For Hearing 8th December 2022

IN THE MATTER OF A PUBLIC INQUIRY

THE POST OFFICE HORIZON IT INQUIRY

(1) TRACY FELSTEAD
(2) SEEMA MISRA
(3) JANET SKINNER
(4) LEE CASTLETON
(5) NICHOLA ARCH
(6) VIJAY PAREKH
(7) SATHYAN SHIJU

SUPPLEMENTARY
SUMBMISSION ON COMPENSATION

"Parties are entitled to legal process in order to prosecute legitimate causes. Since access to justice is available for the redress of wrongs, a party who uses it for the commission of a crime or a wrong forfeits the right of access in relation to the particular cause. Striking out a case for abuse of process is primarily designed to protect the legitimacy of the court's own process. For a court that suffers its process to be used for the commission of a crime or a wrong will lose public confidence in its ability to maintain the rule of law." [1]

[1] AAS Zuckerman "Court protection from abuse of process – the means are there but not the will." (2012) 31 CLQ, Issue 4, 377 at p.378.

> "Both solicitors and counsel (as officers of the court) bear a heavy responsibility to ensure that their clients fully comply with these duties. They must make their clients appreciate from the start their obligation to make full and honest disclosure, to avoid suppressing documents and to preserve documents from loss or destruction. Where a solicitor becomes aware that a client refuses to comply with their disclosure duties, they may be duty- bound to withdraw, or even to notify the court. Barristers are similarly required to cease to act for a client who refuses to authorise them to make some disclosure to the Court which their duty to the Court requires them to make ..." [2]

(Note: This supplementary submission addresses and amplifies the submission made by Paul Marshall (1st December 2022) from paragraph 15 ff. Apologies are profusely tendered by leading counsel for the delay in its submission. His instructing solicitors, junior, and Mr Marshall are not responsible in any way for the late submission of this document)

Summary: POL, from 2000 to 2021 sought to deny, obstruct, and suppress the fact that Horizon was subject to bugs, errors, and defects, and therefore unsuitable as a forensic prosecutorial dataset. It maliciously and intentionally interfered and denied those wrongly convicted over many years any prospect of appeal. Three cases: Castleton, Brennan, and Butoy show that the senior judiciary (in EWHC and CACD) were misled by POL in 2004, 2007, and 2018.

This was motivated by ruthless commercial interests. Over 700 SPMs were prosecuted to serve this fiction, or myth. The abuse of prosecutorial power is without precedent – standards of integrity, impartiality, and independence were abandoned in favour of partisanship and bias.

Government cannot escape responsibility for this, as it failed to supervise and inquire.

Fujitsu's symbiotic relationship with POL facilitated these appalling miscarriages of justice. It was financially beneficial for them to do so, and reputationally expedient. Fraser J (when writing to the DPP) said that he had "very grave concerns

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[2] AAS Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice (4the Edition)* (Sweet & Maxwell 2021) 815

regarding the veracity of evidence given by Fujitsu employees to other courts in previous proceedings about the known existence of bugs, errors and defects in the Horizon system." He did not impute cupidity to them as a motive, but it seems that loyalty to the corporate they served overcame any consideration of their duties as experts to the Court.

The long delay in this matter being exposed, after the most bitterly fought litigation, has wrought enormous harm on the victims. Years passed, and their faith in our system of justice was destroyed, in the same way that the Law was used to destroy them. The intentional and malicious denial of their right to appeal is inexcusable and a grotesque injustice that ought to be compensated. That it is not a head of damage is perhaps explained by the rampant breaches of prosecutorial and professional standards, and POL's abject lack of objectivity and integrity, amply demonstrated over many years.

The matters addressed below advance the following propositions:

a. *POL engaged in a deliberate policy of misleading the Courts. It not merely disregarded but broke the Law in failing to follow well known and long-established norms of independence and impartiality (established by the Civil and Criminal Procedure Rules, the Attorney General's Guidelines on Disclosure, the CPIA and Codes of Practice. POL, in deliberately departing from the same, whether through self-justification or partisanship, may have committed criminal offences.*
b. *This approach, implacable and hostile to its victims, denied the wrongly convicted the chance to clear their names. The failure to rectify the position also allowed POL to criminalise and devastate the lives of countless others. The High Court was misled [Castleton] and two appellants had their appeals dismissed by the CACD before Hamilton was decided [Brennan and Butoy]. It suppressed vital information and frustrated and deprived the wrongly convicted the means to appeal for many years;*
c. *The CCRC decided to await the outcome of the Horizon litigation before making a referral to the CACD. POL's breakneck, no holds barred tactics in the Bates litigation must be seen in that context. More inexcusable delay was inflicted on the victims. The conduct of POL in Bates is directly relevant – it hazarded the entire system of civil justice, knowing what was at stake.*
d. *This head of damage, the long delay, caused by POL's deliberately false and misleading conduct, and protracted misfeasance facilitated by sub-optimal*

