POL00142389

Court of Appeal Reference: 202001571 B3
CCRC Reference No. 00489/2015
Court of Appeal Reference: 202001567 B3
CCRC Reference No. 00368/2015
Court of Appeal Reference: 202001565 B3
CCRC Reference No. 00363/2015

IN THE COURT OF APPEAL CRIMINAL DIVISION
UPON REFERRAL BY THE CRIMINAL CASES REVIEW COMMISSION

B E T W E E N:

REGINA

-and-

(1) SEEMA MISRA
(2) JANET SKINNER
(3) TRACY FELSTEAD

Appellants

SKELETON ARGUMENT ON BEHALF OF THE APPELLANTS FOR HEARING COMMENCING 22nd MARCH 2021

In what follows, the above Appellants are referred to as the "Appellants". Where is it is necessary to refer to the other appellants in the proceedings, they are referred to as "the appellants".

The Respondent is variously referred to as "the Respondent", "Post Office Limited", "the Post Office" or "POL".

INTRODUCTION

1. This is the Appellants' Skeleton Argument in support of their appeals on a reference by the Criminal Cases Review Commission ("the CCRC") under section 9 of the Criminal Appeal Act 1995 ("the 1995 Act") against their respective convictions in the Crown Court, the details of which are set out in the Criminal Appeal Office Summaries compiled with respect to each of them. [1] Their appeals are made on two grounds, namely:

[1] 20200565 Felstead Sy Pt 1; 202001567 Skinner Sy Pt1; 202001571 Misra Sy Pt1.

POL00142389

(1) The reliability of Horizon data was essential to the prosecution and, in light of the High Court's findings against Post Office Limited ("POL"), it was not possible for the trial process to be fair (i.e. Category 1 abuse of process) ("Ground (1)"; and

(2) The reliability of Horizon data was essential to the prosecution and, in light of the High Court's findings, it was an affront to the public conscience for the Appellant to face criminal proceedings (i.e. Category 2 abuse of process(("Ground 2").

2. The reference to "the High Court's findings" in the case of each ground are to the findings of Fraser J in Bates v Post Office (Common Issues) [2019] EWHC 1373 (QB) ("the Common Issues Judgment") and Bates v Post Office (Horizon Issues) [2019] EWHC 3408 (QB) ("the Horizon Issues Judgment").

3. So far as the Appellants are concerned, the Respondent has confirmed in its Respondent's Notice responding to the CCRC's Statement of Reasons ("SoR") that their appeals will not be opposed on Ground (1), but that it does not accept that the failings identified by the CCRC amounted to Category 2 abuse, such that it opposes the appeals on Ground (2).

4. In the Appellants' respectful submission, their appeals should be allowed, and their convictions quashed, on both Grounds (1) and (2), for the reasons set out below.

THE PARTIES

The Appellants

5. Each of the Appellants' relevant details are summarised in the Criminal Appeal Office Summaries. Chronologies of the events relating to their convictions are set out in Appendix I to this Skeleton Argument.

6. For present purposes, it may be noted that, given the dates of the prosecution proceedings undertaken with respect to each of them,[2] the relevant iteration of the Horizon System that pertained to them was Legacy Horizon.

[2] Namely 2002 in the case of Tracy Felstead; 2007 in the case of Janet Skinner; and 2010 in the case of Seema Misra: see 20200565 Felstead Sy Pt 1; 202001567 Skinner Sy Pt1; 202001571 Misra Sy Pt1.

POL00142389

Post Office Limited

7. POL is an emanation of the State: Whitfield v Lord Lé Despencer (1778) 2 Cowp 754 at 764; 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.

AGREED FACTS

9. In its Consolidated Response to the Proposed Agreed Facts Served on Behalf of the Appellants ("Response"), the Respondent agrees, inter alia, to the following propositions, to which the Appellants' comments in response in turn, are appended:

   (1) As previously agreed by the Respondent, the findings in the Common Issues and Horizon Issues Judgments are admissible for the reasons given by the CCRC at paragraphs 86-93 of the SoR, and the Court can rely on specific judicial findings where the issues are identical or similar (Response, paragraph 1).

   (2) This is however subject to the Respondent's acknowledgment that the admission of Judgments is subject to the ultimate decision of the Court whether to adduce them as fresh evidence under section 23 of the Criminal Appeal Act 1968, and see the Court's Judgment of 15th January 2021 (Response, paragraph 2). For the avoidance of doubt, the Appellants do not take issue with this. They respectfully submit that the Court should permit the Common Issues and Horizon Issues Judgments to be adduced as fresh evidence, given their direct relevance to the present proceedings.

   (3) Subject to the proviso relating to the Court's ultimate decision on the admissibility of the High Court Judgments, the Respondent agrees with the appellants (Hamilton and others) that "There can be no substitute for reading the Horizon Issues judgment in full, and the Court is urged to do so in the final analysis of these

POL00142389

appeals", and also agrees with the Appellants that the facts highlighted in their proposed Statement of Agreed facts "do not act as a substitute for reading [the] decisions" (Response, paragraph 4). In short, the Respondent and the Appellants are therefore agreed on this point.[3]

(4) As regards the CCRC's SoR, the Respondent makes the point (Response, paragraph 6), that the SoR is an explanation for the CCRC's decision to refer the relevant cases to the Court, such that it is "akin to a pleading, and not, therefore, susceptible to admission". The Appellants agree, if what is meant by this, as they assume to be the case, is that the SoR is not admissible as evidence. Nonetheless, plainly, it forms the basis for the grounds of appeal and is therefore highly relevant to the Appellants' appeals.

10. The Respondent's response to "those parts of the Appellants' proposed agreed facts which deal with issues falling outside the High Court judgments, save where it is necessary to refer to the judgments to explain that response" (see Response, paragraph 8; emphasis in original) commences at the Table staring at page 16 of the Response, where the Appellants are concerned. This Table is self-explanatory. Where relevant, the Appellants reserves the right to refer to such facts as are agreed in the Table in oral submissions. As for those "proposed facts" which are not agreed, the Appellants would observe that many of them derive from or at any rate are consistent with the findings of Fraser J in the Common Issues and Horizon Issues Judgments, and is content to rely upon the relevant passage in the Judgment concerned, rather than seeking to rely on evidence extraneous thereto. They do reserve the right, however, to rely upon the evidence recently disclosed by the Respondent, and adverted to in Appendix II to this Skeleton Argument and in the Appendices to their own Proposed Agreed facts, where relevant.

LEGAL FRAMEWORK

CCRC Referrals

[3] That said, in order to keep this Skeleton Argument to a manageable length, the Appellants have sought to avoid quoting at undue length from the High Court Judgments, instead referring the Court to the relevant paragraph numbers, such that the paragraphs in question may be treated as having been incorporated into it.

POL00142389

11. By section 9(2) of the Criminal Appeal Act 1995, when the CCRC refers a conviction to the Court under section 9(1), the reference shall be treated for all purposes as an appeal against conviction under section 1 of the Criminal Appeal Act 1968. Accordingly, the requirement for leave is by-passed in respect of any ground which relates to any of the CCRC's reasons, but leave is required in respect of any other ground.

The Court's powers on appeal

12. By section 2(1)(a) of the Criminal Appeal Act 1968, the Court shall allow an appeal against conviction if it thinks that the conviction is "unsafe". By section 2(2) of that Act, in those circumstances, it must quash the conviction. By section 7, the Court may order a re-trial if to do so is in the "interests of justice". POL have indicated that they do not seek a re-trial upon the quashing of the Appellants' convictions in this case.

Abuse of process – general

13. In R v Maxwell [2011' 1 W.L.R. 1837 (at [13]) the Supreme Court set out the two categories of abuse of process as follows:

> "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)"

14. The same principles have also been applied by the Court of Appeal when quashing a conviction on the ground that it considers the conviction to have been unlawful by reason of an abuse of process.

Category 2 abuse of process

POL00142389

15. The Court's power to act on a finding of Category 2 abuse is rooted in its constitutional function, in particular, as a check on the power of the executive and a guardian of the rule of law:-

    (1) The judicial branch of the state has a constitutional duty "to ensure that executive action is exercised responsibly and as Parliament intended." This includes the use of the power to prosecute: R (Bennett) v Horseferry Road Magistrates Court [1994] 1 AC 42 at 62.

    (2) The exercise of the Category 2 jurisdiction allows the Court to uphold the rule of law by protecting the purpose and function of the justice system. Consideration of Category 2 abuse therefore requires the Court to look beyond the "conventional practices and procedures of the justice system" and, instead, to consider "the process of law" in a holistic sense: Bennett at 67.

    (3) Questions of Category 2 abuse are not limited to the "procedure that has been built up to enable the determination of a criminal charge" but, rather, concern the "wider and more serious abuse of the criminal jurisdiction in general": Bennett at 67, quoting Moevao v Department of Labour [1980] 1 N.Z.L.R. 464 at 475-476.

    (4) The Court is not entitled to "punish" agents of the executive for abuse of their own constitutional role or that of the courts; but it can refuse to make its processes available, in essence, denying the executive the use of the justice system if, by its actions, it renders itself "unworthy" of that system. Ensuring that the court's processes are not available to those who seek to make use of them on the basis of "unworthy" conduct is "essential to the rule of law": Bennett at 77.

16. Given the purpose of Category 2 abuse, the Court is entitled to take a broader approach to scrutinising prosecutors' actions than in an ordinary criminal appeal. It must take into account, not just the trial itself, but the events which brought the matter before the trial court. This includes, but is not limited to, the investigation of the alleged offence and the conduct of the prosecution: Bennett at 76.

17. There is no zero-sum test for Category 2. Rather, the Court must consider all of the circumstances of the case in the round; and ask whether, given the prosecuting authority's behaviour, it should be allowed to make use of the justice system. This, in essence, is an exercise of the Court's discretion, and previous courts have declined to give binding

POL00142389

guidance on how that discretion should be exercised. Nevertheless, a number of points arise from previous cases, which the Court may find helpful:

(1) The class of cases in which a court may make a finding of Category 2 abuse is open ended. The court's discretion is in no way confined by the facts of the previous cases in which Category 2 abuse has been found: R v Latif & Ors [1996] 1. W.L.R. 104 at 113.

(2) Given that the purpose of Category 2 is to prevent the abuse of the criminal justice system, the court must examine the conduct of both the prosecutor and investigators. The court is entitled to ask whether the prosecution or investigation was conducted in an abusive or oppressive manner and whether the prosecution came to the trial court with "clean hands": S v Ebrahim 1991 (2) S.A. 553; Bennett at 65.

