Working Paper 4

Submissions on Four Themes

The Evidence Based Justice Lab
Post Office Scandal Project
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Acknowledgments

Although these are our submissions alone, we have had the benefit of input from members of our Advisory Group and a seminar over two half days with General Counsel (GCs) and other experienced professionals, looking at events involving the Post Office (POL) in detail, for which we are grateful.

Executive Summary

In essence these submissions argue that an understanding of the Second Sight Investigation; the role of legal advice on shortfall cases, civil and criminal; and the conduct of the Bates litigation are fundamental to an exploration and understanding of the harms arising from POL's use of the Horizon system.

The High Court and the Court of Appeal have raised matters of profound importance and concern in which legal work has played an important, and sometimes central, role. A failure to consider this role in full will severely limit the capacity of the Inquiry to get to the truth behind the Horizon failings. Horizon is about software failings certainly, but it also clearly raises management failings and legal failings. Harms directly arose from the way legal work was managed and conducted: people were threatened, sued, fired, and prosecuted via legal work. Denials, non-disclosure, and delay were enabled, at least in part, by legal work.

Second Sight raised many of the concerns accepted by the Court of Appeal and the High Court. They were resisted, rightly or wrongly at the time, by POL managers with the assistance of POL lawyers, and over a considerable period. The entirety of that period will provide critical evidence of how POL responded to concerns about Horizon.

Software errors were nothing without the human actions and human action was shaped by, carried through, and then defended by legal work which has prevented and delayed justice for the Sub-Post Masters. The Inquiry cannot consider such matters off limits and meet its objectives.

Submissions

1. These are our responses to the Notice of Preliminary Hearing on 8 November 2021 (NPH). Our submissions refer to the Inquiries' "terms of reference" (TOR) and the "Provisional List of Issues" (PLI) where necessary. We refer to Post Office Limited as POL, and Sub-Post Masters and others blamed for Horizon shortfalls as SPMs for convenience. When we refer to POL, we have in mind in particular its chairman and board as well as other employees. The role of government as shareholder, investor, and possible influencer should also be kept in mind.
2. We concentrate on three of the themes in the NPH. We see the Second Sight Investigation; the role of legal advice on shortfall cases, civil and criminal; and the conduct of the Bates litigation as fundamental to an exploration and understanding of the harms arising from Horizon. Harms directly arose as a result of legal work and understanding the legal processes and decisions leading to shortfall cases is critical to understanding how POL came to take the decisions it did as well as who knew what and when.
3. More mundanely, but very importantly, legal advice and legal work were necessary, often important, and sometimes central, elements in the implementation and review of Horizon. Responsibility is not likely to have been the lawyers' mainly or alone: corporate governance by others in POL and Fujitsu, technical and factual information on the Horizon scheme from engineers and the like, as well as input from Government, are all likely to have played their part but it is also clearly the case that legal work underpinned many of the actions taken by POL across the time span in question and helped produce Horizon's real-world effects. Lawyers, supposed to be independent and objective about legal matters, failed to provide the necessary challenge and scrutiny of decisions that were deeply legal (should shortfalls be enforced; was there evidence to charge; were convictions safe; the ability of management to deny evidence of unsafe convictions). In particular:
    3.1. Legal work was central to the prosecutions of SPMs and the enforcement of shortfalls through litigation and letters before action.
    3.2. Legal work translated the absence of a process for challenging Horizon shortfalls into mechanisms requiring statements of account to be agreed and debts to be paid as a condition of continuing to trade. Arguably, this 'quick' and 'tidy' approach to financial management transferred the risk of Horizon failure onto those least able to bear or challenge it.
    3.3. Even prior to that, legal work framed the relationship between Fujitsu and POL, including how they managed the risk of errors posed by Horizon Legal work and the information to be provided when there were queries or challenges.
    3.4. Legal work was central to the evaluation, containment, and denial of substantive and reputational arising from Horizon and POL's conduct based on Horizon. Legal work helped shape and manage Second Sight's review; it shaped the response of POL to evidence of wrongdoing and Horizon's vulnerability as a corporate citizen; and it shaped POLs conduct

as a prosecutor and as a defendant in civil proceedings and in defending an unparalleled appeal in the Court of Appeal.