Government supervision, and Fujitsu's active deception is not recoverable in damages in the current compensation negotiations. Such ineligibility cannot be justified.

e. ***It should be an important factor in the assessment of compensation. The protracted injustice, and denial of appellate rights, is inseparable from the egregious wrongdoing attested to before the High Court and determined by the CACD. This major head of damage, should it not fall to be compensated, will work continuing injustice.***

f. ***This is because the gravamen of the wrongs inflicted by the atrocious abuse of the legal system, if not given any weight (as currently proposed) does not mark the very grave nature of the damage, and denies proper restitution to the SPMs.***

A. THE PERNICIOUS EFFECT OF OBSTRUCTING & DELIBERATELY DENYING A RIGHT OF APPEAL

1. Delay is a potent source of injustice, its corrosive effect exacerbated years of malicious non-disclosure.

    A. Tracy Felstead spent half her life deemed to be a felon, from the age of 19 to the age of 41 – she should never have been prosecuted at all, but her ordeal was prolonged by obdurate, aggressive denial by POL of its excess – even through its attempt to suppress and evade the consequence of its wrongdoing in CACD, in Hamilton. Tracy suffered hostility from unexpected quarters, together with Janet Skinner and Seema Misra, owing to the courageous and principled stance they took, which was ultimately vindicated. Limb 2 could, of course, have been abandoned as a result of the asperity and criticism they were subjected to. POL knew this.

    B. The taint of conviction: for years those who suffered injustice encountered extreme difficulties restarting their careers or businesses in any cash handling or retail business. This would include being denied finance or credit. Unremediated allegations of dishonesty – especially in small and often quite tightly knit communities – are crushing. The stigma is ineradicable.

    C. The extraordinary decimation of family life. The stigma, especially in small tight knit communities has ripped family life asunder: victims become outcasts or pariahs. This agony was unnecessarily prolonged for years.

B. BACKGROUND: GOVERNMENT RESPONSIBILITY FOR THE POST OFFICE [POL] [SUBS0000001]

1. As BEIS submitted, the Post Office is Government owned and exists to provide a public service [1]. Its history as a Public Corporation, from 1969, is encapsulated at [27] (a) to (j) at pp.18-19 of BEIS' submission.

2. As was submitted by Ms Buch KC on behalf of Tracy Felstead, Janet Skinner, and Seema Misra in the Court of Appeal:

> ***Post Office Limited***
>
> *7. POL is an emanation of the State: Whitfield v Lord Lé Despencer (1778) 2 Cowp 754 at 764; Mersey Docks & Harbour Board Trustees v Cameron (1864) 11 HLC 443 at 464; Tamlin v Hannaford [1950] 1 KB 18; Triefus & Co Ltd v Post Office [1957] 2 QB 352 at 362; Malins v Post Office [1975] ICR 60; Harold Stephen & Co Ltd v Post Office [1977] 1 WLR 1172 at 1177.*
>
> *8. POL is now incorporated as a company. In exercising its powers as an investigator and a prosecutor, however, it has the same duties and responsibilities as other public bodies which exercise those powers: for details see the CCRC SoR, paragraph 65; Criminal Procedure and Investigations Act 1996 Code of Practice ("CPIA CoP"), §1.1. Since its incorporation it has been the subject of judicial review proceedings, i.e. as a public body: R v Post Office, ex p Association of Scientific Technical and Managerial Staffs [1981] ICR 76.*

3. The Post Office, in essence, as the Inquiry has heard, was originally a powerful arm of the State from the 17th Century. As BEIS and UKGI candidly accept, the fact that it is owned by Government makes matters worse.

