SUBS0000100

PAUL MARSHALL

2-3 GRAY'S INN SQUARE
GRAY'S INN
LONDON
WC1R 5JH

[GRO] GRO
Clerks: 0207 242 4986

23rd March 2023

Dear Minister Hollinrake,

Re: The Post Office and Compensation Arrangements

After careful reflection, I am writing to you in connection with the compensation arrangements for victims of the Post Office. I suspect that you, perhaps more than almost any member of the government, understand, as does Sir Ross Cranston, the intractable problems that result from flawed and unfair compensation schemes.

This letter is long, it is nonetheless important. It is necessary for me to refer to some (limited) law. While I am conscious that you are not a lawyer, the law referred to is only to support a more general proposition. I am conscious that you are ably assisted by the lawyers of your department.

I have the privilege to represent[1] several of the Post Office's victims, including Tracy Felstead, Janet Skinner and Seema Misra, all of whom, on prosecution by the Post Office, were falsely convicted of offences of dishonesty. Tracy Felstead was wrongly convicted of theft more than 20 years' ago. I also have the privilege of representing Lee Castleton, the victim of a false civil claim in the High Court of Justice in 2006 in which judgment was given against him on false and misleading evidence in 2007. The Post Office recovered a costs order for £321,000 against Mr Castleton on a claim for £26,000. That precipitated his bankruptcy, from which he has only very recently been discharged. The civil judgment against him remains to be set aside. As a result of the Post Office's actions, for several years he was compelled to earn his living working where he could in the country, living out of his car. He rarely saw his family; his daughter nearly died as the consequence of her illness caused by the blighting of her family's life, the destruction of her father's livelihood and his reputation in his community, and the loss of his life savings. In 2006 the solicitor for the Post Office promised Mr Castleton that should he defend the (false) claim against him, the Post Office would ruin him. It did so. The solicitor was then of the firm Bond Pearce LLP, the firm that later as Bond Dickinson advised the Post Office in 2013 in connection with the Post Office's notification of its insurers of risk in connection with Mr Gareth Jenkins's evidence. Later still, then known as Womble Bond Dickinson, the firm acted for the Post Office in the Bates GLO litigation. (Mr Castleton was the first of the GLO claimants to receive, only in May 2020, the settlement deed under which the litigation against the Post Office was settled in

[1] My clients are separately represented in the Williams' Inquiry by other counsel and Hodge Jones & Allen.

SUBS0000100

December 2019. Until then it had been withheld from claimants in the litigation on grounds of its confidentiality.)

The reason for my now writing to you is because the Department of Business and Trade (hereafter DBT), as the government department responsible for the Post Office and to which it reports, is best placed to engage with and address the issues to which I shall refer.

It is becoming increasingly clear that the existing compensation arrangements are unfair to the Post Office's many victims, including those represented by me. I believe that the position will shortly be reached where the present arrangements will be recognised as no longer tenable/sustainable. My second reason for writing to you is that I am anxious that, even as the existing compensation arrangements, such as they are, are being put into effect, there is a second serious and widespread miscarriage of justice unfolding, that to date has received virtually no attention. This might matter less, were it not for the fact that victims include those grievously injured by the Post Office as long as two decades' ago. Some victims, as Sir Wyn Williams recently has publicly recorded, have died, uncompensated for the injury inflicted upon them by the Post Office. The government owns the Post Office.

As I shall show, there is a plain disparity between public avowals of regret by the Post Office and its present conduct in its approach to the payment of compensation. Its approach and conduct, through its solicitors Herbert Smith Freehills LLP, remains strikingly similar to the studied injustice that it perpetrated over many years. It remains aggressively acquisitive, including on legal grounds that do not withstand scrutiny. That should cause concern, loudly resonating as it does with, for example, the false legal arguments relied upon by the Post Office over many years (that included reversing the burden of proof - which resulted in the ruination of Lee Castleton) but that were eventually rejected by Mr Justice Fraser in his "Common Issues" judgment in 2019: Bates and ors. v Post Office Ltd (No. 3) [2019] EWHC 606. As I shall explain, this extends to the Post Office (wrongly in law) now claiming, against victims it is compensating, credit for damages paid to others of its victims under the 2019 settlement of the GLO litigation. As they say, 'you couldn't write it'. This should be a matter of public concern. It goes without saying that the position now adopted by the Post Office on matters of law, that are plainly wrong, but that intended to secure an improper (unlawful) benefit and advantage for the Post Office, does nothing to inspire confidence in its publicly avowed commitment to properly and fairly compensate its victims, quite the reverse.

With my learned junior, Ms Flora Page, and my instructing solicitors Aria Grace Law, in November 2020 I was alone in identifying, from material late disclosed by the Post Office in the criminal appeals, that the key events in this tragedy occurred in 2013. These included my eliciting evidence beyond that then available to the CCRC, that the Post Office had engaged in 'second category' abuse of the process of the court. That separate ground of appeal, in the teeth of sustained opposition from others, was eventually upheld by the Court of Appeal in April 2021 in 39 of the 42 appeals. That finding by the court was likely to have been a central consideration in the government's decision from May 2021 to elevate the inquiry chaired by Sir Wyn Williams to a full statutory inquiry. Contrary to Mr Justice Fraser's perception of the Post Office's position, described in his judgment Bates and ors. v Post Office Horizon Issues (No. 6) Rev 1 2019 EWHC 3408 as having been in 2013 one of "dreadful complacency", in truth the Post Office's energetic evaluation of multiple problems, and of its own knowledge, resulted in late 2013/early 2014 in a decisive shift in strategic approach. That change was

SUBS0000100

not only to its prosecution of its postmaster and employees[2] but also, critically, in the light of its knowledge in 2013, in its treatment of those whom in the past it had prosecuted and others against whom it had taken enforcement action (further, Part II below). Mr Justice Fraser did not have the advantage of full, or, indeed, proper, disclosure of documents from the Post Office (below). This is of continuing importance for reasons I shall explain. In other important respects, Fraser J. was misled, including as to the reason for the absence of Mr Gareth Jenkins at the Horizon Issues trial as a witness for the Post Office. (So far as is known, the false and misleading explanation given by the Post Office to the court for his absence has never been corrected.)