3.5. A significant element of this was done through further legally focused reviews as well as through the defence of the *Bates* litigation. Even in *Hamilton*, where POL has come closest to cooperating fully with legal process, legal work had the potential (deliberately or otherwise) to prevent the two Clarke advices, one in particular about the potential shredding of disclosure records, coming to public, and perhaps the court's, attention limiting reputational damage to POL from the miscarriages of justice exposed there.

4. Such legal work helped POL resist, for a long period of time, an exploration of the concerns and issues suggested by Second Sight's investigations and confirmed by the *Bates* and *Hamilton* cases: that Horizon was not fit for purpose; that knowledge of the problems within POL was significant; that POL's obligations as a prosecutor, pre- and post-conviction were abused and that, relatedly, disclosure obligations were not discharged deliberately. The process of resistance in *Bates* led to the court being repeatedly misled, with an experienced High Court judge discussing a litany of complaints about the way the case was handled.

5. Neither the Court of Appeal in *Hamilton* or the High Court in *Bates* had need, cause, or the time to look into what caused all the problems they identified. They left many matters of vital importance to the Inquiry unresolved, such as: why and by whom disclosure obligations were deliberately not discharged in criminal cases pre- and post- conviction; whether this was done in bad faith; and, why witness statements, oral evidence, and pleadings in *Bates* ran significantly contrary to disclosed documentary evidence. It is critical that these concerns are explored given the reliance on lawyers by POL for their strategic management of issues with Horizon, their approaches to any form of 'formal review' of Horizon (internal or external), and the positions taken during litigation.

6. It seems likely too that Parliament was misled, whether deliberately or otherwise. In 2015 Paula Vennells, then CEO of POL, made the claim to a Select Committee that, "If there had been any miscarriages of justice, it would have been really important to me and the Post Office that we surfaced those."[1] She made the claim in spite of a series of reports and reviews from Second Sight (as well as other internal reviews), especially through 2013. Sir Anthony Hooper, a former Court of Appeal judge, and chair of POL's Mediation Scheme from 2013 has indicated his belief, we presume between 2013 and 2015, conveyed he says to senior management, that Horizon cases were not consistent with theft.[2] He also indicated his view that Horizon flaws were the most likely explanation for shortfall cases.[3]

[1]See also her letter to George Freeman MP in July 2015 • Department for Culture Media & Sport

[2] 'The Great Post Office Trial - 6. War of Attrition - BBC Sounds' <https://www.bbc.co.uk/sounds/play/m000jp2m> accessed 25 October 2021.

[3] ibid.

7. Significant information from multiple sources had surfaced within POL, and probably to Vennell's knowledge so what had persuaded her she could ignore or discount it? In 2020, after *Bates* but before *Hamilton*, Paula Vennells sought to shift the blame for some of the failings exposed onto lawyers as being wholly responsible for individual prosecutions and for the overall general advice on the adequacy of the processes of prosecution.[4]
8. Blame shifting of this kind can be a feature of corporate scandals. A key decision-maker says they were only following the advice of their lawyers; the lawyers say they were mere advisers, advising on or following instructions. The usual secrecy of legal advice encourages mutually assured irresponsibility. Sometimes the mere following of legal advice is a fair description of events and sometimes it is not; but without investigating legal work and its management, the Inquiry will never know and will not be able to discharge its investigative duty to society. Examining this potential diffusion of responsibility is of particularly critical importance in this case given that lawyers have been involved in many of the key decisions taken by POL.
9. In a matter such as Horizon failings, legal work is so important to the entire saga, from the inception of Horizon; through the pursuit of shortfall; and the denial of containment of substantive and reputational harms, that the failure of the Inquiry to cover it in depth would frustrate the central aims of the inquiry itself. There can be little doubt that to, "listen to those that have been affected," (TOR, opening para.) the Inquiry needs to consider how SPMs were impacted by the legal processes and denials constructed by POL and their lawyers. And to, "understand what went wrong, and assess whether lessons have been learned" it is absolutely essential to consider how the lawyers and managers worked individually and collectively on the Horizon project. Good corporate governance and the appropriate use of legal power depends upon understanding these things far better.
10. We turn now to the specific issues raised by the Inquiry in the NPH.