(3) The discretion to stay proceedings (or quash a conviction) should not be used to express the court's mere disapproval of the executive's conduct: Bennett at 74-5.

(4) The question of whether the trial was fair is not relevant to Category 2. The court is entitled to stay proceedings on the basis of Category 2 abuse even when the defendant/appellant could have had or did have a fair trial: Latif at 113.

(5) In R v Mullen [1999] Cr App R 143 (at p 157), the Court observed "Additionally, the need to encourage voluntary disclosure before trial of material and information in the hands of the prosecution relevant to the defence is a further matter of public policy to which it is also necessary to attach great weight. Omission to make such disclosure clearly is a matter to be taken into account, on the exercise of this Court's discretion following a conviction".

18. In Latif the court conducted a "balancing exercise", weighing "the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies the means" (paragraph 113). For the avoidance of doubt, however, the Appellants respectfully submit that such an approach would be inappropriate in the instant case. In Latif, there was no dispute as to whether the defendant had committed the acts of which he was accused. The court was, rather, asked to consider the manner in which he was brought to trial. While the public interest is undoubtedly relevant to the present

POL00142389

proceedings, the question of the Appellants' guilt of the offences of which they were respectively charged is very much in issue. Further or alternatively, the Appellants would refer the Court to the observations of the CCRC at paragraph 129 of the SoR, which are addressed below.

Relevant powers and duties of the Post Office

Investigation

19. A criminal investigation and trial "is not a contest of private interests". When investigating and prosecuting an alleged criminal offence, POL is fulfilling a public function and must act as a responsible prosecutor, not a private entity entitled to try to "win at all costs": R v Lee Kun [1916] 1 K.B. 337 at 341; Bennett at 76.

20. The Secretary of State is required to prepare a code of conduct to ensure that "where criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued": CPIA, s. 23(1)(a). The relevant code is the CPIA CoP, first published in 2005 and updated in 2015 and 2020. POL is bound by the CoP (§1.). The following points arise from the CoP:

    (1) An investigation includes three separate functions: investigator, officer in charge of the investigation, and disclosure officer. These may be performed by the same person but are functionally different (§3.)].

    (2) The investigator must pursue "all reasonable lines of inquiry, whether these point towards or away from the suspect". What constitutes a "reasonable enquiry" is a matter for the investigator and, where necessary, the prosecutor; and depends on the particular circumstances of the case (§3.5).

    (3) If the officer in charge believes that other persons may be in possession of material that is relevant to the investigation then they have a positive duty to instruct the disclosure officer to obtain that material. This duty does not require speculative inquiries (§3.6).

    (4) All relevant information must be recorded. This includes negative information (§§4.1-4.3).

POL00142389

(5) All relevant material obtained during the course of the investigation must be retained. This includes material which must be disclosed to the defendant. It includes, but is not limited to, "any material casting doubt on the reliability of a prosecution witness" (§5.1; §5.5).

(6) The officer in charge of the investigation must keep material under review and, where material previously examined but not retained becomes relevant as a result of developments in the case, that material must, wherever possible, be retained (§5.3).

(7) The prosecutor must keep the evidence under review and, where necessary, advise the investigator on "reasonable lines of inquiry": Code for Crown Prosecutors, §§§3.2-3.

21. While the question of what constitutes a "reasonable line of inquiry" will depend on the facts of the case (R v McPartland [2019] 4 W.L.R. 153 at 44), the approach taken in previous cases may assist the Court:

(1) The duty of the prosecutor is a positive one. He or she must be alert to relevant lines of inquiry and, where necessary, advise investigators to pursue them: R v E [2018] EWCA 2426 (Crim) at 21 (quoting the CPS Guidelines on Communications Evidence).

(2) A "reasonable line of inquiry" is one that is not "fanciful" or "speculative" and for which there is "an identifiable basis which justifies taking steps in the context": R v CB [2021] 1 W.L.R. 725 at 71.

(3) Investigators may be alerted to a reasonable line of inquiry by inference or possibility. Where investigators are so alerted their duty is to "investigate as many inquiries as [is] reasonable in order to test the proposition…": Mouncher v Chief Constable of South Wales [2016] EWHC 1367 (QB) at 498.

22. The Attorney General's Guidelines on Disclosure (first published 2005 and updated in 2011, 2013, and 2020) provide further guidance on ensuring that "all reasonable lines of inquiry" are pursued (see R v E at 21):

POL00142389

(1) Investigators should consider asking the suspect whether there might be material that may have a bearing on the case.

(2) The facts of the case, issues raised, and any potential defence are relevant to the decision as to what amounts to a reasonable line of inquiry.

(3) Prosecutors should provide assistance to investigators when making that decision.

23. The High Court has held that it is entitled to apply a "reasonably intensive" standard of review to the question of whether investigators pursued "all reasonable lines of inquiry". Parliament has explicitly legislated to impose such an obligation and there is substantial public interest in diligent investigation: R (Wyatt) v Thames Valley Police [2018] EWHC 2489 (Admin) at 82-83.

The prosecution decision

24. The next stage in the process of bringing a prosecution is the decision to prosecute. POL was bound to take the decision to prosecute as a responsible and disinterested prosecutor, advancing the public (as opposed to its private) interests. This included:

(1) Making decisions in a manner that is fair and objective; Code for Crown Prosecutors (§2.7).

(2) Acting in the interests of justice and not solely for the purpose of securing a conviction (§2.7).

(3) Adopting an approach that is even handed and ensures that the rights of suspects and defendants, as well as victims, are protected (§2.8).

(4) Not beginning a prosecution if they believe it may be an abuse of process (§3.5).

(5) Keep the prosecution under review throughout and where necessary, advising that further lines of inquiry should be pursued (§3.6).

(6) The decision to prosecute should not be taken until all outstanding reasonable lines of inquiry have been pursued (§4.3).

POL00142389

(7) The prosecutor must not bring more charges than are necessary and must not add additional charges in order to pressure the suspect to plead guilty to a lesser charge (§63).

Disclosure

25. The prosecutor must, in advance of the trial, disclose to the defendant "any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused": CPIA, s. 3(1)(a).

26. The investigators must facilitate the prosecution disclosure by preparing a schedule of all relevant material which has not been used in the prosecution case: CPIA CoP, §6.3.

FINDINGS OF THE CCRC

27. The findings of the CCRC with respect to Category 1 and Category 2 abuse, as set out in its SoR dated 3rd June 2020, are derived in turn from those of Fraser J in the Common Issues and Horizon Issues Judgements, which, the CCRC observed (SoR Executive Summary, paragraph 5), represent "a fundamental shift in understanding with regard to the operation of the Post Office Horizon system, and particularly on the reliability of that system and the accuracy of the branch accounts which it produced".

28. Noting (*ibid*) that "over the course of many years the foundation of POL's prosecution of individual SPMs, managers and counter assistants was that the data produced by the Horizon system was accurate and could be relied upon", and that it was on that basis that "prosecutions were commenced and pursued, and defendants were provided with legal advice and considered how to plead in the same context", the CCRC went on to observe (paragraph 6) that it considered that there were a number of findings in the High Court Judgments which, taken together, were of significance to the safety of the convictions of the 34 cases discussed in the SoR (including those of the Appellants). The most important points were:

> "1) That there were significant problems with the Horizon system and with the accuracy of the branch accounts which it produced. There was a material risk that apparent branch shortfalls were caused by bugs, errors and defects in Horizon.

POL00142389

> 2) That POL failed to disclose the full and accurate position regarding the reliability of Horizon.
>
> 3) That the level of investigation by POL into the causes of apparent shortfalls was poor, and that the Post Office applicants were at a significant disadvantage in seeking to undertake their own enquiries into such shortfalls".

29. In the CCRC's view, the findings of the High Court gave rise to two "cogent lines of argument" in relation to abuse of process, in summary, relating to Category 1 and Category 2 abuse.

30. At paragraphs 32-33 of the SoR, the CCRC confirmed that, in the case of the Post Office applicants who had not sought to appeal against their convictions to the Court of Appeal (which includes the Appellants), there were "exceptional circumstances" which justified referring their convictions to the Court for the purposes of section 13 of the 1995 Act.

31. At paragraphs 63-68 of the SoR, the CCRC set out its observations under the heading "D) If a shortfall in accounts could not be explained, POL adopted the default position that SPMs must be responsible. The level of investigation by POL and Fujitsu was poor". The Appellants would respectfully refer the Court to the citations from the Common Issues and Horizon Issues Judgments contained in paragraphs 63 and 64 of the SoR. At paragraph 65, the CCRC said that it considered that those findings gave rise to

> "serious concerns as to whether POL carried out thorough and objective criminal investigations in the cases of those SPMs who were prosecuted on the basis of Horizon data in connection with shortfalls at their branches".

32. In this connection, it observed that the CPIA applies to POL investigators who are investigating whether a person should be charged with an offence (see sections 1(4) and 26 of the CPIA), and also applies to POL prosecutors (section 2(3)), while the CPIA CoP applies to POL investigators (paragraph 1.1 of the CoP), and POL prosecutors are subject to a duty, corresponding to that contained in paragraph 3.5 of the CoP, to ensure that all reasonable lines of inquiry have been pursued. As to this, see footnote 31 to paragraph 65 of the SoR, which notes that, although the source of the latter duty, namely the Code for Crown Prosecutors, is issued primarily for prosecutors in the CPS, POL has confirmed that its prosecutors also follow the Code.

POL00142389

33. The Appellants would also respectfully refer the Court to paragraphs 66-67 of the SoR, which address the relationship between POL and Fujitsu, and POL's investigative duties in relation to this.

34. Having gone on to consider the matters discussed in paragraphs 69 to 93 of the SoR, the CCRC, at Section 2 of the SoR, commenced its discussion of abuse of process, setting out the principles applicable to Category 1 and Category 2 abuse respectively. It then turned, in Section 3, to its "analysis of the potential argument that the prosecution of the Post Office applicants was an abuse of process". As to this, at paragraph 110 (2) of the SoR, by way of a summary of its position, the CCRC identified, as a "potential argument" regarding abuse of process, namely one to the effect that the Post Office prosecutions were an affront to the public conscience (i.e. Category 2 abuse):

> "In light of the numerous and material findings against POL by the High Court – but particularly the three points summarised above – criminal proceedings should not have been brought in the first place in any case where, in the context of the evidence of case in question, the reliability of Horizon data was essential to the prosecution case against the Post Office applicant".