For convenience, the extant compensation (in its generic sense) schemes are (1) arrangements administered by the solicitors' firm Herbert Smith Freehills LLP, solicitors for the Post Office, for "Overturned Historic Convictions" ("OHC cases"); (2) the scheme shortly to be announced by the Department for Business and Trade for those who were claimants in the Bates v Post Office Group Litigation Order (GLO) civil litigation, that resulted in settlement of civil claims under a deed of settlement of December 2019, but who were not convicted of offences (the "GLO scheme"); and (3) claims for compensation for victims of the Post Office (by various enforcement action) who were (i) not convicted on Post Office prosecutions and who additionally (ii) were not parties to the GLO litigation settled in 2019 (the "HSS scheme" – a non-adversarial compensation scheme, also overseen by Herbert Smith Freehills).

For the purposes of brevity, I shall confine myself to making two main points. The first has four subsidiary points. The second main point is one that the government is powerless to address. It nonetheless in my view should be a matter of considerable public concern.

PART I

THERE IS A DISPARITY IN TREATMENT BETWEEN THOSE WHO WERE FALSELY CONVICTED OF OFFENCES ON POST OFFICE PROSECUTIONS, WHO WERE PARTIES TO THE GLO CIVIL LITIGATION, COMPARED WITH THOSE WHO WERE NOT PROSECUTED AND CONVICTED BUT WHO WERE ALSO CLAIMANTS IN THE GLO LITIGATION.

It is incontestable, as I shall show, that those who were convicted on Post Office prosecutions, as present arrangements stand, are being and are likely to continue to be disadvantaged. That position is incapable of being justified and it offends against ordinary conceptions of justice and fairness. The disparity in treatment, as I shall explain, is manifest both procedurally and substantively.

(1) Procedurally, victims of Post Office prosecutions - victims of miscarriages of justice and ex hypothesi[3] victims of malicious prosecution by the Post Office - continue to be engaged in adversarial litigation 'toe to toe' with the Post Office as represented by Herbert Smith Freehills LLP - the fact of which I have been recently reminded of by HSF. Litigation is a 'zero sum game' in which the Post Office's solicitors are professionally duty bound to secure the best

[2] Explained by Mrs Paula Vennells C.B.E. to Mr Darren Jones M.P. Chair, BEIS Select Committee, in June 2020.

[3] In the sense of not established by judgment; but the factual basis for malicious prosecution as arguabl e is the premise of claims for damages and the Post Office paying these.

SUBS0000100

outcome and to act in their client's best interests. Necessarily, those interests are the very opposite of those of the Post Office's victims.

That victims of the Post Office should be locked in attritional adversarial litigation with the wrongdoer, as represented by a leading international and national firm of solicitors, with effectively unlimited resources through the public purse, offends against a sense of fairness. This is in sharp contrast with the government's GLO scheme, administered through DBT, which in public statements has been said to be intended to put participants in the scheme (applicants for compensation – not litigants against DBT), so far as money can, in the position that they would have been in, but for the wrong done to them by the Post Office. That contrasts starkly with HSF's professional duty to its client – namely, to secure the best deal/settlement it can for the Post Office and the correlatively worst deal possible for its victims. I am allowed by Miss Tracy Felstead, who was imprisoned in 2002 on false evidence and who has suffered life-changing permanent injury as a result, to tell you that she feels "unable to go on". Is that surprising? Her entire adult life for the past 22 years has been blighted by the Post Office. How can this situation possibly be justified? It is unacceptable. As I shall show, she is confronted by legal arguments for reducing compensation payable to her by the Post Office that are simply wrong. I doubt she is alone.

(2) That procedural disparity in treatment is not simply formal. It manifests itself substantively. The most obvious way in which this disparity is to be seen is that, because claimants in the GLO scheme were the recipients of compensation paid by the Post Office under the terms of the 2019 deed of settlement for the GLO litigation (that settled those claimants claims), the GLO scheme has been explained to Sir Wyn Williams, by counsel for the government, to be an ex gratia scheme. This contrasts with the OHC scheme which is concerned with claims for damages in law that are payable to OHC litigants. That is to say compensation under the GLO scheme is not to be paid as of right, but as a matter of fairness (explicitly in recognition that claimants in the HSS scheme will otherwise do much better than those who were claimants in the litigation - that gave rise to the HSS scheme (it is a term, perhaps oddly, of the 2019 settlement)). That means that the 2019 settlement deed and its terms are necessarily disregarded for the purposes of paying compensation under the DBT GLO scheme. What is in issue, accordingly, is not the legal classification of the harm inflicted (which is of the utmost importance in the OHC scheme) but the amount of damage inflicted and the appropriate amount of money that should be paid in recognition of that harm and 'to put them in the position that otherwise they would have been in, but for that harm'.

The result is that compensation is available to an applicant under the DBT GLO scheme for a loss suffered/injury inflicted, regardless, as a matter of strict law, that a particular head of loss has been compromised/surrendered under the terms of the 2019 settlement. This is not a formality. For those claiming compensation for malicious prosecution in the OHC scheme, the Post Office's stated position is that all heads of claim other than malicious prosecution (which was the only head of claim preserved to convicted claimants who were parties to the GLO litigation) were compromised in 2019 and are thus not available heads of claim/loss. That leads to the remarkable result that the DBT ex gratia GLO scheme offers a prospect of fuller and on the face of it 'better' compensation than is available to those whom the Post

SUBS0000100

Office prosecuted, because GLO claims for compensation are not restricted and cut-down by the terms of the 2019 settlement deed.