A. *Second* Sight Investigations Limited ("Second Sight")

> *(i) To what extent should the Inquiry examine the events surrounding Second Sight?*
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> *(ii) Is it sufficient for the Inquiry to investigate the reasons for the decision to terminate the Post Office Complaint Review and Mediation Scheme?*
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> *(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?*

11. Our view is that a detailed understanding of the events surrounding Second Sight are likely to be a vital part of the Inquiry. It would be insufficient to

[4] Paula Vennells, 'Paula Vennells to Darren Jones MP, Chairman of the Business, Energy and Industrial Strategy Select Committee' (24 June 2020) <https://committees.parliament.uk/publications/1621/documents/15462/default/>.

concentrate on termination (ii). The scope and findings of, and disclosures made to, Second Sight are an important element in understanding what went wrong.

12. Our reasons include the following.

12.1. SPM dissatisfaction with the way in which the Second Sight Inquiry was dealt appears to be one of the factors which led to the *Bates* litigation (and so is relevant to para A of the TOR, Understand and acknowledge what went wrong in relation to Horizon, leading to the civil proceedings in Bates).

12.2. Second Sight produced evidence of significant Horizon errors and remote access. At least some of this was prior to the creation of the Mediation Scheme. How POL engaged with and responded to this evidence is vital.

12.3. Second Sight has indicated that they developed concerns about the conduct of private prosecutions early in the process of their Investigations. Information provided by Second Sight required POL to consider as soon as practicable its ongoing obligations as a prosecutor as it was evidence which may give rise to doubts about the safety of prosecutions they had conducted.

12.4. Second Sight has argued that POL changed their approach to Second Sight's requests for information as their investigation progressed having found issues connected with the safety of prosecutions. This alleged change of approach predates by a significant period the termination of the mediation scheme. It requires scrutiny.

12.5. The conduct of POL in relation to the mediation scheme, and not just its termination, are relevant to the Inquiry. As noted above, Sir Anthony Hooper, who chaired the Mediation Scheme, has indicated, his NDA having been lifted, that his view of the cases coming before him was: "As I pointed out to senior management in Post Office, it was very difficult to see how this could be theft." He also judged the most likely explanation for the cases that were before him as a mediator was Horizon error, but that POL were unwilling to accept that.[5]

12.6. That knowledge needs to be contextualised. POL minutes appear to express concerns about Second Sight's work (at a point when Second Sight had evidenced the concerns they were raising). The substance and legitimacy of these concerns will impact on an assessment of POL's knowledge and culture (including under PLI Qs42 and 179). So too will the series of other reporting events taking place in 2013 (when the mediation scheme was created) such as the Rose Report, the Dettica Report, the Clarke Advices, the Altman Review, the beginning of the CK Sift, the exit from POL of their General Counsel, and a firm of solicitors writing to the Board to advise of the 'Jenkins problem' for insurance purposes.[6]

[5] 'The Great Post Office Trial - 6. War of Attrition - BBC Sounds' (n 1).

[6] Richard Moorhead, Karen Nokes and Rebecca Helm, 'The Conduct of Horizon Prosecutions and Appeals, Post Office Project: Working Paper 3' (2021).

12.7. A focus on the[7] termination of the Mediation scheme risks missing a full consideration of the crucial events taking place in the 2013 period. The Clarke Advices, the Altman General Review, and the review of individual cases conducted by Mr. Clarke's firm (the CK Sift) were prompted in whole or in part by the Second Sight Investigation. It is not possible to meaningfully consider one without the other if the Inquiry is to "Understand and acknowledge what went wrong in relation to Horizon, leading to the civil proceedings in *Bates and others v Post Office Limited* and the quashing of criminal convictions." (para A, TOR). It would be surprising if some of the "key lessons to be learned for the future" (para A, TOR) did not include how the many processes of review and advice instigated could have been handled to result in a very different and responsible outcome.

12.8. A key question posed by the *Bates* and *Hamilton* judgments is the extent to which POL/Fujitsu's problems are the product of groupthink – flawed group decision making; what Fraser J referred to as their flat earth case;[8] their absolute conviction, "that there is simply nothing wrong with the Horizon system at all";[9] inability to, "allow themselves to consider the possibility that the Post Office may be wrong, as the consequences of doing so are too significant to contemplate."[10] An alternative to groupthink is more sinister, what the Court of Appeal described as deliberate non-disclosure of relevant evidence and failures to investigate.[11] They raise but do not resolve the potential for this to have been done in bad faith.[12] The Second Sight Investigation provided an extended period of evidence-based challenge to POL, directly relevant to understanding how groupthink could have arisen, and/or been maintained, the individual responsibilities for that, the possibilities of malfeasance, and lessons to be learnt about the management, framing, and action on information detrimental to the reputation of Horizon and POL's management. All of this is central to understanding the mismanagement of Horizon responses and the injustice visited on SPMs through shortfall recovery, prosecutions, and the subsequent delay and denials of injustice.

