

Hodge Jones & Allen
FAO Mr Schwarz

By email only to:
mschwarz@hja.net

Post Office Horizon IT
Inquiry
PO Box: Post Office
Horizon Inquiry
1 Victoria Street
London
SW1H 0ET

27 September 2022

Dear Sir/Madam,

Re: Proposed Amendment of the Terms of Reference

Thank you for your email of Friday 23rd September 2022 (17:39), and the submissions attached to it. The Chair has considered your submissions and he has asked me to respond in the following terms.

The List of Issues is the instrument by which the Inquiry carries its Terms of Reference (“*TORs*”) into effect. A provisional draft of the List of Issues was settled by the Inquiry Team and distributed to Core Participants and other interested persons on 26th August 2021. The Chair invited written and oral representations from Core Participants and other interested persons – many such written submissions were made, and an oral hearing was held on 8th November 2021. Following the representations made to him, on 17th November 2021, the Chair published a Completed List of Issues.

You will see from the Completed List of Issues that the issues which your clients suggest require amendment to the ToRs in order to be investigated by the Inquiry, are already set out as matters that will be investigated by the Inquiry. In particular:

- (1) In relation to the matters set out in paragraphs 1(a) and 1(b) of your submissions, - was evidence as to the unreliability of Horizon hidden from public scrutiny and, if so, who was responsible for doing so – I would draw your attention to the following issues:
 - a. Issue 49:

“What information and knowledge did Post Office Limited, Royal Mail Group Limited, Fujitsu Services Limited, the National Federation of Subpostmasters, the Communication Workers Union, UK Government Investments and the government have about the following facts and matters during the relevant period...”

Read with:

A(a): “The existence and extent of bugs, errors and defects in the Horizon IT System”

A(b): “The ability of such bugs, errors and defects to cause apparent discrepancies or shortfalls in branch accounts”

A(c): “The ability of such bugs, errors and defects to undermine the reliability of the Horizon IT System accurately to process and to record transactions”

A(d): “The extent to which apparent discrepancies or shortfalls arose in branch accounts as a result of bugs, errors and defects in the Horizon IT System”

F(b): “The non-disclosure by Royal Mail Group Limited / Post Office Limited of the existence of problems with and / or concerns about the reliability of Horizon when bringing criminal proceedings against persons alleged to be responsible for those shortfalls.”

- b. 50: “At what level within the organisations named at Q.49 and the government were these known?”
- c. 51: “When and in what circumstances did they first become aware of these matters?”
- d. 52: “How did their knowledge develop over time?”
- e. 59: “What (if any) steps were taken by the organisations named at Q.49 and the government to bring these matters to the attention of SPMs, managers and assistants?”

(2) In relation to the matters mentioned in paragraph 1(c) of your submissions - the issue of when full and fair compensation be paid – I would draw your attention to the following issues:

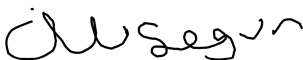
- a. Issue 183: “To what extent (if at all) has the creation and implementation of the Historic Shortfall Group Scheme and the Interim Compensation Scheme provided an adequate means for affected SPMs, managers and assistants to obtain financial redress for the wrongs which they have suffered?”
- b. FN 6 to the List of Issues: “For the purposes of Issue No. 183, the Inquiry confirms that in answering this question the Chair will consider whether all affected sub-postmasters, sub-postmistresses, managers and assistants, including the 555 Claimants in the group litigation of *Bates and Others v Post Office Limited* [2019] EWHC 3408 (QB), were adequately compensated for the wrongs they suffered.”

The Completed List of Issues noted at its outset: “For the avoidance of doubt, the Chair will be guided by the evidence that emerges throughout the Inquiry and this Completed List of Issues will not bind the Chair to investigate only those issues set out therein or necessarily to investigate a listed issue irrespective of the sufficiency of evidence that is identified.” That remains the case.

Accordingly, in the Inquiry’s view, and in the light of the issues which the Inquiry proposes to investigate, there is no need for any amendment to the TORs.

Finally, as the Inquiry operates in an open and transparent way, consistently with s18(1) of the Inquiries Act 2005, the Inquiry proposes to disclose your submissions of 23rd September 2022 to the other Core Participants, along with a copy of this reply.