4. Much worse, we submit, because the prodigious sums of public money spent on legal services by POL, first to criminalise innocent

SPMs, and thereafter obstruct and deny them the means to clear their names, is not only a tragedy for the victims, but a national scandal that calls into question the very administration of justice and equality before the Law. POL's conduct undermined both civil and criminal justice and denied its victims effective access to the courts. The mischief wrought, in which the courts became complicit is profound. Evidence, routinely accepted by the courts against SPMs was fabricated or perjured. At the very least flawed expert evidence was relied upon to secure convictions. Evidence helpful to the defence was concealed or withheld, and in consequence the SPMs, who should never have been prosecuted in the first place, remained convicted directly because of POL's actions.

5. The 'profound anger and dismay' expressed on behalf of BEIS concerning this tragedy, although laudable, does not answer the question as to why POL was allowed 'free rein' in the conduct of its ruthless, indeed infamous, defence in the GLO Bates litigation. The exorbitant sums it expended almost fatally compromised the ability of the Court to dispense justice. **POL00006764** shows the membership of POL's Postmaster Litigation Sub-Committee, which imputes knowledge to the Board, and the Government, especially as one non-executive director was appointed by UKGI, which is referred to at paragraph 4:

> **Protocol for engagement with UKGI**
>
> The request from UKGI for regular briefings on the progress and status of the litigation was discussed and it was noted that UKGI and Post Office were discussing a draft protocol to enable such information to be shared. The Committee noted that such briefings could involve legally privileged information and that it was important for such privilege to be maintained.

6. The minute suggests that POL would jealously defend legal professional privilege. Whether LPP was used as a pretext to deflect

scrutiny is not yet clear, but the presence of a Government appointed NED ought to have defeated this strategem. What can be confidently submitted is that there was a critical failure of Government oversight, which facilitated POL's disgraceful conduct during the Bates litigation. POL's excesses, amply demonstrated, were, therefore, in part attributable to that lack of monitoring.

C. POL'S INTENTIONAL DENIAL & PROTRACTED OBSTRUCTION OF CONVICTED DEFENDANTS' RIGHT TO APPEAL

CONDUCT OF THE BATES LITIGATION

References to Bates v Post Office Judgment No 3 'Common Issues' [2019] EWHC 606 (QB) are made in round brackets (x) and are not underlined

References in BOLD [X] relate to Bates v Post Office Limited Judgment (No6) "Horizon Issues" [2019] EWHC 3408 unless otherwise stated

1. It is apparent from Fraser J's judgments that a perverse, antagonistic, and uncooperative approach marked POL's engagement throughout. In Bates No.3 he observed at (544):

   > "The Post Office has appeared determined to make this litigation, and therefore resolution of this intractable dispute, as difficult and as expensive as it can."

2. From this one may infer that POL chose to be relentlessly combative trying to make the litigation as arduous and costly as possible. Fraser J's condemnation was not exclusively directed at POL, and given the outright dismissal by Coulson LJ of bias, no lurking suspicion that the judge was unbalanced in his condemnation of POL's tactics can be sustained. Such criticisms Fraser J made were detailed, but wide-ranging, covering a litany of bizarre, questionable, and almost incredible events (considering the quality of representation, and issues so clearly identified which were at stake) which suggested that POL may have even desired to disrupt, or derail the proceedings. The pun "lawfare" is not wide of the mark - a 'scorched earth' policy of obstruction, obfuscation, and aggressive adversarial conduct,

without (so it seemed) even the most scant regard for the overriding objective.

3. There were disquieting issues of non-disclosure, or misleading pleadings, submissions, or erroneous evidence, which could not be sensibly understood. Fraser J's treatment of the remote access issue **[319]-[321] [539]** reveals that POL only disgorged the reality of remote access after Mr Roll had given evidence, and that Fujitsu's expert, himself, seemed to have been unaware. There was also the delay of two months (in the trial itself) between the existence of a bug being drawn to the attention of POL's solicitor, and onward disclosure to the claimants **[620]**:

> 321. I consider this to be extremely important evidence, both in resolving the Horizon Issues, and indeed in the whole group litigation. Its import is obvious. It means that Fujitsu could remotely insert a transaction into the accounts of a branch using a counter number which was the same as a counter number actually in use by the SPM (or an assistant). This would appear to the SPM from the records that they could see (and anyone else looking at those records) as though the inserted transaction had been performed in the branch itself. This information was only disclosed by Fujitsu (and therefore the Post Office) in this group litigation in January and February 2019. Even Mr Godeseth, a very senior person in Fujitsu so far as Horizon is concerned, said that he did not know this before.