12.9. There are significant lessons to be learned whether or not the Inquiry forms the view that the legal and other work developed in response to Second Sight had been organised with a view to containing, denying, or covering-up the extent of evidential and other problems with POL's Horizon-related conduct. The setting up and management of the Second Sight investigation is one absolutely pivotal period requiring examination which will very likely yield lessons pertinent to the future of the POL, to

[7] ibid.

[8] *Bates No 6* para. 929

[9] *Bates No 6* para. 545

[10] *Bates No 6* para. 547

[11] *Hamilton* para. 129

[12] *Hamilton* par. 135

justice and trust in the rule of law, and to the advancement of the ESG agenda for UK organisations overall.

13. We submit that the above are relevant to a clear understanding of "1) the implementation and failings of Horizon over its lifecycle and 2) Post Office Ltd's use of information from Horizon when taking action against persons alleged to be responsible for shortfalls." (TOR, para. B; our emphasis). The Second Sight investigation; the review of disclosure post Clarke advice; the decision to defend Bates and the nature of that defence of Bates (e.g. allegations of dishonesty were maintained in the absence of supporting evidence) are vital parts of the lifecycle – they are amongst the clearest signals of illness to which Post Office needed to respond.[13]

14. Second Sight's investigation is also plainly relevant to "the historic and current governance and whistleblowing controls in place at Post Office Ltd" (para. F, TOR); the setting up, management, and response to an independent review are central to understanding POL governance at the time, and over the life of the review. This includes not only the work in drafting terms of reference, undertakings as regards access to documents, and the apparent imposition of inhibitions on the ability of such investigators to give evidence,[14] but also general oversight and reporting lines into the Board and non-executive directors in particular. Second Sight's investigation was of substantial scale and critical importance (given the increasing prominence of concerns being raised about Horizon within Government and more widely in the media), and it would, or should, have had clear lines of communication into the highest levels of the Company. How the concerns Second Sight raised were framed in discussions and documentation intermediate to and at Board level, what questions were asked, decisions taken, and actions prompted are all critical parts of understanding the culture, competence, and behaviour of POL, individually and collectively.

15. Put more simply, Second Sight's work provided some of the biggest opportunities for POL to stand back, understand the problem, and put things right. This work took place and was responded to over an extended period of time. What happened is central.

B. Reliance upon legal *advice*

(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?

(ii) If so, should the nature of the legal advice received be investigated?

[13] *Bates No 6* paras. 134, 139

[14] *Bates No 6* paras. 67, 190-191

16. Legal advice and legal work did, or is likely to have played a role in some or all of the following elements of the Horizon saga:

    16.1. **The design of contracts between Fujitsu and POL** allocating risk and governing information exchange on Horizon over its lifecycle. Contractual incentives may have encouraged Fujitsu to report Horizon errors as user errors where they were not and inhibited the making of disclosure requests by Horizon.[15] The extent to which the contract provided for oversight/auditing of error reporting is not clear to us but is also likely to be important.

    16.2. **The design of a 'quick' and 'tidy'[16] approach to dealing with shortfalls** under the Horizon system and the contract requiring that they be signed off, and then treated as agreed or settled accounts, without there being a mechanism for dispute.

    16.3. **The recovery of shortfalls informally and formally under the contracts** including the writing of letters before action in ways Fraser J regarded as oppressive.[17]

    16.4. The **termination** of contracts, the **investigation** of shortfalls and escalation of these for criminal investigation and **decision to prosecute** in some cases.

    16.5. **The resistance of requests for evidence to challenge Horizon especially as legal process ensued.** Legal work may also have facilitated disclosure policies which led to SPMs being told that they were the only ones experiencing issues with Horizon when they were not.

    16.6. **Decisions on charging, plea deals, plea acceptance criteria, and negotiation of pleas in mitigation**, as well as decisions on confiscation and recovery of debts based on prosecutions.