35. The "three points" in question were those highlighted in the SoR Executive Summary, repeated at paragraph 110 of the SoR, and set out at paragraph 28 of this Skeleton Argument above.

36. The CCRC took the view (see SoR, paragraph 124) that the High Court findings summarised at paragraph 112 in relation to Category 1 abuse were "no less important to a consideration of whether there has been a second category abuse of process". In its opinion, when those findings were "considered in the round" there was "a cogent argument that, in the words of Lord Steyn in Latif, it was an 'affront to the public conscience' for POL to bring criminal proceedings in any case where the reliability of Horizon data was essential to the prosecution case (when viewed in the evidential context) against the Post Office applicant in question".

37. Citing the comments of the South African Court of Appeal in S v Ebrahim 1991 2 S.A. 553, which were in turn cited with approval by Lord Griffiths in Bennett, the CCRC went on to observe (at paragraph 126 of the SoR) that the Common Issues Judgment and the Horizon Issues Judgment "read as a whole raise significant doubts about whether POL can be said to have approached the prosecution of SPMs 'with clean hands'", an expression which the CCRC considered to include "acting in good faith as a fair-minded and objective

POL00142389

prosecutor". In this connection, the CCRC "reminded itself" of the comments of Fraser J at paragraph 1111 of the Common Issues Judgment, in which, inter alia, the Learned Judge referred to the Post Office's description of itself on its website as "the nation's most trusted brand", and observed that, so far as the claimants and the subject-matter of the Group Litigation before him were concerned, "this might be thought to be wholly wishful thinking".

38. At paragraph 127 of the SoR, the CCRC noted "with concern" the following findings in the High Court Judgments:

> (a) The Post Office deliberately chose not to disclose full details of defects in Horizon because they might have an impact on ongoing legal cases (Horizon Issues Judgment at [457]).
>
> (b) The Post Office "routinely and comprehensively" overstated the contractual obligations on SPMs to make good losses. The High Court concluded that there was no excuse for this; that it must have been done to make SPMs believe that they had no choice but to pay; and that this was "oppressive behaviour" by the Post Office (Common Issues Judgment at [222] and [723]).

39. The CCRC took the view that this was evidence that the Post Office (which was victim, investigator and prosecutor in the cases in question) had "consciously deprived defendants and the courts of a full and accurate understanding of the reliability of the Horizon system; and that it had behaved oppressively to SPMs by overstating their contractual obligations" (see SoR, paragraph 128).

40. At paragraph 129 of the SoR, the CCRC referred to the "balancing exercise" which is involved in the consideration of Category 2 abuse, but observed (at paragraph 129) that it did not consider that the offence types in the Post Office cases "were so serious that the Court of Appeal would necessarily conclude that they outweighed any arguable 'second category' abuse of process", adding:

> "In all of the circumstances, the CCRC remains of the view that the High Court's findings give rise to a cogent argument that individual Post Office prosecutions in which the reliability of Horizon data was essential to the prosecution case (when viewed in the evidential context) were an affront to the public conscience and should not have been brought".

POL00142389

41. For the avoidance of doubt, it is clear that the reliability of the Horizon data was central to the prosecution case against all three of the Appellants, and the CCRC was of the opinion, in each case, that the "potential argument" relating to Category 2 abuse (as well as that which it had identified relating to Category 1) was applicable (see SoR, paragraphs 146, 156, 157 and 159 (regarding case 00489/2015), paragraphs 152, 158 and 159 (regarding case 00363/2015), paragraphs 170-174, and paragraph 175 (6) and 177 regarding case 00368/2015).[4]

SUBMISSIONS

Submissions with respect to Ground (1)

42. As indicated above, the Respondent has stated that it does not oppose the Appellants' appeals on Ground (1). The decision as to whether or not to allow the appeal on this Ground is one for the Court. The Court has, however, not raised any queries with respect to Ground (1), or indicated that, the Respondent's concession notwithstanding, submissions require to be made with respect to it. In these circumstances, the Appellants respectfully submit that their appeals on Ground (1) should be allowed, and their convictions quashed accordingly, without more ado. That said, for the avoidance of doubt, the Appellants respectfully reserve the right to rely upon the written and oral submissions of Lead Counsel appointed by the Court (namely Mr Tim Maloney QC) concerning Ground (1).[5]

Ground (2)

43. Ground (2) for the appeal, as formulated by the CCRC (see SoR, paragraph 110), is that "The Post Office prosecutions were an affront to the public conscience. In the light of the numerous and material findings against POL by the High Court – but particularly the three points summarised above, criminal proceedings should not have been brought in the first place in any case where, in the context of the case in question, the reliability of Horizon data was essential to the prosecution case against the Post Office applicant". As explained previously, the "three points" are those set out in paragraph 6 of the Executive Summary to the SoR, and reiterated at paragraph 110.1". The Appellants take these three points in

[4] Note also that Fraser J was clear, in the Horizon Issues Judgment, that the Horizon Issues forming the subject-matter of that Judgment were "generic issues relating to Horizon and its operation" [34].
[5] The Appellants also respectfully reserve the right to rely upon the submissions of Mr Maloney QC with respect to Ground (2).

POL00142389

turn. They then turn to address the question of whether the three points in question substantiate, not only a case under Ground (1), but also their case under Ground (2); the answer to which, in their submission, is plainly "yes".

Ground (2)(a): There were significant problems with the Horizon system and with the accuracy of the branch accounts which it produced. There was a material risk that apparent branch shortfalls were caused by bugs, errors and defects in Horizon

44. Ground (2)(a) can be taken relatively shortly, in view of Fraser J's findings in the Horizon Judgment (in particular), and the Respondent's concession on Ground (1). So far as Fraser J's findings are concerned, the matter is summarised in [925][6] of the Horizon Issues Judgment, under the heading of "L. Overall conclusions", in which the Judge, having explained his reason for preferring the expert evidence of Mr Coyne (for the claimants in the Horizon Issues case) to that of Dr Worden (for POL), went on to say:

> "Mr Coyne … using PEAKs and KELs in particular, identified a great many specific incidents that Fujitsu had recorded, which plainly demonstrated the existence of numerous bugs. Indeed, some of the terms used by Fujitsu made it crystal clear that these were known to be bugs. One notable example is the expression used by Anne Chambers – 'this bug has been around for years' – in February 2006. Dr Worden did engage with the detail of PEAKs both in the joint expert meetings and also in his oral evidence, and the final result is that by the end of the trial, the summary at the beginning of Appendix 2 of the Post Office closing submissions, was forced to accept the existence of a great many bugs in Horizon. The extent and nature of their impact was not agreed, but the Post Office could no longer deny their existence".

45. It is also clear from Fraser J's Judgment that there was indeed a "material risk that apparent branch shortfalls were caused by bugs, errors and defects". In the Appellants' submission, this, in itself would be sufficient to support a case of Category 2 abuse of process, since, if there were evidence available (irrespective of whether POL chose to avail itself of that evidence) to demonstrate such a risk, then clearly, that matter should have been investigated in advance of prosecutions proceedings brought with respect to an SPM whose case turned materially on the reliability of the Horizon data (as to this, see the outline of the duties to which criminal investigators and prosecutors are subject in this Skeleton Argument, and the Appellants' submissions below).

46. In fact, the matter goes further than "material risk". POL consistently maintained, up to and during the Horizon Issues trial, and despite the evidence to the contrary, that the Horizon

[6] In the text that follows, numbers in square brackets refer to paragraph numbers in the Horizon Issues Judgment.

POL00142389

System, in all its incarnations, was "robust". Thus, as Fraser J observed at [22], POL "has said publicly, and on many occasions, that no computer system is 100% accurate and/or perfect but Horizon is 'robust", i.e. "What the Post Office mean by this (in outline terms only) is that the Horizon system can properly and safely be relied upon by the Post Office for the purposes for which it is designed and intended". In his response to Issue (1) [967] of the issues agreed for the purposes of the High Court Horizon proceedings, however, Fraser J stated:

> "968: Answer: it was possible for bugs, errors or defects of the nature alleged by the claimants to have the potential both (a) to cause apparent or alleged discrepancies or shortfalls relating to the Subposmasters' branch accounts or transactions, and also (b) to undermine the reliability of Horizon accurately to process and record transactions as alleged by the claimants.
>
> 969. Further, all the evidence in the Horizon Issues trial shows not only was there the potential for this to occur, but it actually has happened, and on numerous occasions. This applies both to Legacy Horizon and also Horizon Online. It has happened under both the HNG-X and HNG-A iterations of the Online system, but far less frequently under the latter than the former. Indeed there are only isolated instances of it happening in respect of HNG-A, which the experts agree is a far better system than either of the other two iterations of Horizon".

47. It should be noted, in connection with the above passage, that the HNG-A version of Horizon was introduced in February 2017, long after the dates of the Appellants' respective prosecutions. Consequently, none of them benefitted from the improvements made to Horizon Online when HNG-A was substituted for HNG-X. On the contrary, as noted above, their prosecutions took place at the time when Legacy Horizon was in operation, which, in the words of Fraser J, "was not remotely robust": [975].

48. The Appellants would also respectfully refer the Court to Fraser J's answer to "Issue (3): To what extent and in what respects is the Horizon System 'robust' and extremely unlikely to be the cause of shortfalls in branches" [974] at [975] to [978].

49. Finally, the flaws in the Horizon System are dealt with in detail in Section E: Bugs, errors and defects and their symptoms" of the Technical Appendix to the Horizon Issues Judgment, to which the Appellants would again respectfully refer the Court. Further as to this, Appendix 1 to the Appellants' Proposed Statement of Agreed Facts, entitled "Summary of Horizon Bugs found in Bates" contains a Table setting out (a) the name of the relevant bug, error or defect; (b) the years that it was active; (c) the nature of its effects; (d) whether it had an actual or potential impact on branch accounts; and (e) the reference

POL00142389

to the paragraph numbers of the Technical Appendix from which the latter information derives. The Respondent has declined to agree this Table on the basis of its position that both the substantive Horizon Issues Judgment and the Technical Appendix should be read as a whole (with which, as stated above, the Appellants agree). However, it has not disputed the accuracy of the information contained in the Table. In the Appellants' submission, on the basis that the Judgment and Technical Appendix will have been read and taken into account as a whole, their "Bug Table" forms a useful summary of and point of reference for the bugs, errors and defects in the Horizon System at any given time, and the impacts of the latter on branch accounts. They would therefore respectfully recommend in to the Court.

