.org/ew/cases/EWHC/QB/2019/871.html

97 February 2022.

98 See Nick Wallis's blog: "*Recusal Top Dog Revealed*": https://www.postofficescandal.uk/post/recusal-top-dog-revealed. I wrote a blog post for *Legal Futures* on this remarkable, and in my view unattractive, circumstance: https://www.legalfutures.co.uk/blog/the-post-office-and-lord-neuberger-going-upstairs.

99 Considered by Fraser J to be an unacceptable/improper attempt to put the court *in terrorem* – *Common Issues* judgment para [30].

By October 2020, I had arrived at the view that something very serious had occurred in about 2013 or 2014 to cause the Post Office to change its strategic policy in prosecuting its postmasters. From the turn of the century, what had hitherto been a trickle of occasional prosecutions had turned into a *tsunami*. In the years running-up to 2013 there had been about 47 a year, but after 2014 there were none.[100] Why the change?

The 2010 'Ismay' Report

There were several crucial documents that suggested that between 2010 and 2013 the Post Office entertained serious misgivings about the integrity of its *Horizon* system. The first of these documents was what is called the "*Ismay report*". The Court of Appeal treats it in a little detail. [101] It noted that: "In August 2010 Rod Ismay, the Post Office's Head of Product and Branch Accounting, prepared a report entitled "*Horizon – Response to Challenges Regarding Systems Integrity*"".

Those to whom the report was copied included the Head of Criminal Law at the Post Office. In summary, Mr Ismay considered the desirability of an independent evaluation of *Horizon*. He warned: "*It is also important to be crystal clear about any review if one were commissioned – any investigation would need to be disclosed in court. Although we would be doing the review to comfort others, any perception that [the Post Office] doubts its own systems would mean that all criminal prosecutions would have to be stayed. It would also beg a question for the Court of Appeal over past prosecutions and imprisonments*."

To my knowledge, that document was not disclosed in the *Bates* group civil litigation. If it was, it was overlooked by the claimants. It is an oddity, that what appear to me to have been the three most important documents, or class of documents,[102] all seem to have been overlooked by the group claimants' legal team. A simpler explanation is that they were not disclosed – a circumstance that would be consistent with other habitually unsatisfactory and incomplete disclosure by the Post Office.[103]

An independent software engineer, an expert with long experience of giving advice on computer engineering issues relating to aviation safety, recently commented to me that he found the statement in the *Ismay* report astonishing. He considered that it must have been very obvious to anyone in 2010 that the *Horizon* system *demanded* external evaluation and testing. If you want to

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100 Postmasters were of course vetted for their appointment. They typically, like Seema Misra and Lee Castleton invested large sums of money, often life savings of hundreds of thousands of pounds, in purchasing a branch post office.

101 Judgment para [24].

102 The Ismay report, the Detica report, and documents relating to notification of the Post Office's insurers in 2013 (below). The Ismay Report is due to be published in the *Digital Evidence and Electronic Signature Law Review* in the autumn of 2022.

103 While disclosure is a client duty (equitable in origin but now codified by statute), in litigation disclosure tends to be overseen by lawyers, not least because issues such as legal privilege tend to arise. Where a lawyer knows that their client has given incomplete disclosure they cannot continue to act: *Myers v Ellman* [1940] AC 282.

understand about IT auditing and reliability in the context of effective corporate governance, James Christie has written what may be considered to be the seminal article on the subject. It was published last week.[104] That the Post Office was astute to avoid external scrutiny/evaluation and independent system audit of Horizon in 2010 is a matter that, separate from everything else, is disquieting. (It is difficult to understand why this is, without understanding the role and importance of IT auditing/evaluation.) As noted below, at one point in his *Horizon Issues* judgment, Mr Justice Fraser refers to the appearance that, in 2013, the Post Office did not investigate matters for fear of what might be found. But that was an attitude apparent in *2010* – though in a document (i.e., *Ismay*) that seems not to have been available to the claimants in the *Horizon Issues* trial itself in 2019.[105] It was an attitude that in fact had changed by 2013.

Helen Rose – June 2013

In June 2013, Helen Rose, a fraud analyst employed by the Post Office who had become concerned about the integrity of *Horizon* data, submitted a report to the Post Office that included the statement: "… it is just that I don't think that some of the system-based correction and adjustment transactions are clear to us 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*".[106] (My emphasis.) Ms Rose's concerns were consistent with those previously expressed to the Post Office by external consultants Detica (below) in 2012, who reported to the Post Office that "*Multiple versions of data means no single version of truth"* and that *"databases are operating beyond capacity and are therefore prone to failure*…". Ms Rose communicated with Mr Gareth Jenkins in connection with known issues concerning the integrity of *Horizon*. In February 2013, she had written to Mr Jenkins: "*I know you are aware of all the Horizon integrity issues*…". If I had been a defendant, convicted of an offence on the basis of evidence from *Horizon*, I would have been very interested to see that material. The same would apply to Detica's stated concerns.

Ms Rose is not a lawyer. For reasons that I outline below, it is arguable that the material in Detica's and Helen Rose's reports ought to have been disclosed to convicted defendants, so far as these raise doubts about the integrity/reliability of data, and the understanding/interpretation of it. Ms Rose's concerns are specifically raised in connection with the possibility of *misinterpretation* of that data in evidence in Post Office prosecutions. Ms Rose's comments are properly understood when read in conjunction with both Detica's 2012 report and, in particular, its later extensive October 2013 report.

The Post Office recognised the possible importance of Helen Rose's report for convicted defendants. In January 2014 the Post Office invited Mr Clarke, a barrister employed by Cartwright

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104 Https://journals.sas.ac.uk/deeslr/article/view/5425/5211.

105 The claimants made detailed submissions to Fraser J on Post Office *Horizon* audit – to which the *Ismay* report would likely have been very material, had it been disclosed.

106 Written submission, Marshall, and Page, to the Court of Appeal 4 November 2020.

King, to consider whether Helen Rose's report, and the Second Sight Interim report, should be disclosed to Mrs Misra. He advised against this. In doing so he referred to and applied a test for disclosure provided to the Post Office by Mr Brian Altman Q.C. (the Post Office's leading counsel on the appeals to the Court of Appeal in 2020-2021).

The October 2013 'Detica' Report

At paragraph [219] of his *Horizon Issues* judgment, Mr Justice Fraser, in connection with circumstances in 2013, says this:

> *"In my judgment, the stance taken by the Post Office at the time in 2013 demonstrates the most dreadful complacency, and total lack of interest in investigating these serious issues, bordering on fearfulness of what might be found if they were properly investigated."*

The judge expressed his view in connection with a statement made by Mr Andrew Winn, of the finance department of the Post Office, to Mrs Angela Van Den Bogerd, a director and the most senior witness of the Post Office to give (misleading) evidence at the *Horizon Issues* trial. Mr Winn had written to her "*My instinct is that we have enough on with people asking us to look at things*." The full import of Mr Winn's statement was not, it seems, explored and he did not give evidence. But the judge's conclusion that the Post Office was either complacent or uninterested in investigating matters in 2013, was wrong. The Post Office was anything but complacent. But Fraser J received incomplete evidence as to what the Post Office had investigated and was (busily) investigating in 2013. (Mr Winn was one of the senior Post Office representatives who attended the Receipts and Payments Mismatch bug meeting in September 2010, shortly before Mrs Misra's trial.)

Mr Winn's response was in connection with concerns about (i) an alleged flaw in *Horizon* in July 2013 concerning a 'phantom cheque', (ii) concern in the Post Office about BBC interest in *Horizon* and (iii) a complaint by a sub postmaster to their Member of Parliament. Whether Mr Winn knew, in July 2013, about the Clarke Advice and its recommendations, that resulted in the review of 308 Post Office prosecutions, is not known. But he is likely, in July 2013, to have been aware of the Post Office's engagement of external consultants to review its systems, not least because of the cost involved. Mrs Van Den Bogerd as a director will have known about both.

There was a document even more important than the *Ismay* report, that was produced by an external consulting firm engaged by the Post Office. The firm was *Detica Net Reveal*. *Detica* is a consulting division of BAE Systems.[107] It is of particular importance because of the positions of those to whom its October report was copied in 2013. The report was commissioned by the Post Office's head of security, John Scott, and its Legal and Compliance Director, Susan Crichton. Detica's work commenced (on this particular report) in March 2013. That was at a time more or less coinciding with the anticipated delivery of Second Sight's Interim Report, that was submitted to the Post Office

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107 It is referred to in a complaint to the Parliamentary and Health Service Ombudsman submitted by the Justice for Sub postmasters Alliance represented by the firm Stephens & Bolton in December 2020.

in June 2013. An FOI request has revealed that Detica's October 2013 report was made available to the Post Office's General Counsel, its Chief Financial Officer, Chief Information Officer, Chief Technical Officer, and to others whose identity has been withheld. The conclusions to the report, that was entitled "*Fraud and non-conformance*" were devastating. These included:

> *"**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**."*[108]

> *"An interim report by Second Sight, and the accompanying commentary by unions and parliamentarians suggests that the Post Office will be challenged to respond comprehensively and openly about the changes to be enacted when the final report is published."*

The Detica report represented a massive investment. It will have cost the Post Office hundreds of thousands of pounds, and Detica's engagement possibly millions.[109] To my knowledge, that document was not disclosed in the *Bates* civil litigation. Mr Justice Fraser at paragraph [541] of his *Horizon Issues* judgment said, "I did however tell counsel for both parties that I would read all of the documents in preparing this judgment an neither party objected to my doing that." At paragraph [542] of the judgment there *is* a reference to Detica,[110] but there is no reference to its October 2013 report. It must be assumed that it would not have escaped the judge's scrutiny, had he been provided with it.

Other conclusions in the report included the observation that an endemic problem with reconciling balances on ATMs at post office's that used this equipment could not be accounted for on grounds of fraud alone. This conclusion remains unexamined and unexplored as to its wider implications. It may well cast serious doubt upon the Court of Appeal's apparent current enthusiasm for dismissing appeals where it considers convictions do not turn on/are not solely concerned with accounting shortfalls evidenced by *Horizon*. The Post Office had lots of other problems with its

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108 My, possibly unnecessary, emphasis. Written submission, Marshall, and Page, to the Court of Appeal 4 November 2020.