> 539. I consider the significance of the previously factually untrue statements to be considerable. The statement was made publicly by the Post Office, turned out not to be factually correct, and the Post Office gave an explanation and said the full set of facts was now available. The

> situation was pleaded to by the Post Office in its Generic Defence, with a statement of truth. That too turned out not to be correct, and the true position has only emerged in the Horizon Issues stage of the litigation as a result of the evidence of Mr Roll, which I have dealt with above. It was only following his written evidence that Mr Parker, and Mr Godeseth – both senior Fujitsu employees – prepared their supplementary witness statements correcting their first statements. These first statements, as I have explained above, were simply untrue in that important respect. These witnesses had previously stated that this was not possible. Mr Parker said Fujitsu did not have the power to do this.
>
> 620. The conclusion to be drawn from this is that disclosure was given in a manner that could only have disrupted and delayed proper investigation of the issues contained in the documents. In this specific case, that includes the Drop and Go bug. That document should have been provided to the claimants very rapidly once it came to the attention of the Post Office's solicitors, not kept "for the next couple of months", as Mr Parsons puts it.

4. Questionable redactions to documents had been made, censoring information that revealed that POL's board were aware of flaws to Horizon at the material time, which were described by Fraser J **(at [247])** as being,

> "not consistent with a view that the debt/suspensions/audit losses are incurred by carelessness on the part of SPMs or criminal activity. It is also hard to see how it could be justified that these had been redacted originally."

5. The catalogue of criticisms can justly be described as monumental. This is not a quantitative but a qualitative judgment. The concerns expressed go to the very integrity of our system of justice, and the premise upon which the parties are supposed to be governed under the CPR. The misleading position on remote access has been addressed, but three examples provide further proof of a litigant not engaging with its duties:

    a. Dr Worden was not properly instructed, partisan, failed to follow the duties of independence and impartiality, made a priori assumptions which were indefensible, and had received latent briefings from Mr Jenkins that had not been recorded or retained. His expert evidence and conclusions were not reliable;
    b. Mrs Van Den Bogerd, a key POL witness, its Business Improvement Director was found to be a poor judge of relevance, omitting to deal with matters that cut against the grain of POL's case. Her statements (adopted in chief) were in key respects wrong, and undermined in cross-examination because it appeared she had not reviewed or was even aware of the documents the claimants intended to rely upon (417) (418) (425) (544) **[249]-[252]**;
    c. The revelation of KELs and PEAKs was unsatisfactory. In the case of the former, the KELs were only obtained, after unwarranted objections were dismissed. As to the latter, the existence of PEAKs was only discovered fortuitously by the claimants' expert, by chance, in 2018.

6. The Court expressed concerns in respect of the following:

1) Fettering judicial assessments of credibility (21)
2) Application to exclude or present evidence driven by PR concerns (15) (156)
3) Insinuating judicial bias (28) (30) (35)
4) Denial of manifest relevance (34) (425) (570)

5) Culture of secrecy especially re Horizon (36) (483) (545) (560) (561)
6) Questionable Redactions (37) (39) (42) (120) (246) (247)
7) Document destruction/deprivation re dismissed SPMs (166)
8) XX of SPMs on instructions criticised/not upheld on evidence (121) (123) (137) (138) (223) (228) (266) (269)
9) **Resiling from agreed positions [20] [21] [23] [26]**
10) **Attempting to adduce evidence and deny XX [71]**
11) **Failure to acknowledge impact of Horizon defects [64]**
12) **"Ongoing legal cases" influencing disclosure? [426] [437]**
13) **Relevant documents disclosed after conclusion of trial [593] [617] [619]**
14) **Disclosure obfuscation re KELs /Peaks criticised [586]-[590] [592] [603]-[606] [609]**
15) **Late disclosure impeding trial/fairness [520]-[522] [568] [569] [615] [616] [619] [620][624] [625] [935]**
16) **Failure to call but evidence of Mr Jenkins' latent involvement in briefing experts [77] [508] [510] [880]**
17) **Misleading instructions/inaccurate submissions [378] [379] [382] [565]**
18) **Criticism of expert evidence (Dunks - witness at trial of Seema Misra) [294]**
19) **Criticism of expert evidence (Worden) [698] [702] [709] [722] [728] [809] [819.9] [820] [844] [876] [880][902]**
20) **Non-disclosure/LPP asserted re litigation strategy expert [556] [558]**
21) **Second Sight material originally provided to Second Sight not collated or fully disclosed to claimants [186]**
22) **Contractual restrictions on evidence: Ian Henderson [67] [190]-[195]**
23) **XX of SPMs on instructions criticised/not upheld on evidence [91] - [117]**
24) **Serious accusations put without foundation [134-139]**
25) **Misleading pleadings: remote access [532-545]**
26) **Costs [59]**