Ground (2)(b): POL failed to disclose the full and accurate position regarding the reliability of Horizon

50. Again, it is plain from the Horizon Issues Judgment that this proposition is amply evidenced and correct. The Appellants would point to the following initial points by way of (important) background.

51. First, Fraser J was clear in his finding, in response to Issue (2) [972] that "the Horizon System did not alert SPMs" of the bugs, errors and defects that were in the system at any given time". Second, Fraser J was also clear (and as was "substantially agreed") that the "Post Office had access to data and systems that were not available to SPMs" (see [992] and [993]). Third, the answer to Issue (9) [996] (which was also substantially agreed), was that, while the causes of some types of apparent or alleged discrepancies and shortfalls could be identified from reports or transaction data available to SPMs, other causes "of apparent or alleged discrepancies or shortfalls may be more difficult, or impossible, to identify from reports or transaction data available to SPMs, because of their limited knowledge of the complex back-end systems" [997]. Accordingly [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".

52. As to this, see also paragraphs 484-485 and 886 of the Common Issues Judgment.

POL00142389

53. Third, the Appellants would respectfully refer the Court to Issue (10) [1001], and Fraser J's response at [1002]-[1006]. In short, the evidence confirmed that Fujitsu could and did obtain remote access to branch accounts, without the SPMs' knowledge or consent. This was consistently denied by POL prior to and during the course of the High Court proceedings, until the Fujitsu witnesses were called to give evidence in the Horizon Issues trial, by which time they "had accepted what Mr Roll had said was correct, and Mr Godseth confirmed that this would look as though the SPM had done it" [1004].

54. Mr Roll, who had worked at Fujitsu between 2001 and 2004 [153], and whom Fraser J considered to be an "important factual witness" in the group litigation [154], stated in evidence, *inter alia*, that "if we were unable to find the cause of the discrepancy then this was reported up the chain and it was assumed that the postmaster was to blame" [173]; that "even if software fixes were developed the problem would sometime reappear several weeks later" [174]; that "remote access to branch systems was possible; the ability was extensive; that this was done without SPMs being aware; that data and transaction information could be changed by Fujitsu; and that sometime SSC would log on to a branch system whilst it was switched on but not in use" [174]. Fraser J accepted this evidence (see further [175]-[180]).

55. Mr Godseth, who was employed by Fujitsu at the time of the Horizon Issues trial, and who was the Chief Architect on the POL account [297], gave evidence (which Fraser J considered to be "extremely important … both in resolving the Horizon Issues and indeed in the whole group litigation") confirming 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)" and that 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". Per Fraser J [321]: "This information was only disclosed by Fujitsu (and therefore the Post Office) in this group litigation in January and February 2019. Even Mr Godseth, a very senior person in Fujitsu so far as Horizon is concerned, said that he did not know this before" (emphasis added).

56. For the avoidance of doubt, so far as the relationship between Fujitsu and POL is concerned, Mr Godseth confirmed in evidence that "Post Office would have been aware of what was being done by Fujitsu" [367], and this was confirmed by the evidence [369].

POL00142389

57. As regards the issue of disclosure in relation to "bugs, errors and defects in Horizon", to the existence of which SPMs were not alerted, the evidence before Fraser J showed that Fujitsu employees, in early 2006, knew that "this problem", namely a software bug "had been around for 'years'" [413] (and see further [425]-[426]). In addition, in connection with this matter, the Appellants would refer the Court to Fraser J's discussion at [428] to [434] of an "issue notes" document dated 17th October 2012 [428] in relation to the "Receipts and Payments mismatch" bug (see further [428]). That document was described by Fraser J [429] as "a most disturbing document in the context of this group litigation". As he noted, it was a 2010 document "and issues between the Post Office and many SPMs concerning the accuracy of Horizon had, for Legacy Horizon, gone on for a decade" (2000 to 2010) and these continued under Horizon Online (introduced in 2010)".

58. As Fraser J also recorded [429], under "Impact", the issue notes listed "some of the bullet points incorporate a summary of these issues". The bullet-points in question (which should be read in full), include references to operational issues with Horizon which "If widely known could cause a loss of confidence in the Horizon System by branches"; which could have a "Potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon data"; and which "could provide branches ammunition to blame Horizon for future discrepancies". Fraser J went on to record [429] that a meeting for the purposes of which the "issue notes" had been prepared was attended by "at least one member of the Post Office (rather than Fujitsu) personnel", noting:

> "There were obviously legal cases going on at the time, hence the reference in the underlined bullet point to 'ongoing legal cases'. If these were criminal cases, the Post Office would be the prosecuting authority, with certain important duties. If these were civil cases, the Post Office would be a party with disclosure obligations. An affected branch would believe it had balanced its accounts correctly; it would not have done so. There is an evident concern amongst some at the meeting which is recorded in this document that this issue should not become 'widely known' in order to avoid causing 'a loss of confidence in the Horizon System'. Fujitsu do not seem to have been particularly prompt in either identifying the problem or reacting to it".

59. In the words of Fraser J, the evidence referred to in [428]-[432] showed

> "that there was a distinct sensitivity within both the Post Office and Fujitsu about keeping [information relating to the Receipts and Payments mismatch bug] to themselves in order to avoid a 'loss of confidence' in Horizon and the integrity of its data. A less complimentary (though accurate) way of putting it would be to enable the Post Office to continue to assert the integrity of Horizon, and avoid publicly acknowledging the presence of a software bug …" [433].

POL00142389

60. In the Appellants' submission, therefore, the evidence before Fraser J in the Horizon Issues trial, and his findings with respect to that evidence, show that, far from disclosing information concerning the operation of Horizon to SPMs and the courts, POL sought to suppress that information. This is confirmed by the passage of Mr Godseth's oral evidence recorded at [434], and by Fraser J's observations regarding a number of other bugs, the existence of which to known to POL, but not disclosed to SMPs, at [435] to [461], upon which (*inter alia*) the Appellants rely in support of their case under Ground (2)(b).[7] They draw attention, in particular, to [442], where Fraser J, in connection with POL's responses (at [437]-[441]) to questions put to the parties by him as to, inter alia, the dates when the existence of the Dalmellington and Callender Square bugs was communicated by POL to SPMs, said that POL'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 Callender Square as an example, that this bug existed in Horizon. They knew 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] omitted from Mr Godseth in 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 …" (emphasis added).

61. Next, the Appellants would respectfully refer the Court to the passages of the Horizon Issues Judgment dealing with the evidence of Mrs Van den Bogerd, a Senior Director at POL (see [203]-[254)]. The evidence addressed in these paragraphs indicates, *inter alia*, that, during the course of a meeting held on 17th May 2010 with two MPs and various POL officers, despite POL's telling the MPs that POL wished to be "open and accurate", it in fact provided them with information concerning the upgrade of Horizon which took place in 2010 which was "not accurate" [232]. As Fraser J went on to record, in an internal, heavily redacted, document entitled "Extracts from Lessons Learned Log", one entry under the heading "issues identified" regarding POL was "Failure to be open and honest when issues arise eg rollout of Horizon, HNGx, migration issues/issues affecting few branches not seemingly publicised" (Fraser J's underlining) [234]. As to this, Fraser J observed [*ibid*]:

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[7] Paragraphs [517]-[555] of the Horizon Issues Judgment dealing with "Inaccurate Statements by the Post Office" are also relevant to Ground (2)(b), and indeed to Ground (2) as a whole. The Appellants returned to these paragraphs when dealing with "Ground (2): the Category 2 abuse case" in this Skeleton Argument below.

POL00142389

> "This frank expression in a document authored by Mrs Van den Bogerd herself as recently as 2015 is consistent with the general tenor of the claimants' case and their criticism of the Post Office. This entry in this contemporaneous internal Post Office document is, in my judgment, inconsistent with the picture which the Post Office continually seeks to portray, namely that it wishes to be open and transparent about issues with Horizon, and is as interested in getting to the bottom of any problems with Horizon as anybody else. It is an internal recognition of a 'failure to be open and honest when issues arise".

62. In other words, in summary, inasmuch as POL "failed to be open and honest when issues arise", and on the basis of all of the evidence that was adduced during the course of the Horizon Issues trial, it is clear that POL did indeed fail to disclose "the full and accurate position regarding the reliability of Horizon", whether to the SPMs or the criminal courts (or, for that matter, anybody else).

63. Finally, Fraser J dealt with the issue of disclosure in the context of the Horizon Issues trial itself at [559]-[563]. The Appellants would draw the Court's attention, in particular, to his discussion of the disclosure of "The Known Error Logs or KELs" at [573]-[614]. As he recorded at [575]-[577], POL's solicitors, in a response to a request contained in the claimants' Letter Before Claim for disclosure of the KEL kept by Fujitsu, declined that request on the basis that, *inter alia*, the KEL was not relevant to the Horizon Issues. In Fraser J's view [577],

> "The suggestion in that letter that the Known Error Log was not relevant, is simply wrong, and … entirely without any rational basis. The further suggestion, viewed with the hindsight now available, that the 'known error log' may not exist, is disturbing. The claimants' request used in the precise title – 'known error log' – and this clearly did exist. To suggest in an answer 'if they exist' is somewhat misleading".

64. Having described POL's conduct in relation to disclosure of the KEL as "obstructive" [580], Fraser J went on to consider its argument, having admitted that the KEL did in fact exist, that it was not relevant to the proceedings, and was not a document in its control. In this context, in relation to the claim that the KEL was not relevant, he observed [592]:

> "… It must therefore have come as a surprise to the Post Office, given the contents of its pleadings and the express submissions that it had made to the court, that both experts considered the Known Error Log to be highly relevant. This should also have led to the Post Office beginning to doubt what it was being told by Fujitsu, given the source of what the court was told about this was what Fujitsu had told the Post Office, as set out above. The explanation of what the Known Error Log was, what it contained, and its lack of relevance, was not remotely accurate".

POL00142389

65. As for the suggestion that POL did not have control over the documents is question, Fraser J concluded his discussion with the observation that, in his view [605], the claim to that effect was "verging on entirely unarguable, given the express terms of the Fujitsu contract which is now available to the court". He also observed [606] that the fact that POL had submitted "that in July 2017, on its understanding then, the KEL was not a 'record'" demonstrated a "worrying lack of knowledge on the part of the Post Office, about both Horizon, and Fujitsu's record keeping …". In this connection also, please see the concluding passage of this discussion at [613].