109 Prof. Peter Ladkin has commented that his rule-of-thumb is that an engineer as consultant costs as client £200K/€200K p.a.. So "hundreds of thousands of pounds" is typically reached in 6 person-months. 6 person-months is not a huge amount of work. Michael Barr's discovery of the flaw in the Toyota software (unexplained acceleration (for the detail of which see Mason & Seng (Further Reading below) is said to have taken him 36 PM, and that is on top of a NASA investigation which could well have cost a lot more than that. The Detica project is, to date, a wholly unexplored aspect of the entire Horizon scandal. It is extraordinary and rather unsatisfactory that the Court of Appeal was not addressed on this, given Detica's conclusions. Flora Page's and my written submissions on the point appear to have been left on the 'cutting-room floor'. Detica opens-up issues which are not limited to '*Horizon* shortfalls' but extend to reconciling data from disparate sources.

110 "Proactive fraud identification (obviates the complexity costs of the Detica project which if goes ahead will need to take inputs from multiple sources instead of just one single database)" That is the only reference to Detica in the *Horizon Issues* judgment.

information and data management systems – not only *Horizon* – *q.v.* the conclusion: *"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."* It is remarkable and unfortunate that this point was not raised with the Court of Appeal.[111] The now conventional (and to my mind rather unconvincing[112]) reason for the court disallowing appeals is that the circumstances of prosecution - and consequent conviction - were *not dependent* on *Horizon* shortfalls. The Court of Appeal may have a somewhat limited, and an arguably incomplete, conspectus.

It is likely that the Detica report of October 2013 and its conclusions would have been carefully considered at the highest levels within the Post Office. It would be surprising if the government, as sole shareholder in the Post Office, was not briefed on Detica's conclusions. In 2020 Paula Vennells C.B.E., the Post Office former CEO, and a member of the lay clergy of the Church of England, wrote to the Chair of the BEIS Select Committee, Darren Jones M.P., informing him that from 2014 the Post Office effectively ceased prosecuting its sub postmasters for *Horizon* shortfalls. This meant that for all practical purposes the Post Office then ceased all prosecutions for false accounting and theft based on *Horizon* data.[113]

A key factor in the Post Office's change in its prosecution strategy was likely to have been that in June 2013 the Post Office received an interim report from Second Sight Support Services Ltd (now called Second Sight Investigations 'Second Sight'), the small specialist forensic investigatory and accountancy firm that the Post Office had appointed in 2012, in response to increasingly vocal parliamentary pressure and disquiet, to look into *Horizon* and issues in connection with the treatment by the Post Office of its postmasters. Second Sight's Interim Report, delivered in June 2013, must have made for very disturbing reading for the Post Office – as recognised by Detica. It was Second Sight's identification of the Receipts and Payments Mismatch bug, notice of their awareness of which had been given to the Post Office by Second Sight, it seems, prior to delivery of the interim report itself, that resulted in the Post Office giving instructions to external solicitors, Cartwright King, that elicited the infamous Clarke Advice (Lord Falconer, a former Lord Chancellor, described it to Nick Wallis as a "smoking-gun").

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111 It was addressed in written submissions by us, but Flora Page and I had been successfully removed from the appeals, by December 2020.

112 As will be apparent, in my view, the Court of Appeal, for reasons connected with the non-disclosure until the last minute of important documents, notably the Clarke Advice, received only a limited and somewhat selective account of systemic problems within the Post Office. That is not entirely the court's fault, nor is it the fault of the CCRC that had no knowledge of either the "Clarke Advice" nor the August 2013 "Shredding Advice" at the time of its CAA section 9 referrals in June 2020. The CCRC appear not to have received the October 2013 Detica report. The CCRC also appears not to have been aware of the Post Office's notification of its insurers in 2013. In short, the CCRC didn't really know very much about the background circumstances at the time it filed its first s. 9 reference with the Court of Appeal.

113 See also Justice Select Committee (Ninth) Report (2019-2021), Private Prosecutions: https://committees.parliament.uk/publications/2823/documents/27637/default/ (2 October 2020 para [12]).

Among their provisional interim comments, Second Sight suggested that there appeared to be a conflict of evidence on whether so-called "remote access"[114] to branch accounts appeared to be possible. This would mean that data showing at Post Office branch terminal could be manipulated without the knowledge of, and thus without the consent of, its postmasters. (The Post Office's lawyers, in the later civil litigation, initially suggested that the point and its significance were not understood.[115]) This triggered an extensive aggressive campaign of vigorous public denial by the Post Office. It was only abandoned six years later in 2019, having incurred costs of "tens of millions of pounds" as Mr Justice Fraser laconically observed.[116] The denial was untruthful.[117] Furthermore, Second Sight raised the possibility that unattributed funds in Post Office suspense accounts, the origin of which could not be ascertained, might well represent the missing sums suggested by imbalances on some branch accounts. *Horizon* is not a double-entry accounting system. The spectre raised by Second Sight was of the Post Office prosecuting defendants, and of them being imprisoned, for money that *the Post Office actually had* in its suspense accounts. To date, no external evaluation of Post Office suspense accounts has been undertaken. Most worryingly of all for the Post Office, Second Sight referred to the Receipts and Payments Mismatch bug that I mentioned earlier.

The Clarke Advice is revealed

Late one evening, towards the end of October 2020, I was leafing through very late Post Office electronic disclosure, given on 23rd October, of a heavily edited schedule of references to documents. This included, amongst hundreds of documents, a few lines of text referring to memorandum written for *the board* of the Post Office by its external solicitors, Bond Dickinson LLP. The quotation referred to the board being informed of concerns about the completeness of the evidence of Mr Jenkins, the Fujitsu witness who had given evidence against my client Seema Misra, and to other concerns about the completeness of disclosure given by the Post Office. This was electrifying. Anyone who knows anything about how large corporations work would immediately recognise that this suggested a big deal – otherwise the board would not be troubled with it. The fact that it emanated from external solicitors was similarly significant. On 27 October 2020 I got my solicitors to write one of those lengthy question-laden letters that solicitors are good at writing. There was a hearing for directions in the appeals, fixed for 18 November 2020. On 12 November 2020 a response was received from the

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114 Sometimes referred to as 'super-user' access rights.

115 A response Fraser J suggested could not sensibly have been made.

116 *Horizon Issues* judgment [526].

117 The Post Office constructed an argument that there was no "*functionality*" in *Horizon* that facilitated 'remote access'. But that was not the point, it *was possible* regardless of 'functionality' provided by *Horizon* itself. In law, a statement made that is true only with a qualification, that remains unstated by the maker of the statement, is an untrue statement. To date, there have been no consequences whatever for this lie, told publicly over years, either for the Post Office or any of its management. The contrast with the United States, an example of which is to be found in the fine imposed on Toyota in connection with the 'unexplained acceleration' issue, is striking. The general state of English law on corporate attribution (and on vicarious liability, despite recent attempts at clarification by the Supreme Court) is profoundly unsatisfactory. I imagine that few lawyers could give a satisfactory account of it.

Post Office's solicitors, Peters & Peters, that included the single most explosive document I have read in my thirty years practice at the Bar.

The Post Office's formal stated case on the appeals was that it was wholly unnecessary for the Court of Appeal to determine the second ground of appeal, that is to say category two abuse, given that each unopposed appeal was conceded on the first ground. In crude terms, if the conduct was an abuse of process, so be it, the conviction could be quashed. Getting a finding of second category abuse, the Post Office's lawyers contended, couldn't result in 'more quashing'. But the Post Office's position on this, even upon cursory examination, was logically and also legally inconsistent (it conceded second category abuse in a handful of cases). On 6 November 2020 the Post Office's leading counsel had filed written submissions urging the Court of Appeal to restrict "fresh evidence" on the appeals to the judgments of Mr Justice Fraser and submitted that the CCRC case on second category abuse of process was weak. Had the court acceded to that invitation the Clarke Advice would have ceased to be a disclosable document.

Perhaps it's too obvious to state, that a finding against the Post Office on the second ground, that its conduct had had the effect of, or risked, subverting the criminal justice system, or undermining public confidence in it, potentially carried massive prospective reputational and other implications for it.

While I believed there must have been some triggering event, beyond Detica and Ismay, that had caused the Post Office from 2014 to cease its policy of prosecuting postmasters for *Horizon* shortfalls, I had not been able to put my finger on it. On12 November 2020, disclosure was given to my solicitors of the now famous "Clarke Advice". It gave me the answers and the explanation for which I had long been searching.

Mr Clarke was a barrister, then employed by the specialist firm of criminal lawyers, Cartwright King LLP. It regularly acted for the Post Office in its prosecutions. Mr Clarke had been instructed to consider information that appears to have emanated from Second Sight in connection with the existence of bugs, specifically, the Receipts and Payments Mismatch bug. This you will recall, was a bug the existence of which had been discussed at a high-level meeting between Fujitsu and the Post Office in around September 2010, only a month before Mrs Misra's criminal trial for theft in October 2010. Mr Clarke's review and conclusion, entitled "*Advice on the use of expert evidence relating to the integrity of the Fujitsu Services Ltd Horizon System*", was extraordinary. He had reviewed a sample of five separate criminal cases in which Mr Jenkins had given expert evidence for the Post Office from October 2012-April 2013. Mr Clarke noted that Mr Jenkins had been the Post Office's preferred expert for many

years.[118] He concluded that in every sampled case in which Mr Jenkins had given evidence, he had given incomplete evidence of his knowledge of the existence of bugs in *Horizon*. The Court of Appeal records part of his advice:

> *"- Notwithstanding that the failure is that of [Mr Jenkins] and, arguably, of Fujitsu Services Ltd, being his employer, this failure has a profound effect upon [the Post Office] and [the Post Office] prosecutions, not least because by reason of [Mr Jenkins's] failure, material which should have been disclosed to defendants was not disclosed, thereby placing [the Post Office] in breach of their duty as a prosecutor.*
>
> *By reason of that failure to disclose, there are a number of now convicted defendants to whom the existence of bugs should have been disclosed but was not. Those defendants remain entitled to have disclosure of that material notwithstanding their now convicted status. (I have already advised on the need to conduct a review of all [the Post Office] prosecutions so as to identify those who ought to have had the material disclosed to them. That review is presently underway.[119])"*

The implications for the Post Office were seismic. Very importantly, Mr Clarke advised that Mr Jenkins should not be used as a witness for the Post Office again. He wrote: "*[Mr] Jenkins's credibility as an expert witness is fatally undermined; he should not be asked to provide expert evidence in any current or future prosecutions. Similarly, in those current and ongoing cases where [Mr] Jenkins has provided an expert witness statement, he should not be called upon to give that evidence …*".

