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REVIEW OF POST OFFICE LIMITED CRIMINAL PROSECUTIONS

A. INTRODUCTION

1. In an independent review on behalf of the Chairman of Post Office Limited ("**POL**"), Tim Parker, Jonathan Swift QC and Christopher Knight were requested to consider whether there was any further action that might reasonably be taken by POL to address a series of complaints raised by sub-postmasters ("**SPMRs**") about their alleged treatment by POL.

2. That review led to a written review document dated 8th February 2016 ("**the Swift/Knight review**"). In it, Messrs Swift QC and Knight identified, among others, two particular areas of concern that are germane to this review.

3. The first, which is found in a section headed, "Criminal Prosecutions",[1] is "whether POL acted appropriately in cases where it pursued charges both of false accounting and of theft (or whether POL pursued theft charges in cases where there was no proper basis in evidence to do so simply to encourage a guilty plea to the false accounting charge)."

[1] Paragraph 90 at 91(b), page 31
[2] Paragraph 114 at 116(c), pages 39-40

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4. The second area of concern, which is found in a section headed, "The Horizon System", [2] is "whether branch balances can be affected by third party alterations without SPMR knowledge."

5. In respect of the first area of concern, having set out the competing arguments, [3] Messrs Swift QC and Knight made the following recommendations:[4]

> **"(1) Legal advice be sought from counsel as to whether the decision to charge an SPMR with theft and false accounting could undermine the safety of any conviction for false accounting where (a) the conviction was on the basis of a guilty plea, following which and/or in return for which the theft charge was dropped, and (b) there had not been a sufficient evidential basis to bring the theft charge.**
>
> **(2) If such a conviction could be undermined in those circumstances, that counsel review the prosecution file in such cases to establish whether, applying the facts and law applicable at the relevant time, there was a sufficient evidential basis to conclude that a conviction was a realistic prospect such that the charge was properly brought."**

6. As regards the second area of concern, which was dealt with in the review,[5] they recommended:[6]

> **"POL seek specialist legal advice from external counsel as to whether the Deloitte reports, or the information within them concerning Balancing Transactions and Fujitsu's ability to**

[2] Paragraph 114 at 116(c), pages 39-40
[3] Paragraphs 100-109, pages 34-37
[4] Paragraph 113, page 38
[5] Paragraphs 130-148, pages 45-53
[6] Paragraph 149(6), pages 53-54

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delete and amend data in the audit store, should be disclosed to defendants of criminal prosecutions brought by POL. This advice should also address whether disclosure should be made, if it has not been, to the CCRC."

7. As a result of these recommendations, I received a set of instructions dated 18th February 2016 directly from Rodric Williams at POL enclosing the Swift/Knight review document and other material germane to the issues in order to advise upon the two areas of concern set out in their review.

8. Since receiving these instructions, a group civil claim has been filed against POL, in which allegations have been made that are related to the same subject-matter as was reviewed by Messrs Swift QC and Knight. The review commissioned by Mr Parker has subsequently been brought to a close, and POL is actively defending the civil claim. I have, however, been instructed to continue with the work requested by Mr Williams for the purpose of assisting POL's defence of the civil proceedings.

9. On 20th March 2016, I sent to Mr Williams by email my preliminary views. As regards the theft/false accounting issue I said that the recommendation, as formulated, suggested to me that the only solution would be to proceed to a review of all such affected cases, because the recommendation was predicated on the basis that "(b) there had not been a sufficient evidential basis to bring the theft charge".

10. In my view, the second limb to this recommendation was such that I could not advise on any basis other than to move to a review of affected case files, because it could never be appropriate, adopting the Code for Crown Prosecutors (which POL has adopted, and applies in

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making charging decisions), to charge theft when there is no sufficient evidential basis to support it.

11. The suggestion has been made that POL had been indicting charges of theft without any evidential basis solely to encourage and secure pleas of guilty to what was argued to be lesser false accounting charges.

12. The underlying, serious allegation is, it appears to me, that, as a matter of deliberate policy, POL has been systematically manipulating the criminal justice process in its position as private prosecutor as to amount to an abuse of the process.

13. As I pointed out in the email to Mr Williams, the safety of a conviction based even on a plea of guilty might be undermined by a serious abuse of the process. There was, I pointed out, authority that material non-disclosure might lead to the finding of an abuse even where the defendant had pleaded guilty. This is because the defendant has, by the non-disclosure, been deprived of the opportunity to deploy an argument to stay the indictment. So too here, if there was undisclosed evidence of a deliberate practice to do as has been alleged, then that could lead to a finding of an abuse.

14. As regards the second issue (Balancing Transactions), I had been informed that this issue had been disclosed to the CCRC. Accordingly, I observed in the email that my remit was solely to advise on its disclosure to "defendants of criminal prosecutions".

15. In paragraphs 149(4) and (5) of the Swift/Knight review, recommendations were made that POL instruct a suitably qualified party to review "the use of Balancing Transactions throughout the lifetime of the Horizon system, in so far as possible, to independently confirm from Horizon system records the number and circumstances

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of their use" and to instruct a suitably qualified party to review "the controls over and use of the capability of authorised Fujitsu personnel to create, amend or delete baskets within the sealed audit store throughout the lifetime of the Horizon system, in so far as possible."

16. In the email, I advised that there was no point advising on the recommendation set out in paragraph 149(6) unless and until the reviews recommended in paragraphs 149(4) and (5) were complete, and POL knew whether there was a real problem, rather than some highly speculative possibility, my view being that premature wholesale disclosure might lead to unjustifiable, new claims of third party tampering being made.

17. In his response email of 4th April 2016, Mr Williams accepted that I should move to a review of the relevant files affected by the first area of concern, and, in so far as the second area is concerned, that could and should await the outcome of the recommended further reviews.

18. Following a telephone conference with Mr Williams on 5th April, I was sent, on 11th May 2016, the first tranche of two case files to review falling within the first area of concern. I have since been sent six further case files to read and comment upon. In total, therefore, I have reviewed eight case files said to be affected by the first area of concern. Together they comprise a total of 23 Lever Arch files.

19. To recap, therefore, this review deals only with the theft/false accounting issue. I shall await the outcome of the recommended further reviews before advising on the second area of concern.

20. I have not set out in this document the arguments rehearsed in the Swift/Knight review, neither have I sought to repeat the content of my advice of 8th March 2015, which dealt with certain aspects of the

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theft/false accounting issue, which has been raised by other parties, and which has been the subject of on-going exchanges of correspondence.

21. Before coming to deal with each case file in turn, I return to the issue of abuse of process.

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B. ABUSE OF PROCESS

22. A prosecution may be stayed essentially on two bases: (1) where it is impossible for the defendant to have a fair trial and (2) where a stay is necessary to protect the integrity of the criminal justice system (in other words where it is unfair to try the defendant). The allegation here principally engages the second limb of abuse.

23. The decision whether or not to prosecute requires a judgment to be made. Consequently, even if it could be shown that there was a failure to follow relevant guidance or policy, it does not follow that will amount to an abuse of the process. However, if the allegation is that POL pursued an improperly motivated and deliberate policy of disapplying the evidential stage of the full Code test in the Code for Crown Prosecutors (which POL applies) by charging theft, where the evidential sufficiency test was not met, solely to influence or encourage a plea to a charge or charges of false accounting, then that could well amount to an abuse of the process.

24. Material non-disclosure may lead to the quashing of a conviction even where there has been a plea of guilty on grounds that engage the first limb of abuse, namely, that the defendant did not have a fair trial.

25. In *R. v. Smith and others*[7] it was held, "If material is indeed capable of supporting [an argument to stay the indictment as an abuse of the process] then the applicants have been deprived of the opportunity to deploy it and therefore of having the indictment stayed. The failure to disclose the material therefore denied them a fair trial … the question therefore is whether or not the material could indeed have had a causative impact on a tenable abuse argument … The applicants were therefore denied the opportunity to deploy that material in support of

[7] [2004] EWCA Crim 2212 at [19]-[21]

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the abuse of process application and were accordingly denied a fair trial. Despite their pleas of guilty the convictions were unsafe."

26. If such a policy existed, then the non-disclosure of it to those defendants unsighted by it might lead to the safety of their convictions (their pleas of guilty to false accounting) being called into question, the argument being they were wrongfully misled into pleading guilty to the "lesser" charge of false accounting, which they might otherwise have contested, for fear of being convicted of the "greater" charge of theft with which they had been unjustifiably charged (these being the arguments, as I understand them, of Lord Arbuthnot and Second Sight).

27. There are good arguments to resist such allegations, most or all of which have been rehearsed in exchanges of correspondence: the defendant was able to challenge the sufficiency of the evidence said to underlie the theft charge, if so advised, and to seek its dismissal; indeed, it was open to the defendant to contest all the charges and seek to make a submission of no case to answer at the close of the prosecution case, if so advised; the defendant could, through his advisors, seek disclosure, which might reasonably assist his case; finally, it is ultimately the defendant's decision to plead guilty to a charge or charges of false accounting on the basis of the legally privileged advice he received at the time.

