

IN THE MATTER OF THE POST OFFICE HORIZON IT INQUIRY

SUBMISSIONS: PROVISIONAL LIST OF ISSUES ON BEHALF OF CORE PARTICIPANTS REPRESENTED BY HUDGELL SOLICITORS

1. These submissions are made on behalf of the Core Participants (“CPs”) represented in the Inquiry by Hudgell Solicitors. They are limited to the four issues identified by the Chair in the Agenda and Notice of Preliminary Hearing dated 12 October 2021:¹
 - A. Second Sight Investigations Limited (“Second Sight”)
 - B. Reliance on Legal Advice
 - C. Conduct of the Group Litigation
 - D. Divergences across the United Kingdom

2. Taking each in turn:

A. Second Sight Investigations Limited (“Second Sight”)

3. Central to the concerns over the actions of Royal Mail Group and POL has been its historic resistance to independent review of its actions. Expression of such concerns are too numerous to set out in any detail and will be well known to the Chair, but as just one example, the Court of Appeal (Criminal Division) pointed out in *Hamilton* [24]:

¹ Throughout abbreviations are used for ease of reference and the avoidance of repetition:

1. Sub-Post Masters or Mistresses or former (“SPMs”)
2. Post Office Limited (“POL”)
3. *Hamilton & Ors v Post Office Limited* [2021] EWCA Crim 577 (“Hamilton”)
4. *Bates & Others v Post Office Limited (No. 3) “Common Issues”* [2019] EWHC 606 (QB) (“Common Issues (3)”)
5. *Bates & Others v Post Office Limited (No. 6) “Horizon Issues”* [2019] EWHC 3408 (QB) (“Horizon Issues (6)”)
6. The Terms of Reference for this Inquiry (“TOR”).

24. In August 2010 Rod Ismay, POL's Head of Product and Branch Accounting, prepared a report entitled "Horizon – Response to Challenges Regarding Systems Integrity"..... Mr Ismay went on to give this warning:

"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."

25. In the event, several more years passed before POL did commission an independent review.

4. Plainly, Second Sight were ostensibly commissioned in 2012 to provide independent investigation and oversight of the Horizon system. The extent to which they were able, or not, to carry out that role; as well as any reasons for their inability to carry out that role, are vital to the understanding by the Inquiry of a fundamental element of the process underlying the injustice suffered by SPMs. The examination by the Inquiry of the Second Sight investigation should therefore be as comprehensive and thorough as possible.

5. **Accordingly, we answer the Chair's questions as follows:**

(i) To what extent should the Inquiry examine the events surrounding Second Sight? **As fully as possible.**

(ii) Is it sufficient for the Inquiry to investigate the reasons for the decision to terminate the Post Office Complaint Review and Mediation Scheme?
No

(iii) Should the Inquiry examine whether and to what extent the scope and findings of, and the disclosure made in relation to, the independent investigation(s) undertaken by Second Sight were appropriate? **Yes**

B. Reliance on Legal Advice

6. Reliance on legal advice cannot become an untested answer which closes down effective scrutiny by this Inquiry. Evidence already available indicates that the extent to which POL and others were acting on legal advice, the substance of that advice, and whether it was relied upon, will inevitably become an issue for this Inquiry. For example:
 - a. The significance of the Clarke advices is plain following the decision of the Court of Appeal in *Hamilton* (see [82] – [93]). Provided in 2013, this series of advices addressed, *inter alia*, flawed expert evidence that Horizon remained robust; disclosure duties in respect of Horizon; and, advice on reported attempts to prevent records being kept in respect of subsequent actions. This included POL being advised in respect of any “*attempt to abrogate the duty to record and retain material, observing that a decision to do so may well amount to a conspiracy to pervert the course of justice*” [89].
 - b. The Court of Appeal found it “*extraordinary*” that as a prosecutor POL had to be advised in such stark terms of their duties (*Hamilton*, [87], [90]): “*the need to give it suggests there was a culture, amongst at least some in positions of responsibility within POL, of seeking to avoid legal obligations when fulfilment of those obligations would be inconvenient and/or costly for POL*” (at [90]). This raises issues plainly relevant to the TOR of this Inquiry.
 - c. Although the Clarke advice was provided in 2013, it addressed issues arising in a number of historic prosecutions.
 - d. The Court of Appeal concluded at [129]: “*We are driven to the conclusion that throughout the period covered by these prosecutions POL’s approach to investigation and disclosure was influenced by what was in the interests of POL, rather than what the law required.*” It necessarily

begs the question about advice provided at an earlier or later stage; whether in individual prosecutions or on an overarching basis.