This was, and remains, an issue of considerable importance in the group Civil litigation in 2019. In *Bates and Others. v Post Office Ltd (No. 6 "Horizon Issues") Rev 1* [2019] EWHC 3408, Mr Justice Fraser addresses the reasons for Mr Jenkins's absence as a witness from the *Horizon Issues* trial at some length, over four pages of the judgment at paragraphs [508]-[516], under the specific heading "*The absence of Mr Gareth Jenkins*". The reason given to Mr Justice Fraser by the Post Office in 2019 was that: *"Taking into account that Mr McLachlan's evidence specifically addressed things said or done by Mr Jenkins in relation to the Misra trial, Post Office was concerned that the Horizon Issues trial could become an investigation of his role in this and other criminal cases."*

Now that is a reason that appears, in terms, in Mr Justice Fraser's judgment in 2019 that was annexed to the CCRC's statement of reasons for its referrals in the first 42 appeals. But *it was not in fact the true reason* for Mr Jenkins not being called in the 2019 group litigation to give evidence for the Post Office. This would have been apparent to anyone familiar with the events of 2013 and the Clarke Advice. The true reason lay in the Clarke Advice and Mr Clarke's recommendation in July 2013 that

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118 *"For many years both RMG and latterly [the Post Office] has relied upon Dr (sic) Jenkins for the provision of expert evidence as to the operation and integrity of Horizon. Dr Jenkins describes himself as an employee of Fujitsu Services Ltd and its predecessor ICL since 1973. He holds a number of distinguished qualifications in relevant areas and has worked on the project since 1996; he is accordingly a leading expert on the operation and integrity of Horizon.*
Dr (sic) Jenkins has provided many expert statements in support of [the Post Office] (&RMG) prosecutions…".

119 See below under III.

Mr Jenkins should not be called as a witness again, because he was discredited as an expert witness and had repeatedly given incomplete and misleading evidence, putting the Post Office in breach of duty to the court as prosecutor..

Common sense suggests that, together with Detica's October 2013 report and Second Sight's Interim Report of June 2013, the Clarke Advice of July 2013 (below) is likely to have weighed heavily in the Post Office's decision to cease acting as a private prosecutor from 2014 (*q.v.* Vennell's letter to Darren Jones M.P.) and to thereafter cease prosecuting at all for alleged '*Horizon* shortfalls'. It is noticeable that the reasons for it doing so were not disclosed in the civil litigation in 2019. The circumstances, had they been disclosed, would have undermined the Post Office's defence. Further, there was no clear exposition of these circumstances to the Court of Appeal in 2021. That is unfortunate. It was one consequence of the Court of Appeal's questionable response to the Post Office raising, without proper warning and in disregard of the rules of court,[120] doubtful allegations of contempt of court on 18 November 2020, with the unfortunate consequences that ensued.

If I am correct in my perception that (i) Detica's report, (ii) the Second Sight Interim Report and (iii) the Clarke Advice - together perhaps with Helen Rose's clearly stated misgivings - were all crucial documents in the Post Office's decision, no doubt on advice, in about late 2013 or very early 2014, to cease prosecuting for Horizon Shortfalls after 2013, the reason for the Post Office ceasing prosecuting for Horizon shortfalls was the separate and cumulative effect of serious doubts, from multiple sources, about the reliability and integrity of data used as evidence as the basis for its prosecutions.

As I shall explain, save where subject to legal professional privilege, that material *was disclosable as of right*, to those whom the Post Office had convicted on the basis of data in respect of which doubts about its reliability and integrity were expressed (see further below under Part IV). The Post Office went to considerable lengths, not only not to disclose that material, but to conceal it.[121]

III. THERE'S MORE TO THIS THAN MEETS THE EYE – SACKING SECOND SIGHT

On 17 December 2014 there was an adjournment debate in Westminster Hall moved by Mr James Arbuthnot M.P., now Lord Arbuthnot of Edrom. (An adjournment debate is a debate without a vote. Such debates are usually on subjects considered to be of general public importance.) Second Sight Investigations, the specialist firm of forensic accountants had two years' previously been appointed by the Post Office, in response to pressure from Members of Parliament, to look into the Post Office's treatment of its postmasters in connection with *Horizon*. Sir Anthony Hooper, a retired

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120 Criminal Procedure Rules, r. 48 – which is highly prescriptive and provides a statutory code. The reason for the rules being prescriptive is that allegations of contempt are readily open to abuse. The commentary on both the Criminal Procedure Rules and also the Civil Procedure Rules (CPR 81) are replete with warnings of the necessary care with which courts should approach issues/allegations of contempt.

121 The Detica report, like the Ismay report, was plainly disclosable by the Post Office in the *Horizon Issues* litigation.

judge of the Court of Appeal, had been appointed to oversee a mediation process that had been established.

Responding for the government to the December 2014 debate, Jo Swinson M.P., then the government minister for Postal Services, having heard from M.P.s a series of shocking stories of the treatment by the Post Office of its postmasters, said this to parliament:

> *"…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."*[122]

Less than six weeks after the minister's statement to parliament, on 3 February 2015, Ian Henderson, a director of Second Sight, an experienced forensic fraud investigator, gave this evidence to the Business Innovation and Skills'[123] parliamentary select committee:

> "*… 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 determined to get to the bottom of this matter, which we regard as extremely serious."*

So, in February 2015, Ian Henderson told parliament in the select committee, that Second Sight wanted to do *exactly* what Jo Swinson M.P., the government minister in December 2014 had said the government saw to be *necessary*.

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122 Hansard: https://publications.parliament.uk/pa/cm201415/cmhansrd/cm141217/halltext/141217h0002.htm

123 Since then, re-named Department for Business Enterprise and Industrial Strategy (BEIS).

The video recording of the select committee hearing makes for arresting viewing.[124] Mrs Paul Vennells C.B.E., the Post Office's then CEO is cross-examined, pretty effectively, by Mr Zahawi M.P.. He is asking the Post Office for reasons why prosecution files were not given to Second Sight.[125] Mrs Vennells and Mrs Van Den Bogerd are steadfastly declining to agree to the committee's invitation to hand-over the prosecution files to Second Sight.

It is on record, including in evidence to parliament, that when first appointed, it was expressly agreed that Second Sight, being independent, would have *unrestricted* access to material that they considered to be relevant. That position changed sometime after 2013, which led to the February 2015 select committee hearing.

Now here's a thing. In late November 2020 the Post Office's solicitors revealed an extraordinary circumstance. My solicitors, and the other appellants' solicitors, were told that between the end of 2013 and 2014.

> *"….. in mid-2013, following receipt of the Clarke Advice, Cartwright King Solicitors (a leading criminal law firm who had acted as prosecution agents for [the Post Office] in a significant number of cases) were instructed to conduct an independent review to ensure that proper post-conviction disclosure was made in appropriate cases.*
>
> *The CK Sift Review referred to above continued for a number of months into 2014, during which Cartwright King reviewed all cases conducted since 1 January 2010 (both Crown Court and Magistrates' Court) in which the primary or main evidence against the defendant was based on Horizon data …*
>
> *Over the course of a number of months, Cartwright King carried out a sift of 308 case files, a second sift of 229 cases, and a full review of 53 cases."*

Three things are striking. The first is that, of 308 case files subject to the sift review by Cartwright King and 53 full case reviews, not one case reviewed by Cartwright King resulted in a successful appeal to the Court of Appeal. Yet, in 2021 without exception, every one of the successful appeals (39 of the 42 referred by the CCRC) to the Court of Appeal resulted in the conviction being quashed both on grounds of incomplete and inadequate disclosure by the Post Office resulting in an unfair trial, but also, importantly, for second category abuse of process. In some instances, the court quashed the conviction 'without hesitation'. Furthermore, each appeal was classified as an "exceptional" appeal for the purposes of s. 13 of the Criminal Appeal Act 1995. You might say

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124 https://parliamentlive.tv/event/index/d05cb9e7-04d0-4d05-8a43-ddd74b1eecc0?in=10:54:58&out=10:57:51

125 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 Offices prosecution files: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-innovation-and-skills-committee/post-office-mediation/oral/17926.html (Transcript).

Cartwright King got everything that could possibly be got wrong, wrong – if it was considering material identified post-trial that might properly be disclosed to convicted defendants for the purpose of an appeal. Now why should that happen? A number of possible explanations are available. But it is clear that Cartwright King did not, contrary to what was said, carry out an "independent" review. They were long-established prosecuting agents for the Post Office.[126]

Now, as I have mentioned before, the Post Office is owned by the government its sole shareholder being UK Government Investments Ltd (UKGI). The board of the Post Office had been notified of concerns about Mr Jenkins's evidence in 2013.

Is it not remarkable, and I say nothing of the legal issues, that parliament conducts a select committee hearing at which the CEO of the Post Office is vigorously cross-examined by M.P.s as to why the Post Office will not hand-over prosecution files, and Mrs Vennells's somewhat evasive response includes that Second Sight is not legally qualified?[127] (Both the directors of Second Sight were experienced specialist forensic fraud investigators.) Is there not a touch of unreality in the position? Had Mrs Vennells been candid, she would have made clear that the Post Office had already, with the assistance of an external specialist criminal law firm, conducted a sift of some 308 prosecutions from 2010 and that (presumably) action in each case, where considered appropriate, had been taken. That would have been a complete answer to Second Sight's requests - and also to Mr Zahawi M.P.'s vigorous questioning of Mrs Vennells. But it would have prompted the question as to *why the Post Office had undertaken such an extensive (and expensive) review of its own prosecutions?* The only honest response to that question would have ineluctably led to revelation of the Clarke Advice - because it was the explanation for the review given in November 2020 to the appellants' solicitors by the solicitors for the Post Office.