28. So the argument would be that the alleged deliberate failure by POL to apply the Code (otherwise adopted and applied by it), coupled with the failure to disclose the alleged policy of charging theft without any proper basis to do so, just to secure a plea to false accounting, rendered any trial process unfair and the allegedly deliberate policy to manipulate the process made it unfair to try the defendant.

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29. As I have said before, because of the narrow terms of the recommendation on this issue,[8] I see no option other than for me to review each affected case file, which I do now in no particular order.

[8] Paragraph 113(1)(b), page 38

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C. CASE FILES

Jacqueline McDonald

30. This defendant was born in GRO, and is now GRO She was GRO at the time of the proceedings against her in 2009. She was then SPMR at Broughton Sub-Post Office in Preston, which was part of a shop, that she and her husband ran.

31. On 1st October 2008, a Business Development Manager, Caroline Richards, visited the post office in order to carry out a check of cash held at the branch. The post office had been declaring that it had excessive amounts of cash of over £100,000 and Ms Richards intended requiring the return of the excess cash.

32. The overnight cash holdings for 1st October 2008 had been declared as £120,102.98. On inspection, there was only £17,000 cash in the safe but there was no further cash.

33. Mrs McDonald was suspended and an audit team who went into the branch discovered there was a shortage of £94,380.69. Of that total, £85,505.38 was the difference in the cash figure, £6,524.24 the difference in stock figures, £1,673.49 the difference in cheque figures and £244.82 the difference in foreign currency figures. The total is arrived at when a debt of £432.76 is deducted.

34. In interview under caution, Mrs McDonald said she had taken over the post office in December 2006 and had started working full time in it in March 2007. In July 2007, the premises were closed for refurbishment and they were reopened in November that year.

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35. She claimed that cash and stock were balanced every Wednesday, that she alone controlled the safe, that usually no more than £20,000 was kept in the safe, and she claimed she would physically count the cash three times a week at least. She added the last correct cash declaration had been made in March 2008.

36. She conceded that the cash declarations falsely represented the balance of cash at the post office and, in interview, admitted offences of false accounting. She refuted any suggestion that her assistant was responsible for stealing any money and she denied stealing the money herself.

37. She claimed to have called the helpline but enquiries of the helpline revealed that none of the calls from the post office concerned any cash shortage. She claimed also that mistakes were made when cash was remitted to the post office from the branch, but the claims was untenable in light of POL systems and processes, which ensured that there would have been an audit trail of any remitted cash.

38. Alice Smith, a former accountant to Mr and Mrs McDonald acted for the couple when the post office was bought in 2006. She made a witness statement in October 2009. In March 2007, she said, she had been concerned that the business did not have sufficient cash flow to service its borrowings and it became apparent that Mrs McDonald had not provided accurate information about creditors. This resulted in the actual profit of the business being overstated in the accounts. Following the closing of the business for refurbishment in July 2007, in July 2008, she discovered that banking plus cash payments were around £23,000 more than recorded takings for the quarter ending July 2007. In the following quarter ending October 2008 there was an excess of £28,000. When Ms Smith questioned Mrs McDonald about this, she claimed that she and her husband had entered the UK from the USA

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(where they had previously lived) with £100,000, which she had kept in the safe and used as and when required. The McDonalds ceased employing Ms Smith following her enquiries into a £51,000 discrepancy in the cash control account. A POL Security Team memorandum of 30th April 2009 indicates that the accountant made a suspicious activity report under the Money Laundering Regulations in relation to a sum of £50,000 deposited into their business account. I am unclear if this is the same sum as the £51,000 Ms Smith refers to in her witness statement, in which she makes no reference to any suspicious activity report.

39. This case, like others I deal with below, occurred before the separation of Royal Mail and POL in April 2012, and it predates the coming online of Horizon Online, which was rolled out into all POL branches between January and September 2010. I assume that this case has been included in my review for the same reasons given in footnote 5 of the Swift/Knight review, namely, before 2012 prosecutorial decisions relating to SPMRs were taken by the Royal Mail part of the business, but they were being done in the name of, and on behalf of, POL. For this reason, in this review I do not distinguish between pre and post-separation cases but am treating them, for all purposes, as POL cases.

40. In a memorandum dated 15th December 2008, Jarnail Singh, then a senior lawyer in the Criminal Law Division of the Royal Mail, later of POL, recorded his decision that the evidence was sufficient to provide a realistic prospect of conviction of Mrs McDonald upon the charges he had set out in a schedule attached to the memorandum. They were charges of theft of £94,380.69 (the audit shortage) and, in view of her admissions in interview, charges of false accounting.

41. On 21st April 2009, Mr Singh instructed counsel, John Gibson, to prosecute, advise on the evidence and to settle the indictment.

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42. The brief to counsel indicates that a draft indictment based on the schedule of charges was sent to counsel. As I understand it, counsel approved the draft.

43. The draft indictment indicted the defendant on seven counts. Count 1 was a general deficiency count alleging theft relating to the total loss of £94,380.69. Counts 2 to 7 were discrete allegations of false accounting. I have seen two Advices in writing from counsel. The first is dated 23rd April 2009. In it, counsel advised, among other things, that he was "satisfied that the statements and exhibits … are sufficient to support the counts on the draft indictment …" [9]

44. The second, further Advice, dated 2nd June 2009, dealt with matters arising from the Plea and Case Management Hearing ("**PCMH**") at Preston Crown Court at which the trial date was fixed for 9th December 2009.

45. At a further hearing on 27th November 2009, the trial date was vacated at the behest of the defence due to the time required by their expert, and a new provisional trial date was fixed for 6th April 2010 (the date was later moved to 12th April). It appears that at the November hearing an approach was made to the prosecution to see whether they would be prepared to accept pleas of guilty to the counts alleging false accounting in return for discontinuing the theft charge once the losses had been repaid.

46. A memorandum of 2nd December 2009 from Phil Taylor of the Royal Mail Criminal Law Division, and a letter of the same date from Mr Taylor to counsel, indicated that counsel's view was that "the defendant must also be guilty of theft and that he would be prepared

[9] Paragraph 4

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to run it", and that the investigation team probably shared the same view.

47. The plea offer was put in writing by Mrs McDonald's solicitors on 30th November 2009. In it, among other things, they proposed the prosecution discontinue or withdraw the allegation of theft, that Mrs McDonald would plead guilty to the counts of false accounting, and that a repayment plan would be put into operation whereby the sum of £85,000 would be repaid to POL over a period of 12 to 18 months.

48. In an email from counsel to Mr Singh, counsel said he had told defence counsel that the proposals mentioned to him at court were not practical. In a memorandum of 9th December 2009 the investigation team confirmed their view that Mrs McDonald was also guilty of theft.

49. In a letter dated 23rd December 2009, Mr Taylor wrote to the defence solicitors saying the prosecution would be prepared to accept a plea to the missing cash in the sum of £85,505.38 rather than the audit shortage of £94,380.69 but would require compensation/confiscation in that sum.

50. On 12th April 2010, Mrs McDonald did plead guilty to the counts alleging false accounting (Counts 2 to 7). However, the prosecution did not accept the pleas, and because the defence expert required yet more time to provide a further report, the trial of the theft count went off to 9th November 2010.

51. Many months later, on 8th November 2010, Mrs McDonald in fact pleaded guilty to the count alleging theft (Count 1). On 21st January 2011, she was sentenced to 18 months' imprisonment on each count to run concurrently. Confiscation was dealt with on 28th July 2011, when the court found that Mrs McDonald had benefited in the sum of

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£99,759 odd, that the realisable amount was nil, and that the amount to be recovered was a nominal £1.[10]

52. Given these facts, the case falls outside the terms of the recommendations for this review because, although the defence proposed that Mrs McDonald would plead guilty to the false accounting charge if the prosecution were to withdraw the theft charge, in fact the prosecution continued to pursue the count of theft in spite of Mrs McDonald's guilty pleas to the false accounting charges, and sought a conviction on it, to which, in the end, Mrs McDonald also pleaded guilty.

53. In this case, the prosecution did not regard the false accounting charges as alternative allegations to the charge of theft, but as evidence of additional criminality deserving of proof to conviction. This was one of those cases, therefore, where the offender was falsely accounting not to conceal muddle but to conceal the theft, that is to say the dishonest appropriation of property belonging to POL, with the intention of permanently depriving POL of it, rather than dishonestly securing some temporary gain only,[11] which is sufficient evidence to support a charge of false accounting, but is insufficient evidence to support a charge of theft.