66. The Appellants return to the issue of the relationship between Fujitsu and POL in this Skeleton Argument below. For present purpose, it suffices to cite Fraser J's trenchant, and, with respect, self-evidently correct, remark [1018] that POL "ought to have known how its own system works". In their submission, POL's approach to disclosure in the context of the Horizon Issues trial, including in particular in relation to disclosure of the KEL, which ranged from obstructive, to unreasonable, to misconceived, lends further support to their case under Ground (2)(b).

Ground (2)(c): the level of investigation by POL into the causes of apparent shortfalls was poor, and the Post Office applicants were at a significant disadvantage in seeking to undertake their own enquiries into such shortfalls

67. The disadvantages which the POL applicants faced in making their own enquiries into shortfalls in branch accounts has been touched on above. The evidence before Fraser J, and his findings on that evidence, makes it clear that they were not only disadvantaged in that connection, but significantly so. As for the quality of POL's own investigation into this matter, the Appellants would make the following submissions.

68. First (despite the "change of approach in Mrs Van den Bogerd" in the Horizon Issues trial, as compared with the Common Issues trial), it is clear from the evidence before Fraser J that the "default approach" adopted by POL to the issue of shortfalls was to make a "widespread attribution of fault to SPMs" [204] (and see also paragraphs 462 and 566 of the Common Issues Judgment). Thus, Fraser J commented [249], with respect to Mrs Van den Bogerd's live evidence, that she

> "minimised any reference to problems or issues with Horizon, and reverted to potential user error whenever possible as a potential explanation, an approach which she explained in her written statement as providing 'plausible' explanations. Her witness statement also stated, in terms, the exact opposite of

POL00142389

> what the reality of the situation was, and I have given examples at [221], [223] and [226] [*to which the Appellants respectfully refer the Court*] above. Witness statements are supposed to be factually accurate, and care must be taken in future rounds of this group litigation that they are drafted in accordance with the rules. Making statements that are the exact opposite of the facts is never helpful, to put it at its mildest. It is also the opposite of what witness statements are supposed to be".

69. Second, the evidence also indicates that both Fujitsu and POL declined to accept that branch shortfalls in any case or cases were, or at least could be, attributable to defects in the Horizon System, even where there was available independent evidence of "phantom transactions" (see [209]-[213]).

70. Third, the evidence drew Fraser J to conclude that, as at 2013, that the stance adopted by POL to the issue demonstrated "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" (emphasis in original). This comment was prompted by POL's response to a suggestion made by a SPM that the Horizon System was flawed, and that he had evidence to support this [216]. An internal POL email in relation to this posed the question: "Given the current media and in particular the BBC's attention on Horizon, do you think it is worthwhile looking into this 'alleged flaw' with Horizon that this SPMR has highlighted to pre-empt any enquiries from his MP?" [217].The response from another POL officer, Andrew Winn, *inter alia*, was to say "My instinct is that we have enough on with people asking us to look at things" [218].

71. Fraser J further remarked, concerning the above [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".

72. Fourth, the Appellants rely upon the evidence and findings of Fraser J set out at [428] to [436], addressed in connection with Ground (2)(b) above in support of Ground (2)(c), as well as the latter Ground. This material confirms, not only that POL sought to suppress evidence disclosing the existence of bugs, errors and defects in the Horizon System

POL00142389

(rather than disclosing it) but also that they had no enthusiasm for pursuing an investigation which would bring the existence of these, or the cause of problems in the System, to light.

73. This is further borne out by the events described at [948] to [957] of the Horizon Issues Judgment. As Fraser J there records, following disclosure of the Callender Square bug "the following emails went to and from very senior people in the Post Office …". One of those emails, sent on 1st July 2016, called for "an urgent review and mini-taskforce on this one …" [949]. However, an email sent to "the same recipients" later on in that same day stated "can you stand down on this one please? …". Fraser J commented, as to this:

> "951. The email chain is heavily redacted and therefore the reasoning behind this volte face within the Post Office is not shown, and nor was it explained by any Post Office witness.
>
> 952. Thus the entirely understandable initial reaction of the Chief Executive of the Post Office, that a point-by-point investigation was required in respect of specific criticisms of Horizon in respect of one particular SPM who blamed Horizon for shortfalls and discrepancies, appears to have been very swiftly shut down and not pursued due to a decision at what must have been very high levels within the Post Office. I can think of no justifiable reason why the Post Office, institutionally, would not want to address the Chief Executive's points and investigate as she initially intended, and find out for itself the true situation of what had occurred".

74. Then, having set out [953] an excerpt from POL's Technology Strategy Update Decision Paper of 30th January 2017, which stated, *inter alia*, that "In July we outlined that IT was not fit for purpose …", Fraser J continued:

> [954] This therefore means that the decision taken *not* to investigate further in July 2016 and to 'stand down', in itself a surprising decision for a reputable institution to take given all the circumstances, was taken at broadly the same time as a conclusion was reached that the IT 'was not fit for purpose' …" (emphasis in original).

75. Finally, in support of their case under Ground (2)(c), the Appellants rely on Section K of the Horizon Issues Judgment relating to "Audit Data". As Fraser J recorded at [905], the experts were agreed that "Post Office does not consult the full audit data (unfiltered ARQ Data) before deciding how to handle discrepancies and issuing Transaction Corrections". At [908], he recorded that it was the claimants' case that the audit data should have been used in circumstances where there was a dispute between POL and SPMs about what had occurred in Horizon at a particular branch. Then, having quoted [912] Dr Worden's explanation that "it is a central principle of Horizon that the Core Audit Database acts as a secure 'gold standard' for branch accounts (countermeasures SEK) and that the audit

POL00142389

record can only contain events which originated at the counter – either in customer transactions or monthly balancing", Fraser J observed [913]:

> "That is an accurate description in my judgment. I can see no sensible or justifiable reason for the Post Office's reluctance to consult the audit data in cases of serious dispute with SPMs, in particular the types of dispute which form the subject of this case and, without doubt, any dispute that involves criminal proceedings against SPMs. I also consider the same point applies in relation to internal Post Office proceedings that lead to the suspension or termination of SPMs. Acceptance of that point does not mean that the audit data has to be consulted for every transaction correction issued by the Post Office. As can be seen from the passage of cross-examination at [908] above, the Post Office effectively jumped to the issue of whether audit date should be consulted before issuing every TC. Mr Coyne accepted that it was not necessary to do that. That is not the same as accepting it should be consulted in circumstances where there was a dispute between the Post Office and SPMs" (emphasis added).

76. The Appellants respectfully concur with that passage, including in particular the proposition that the audit data could, and should have been consulted in any dispute that involves criminal proceedings against SPMs, They further submit that the audit data could, and should, have been consulted by POL before criminal proceedings were brought with respect to each on them. Plainly, in their submission, consulting the audit data before commencing criminal proceedings was an essential component of the investigatory duties to which POL was subject, outlined in this Skeleton Argument above.

Ground (2) – The Appellants' Category 2 abuse case

77. The CCRC took the view that the findings of Fraser J in the Common Issues and the Horizon Issues Judgments, and in particular the three points set out at paragraph 6 of the Executive Summary and paragraph 110 of the main body of the SOR, gave rise to a "cogent argument" (see e.g. paragraph 124 of the SoR) in support of both a Category 1 and a Category 2 abuse of process case. The Appellants endorse this conclusion, and respectfully invite the Court to allow their appeals on Ground (2), as well as on Ground (1). In short, not only could they not have had a fair trial, in all of the circumstances of this case, but (again with respect) from any reasonable point of view the criminal proceedings with respect to the Appellants were an affront to the public conscience, and should never have been brought. They would make the following additional submissions.

78. First, and importantly, the question of whether Category 2 abuse has been made out in this case does not turn on the question of "who knew what, when". So far as the relationship between Fujitsu and POL is concerned, as noted at paragraph 55 of this

POL00142389

Skeleton Argument above, Mr Godseth confirmed in evidence that POL would have known that Fujitsu had remote access to branch accounts; and the Appellants would repeat Fraser J's observation [1018] that POL "ought to have known how its own system works". This is manifestly true as a general proposition, but critically so in circumstances in which the POL both contemplated bringing, and did bring, criminal prosecutions against numerous SMPs, managers and counter-assistants, with the inevitable devastating consequence for them.

79. So far as concerns internal POL personnel, POL is a legal person, subject to the corporate veil.[8] It cannot avail the Respondent, therefore, should it seek to do so, to content that POL is not guilty of Category 2 abuse, simply on the basis that one or several POL officers, including, for example, those sufficiently high up the hierarchy to be responsible for executive decision-making, were unaware of the facts relevant to the Category 2 abuse case (which is not borne out by the evidence in any event).

80. Second, and relatedly, the initial key point is that POL failed to disclose what it did know (as per Ground (2)(b) above) relating, for instance, to Fujitsu's ability to gain remote access to branch accounts, and as to the existence of bugs, errors and defects in the Horizon System, including Legacy Horizon and Horizon HNGx (see again, in particular, [442] of the Horizon Issues Judgment).[9] The further key point is that POL not only failed to undertake, but deliberately avoided undertaking, the investigations which they were bound by law to undertake before deciding to prosecute SPMs, including the Appellants (as per Ground (2)(c)).

81. In both respects, POL were, plainly, in the Appellants' submission, in breach of their investigative duties, contained in the COIA CoP, set out at paragraph 19 of this Skeleton Argument above, of their prosecutorial duties contained in the Code for Crown Prosecutors, also outlined above; as well as their duties of disclosure. By the same token, POL failed to act as a responsible prosecutor, and instead behaved like a private entity

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[8] A properly formed company has a separate legal personality to its shareholders, with separate rights and liabilities: *Saloman v Salomon & Co Ltd* [1897] AC 22. This is known as the "corporate veil". The Court can only pierce the corporate veil in a small category of cases where abuse of the corporate veil to evade or frustrate the law can only be addressed by disregarding the company's separate legal personality: *Prest v Petrodel Resources Ltd* [2013] UKSC 34. If there is another legal remedy available, it will not be permissible to pierce the corporate veil.

[9] As to this, Appendix 2 to the Appellants' Proposed Statement of Agreed Facts contains a Table entitled "Post Office Knowledge/Notice of Bugs, Errors, Defects". As with the Table contained in Appendix 1, the Respondent has declined to agree this, but has not disputed its accuracy. The Appellants respectfully recommend it to the Court.