- e. Other failings identified also raise questions about the significance and the relevance of legal advice taken and relied upon by POL and the extent to which legal advice had been sought whether in the context of prosecutions or civil litigation. To take a small number of examples:
 - i. The extent to which POL maintained that Horizon was robust (see above);
 - ii. The extent to which the contractual obligations of SPMs were overstated by POL (*Common Issues (3)* [222], described as “*oppressive behaviour*” by Fraser J; *Hamilton*, [33], [56]). This is plainly an issue on which legal advice might reasonably have thought to have been sought by POL whether internally or from external counsel before proceeding to adopt such a position in their policy towards debt recovery and, ultimately, prosecution; and,
 - iii. The extent to which positions were maintained in individual prosecutions which were irrational and improper; including, for example, sustaining threats of unsustainable charges in order to secure concessions favourable to POL in both financial and reputational terms (e.g. *Hamilton*, [113]-[114] describes the stark concessions made in respect of the plea negotiations with Josephine Hamilton).
7. The Inquiry addresses a scandal encompassing hundreds of prosecutions and major civil litigation. If matters “*went wrong*”, either in the advice given, or in the failure to heed advice, or in the failure to obtain advice at all, it is essential that the Inquiry establishes that.
8. The Chair will be aware that CPs may seek to rely on privilege in the course of any public inquiry; to the extent that Legal Professional Privilege (“LPP”) would

also be available in civil proceedings. Section 22 of the Inquiries Act 2005 provides:

- (1) A person may not under section 21 be required to give, produce or provide any evidence or document if–*
- (a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom,*

9. If a witness or CP chooses to assert privilege that is their right. Privilege may, of course, be waived. Where an individual or organisation chooses to rely on legal advice to justify their actions; that may be a difficult choice to make and inferences may be drawn by observers or, indeed, the Chair. Any assertion of privilege; or any challenge to that privilege would be a legal question to be resolved on an *ad hoc* basis. Arguments may need to be heard in respect of particular items/specific issues; but LPP as a principle cannot constrain the Inquiry from considering matters otherwise within the TOR.²
10. The Chair may be assisted by the Statement of Approach made by Sir Brian Langstaff in the Infected Blood Inquiry on Disclosure and Privilege:

Organisations may consider that some of the documents or information they hold are potentially covered by legal professional privilege (LPP). The right to assert LPP, which exists in civil proceedings, is preserved in the context of public inquiries by s.22(1) of the Inquiries Act 2005. That being said, this Inquiry is tasked with investigating matters spanning a period of over 50 years, and given the passage of time LPP and confidentiality issues will in many cases have been eroded. With this in mind, and having regard both to the commitment made in Parliament and to the fact that issues of candour, openness and cover-up form part

² Indeed, disclosure protocols in a range of public inquiries make clear that the assertion of LPP will be considered by the Inquiry Chair where documents disclosed are relevant. For example, the [Undercover Policing Inquiry Disclosure Protocol](#) indicates that material held by the MPS may be disclosed to the Inquiry and LPP asserted thereafter: “*In such circumstances, if the Metropolitan Police Service wishes to assert privilege, it must do so promptly after the Inquiry notifies it that it regards the material as relevant*”; and further, the Protocol stresses that privilege may be waived.

of the areas for investigation by the Inquiry, I expect all government departments, public organisations and others providing documents and information to the Inquiry to give careful consideration to waiving LPP where this issue arises. Indeed, those that do not will be conspicuous for that reason.

11. There is no lesser commitment to transparency and accountability in the establishment of this Inquiry. We reiterate the commitment of Ministers to Parliament in respect of this Inquiry:

[T]he Horizon saga has wrecked lives and livelihoods. Whilst we cannot undo the damage that has been done, but we can and must establish what went wrong at the Post Office, ensure that lessons are learned and that something like this is never allowed to happen again. (See Paul Scully MP, Minister for Small Business, Consumers & Labour Markets, 19 May 2021 ([Letter to Chair of the BEIS Select Committee](#))).

12. **In brief, we answer the Chair's questions as follows:**

(i) Is it necessary for the Inquiry to investigate whether and to what extent Royal Mail Group and Post Office Limited acted upon legal advice when they:

- a. formulated policies and guidelines on the civil and criminal liability of SPMs, managers and assistants for shortfalls shown by Horizon; and
- b. brought civil and / or criminal proceedings against SPMs, managers and assistants alleged to be responsible for shortfalls shown by Horizon?

Yes, to both questions.