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126 Hence Mr Clarke referring to the requirement that "we" use a different expert in place of Mr Jenkins.

127 In a letter of June 2020 (*loc. cit.*) in response to an inquiry from Chair of the Business, Energy and Industrial Strategy Committee at question **(11)**: "**Second Sight told us that Post Office Limited obstructed their access to legal files to review cases as part of the Complaint Review and Mediation Scheme. Did you as Post Office Ltd CEO actively stop files and information being released to Second Sight when requested? Why were they refused access to files?**" Ms Paula Vennells C.B.E., former CEO, answered:

> *"Post Office decisions in relation to the Scheme were discussed in the first instance by an ad hoc Board sub-committee, consisting of the then Chair (Alice Perkins), myself, and two non-executive directors. Meetings were attended by, among others, the General Counsel, and the company secretary.*
> *The decision that was made, collectively by the Board sub- committee, was that Second Sight would not be given access to the internal files. Firstly, because the documents were legally privileged and, as I understood it, it had never been agreed that Second Sight would be given access to privileged material. Secondly, it was the view of Post Office that the conduct of prosecutions was outside the scope of the Scheme.* ***Thirdly, Second Sight, as forensic accountants, had no expertise to consider legal matters****."* (My emphasis.)

Mrs Vennells made no reference to the fact of the extensive 2013-2014 review by Cartwright King LLP, in response to the Clarke Advice, the revelation of which had to wait for another five months. A simpler answer might have been '*because the Post Office had undertaken and independent review of prosecution files in 2013-2104 so there was no need for Second Sight to see the files*'.

So, the government-owned Post Office couldn't tell parliament about its own extensive review without revealing the existence of the Clarke Advice. That is pretty strong circumstantial evidence that the Post Office was very concerned to keep the Clarke Advice to itself and was astute not disclose its existence to parliament – or to anyone else. It also might suggest that the Cartwright King exercise was intended to 'ring-fence' the Post Office's more recent prosecutions from possible criticism as having been tainted by association (with Mr Jenkins). A cynic might think that Cartwright King perhaps provided the response, and the protection, that the Post Office was looking for. The terms of Cartwright King's instructions, and who was responsible for deciding upon these, would be illuminating. It remains extraordinary, that despite so many reviews – and the reason for them, not one resulted in a successful appeal to the Court of Appeal. Sometimes the frequency of accident is so improbable that design may offer better explanation.

The CCRC's immediate response, upon being referred in correspondence by the Court of Appeal to the 2013 Clarke Advice in November 2020, was to raise the question with the Court of Appeal of whether consideration should not be given to providing it to the Metropolitan Police.[128]

Shortly after Mr Henderson's evidence to the select committee, in March 2015, the Post Office gave notice that it was terminating the engagement of Second Sight. The Post Office abruptly withdrew from the mediation process. By then, Second Sight had been working on the Post Office cases and assisting in the mediation scheme for two years.

Second Sight delivered their Final Report in April 2015.[129] The report recorded that, contrary to assurances given to them when first engaged by the Post Office: "We have experienced significant difficulty in obtaining access to a number of documents we believe are necessary for the purpose of our investigation [including] … the complete legal files relating to investigations or criminal prosecutions commenced by Post Office that relate to the Applicants [to the mediation scheme]" Given the review that Cartwright King had undertaken in 2013-2014, the fact of which was disclosed by the Post Office neither to parliament or to Second Sight, this statement in the Final Report is striking:

> *"We however, consider that a complete and independent review of these criminal cases is the only proper way to identify whether there are instances of possible misconduct by prosecutors acting on behalf of Post Office and whether or not miscarriages of justice may have occurred."*

The Post Office later, in November 2020, *for the first time* asserted that such an independent review had been undertaken by Cartwright King LLP. It remains extraordinary that neither its fact nor its outcome had previously been disclosed. One wonders what the Post Office made of Second

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128 Letter from the CCRC dated 24 November 2020 to the Court of Appeal: "We understand that the parties may wish to consider whether the Clarke advice – either in whole or in part - ought to be disclosed to the [Metropolitan Police Service] investigation team. You may already have that in hand."

129 https://becarefulwhatyouwishfornickwallis.blogspot.com/2015/04/exclusive-second-sight-final-report-in.html.

Sight's recommendation at the time of its recommendation in April 2015? It is difficult to resist the conclusion that the Post Office was determined to close down Second Sight's inquiries – and it did so. It was the ending of the mediation scheme that provided the catalyst for the commencement of the civil litigation, initiated by Alan Bates, that in due course would become the group litigation. It is perhaps unlikely that the Post Office anticipated this.

You may form your own view as to what the government may have been told about the termination of Second Sight's engagement and the reasons given by the Post Office for this, so soon after the minister Jo Swinson M.P.'s statement to parliament.

Given the trouble that Second Sight had put the Post Office to, in having to consider 308 prosecutions after 2010, following Mr Clarke's July 2013 advice, itself prompted by delivery of the Second Sight Interim Report in 2013, conjecture might suggest that Second Sight, like a moth, had flown too close to the flame and got burnt.

I have previously suggested that there are two possibilities. Either the government was told the truth, in which case it was complicit, or else the government was seriously misled by the Post Office.

The Post Office issued a rebuttal document in response to the Second Sight Final Report of April 2015. It is an extraordinary document, which, in the light of what is now known, reads like a poor work of fiction. There are questions as to how it came to be written, by whom and upon the basis of what information/instructions? The question also arises as to for whom the report was written? On the important issue of "remote access" the document stated: "*To be clear, Horizon does not have functionality that allows Post Office or Fujitsu to edit or delete the transactions as recorded by branches*." That statement was false and misleading. The issue was not whether Horizon had the relevant "*functionality*", but whether 'remote access' to branch accounts was possible without postmaster knowledge or consent. It was. At paragraph 26.6, the author of the document recorded: "*Post Office has a continuing duty after a prosecution has concluded to disclose immediately any information that subsequently comes to light which might undermine its prosecution case or support the case of the defendant*." It is to be assumed that the author knew nothing of the Clarke Advice, or the Ismay or Detica October 2013 reports. There is no reference to the review of 308 prosecution files by Cartwright King in 2013-2014. There is no reference to the Receipts and Payments Mismatch bug. There is, of course, no reference to any concerns of the Post Office about Gareth Jenkins and the completeness or reliability of his evidence. Nor is there any reference to the Post Office having notified its insurers of risk in August 2013. The document has only a slender and tenuous connection with reality and the facts, as these would have been known to the Post Office at the time when the document was drafted.

To give but one, almost surreal, example, the Post Office rebuttal paper on Second Sight's Final Report included the following statement:

> "At paragraph 2.5 the [Second Sight April 2015 Final] Report questions whether there have been any miscarriages of justice. Post Office takes any allegation of this nature extremely seriously. In none of the Post Office's own investigations, nor through all of

> Second Sight's work, has any evidence emerged to suggest that a conviction is unsafe. Nevertheless, Post Office *will engage with the appropriate independent bodies* to review any possible miscarriage of justice (noting that matters relating to criminal law and procedure, such as prosecutor conduct and the safety of convictions, are outside Second Sight's scope of expertise as forensic accountants)." (Italics mine.)

That was written a year after the Post Office, because of the impact of the Clarke Advice, had engaged Cartwright King LLP to undertake a review, over a period of six months or so, of *all its Horizon prosecutions from January 2010* - 308 of them - and yet the document refers to neither of those circumstances. The future tense "will engage with the appropriate independent bodies" is misleading to any reader, because it necessarily suggests that this was yet to be done.

It might be, however, that conjecture about what the government was told may not be very important. An executive director of UKGI (i.e., the government's investment holding company, owned by HM Treasury – which owns the issued share capital in Post Office Limited), Richard Callard, was the government representative and non-executive director on the Post Office board from 2014-2018. At a meeting as long ago as April 2014, the sub-committee of the Post Office board held a meeting at which a reduction in Second Sight's role was discussed. (This was at a time that Second Sight were asking difficult questions and seeking access to prosecution files.) Present were the Chair of the Post Office and the CEO and its General Counsel, Chris Aujard, as well as the UKGI representative Richard Callard. Angela Van Den Bogerd, the most senior officer of the Post Office to give evidence to Mr Justice Fraser in 2019 (who concluded that she was not a reliable witness of fact – but had sought to mislead him) was also present. She was tasked with preparing a table "*demonstrating that Post Office is rebutting the concerns raised by Second Sight in relation to Horizon*". Most of the minute is redacted. All of Second Sight's stated concerns in 2013 were subsequently vindicated by Mr Justice Fraser in his *Horizon* Issues judgment – save as to what unattributed funds were in Post Office suspense accounts, a tantalising question that remains unaddressed.

Post Office minutes show that later, on 18 February 2015, Richard Callard (director of UKGI) sought a briefing document so that he could brief the minister for the Post Office on the *changes* with Second Sight. The strong inference is that, by 18 February 2015, thus immediately following the disastrous select committee hearing on 3 February 2015, the Post Office determined that Second Sight's involvement should cease. Until the devastating judgments of Mr Justice Fraser in 2019, it was Second Sight that had got closest to rumbling what was wrong with *Horizon* and the Post Office's reliance upon it – and much else besides.

The parliamentary select committee, at which Mrs Vennells 'stonewalled' on access to prosecution files for Second Sight, was less than two months after the minister, Jo Swinson M.P., had told parliament that the government wished Second Sight to forensically examine each case.

Jo Swinson M.P. has refused all requests by the journalist Nick Wallis to give an interview.

It took another *six years* for the Post Office's first victims to successfully challenge their convictions and to be told that their prosecution, in every case, was 'an affront to the conscience of the court'. In every case the appellant's *right to a hearing of an appeal within a reasonable time* was violated. The cause of the delay was the Post Office and its elaborate strategy of concealment and denial. That strategy receives neither analysis nor comment from the Court of Appeal.