54. Despite the fact the case falls outside the strict remit for this review, I have chosen deliberately to deal with it at some length, not only because the case file has been provided to me for review, but also because it shows the approach the prosecution took to the case where there was evidence both of theft and false accounting, to which, ultimately, Mrs McDonald pleaded guilty.

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[10] I have taken this from the endorsements on the backsheet to counsel's brief
[11] See paragraphs 16-19 of my Advice of 8th March 2015, and *R. v. Eden* (1971) 55 Cr. App. R. 193

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55. Thus, there can be no question whether it was appropriate to charge both theft and false accounting in this case. The in-house lawyer for Royal Mail (as he was then) decided that the evidence satisfied the evidential stage of the full Code test. Counsel whom he had instructed agreed with his decision and with the content of the draft indictment and endorsed both in an Advice in writing. I agree with the approach and the decision.

56. When pleas to false accounting were offered, they were rejected on the basis there was evidence also of theft, that is to say, evidence that satisfied the evidential stage of the full Code test. The decision to seek Mrs McDonald's conviction upon the count of theft was amply justified by her later plea to it.

Josephine Hamilton

57. Born on GRO at the time of the proceedings against her in 2006 Josephine Hamilton was GRO years of age. She is now GRO years old. She had been SPMR at South Warnborough Sub-Post Office since October 2003. The post office formed part of a general store and a coffee shop in a semi-rural location in Hampshire. She had been trained in the use of Horizon and in the running of the post office.

58. Mrs Hamilton employed June Partridge, who told investigators in her witness statement of 31st July 2006 that she would assist in the post office by selling stamps and by dealing with pension and allowance customers, but she never had access to the safe or balanced or declared cash holdings.

59. On 6th March 2006, Rebecca Portch of POL's Retail Cash Management Team contacted the post office and, it is believed, spoke to Mrs Hamilton about the very high levels of cash reported as kept on the

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premises. Ms Portch asked that at least £25,000 be returned to POL by 8th March 2006. On that same day, Mrs Hamilton contacted her union representative to claim there had been problems at the post office.

60. On the day following contact by Ms Portch, on 7th March, Mrs Hamilton GRO GRO

61. Due to concerns about the information provided and Mrs Hamilton's failure to return the cash requested, a POL investigator, an area intervention manager and an auditor attended the post office on 9th March 2006. Following a check of all the documents and accounts it was discovered that the post office was short by £36,644.89. Later that day the investigators attended Mrs Hamilton's home address, where she was suspended, and they invited her to be interviewed.

62. Analysis of the records showed that the cash on hand figure recorded on the weekly cash accounting documents had increased from about £15,000 at the end of 2004 to over £35,000 by February 2006.

63. Mrs Hamilton was interviewed under caution in May 2006 in the company of her solicitor, having been provided with documentation outlining the allegations against her. She made no comment to the questions asked of her but provided a prepared statement in which she claimed to have received inadequate training, she said that POL systems were shambolic and she detailed problems she had encountered running the post office; she said she had made calls to the helpline. She denied theft or acting dishonestly.

64. Graham Brander, the investigation manager, reported on 17th May 2006, and, in response to certain queries made of him by Juliet McFarlane, a lawyer in the Royal Mail Criminal Law Division, which

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she detailed in a memorandum of 26th June 2006, Mr Brander supplemented his report on 11th August 2006.

65. In his first report he said, "Having analysed the Horizon printouts and accounting documentation I was unable to find any evidence of theft or that the cash figures had been deliberately inflated." That must have been a reference solely to Horizon records, because a little later he added that he could not identify "the period of offending, mainly due to the fact that Mrs Hamilton responded no comment to my questions. You may wish to consider a charge of theft for the audit deficit of £36,644.89, covering the period from when Mrs Hamilton became Postmaster (21/10/03) to the date of the audit (09/03/06). The only evidence appears to be the fact that the audit identified the money as missing."

66. In his supplementary report in August he said, "The audit completed the Branch Trading Statement for Period 11 on 09 March 2006. It would appear that Mrs Hamilton must have been the person who completed Branch Trading Statement for period 10 (13/01/06 – 08/02/06). This statement showed a shortage of £6.74 and the cash on hand as being £35,515.83. As the cash on hand for Trading Period 11 (08/02/06 – 09/03/06) was £1,933.48 then either the whole audit deficit of £36,644.89 went missing between those two periods (no evidence to suggest it has) or the cash figure on Trading Statement period 10 must have been false."

67. In so far as calls to the helpline go, the investigator had examined the Network Business Support Centre ("**NBSC**") call logs and calls to the Horizon helpdesk. A number of losses of various sums ranging between £750 and £4,188 had been reported to the NBSC between 3rd December 2003 and 5th January 2006, but the investigator concluded he

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could not see "anything that relates to a single or multiple discrepancies that would account for the audit deficit of £36,644.89."

68. The Hamilton case is also a pre-separation case and it predates the rollout of Horizon Online. I have assumed that this case has been included in this review for identical reasons as those given above in relation to the McDonald case.

69. In her 26th June 2006 memorandum, the case lawyer, Juliet McFarlane, had expressed the opinion that the evidence "gave rise to offences of theft / false accounting against the offender." However, before advising she had asked Mr Brander to deal with a number of points that were to result in his 11th August report.

70. In a further memorandum dated 11th October 2006, Ms McFarlane advised that in her opinion, "the evidence is sufficient to afford a realistic prospect of conviction of the above named (Hamilton) on the charges set out on the attached Schedule. In my opinion there is a low/medium prospect of success. The defendant will no doubt argue that she got into a muddle due to confusion with the Post Office system and lack of training. The prosecution will need to refute this."

71. She added, "In due course an approached (sic) may be made by the defence regarding consideration of false accounting charges. If this happens I will need to review the file."

72. Although she expressed it as a schedule of "charges" (plural), the only charge I have found in any schedule that Ms McFarlane drafted is a single charge alleging theft of £36,644.89 on or before 7th March 2006.

73. Her advice regarding future "consideration of false accounting charges", coupled with an internal memorandum of 18th October 2006

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from a casework advisor on the investigation team, which refers to "a schedule of 1 charge" confirms that theft was the sole charge Ms McFarlane considered available on the evidence at that time.

74. If I have any criticism at all of her decision-making it is the glaring inconsistency in advising that there is a realistic prospect of conviction, but then advising there was only a low/medium prospect of success. I highlight this issue now for the first and only time during my case reviews, although I have come across similar forms of assessment of the prospects of success in other charging decisions during the course of this process. Either there is or there is not a realistic prospect of conviction, but to qualify a decision that there is a realistic prospect of conviction with a view on the chances of success is not only to put a wholly unnecessary gloss on the evidential test, but also it risks the charge of irrationality in the decision-making process.

75. In this case, independent counsel, Richard Jory, was briefed on 13th February 2007 to settle the indictment and advise on evidence, as well as to appear for the prosecution at the PCMH at Winchester Crown Court on 12th March 2007.

76. Mr Jory settled the indictment on or about 27th February 2007. I have in fact seen two versions of it, one containing 14 counts, and the other 15. I am confident it is the 15 count indictment, which was preferred. Count 1 was an allegation of theft of £36,644.89 between 1st October 2003 and 9th March 2006, and Counts 2 to 15 alleged a series of offences of false accounting covering a period of from "on or about 1st December 2004" to "on or about 8th February 2006".

77. At the PCMH of 12th March 2007, among other directions, the trial was fixed for 10th September 2007. I have assumed Mrs Hamilton pleaded not guilty to all the counts on the indictment at this hearing.

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78. On 25th May 2007, the case was mentioned at the behest of the defence on the question of disclosure. It is apparent to me from the endorsed backsheet of counsel who attended the hearing that day that the judge requested the prosecution to review the indictment to see whether it would be more appropriate to cover a longer period. A further endorsement shows that Mr Jory drafted an amended indictment on 30th May 2007. This might explain the different versions of the indictment I have seen.

79. In his email of 30th May 2007 attaching the new draft indictment, Mr Jory opined, "Our case is that she has been carrying an increasing loss for some time. The purpose of this is to see whether she accepts this falsification [implicit in her prepared statement] or whether she contends that she completed the documentation accurately." He added, "Is there any evidence of lifestyle/debts/extravagance etc? ie where did the money go?"

80. The indictment counsel settled and the content of his email indicates he was satisfied there was sufficient evidence to support all the counts, including theft.

81. It appears from the content of a memorandum sent to the investigation team by Ms McFarlane on 9th August 2007, that this indictment, a set of draft admissions also drafted by counsel, and his opening note, had been sent to the defence.