17. Item 16.1 may seem irrelevant to the question posed by the Inquiry. We mention it because, in our view, this prior work may have led to an informal conflict of interest in the minds of POL lawyers subsequently which may have affected behaviour and advice when coming to advise on shortfalls subsequently. To give one example of practical relevance, a quick and tidy shortfall recovery position under the contract would be judged differently by the Inquiry, potentially, if Horizon was known to be of questionable reliability when the contracts under 16.1 were drafted. It may illuminate the key question of whether a quick and tidy shortfall recovery approach was designed to stifle concerns about Horizon. In relation to the management of shortfall recovery pre-prosecution, this is speculation on our part. Evidence that such stifling was done post-prosecution is, however, seen in *Hamilton* in relation to criminal prosecution decisions.[18]

[15] *Bates No 6* paras. 181, 182, 493 and *Hamilton* para. 91

[16] See *Bates No 6* para. 301

[17] *Bates No 3* para. 222

[18] See, for example, *Hamilton* para. 114 (v)

18. Some of these tasks, such as 16.3 and 16.4, may not have been carried out directly by lawyers, but by others. In which case, the extent to which the tasks were guided by legal advice or supervised by lawyers is relevant.

19. The relevance of legal advice is shown in relation to certain cases such as the case of Jo Hamilton, referred to bv Ian Henderson of Second Sight, where a prosecuting lawyer in POL proceeds to charge theft in the absence of evidence of dishonesty.[19] Another example is the failure to advise on or consider disclosure prior of a bug disclosed just prior to Seema Misra's trial.

20. Paula Vennells has explicitly sought to distance herself from prosecution decisions saying she, "played no role in investigatory or prosecutorial decisions or in the conduct of prosecutions. There was full separation of powers, with the team responsible for prosecutions reporting to the General Counsel."[20] She also indicated, "Post Office relied on lawyers (both internal and external) for advice in relation to criminal matters, and lawyers held the operational responsibility for investigating and prosecuting criminal misconduct. My main role, and the role of the rest of the Board, was to set policy, informed by legal advice."[21] She also recalls a specific discussion with the, "then General Counsel shortly after I became CEO because I wanted to understand the rationale for the policy [or private prosecution]," and being, "assured by in-house and external lawyers" that the Code for Crown Prosecutors was being followed.[22] As well as the Clarke advice, the CK Sift, and Altman Review of 2013; a QC was apparently instructed in 2014, and the Chairman instructed a further review assisted by a QC in 2015.[23] A key actor is blaming the lawyers for a good many problems. A key question is whether she is right to?

21. As argued above, given the centrality of legal work to the impact of Horizon on SPM lives and livelihoods, we do not see how a consideration of the advice given to POL, the ways that advice was presented and understood, and how this influenced the decisions that were taken, can be avoided if what went wrong in POL can be understood and the lessons learned. It cannot be doubted that POL's instruction of lawyers to conduct reviews points towards the centrality of legal issues to their management of Horizon problems. Understanding the legal work done is a, if not the, central feature of the story. Most actions taken on the basis of Horizon or in defending POL's reputation once problems surfaced had a legal component, and often that component was dominant.

22. Understanding legal work needs to penetrate decisions on individual cases, but also explore how legal advice was sought, presented, reflected on, and used at Board level, as well as choices made about internal and external advice, when

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[19] Ian Henderson, 'Written Evidence Submitted by Second Sight Support Services Ltd (POH0028): BRIEFING NOTE TO BIS Select Committee' (June 2020) <https://committees.parliament.uk/writtenevidence/6580/html/> accessed 8 July 2021. See also *Hamilton* paras. 145-147

[20] Vennells (n 3).

[21] ibid.

[22] ibid.

[23] 'Written Evidence Submitted by the Department for Business, Energy and Industrial Strategy (POH0006)' <https://committees.parliament.uk/writtenevidence/1007/html/> accessed 26 October 2021.

deciding and reviewing POL policy and reputation management. The Inquiry also needs to look carefully at the context for the legal work being sought and undertaken; how lawyers were chosen; how instructions were drafted and by whom; the giving of advice; who saw and considered the advice; and, how legal work shaped decision making and organisational strategy. The Inquiry needs to consider how lawyers were managed towards or away from proper independence.

C. Conduct of the Group Litigation

Do the Inquiry's Terms of Reference permit an investigation of the conduct of the Group Litigation?

23. As we note above, the conduct of the *Bates* litigation raises a central set of questions for the Inquiry: did POL genuinely believe that Horizon was robust, and most importantly that their behaviour towards SPMs on the back of Horizon data was legal, fair, and proper? How did an approach of denial and containment based on "bare assertions and denials" arise;[24] was misleading the court countenanced knowingly or recklessly, and if so by whom?