(ii) If so, should the nature of the legal advice received be investigated? **Yes. As outlined above; the nature of the legal advice; (aside from whether legal advice was sought or not; and how that legal advice was taken) may be highly significant to the decisions**

taken by POL and others. Argument may be necessary on the question of privilege when and if it is claimed; but that is a question secondary to whether the Inquiry can and should include this particular issue in its investigation.

C. Conduct of the Group Litigation

13. There is a strong evidential basis on which to include this issue. The conduct of the group litigation was broadly criticised by Fraser J, in both the *Common Issues (3)* and *Horizon Issues (6)* judgments.
14. The TOR indicates that the Inquiry will consider what went wrong; and will consider “*affected postmasters’ experiences and any other relevant evidence in order to identify what key lessons must be learned for the future*” (see TOR, Point A). The criticisms made by Fraser J were against a backdrop of the experience of the SPMs. They had lived through a miscarriage of justice and then endured the group litigation where their accounts were denied time and again and many saw their credibility challenged at every turn.
15. These short submissions do not attempt a full review of the available evidence. There are many reasons why the exploration of this issue is significant to the overarching purpose of the Inquiry. These include:
 - a. The criticism of Fraser J went to the strategic approach of POL to the whole of the group litigation: “*The Post Office has appeared determined to make this litigation, and therefore resolution of this intractable dispute, as difficult and as expensive as it can*” (*Common Issues (3)*, [544]). The judge described the approach taken by POL as “*attritional*” (*Common Issues (3)*, [569(26)]) The significant parallel between this criticism, arising from litigation run between 2017 and 2019 and the comments made in *Hamilton* about the approach of POL to the prosecutions cannot be underestimated. We do not propose to list here the many specific criticisms made of the approach taken by POL to disclosure and to evidence.

- b. The criticism of the judge referred to particular attacks on the Claimants' credibility; described by the judge as a "*peculiarly one-sided approach*" (*Common Issues* (3), [21]); see also [272]. Not least, fraud was pleaded; and witnesses cross-examined; arguably without adequate basis (the reason behind this, including whether POL had fallen into error as a result of information provided by Fujitsu, was not explored by Fraser J) (*Horizon Issues* (6), [548] – [550]).
- c. Many other serious criticisms impugn not only the conduct of POL but the involvement of the legal professionals involved. For example, an argument about contract construction was described as an "*overly intricate attempt to sow confusion and obscure the true issues in the case*" (*Common Issues* (3) [671]).
- d. Criticism of the conduct of the group litigation focuses not only on POL but is critical of the conduct of legal professionals in the preparation of the defence evidence (see, e.g. *Horizon Issues* (6), [251] – [252]: criticising inaccuracies in the evidence of Mrs Van Den Bogerd in the litigation; despite the support of a team of 10).
- e. Aside from the impacts on SPMs individually and as a group, and on the involvement by or responsibility of legal professionals; the costs which were accrued in this litigation, arguably as a result of the approach of POL, were enormous. Rising costs risks impact significantly on the options open to individual Claimants even in ordinary civil litigation. The arrangements put in place by POL for determining litigation strategy (including the appointment of external experts to provide privileged advice not provided to counsel) was described as "*highly unusual*" (*Horizon Issues* (6), [556] – [558])). Ministers have previously abrogated all responsibility for the conduct of the litigation and the accrual of costs.³

³ See Computer Weekly, [Government refuses request to pay legal costs for subpostmasters in Post Office case](#), 3 February 2020: "A BEIS spokesperson told Computer Weekly in January that "ministers monitored the litigation

It is far from clear how responsibility was managed by the Board at POL or by the legal professionals responsible for the conduct of the case. The Inquiry is well placed to explore the extent of the evidence on this issue and the responsibility for the conduct of the litigation and the accrual of costs without questioning the terms of any settlement.

16. Although the terms of settlement are beyond the scope of the Inquiry, the TOR expressly provide that the steps which led to that settlement are within scope and may be properly examined:

*The Horizon group damages settlement (**albeit the Inquiry may examine the events leading to the settlement**), and/or the engagement or findings of any other supervisory or complaints mechanisms, including in the public sector, are outside the Inquiry's scope.*

17. A more restrictive approach would inhibit the ability of the Inquiry to discharge its overarching goal of understanding and acknowledging what went wrong and identifying lessons for the future (see TOR, Point A).
18. For the avoidance of doubt; there is no barrier to a public inquiry establishing or addressing facts arising in the context of civil or administrative litigation, nor examining lessons to be learned from approaches taken to litigation and litigation strategy. For example, in a recent examination of accountability and reparations by the Independent Inquiry on Child Sex Abuse ("IICSA"), evidence was taken and assessed in respect of the role of legal advice and insurer's actions when considering the defence of compensation claims by survivors of CSA.⁴ A number

and were updated regularly with developments", but added: "While publicly owned, Post Office operates as an independent, commercial business within the strategic parameters set by government. As such, government did not play a day-to-day role in the litigation or on the contractual and operational matters that were at the heart of it."