In May 2020, for the first time, it emerged that it had been explicitly agreed under the terms of the 2019 settlement deed, that convicted GLO claimants received not one penny from the Post Office under the settlement sum that it then (in 2020) paid. That, regardless of the fact that under those terms they surrendered all their other claims against the Post Office (e.g. for breach of contract etc.) – with the sole exception of the residual right to claim malicious prosecution. Even then, only upon the contingency of an appeal court quashing their conviction - a pre-condition for any claim for malicious prosecution.

Once again, this is no mere formality. Much of the injury and harm inflicted by the Post Office upon its victims was the result of the Post Office's strategy of concealment and cover-up - from not later than 2013 and arguably 2010 - that resulted in years of delay up to the "Horizon Issues" trial in 2019 before Mr Justice Fraser, and the consequent appeals to the Court of Appeal in March 2021. Lord Hughes in Attorney General's Reference No 2 of 2001 [2003] UKHL 68 noted that delays in appeals take effect in that "...years of a defendant's life are blighted. He cannot have them over again; they are gone forever". It is arguable that that strategy of concealment denying for years as it did to those the Post Office had wrongly convicted of offences, access to the courts by keeping from them disclosure of material that cast reasonable doubt upon the safety of their convictions, is an actionable abuse of process entirely separate and discrete from their malicious prosecution. That intentional tort (legal wrong) ordinarily would carry a right to claim both aggravated and exemplary damages. The position of the Post Office for convicted claimants is formally stated to be that any such claim is precluded by the terms of the 2019 deed of settlement and is thus not available to a convicted GLO claimant. That contention is offensive to an ordinary conception of justice and fairness.

That position is indefensible. Mr Lee Castleton has a mirror image complaint in connection with the fraudulent civil claim brought against him in 2006 and the Post Office's concealment and withholding from him, from not later than 2013 (and strongly arguably, long before then) of information and material that would have enabled him to appeal the judgment against him. He also has a claim for compensation for malicious prosecution (albeit his was a civil claim) that was (perhaps surprisingly) formally compromised under the terms of the 2019 settlement deed. Those claims are not constrained or precluded under the GLO scheme. That is because under the DBT GLO scheme, in which Mr Castleton is a registered applicant for compensation, the 2019 settlement deed and its terms are necessarily disregarded in assessing and paying compensation. This position, and disparity in treatment of those seeking to be compensated for the harm inflicted upon them, is incapable of rational justification.

The public would be very surprised, I imagine, to know that convicted postmasters, the victims of miscarriages of justice and malicious prosecution by the Post Office (for that is what founds their (residual) claims) are worse-off and stand to receive less by way of compensation than those who were not prosecuted. But their position is in fact worse than that, as I shall explain.

SUBS0000100

(3) A further illustration of how convicted postmasters, whose convictions were subsequently quashed on appeal, are in a worse position and treated less favourably than those who were parties to the GLO litigation but who were not prosecuted and convicted, arises, once again, from the fact that claimants who were parties to the GLO litigation who had been convicted of offences, surrendered all their rights and claims against the Post Office for nothing (i.e. no compensation at all) save a preserved, but contingent, right to claim against the Post Office for malicious prosecution, should an appeal court in due course quash their conviction for being unsafe. (That is a right that was existing and preserved (i.e. the remnant of their other claims all of which they surrendered on settlement.) To that extent, convicted postmasters would have been better-off had they not been parties to the GLO litigation.

I have a client to whom that applies, i.e. they were convicted and imprisoned and had their conviction quashed on appeal – but they were not a party to the GLO litigation. Accordingly, their claim for damages is more extensive than a client who was a party to the GLO litigation and who had been convicted of an offence and who, as a result, got nothing out of that litigation save a residual malicious prosecution claim. That is a result that cannot be justified as a matter of logic, justice or fairness. I apprehend that this position may not be well known or well understood. (Further, any additional claim for abuse of process (for example, the deliberate obstruction of rights of access to the court) – a claim unavailable to OHC claimants but that is available to others, whose convictions on Post Office prosecutions have been quashed - doesn't require determination of the prosecution/claim in a claimant's favour, which malicious prosecution requires.)

(4) The most startling, and wrong, disparity of treatment and unfairness, I shall now explain. In claims for malicious prosecution now made against the Post Office, for GLO claimants who were convicted, the (to my mind extraordinary) position is as follows:

(i) payments were received by convicted GLO claimants out of the global sum received by the Steering Committee under the terms of the 2019 settlement (the settlement sum).

(ii) Those sums were paid to convicted GLO claimants out of sums that stood to the account of GLO claimants who were not convicted. Under the auspices of the GLO Steering Committee, the not-convicted GLO claimants paid ex gratia an increment (i.e. a portion) out of the settlement sum (compensation) to which they were otherwise entitled, as determined and directed by the GLO Steering Committee, to the GLO convicted-claimants who are explicitly excluded from any compensation paid by the Post Office under the 2019 settlement terms. (That result is expressly contemplated as permissible under the deed.)

(iii) As will be apparent, Mr X, who was a convicted GLO claimant, received a modest payment, ex gratia, from deductions made from all the non-convicted claimants' damages, because the Steering Committee in the exercise of its discretion considered that it would be unacceptable for convicted postmaster GLO claimants to receive no payment of compensation at all (except the chance of one day perhaps being able to

SUBS0000100

bring a claim against the Post Office for malicious prosecution) out of the litigation in which they were claimants and to which they were parties. That might be called "benevolence" as exercised by the GLO Steering Committee. Certainly convicted GLO claimants had no right to payment.