82. The opening note is dated 25th June 2007. In it, the prosecution made clear its case. In so far as the increasing amounts of the cash on hand figures between the end of 2004 and February 2006 go, counsel wrote, "The prosecution indicates that this represents the defendant's efforts to hide the fact that she was in fact taking money from the post office

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during this time, and by recording the high cash figure was trying to cover up the fact she had taken it." [12]

83. In concluding, he alleged, "The truth is that the defendant had been inflating the cash on hand figure at the post office over a period of several months prior to the audit on 9th March 2006. She had done this in order to disguise her thefts of cash ... There is no doubt that the money has been taken and the Post Office have therefore lost over £36,000."

84. Thus, the prosecution was clearly alleging that she had covered up the theft of money by false accounting.

85. On or about 20th July 2007, the case investigator visited counsel's chambers to inspect 91 ring binders containing material provided by the defence, which they claimed POL had overlooked. According to the investigator, the documentation contained within the 91 ring binders was of the kind he expected to find in every post office. But he found nothing that offered any explanation for the audit deficit in this case.

86. At a further mention hearing on 26th July 2007, the trial date was moved to 10th December 2007.

87. On or about 9th October 2007,[13] Mr Jory emailed Juliet McFarlane and Jennifer Andrews of the Criminal Law Division to inform them that defence counsel had offered pleas to false accounting. He said he presumed the offer was to Counts 2 to 9, and he had been asked to take instructions as to the acceptability of the offer.

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[12] Paragraph 7
[13] The actual date of the email is not in fact revealed on the copy I have seen

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88. I am not clear whether the offer was made at a hearing or informally. Moreover, I fail to understand the basis of the presumption that the offer only embraced Counts 2 to 9. Neither issue is critical to my review.

89. Importantly, however, in the context of this review, Mr Jory added to the email, "My view is that there is evidence she has taken the money, and that there is sufficient evidence to support theft, but Royal Mail may be content with guilty pleas to dishonesty matters if she undertook to repay the amount of the shortage at the audit, ie £36,644.89." He advised that the investigators be spoken to for their view.

90. Thus, counsel's advice was clear: there was a sufficiency of evidence to support the charge of theft but, for pragmatic reasons, pleas might be acceptable if the money was repaid.

91. Mr Jory's email was forwarded to the investigators. On 10th October 2007, Mr Brander responded, saying he was in agreement with counsel, that in his opinion "the evidence clearly shows theft (charge 1), however, if the defence are offering up guilty pleas to all False Accounting charges (2 - 15 on my copy of the indictment), then I would suggest we accept this on the understanding that Mrs Hamilton agrees to repay the full amount (£36,644.89)."

92. He added that any decision to accept the pleas would be made by Dave Pardoe (I think I am correct in saying Mr Pardoe was the then Designated Prosecution Authority).

93. A memorandum of 15th November 2007 from Juliet McFarlane to the investigation team noted that counsel had requested the case be relisted for mention on 19th November 2007 to see whether the trial

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might be vacated should Mrs Hamilton plead guilty to the counts of false accounting. One option that was canvassed in the memorandum was leaving the count of theft on the file pending repayment by the date of trial (fixed for 10th December 2007) or some later date.

94. A subsequent exchange of emails on 16th November 2007 canvassed views about the efficacy of accepting pleas to false accounting as regards confiscation proceedings. Ms McFarlane's view, of which she informed counsel, was that whilst there was "no outright objection to proceeding with False Accounting, there is concern as to recovery of money. We have to date been able to recover where False Accounting only is charged though on one or two cases the Defence will argue against. Whilst a plea to Theft would be preferable, in the event of non-payment the intent would be to proceed to confiscation."

95. Counsel's endorsed backsheet reveals that, at the 19th November hearing, the prosecution sought and obtained leave to amend the indictment, and that the defendant pleaded guilty to Counts 2 to 15 (the false accounting allegations). Sentence was adjourned to 25th January 2008 for reports.

96. The endorsement continues, "Pros. made it plain pleas acceptable only if repayment by 25.1.08 [NB: will consider confiscation in the event of non-compliance]".

97. In a further memorandum of 19th November 2007, Juliet McFarlane informed the investigation team that Mrs Hamilton had been informed that full payment must be made prior to 25th January 2008, and that the theft count had remained on the file "on the understanding that it should be proceeded with if the money is not paid". That was incorrect. The order for the count of theft to lie on the file was not made on 19th November 2007. In fact it was made at a hearing on 4th

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February 2008 once the prosecution had received reassurance that the money would be repaid.

98. It is clear that the repayment was not to be made under any court order, but as a condition of the dropping of the theft charge.

99. By 1st February 2008, no repayment had been made. Ms Andrews informed Mr Brander in a memorandum of 1st February 2008 that the theft charge could be proceeded with "in the event the money was not repaid before sentence, or compensation and confiscation could be sought in relation to the basis of her plea as she appears to accept responsibility for the loss."

100. Counsel's backsheet shows that, on 4th February 2008, Mrs Hamilton was sentenced to a community order with a 12 month supervision order and £1,000 was ordered to be paid towards prosecution costs. Her solicitor signed an undertaking that the £36.644.89 would be paid within the week. As indicated above, the count of theft was accordingly ordered to lie on the file. On 18th February 2008, the investigation team confirmed receipt of a cheque for £37,644.89, which included the £1,000 costs.

101. The review of this case shows that consideration was given to the nature of the indictment both by the in-house lawyer and independent counsel, who considered there was evidence of theft to support the charge in Count 1. I agree that absent any tenable explanation from Mrs Hamilton consistent with her being not guilty of theft, there was indirect evidence to support the charge of theft: she had increasingly declared excessive cash holdings that were not to be found in the post office. In her prepared statement, which is the only word she uttered about the audit shortage, she appeared to blame a lack of training and shambolic POL systems. However, further investigation of her calls to

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the Horizon helpdesk and to the NBSC helpline failed to explain the loss of over £36,000, and, more importantly, the reason why she should need to falsify the declarations to such an extent if it had been for reasons unrelated to her taking the cash over time, such as to cover up a genuine muddle.

102. As regards her pleading guilty to the counts of false accounting, Mrs Hamilton's own counsel clearly initiated discussion about pleading guilty to them in early October 2007, which, given the terms of the email Mr Jory sent Ms McFarlane about it, can only have been on Mrs Hamilton's instructions. The prosecution accepted the pleas on condition that she repaid the losses, which she did, voluntarily, by 18th February, which is a powerful indication of her acceptance that the loss had been caused by her having taken the money, even though she was contractually bound to repay it.

103. There is no evidence whatsoever that Mrs Hamilton was pressured into pleading guilty to the false accounting charges by the indicting of the theft charge. As I have indicated, in my view, the theft charge was legitimately indicted, and, having reviewed the material, it is my opinion on the whole of the available evidence, that there was a realistic prospect of conviction of Mrs Hamilton upon that offence such that the convictions for false accounting are perfectly safe.

104. However, I do observe that the means by which repayment of the shortage was secured was liable to leave the prosecution open to other complaints of pressure. Where the plea or pleas of guilty entered by an offender are regarded by the prosecution as an adequate plea to the indictment as a whole then it is the customary practice for the judge to order the remaining count or counts to which the offender has pleaded not guilty be left on the file marked "not to be proceeded with without the leave of the court or the Court of Appeal." The judge's consent is

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required for this order and as a matter of practice the judge will usually give his consent provided the defence agrees.

105. The order for the count to remain on the file means the count is available to be proceeded with if the court so orders it. It is thus left in suspense.[14] It would have been inappropriate for the prosecution to offer no evidence resulting in the judge directing a not guilty verdict under section 17 of the Criminal Justice Act 1967, because there *was* evidence supporting the count of theft, which, in this case, was not intended as a viable alternative, but as an additional, self-standing allegation.

106. The proposal here, however, ultimately to invite the court to order the count be left on the file as a condition of repayment was highly unusual if not exceptional, and was, it seems to me, fraught with difficulty, despite the judge approving this course.

107. First, the effect of the arrangement was that the prosecution was in effect allowing Mrs Hamilton to buy her way out of a charge upon which the in-house lawyer and counsel had advised there was a sufficiency of evidence. Second, the question might be asked why if the prosecution felt the evidence was sufficient to support the count of theft it was content to drop it for repayment of the losses. Third, if Mrs Hamilton did have a tenable defence to the count of theft (although I have seen no defence statement providing any defence, and doubt a defence statement was ever served) then it might be argued that the suggestion she should repay the losses in return for the dropping of the theft count, which was an idea originating with the prosecution, placed undue pressure on her, despite the fact she was represented, and despite having pleaded guilty to false accounting.

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[14] *R. v. C.C.C., ex parte Randle and Potter* [1991] 1 WLR 1087 at 1097D

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108. While it cannot be said on the material I have seen in this case that the count of theft was charged and indicted solely (and improperly) to influence or encourage guilty pleas to the counts of false accounting, at the stage at which Mrs Hamilton had indicated she would plead guilty to the false accounting charges, the condition of repayment in return for the dropping of the count of theft, in my view, could lend itself to the possible, unfortunate allegation that what occurred provides evidence of the manipulation by the prosecution of the criminal process by securing the repayment of its losses through the criminal process, in particular, by the charging of theft.