It is notable, and unsatisfactory, that Mr Henderson, by agreement with the Post Office, was constrained and limited in the evidence that he felt able to give to Mr Justice Fraser in 2019 at the *Horizon Issues* trial. The Post Office sought to downplay – and to misstate - the effect of that constraint on Mr Henderson's evidence.[130]

One of the interesting, and as yet unexplored, dimensions to the Post Office fiasco is that in May 2015 the EU Tenders Electronic Daily website reported[131] that on 19 February 2014 the tender process for the Post Office Front Office IT application services had resulted in the contract for the Post Office front office applications being awarded to IBM. However, on 26 February 2016, the TED[132] noted a modification and extension to the existing Post Office contract with Fujitsu, for application and IT services relating to point of sale, customer-facing, transactions. This was on grounds that, for economic and technical reasons, change would result in inconvenience and duplication of costs for the Post Office. One is bound to speculate whether the economic and technical reasons might not have been related to the difficulties with *Horizon*, and the consequences of these, that by then had been identified within the Post Office – the gathering storm.

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130 *Horizon Issues* judgment, *per* Fraser J:

> "197. The actual question posed to Mr Henderson was not as set out in the above extract of the submissions [for the Post Office] at [195] above, it was rather wider. It was posed by me, and it was at the end of his cross-examination. It was in the following terms:
> "I just want to be clear: is it your evidence therefore that because of that protocol agreement your evidence of fact to this court is narrower in scope than it would be absent the protocol agreement?"
> 198. His answer was "yes, it is". He was then asked by counsel for the Post Office whether it had inhibited him in answering questions, and he said it did not. I do not consider that the closing submissions [for the Post Office] are an accurate summary of both questions put to him about this, or the restrictions he considers had an impact upon his evidence. The restriction was wider than impacting upon the questions he was asked, and his answer showed that his evidence as a whole had been affected…".

131 TED Notice 2015/S 106-192927 29 May 2015.

132 TED Modification Notice 2016/S 040—0644434. Under reasons for modification: [2.2] "The Authority's [Post Office's] existing POS system is highly complex. The services cannot for economic and technical reasons be provided by a contractor other than the original contractor because of the specific interoperability requirements and the highly complex nature of the existing infrastructure and the Authority's business model and operating procedures. Acquiring services having different technical characteristics would result in disproportionate technical difficulties in operation and maintenance and carry a significant technical integration and interoperability risk. Awarding the contract to a different contractor would also cause significant inconvenience in terms of service delivery, reliability and continuity of service and would materially compromise the Authority's ability, operationally, to provide Post Office counter services. Introducing a separate third party would result in a substantial duplication of costs and represent poor value for money."

IV. DOUBTING THE COURT OF APPEAL

I am not at all persuaded that the Court of Appeal, in its April 2021 judgment, got its analysis of second category abuse of process right. I'll attempt to explain briefly why.

The prosecutor's duty of disclosure, post-conviction

There are two propositions of law that it is necessary to refer to. The first is the decision in *R (on the Application of Nunn) v Chief Constable of Suffolk Police* UKSC [2014] 37. Lord Hughes JSC, giving the judgment of the Supreme Court, with which all the other justices concurred, summarising the common position in connection with the obligation (duty) of post-conviction disclosure by a prosecutor, said this:

> "a limited common law duty of disclosure remains [by the prosecution after trial]. Its extent has not been analysed in English cases, but plainly it extends in principle to any material which is relevant to an identified ground of appeal and which might assist the appellant. Ordinarily this will arise only in relation to material which comes into the possession of the Crown after trial".

The word used is *"material"*, not "documents". Lord Hughes explained that:

> "[t]he principled origin of the duty of disclosure is fairness. Lord Bingham put it in this way[133] speaking in the context of the proper procedure for handling claims to withhold disclosure on public interest grounds: "*Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure.*" There is no doubt that this principle of fairness informs the duty of disclosure at all stages of the criminal process….".

At paragraph [35], Lord Hughes said this:

> "There can be no doubt that if the police or prosecution come into possession, after the appellate process is exhausted, of something new which might afford arguable grounds for contending that the conviction was unsafe, it is their duty to disclose it to the convicted defendant." (My emphasis).

The duty to disclose doesn't go away. A convicted defendant's *right to disclosure* of material persists. Prosecution post-conviction disclosure plainly engages with the *ability* of a convicted person to appeal their conviction and thus engages with their *right* to do so.

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133 *R v H* [2004] UKHL 3; [2004] 2 AC 134, at para [14],

Let me put this question: did the Post Office's *knowledge* that its preferred principal expert witness, that it had used for years, had given misleading and incomplete evidence in every sampled case of the five that were reviewed in 2013, and who was a witness whose credibility was recognised as having been fatally undermined, so as to put the Post Office in breach of its duty to the court as prosecutor, fall within "*material*" that was disclosable within Lord Hughes's formulation *in Chief Constable of Suffolk*? Might it have afforded arguable grounds, say to Mrs Seema Misra, the only case in which Mr Jenkins had given live oral evidence, for contending that her conviction in 2010 may well have been unsafe? You might very well think it was. If it was, why was it not disclosed to her? I could tell you why, because I have read Mr Clarke's reasons for the Post Office declining to give her post-conviction disclosure. I had hoped to explain this to the Court of Appeal, but by December 2020 I was well out of the picture. A proper explanation would have taken, in any event, more time than the Court of Appeal had allowed for the hearing of the appeals.

This brings me to my last point on this section, and I believe it is an important one.

My immediate reaction to the Court of Appeal's treatment of my junior Flora Page, in its enthusiastic and in my view unprincipled response to the attack upon her made by the Post Office's leading counsel, Brian Altman Q.C., on 18 November 2020, was to resign both from the case and also from the Bar. I thought my resignation and protest might attract a few newspaper headlines. A large number of appellants who have had their convictions on both first and second category abuse of process owe a substantial debt of gratitude to Lord Arbuthnot of Edrom. Lord Arbuthnot, who moved the December 2014 Westminster Hall debate, from about 2009, then as James Arbuthnot M.P., has campaigned tirelessly for the cause of justice for postmasters and others. I telephoned him to tell him what had transpired in the Court of Appeal and that I intended to resign in protest. His response was to tell me absolutely that I must not. He pointed out that should I then resign, the entire argument on second category abuse of process would fall away, because no one else would be interested in pursuing it.

Though the Court of Appeal, by its (to my mind unwarranted) threats, on 18 and 19 November 2020, had made my continuing to represent my clients impossible, it had fixed a date, upon which the issue of whether it would be willing to hear argument on second category abuse of process, as 17 December 2020. I was in a dilemma, I could not continue to act, but if I resigned immediately that would torpedo the argument on second category abuse of process. What I determined to do, was to file a skeleton argument on reasons why the Court of Appeal should hear argument on second category abuse of process as a free-standing ground of appeal, hand the case over to a trusted colleague, and then withdraw.

I filed my written submissions with the Court of Appeal on Friday 11 December 2020 (as directed by the court). I arranged for Lisa Busch Q.C., an able public lawyer, to take over from me. I then withdrew from the appeals. On Monday 13 December 2020 I wrote to Lord Justice Holroyde

explaining in detail my reasons for withdrawing. My letter to him is publicly available.[134] On 17 December 2020 the Court of Appeal determined that it would hear argument on second category abuse of process as a free-standing ground of appeal. Only my three former clients among the 42 appellants sought that ruling – a position adopted by the other appellants that elicited an expression of surprise from Mr Justice Picken. After 17 December 2020, all the other appellants sought to rely upon second category abuse of process as a separate free-standing ground of appeal, in doing so eventually, if somewhat reluctantly, following my clients' lead.

I'll attempt to show you why I think the judgment of the Court of Appeal of April 2021 is both questionable and inadequate to the circumstances. The following, for reasons of brevity, may read like a legal submission.

Article 6 ECHR – a substantive right

First, rights conferred under the **European Convention for the Protection of Human Rights and Fundamental Freedoms** (ECHR) are substantive rights, not mere aspirations. Famously, in the House of Lords' decision in *R v Horseferry Road Magistrates' Court* [1994] 1 AC 42, a stay case, Lord Griffiths said this:

> "If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law." (Emphasis mine.)

I suggest that such behaviour extends to withholding material, post-conviction, that casts doubt upon the safety of a defendant's conviction. Doing so, I suggest, is in principle and in fact abusive.

The Post Office appeals engage with behaviour by the Post Office that both threaten basic human rights and the rule of law. That is a high claim. I shall attempt, as briefly as I can, to show you why.

Article 6(1) of the ECHR provides that: "*In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...*". The latter provision was described by Lord Bingham as "the reasonable time requirement".

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134 https://www.postofficetrial.com/2020/12/paul-marshalls-resignation-letter-to.html I subsequently wrote to the Lord Chief Justice. (The redacted parts are because Wallis had no appetite for being threatened with contempt proceedings for referring to the "Clarke Advice" – a threat that had an unfortunate and distinctly chilling effect on consideration of/wider discussion of this important document prior to the appeals in March 2021.)

The violation of an Article 6 ECHR "reasonable time" right is separate from the issue of whether the trial itself was fair or an abuse of process: *Attorney General's Reference No 2 of 2001* [2003] UKHL 68 [20]. A crucial difference is that an unfair trial may be remedied. Violation of the right to a hearing within a reasonable time is "irretrievable": *Attorney General's Reference No 2 of 2001* at [151]. Lord Rodger JSC, in an important passage that merits being cited in full, said:

> "By definition, the undue delay with its harmful effects occurs by the time the hearing comes to an end. The relevant authorities cannot remedy the situation and give the defendant his due by holding a fresh hearing - this could only involve still greater delay, prolonging the disruption to the defendant's life and so exacerbating the violation of his Convention right. But the fact that this particular breach of article 6(1) cannot be cured by holding a fresh hearing is not just some quirk of the Convention that happens to put the relevant authorities in a particularly awkward position. On the contrary, it stems from the very nature of the wrong which the guarantee is designed to counteract. If the responsible authorities cannot go back and start again, neither can the defendant. For both sides time marches on. When the authorities delay unreasonably, months or years of the defendant's life are blighted." He cannot have them over again; they are gone forever. By signing up to article 6(1) states undertake to avoid inflicting this kind of harm. Since the harm is irretrievable, the European Court of Human Rights … is correct to regard this right as being of "extreme importance" for the proper administration of justice[135]" (My emphasis.)