(iv) Astonishingly (I do not use the word lightly) the Post Office now is seeking to (and so far as I know may already have) set-off, under the OHC scheme, sums paid ex gratia by the not-convicted claimants to convicted claimants out of the global settlement sum, paid by it in 2020, and from which convicted postmasters were explicitly excluded, against the compensation now payable by the Post Office to convicted claimants. To my mind that is an enormity. In practice, this means that if a convicted claimant received £75,000 from other non-convicted claimants, the Post Office now requires to be credited, in paying damages to a convicted GLO claimant in the OHC scheme, the £75,000 received by them from other GLO claimants out of their compensation. The Post Office, in effect, is seeking to recoup compensation that it has previously paid.

As I shall explain, apart from being offensive, that is wrong, both in principle (one might think self-evidently) and also in law. I apprehend it is a widespread issue and not well understood.

To put the point more simply, the Post Office seeks to reduce its liability to those it falsely convicted by malicious prosecution, by the amount paid, ex gratia by others of its victims. It is seeking, in short, to reduce its liability by an amount of damages it has itself already paid. 'Pulling oneself up by one's own bootstraps' is an expression apt to the circumstances. That is to say, where A harms both B and C and A pays B but not C, and B then pays to C part of the damages they recover, having sympathy for C's plight, A (here the Post Office) asserts against C, who has been uncompensated by A, that the payment by B to C thereby reduces/abates A's liability. That result is offensive to any sense of justice. It is also deeply offensive to the Post Office's victims.

Ostensibly, this is said to be in reliance on the principle that otherwise a prosecuted GLO claimant would recover twice for the same loss (known in law as 'double recovery' – the law, generally, sets its face against windfalls). This is also known as 'avoided loss'.

As a matter of legal analysis, the short answer is that B's payment to C (i.e. an ex gratia payment to a convicted postmaster out of the recovery (compensation) made/received by non-convicted GLO claimants) does not take effect in reducing the Post Office's liability. First, an ex gratia payment from not-convicted postmasters is not the "recovery" of damages or compensation. Legally speaking, a thing done between others does not harm or benefit others.[4] First, to test it by an extreme analogy, if A in similar circumstances is liable to both B and C for the same amount of £100 each, and pays B £100 but refuses to pay C anything, if B then pays to C out of the goodness of their heart ("benevolence" – q.v. below) £95, it would be remarkable if A could thereby contend that their continuing liability to C is merely £5, thereby reducing the overall liability for the 'global' wrong done to both A and B by £95 on the basis that A had already received full compensation. Reduced to such simple terms, the fallacy

[4] A proposition that when lawyers used to like to speak in Latin went by the tag res inter alios acta.

SUBS0000100

becomes obvious and is shown to be little more than nonsense. The Post Office is crediting itself - or claiming to be entitled to credit itself - with damages it has previously paid to its other victims.

That result not only offends against any sense of justice and fairness, but on high authority it is also, happily, wrong in law. It plainly gives the lie to the Post Office's asserted concern to make "fair" compensation "swiftly" available to those it wrongfully prosecuted.

In relation to other payments that may or may not be taken into account in assessing damages payable to an injured party, in Lowick Rose LLP v Swynson Ltd and anr. [2017] UKSC 32 at [98], Lord Neuberger, the President of the Supreme Court, referring to the earlier House of Lords' decision in Parry v Cleaver [1970] A.C.1,[5] said that the considerations of justice, reasonableness and public policy – the relevant criteria identified by Lord Reid in the House of Lords in Parry - "should not be treated by judges as a green light for doing whatever seems fair on the facts of the particular case...the types of payments to a claimant which are not to be taken into account when assessing damages, are either those which are effectively paid out of his own pocket (such as insurance which he has taken out, whether through his employer, an insurance company or the government), or which are the result of benevolence (whether from the government, a charity, or family and friends), all of which can be characterised as essentially collateral in nature." (Underlining mine.) The words 'co-claimants' are readily accommodated in the words in parentheses following "benevolence".[6] It is the intrinsic nature of the payment that in law is the key consideration. The sums received by convicted claimants were in the nature of gifts (ex gratia) from the benevolence of the other GLO claimants, albeit a benevolence mediated by the Steering Committee. Thus, that such gifts should now stand to the credit of the Post Office as wrongdoer not only offends against any sense of justice it is also wrong in law: see further, for example Dennis v LPTB [1948] 1 All ER 779 and Cunningham

---

[5] In Parry v Cleaver [1970] A.C.1, in the House of Lords Lord Reid explained that, whether a plaintiff was bound to bring into account insurance payments, charitable payments, pension payments and the like, which were payable owing to the injury suffered as a result of the defendant's tort... the answer should depend on "justice, reasonableness and public policy".

[6] A less obvious, but similar, result is seen in the recent commercial shipping decision Sevylor Shipping and Trading Corp v Altfadul Company for Foods, Fruits and Livestock and anr. [2018] EWHC 629 [Comm] (The Baltic Straight). It was contended by the carrier of a cargo that had deteriorated, that a credit given to the purchaser (Altfadul) by the seller/shipper/charterer (CoMaCo) under the sale contract should result in the purchaser not being able to claim against the shipowner/carrier the full value of the deteriorated cargo. Mr Justice Andrew Baker, an able judge, dismissed the appeal. He found that the fact of an intermediate payment (credit) by another party to the purchaser was nothing to the point, and payment of the full value by the carrier would simply result in the partial compensation, by way of credit by the seller to the purchaser, would consequently be held on trust for the seller by the purchaser. i.e. The credit by the seller of the goods didn't diminish the carrier's liability.