7. It is submitted that these matters, collectively, suggest a determined attempt by POL to suppress disclosure of its LIMB 2 wrongdoing, which must have been apparent to them for years. The misconduct of disclosure, and irrational decisions motivated by ulterior considerations, in the civil and criminal proceedings is now obvious, both in the GLO trial and before:

   A. The claimants and Fraser J were not informed of the Clarke advice regarding Mr Jenkins, which may reveal the reason why he was not called and yet used as an *eminence grise* to brief Worden - not initially revealed - POL00006357

   B. The claimants and Fraser J were not provided with disclosure of the documents referred to by JBKC, CTI in opening which record Mr Brian Altman's KC involvement in advising on (among other things) disclosure and compensation, such as POL00006801, POL00006586, and POL00038538.Nor were these provided in *Hamilton*;

   C. Mrs Misra's defence team in 2010 were not informed of the Receipts/Payments Mismatch Bug [437] [458] [459] even though the matter was ventilated shortly before her trial and circulated to the legal department;

   D. Neither Mr Castleton, nor Mrs Misra's defence team were not informed of the undermining material concerning Ms Chambers (who gave evidence in the Castleton trial) that the Callendar Square bug had been around for years, probably since 2010.

   E. The attitude to disclosure demonstrated by the POLs CEO – in 2015 POL00029812

   F. The approach to the Rose Review, and whether it was privileged POL00006545

G. That CK were advising POL on compensation in 2013 (Simon Clarke) and yet the CACD proceedings were only resolved, after a bitter fight on GoA Limb 2, in April 2021 POL00006801

H. This advice on compensation chimes with the following by Fraser J at [**219**]:

"By 2013 Horizon was an extraordinarily controversial subject; there can simply be no sensible excuse for the Post Office's failure to try and understand this particular subject. This is particularly reprehensible given that an internal Post Office document in August 2013 showed that Mr Winn's involvement in this was because his area of responsibility was as follows: 'also responsible for resolving specific branch accounting issues'. It was his specific job to resolve specific branch accounting issues, yet he decided at the time that 'we have enough on'. I agree with Mrs Ven den Bogerd that this is inadequate – that is putting it at its most favourable to the Post Office. Somewhat stronger terms are also justified".

8. Appellate proceedings in EWHC and CACD did not bring POL to its senses – in fact three cases demonstrate the degree of wrongdoing:

Lee Castleton's case (Anne Chambers); and material non-disclosure in:

Regina v Lisa Margaret Brennan [2004] EWCA Crim 1329
Regina v Harjinder Singh Butoy [2018] EWCA Crim 2535

9. The UKSC decision in ***R (Nunn) (Appellant) v Chief Constable of Suffolk Constabulary and another (Respondent) [2014] UKSC 37*** requires the CPS to co-operate in making enquiries that have a real prospect of uncovering something affecting the safety of a conviction. There can be no doubt that by 2018, contemporaneous

with the GLO/Bates litigation, that POL's conduct is difficult to understand, except by way of deliberate obstruction, that featured so heavily in that litigation, and its resistance to GoA 2, Limb 2 in Hamilton.