24. One primary focus of concern about being misled is plainly evidence emanating from Fujitsu, but it may not be the only one. The list of concerns revealed by Fraser J's judgments in *Bates* are extensive as we have set out in previous submissions to the Inquiry.[25] As we said then:

> The Bates judgments show Fraser J's concern that a deliberately non-cooperative approach to the litigation may have been taken by POL with a view to making the litigation as difficult and as expensive as possible. Indeed, the criticisms made go further than obstruction to suggest the possibility of deliberate disruption. Such disruption is antithetical to the overriding principle to which all civil litigation is subject. The list of CPR failings we have examined in outline in the previous section are both wide and deep. Excessive cost is driven by taking points Fraser J found were of weak or no substance. This was done on substance, procedure, and evidence. The implication appears to be that pleadings, disclosure, witness statements and submissions were handled in ways either below expected standards or with an eye on disruption or non-cooperation.
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> It follows that the conduct of both internal and external lawyers merits further, thorough investigation. Even if the substance of many problems lies in the attitude and approach of POL and Fujitsu personnel, and we do not yet know how true or not this is, there is a real question to be considered as to how practitioners, owing obligations to the court and the administration of justice, and duty bound to protect their own

[24] *Bates No 6* para. 929

[25] Richard Moorhead, Karen Nokes and Rebecca Helm, 'Issues Arising in the Conduct of the *Bates* Litigation, Post Office Project: Working Paper 1' (University of Exeter 2021) <https://evidencebasedjustice.exeter.ac.uk/wp-content/uploads/2021/08/WP1-Conduct-of-the-*Bates*-Litigation-020821.pdf>.

> independence, should have responded when dealing with a case riven with difficulty but run on such an aggressive basis

25. As with the Second Sight Investigation, strategy and execution of the Bates litigation provides another opportunity to understand how POL understood, or failed to understand, the problems derived from Horizon and the problematic behaviour and systems built around it. We have discussed the case with many lawyers, including experienced in-house lawyers, and one suggestion made by them which we think needs to be kept in mind as one thesis, is that the litigation may have been managed with a particular eye on reputation management.

26. It is incredibly important to understand how an organisation, espousing public interest virtues, and with the Government as sole shareholder, could take the view that its strategy and approach to the litigation was justified given the evidence it held and the history it had experienced. The *Bates* judgment provides a great deal of insight into what POL got wrong, but it does not explain why it happened and what lessons can be learned from the case. The management of litigation is profoundly important both to good corporate governance and to the good conduct of litigation. The impact of these cases on the lives of SPMs magnifies that importance profoundly. We hardly need to note that, had POL succeeded in defending the case or settling it without such critical judgments against it, the outcome of the CCRC review and Hamilton would likely have been different. The possibility that the miscarriages of justice revealed by *Hamilton* would not have been revealed would have increased substantially if the *Bates* judgments, especially *Bates No 6* had not been handed down.

27. We see the Bates litigation as one of the critical, "failings associated with Post Office Ltd's Horizon IT system" that the Inquiry should be investigating (TOR opening para.). It is a critical episode of lawyering on the case, where lawyering is already plainly centrally important, and believe POL should have been, and likely were, presented with red flags about Horizon and the history of action based on it, which they chose to ignore or minimise rather than face up to. Their obligations as a party in civil litigation not to mislead the court and others underline the legal and professional significance of this failure to face their problems. The subject matter of the litigation, and the instructions and evidence given as part of the formulation of case strategy is highly relevant to understanding, "what went wrong in relation to Horizon," (para. A TOR) as it will record either what witnesses and key executives believed, or thought they could get away with, when faced with serious issues with the technology and major litigation on the matter.