Seema Misra

109. Seema Misra was at all material times SPMR at the West Byfleet Sub-Post Office. She is now GRO years of age, having been born on GRO GRO At the time of the commencement of proceedings against her she was GRO years of age.

110. She had been an English graduate of the University of New Delhi and she had also held a computer qualification, and had worked in computer programming. Her service as SPMR had begun in June 2005.

111. On 14th January 2008, branch auditors attended the West Byfleet post office, where they reported a shortage in cash and stock of around £77,000, which included a known debt of £3,034.03. Mrs Misra informed one of the auditors that there would be a shortage of between £50,000 and £60,000, and that the balances had been adjusted to produce a clear trading statement.

112. Mrs Misra provided two written reports to an investigation manager who attended the post office, in which she claimed that the shortages were due to staff thefts around a year previously. She stated that she

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was going to borrow money to repay the money and wanted to pay POL its losses.

113. In an interview under caution, Mrs Misra denied theft but admitted false accounting. She said that previous staff members were responsible for stealing from her and that the losses had been carried for over a year. She said she had reported a theft of £1,000 to the police, and members of staff had been sacked or resigned, or they left the country, as losses were uncovered. Although only the alleged theft of £1,000 had been reported to police, Mrs Misra estimated the loss to be between £89,000 and £90,000. She said the losses had been carried since about November 2006.

114. She explained that she hid shortages by falsifying the cash on hand figure, and also by falsely declaring cash in pouches or currencies awaiting despatch. She conceded this was dishonest, but said she wanted to save her business. She added she had been repaying money into the account. She confirmed that she was the only person who had completed the Branch Trading Statements at the sub-post office since 2007.

115. The actual loss to POL was assessed as £74,609.84.

116. In a memorandum dated 1st April 2008, Jarnail Singh, the then senior lawyer in the Criminal Law Division of the Royal Mail, later POL, recorded his decision that the evidence was sufficient to provide a realistic prospect of conviction of Mrs Misra upon the charges set out in a schedule attached to the document, which was a charge of theft of £74,609.84 (the losses accrued over the course of a year) together with four further charges of false accounting.

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117. Counsel instructed to prosecute the matter settled the indictment, which contained the allegation of theft (Count 1) and, in fact, a total of six allegations of false accounting (Counts 2 to 7).

118. By letter dated 16th March 2009, The Castle Partnership, Mrs Misra's then solicitors, informed the prosecution that it was Mrs Misra's intention to plead guilty to all the false accounting allegations, but she was maintaining her plea of not guilty to theft.

119. Mrs Misra's first defence statement dated 20th March 2009 confirmed she would plead guilty to the allegations of false accounting but not guilty to theft. In the document, she denied dishonestly appropriating monies belonging to POL and said she would "assert that the theft was undertaken by other employees working at the Post Office at the time the monies went missing".

120. A memorandum from Phil Taylor, a Criminal Law Division legal executive, dated 25th March 2009, indicates that when Mrs Misra appeared at Guildford Crown Court on 20th March 2009 for the PCMH she pleaded not guilty. The memorandum does not make clear whether she pleaded not guilty to theft only and guilty to the rest, but the way it reads, as well as subsequent correspondence I have seen, tends to suggest Mrs Misra pleaded not guilty across the board.

121. By a further letter dated 9th April 2009 from The Castle Partnership, the defence solicitors identified those persons who had worked for Mrs Misra who she "suspected of having been responsible for the theft of the monies". They were identified as Shikhar Saxena, Javed Bidiwalla and Nadia Batliwalla, and their last known addresses and other personal details were provided to the prosecution.

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122. Thus, at that time, Mrs Misra was asserting that there had been a theft of money from POL, but that she was not the person responsible for it. No issue was then being raised about Mrs Misra's training or the reliability of Horizon.

123. Mr Taylor, the Criminal Law Division legal executive, wrote to counsel on 13th May 2009 informing him that enquiries of the whereabouts of the named staff members revealed that none lived at the addresses given for them and one was believed now to be living in India. Counsel was asked for his advice whether in light of this and other issues the defence were raising it was sensible to continue with the prosecution or to accept the false accounting charges.

124. On 22nd May 2009, Mr Taylor sent prosecuting counsel an email indicating that while the investigation team were content to accept the proposed pleas to false accounting, acceptance would make confiscation and compensation for the losses very difficult and he sought counsel's further advice. Counsel, Warwick Tatford, responded by email later the same day, saying he had spoken to the investigator about the case, and, "The case for theft is strong and we should not accept the pleas. Confiscation would be a non-starter if we did."

125. The trial, which began on 2nd June 2009, had to be aborted because the defence belatedly raised issues about the reliability of Horizon without notice to the prosecution, which they could not meet.

126. At some point in spring/summer 2009, Mrs Misra changed her solicitors, and her defence: a second defence statement dated 21st January 2010 (which I have not seen) apparently resiled in part from the allegation that her past employees had stolen from her, and she now asserted that her training had been deficient and the Horizon system was responsible for the losses. In a letter dated 13th November

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2009, which predated her second defence statement, Mrs Misra's new solicitors, Coomber Rich, indicated to POL, "Possible theft by other employees is still a live issue".

127. Mrs Misra's trial took place finally on 11th October 2010. I have retained the transcripts of the trial from a previous submission to me. The transcript of the judge's summing-up of 19th October 2010 makes clear that at some point prior to the trial (I have not been able to discover when exactly) Mrs Misra did plead guilty to the counts of false accounting.[15]

128. The jury convicted Mrs Misra of theft on 21st October 2010. She was sentenced on 11th November 2010 by which time she was pregnant. The judge sentenced her to 15 months' imprisonment for theft and to concurrent terms of 6 months' imprisonment for false accounting, totalling, therefore, 15 months' imprisonment.

129. In subsequent confiscation proceedings that took place in July 2011, the benefit figure was determined to be £83,469.59; and the realisable amount was fixed at £40,000, which was ordered to be paid by 7th January 2012 by way of compensation to POL.

130. It is clear from this summary of the proceedings, that Mrs Misra had first admitted the offences of false accounting to investigators, and had subsequently formally pleaded guilty to counts of false accounting, although when precisely she did so is not clear to me. Mrs Misra's case from the January 2008 audit to the first abortive trial (as demonstrated by the terms of the March 2009 defence statement) had been that her previous staff had stolen the money.

[15] Pages 53H-54A

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131. Indeed, in order to make good that claim, she asserted that she had reported the theft of £1,000 to police. Investigation showed that the only report made to police about any previous theft had in fact been made by Javed Bidiwalla, a former member of staff Mrs Misra had (according to him) falsely accused of stealing £2,000 in February 2006. She also named him as one of three suspects for theft or thefts in her solicitors' letter to POL in April 2009.

132. It appears that Mrs Misra had complained to the police that she suspected Nadia Batliwalla (who was Mr Bidiwalla's sister-in-law) was GRO and was causing trouble at the post office, and that she suspected her of stealing from the post office. The transcript of the judge's summing-up of 19th October 2010 deals with this complaint.[16]

133. This case falls outside the narrow compass of this review because Mrs Misra pleaded guilty to counts of false accounting, but not as an acceptable alternative to a charge of theft, for which there had been no proper basis. Indeed, far from withdrawing the count of theft once Mrs Misra had pleaded guilty to the false accounting offences, POL pursued it, and Mrs Misra, who contested it, was duly convicted of it by the jury in the second trial.

134. It is clear that at the time of the first trial her case was there had been a theft of the monies, which she had tried covering up, and, by the time of her second trial, her case had remained so, as evidenced by her new solicitors' letter of 13th November 2009, albeit running in parallel with claims about Horizon fallibility and her training. Indeed, in his summing-up, the judge summarised her defence thus: "There was a shortfall apparent on (sic) the tills at the time of the audit, she tells you, but the cause of that was not her taking the money. She thinks it was

[16] Page 72C-G

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staff theft, problems with the computer system and general (sic) just problems of coping with the demands of running the post office leading to disorganisation and incompetence. That is what the defence case is." [17]

135. Later he summed up her own evidence to the jury: "… it is her case … that those offences [i.e. false accounting] were committed not because she had committed theft but because she was trying to keep the post office going when there were deficiencies not caused by her dishonesty."[18] It is clear from the judge's summary of her evidence that she had maintained her claimed suspicions about her staff stealing from her.[19]

136. The importance of this line of defence was that to the extent she was arguing that the losses were in whole or in part due to theft by others, she was accepting that, at the very least, there might have been thefts at the post office. But if so, if not by her then by whom? The jury resolved that question against her.