Yours faithfully,



Segun Jide

Solicitor to the Inquiry

Post Office Horizon IT Inquiry

Post Office Horizon IT Inquiry

On behalf of Core Participants:

Nichola Arch, Lee Castleton, Tracy Felstead, Seema Misra, and Janet Skinner

Submissions on Terms of Reference

Introduction

1. As representatives of the above-named Core Participants, we are invited to make an Opening Statement to the Inquiry. We make these submissions in advance of doing so, because our Statement, and three of the key questions we ask the Inquiry to investigate therein, might go beyond the existing Terms of Reference. These Questions are as follows:
 - a. Did officials within the Post Office, Fujitsu and/or Government deliberately hide the unreliability of Horizon “evidence” from public scrutiny?
 - b. If so, who within Post Office, Fujitsu and/or Government were responsible for suppressing, or failing to disclose the unreliability of Horizon “evidence” from public scrutiny, and the judicial process?
 - c. Based upon (a) and (b) above, which we submit to be grave aggravating features, when will the Horizon victims receive full and fair compensation, and candid acknowledgment of the egregious misconduct from which they have suffered?

2. In what follows we have set out the terms, together with our suggested amendments marked up, and our submissions on each Term below. We have put the 2021 modifications to the Terms into italics,¹ because the iterative process is informative. The Inquiry has been underway for two years in the lead up to Opening Statements. Now that the Inquiry has heard the Human Impact evidence, and has explored the difficulties with compensation, we submit it is now time to review the Terms of Reference once more, to ensure that appropriate revisions are made that will allow the Inquiry (a) to maintain focus on its existing terms of reference; (b) whilst not being denied scope to explore important evolving considerations, of obvious relevance, to the victims of injustice; thus (c) being empowered to remain true and best serve its original purpose.

Term A:

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, by drawing.~~ Drawn from, but not limited to, the judgments of Mr Justice Fraser in *Bates and others*, the judgments of the Court of Appeal (Criminal Division) in *R v Hamilton and others*, other judgments in which convictions have been quashed, affected postmasters' experiences and *any other relevant evidence in order to identify what key lessons must be learned for the future.*

3. In our suggested re-drafting we have de-coupled the question of "what went wrong in relation to Horizon" from what follows in Term A. This is because the rulings in *Bates and others v Post Office Ltd* and *R v Hamilton and others* were perforce restricted to the issues before the courts. The implication of the drafting of this term, however, is that "what went wrong in relation to Horizon" is defined by those issues. In fact, there is reason to investigate

¹ The Terms were originally drawn up on 30 September 2020 but modified on 1 June 2021 in light of *R v Hamilton and others*.

whether “what went wrong” extended beyond the technical failings and oppressive contractual terms raised in the *Bates* litigation, and beyond the disclosure failings that rendered the criminal convictions unsafe according to *Hamilton and others*, encompassing a covert agreement to suppress the already known widespread, frequent, and unpredictable errors that existed within the system.

4. There are indications that once Post Office took the decision to stop bringing prosecutions based on Horizon “evidence” a deliberate cover-up began. We have appended a Chronology of key events to these submissions which we submit raises a *prima facie* case to investigate this possibility. However, in order to carry out such an investigation, which we would submit is entirely within the spirit of the Inquiry’s original remit, it may be thought necessary to make it plain that the question of “what went wrong” is merely assisted by consideration of the issues which were raised in *Bates* and *Hamilton*, rather than being circumscribed by them.

Term B:

Build upon the findings of Mr Justice Fraser *and the judgments of the criminal courts specified in A above* by obtaining all available relevant evidence from Post Office Ltd, Fujitsu, BEIS *and UKGI* to establish 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* and 3) what steps were taken when the failings of Horizon became apparent to key decision-makers.