10. The problem of non-disclosure reveals an attitude, of course, as was identified by Fraser J, in a scathing passage, in the **Horizon Issues Trial**, which deals with the delay in disclosing bugs, errors and defects, and the myopia of POL as to their relevance:

> 440. I will reproduce two entries from one of these documents, a PEAK with reference PC0103864. This shows that on 3 June 2004 an SPM reported "that he had a problem with some transfers yesterday, he was transferring stock and cash between the aa main stock unit and the bb shared stock unit and although only one transaction shows for the transfer out the transactions were transferred into the bb stock unit twice giving the pm a discrepancy."
>
> 441. The discrepancy in the cash account was £22,290 in total (shown in the entry for 8 June 2004) although the reconciliation error reported by the Host was £44,580. This was finally resolved on 5 August 2004 with the issue of an error notice. There is nothing to suggest that the SPM was told that this had been caused by a software bug.
>
> 442. The Post Office's approach to this, in my judgment, entirely misses the point. In my judgment, the above passages are simply extraordinary. Two of the documents above are dated 2010, some 9 years ago. The PEAK is from 2004, 15 years ago. Their contents support the claimants' case on the Horizon Issues. Fujitsu knew, to take Callendar Square as an example, that this bug existed in Horizon. They knew that it had affected branch accounts. It was not, as the Post Office puts it "unnecessary and inappropriate" to notify SPMs of this. I have listed the points on this bug at [425] above omitted by Mr Godeseth from his written evidence. Those same points all lead to the same conclusion in my judgment, namely that the Post Office ought to have notified, at the very least, all those SPMs whose branch accounts had been impacted by this bug that this had occurred, and that it had occurred as a

result of a software bug. The fact that the integrity of Horizon data was a live issue at this time should not have influenced the decision to notify SPMs of a software bug. Further, the Post Office's explanation in its submissions that SPMs had their accounts "corrected in the ordinary course" is not a suitable phrase, unless by "ordinary course" one means keeping the cause or reason for the correction secret and therefore hidden from the other party in the accounting transaction, namely the SPM. Also, one is not educating users in the details and terminology of the system (as suggested by Dr Worden) if one informs them that there is a software bug in the system and its symptoms are as follows. This is relevant to Horizon Issue 2, namely whether the Horizon IT system itself alerted SPMs of such bugs, errors or defects as described in Issue 1 above and if so how, and also Horizon Issue 9, which concerns transaction data and reporting functions available to SPMs. It is also relevant to Dr Worden's consideration of countermeasures, which he considers includes vigilance by users (which means SPMs).

D. OBSTRUCTION AND MOTIVE INFERRED FROM THE VARIOUS JUDGMENTS OF FRASER J IN THE HORIZON GLO BATES LITIGATION AND THE CACD IN HAMILTON: GOA 2 /LIMB 2 ABUSE

Hamilton v Post Office [2021] EWCA Crim 577

Bates v Post Office Limited Judgment (No6) "Horizon Issues" [2019] EWHC 3408

REPUTATIONAL, DISCIPLINARY, AND FINANCIAL MOTIVES GOVERNING POL'S OPPRESSIVE APPROACH

1. The CACD encapsulated the Limb 2 submission as follows:

> 137. In those circumstances, the failures of investigation and disclosure were in our judgment so egregious as to make the prosecution of any of the "Horizon cases" an affront to the conscience of the court. 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.

2. As may be seen, it was in POL's interest to maintain that Horizon was infallible for administrative, financial, and disciplinary purposes. The myth of the 'incontrovertible loss' was used to harrow SPMs into submission, or dismissal and prosecution. Astonishingly, at the specific request of POL Horizon had no function for disputing transactions. This omission was to become an oppressive feature in all these cases, revealing the disparity of power between POCL and the SPMs. As Fraser J noted in the 'Horizon Issues' judgment at [300]:

> it was a specific Post Office decision not to have any dispute button/function for SPMs built into the Horizon system.

3. The consequences of this omission, combined with the suppression of information relating to Horizon's bugs, errors, and defects, provides important context to the prosecutions that followed, and the imbalance of power. As was noted by the CACD at variously between [9] to [32] and specifically at [22]:

> appellants understood, and were led by POL to understand, that they were required to make good any shortfall shown by Horizon, whether or not they accepted that there was a genuine shortfall, and whether or not there was any negligence or dishonesty on their part. They further understood, and were led to understand, that they would be liable to be dismissed if they did not do so.

4. Fraser J further observed:

1000. Because the reports and data available to SPMs were so limited, their ability to investigate was itself similarly limited. The expert agreement to which I refer at [998] above makes it clear in IT terms (based on the transaction data and reporting functions available to SPMs) that SPMs simply could not identify apparent or alleged discrepancies and shortfalls, their causes, nor access or properly identify transactions recorded on Horizon, themselves. They required the co-operation of the Post Office.