POL00142389

entitled to try to "win at all costs" (R v Lee Kun [1916] 1 K.B. 337 at 341; and Bennett at 76, cited above), notwithstanding its status as a public body. The evidence adduced in the Horizon Issues case and the findings of Fraser J clearly support the proposition that, far from approaching the decision to prosecute SPMs in a fair-minded and "clean handed" way, POL subjugated the rights and interests of SPMs to its vested interest in protecting the reputation of the Horizon System, as well as its own reputation.

82. So much is borne out by the passages of the Horizon Issues Judgment [517]-[55] set out under the heading "Inaccurate statements by the Post Office". As Fraser J observed at [518], while POL had "no obligation to assist the claimants in advancing their case against it", it had "maintained publicly that it 'was seeking to be "transparent" about Horizon". As he also noted, in statements made prior to the Horizon Issues litigation, POL

> "routinely and strongly insisted that there was nothing in the criticisms being levelled at the accuracy of Horizon, and that losses were shown in SPMs' branch accounts were caused either by carelessness or dishonesty on the part of the different SPMs who experienced what they considered to be unexplained discrepancies and losses".

83. Again, as Fraser J recorded [519], statements to the latter effect were conveyed to the BBC in 2015 after it had aired the Panorama programme concerning Horizon. These statements, plainly, were wrong; and if, at the time, POL did not know them to be wrong (and the evidence shows that it did), then they ought to have known.

84. The other significant element identified by Fraser J as a "misleading statement" was that comprised by POL's position on remote access, as to which see [520]-[554]. Fraser J concluded this section of his Judgment by observing [554] that criticism was justified of POL's incorrect previous statements

> "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 …".

POL00142389

85. Third, while many of the events adverted to in the Horizon Issues Judgment post-date the dates on which the Appellants were convicted, the conclusions to which the evidence in the Horizon Issues trial, and the findings of Fraser J in the Judgment, lend themselves, bearing on Ground (2), apply with respect to the Appellants with equal force. The evidence shows, in summary and to repeat, that Legacy Horizon was "not remotely robust". Again to repeat, it was incumbent upon POL, at all material times, to know how its own systems worked. Plainly, there were bugs, errors and defects in the System at the times, respectively, when the Appellants were prosecuted and convicted.[10] Equally plainly, POL had a duty to conduct proper investigations before commencing prosecution proceedings, and to comply with its duties of disclosure with respect to the Appellants. It manifestly failed to do so (further as to this, see Appendix II to this Skeleton Argument).

86. The Appellants also rely, and respectfully ask the Court to place weight, on the Advice of Simon Clark dated 15th July 2013 ("the Clark Advice"). While that Advice relates to the period between 5th October 2012 and 3rd April 2013, again post-dating the Appellants' convictions, it is plainly relevant to their Category 2 case. The Clark Advice attests to the fact that Gareth Jenkins, who routinely gave evidence on behalf of POL (and who gave evidence for the prosecution in the trial of Seema Misra), equally routinely gave evidence that was entirely misleading as regards the "robustness" of the Horizon System, in such a

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[10] Appendix 2 to the Appellants' Proposed Statement of Agreed Facts shows PEAKs recorded by Fujitsu relating to Horizon. That Appendix shows that issues with Horizon existed since its inception in 1999. Many of the PEAKs set out in Appendix 2 suggest that the PO had knowledge of the reported issue at that point, either because the PEAK recorded that the SPM had spoken to the NBSC helpline, or because Fujitsu was going to give, or had already given, PO notice of the matter under investigation. The PEAKs therefore suggest that PO had knowledge of the following problems (whether they constituted a bug or not) as early as the following dates:

a. Payment discrepancy: as early as 18/07/2000 (**152005134**);

b. Payment/receipts mismatch: as early as 24/11/2000 (**PEAKS18_161004487**);

c. Lost transactions: as early as 20/06/2002 (**MINI_161028987**);

d. Transactions going through without cash being received: as early as 30/12/2004 (**SouBJW45_119047030**);

e. Counter values discrepancy: as early as 18/05/2006 (**MINI_16108403)**;

f. Incorrect remming totals: as early as 12/02/2007 (**152005648)**;

g. Duplicate transactions: as early as 31/03/2010 (**152005962)**

POL00142389

way as to be in breach of his duties to the court, the prosecution and the defence. POL chose not to call Mr Jenkins as a witness in the Horizon Issues trial, but, as Fraser J recorded [508], he was "obviously widely available to the Post Office and the source of a great amount of information both to the Post Office's witnesses of fact, and also to Dr Worden …". Thus POL relied, in the Horizon Issues trial, upon information and opinions deriving from a person whom they knew had misled the courts on numerous occasions, in an attempt to exonerate itself, and substantiate its own counter-claims against the claimants in that case.

87. In connection with paragraphs 81 to 84 above, the Appellants Would respectfully remind the Court the observations of the Vice President of the CACD in R v Early & Others [2002] EWCA Crim 1904 (at [10]):

> "Judges can only make decisions and counsel can only act and advise on the basis of the information with which they are provided. The integrity of our system of criminal trial depends on judges being able to rely on what they are told by counsel and on counsel being able to rely on what they are told by each other. … [I]n our judgment, if, in the course of a PII hearing or an abuse argument, whether on the voir dire or otherwise, prosecution witnesses lie in evidence to the judge, it is to be expected that, if the judge knows of this, or this court subsequently learns of it, an extremely serious view will be taken. It is likely that the prosecution case will be regarded as tainted beyond redemption, however strong the evidence against the defendant may otherwise be …".

88. In their submission, the same or similar principles should be applied when witnesses, including those in both criminal proceedings and civil proceedings which have a bearing on criminal proceedings make statements in evidence which are untrue, and which they either knew or ought to have known were untrue.

89. Finally, added to all of the above is the oppressive behaviour in which POL, again, as a public body, engaged in relation to its contractual relations with SPMs, identified and described as such by Fraser J in the Common Issues Judgment (see paragraphs 222 and 723 thereof; and see S v Ebrahim 1991 (2) S.A. 553; Bennett at 65, cited above).

90. In all of the above circumstances, the Appellants respectfully invite the Court to conclude that the bringing of criminal proceedings with respect to them was an affront to the public conscience, and that they should never have been brought. Such proceedings would not and could not have been brought (or at least, not successfully brought) if POL had complied with the duties to which it was subject, generally, as a public body, and more specifically, as investigator and prosecutor. Such proceedings would not have been

POL00142389

brought if POL had acted with “clean hands”. In making such a finding, the Court would clearly evince compliance with its constitutional duty “to ensure that executive action is exercised responsibly and as Parliament intended” (Bennett at [62]), and to uphold the rule of law by protecting the purpose and function of the justice system (*ibid* at [67]). The Appellants would also submit that the conduct of POL with respect to them was of such a nature as to "undermine public confidence in the criminal justice system and bring it into disrepute" (Latif at 112F, cited in Maxwell at [13]). That being so, in their respectful submission, a decision to allow their appeals on Ground (2) on the basis that a case of Category 2 abuse of process has been made out would be amply warranted.

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POL00142389

APPENDIX I

Tracy Felstead

November 1999	TF starts begins working as a counter clerk at Camberwell Green Crown Post Office. (*GA_016_108002169, p3*)
26 February 2001	A loss of £11,503.28 on the Stock Unit usually used by TF is identified while she is away on holiday. (*GA_016_108002169, p3*)
27 February 2001	TF returns from holiday. (*GA_016_108002169, p3*)
28 February 2001	TF confirms that there is an apparent loss of £11,503.28 on her stock unit. (*GA_016_108002169, p3*).
05 March 2001	TF is suspended from duty by PO. (*GA_016_108002169, p3*)
09 April 2001	TF is interviewed alone under caution at Peckham Police Station by two PO investigators and is accused of theft and false accounting. She made no comment answers except to explicitly deny theft. (*GA_016_108002169, p3*). In response to this denial, the officers asked, *"can you demonstrate how you didn't steal the money*?" *(Document M057_POL_007, p33)*. The officers also stated that if JS was *"prepared to demonstrate"* to them that she *"didn't steal the money we'll continue the interviews*." TF was asked if she could "*satisfy* [the officers] *that* [she didn't have] *any responsibility for the missing eleven thousand."* TF was asked the following questions: - "*what happened in* [her] *life just before Christmas that made* [her] *start*" to steal money from the PO (p27); - if she had paid for people to go on holiday (p28); and - whether her family were forcing her to steal money (30)

POL00142389

27 April 2001	An invitation to a disciplinary meeting between PO and TF on this date was sent to TF. She did not attend, apparently because of legal advice she had received. (*GA_016_108002169, p3*)
30 April 2001	PO writes to TF to inform her that her contract of employment has been terminated and that this decision is based "solely on the evidence on hand" that she had "seriously breached PO standards by deliberately inflating cash declarations to show a correct balance". (*100000333*)
Later in 2001	TF pleads not guilty to theft and false accounting at Guildford Magistrates' Court.
Later in 2001	After a trial at Kingston Crown Court TF is convicted of fraud and false accounting. Prior to sentencing, TF was given the opportunity to repay the shortfall and apologise. While the shortfall was repaid by her family, as a result of her refusal to apologise, she received a 6-month custodial sentence *(100000329, p1*)

Janet Skinner

1995-2003	JS (DOB: 28/11/1970) worked for POL as a counter clerk with United News Limited until she was made redundant. (*200004905, p1*)
September – November 2003	JS worked as a counter clerk at Hessle Road Post Office. (*200004905, p1*)
November 2003 - May 2004	JS acted as manager of North Bransholme Post Office. (*200004905, p1*)
27 May 2004	JS became Post Mistress of North Bransholme Post Office. (*200004905, p1*)
28 May 2004 - 01 February 2005	JS was Post Mistress of Bodmin Road Post Office, until it closed down. On closure it was audited and no issues

POL00142389

	discovered. (*200004905.pdf, p1; 100000513, p1; 100000516*)
January 2006	JS was appointed permanent SPM of North Bransholme Post Office. *(100000513, p1)*
	JS began to experience problems with Horizon, when the system showed a shortage of £7000 which JS could not explain (*100000516, p4)*. JS therefore concealed the loss by putting it into another stock unit. JS believed that someone had taken the money and would put it back. (*200005202, p7)*
	JS made numerous calls to NBSH, 6 of which were transferred to HSD. Records of the calls no longer exist. (*100000517, p6)*
February 2006	JS discovered the loss had doubled to £14,000, again without explanation. *(100000516, p4)*
March 2006	JS discovered the loss had again increased to £21,000 (*100000516, p5).*
30 May 2006	A cash verification visit took place at North Bransholme Post Office, which identified a cash shortage of around £54,000 when compared to the total cash figure on the office snapshot printed from the Horizon system.
	As soon as a PO representative arrived at the branch, JS informed them there would be a large shortage of cash of around £40,000 (*200004977*). JS was asked if she knew where the shortage had gone. JS stated that she did not know but that it had started in January 2006 (*200005172, p2*).
	An audit was ordered and JS was suspended from employment by PO *(100000513, p1; 200005173, p2).*