137. Even though the present case falls outside the strict terms of reference for this review, in my judgment there was ample evidence to justify the charge of theft, not least Mrs Misra's own case that she suspected there had in fact been thefts; simply that she had not been responsible for them.

Julian Wilson

138. Julian Wilson was SPMR at Astwood Bank Sub-Post Office in Redditch, Worcestershire. He is GRO having been born on GRO

[17] Page 59D-E
[18] Page 81B-C
[19] Page 83E-H, page 84F

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GRO He wa GRO years of age at the time proceedings were commenced against him.

139. On 11th September 2008, POL auditors attended the sub-post office. Mr Wilson informed them that there would be a shortage of about £27,000, which he explained had been an accumulation of shortages over the past five years or so. He added that he had been inflating the cash on hand figures to show that the office accounts would balance weekly and, more recently, on the monthly trading period.

140. The audit revealed a deficit of £27,811.98. In a later interview under caution, he admitted false accounting over a period of five years to cover losses. He denied using the money for his own purposes.

141. Anthony Vines, independent counsel, was briefed on 14th May 2009, and asked, among other things, to advise whether theft should be added to the schedule of charges, which until then had contained a series of false accounting charges.

142. In an Advice in writing dated 22nd May 2009, counsel advised that it was not a straightforward case "because of the difficulties in establishing theft and the fact that the charges of false accounting do not necessarily result in the claim to the full loss" but, having discussed the case with Juliet McFarlane (the then Royal Mail lawyer in the Criminal Law Division) he had drafted an indictment with counts "which … are made out on the evidence and admissions, which have been served, which enables a proper claim to be made for the full sum of £27,811 odd …"

143. That draft indictment contained five counts. According to counsel's case summary, Counts 1 to 3 were allegations of false accounting over the four years Mr Wilson admitted falsely accounting in the period

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prior to the coming into force of the Fraud Act 2006 on 15th January 2007. Counts 4 and 5 were allegations of fraud by abuse of position, the start date in Count 4 being 15th January 2007 (the commencement date of the Fraud Act 2006), both counts representing two relevant trading statements periods post-dating the offences alleged in Counts 1 to 3, which related to the falsification of cash on hand figures between 1st January 2004 and 15th January 2007.

144. The fraud counts alleged that between 15th January 2007 and 17th December 2008 Mr Wilson had "dishonestly and intending thereby to make a gain for himself or another abused his position as sub-postmaster of Astwood Bank Post Office in which he was expected to safeguard the financial interests of Post Office Limited by enabling a substantial deficiency to rise, by failing to make good that deficiency whilst pretending that he had done so and by falsifying entries in Final Branch Trading statements in breach of section 4 of the Fraud Act 2006."

145. I make three observations: (1) the fraud counts were self-evidently not designed as alternative counts to the false accounting allegations because they post-dated the allegations made in Counts 1 to 3, and so did not cover the same period; (2) they reflected the falsification of Final Branch Trading statements rather than cash on hand figures; and (3) as is evident from the Advice of counsel originally instructed, the fraud counts were added to ensure confiscation or compensation orders might be made on conviction.

146. New counsel, Richard Cole, appeared at Worcester Crown Court on 15th June 2009 for the PCMH. Counsel's backsheet shows that on this occasion Mr Wilson pleaded not guilty to Counts 1 to 3 but guilty to

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Counts 4 and 5. The backsheet is endorsed "G pleas to counts 4 + 5 on basis. Acceptable to Rob Wilson.[20] See e-mail post hearing."

147. I have not discovered the email referred to, but, by the terms of the basis of plea document, which I have found in the case files, Mr Wilson pleaded guilty to Counts 4 and 5 on the basis that he had failed to make good losses, which accumulated in the years 2007 to 2008. He said he had falsified entries in the Final Branch trading statements, and in so doing had avoided repayment, as was his contractual obligation. He said the losses had occurred as a result of staff or systemic errors, he did not believe any of the money was stolen, he had not stolen the money, and he had made no financial gain.

148. Sentence was adjourned to 3rd August 2009 on which date Mr Wilson was sentenced to 200 hours' unpaid work and costs. Counts 1 to 3 were ordered to lie on the file. On 17th December 2009 a confiscation order was made in the sum of £28,434.95.

149. This case also falls outside the strict terms of my remit on this review, because Mr Wilson did not in fact plead guilty to any of the false accounting charges; also no alternative count of theft was indicted. Mr Wilson pleaded guilty to the two non-alternative counts of fraud, which related to the latter part of the indicted period (2007 to 2008 only), rather than to charges of false accounting, which covered an earlier period and the falsification of different records.

150. The rationale behind charging offences of fraud, as against false accounting, post-15th January 2007, was, it appears, to secure confiscation or compensation orders on conviction. I think the allegation of fraud was legally legitimate, if a little tortuous, on these facts. But, for the avoidance of doubt, from everything I have read

[20] Then Royal Mail Group Head of Criminal Law

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there is nothing that undermines the safety of Mr Wilson's convictions in this case.

Peter Holmes

151. Peter Holmes was born on GRO, making him GRO years old. When proceedings were commenced against him in 2008, he wa GRO

152. Mr Holmes was post office manager at Jesmond Sub-Post Office in Gosforth, Newcastle upon Tyne. The sub-post office was part of a pharmacy and located at the back of the shop owned and run by Sunil Khanna, who was SPMR in name only, and took no part in the running of the post office, but had employed Mr Holmes to do so.

153. On 18th July 2008, POL auditors carried out an audit at the post office when a total shortage of £46,049.16 was discovered, consisting for the most part in differences in cash, stock, foreign currency and cheques on hand figures. In interview under caution, Mr Holmes denied theft but admitted false accounting over a period of between six and nine months. He said that deposits into a bank account totalling £48,000 between July 2007 and August 2008 were the takings from his wife's business. Mr Holmes made allegations that Horizon had been faulty in 2008. Analysis suggested that Mr Holmes had been false accounting since October 2007.

154. In a memorandum dated 16th February 2009, Juliet McFarlane, the Royal Mail lawyer in the Criminal Law Division, advised that in her opinion the evidence was sufficient to afford "a realistic prospect of conviction on the charges set out in the attached Schedule". The schedule set out one offence only: an allegation of theft alleging that between 1st August 2007 and 19th September 2008 Mr Holmes had stolen £46,049.16 belonging to POL. It was upon this offence that, on

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18th February 2009, Mr Holmes was summoned to Gosforth Magistrates' Court, where he appeared on 30th March 2009 and indicated a not guilty plea. Jurisdiction was declined and he was in due course committed for trial.

155. From the terms of the PCMH form completed during the hearing at Newcastle Crown Court on 22nd June 2009, Mr Holmes, through his counsel, indicated he was prepared to plead guilty to false accounting and that he was likely to be relying on a forensic accountant. It appears from an attendance note of the PCMH that the prosecution indicated that an additional charge of false accounting would be added to the indictment, which the defence indicated they would accept in accordance with Mr Holmes' interview admissions. However, the prosecution indicated that such a plea would not be acceptable and that they would proceed to trial on theft. The trial was provisionally listed for the week of 14th September 2009.

156. An expert accountant's report dated 28th July 2009 commissioned on behalf of Mr Holmes concluded that deposits into his and his wife's joint bank account amounting to £43,605 during the period of the alleged theft charge had derived from the takings from Mrs Holmes' business and not from monies stolen from POL.

157. In his defence statement (confusingly dated in different places 16th July 2009 and 30th July 2009), Mr Holmes denied theft, said he believed that Horizon had occasionally been at fault, asserted that the monies deposited in the joint bank account were proceeds from his wife's business, but accepted he had falsified documents to cover discrepancies.

158. He added he did not believe that "the Royal Mail [had] conducted a thorough investigation and did not consider any alternative in relation

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to the allegation." In other words, he was accusing Royal Mail of having a closed mind and failing to consider sufficiently or at all that he had been guilty of false accounting rather than theft.

159. It is clear from a report by a POL fraud investigator dated 19th August 2009 that the investigator did not agree with the expert's conclusions on the source of the deposits, saying that the manner in which the deposits were made suggested differently. However, because he did not have access to the daily takings for the period, he could not be certain. (The daily takings were subsequently attached to a letter from the defence dated 16th November 2009.)

160. By letter dated 24th August 2009, the defence solicitors wrote to the prosecution suggesting in light of their expert report that the prosecution would be in difficulty pursuing theft, and inviting the prosecution to offer no evidence on the theft charge and adding to the indictment an alternative charge of false accounting, the proposed particulars of which they set out in the letter. Of course, the prosecution had indicated at the June PCMH that it was minded to add false accounting to the indictment, but had rejected taking any plea to false accounting as an acceptable alternative to theft.

161. At some point the provisional September date for trial was vacated and the trial apparently relisted for 14th December 2009.

