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By email only: solicitor@postofficehorizoninquiry.org.uk

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1st November 2021

Dear Sir Wyn,

RE: POST OFFICE HORIZON IT INQUIRY
TERMS OF REFERENCE AND ISSUES – REMOVAL OF STATUTORY PROTECTIONS

Following an exchange of emails with Lindi Todd last week, I again reviewed the Terms of Reference and the Provisional List of Issues together with the "themes" circulated on 12 October 2021.

It is puzzling that it seems to be unresolved as to whether the Post Office's conduct of the *Bates* group litigation falls within the terms of reference of the Inquiry (Agenda for 8 November 2021 Item C(i)). It is surprising, and perhaps unsatisfactory, that this should be a matter of uncertainty or doubt.

The *Bates* litigation, and the Post Office's approach to that litigation (which is by no means fully addressed by the judgments of the trial judge – *e.g.* the various Clarke Advices), might appear to be essential to any proper understanding of the '*Horizon*' catastrophe. The reason is simple. In 2018-2019 the Post Office was compelled, for the first time (*per* Fraser J), to give proper disclosure of the Fujitsu Known Error Log. That disclosure, in the teeth of repeated/multiple objections from the Post Office and its lawyers, was the key to Mr Justice Fraser's judgment on the 'Horizon Issues'.

The non-disclosure of the Fujitsu KEL (and related PEAKs) (*viz* the material covered by these) was the central theme of the CCRC reference of June 2020 of the first 42 appeals under s. 9 of the Criminal Appeal Act 1995. Likewise, it is the foundational (though not only) issue for the Court of Appeal's 23 April 2021 judgment quashing (the first) 39 convictions.

Mr Justice Fraser, in his December 2019 judgment, records as a fact that proper disclosure of the KEL, until the 2019 Horizon Issue trial, had not previously been given by the Post Office. (A fact almost self-evident given the Post Office's strenuous resistance before Fraser J - on

unsustainable and misleading[1] grounds - to giving that disclosure to the 557 claimants in the *Bates* litigation.)

The importance of this is impossible to overstate, given the statutory framework for the disclosure eventually given by the Post Office. It appears that the *Bates* group litigation was the first occasion on which the Post Office had been required to prove affirmatively that the source of the evidence relied upon in its previous many prosecutions and civil claims, *viz* the *Horizon* system, was working properly at the material time. It is notorious that Fraser J dismissed, in almost derisive terms, the Post Office's contention that Horizon was "robust and reliable", him holding it to be neither.

This single issue, possibly more than any other, lies at the heart of the individual human tragedies and the enormous suffering inflicted by the Post Office upon its sub-postmasters and employees. (It goes without saying that there are other issues of importance – most obviously the danger of over-reliance upon a single source of evidence, especially where the evidence in question is hearsay – and there is the separate issue of the truthfulness of Fujitsu witnesses now subject to police investigation.)

It will be seen that the non-disclosure of the Fujitsu KEL and PEAKs over the period from roll-out of *Horizon* in 1999, until the Horizon Issues trial in 2019, matches exactly the period since abolition of the statutory safeguards hitherto provided by:

Police and Criminal Evidence Act 1984 s. 69(1).

Civil Evidence Act 1968 s. 5.

Those provisions/protections were repealed, respectively, by the **Youth and Criminal Evidence Act 1999** and the **Civil Evidence Act 1995**. The repeals were effected by Parliament upon recommendations by the Law Commission in its papers *Evidence in Criminal Proceedings Hearsay and Related Topics* (1997 Law Com No. 216) and *The Hearsay Rule in Civil Proceedings* (1993 Law Com No. 245).

Repeal of the statutory protections were underpinned by several, then popular, perceptions reflected in the Law Commission papers. These included, crucially, that problems with computers, and by extension problems with evidential material derived from computers, would commonly be apparent to an operator/user. That view was lent support by judicial *dicta* at the highest level, notoriously by Lord Hoffmann in **DPP v McKeown and Jones** [1997] 1 WLR 295, 201 C-D – but also elsewhere.