POL00142389

31 May 2006	An audit found there were no cash holdings and a shortage of £59,216.43 in the accounts (*100000513, p1).*
30 June 2006	JS was interviewed under caution by PO investigators. She admitted that she had tried to hide the unexplained shortfalls in the Horizon system by inflating the figure in the cash holding account *(200005203, p16*). JS denied any knowledge of what had happened to the apparently missing money (*171000083, p 28*). The PO officers made it clear to JS that she was personally responsible for repaying the lost sum unless she herself had evidence that someone else had stolen it *(171000076, p24-25).* The Investigators asked JS how they could know that she "*hadn't stolen the money*" when she had "*offered no explanation of where the money's gone*." JS stated simply that she could offer no explanation "*because I can't explain it*." (*171000083, p25*) In response to JS' question about what she should do if she suspected someone else of theft, the Investigators told her that it was "*entirely down"* to her and "*not for us to say what you should do" (171000076, p26)*
26 July 2006	JS sent a letter to PO in which she denied theft but admitted to falsifying the accounts to cover the apparent losses because she "*naively hoped*" they "*would be found in the paperwork*" (*200005189, p1).*
04 September 2006	A PO lawyer wrote to the PO Investigation Team advising that there was a medium prospect of successful prosecution of JS for theft and that, in light of this, they did not advise a charge for false accounting *(200004966)*

POL00142389

12 September 2006	JS received a summons to appear at Hull Magistrates' Court to answer one charge: theft of £59,175.39 contrary to s 1 of the Theft Act 1968 between 31 December 2005 and 01 June 2006 (*200004957).*
Between September 2006 and January 2007	A false accounting charge is added to the indictment by PO (*200004926; 200004932).*
05 January 2007	At Hull Crown Court JS pleads not guilty to theft and guilty to false accounting of £59,175.39 between 31 December 2005 and 1 June 2006 contrary to s 17(1)(a) of the Theft Act. The plea was accepted by PO (*200004800; 200004849, p2*).
02 February 2007	JS is sentenced to 9 months' imprisonment (*200004849, p2).*
29 August 2007	A confiscation order is made against JS, requiring her to pay £11,000 to PO within 6 months, with 12 months' imprisonment to be imposed consecutively in default of payment. (*200004800*)

Seema Misra

29 June 2005	SM (DOB: 25/04/1975) began working as SPM at West Byfleet Post Office (*100000094, p2)*
19 & 20 July 2005	SM called NBSC because she had expected further assistance with balancing but no one had attended (*100000094, p6).*
21 July 2005	SM called NBSC because she had been told she would receive two weeks of assistance with balancing, but it had not arrived (*100000094, p6).*
July – October 2005	Branch staff called NBSC for assistance with balancing on 31 occasions. (*100000094, p7).*

POL00142389

August 2005	SM's branch was visited by a PO manager because of balancing issues. The branch had a loss of £466.73 and an "over" of £96.80 that had been put into the suspense account by a PO trainer. SM was warned that unless an error came back, she might be liable (*MO12 Doc 008, p1).*
10 October 2005	A request for an audit was made because of SM's belief that someone was stealing from the Post Office (*100000121).*
14 October 2005	An audit was carried out by PO, which found a £5000 loss, in relation to which SM was given a warning *(108184986, p2).*
20 February 2006	SM called HSD to report that the system showed a £6000 loss (*Call Logs MO15 Doc 006, p22).*
21 February 2006	SM called HSD to tell them that for the last couple of weeks the Horizon system was always showing a loss (*Call Logs MO15 Doc 006, p24).*
23 February 2006	SM called HSD to tell them that she had losses every week in two of her Stock Units (*Call Logs MO15 Doc 006, p25).*
14 January 2008	An audit revealed a shortage of £77,643.87 (*Interview Notes MO12 Doc 13, p1).* SM was interviewed under caution by PO Investigators. SM told the Investigators that she believed the shortage was caused by theft by others *(200000265).* Despite SM's stated belief there had been theft by others, the Investigator asked SM "*for proposals on repayment of shortage" (200000265, p1).*
12 March 2008	SM was interviewed, not under caution, by POL to "give [her] the opportunity to put forward reasons why her

POL00142389

	contract... should not be terminated" (*Interview Notes MO12 Doc 13, p1).*
	SM was asked how she was going to "*make good the money?*" (*Interview Notes MO12 Doc 13, p15).*
01 April 2008	A PO lawyer wrote to the investigation team advising there was a realistic prospect of conviction of SM for theft and false accounting and that she had been charged accordingly. (*136013019)*
	SM was charged with one offence of theft of £74,609.84 between 15 November 2006 and 14 January 2008 contrary to s 1(1) of the Theft Act 1968 and four counts of false accounting contrary to s 17(1) of the Theft Act 1968 (*200000002)*
	PO wrote to SM to inform her that her contract was being terminated on the grounds that £77,643.47 had been lost as a result of misuse of PO funds and falsifying accounts. The letter stated that SM as SPM was responsible for all losses, which should be made good without delay (*31005496).*
19 December 2008	SM pled guilty to false accounting and not guilty to the single charge of theft at Woking Magistrates' Court (*100000096, p14).*
30 May 2009	SM's trial was adjourned when she produced an article from Computer Weekly, highlighting potential issues with Horizon *(200000073).*
14 July 2009	At a pre-trial hearing, SM's lawyers indicated that they required documentation regarding Horizon's operation at West Byfleet *(200000073)*
25 August 2009	PO wrote to SM's lawyers saying it would take 6-8 weeks to obtain documents from Fujitsu relating to Horizon *(200000073).*

POL00142389

01 October 2009	SM's lawyers made a disclosure application to which no response from PO was received *(200000073).*
30 November 2009	SM's lawyers made a further disclosure request to PO, to which no response was received (*200000073).*
21 January 2010	SM's lawyers wrote to PO to note that none of SM's disclosure requests had been acknowledged despite 9 months having passed since SM raised issues with Horizon *(200000073)*
02 October 2010	SM was found guilty of theft and false accounting at Guildford Crown Court. (*108069988)*
11 November 2010	SM was sentenced to 15 months' imprisonment. (*100000094, p3).*

POL00142389

APPENDIX II

Evidence relating to POL's investigations into SPMs

1. The approach of POL during its investigations into unexplained shortfalls was to proceed on the assumption that the SPM had committed theft (**Common Issues, 462, 566; Horizon Issues, 177, 493(4)**). As an email sent by a POL lawyer stated, PO's view was that the suggestion it was for PO to "*prove that errors were not the result of a fault with Horizon* […] *seem*[ed] *backwards*" **(179000002, p29)**.

2. In accordance with this view, at interview POL treated SPMs as if it was for them to establish a defence rather than for POL to prove theft. In line with this approach all of SM, TF and JS were asked at interview to provide positive proof that they had not stolen the money (**M057_POL_007; GA_016_108008021; 171000076; 200000265)**.

3. If, as SM, TF and JS could not, the SPM could not provide an explanation for the discrepancy in the accounts, they were treated as though they had failed to displace the presumption of guilt placed upon them by the Horizon record. POL equated the absence of positive evidence that theft had not been committed with the existence of positive evidence that it had:

> *"POL: I think you have taken the money… I have no evidence to suggest otherwise.*
> *A175: No, no, no, what evidence can you say that you believe that I took money.*
> *POL: The money has been stolen from the Post Office*
> *A175: Why do you believe that?*
> *POL: Well where is it"* **(179000002, p10)**

4. POL took this approach despite the consistent assertions of SPMs under investigation that they:
   a. had not committed theft;
   b. could not explain how the shortfall had occurred; and
   c. had inflated the figure in the cash account only because they did not know what else to do about the unexplained apparent discrepancies.

5. When being interviewed by POL Investigators, SPMs repeatedly denied theft in the strongest possible terms:

POL00142389

[B189]: "*I have not taken money out from there. Not a penny*" **(190000001, p2)**

[A159]: "*I would like to say that at no point have I ever taken money out of the post office*" **(190000001, p10)**

6. These denials were usually made alongside a clear statement that the SPM did not know how the discrepancy in the accounts had occurred:

[A636]: "*Q: You stole the money didn't you*
A: No […] *I didn't steal the money*
Q: So what happened to it
A: I don't know." **(190000001, p14)**

[A074]: "*Q: Why's there a shortage on there then?*
A: I don't know I can't explain that [...] *I've thought really hard* […] *but we can't sort of come up with a logical answer*" **(190000001, p16)**

7. There was a clear trend of SPMs explaining to POL that they had falsified the accounts only because they could not explain how the shortfalls had occurred and knew that PO would hold them liable for repayment:

[A159]: "Q. *Why didn't you just show your losses each week?*
A. Because I always assumed I'd have to settle them straight away." **(190000001, p10)**

[A177]: *"* […] *I was adding it on, to cover it over because I couldn't afford it.*" **(190000001, p14)**

[A187]: "Q. *Did you know that it was wrong to put in a false figure?*
A. Oh yes. I was well aware of it but I didn't know what else to do…
Q. So basically you were inflating the cash figure because you simply couldn't put the money back in?
A. Yes." **(190000001, p19-20).**

"*B107 told me […] she had been artificially inflating the cash due to ongoing discrepancies on horizon that she could not explain*" **(449000166, p6)**

POL00142389

8. Despite all of the above, POL investigators did not acknowledge or consider the possibility of Horizon errors being responsible for discrepancies. They often feigned ignorance that such errors were possible or incorrectly asserted that they were impossible when the issue was raised by SPMs:

> [A692]: "*Is there no way there can be an error on the system?*
> *PO: What, what sort of error can be on the system?"* (**179000002, p6)**

> "[Investigator] *explains that errors don't happen like that and theft is suspected. It is only* [redacted] *or A613 that could have taken the money.*" **(179000002, p14)**