162. A memorandum dated 10th December 2009 from a member of Royal Mail's Criminal Law Division recorded the investigation officer's view that, having viewed the documentation provided by the defence (i.e. that provided by the letter of 16th November 2009), he "could find no sufficient evidence to bring any part of the Expert's report in to question". Subject to further checks, the memorandum acknowledged

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that in the absence of the identification of any further account, "there is nothing further I could consider to assist with the theft charge".

163. The documentary material from the case file thereafter is lacking. I have not been able to discover the final amended indictment or any results sheet other than a case closure report that indicates on 29th January 2010,[21] having pleaded guilty to four counts of false accounting, and asked for 13 similar offences to be considered, Mr Holmes, GRO, was sentenced to a home detention curfew order for three months. I am unable to tell how the theft count to which he had pleaded not guilty was disposed of.

164. In my view, it is clear that there was a realistic prospect of conviction of Mr Holmes for theft on all the available evidence at the time of initial charge. However, the prosecution had properly kept the matter under review, and, following the service of the expert report, and further analysis of documentation underlining it that cast doubt upon the view that Mr Holmes had deposited money stolen by him from POL, alternative charges of false accounting were added to the indictment, to which, ultimately Mr Holmes pleaded guilty.

165. In my view this was a proper exercise of prosecutorial discretion and cannot be faulted. Theft had been properly charged on the evidence as it had been understood, and it was only when Mr Holmes provided an answer to the deposit of funds that the prosecution reviewed the evidence and accepted the pleas to false accounting. I have found nothing about this case on review that renders the convictions unsafe.

[21] The report in fact gives "29/1/**09**" as the hearing date but the year date is clearly incorrect

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Alison Hall

166. The single file regarding this case is lacking the relevant documentation for me to make any assessment of the case. I have, however, been able to glean that on 2nd September 2010 a visit was made to Hightown Sub-Post Office, Liversedge, West Yorkshire, as part of the Horizon Next Generation roll out programme. This was a sub-post office located within a retail outlet. Alison Hall was SPMR there, and had been so since February 2005.

167. Prior to the visit, Ms Hall had said that she had been having trouble with her lottery. A cash count showed that there was a cash discrepancy of £13,624.41. The following day auditors discovered a total shortage of £14,842.37 in large part comprising differences in cash and stock.

168. Ms Hall told the auditors that the losses had occurred due to lottery accounting problems and she produced a report from Lottery Accounting Chesterfield detailing errors.

169. For the rest, her interviews under caution are absent from the case file, there is no indication of what offences she was charged with, and when, the progress of any proceedings against her, far less their outcome. Consequently, I am unable to review this case within the terms of reference for this review.

Margery Williams

170. Margery Williams is now GRO years of age, having been born on GRO GRO At the time of proceedings against her she was GRO years old. She had been SPMR of the sub-post office at Llanddaniel in Anglesey,

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North Wales, since April 2009. The post office formed part of a general store.

171. On 3rd June 2011, POL investigators attended the sub-post office in order to perform an intervention visit on cash management and a cash check. Mrs Williams allowed the investigators access to the safe. A cash check revealed a cash shortage of £14,010.69. She said she could not explain the shortage. An audit revealed a total shortage of £14,633.57, representing the difference in cash, stock, postage and foreign currency figures.

172. Mrs Williams was interviewed under caution on 30th June 2011. She explained that she had been having trouble with balancing from the end of February to the beginning of March 2011. She was unable to explain the shortfall in the cash on hand figures, but implied the losses might have been linked to Horizon. She had first noticed a discrepancy in the accounts around February/March 2011. She admitted producing a false Branch Trading Statement by inflating the cash on hand figures; she had done this by inflating the cash figures of one denomination rather than across all denominations. She confirmed knowing it was wrong to do this. She admitted inflating the cash for a period of about three months, but she denied theft. She admitted inflating the number of stamp books on hand which were out by bundles of 50, explaining that in April 2011 the stamp books had changed and in the following balances they were out. She had concluded that she must have 'remmed' them wrongly into the Horizon system.

173. By a memorandum dated 23rd August 2011, Jarnail Singh then senior lawyer in the Criminal Law Division of the Royal Mail, later POL, recorded his decision that the evidence was sufficient to provide a realistic prospect of conviction of Mrs Williams upon the charge he had

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set out in a schedule attached to the memorandum, which was a single charge of fraud by representation.

174. Mrs Williams first appeared before Holyhead Magistrates' Court on 25th October 2011 charged with fraud by false representation. John Gibson, counsel briefed by POL to prosecute the case, was instructed to advise, among other things, on charge. He advised on 25th January 2012, and drafted an indictment containing four counts of fraud by false representation covering the three month period between 2nd March 2011 and 2nd June 2011.

175. The PCMH was listed before Caernarfon Crown Court for 10th February 2012. The case appears to have been relisted for 16th February, when Mrs Williams pleaded guilty to the indictment: the four counts of fraud by false representation. Prosecution counsel's brief has endorsed on it, "Adj for PSR (adjourned for pre-sentence report) to 9/3/12 Def accepts will be sentenced on basis stole money 16.2.12".

176. The pre-sentence report (incorrectly dated 7th February 2012; more likely 7th *March* 2012) contained several significant admissions, including, "Mrs Williams later in the interview stated that she had deliberately 'cooked the books' from February onwards …" and "Mrs Williams was unable to fully give an account of her reasons for taking the money, only stating that she had used some of it to support her shop which was underperforming …" The author of the report noted "… she was not open with regard to what had happened to (all of) the money".

177. Sentencing did not, however, take place on 9th March 2012. The case returned to court on 19th March 2012, when Mrs Williams' mitigation through counsel was that with increasing competition from large supermarkets the business was failing and she had in effect "robbed

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Peter to pay Paul". Because the money had not been repaid, the judge adjourned sentence to 10th April 2012, by which time a cheque dated 5th April 2012 drawn on Mrs Williams' brother-in-law's account had been presented, but had not yet cleared.

178. Mrs Williams was in fact sentenced on 3rd May 2012, by which time the cheque had cleared, to 52 weeks' imprisonment concurrent on each count suspended for 18 months coupled with a supervision order for 12 months and an unpaid work requirement of 200 hours.

179. Again, this case does not fall within the strict terms of this review because Mrs Williams was not charged with offences of theft and false accounting; she was only ever charged with offences of fraud by false representation, so the issue that has been raised for my consideration on this review does not arise in this case.

180. For the sake of completeness, however, in my view, it was legitimate to charge the offences of fraud by false representation covering the period on the facts as revealed by the evidence; there was a clear evidential basis underlying them.

181. I should, however, add that it is perfectly clear from what Mrs Williams had to say in mitigation, as well as to the author of the pre-sentence report, and, as was clearly understood by prosecuting counsel to be the basis for sentence, she accepted liability for taking and using some or all of the money to support her failing business, albeit she was not indicted with theft.

182. The fact that the full sum was repaid on her behalf reflects her admissions in this regard, but it also reflects the SPMR's contractual obligation to repay losses.

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Alison Henderson

183. Alison Henderson had been SPMR at Worstead Sub-Post Office in North Walsham, Norwich, for some 13 years. The sub-post office is located inside Mrs Henderson's private address in the village of GRO. She is now GRO years of age, having been born on GRO GRO At the material time she was GRO

184. On 10th February 2010, an audit at the branch revealed that the cash on hand figure did not equate to the Horizon expected cash on hand figure. The deficit was £11,957.78.

185. In the course of an interview under caution that took place on 11th March 2010, Mrs Henderson said she could not tell the investigators anything about the audit shortage. She said it was a shock and she had no idea why there was a shortage.

186. She explained that the branch was small and operated out of her private property; there was no retail aspect to it and the branch opened for a limited period each week. She said no one else had stolen the money, and she denied stealing the money herself. She also denied falsifying Branch Trading Statements. She offered to repay the money.

187. It was pointed out to her that, on 6th January 2010, a Branch Trading Statement declared a cash on hand figure of £16,712. It was further pointed out to her that up until the time of the audit, when it was discovered that there was £8,000 in cash at the post office, there had been an average sum of about £20,000 in cash held at the post office. If that was right, then the loss of almost £12,000 must have occurred within a four week period when the post office was only open for

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business in total three days a week; that would mean she had lost around £1,000 a day.

188. The investigator's report suggested she be charged with theft and false accounting.

189. Mrs Henderson was summoned to appear at Norwich Magistrates' Court on 12th August 2010 on a single charge of theft of the full amount (£11,957.78) between 1st January 1997 and 11th February 2010. The case was adjourned and, having indicated a not guilty plea, on 7th October 2010, she was committed to the Crown Court for trial.

190. Counsel, Dianne Chan, was briefed to prosecute the case, and she was instructed to settle the indictment. Counsel's backsheet indicates that, on 14th October 2010, she drafted the indictment to contain an allegation of theft (Count 1) and an allegation of false accounting (Count 2), both covering the identical period of 1st January 1997 to 11th February 2010.