28. The independence of thinking shown, especially by lawyers involved but also by non-executive directors, when considering litigation risk will also be important in understanding POL's governance at the time. That importance extends to the Government's role as sole shareholder. The general balancing, or failure to balance, core legal obligations up to 2017 is thrown into sharp relief by litigation that on POL's own reckoning posed severe risks commercially and reputationally. It is, alongside the Second Sight investigations, one of the key episodes when most stands to be learnt about why POL appears to have got that balance striking wrong. Seeing how POL, its lawyers, and its chairman and non-executive directors, responded to adverse evidence about Horizon, and what

aims they thought could be achieved by litigation, will be amongst the "key lessons" to, "be learned for the future". (Para. A, TOR)

29. As an example of the substantive issues that can be explored by looking at the conduct of *Bates*, the litigation began as Horizon was moving into a third, more robust, incarnation[26] and yet at this stage POL seemed unsure of, unable, or unwilling to disclose the true position on whether there was a system for challenging shortfalls under Horizon, and facilities for remote access over the life of the system. This speaks to their ability to manage the system during litigation but also must be part of "a clear account of 1) the implementation and failings of Horizon over its lifecycle and 2) Post Office Ltd's use of information from Horizon when taking action against persons alleged to be responsible for shortfalls." (para. B, TOR) Another point relevant to para. B, one of particular likely significance to the victims, is that at this stage POL were still alleging witnesses were unreliable in the absence of evidence in support, presumably founded purely on Horizon data. In this sense they were still repeating or taking action on the basis of Horizon data many years after it was found lacking and doing so through the *Bates* litigation.

30. An important point also is who participated in the conduct or oversight of the litigation as lawyers or with executive or non-executive responsibilities. We are told that a firm of solicitors was involved in the disclosure of concerns about Jenkins' evidence in criminal cases in 2013;[27] and that various in-house lawyers and other practitioner would have seen various evidence of Horizon concerns over the years, some of whom may have remained involved in the litigation peripherally or centrally. Two points present themselves: how POL maintained or lost institutional memory, or, on the contrary, how prior involvement led to conflicts of interest or compromised judgements during reviews, litigation, and the criminal appeals.

31. Moreover, we know that existing staff within the POL in-house team would have almost certainly had some responsibility for strategy, oversight, or conduct of *Bates* and they remain in post. An understanding of what went on, their involvement, and how they have changed structures, and behaviours in response to lessons from Bates is an important part of seeing whether and how POL has learnt the lessons "from the criticisms made by Mr Justice Fraser in his judgments following the 'Common Issues' and 'Horizon Issues' trials and … on the organisational and cultural changes necessary to ensure a similar case does not happen in the future." (TOR, Para. C) As well as dealing with the governance points made in para. F (on "governance and whistleblowing controls," past and present).

32. In summary, the conduct of *Bates* will have, or ought to have, provided many key moments of critical reflection and decision-making on the evidence available and the past conduct within POL, Fujitsu and Government. It is critical to examine and understand the relationship between POL and the lawyers in this case if the Inquiry is to reduce similar organisational failings in the future. What

[26] *Bates No 6* para. 964

[27] 'Marshall Spells It out: Speech to University of Law' <https://www.postofficetrial.com/2021/06/marshall-spells-it-out-speech-to.html> accessed 1 September 2021.

lawyers said and did would have influenced how managers thought and acted. The reverse is true too: managers will have influenced how lawyers approached their tasks. The reflection and decision-making will have at least been influenced by legal interpretations of the evidence and behaviour. Whether POL and others appreciated, or ought to have appreciated, the scale of the injustice they had presided over cannot be examined without looking in detail at the conduct of the litigation and the influence of POL and their lawyers (internal and external).

33. The lessons which would or should have become apparent as the case developed would have been, or should have been, thoroughly reviewed by those responsible for the stewardship of the company: especially the General Counsel, relevant risk committee members, and, critically, Board members, especially the Chair and the Non-Executive Directors. Key decision makers and influencers relevant to the litigation remain within the Post Office. Crucial lessons learned will come from an evaluation of them and their evidence.

D. Divergences across the United Kingdom

A further issue raised in response to the Inquiry's consultation concerns the extent of any differences in Post Office Limited's systems of investigation within the devolved union. The Chair, therefore, invites submissions in response to the following question:

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?

34. We think there could be significant value in looking separately at data and approaches where the legal systems differed markedly. For instance, Scottish prosecutions took place, as we understand it, through the Crown Office. The profile, handling, and outcome of such cases are likely to provide critical data on how important differences in approach to prosecution North and South of the border were to the impact on sub-postmasters and whether this extra level of external check altered POL's behaviour significantly. Comparing data from across jurisdictions provides an important opportunity to examine causal contributions of specific factors differing by jurisdiction. Two matters come immediately to mind: approaches to guilty plea discounts and the fact that south of the border prosecutions were conducted privately.

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