Lord Rodger continued: "Despite the difference to which Lord Bingham draws attention, the three guarantees in article 6(1) are all essentially similar. *In effect they impose positive duties that the state authorities must fulfil. If in any given case they do not do so, the authorities violate the relevant aspect of the defendant's article 6(1) right…*". (Emphasis mine.) This is not desirable, it is a *duty* owed by the state, that is the correlative of the right.

It is elementary that it is the general duty of the courts to give effect to Convention rights, and, in doing so, to take into account any judgment of the European Court of Human Rights and any opinion or decision of the commission: Human Rights Act 1998 s. 2(1).

A point, that I believe is not as widely recognised as it should be, is that the relevant period of time under Article 6 begins when the person is charged and ends at acquittal or conviction, even where this decision is reached on appeal: *Wemhoff v Germany* [1968] ECHR 2 and *Eckle v Federal Republic*

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135 *Guincho v Portugal* (1984) 7 EHRR 223, 233, para [38].

of Germany [1982] 5 EHRR 1, applied *Dyer v Watson* [2004] 1 AC 379 [76], [90].[136] *Dyer,* a decision of the Privy Council, remains the leading UK authority on the point.

Tracy Felstead waited 19 years for her appeal and for her conviction to be quashed. The Court of Appeal says nothing about the manifestly unreasonable delay in the length of time that it took Tracy to appeal her conviction and it to be quashed, not only because she had had an unfair trial, but because she should never have been prosecuted. In my view the Court of Appeal thereby failed in its judicial function.

The mere fact of inordinate or excessive delay is sufficient to raise a presumption in their favour that a person will be/has been prejudiced. Importantly, *the burden of coming forward with explanations for inordinate delay is on the prosecuting authorities*: *Eckle v Federal Republic of Germany* 5 EHRR 1, 29, [80]. The Court of Appeal did not require any explanation from the Post Office as to why it had taken so long for the appeals to come on. There is no finding by the court that the delays were unreasonable within Article 6. The Court appears to have accepted, without more, that responsibility for delay lay with the CCRC. That is too facile an explanation and accords neither with principle nor reality. (In law, state lack of resources is no justification or reason for unreasonable delay – for obvious reasons unnecessary

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136 *König v Federal Republic of Germany* (1978) 2 EHRR 170 contains the first statement of a principle which has been repeated and applied in many later cases. In paragraph 99 of its judgment, at p 197, the court said: "The reasonableness of the duration of proceedings covered by article 6(1) of the Convention must be assessed in each case according to its circumstances. When inquiring into the reasonableness of the duration of criminal proceedings, the court has had regard, inter alia, to the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities. The court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated by article 6(1)." *Dyer v Watson* [2004] 1 AC 379, (Privy Council) [37], [38]. In *Howarth v United Kingdom* (2000) 31 EHRR 861 the defendant had been interviewed by the Serious Fraud Office in March 1993 and charged in July 1993. Following conviction in February 1995 he had been sentenced in March to community service. He had appealed against conviction and the Attorney General had applied for leave to refer the sentence to the Court of Appeal as unduly lenient. The appeal and the reference had each been determined adversely to Mr Howarth in March 1997. The court held that the reasonable time requirement had been violated since no convincing reason had been given to justify the period of two years it had taken to deal with the appeal (p 867) paras [29], [30]: *Dyer* at para [46].
In *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, two separate criminal proceedings for fraud against the applicants had lasted for 20 years and 15 years respectively from the date of the initial complaint to the disposal of the final appeals. The court held that the "reasonable time" begins to run as soon as a person is "charged" within the meaning which is to be given to that expression for the purposes of article 6(1), and that the word "time" covers the whole of the proceedings in issue, including appeal proceedings: pp 27-28, paras [73]" [76]. The ECHR gave guidance on the meaning of the word "reasonable", at p 29, [80]: "The reasonableness of the length of the proceedings must be assessed in each instance according to the particular circumstances. In this exercise, the court has regard to, among other things, the complexity of the case, the conduct of the applicants and the conduct of the judicial authorities. The present case concerns sets of proceedings that endured 17 years and 10 years respectively. Such a delay is undoubtedly inordinate and is, as a general rule, to be regarded as exceeding the 'reasonable time' referred to in article 6(1). In such circumstances, it falls to the respondent state to come forward with explanations" Lord Bingham in *Dyer* said: "… *with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable*" [53].

to state.[137]) There is, in my view an explanation for the delay that the court did not inquire into. The reason for the delay is that the Post Office from 2013 withheld from convicted defendants and concealed material to which they were in law entitled (*Chief Constable of Suffolk*) that would have enabled competent lawyers to advise on an appeal.

Lord Bingham in *Dyer* at paragraph [52] explained that the test for "reasonable time" under Article 6 has two stages:

> "the first step is to consider the period of time which has elapsed. …the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. **(1)** First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. **(2)** Secondly, it is necessary for the contracting states to explain and justify any lapse of time which appears to be excessive". (Emphasis and numbers in bold typeface mine.)

The reason for this is simple. The state is responsible for delays attributable to the prosecution: *Orchin v UK* 6 EHRR 391. While there has been some discussion on whether this applies to private prosecutions, the better view is that it does.[138] A *private prosecutor*, by exercising the right and privilege of private prosecution, is thereby permitted to assume the mantle of the state. The prosecution of offences is a state and public function, regardless of how it is undertaken. It was a privilege that the Post Office as prosecuting authority abused.

The questions that drop-out from that analysis, are why it took 19 years for Tracy Felstead's conviction to be quashed on appeal, for 14 years for Janet Skinner's conviction to be quashed and for 11 years for Seema Misra's conviction ("without hesitation") to be quashed? The Court of Appeal remains silent on these (and similar) important questions. The delay is manifestly unreasonable. The court had a duty to inquire as to the reasons for it, given the guarantee provided by the state and the importance (attached by Strasbourg) for the proper administration of justice of avoiding delay.

Shredding of unhelpful documents

The Court of Appeal does not address the question as to why the CCRC did not have available to it, before 2020, the important material in the Clarke Advice. It does not address the question as to

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137 So even if the CCRC *was* the cause of delay (which it truth it was not), its lack of resources as a state institution offers no justification or excuse for its unreasonable length.

138 Should authority be needed, Lord Reading C.J. in *Rex v. Lee Kun* [1916] 1 K.B. 337, 341 observed: "… the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State."

why a protocol in the Post Office for the shredding of documents,[139] the existence of which was subject to a written advice from external solicitors in August 2013, emerged only in February 2021, immediately before the appeals were heard in March 2021. That protocol was put in place by the Post Office's head of security, the same person who procured the Detica Report in October 2013.

We know that in 2014 the CCRC had already commenced its inquiries with the Post Office. We know that because Paul Vennells C.B.E., in her June 2020 letter to the Chair of the BEIS Select Committee, explained that in July 2014 it had engaged "*a senior QC to advise on its response to a letter received from the CCRC regarding convictions relating to Horizon*". (The Q.C. is not identified by Mrs Vennells and privilege is asserted in connection with the advice received.) It emerged, on 30 November 2020, that the Post Office's leading counsel in the 2021 appeals, Mr Brian Altman Q.C., had referred to the Clarke Advice and considered its content and conclusions in written advice given by him to the Post Office in October 2013. That is to say, immediately prior to the Post Office's decision to cease prosecuting its postmasters for *Horizon* Shortfalls and at about the same time that the Detica report was received by the Post Office. That information came as a considerable surprise.

The reason for the delay in it taking until 2021 for the appeals of convicted defendants, such as Tracy Felstead, who was wrongly convicted of theft in 2002, to be heard, is perfectly obvious. The Post Office institutionally covered-up its knowledge of possibly unsafe convictions that it had secured by its prosecutions, based as these were upon evidence the integrity of which was doubted. It appears that the Post Office may not have disclosed important documents casting doubt upon the integrity of *Horizon* from 2010 in the large-scale group civil litigation before Mr Justice Fraser. It plainly misled Mr Justice Fraser as to the reason for Mr Jenkins not being called as a witness, despite much of the technical evidence in the *Horizon Issues* trial emanating indirectly from him – though not being explicitly attributed to him.

The issue of problems with *Horizon* within the Post Office was delegated to a sub-committee of the Post Office board. It was designated "*Project Sparrow*". It was shrouded in deep secrecy. Mr Justice Fraser makes some highly critical, if amusing, comments about it in his judgment (legal privilege was asserted in the name of the project). The judge found there to be a general 'culture of secrecy' within the Post Office.[140]

Notice to Post Office's insurers

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139 *Hamilton and Ors. v Post Office* https://www.bailii.org/ew/cases/EWCA/Crim/2021/577.html at para [88].

140 Mr. Justice Fraser said that a distinguishing feature of the Post Office's conduct from 1999 to 2021 was a "*culture of secrecy and excessive confidentiality generally … particularly focused on Horizon*": *Bates and Others. v Post Office Limited (No. 3 "Common Issues")* [2019] EWHC 606 QB paragraphs [36], [42]. See also: "*… Other redactions are not quite so easily explained, and in my judgment demonstrate a culture of secrecy in the Post Office"* [120], and further paragraphs [390], [484], [542], [723]. See also, *Bates and Others. v Post Office Ltd (No. 6 "Horizon Issues") Rev 1* [2019] EWHC 3408 [442], especially at paragraph [457] "*… There can be no proper explanation for keeping the existence of a software bug in Horizon secret in these circumstances*" and see also paragraph [934]. One wonders what Fraser J would have made of the 2013 'shredding' protocol the fact of which was disclosed in February 2021.

A further point that, as a civil lawyer, I find particularly interesting, is that when the Post Office disclosed the Clarke Advice to my instructing solicitors in November 2020, the Post Office's solicitors explained that the memorandum that had triggered my interest in October, that had been used to notify the board of the Post Office about concerns about Mr Jenkins, was also used to put the Post Office's insurers on notice. Now that is a big deal. Anyone who knows anything of commercial law, to which insurance is a fundamental dimension, will understand that a national institution putting its insurers on notice of risk is not something that is done lightly.