191. Ms Chan advised in writing on the same date, but did not indicate her rationale for adding a false accounting allegation to the indictment. It seems to me that the false accounting allegation can only have been added to the indictment as a viable alternative to the allegation of theft on the available evidence, upon which there was a sufficiency of evidence that met the evidential stage of the full Code test. If that was the rationale, and I can see no other, then I agree with it on what I have seen.

192. The PCMH took place at Norwich Crown Court on 3rd November 2010, when other counsel took over the brief for the prosecution, whereupon Mrs Henderson pleaded not guilty to both counts, and the case was adjourned for trial.

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193. On or about 16th November 2010, the defence served an amended defence statement in which Mrs Henderson accepted that £11,957.78 appeared to be missing; she had no explanation as such for the discrepancy, but believed that Horizon may have malfunctioned. She categorically denied theft, and accepted she was contractually bound to repay the money and would do so.

194. By letter dated 18th November 2010, Mrs Henderson's solicitors wrote to Rob Wilson, then Head of Royal Mail Criminal Law Division, offering a plea to false accounting as well as full repayment of the outstanding figure. I am unclear if this was acceptable to the prosecution at that time, but a letter from Jennifer Andrews of Royal Mail Criminal Law Division to the agents dealing with the case indicated that communication between counsel had confirmed that the basis of plea was that the money had gone missing, but that Mrs Henderson had not stolen it; also that there was no Horizon issue. The sense of the letter is that the prosecution was at this time countenancing acceptance of the plea.

195. On 1st December 2010, the case was listed at Norwich Crown Court for a 'Goodyear' indication.[22] The judge did not give any 'Goodyear' indication as such, but he adjourned the case to 15th December so that Mrs Henderson could repay the money, saying that if the money were repaid in the intervening period he would look upon the matter more favourably. No plea was entered.

196. I have seen and read in the case file an undated defence document headed "Factual Basis/Application for 'Goodyear' Indication", in which it was asserted, among other things, that Mrs Henderson maintained her denial of theft, and that her plea to false accounting

[22] An indication of the likely maximum sentence on a plea of guilty

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was on the basis that she became aware of a discrepancy in the accounts, which she dishonestly covered up by entering false figures in the branch accounts; she accepted she was contractually bound to repay the deficit.

197. In a letter from POL's local agents to POL dated 2nd December 2010 the agents wrote that although counsel (by which I take this to mean defence counsel) had the written basis of plea in his brief "my representative was not shown it", indicating that by that stage prosecution counsel had not seen the document. Clearly at some stage it was served on the prosecution, as it is in the case file; I cannot tell, however, when it was served and the final status of it. In the end, it may not matter overmuch.

198. A cheque for the full amount was sent to POL later that same day by letter from Mrs Henderson's solicitors. By the return date for sentence (15th December) the cheque had not yet cleared. However, prosecuting counsel invited the judge to proceed. The judge duly gave an indication that there would be a non-custodial sentence, whereupon Mrs Henderson pleaded guilty to the false accounting offence (Count 2), and the prosecution offered no evidence upon theft (Count 1), in respect of which the judge entered a formal verdict of not guilty.

199. As I have observed above,[23] in my judgment, it was inappropriate for the prosecution to offer no evidence resulting in the judge entering a not guilty verdict under section 17 of the Criminal Justice Act 1967, if there was evidence supporting the count of theft, albeit in this case, theft and false accounting were almost certainly intended as alternative allegations. It would have been better to invite the court to order the count to remain on the file. Although this may be viewed as a procedural technicality, which it will be in most cases, nonetheless

[23] Paragraph 105

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where serious allegations are being made that POL is only charging theft to encourage pleas to false accounting when there is no proper basis to charge theft, to offer no evidence sends out the wrong message, and exposes POL to potential criticism.

200. Returning to the sentence, a fast delivery, stand-down pre-sentence report was ordered to assess Mrs Henderson's suitability for unpaid work, which was positive. The judge then sentenced Mrs Henderson to a community order with 200 hours' unpaid work together with costs. In his sentencing remarks he observed, "I take it that your plea was based on muddle and confusion."

201. I have not been able to find any memorandum recording the charging decision in this case, and, as observed above, have seen no rationale from counsel who settled the indictment for adding the offence of false accounting. This case falls squarely within the terms of reference for this review. Despite finding nothing to indicate the rationale for the charges, I am satisfied that the evidence did provide a realistic prospect of conviction of Mrs Henderson for theft, and the alternative charge of false accounting to which, ultimately, she pleaded guilty.

202. Additionally, I emphasise there is nothing I have seen to indicate that the theft charge was unjustifiably laid in order to influence or encourage a plea to false accounting, not least because until counsel drafted the indictment the sole charge Mrs Henderson faced was theft, and it was independent counsel who added the charge to which Mrs Henderson was eventually to plead guilty. There is nothing about this case that affects the safety of the conviction for false accounting.

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D. CONCLUSIONS

203. I have reviewed eight case files, only three of which (Hamilton, Holmes and Henderson) fall within the narrow terms of this review. I am unable to tell whether the case of Hall falls within the terms of this review, given the dearth of information within the file. Although the facts of the cases of McDonald, Misra, Wilson and Williams do not fit the review criteria I have nonetheless examined them all. If nothing else, they demonstrate that POL adopts a fact-specific approach to their cases. There is no "one size fits all" approach.

204. The effect of my review is that those cases that do fall squarely within the remit for this review were, in my judgment, conducted in such a way that any allegation that POL (or Royal Mail pre-separation) operated a deliberate policy to charge theft when there was no or no sufficient evidential basis to support it, just to encourage or influence pleas of guilty to charges (said to be lesser charges) of false accounting, is fundamentally misplaced; not only is there no evidence of such a policy, there is positive evidence that each case was approached both by internal and external lawyers professionally and with propriety, and, unquestionably, case-specifically.

205. Not only have I found absolutely no evidence of the existence of any such policy, I have also not discovered any evidence in the cases I have been invited to review that theft (or fraud for that matter) was charged without any proper basis to do so and/or in order only to encourage or influence guilty pleas to offences of false accounting.

206. Although the Code for Crown Prosecutors stipulates that it would be wrong for a prosecutor to proceed with a more serious charge just to

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encourage a plea to a lesser charge,[24] in those cases following within the remit of this review, there is simply no evidence that the thinking underlying the charging of offences of theft was to encourage a plea to the "lesser" offence of false accounting.

207. In the course of this review, I have, however, made slight criticisms about the use of inconsistent language in the recording of charging decisions, and about offering no evidence on the theft count, resulting in the judge formally entering a not guilty verdict, when the count ought technically to have been left on the file.

208. More substantive criticism, albeit beyond the remit of this review, involves the risk of challenge, not that POL has been charging theft where there was no proper basis to do so only to encourage or influence pleas of guilty to false accounting charges, but that POL has been using the criminal justice system as a means of enforcing repayment from offenders by charging and pursuing offences that will result in confiscation and compensation orders. It might be argued that as SPMRs are contractually bound to repay losses, POL is using (and abusing) the criminal justice process rather than civil litigation to recover from offenders.[25]

209. In fact, the Code for Crown Prosecutors (which POL adopts and applies) stipulates that it is appropriate to consider, among other things, when selecting charges, the court's sentencing powers and the imposition of appropriate post-conviction orders.[26] In the cases I have reviewed, I am satisfied that where offences were indicted with an eye to the making of applications for confiscation and/or compensation orders on conviction, there was, in each case, a proper legal and

[24] Paragraph 6.3 of the Code for Crown Prosecutors
[25] Indeed, this is one claim made by the claimants in the proposed group action in their pre-action letter of claim of 28th April 2016 at paragraph 147
[26] Paragraph 6.1(b) of the Code for Crown Prosecutors

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evidential basis for so doing, which included consideration of the orders that might follow conviction.

210. In fact, on analysis, there are only two cases falling within the review (Hamilton and Henderson), where POL recovered its losses from the offenders through voluntary repayment. In Hamilton, the charge of theft was left on the file in return for repayment of POL's losses. In Henderson (no evidence offered), the offender offered to repay the money voluntarily, because she felt contractually bound to do so, albeit she denied theft. In Williams (a case that falls outside the narrow terms of the review), the offender pleaded guilty to the indictment, which contained only four counts of fraud. From the available information, Mrs Williams made repayment on a voluntary basis. In all three cases, where there is evidence of repayment, none of the offenders did so under any post-conviction court order.

211. In McDonald, Misra and Wilson (all of which fall outside the review) there were confiscation orders of varying amounts. In Holmes (which does fall within the review), there is no information available to me about any post-conviction orders. The paucity of information in the Hall case did not even permit of an assessment within the terms of the review.

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26th July 2016