SUBS0000100

v Harrison ([1973] QB 942 (ex gratia payments made by a sympathetic employer were not deductible).

I am fortified in the foregoing analysis by an earlier statement of Neuberger J, then a High Court judge, in Hamilton-Jones v David & Snape [2004] 1 WLR 924:

> "the principle can be said to be based on the proposition that the gratuitous payment of money by third parties to the claimant is res inter alios acta, as between the claimants and the defendants" and
>
> "There is no reason why payments made to the claimant by third parties, particularly when those payments are made out of natural love or affection for the claimant, should be credited to the benefit of the person whose negligence has harmed the claimant, and to the disadvantage of the claimant. Indeed it would seem almost absurd if that were the law." [My underlining.]

The Post Office's asserted right to be entitled to set-off, against its present liability to those it had prosecuted and convicted and in many cases had imprisoned on false and misleading evidence, sums previously paid by it under the terms of the 2019 settlement of the civil litigation, is plainly much worse and more objectionable and serious than the "absurdity" identified by Neuberger J. in Hamilton-Jones.

My concern in this regard is that it seems likely that many of the Post Office's victims may accept, and may have accepted, compensation from the Post Office, as represented by Herbert Smith Freehills, that is unjustifiably less than that to which in law they may be properly entitled, as the result of a mistaken understanding of the law on 'double recovery'/avoided loss.

It doesn't encourage confidence, where points such as this are being taken against vulnerable, and in many instances profoundly damaged, claimants in adversarial attritional litigation against the Post Office, as represented by one of the largest and most prominent law firms in the country. As I mentioned at the start of this letter, Tracy Felstead, whose life and health have been blighted by the Post Office, feels that she just "cannot go on". She should not have to be dealing with this kind of thing. I fear that others may already have been seriously disadvantaged – and have thereby suffered further wrong at the hands of the Post Office.

I have explained the position, as I see it, to Herbert Smith Freehills, in separate correspondence. On 10 February 2023 I requested from HSF an explanation of the legal basis for the asserted right to set-off ex gratia payments made by not-convicted claimants against the Post Office's liability to pay damages to convicted postmasters, including any propostion of law relied upon in support. My detailed and careful request has elicted no substantive response, still less justification for the Post Office's asserted right to set-off.

PART II

SUBS0000100

A FALSE DICHOTOMY? - PROSECUTIONS WHERE THE RELIABILITY OF HORIZON DATA WAS ESSENTIAL TO THE PROSECUTION AND THOSE WHERE IT WAS NOT. AN OVERSIMPLIFICATION? 'UNINTENDED CONSEQUENCES'?

The following discussion is provided principally for your information and for the purpose of adverting to the fact that, as a result of the Court of Appeal's judgment in Hamilton and ors. v Post Office Ltd [2021] EWCA Crim 577, it is likely that there is widespread continuing injustice suffered by victims of the Post Office.

I shall make some preliminary observations.

(1) There are grounds for the view that virtually no judgment given against a defendant, civil or criminal, on a claim or prosecution by the Post Office can be treated, without more, as safe. There may be a tiny handful of cases where there has been compelling evidence of wrongdoing, independent of Horizon or other Post Office systems, the Post Office, Fujitsu, the actions of their employees or third parties and of the actions/conduct of the Post Office's own lawyers. Those will necessarily be a tiny fraction.

(2) The fundamental fact, that is a consistent theme from 1999 onwards, is that the Post Office was unable to distinguish between fraud and dishonesty, on the one hand, and system and technical errors, whether caused by known bugs in Horizon or other, unknown, bugs, or by other system or data handling/reconciliation failures or errors (whether or not Horizon), on the other. The Post Office's default position, until 2014, was to attribute the consequences of all identified error to postmaster/employee dishonesty and liability (a point made by both Second Sight and Detica (below)). That position was recognised as untenable and no longer sustainable after 2013 (including, after Second Sight's and Detica's reports), but the implications of that recognition were deliberately suppressed by the Post Office, adding to and augmenting the grievous injury previously inflicted by it upon its many victims and obstructing and interfering with their right of access to justice.

(3) It was not Horizon that prosecuted and brought other legal and enforcement action against postmasters and other Post Office employees, such as Tracy Felstead (then aged 19). It was individual Post Office officers and its employees, assisted and supported by other individuals. These included employees of Fujitsu and the Post Officer's own lawyers. Those individuals are now known, over a long period of time, to have suppressed and concealed material evidence and to have withheld their knowledge of the true facts, both from the Post Office's victims and from the courts. (Mr Altman Q.C. referred to a "cultural problem" in the Post Office with the shredding of documents by the Post Office, as referred to in a written advice dated 2 August 2013 (his

SUBS0000100

"General Review" of 15 October 2013, at paragraph 112[7]) It is wrong, therefore, to overly stress the by now very well documented unreliability of the Horizon accounting system as the cause of what happened to the Post Office's victims. Doing so is apt to downplay the issue of the integrity of the Post Office at board and prosecutorial level and in other respects (e.g. Castleton). What happened was the consequence of actions taken and decisions made by individuals for their own and the Post Office's purposes.