9. Where SPMs raised the possibility of Horizon playing a role in alleged shortfalls, POL did not pursue this line of inquiry by obtaining audit data recorded by Horizon (**Horizon Issues 905).** Instead, POL suggested to SPMs that the evidential burden for proving there was an issue with Horizon was on them, rather than it being a matter for POL to investigate:

> A556: "*…I personally think there was a fault in the system…"*
> POL: *"And what proof do you have of a fault in the system?"*
> A556: *"I don't have any proof."* (**179000002, p31)**

10. On one occasion, it is apparent that an SPM who had raised an issue with Horizon had been charged with theft without the POL even having looked at the substance of the calls she had made to the Horizon helpline:

> "*It is possible that she may contest the theft charge and in view of her explanation under caution she may bring into question her claim that the Horizon system was not working properly. In that instance it would be necessary to contact the Helpline regarding any calls made. "* (**179000002, p18)**

11. POL investigators wrongly placed the burden of proving issues with Horizon existed on SPMs despite the fact that:

    a. it was not possible for SPMs to identify the causes of apparent discrepancies without PO's cooperation (**PO-033/70; Common Issues, 484-485)**;

    b. suspended SPMs were denied access to any information or records (**PO-033/70; Common Issues, 886)**; and

POL00142389

c. the only way to understand anomalies in branch logs with full audit data, which was not provided to SPMs (**PO-034/73).**

POL's oppressive behaviour during investigations

12. The style of POL investigation caused one SPM to admit to theft simply to end the interview as soon as possible because they felt "*very intimidated*" and "*would have said anything*" to get out of the situation **(190000001, p26).**

13. POL repeatedly either wrongly asserted that SPMs' liability to repay apparent losses was strict or failed to correct SPMs' impression that this was the case. In so doing, POL concealed the fact that the liability actually required negligence or fault on the part of the SPM (**PO-036; Common Issues, 723**). The following are three such examples:

> PO: "*You knew if you showed* [the loss] *then somebody would ring you up and say you need to make this good.*
> A159: "*Yes*". (**190000001, p 10)**
>
> PO: "*Tell me your understanding regarding what should happen when the office misbalances?*
> *Seema Misra: Have to make good any losses."* **(200000265, p5)**
>
> PO to Janet Skinner: "*… Losses and gains have to be made good by you. That's in your contract. You know that don't you?"* (**171000076.pdf)**

14. PO Investigators sometimes untruthfully told SPMs that no other SPM had reported a possible issue with Horizon. One SPM, as late as 2012, was told in response to their concern about Horizon that "*nobody else in the whole country has had a problem*" with Horizon (**179000002, p31)**. In reality, by 2012 there had been 21 known bugs with Horizon over the preceding 13 years (**Appendix 1, Appellants' Proposed Statement of Agreed Facts)**

POI knowledge about issues with Horizon

15. POL's knowledge about Horizon came from two sources – either from Fujitsu or from issues reported to it directly by SPMs (as to the latter, see §21 below).

16. POL was entirely reliant on Fujitsu to inform it whether a shortfall in accounts was caused by a defect, error or bug in Horizon (**Horizon Issues 995)**. In accordance with

POL00142389

this set-up, all investigations relating to Horizon were carried out by Fujitsu rather than by POL, as is demonstrated by the PEAKs and KELs recorded by Fujitsu. (**Horizon Issues 995).**

17. However, despite the investigations themselves being carried out by Fujitsu, POL always had access to the causes of alleged shortfalls in branches, including whether they were caused by bugs, errors or defects in Horizon, by obtaining the necessary information from Fujitsu. (**Horizon Issues 995).**

Reports made to POL by SPMs about suspected issues with Horizon

18. Some SPMs had reported issues to POL before the point at which they were accused of theft. One SPM had reported issues with "doubling up" transactions and was referred to NBSC. However, NBSC did not follow up and an Area Manager noted they were not "*getting anywhere*" in resolving the issue (**152003867).**

19. During the investigation process, some SPMs explicitly told POL that they suspected that the Horizon system was responsible for the alleged shortfalls, as shown by the following interview extracts:

> PO: "*If you're telling me that you haven't taken the money and you don't suspect your sister of taking the money, can you explain to me how we can lose… about £500 a week?*
> B383: "*The Horizon system…I think there's something seriously wrong with that system….I have heard a lot of postmasters losses that they have incurred that they can't account for…I think there is something not right about Horizon.*" (**108028400** and **108028401)**
>
> A556: *"I personally think there was a fault in the system so that's why it keeps giving me a loss"* (**179000002, p31).**
>
> A095: "*We swapped over to Horizon in August. Pretty shortly afterwards, in fact I think it was even from the first week, we were having shortages.*" **(179000002, p27)**

20. On other occasions, while an SPM under investigation did not explicitly state that they believed there was an issue with Horizon, the information being given to POL by the SPM could have led it to inquire whether this might be the case. For example, on one occasion POL asked an SPM why a transaction wasn't entered on the Horizon system,

POL00142389

but the SPM insisted that they had entered every transaction that had ever occurred (**10029727).**

Obfuscation of problems with Horizon

21. Throughout the investigations as a result of which the Appellants were convicted, POL consistently told some SPMs that:

    a. "*the system couldn't cause losses*" (**179000002, p34);**
    b. there was "*no problem*" with it (**GA_004_438001005)**; and
    c. the reported issue with Horizon was "*peculiar to*" (**GA_004_438001005)** that particular SPM.

22. This was despite 21 bugs having been identified between 2009 and 2013 (**Appendix 1, Appellants' Proposed Statement of Agreed Facts)**.

23. In all of the Appellants' trials, POL positively asserted that it was robust (**PO-020/53).** However, the evidence provided in witness statements by PO employees was not always supported by the facts.

24. For example, a POL security analyst swore in her witness statement that she had "*never personally come across any computer problems generating cash shortfalls and B009's explanation sounded completely implausible*". **(179000002, p9***).* This claim of implausibility is contradicted by the fact that exactly such a discrepancy had been reported as far back as November 1999 (**Horizon Issues, 236).**

25. There is evidence that POL attempted to conceal evidence in order to prevent it prompting either disclosure requests from SPMs in relation to Horizon or questions about the adequacy of investigations conducted by POL:

> *"I would prefer not to let the Applicant see the sentence in Diane Matthews' report of 25 October 2005 which noted that she was 'currently awaiting the results of tests by Fujitsu on the Horizon system' if those test results cannot be found. Such a sentence may well invite a request for disclosure of the test results. There may also be a risk the Applicant will suggest the investigation was inadequate or incomplete."* **(179000002, p37)**

POL00142389

26. Some SPMs who tried to raise issues with Horizon at trial were described by POL as having "*jumped on the Horizon bandwagon*". (**179000002, p24).** The POL's protective attitude towards Horizon is demonstrated by evidence of POL making prosecution decisions on the basis of how susceptible Horizon would be to attack in a given case. For example, on one occasion POL accepted a plea of false accounting in order to avoid "*a three day* [theft] *trial and an attempt by the Defence to discredit the Horizon system which* […] *was regarded as being undesirable*". It was noted that this was a "*good result*", partly because "*the reputation of Horizon is not affected*" **(179000002, p26).**

27. There was recognition within POL that a reasonable prospect of conviction relied on being able to obtain statements "*confirming that the computer system was operating correctly at the time and there was no reason to doubt its accuracy etc*" **(179000002, p13).** Charges being disputed by SPMs was sometimes a prompt for the POL to obtain statements "*confirming that the computer system was operating correctly at the time and there was no reason to doubt its accuracy*" (**179000002, p33)**. However, it appears that obtaining such a statement was generally regarded by POL as a necessary procedural step to be undertaken "*in due course*" (**179000002, p4).**

28. On one occasion a POL case management memo requested that the "*usual statement from Fujitsu services dealing with the correct functioning of Horizon*" (emphasis added) be obtained in relation to an upcoming trial (**179000002.pdf, p7***).*

29. Connected to this request for the "usual statement from Fujitsu" is the finding that Fujitsu used a "*standard form of words*" in its employees' witness statements which were relied upon at SPMs' trials (**Horizon Issues, 294)**. This standard form of words was a "*legally drafted assertion of accuracy*" by which Fujitsu witnesses asserted that the Horizon system was at all material times working properly, or that if it was not this did not affect accuracy (**Horizon Issues, 294)**. This statement has been found to be at odds with Fujitsu's acceptance of flaws with audit data (**Horizon Issues, 294).**

30. In relation to Andy Dunks (a Fujitsu employee who used this statement) it was found that he could not have known personally whether the assertion of accuracy used in these witness statements was true (**Horizon Issues, 294).** Among the SPMs at whose trials both this form of witness statement was used, and by Andy Dunks, is Seema Misra (**Horizon Issues, 282).**

POL00142389

31. There were other prosecutions in relation to which "*evidence from Mr Dunks highlight*[ing] th*at the reported faults* [with Horizon] *would in essence not have affected the balance*" was relied upon in supporting POL's conclusion that there was a realistic prospect of conviction **(179000002, p12).**

POL00142389

APPENDIX III

List of Authorities

Statute

Criminal Appeal Act 1995, 9, 13

section 1, 2, 7, section 23 of the Criminal Appeal Act 1968, 1, 2, 7, 23

Criminal Procedure and Investigations Act 1996, 1, 2, 3, 23, 26, 27

Guidance

Criminal Procedure and Investigations Act Code of Practice

Attorney General's Guidelines on Disclosure

Caselaw

Whitfield v Lord Lé Despencer (1778) 2 Cowp 754

R v Lee Kun [1916] 1 K.B. 337

Harold Stephen & Co Ltd v Post Office [1977] 1 WLR 1172

R v Post Office, ex p Association of Scientific Technical and Managerial Staffs [1981] ICR 76.

Moevao v Department of Labour [1980] 1 N.Z.L.R. 464

S v Ebrahim 1991 (2) S.A. 553

R (Bennett) v Horseferry Road Magistrates Court [1994] 1 AC 42

R v Latif & Ors [1996] 1. W.L.R. 104

R v Mullen [1999] Cr App R 143

R v Maxwell [2011] 1 W.L.R. 1837

Mouncher v Chief Constable of South Wales [2016] EWHC 1367 (QB)

R v E [2018] EWCA 2426 (Crim)

R (Wyatt) v Thames Valley Police [2018] EWHC 2489 (Admin)

Bates v Post Office (Common Issues) [2019] EWHC 1373 (QB)

Bates v Post Office (Horizon Issues) [2019] EWHC 3408

R v McPartland [2019] 4 W.L.R. 153

R v CB [2021] 1 W.L.R. 725