The repeal of former statutory protections had a calamitous effect in creating a default legal presumption that a computer was working correctly, at the material time, analogous to that which the law applies to machines. This was not least because, proceeding as it did from a false premise, the removal of the safeguards had the unintended effect, in fact if not in law (because at least theoretically it ought readily to be possible to raise an issue that shifts the *onus* of proof – but as the Post Office catastrophe shows, in practice this was rarely achieved by defendants) of placing an evidential burden upon those in the position of a postmaster, facing prosecution or civil

[1] Including the Post Office's contention that disclosure of the KEL sought by the claimants was a 'red herring' (Horizon Issues [587]).

proceedings on the basis of Horizon data, that was in practice (as the Court of Appeal recognised) simply impossible for them to discharge. While in practice that was something that the Post Office took full (and seemingly improper) advantage of, the *occasion* for doing so was provided by the repeals effected in response to the Law Commission's recommendations.

It is difficult to see that any proper understanding of what happened (which I take to be, at the highest level of abstraction, the point of the Inquiry) can sensibly be achieved without considering in some detail the Post Office's approach to its disclosure obligations, including in the *Bates* litigation (which appears to have been the end-point of a long-established restrictive approach to by the Post Office and its lawyers to its disclosure obligations), and, similarly, the legal framework for those obligations.

Not only does Mr Justice Fraser's analysis of the 'Receipts and Payments Mismatch' bug (amongst others), and his findings in connection with it, show that the premise that most problems are readily detectable by an operator was false (as was known to the Post Office and Fujitsu in September 2010 in connection, specifically, with the RPM bug), but Mrs Seema Misra's prosecution, in the light of the Post Office's disclosure failures that were considered in some detail by the Court of Appeal, reveals (including in connection with the RPM bug as analysed by Fraser J) that there is something systemically wrong. It will be recalled that Mrs Misra (whom I was privileged to represent, until December 2020) made no less than four applications for disclosure in the course of her prosecution in 2010. Those applications included: (a) several made on the basis that the Post Office's disclosure failures were such as to render her prosecution an abuse of the process of the court and also (b) (during her trial) on grounds that the nature of the disclosure failures were such as to deny to Mrs Misra a fair trial. Each of those submissions was correct, but rejected at the time by three different judges; it took another 11 years for their correctness to be accepted, belatedly and after inordinate delay (the causes of which remain unexamined), by the Court of Appeal.

I am writing to you now to invite you to read the following articles that explain, in careful detail, the consequences of the repeal of the statutory protections formerly provided for reliance upon (hearsay) computer evidence. Dr. Steven Murdoch has separately made submissions on the engagement of the Post Office and its solicitors with the Law Commission and its reports. The last of the four articles addresses proposed amendments to the present, manifestly unsatisfactory, approach of the courts to the disclosure of computer evidence. What is suggested is required, is not a presumption that a computer is working properly (which had the indirect and unintended consequence of effecting what amounted to a reversal of the burden of proof in the Post Office cases (*q.v.* the Court of Appeal's judgment at paragraph [137])) but express recognition and acknowledgement by judges – as the starting point/point of departure - that all computer software has the propensity to fail to work as intended.

The four articles are:

The Law Commission presumption concerning the dependability of computer evidence, Professors Peter Bernard Ladkin, Bev Littlewood, Harold Thimbleby and Martyn Thomas C.B.E., Digital Evidence and Electronic Signature Law Review 17 (2020) 1.

The harm that judges do – misunderstanding computer evidence: Mr Castleton's story 'an affront to the public conscience', Paul Marshall, Digital Evidence and Electronic Signature Law Review 17 (2020) 25.

English law's evidential presumption that computer systems are reliable: time for a rethink? Paul Marshall, Butterworths Journal of International Banking and Financial Law 7 (2020) 433

Recommendations for the Probity of Computer Evidence, Paul Marshall, James Christie, Prof. i.R. Peter Bernard Ladkin, Prof. (Emeritus) Bev Littlewood, Stephen Mason, Prof. (Emeritus) Martin Newby, Dr. Jonathan Rogers, Prof. Harold Thimbleby, Prof. (Emeritus) Martyn Thomas C.B.E., Digital Evidence and Electronic Signature Law Review 18 (2021) 18.

The hyperlinks work at the time of writing. Should hard copy be required it can be supplied.

I am sending this letter to you now so that it cannot be said in due course that no or no sufficient steps were taken to advert to/highlight this issue and its importance.

Yours sincerely,

c.c. James Christie, Prof. i.R. Peter Bernard Ladkin, Prof. (Emeritus) Bev Littlewood, Stephen Mason, Dr. Steven Murdoch, Prof. (Emeritus) Martin Newby, Dr. Jonathan Rogers, Prof. Harold Thimbleby, Prof. (Emeritus) Martyn Thomas C.B.E.., Lee Castleton.

Sir Wyn Williams
Chair
Post Office IT Inquiry