(4) Rhetorically, one can reflect upon what an ordinary juror might make of a prosecution by the Post Office where (non-exhaustively – and to say nothing of individual conduct):

a. The scale and effect of the presence of known bugs in Horizon over time was to be disclosed and properly explained. (Ignoring, for this purpose, the possible effects of unknown/undocumented bugs.)

b. The fact and scale of 'remote access' by Fujitsu to Horizon branch accounts and terminals – ('super-user' rights) from roll-out in 1999 was disclosed, and properly explained, and that for many years no record was kept, either of the fact of access or what was done in exercising those rights of access - including the impersonation of postmasters by adopting their ID.

c. The existence of substantial (some would say colossal) sums in unallocated Post Office suspense accounts and that such funds were credited to the Post Office's P&L account when it could not with any confidence be said that the sums in question were owned by the Post Office. (On this, it is worth noting that no statement to date has been made by the Post Office as to whether any investigations were undertaken into the scale of suspense account balances nor, if they were, what these revealed.)

Not only would there be room for 'reasonable' doubt, there would be the gravest possible doubt.

(5) To date no consideration appears to have been given to, still less has there been any evaluation of, the vulnerability of the Post Office to fraud carried out by third parties who knew of the Post Office's systems' vulnerability, both to system error and failure (bugs etc.) but also to undocumented rights of access to postmaster branch terminals and accounts.

While what follows is provided for your information, the issue to my mind is both important and real - with present effects. As a concrete example, it has recently arisen in connection with one of my

[7] https://www.postofficehorizoninquiry.org.uk/sites/default/files/2023 -01/POL00006581%20-%20Review%20of%20PO%20prosecutions%20by%20Brian%20Altman%20KC%2015102013.pdf

SUBS0000100

clients, Mrs Nichola Arch (who has given me permission to refer to this), who was prosecuted by the Post Office but, most unusually (it may be said 'exceptionally') in Post Office prosecutions, in April 2002 she was acquitted of any offence. (Mrs Arch's prosecution is notable not least for her having been forbidden by the Post Office from speaking to potential witnesses for her – that is abusive conduct.) The Post Office apparently no longer holds records of her case. The issue recently arose (which I have addressed elsewhere) as to whether the reliability of Horizon data may not have been (and, in the absence of available documents, cannot with confidence be said to have been) "essential to her prosecution".

It is likely that that issue is productive of continuing serious injustice. It is the product of the Court of Appeal Criminal Division, in its judgment in Hamilton and ors. v Post Office Ltd [2021] EWCA Crim 577, having done nothing more than by law it was required to do in discharge of its primary statutory function in determining the outcome of the appeals referred by the CCRC; that is to say, the (narrow) determination of whether or not convictions were safe within the meaning of the Criminal Appeal Act 1968. That role of the court by convention is described as its "reviewing" function or jurisdiction.

There is, however, another important function of the Court of Appeal, namely its "supervisory" function. That is to say, its role in supervising and providing guidance for the inferior courts.

The 42 Hamilton appeals exposed, if not the most, one of the most extensive miscarriages of justice in English legal history. Through a very narrow focus, at the heart of the miscarriages lay the Post Office's institutional failure, over decades, to give proper disclosure of material that would have assisted defendants to its prosecutions. It thereby failed in its duty as prosecutor. A similarly constricted focus also reveals that the many known bugs errors and failures in the Horizon computer system had a known and documented propensity to cause precisely the kind of problems of which defendants to Post Office prosecutions and civil claims explained, in evidence to courts up and down the country, that they had experienced. It is now accepted that the Post Office withheld from disclosure those facts and that knowledge. Eloquent testimony of the difficulties with the Horizon system experienced by postmasters is to be found in, for example, the criminal trial of Mrs Seema Misra, a full transcript of which is publicly available[8] (the trial judge repeatedly wrongly held Mrs Misra's trial to be fair, when it was not), and in the civil judgment given by Judge Richard Havery Q.C. against Lee Castleton in the High Court January 2007: Post Office Ltd v Castleton [2007] EWHC 5 (QB).

Many may think that the Court of Appeal ought not to have confined itself to its narrow reviewing function but that it ought, in the public interest, to have gone on, in the exercise of its supervisory jurisdiction, to consider why, in so many manifestly similar instances, innocent people had been wrongly convicted of serious offences of dishonesty on seriously incomplete and unsatisfactory evidence and as a result became victims of the miscarriage of justice on a scale hitherto unknown in this country? That is to say, why had the courts of England and Wales so frequently failed to operate as intended and as they should? Why the court determined not to address such obviously important questions admits of no easy or obvious answer. (It is no answer that Sir Wyn Williams is conducting an inquiry; his remit does not extend to considering reasons for the failure of the legal system.) It is possible that the Court of

---

8 https://journals.sas.ac.uk/deeslr/article/view/2217

SUBS0000100

Appeal, like the Post Office, was astute to maintain 'confidence in the brand' and broadening the issues before the court might have been seen to be not without risk of the proceedings spiralling out of control, with the consequence that the appeals were determined, in effect, solely by reference to the explicitly and necessarily very narrow[9] findings of fact by Fraser J in Bates and ors. v Post Office Ltd Horizon Issues (No. 6) [2019] EWHC 3408.

It might be said that, confronted as the Court of Appeal was by a 'can of worms', it was content to puncture the lid, but not to lift it.

Were an airline to fail repeatedly in a similar way, with devastating consequences for those using it, aircraft would be grounded and the cause would be rigorously investigated.

The failure, if that is what it can properly be called, by the Court of Appeal to extend its view beyond, in the particular case, its consideration of whether evidence undisclosed by the Post Office of its knowledge of bugs and errors in the Horizon system meant that a given conviction was unsafe or not, has resulted in the dichotomisation by the court (Holroyde LJ, Picken and Farbey DBE JJ) of those appeals in which it considered that "the reliability of Horizon data" was "essential" to the prosecution case, on the one hand, and those where in its judgment it was not, on the other. Whether such a simple dichotomy is a proper tool for analysis (and the determination references to the Court of Appeal by the CCRC and of appeals) is seriously questionable.