5. The prosecutions revealed the very opposite. POL was obdurate in denying disclosure, and financial considerations did not play a small part in this given the loss of revenue from DSS. Prosecutions were conducted in this vein, as detected by Second Sight POL00022772 at page 50/96:

> 25.21. We are aware of cases where criminal charges have been brought which appear to have been motivated primarily by Post Office's desire to recover losses. In some cases, those criminal charges do not seem to have been supported by the necessary degree of evidence and have been dropped prior to trial, often as part of an agreement to accept a guilty plea to a charge of false accounting, so long as the defendant agreed to repay all of the missing funds.

6. This practice was made more oppressive by the CACD's finding (a consistent feature of the upheld appeals) at [261] that:

> It appears there was no evidence to corroborate the Horizon evidence. There was no investigation into the integrity of the Horizon figures. There was no proof of an actual loss as opposed to a Horizon-generated shortfall.

7. At the same time, the campaign to maintain the myth, in the media, and before Parliament, concerning vehement denials of remote access, were considered by Fraser J, when he summarised the misleading statements as follows at **[554]**

> "which included public and high profile statements such as the response to the BBC Panorama programme, whatever may have been said on the subject to the Select Committee, as well as in its own pleadings – about remote access without the knowledge of SPMs. The Post Office should have done its best to discern whether

such remote access was possible when this subject first arose, and whether it had occurred, before such statements were made. Fujitsu should have been frank and unequivocal, internally, with the Post Office, so that there could be no possibility of incorrect statements on this important point being made publicly by the Post Office. The Fujitsu witnesses should not, in their first witness statements, have made the incorrect statements that they did. Had those initial statements been factually accurate, there would have been no need for the supplementary statements from them that eventually led to the true position being accepted by Fujitsu, and therefore by the Post Office. It is highly regrettable that such a situation as this should have developed …".

D. THE LAW

THE MALICIOUS VIOLATION OF THE ECHR ARTICLE 6 RIGHT TO THE HEARING OF AN APPEAL WITHIN A REASONABLE TIME

1. The right to an appeal within a reasonable time is of "extreme importance for the proper administration of justice". Lord Rodger in **A-G's Reference No 2 of 2001** 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 ("the European Court") is correct to regard this right as being of "extreme importance" for the proper administration of justice (*Guincho v Portugal* (1984) 7 EHRR 223, 233, para 38)."

2. It follows that interference with/denial of the right to appeal is similarly of "extreme importance".

3. Further denial of the right results in "irretrievable" harm. While no court has yet considered the circumstances in which the Post Office suppressed and withheld from those defendants it had convicted, the information and material that it had in its possession that was reasonably necessary for them to appeal their conviction, for present purposes that it did so is assumed. On the face of it that it did so is strongly supported and evidenced by among other things:

   a. The suppression/withholding of disclosable material in the July 2013 Clarke Advice from defendants and from the CCRC, until November 2020.

   b. Non-disclosure of material in the Detica Net Reveal report of 2013.

   c. The obstruction, then dismissal of Second Sight.

   d. Non-disclosure that the Post Office had notified its insurers of risk in 2013.

e. The resistance to disclosure of knowledge/documents relating to the prevalence of bugs in the Horizon system, including, in particular, the Receipts and Payments Mismatch bug.

f. Maintenance of the false denial until 2019 of the facility to remotely access and manipulate data at Post Office branch accounts without postmaster knowledge (or permission).

4. The circumstances are unprecedented. There is no known instance in the reported decisions - or in the jurisprudence of the ECtHR- of a prosecuting authority systematically denying/subverting the right of significant numbers of convicted defendants their right to appeal.

5. The Post Office had a commercial purpose in denying/obstructing a defendant's right of appeal (see main submissions). It is submitted that that was the same improper purpose as in its prosecutions – the protection of Horizon and the Post Office's commercial interests.

6. Given that, analytically and jurisprudentially the violation of the right to appeal within a reasonable time – a right of extreme importance – is separate from the issue of whether a trial was fair or an abuse of process, it follows that as a matter of law, interference with the right of appeal is a separate and discrete wrong.

7. It is separate and discrete from both the denial of a fair trial, *viz* first and second category abuse of process as found in **Hamilton and Ors. v Post Office Ltd**, it is also, for the same reason, necessarily separate and discrete from the civil wrong in the tort of malicious prosecution – which is concerned with the bringing and prosecution of legal proceedings with an improper motive and purpose - maliciously.