There are two things about notice to insurers that I consider to be remarkable. The first is that notification of insurers of the Post Office is likely to have generated a whole penumbra of documented communications. The second is that, as with the report in 2013 of Detica's conclusion that the Post Office's systems were "not fit for purpose in a modern retail environment", there is nowhere in Mr Justice Fraser's judgment any reference to the Post Office notification of its insurers of risk. That would surely have been an important matter in the civil litigation, because the Post Office defended it on the basis that, until 2019, it was unaware of any serious problem with *Horizon*. (see the quotation from Mr Justice Fraser's January 2020 letter to the DPP, referred to above). In short, the fact of notice of known risk, notified to insurers in 2013, would have put the proverbial cat amongst the pigeons for the Post Office's defence to the civil group litigation - had it been put into the hands of the claimants' legal team. There is nothing to suggest that any disclosure of notification of the Post Office's insurers was given in the civil litigation. If it was disclosed, it was overlooked, a possibility that strains credulity. (The fact of notification of risk was not legally privileged, regardless of the status of any legal advice given to the Post Office in connection with a *requirement* for disclosure.

I suggest that, as was the case with *Watergate*, it was the cover-up by the Post Office of its knowledge from 2013 that was more serious than the fact that it originally had prosecuted on the false basis of flawed evidence, that it discovered not later than 2013, however egregious were the disclosure failures in particular prosecutions or in general. Mr Justice Fraser's comments upon the culture of secrecy in the Post Office are worth re-visiting. The same applies to the Post Office's recourse, in 2013, to the shredding of seemingly inconvenient or unhelpful documents, the fact of which prompted legal advice in August 2013 on the impropriety of this. (Though it remains startling that such advice was required.) That was only very shortly after receipt by the Post Office of the Clarke Advice. The Court of Appeal refers to both documents, correctly, as "extraordinary".

Violation of the Article 6 right as second category abuse of process?

My point, in case it is not already obvious, is that so far as ECHR Article 6 confers *a substantive legal right* guaranteeing to a convicted defendant *the hearing of an appeal* within a reasonable time (perhaps not widely acknowledged or understood), the violation of that right by the Post Office intentionally withholding material from disclosure that was reasonably required for an appeal, would in my opinion, on the face of it, constitute an abuse of the process of the court. It is of a kind of abuse calculated to, and having the effect of, causing serious (*'irretrievable' per* Lord Rodger JSC) harm

and prejudice. I remind you of Lord Rodger's words: delay, in violation of the Article 6 reasonable time right, *"blights a defendant's life for months or years*." The lost time cannot be had again and is irreplaceable. Tracy Felstead, in every job application she made between 2002 and 2021, had to declare that she had been imprisoned for theft. It's not great on insurance applications. The week before the Court of Appeal hearing in November 2020 Tracy suffered a nervous collapse. In contrast with its silence on the length of time it had taken for Tracy's conviction to be quashed, the Court of Appeal praised the Post Office for its disclosure exercise on the appeals.[141] The appropriate response to that might be hollow laughter.[142]

It seems to me that it is strongly arguable that the Post Office's violation of the Article 6 rights of appellants, by denying to them material relevant to enable an appeal against the safety of their conviction, is a more compelling head of second category abuse of process than merely the sort of 'worse kind of first category abuse of process', in connection with *Horizon* disclosure, of the kind found by the Court of Appeal in its 23 April 2021 judgment.

Perverting the course of justice?

From time to time, I have reflected as to why the deliberate withholding of material from a convicted defendant, being material capable of supporting a challenge to the safety of their conviction, that had as its effect the violation of a convicted defendant's Article 6 right guaranteed by the state, should not constitute the offence of perverting the course of justice? At common law the offence is committed when a person or persons (i) act in a way, or embark upon a course of conduct, (ii) where such acts or course of conduct have a tendency to, and (iii) are intended to pervert the course of public justice: *R v. Vreones* [1891] 1 QB 360 CCR. I would have thought that a prosecutor actively interfering with a person's right to appeal, by intentionally withholding from them relevant

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141 "The respondent has undertaken an extensive process of post-conviction disclosure of unused material" – it was several months before the August 2013 document referring to "shredding" of documents was disclosed. As with the Clarke Advice, it is likely that very careful thought will have been given by the Post Office to its disclosure, and the timing of this.

142 The disclosure given by the Post Office in the appeals was not electronically searchable - so each individual document required to be read. Further, the disclosure exercise was choreographed in such a way that key disclosure was being given after the appellants had been required under directions from the court to file any further written grounds of appeal/further arguments to those advanced by the CCRC. (Reference may be made to the way in which disclosure was given by the Post Office in the Horizon Issues trial – to which Fraser J devotes some attention in his judgment.) The Post Office's solicitors explained in November 2020 that it was originally intended to disclose the Clarke Advice in December 2020 – *after* the date for the directions hearing at which the court was originally expected to consider the issue as to whether 'second category abuse of process' would be allowed to be argued as a separate and additional ground of appeal.

material, on the face of it, discloses that offence.[143] The fact that, in 2013, the Post Office engaged in shredding documents, and had a protocol in place for doing so, is plainly also a matter for serious concern.[144]

In any event, the Post Office's violation of convicted defendants' 'reasonable time' ECHR Article 6 rights, in connection with disclosure of material that was relevant to a possible appeal against their conviction, was informed by or coloured by the Post Office's commercial interests. Those interests were materially identical to those that resulted in the Post Office's systemic and habitual disclosure failure in connection with *Horizon's* known unreliability in its prosecutions, as the Court of Appeal by its April 2021 judgment correctly found.

It was, in the end, a matter of conflict of interest with duty. Interest displaced duty.

Concluding observations

The Post Office's conduct, over the better part of 20 years, has exposed some uncomfortable facts. On the one hand, it is obvious that the Law Commission's recommendations to parliament at the end of the twentieth century, that were implemented in the repeal of previous statutory protections, were founded upon a seriously flawed understanding of computer technology and, in particular, the inherent latent propensity of computer software, in given circumstances, to fail - and to fail in ways that are neither anticipated nor observable. That means that a lot of legal assumptions about computers and their working, and assumptions about evidence generated by computers, proceed upon false premises. Such false premises are exhibited in the Hoffmann/Tapper fallacy and in the Law Commission's report (1997 No 216).

Respectfully adopting the words of the Hon. Justice Travis Laster, cited at the beginning of this paper, "normally you don't have the process of hard-fought, well-funded litigation in which somebody uncovers what actually happened", it should be a matter of profound concern to the legal profession that without the massive group civil litigation, that cost well in excess of a hundred million pounds, for the determination of *only two preliminary issues*, that generated the seminal *Common Issues* and *Horizon Issues* judgments of Mr Justice Fraser, the unreliability of the bug-ridden, rackety *Horizon* system would not have been exposed. The hundreds of victims of the Post Office's wrongful prosecutions, now identified as serious miscarriages of justice, would not have received, and would not now expect to receive, justice – of a kind. That exposes some fundamental misconceptions about computer technology and its reliability that are seemingly deeply embedded in the justice system. (That is entirely separate from the issue of 'access to justice' - or rather its absence - for those of limited means,

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143 The completeness of the disclosure given by the Post Office in the civil group litigation, or rather its incompleteness, and the explanation for this, raises similar questions.

144 It is perhaps eloquent of the culture within the Post Office (see Fraser J's comments on 'secrecy') that there is no record of 'whistle-blowing' in connection with the shredding of documents.

which remains a serious problem that litigation funding plainly does little, if anything, to resolve.) Confronting these issues and addressing them is likely to be difficult and uncomfortable, as with any strongly held belief shown to be unfounded, because of the scale of the implications of doing so. The danger is that, as with the Post Office's concern about confidence in *Horizon*, public confidence in the justice system is put at risk if the reliability of the system (that is to say, the ability of courts, generally, to reach factually and legally *correct* verdicts and judgments) is open to serious and justifiable doubt, which clearly it is. Mrs Misra has eloquently described how, like others, she never imagined that what happened to her could possibly happen, but it did. The same is true of Tracy Felstead. In her evidence to Sir Wyn Williams she was reduced to explaining, through her tears, that at her criminal trial she simply couldn't explain what had happened. She ought never to have been required to do so. She simply had no means of knowing.

Seema Misra and Tracy Felstead, and many many others, were imprisoned for no fault of theirs – let alone dishonesty – but because of institutional error and widespread ignorance. This is a real problem and one that requires to be addressed.

The second profoundly disturbing aspect to the Post Office scandal is that, from 2014, the Post Office's strategy of concealment and denial was so successful. Some of the most important documents did not become available until *after* the group civil litigation, which came to an end in 2019. That alone is troubling. Even then, the important documents were disclosed very late – almost too late. It is to be remembered that the Post Office, for all practical purposes, is a state institution, even though formally and legally a private company. The government, through HM Treasury, owns it. (The point is put beyond serious argument by the fact that it is the government that will fund the '*Historic Shortfall* compensation scheme' and the government continues to support the Post Office, without which support it would collapse.) It is deeply troubling that the central feature of the story of the Post Office's conduct, with regard to its prosecutions of its postmasters and employees, if you like, the *leitmotif,* is the withholding and concealment of relevant, disclosable, material. In the first instance, this was material and information *necessary* to conduct an effective defence to claims and criminal charges brought by the Post Office; in the second period, from 2014, this was material *necessary* for those whom the Post Office had prosecuted and secured convictions against, and others subject to civil judgments, to appeal against the safety of those convictions or judgments. Ultimately, the withholding of that material was part of a legal strategy that impacted legal rights. That also should be a matter of profound concern to the legal profession and to the judiciary. The Post Office subverted the integrity of the justice system. It is impossible to conclude that it did so inadvertently. Its own commercial and reputational interests were strongly engaged/invested in it doing so. It should be a matter of profound public concern that a state-owned institution should have conducted itself in this way – and that the legal system was seemingly so susceptible to being exploited, it might be said, 'hijacked'.

I am honoured to receive the kind invitation. I am grateful, not least, because of the opportunity to re-visit and re-consider some of my thinking on these important issues.

END

To my knowledge, the only firm against which the Solicitors Regulation Authority has taken action, to date, is my instructing solicitors, Aria Grace Law. It did so at the instance of the Court of Appeal Criminal Division.