The dichotomy appears in the CCRC in referrals under s. 9 of the Criminal Appeal Act 1995. It appears, almost like a mantra, in forms of words adopted by the CCRC: "the reliability of Horizon data was [variously] central/essential to the prosecution..." at paragraphs 7(1), 110, 120, 124, 130, 146, 149, 152, 155, 175(1)-(23) inclusive, and at paragraph 181(1)-(8) inclusive (and possibly elsewhere) of the CCRC June 2020 referral document under s. 9 of the Criminal Appeal Act – that is to say, the CCRC's statement of grounds for appeal. It was a central consideration and evaluative tool for the CCRC.

More particularly, and importantly for present purposes, the dichotomy is articulated by the Court of Appeal in the judgment of the court in Hamilton at paragraphs [77], [132], [135], [137] and at [138]. Applying that dichotomy/taxonomy, the appeals of Wendy Cousins, Stanley Fell and Neelam Hussain were dismissed. In effect, the default position appears to be, that so far as the reliability of Horizon data was not considered to be essential to the Post Office's prosecution, such that there was other material, the prosecution has been treated as unimpeachable, Post Office evidence treated as reliable, and the resulting conviction consequently not 'unsafe' – the 'litmus test' for a successful appeal.

That essential distinction, that appears to have commended itself to the Court of Appeal, was not one on which there was it appears to have been much, if any, argument before the court. It is noted that Mr Brian Altman Q.C. represented the Post Office on the unsuccessful appeals by Wendy Cousins, Stanley Fell and Neelam Hussain. Mr Altman had deep knowledge of the events and circumstances of the Post Office in 2013.

---

9 The Horizon Issues trial, though it gave rise to a monumental judgment, was only on explicitly "preliminary issues".

SUBS0000100

It is not without irony that there was other available important evidence that was not considered by the Court of Appeal (and other evidence is now emerging in the Williams' Inquiry). As a result, if a person was convicted on the basis of evidence of (typically) an unexplained balancing error in their Horizon account, on the basis of evidence from Horizon, then the appeal against conviction has been allowed (because the reliability of Horizon data was treated as "essential" to the prosecution), but if that was not the sole/only basis for their prosecution and other data/evidence was adduced by the Post Office as prosecutor, appeals have failed, as happened with Cousins, Fell and Hussain. So far as I understand it, it appears to be the case (perhaps remarkably) that appeals have only been allowed by appeal courts where the Post Office has accepted that there were disclosure failures in connection with Horizon; that is to say, 'first category' abuse of process, as a ground of appeal, has not been contested and the appeal not resisted (on that ground) by the Post Office.

With respect to the Court of Appeal, for reasons that I shall explain in outline, it is likely that the Court of Appeal's dichotomising, and the CCRC's (over) emphasis on the centrality of the reliability of Horizon data to any particular Post Office prosecution, are similarly flawed and may well be overly simplistic. The reason for this is that the Court of Appeal's approach (and the CCRC's before it) was informed by very limited and constricted evidence – essentially confined to Fraser J's (limited) findings of fact in his Horizon Issues judgment.

The burden of the evidence for the CCRC referrals was, as the CCRC explained, itself derived from the judgment of Mr Justice Fraser in Bates v Post Office Horizon Issues (No. 6) [2019] EWHC 3408.[10] That judgment itself, with respect to the learned judge, while a masterly account, was limited by what now appears to have been constricted disclosure by the Post Office. That is to say, even on the Horizon Issues trial, the Post Office failed to give important and highly relevant disclosure that had it been disclosed would likely have had a significant impact on the course of the litigation. For example, it appears:

- That the Ismay report was not disclosed – q.v. Hamilton judgment at paragraph [24]. In 2010 Mr Ismay had written in a widely circulated important document, that contemplated an independent review of Horizon and its integrity: "It is also important to be crystal clear about any review if one were commissioned – any investigation would need to be disclosed in court. Although we would be doing the review to comfort others, any perception that POL doubts its own systems would mean that all criminal prosecutions would have to be stayed. It would also beg a question for the Court of Appeal over past prosecutions and imprisonments." [My underlining.] No review was commissioned.

- That the Post Office's board's notification to its insurers of risk in about August 2013, as then advised by its solicitors Bond Dickinson, was not disclosed in the Bates litigation, as it should have been. Such notification was an important event and suggests recognition of significant financial risk to the Post Office, connected

[10] The CCRC explained that it ceased to pursue its own inquiries and waited for Fraser J's judgment before deciding whether to refer cases to the Court of Appeal pursuant to the Criminal Appeal Act 1995 – some of which had been subject to consideration by the CCRC from as long ago as 2014. (That does not begin to justify the delay for the purposes of Art. 6 ECHR (want of resources do not justify delay).)

SUBS0000100

with evidence given to the court by Mr Gareth Jenkins, and perhaps other known failures (such as disclosure). (A financial risk that has all too obviously now eventuated.)

- That Detica's October 2013 report Fraud and non-conformance in the Post Office; Challenges and Recommendations G-199 Fraud Analysis[11] (below) was not disclosed. That it was not, given its subject matter and importance, is extraordinary.

Each of these constitutes a serious and material disclosure failure by the Post Office in the Bates GLO litigation – a failure that is entirely separate from the issues that were considered by the Court of Appeal in its Hamilton judgment. The reasons for such extensive and serious disclosure failures for present purposes is not relevant (though it will certainly have had an impact on the GLO litigation).