8. In the same way that the Post Office maliciously prosecuted its postmasters, for the purpose of protecting the Horizon System against challenge and for the protection of its own commercial interests, the Post Office was concerned to obstruct and deny those it had convicted in precluding them successfully appealing their convictions. The full nature of that scheme is yet to be examined and it will be considered in this Inquiry. But its fact should be recognised as a wrong independent of and separate from malicious prosecution. The wrong is the malicious violation of the Article 6 right to the hearing of an appeal within a reasonable time.

9. It is the delay in the first of hundreds of appeals coming on for appeal in April 2021 that is the most extraordinary, and yet to be fully examined and explained, feature of the Post Office fiasco.

10. The revelation of the July 2013 Clarke Advice, is emblematic of the central importance of this issue. It is elementary that the Clarke Advice revealed what until 2020 could only be guessed at, namely that there was an event the importance of which caused the Post Office to fundamentally change its prosecution policy from 2014. As Paula Vennells C.B.E. explained to Mr Darren Jones M.P., Chair of the BEIS Select Committee, in June 2020, the Post Office from 2014 effectively ceased prosecuting its postmasters for Horizon shortfalls.

11. Even in 2020, the Post Office was engaged in vigorously seeking to manage the disclosure of the Clarke Advice. The Post Office sought to persuade the Court of Appeal to restrict its hearing, of the 42 appeals referred by the CCRC under s. 9 of the Criminal Appeal Act 1995, to only one ground of appeal, namely first category abuse of process, that was not opposed in 39 appeals. The Post Office expressly submitted to the Court of Appeal (on Mr Nick Wallis's application for disclosure of the Clarke Advice) that if the Court

limited its consideration to the issue of the ground of appeal of 'first category abuse of process' – fair trial as the Post Office urged it to do, the July 2013 Clarke Advice would not fall to be considered by the Court of Appeal and would accordingly never be in the public domain. Other than the writers of this Supplemental Submission, all the other lawyers engaged in the appeals, before January 2021, were content that the Court of Appeal should not consider second category abuse of process as a separate ground of appeal. That position changed after the decision in **Hamilton and ors. v Post Office Ltd** [2021] EWCA Crim 21.

12. The Clarke Advice of July 2013 is of fundamental importance. It exposes the fact that from 2013, at the latest, the Post Office had the clearest possible evidence that its prosecutions were in many instances likely to have been flawed because of incomplete and misleading evidence given to the court of the reliability of Horizon – invariably a fact that was taken as a "given" in prosecutions until challenged head-on in Mrs Seema Misra's prosecution. The Post Office was so concerned in 2013 that in August 2013 it notified its insurers (not disclosed as it ought to have been in the Bates GLO litigation). But the Post Office took active and wholly improper steps to withhold that knowledge from those it had prosecuted, thereby visiting upon them untold and unimaginable suffering in precluding them asserting and and establishing their right to exoneration.

13. In the absence of the law providing a remedy for the Post Office's malicious denial of/interference with the right of convicted defendants to an appeal within a reasonable time, that right, recognised by the European Court and the House of Lords to be of "extreme importance" the right remains a mere aspiration. Such a conclusion is contrary to principle and would stand as a reproach to any proper conception of justice.

14. The extraordinary feature of the Post Office in its capacity as prosecuting authority, is that from its first Horizon prosecution, shortly after the roll-out of Horizon in 1999, until 2021, the Post Office actively subverted the criminal justice system. In doing so it effectively denied to them a functioning justice system in any meaningful understanding of that expression, and subverted the rule of law. That goes beyond malicious prosecution and should and must support relief. That is, it may be said, a very big deal indeed.

15. The Post Office in effect appropriated the criminal justice system for its own commercial purposes.

16. This Inquiry cannot, of course, determine that issue as a matter of law (right to relief for malicious violation of the Article 6 right to the hearing of an appeal within a reasonable time). But given that so many claims for loss and damage are being processed, including claims by those whose right to an appeal within a reasonable time were grossly violated, it is appropriate that the issue be raised. The Post Office is of course entitled to say that it did not subvert or deny any defendant's rights to appeal, and/or that so far as it did do so, it did not do so maliciously (viz with an improper purpose), and/or that so far as it did so maliciously there is no available head or relief or remedy recognised in law for it having done so. It has the opportunity now to do so.

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