⁴ See, e.g. IICSA, [Accountability and Reparations Report](#), C8: The approaches of Defendants and Insurers to claims. This addressed in general terms issues of litigation strategy and the effectiveness of the civil justice system; and the barriers to redress for survivors of abuse. Specific case studies were considered in this Report and other strands of the Inquiry. For example, in the Roman Catholic Church strand, the Panel considered civil litigation, litigation strategy and the role of insurers; this included consideration of a document called *Guidelines for Catholic Church Organisations Responding to Complaints of*

of strands of enquiry in IICSA included consideration of legal advice and litigation strategy and studies in specific cases.⁵ As outlined above, potential reliance by any CP or witness upon LPP should not automatically restrict the Inquiry's approach to the TOR or any question of scope.

19. **In brief, we answer the Chair's questions as follows:**

(i) Do the Inquiry's Terms of Reference permit an investigation of the conduct of the Group Litigation? **Yes. The TOR anticipate that the steps leading to settlement are within the scope of enquiry.**

(ii) If so, should the conduct of the Group Litigation by Post Office Limited (and others) be investigated? **Yes. The conduct of this litigation has already been widely and publicly criticised including in the Common Issues (3) and Horizon Issues (6) judgments (see above); it would be entirely proper to explore its impact (including on SPMs) and to learn lessons for the future. In the absence of any legal barrier; this issue should be examined.**

D. Divergences across the United Kingdom

20. There is very good reason to include this issue; which reason is primarily rooted in the different prosecutorial processes adopted in the various jurisdictions.
21. Hudgell Solicitors do not have any reliable statistics concerning civil actions and criminal prosecutions pursued by Royal Mail Group and POL in Scotland and Northern Ireland. However, we are anecdotally aware that there has thus far not been a successful appeal against conviction based on the unreliability of Horizon in Scotland, and know of only one Horizon based appeal against conviction in

Abuse issued by the then Catholic Church Insurance Association and which set out a position on approaches to litigation and pastoral care; including on the issue of apologies. See IICSA, [Roman Catholic Church Investigation](#): J2.

⁵ For example, see IICSA, *The Roman Catholic Church; Case Study: Archdiocese of Birmingham, C:3 Father John Tolkein*: an example of safeguarding responses pre-and post-Nolan [27] – [40] which addresses solicitors' advice on settlement on discovery of relevant information about allegations of abuse by Father Tolkein dating from 1968; in the context of litigation settled in 2003. This information was passed to the police and the litigation settled without admission of liability.

Northern Ireland. The latter case is yet to be heard by the Northern Ireland Court of Appeal.

22. Those figures stand in stark contrast to the large numbers of appeals pursued, successfully and unsuccessfully, in England and Wales. Plainly, there may be myriad reasons why there are such divergences across the United Kingdom. However, one difference in practice which immediately stands out between England and Wales on the one hand, and Scotland and Northern Ireland on the other, is that private prosecutions are not permitted in Scotland and were not pursued in Northern Ireland.
23. In Scotland, only the Crown Office and Procurator Fiscal Service may pursue criminal prosecutions. In Northern Ireland, Post Office related prosecutions were conducted by the Public Prosecution Service.
24. Accordingly, all prosecutions of persons suspected of crimes committed in Post Offices in Scotland and Northern Ireland were conducted by the relevant public prosecutorial body. Although responsible for the initial audit and investigation, POL was required to, or did, hand over responsibility for the ultimate prosecution of any suspect.
25. As is notorious, in England and Wales POL were able to privately prosecute a great many SPMs.
26. In *Hamilton*, the Court of Appeal was strongly critical of the prosecutorial conduct of POL. Examples of the Court's condemnation include:

121. We have no doubt that the concessions made by POL in relation to Ground 1 were rightly and properly made. Those concessions relate to failures of investigation and disclosure in all the "Horizon cases" across a period of 12-13 years. In each of those cases, there was no independent evidence of an actual shortfall, and it was essential to the prosecution case that the Horizon data was reliable. We accept and adopt Fraser J's findings that throughout the relevant period there were

significant problems with Horizon, which gave rise to a material risk that an apparent shortfall in the branch accounts did not in fact reflect missing cash or stock, but was caused by one of the bugs, errors or defects in Horizon. POL knew that there were problems with Horizon. POL knew that SPMs around the country had complained of inexplicable discrepancies in the accounts. POL knew that different bugs, defects and errors had been detected well beyond anything which might be regarded as a period of initial teething problems. In short, POL knew that there were serious issues about the reliability of Horizon. If POL needed further information, it could have obtained it from Fujitsu. It was POL's clear duty to investigate all reasonable lines of enquiry, to consider disclosure and to make disclosure to the appellants of anything which might reasonably be considered to undermine its case. Yet it does not appear that POL adequately considered or made relevant disclosure of problems with or concerns about Horizon in any of the cases at any point during that period. On the contrary, it consistently asserted that Horizon was robust and reliable. Nor does it appear that any attempt was made to investigate the assertions of SPMs that there must be a problem with Horizon. The consistent failure of POL to be open and honest about the issues affecting Horizon can in our view only be explained by a strong reluctance to say or do anything which might lead to other SPMs knowing about those issues. Those concerned with prosecutions of SPMs clearly wished to be able to maintain the assertion that Horizon data was accurate, and effectively steamrolled over any SPM who sought to challenge its accuracy.

....

123. These pervasive failures of investigation and disclosure went in each case to the very heart of the prosecution..... In short, POL as prosecutor brought serious criminal charges against the SPMs on the basis of Horizon data, and by its failures to discharge its clear duties it prevented them from having a fair trial on the issue of whether that data was reliable.

.....

129. *First, we reiterate that POL deliberately chose not to comply with its obligations in circumstances in which its prosecution of an SPM depended on the reliability of Horizon data. It did so against a background of asserting that SPMs were liable to make good all losses and could lose their employment if they did not do so. It did so despite the fact that POL itself had selected the SPMs as suitable persons to hold their position of trust.*

130.....*We think it clear that throughout the relevant period, POL as prosecutor demonstrated, as Fraser J found in the Horizon Issues judgment at [928], “a simple institutional obstinacy or refusal to consider any possible alternatives to their view of Horizon, which was maintained regardless of the weight of factual evidence to the contrary”. Moreover, the longer that approach persisted, the more POL was able to, and did, rely upon its own past abusive conduct by asserting that no previous challenge to Horizon had succeeded.*

.....

133. *If the full picture had been disclosed, as it should have been, none of these prosecutions would have taken the course it did before the Crown Court. No judge would have been placed in the unhappy position of learning – as some judges (or retired judges) will do if they read this judgment – that they unwittingly sentenced a person who had been prevented by the prosecutor from having a fair trial.*

.....

137. *In those circumstances, the failures of investigation and disclosure were in our judgment so egregious as to make the prosecution of any of the “Horizon cases” an affront to the conscience of the court. By representing Horizon as reliable, and refusing to countenance any suggestion to the contrary, POL effectively sought to reverse the burden of proof: it treated what was no more than a shortfall shown by an unreliable accounting system as an incontrovertible loss, and proceeded*

as if it were for the accused to prove that no such loss had occurred. Denied any disclosure of material capable of undermining the prosecution case, defendants were inevitably unable to discharge that improper burden. As each prosecution proceeded to its successful conclusion the asserted reliability of Horizon was, on the face of it, reinforced. Defendants were prosecuted, convicted and sentenced on the basis that the Horizon data must be correct, and cash must therefore be missing, when in fact there could be no confidence as to that foundation.

27. Plainly, this Inquiry would assist the understanding of how it was that injustice was suffered by SPMs if it was to investigate policies and practices of Royal Mail Group and POL across the United Kingdom. Such investigation of policies and practices would reveal any divergence or absence of divergence in the various jurisdictions in respect of, *inter alia*:

- (i) Strategy and decisions in respect of civil recovery by Royal Mail Group and POL;
- (ii) Charging policy and decisions;
- (iii) Charging Review;
- (iv) Disclosure;
- (v) Acceptance of Pleas; and,
- (vi) Confiscation and compensation proceedings.

28. **In brief we answer the Chair's question as follows:**

Should the Inquiry investigate whether and to what extent there existed divergences in the policies and practices adopted by Royal Mail Group and Post Office Limited within the four countries of the United Kingdom when taking action against SPMS, managers and assistants alleged to be responsible for shortfalls shown by Horizon? **Yes.**

E. Conclusion

29. We are happy to provide any clarification or elaboration of any aspect of these submissions should the Chair request it.

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DOUGHTY STREET CHAMBERS

**NEIL HUDGELL
HUDGELL SOLICITORS**

29 OCTOBER 2021