Arguably, the single most important document that appears not to have been disclosed in the GLO litigation was a document submitted by the firm Detica Limited, that traded as BAE Systems Detica and used the registered name Detica NetReveal ("Detica"). Detica, in 2013, was a consulting division of BAE Systems plc. In October 2013 Detica, having undertaken a six month 'pilot study' that extended to the detailed analysis of Post Office's systems, transactions and resilience, specifically resilience to fraud, submitted to the Post Office an extensive report and made 39 recommendations. The report was circulated at the highest levels within the Post Office[12] and likely would have been considered by its board. Detica concluded and advised the Post Office that its systems were "not fit for purpose" in a modern retail environment. That conclusion was not narrowly concerned with the Horizon computer system. Specifically, Detica concluded that the Post Office was unable reliably to reconcile data from disparate sources.

It is not known whether Mr Altman Q.C. in 2013 was aware of Detica's October 2013 report. If properly instructed, he should have been. The report went through five drafts between August and September 2013.

One example of repeated systemic error identified by Detica was in ATM transactions/reconciliations. These were typically prone to reconciliation error. Detica concluded that endemic (my word) ATM error could not be accounted for by fraud alone. That wasn't a Horizon issue.

ATM errors gave rise to enormous Post Office suspense account balances in the order of tens of millions of pounds. Second Sight, in their 2015 Final Report, observed (paragraph 2.18):

> "... In addition to the credits being taken to Post Office's General Suspense Account we have been informed very recently that at each year end substantial

---

11 https://www.jfsa.org.uk/uploads/5/4/3/1/54312921/document_25_-_detica_netreveal_fraud_analysis_011013_1.pdf

12 The Report was commissioned by Post Office's Head of Security, John Scott and Legal and Compliance Director Susan Crichton. It was made available to the Post Office's General Counsel, its Chief Financial Officer, its Chief Information Officer, its Chief Technical Officer, its People & Change Director and to other individuals.

SUBS0000100

> unreconciled balances existed on many of the individual suspense accounts. These unreconciled balances for the 2014 financial year were approximately £96 million in respect of Bank of Ireland ATMs and approximately £66 million in respect of Santander. These unmatched balances represent transactions from individual branches that occurred in the preceding six months". [My underlining.]

It does not require great insight to recognise that ownership of the balances on those suspense accounts can only have vested (variously) in members of any one of four classes of persons: (i) the Post Office itself; or (ii) its clients, such as, for example, Royal Mail; or (iii) Post Office customers; or (iv) postmasters themselves. Even for a bank, such large unallocated balances would be surprising. The Post Office's ATM errors were separate from problems with, and bugs in, Horizon.

The October 2013 Detica report was most likely an important consideration in the Post Office's strategic decision, from 2014, to (effectively) cease prosecuting its postmasters and employees for Horizon "shortfalls".

The important point about the Detica report of 2013, is that it shows/evidences that Post Office problems were not confined to the by then known serious problems with Horizon data and the effect of bugs and errors in the system and their contingent impact upon postmaster accounts - the central, if narrow, issue in both Mr Justice Fraser's Horizon Issues judgment and in the Court of Appeal's judgment in Hamilton in 2021. What Detica showed and explained was that the Post Office had widespread problems with handling and reconciling data from a variety of sources beyond Horizon and that its "systems" were not fit for purpose. That necessarily raises questions – and doubts – about Post Office evidence that extends beyond the narrow question of whether "the reliability of Horizon data was essential to the prosecution case".

It is a matter of regret that the Court of Appeal was unable to consider the 2013 Detica report. Had it done so, it may well have been unable to draw the dichotomy that it did.

It appears that that dichotomy, unwarranted and unjustified as in my view it is, informs and determines the approach of the CCRC, various appeal courts, and others. It is very possible that is productive of continuing (possibly grievous) injustice.

I should say, that in November 2020, I was acutely concerned to know why, in 2014, the Post Office radically changed its strategic approach to prosecuting its postmasters. Eliciting on 12 November 2020 the July 2013 "Clarke Advice" provided part of the answer. In written submissions made to the Court of Appeal, I sought to explain how developments in Post Office knowledge, including Detica, between 2010 and 2013 were of decisive importance. Unfortunately, after I was constrained in December 2020 to withdraw from representing my clients in the face of a threat by the Court of Appeal of proceedings against me for contempt of court (that it eventually withdrew at the end of April 2021), my arguments, including those founded on the importance of the 2013 Detica report, were not pursued before the Court of Appeal. I fear that a consequence may be continuing injustice. Hence my writing to you now.

SUBS0000100

I am concerned that my clients, like others, were not only the victims of injustice, but further, from 2013, and possibly before then, are likely to have been victims of an attempt to pervert the course of justice, including by the deliberate obstruction of their right of access to the court and intentional violation of their Article 6 rights under the ECHR, rights that are guaranteed by the state.

The Post Office is a public, state-owned, institution. As a private prosecutor it was bound to adhere to the highest standards of fairness, openness and integrity. It did not do so.

I am copying this letter, for information, to Sir Wyn Williams, whom I know to be concerned about the fairness of compensation arrangements, to Lord Arbuthnot of Edrom and to Professor Richard Moorhead.

I am conscious of the length of this letter, and also of the many demands on your time. I believe the matters to which I refer are serious and important, accordingly, I make no apology for drawing them to your attention.

As I suggest at the beginning of this letter, the present compensation arrangements are unfair. What is to be done is for others. All I can do is point to the fact.

Yours faithfully,

[GRO]

Kevin Hollinrake Esq., M.P.
Minister of State for Enterprise,
Markets and Small Business
Department for Business and Trade
1 Victoria Street
London
SW1H 0ET

c.c. Sir Wyn Williams, Chair, Post Office Horizon IT Inquiry
The Rt. Hon. The Lord Arbuthnot of Edrom
Professor Richard Moorhead, University of Exeter
Rob Brightwell, Deputy Director, Business Resilience, Department for Business and Trade
Herbert Smith Freehills LLP, FAO Alan Watts