Postscript

After delivery of this paper, on 11th April 2022 the *Financial Times* carried an article by the journalist Alicia Clegg, entitled "*Asking the right questions is crucial when computer evidence is disputed*". Ms Clegg addressed the question: *Faulty software led to lives ruined at the Post Office. What can be done to challenge AI's reliability?* She wrote. "… From banking apps to algorithms that inform hiring choices, computer-controlled systems have entered our daily lives in countless small ways since the first Post Office prosecutions. Yet, while technology's reach has advanced, the same cannot be said of the law's ability to cope with its failures". Alicia Clegg considered the catastrophic impact on Lee Castleton of the Post Office's civil claim against him and the judgment (wrongly) given against him by Judge Havery Q.C. in 2007.

"*Denialism*"[145] Paul Marshall, February 2020:

"…For the better part of 15 years, until the GLO[146] was eventually made by Master Fontaine in 2017, the Post Office was able to rely upon that disparity in power and resources. Further, the Post Office, even when the untenable nature of its position and its blind and unfounded (and therefore irrational) faith in the Horizon system was laid bare, persisted in contending for its reliability, alleging that those victims who had experienced and described in detail its malfunctions and functional unreliability were simply being untruthful, a contention that Mr Justice Fraser rejected. Litigating against an opponent that exhibits irrationality and mendacity in high degree presents its own special and additional burdens and difficulties (not least financial). The judge, for example, noted that the Post Office cross-examined SPMs on facts that were the subject of express agreement between the parties under statements of agreed facts; remarkable.

The fact that the [sub-postmasters] were ultimately vindicated and, more importantly, exonerated, almost 20 years' after the Post Office introduced its flawed Horizon IT system and began its vicious campaign against them for sums falsely alleged to be owed, will be cold comfort to many, and comes tragically too late for some.

In 2015 there was an inquest into the death of Mr Martin Griffiths, 59, a [sub-postmaster] from Chester. He had stepped out in front of a bus one morning in September 2013. The inquest heard that at the time Mr Griffiths was being pursued by the Post Office for an alleged shortfall of tens of thousands of pounds.

The Post Office, following Mr Justice Fraser's judgments, has announced that it is committed to learning lessons.

While legal formalists will say that ultimately justice has prevailed and the English legal system has delivered the 'right' result, a similarly sanguine sentiment may be expressed of the outcomes for the 'Guildford Four' and the 'Birmingham Six' and, more recently, for the dead victims of the Hillsborough disaster - it took almost 30 years. All that can be said, if so, is that it's a strangely unattractive conception of justice, unlikely to be shared by those falsely prosecuted by the Post Office….. English common law has perhaps lost sight of the biblical imperative to uphold the cause of the poor and the weak; to that extent it is enfeebled.

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145 https://www.appgbanking.org.uk/wp-content/uploads/2020/02/Denialism-Lloyds-and-the-Post-OfficeFF-10-2-20.pdf

146 Group Litigation Order. This is an order that enables numbers of claimants to join together in one claim where individual claims arise out of similar circumstances. They are very familiar in other jurisdictions, but English law leans against claims of this kind. The GLO made by Master Fontaine made the Post Office litigation possible – because it made it commercially viable to obtain external funding for it. But it came at a cost. Ultimately, 80% of the eventual settlement was swallowed-up in funding and insurance costs and lawyers' fees. The justification is that without those things there would have been no claim. It is an odd system, nonetheless, that allocates 80% of an injured party's recovery, to third parties. It is curious that so many believe that litigation funding is a solution to the problem with access to English justice for all but those of immense wealth and resources.

While the pigs haven't yet quite taken over the farm, as so often, it will very likely to fall to parliament to redress the balance."

The last sentence was prescient. In March 2022, the government announced that it would not treat the December 2019 settlement of the Post Office 'Bates' group civil litigation as in 'full and final' settlement of the civil claims, thereby abandoning its previously maintained position. (It is the government that will pay the bill, the Post Office being technically insolvent as a result of the scale of the claims now made against it.)

SUGGESTED FURTHER READING

Electronic Evidence and Electronic Signatures Stephen Mason and Prof. Daniel Seng 5th Edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study University of London, 2021 https://www.sas.ac.uk/publications/electronic-evidence-and-electronic-signatures

Hardback ISBN: 978-1-911507-26-0

This is the principal work on the subject – it is available online free of charge.

Stephen Mason has performed a notable public service by publishing a detailed chronology of the Post Office scandal and a large number of transcripts of trials DEESLR (website) https://journals.sas.ac.uk/deeslr/

The Great Post Office Scandal, Nick Wallis, Bath Publishing (2021) ISBN13: 9781916302389

https://bathpublishing.com/products/the-great-post-office-scandal The 'go to' narrative account of the history of the Horizon scandal and the impact on its victims. It should be required reading for lawyers and judges.

Fix IT, Professor Harold Thimbleby, Oxford University Press (2021) ISBN: 9780198861270.

Evidence of Tracy Felstead, Janet Skinner and Seema Misra to the Williams' Inquiry: https://www.postofficehorizoninquiry.org.uk/hearings/human-impact-hearing-25-february-2022.

Mr Castleton's case (wrongly decided) *Post Office Ltd v Castleton* [2007] EWHC 5 QB. https://www.bailii.org/ew/cases/EWHC/QB/2007/5.html

The harm that judges do – misunderstanding computer evidence: Mr Castleton's story, Paul Marshall, *Digital Evidence and Electronic Signature Law Review* 17 (2020) 25. https://journals.sas.ac.uk/deeslr/article/view/5172/5037

Court of Appeal's decision 23 April 2021 *Hamilton and Ors. v Post Office Ltd* [2021] EWCA Crim 577. https://www.bailii.org/ew/cases/EWCA/Crim/2021/577.html

Mr Justice Fraser's decision on contractual and related issues *Bates and Others. v Post Office Ltd ('Common Issues')* [2019] EWHC 606 QB. https://www.bailii.org/ew/cases/EWHC/QB/2019/606.html

Mr Justice Fraser's decision on technical Horizon issues *Bates and Others. v Post Office Ltd ('Horizon Issues') Rev 1* [2019] EWHC 3408 QB. https://www.bailii.org/ew/cases/EWHC/QB/2019/3408.html

Professor Richard Moorhead Dr Karen Nokes and Dr Rebecca Helm (*The evidence-based justice lab*). *Issues arising in the conduct of the Bates litigation* https://evidencebasedjustice.exeter.ac.uk/current-research-data/post-office-project/

Denialism, the latest entrants, Lloyds Bank the Post Office, Clausewitz and the tinkling teacups of the English judiciary Paul Marshall, February 2020. Available on All Party Parliamentary Group on Fair Banking website: https://www.appgbanking.org.uk/wp-content/uploads/2020/02/Denialism-Lloyds-and-the-Post-OfficeFF-10-2-20.pdf

Recommendations for the probity of computer evidence, Marshall, Christie, Ladkin, Littlewood, Mason, Newby, Rogers, Thimbleby, Thomas, Digital *Evidence and Electronic Signature Law Review* 18 (2021) 18 https://journals.sas.ac.uk/deeslr/article/view/5240/5083

Paper recommending changes in the approach to computer derived evidence. (Published version of a paper submitted at the invitation of the Under-Secretary of State for Justice, November 2020.)

The Law Commission presumption concerning the dependability of computer evidence, Ladkin, Littlewood, Thimbleby, Thomas, *Digital Evidence and Electronic Signature Law Review* 17 (2020) 1. https://journals.sas.ac.uk/deeslr/article/view/5143 Paper recommending changes in the approach to computer derived evidence for triers of fact - an expert critique of the false premise of the 1997 Law Commission recommendations.

Robustness of software, Peter Ladkin, *Digital Evidence and Electronic Signature Law Review* 17 (2020) 15. https://journals.sas.ac.uk/deeslr/article/view/5171/5036

The Post Office IT scandal – why IT audit is essential for effective corporate governance. James Christie *Digital Evidence and Electronic Signature Law Review* 19 (2022) https://journals.sas.ac.uk/deeslr/article/view/5425

A seminal review of the role and importance of effective IT audit (see the comments of the Court of Appeal on the 'Ismay report' of 2010 in *Hamilton*).

English law's presumption that computer systems are reliable: time for a rethink? Paul Marshall, *Butterworths Journal of International Banking and Financial Law*, 7 (2020) 433.

https://cornerstonebarristers.com/cmsAdmin/uploads/jibfl-marshall-english-law-s-evidential-presumption-that-computer-systems-are-reliable-time-for-a-rethink-jul-2020-1-(1).pdf

Can and should retired judges advise on live cases? Professor Richard Moorhead, Lawyerwatch https://lawyerwatch.wordpress.com/2022/03/14/can-retired-judges-advise-on-live-cases/ (14 March 2022)

The Great Post Office Trial Nick Wallis https://www.bbc.co.uk/programmes/m000jf7j/episodes/downloads

BBC Radio 4, 11-part Podcast

The Guardian Podcasts on Janet Skinner's experience, by Anushka Asthana and Richard Brooks:

https://www.theguardian.com/news/audio/2021/may/10/exposing-the-great-post-office-scandal-part-1

https://www.theguardian.com/news/audio/2021/may/11/the-post-office-scandal-part-2

English judges prefer bankers to nuns: changing ethics and the Plover bird Paul Marshall, Butterworths Journal of International Banking and Financial Law (2019) 8 JIBFL 505 https://www.appgbanking.org.uk/wp-content/uploads/2020/02/English_judges_prefer_bankers_to_nuns_chang.pdf

The Hearsay Rule in Civil Proceedings 1993 Law Com. No. 245.

Evidence in Criminal Proceedings Hearsay and Related Topics 1997 Law Com. No. 216.

Westminster Hall adjournment debate on the Post Office moved by James Arbuthnot M.P. 17th December 2014: https://publications.parliament.uk/pa/cm201415/cmhansrd/cm141217/halltext/141217h0002.htm

Westminster Hall debate moved by Darren Jones M.P., Chair BEIS Select Committee 10th March 2021: https://hansard.parliament.uk/commons/2021-03-10/debates/B735CCE6-164E-42E1-98A1-1D3DDDEEF4CF/AutomaticComputer-BasedDecisionsLegalStatus