5. Our suggested addition to Term B may be necessary to ensure that the “clear account” covers the period after Post Office stopped Horizon prosecutions, and in particular the conduct of the Group Litigation. As the Term stands, the “clear account” may not be able to encompass the evidence to be heard in

Phases 5 and 6 of the Inquiry. The conduct of the Group Litigation, and the aggressive tactics the Post Office deployed throughout, mirrored, and assisted the approach taken in the Criminal Appeals. Had a constructive, and conciliatory approach been adopted, the critical disclosure that ultimately justified the limb two finding of the Court of Appeal would not have taken at least seven years to be disgorged.

Term C:

Assess whether Post Office Ltd has learned the lessons from the criticisms made by Mr Justice Fraser in his judgments following the 'Common Issues' and 'Horizon Issues' trials and those identified by affected postmasters and has delivered or made good progress on the organisational and cultural changes necessary to ensure a similar case does not happen in the future.

6. We do not suggest amendments to this Term because it focuses exclusively upon the way that the Post Office has reacted to the 2019 judgments. This does not allow for examination of Post Office conduct prior to Mr Justice Fraser's rulings, but our suggested changes to Terms A & B address that problem. In our submission, examination of the period that predated the judgments of Mr Justice Fraser, and the Court of Appeal in *Hamilton* ought not to be overlooked, and it would seem to be an unintended lacuna in the Inquiry's terms of reference. It will enable the Inquiry to determine whether the Post Office and Fujitsu were acting in good faith, albeit with profound and repeated misjudgement, or had more sinister motives for the decisions taken which caused obvious and protracted anguish for the SPMs, some of whom died of natural causes, or took their own lives, during these years of legal uncertainty, and strife.

Term D:

Assess whether ~~the commitments made by Post Office Ltd within the mediation settlement—including the historical shortfall scheme—have been~~ full and fair compensation has been properly delivered.

7. It has become apparent during the compensation hearings that this Term is outdated and flawed because the mediation settlement was compromised from the start. Even if Post Office has sought to transform since Mr Justice Fraser's rulings (which is by no means clear) at the point the mediation settlement was agreed it was entirely unreconstructed, and through its lawyers, it sought to drive a hard bargain. It has already been accepted by Government that the settlement did not provide full and fair compensation, and it is therefore being unpicked, with BEIS itself taking on partial responsibility. The Chair's own concerns, referred to in his statement dated 22nd September, 2022, suggest that this term should be re-focussed.

Term E:

Assess whether the processes and information provided by Post Office Ltd to postmasters are sufficient:

- i. to enable both parties to meet their contractual obligations
- ii. to enable postmasters to run their businesses.

This includes assessing whether Post Office Ltd's related processes such as recording and resolving postmaster queries, dispute handling, suspension and termination are fit for purpose. In addition, determine whether the quality of the service offer for postmasters and their relationship with Post Office Ltd has materially improved since the conclusions reached by Mr Justice Fraser.

8. We make no proposed changes to this Term, which is exclusively about the present institution.

Term F:

Examine the *historic and current* governance and whistleblowing controls in place at Post Office Ltd, *identify any relevant failings, and establish whether current controls are now* sufficient to ensure that failing leading to *the issues covered by this Inquiry* do not happen again.

9. If our suggested changes to Terms A and B were accepted this Term would not need any changes. If they are not accepted, we are concerned that this Term will need to bear undue weight. It does allow for examination of the period after the Post Office stopped prosecutions, to see why it took a further five years of external pressure for Post Office to accept that the convictions it had secured were unsafe. However, it focusses on governance and whistleblowing controls, which may lead to eliding the central questions. If key individuals within and without Post Office were determined to prevent public scrutiny, it may be unduly constraining to frame that issue entirely with reference to a Term which focuses on Post Office governance and whistleblowing controls. Moreover, given that legal professionals (such as in house lawyers or external advisers) cannot claim any protection for disclosures or whistleblowing based upon information they acquire because of their retainer (given the paramount importance of legal professional privilege) wider concerns as to how disclosures can be made in the future ought to be explored. The crime/fraud exception to LPP might, on the facts of these unjust prosecutions, be difficult to justify in any event.

Edward Henry QC

Mountford Chambers

Flora Page

23ES Chambers

Hodge Jones & Allen solicitors

23 September 2022

Chronology

2012 – Second Sight appointed due to Parliamentary pressure

March 2013 – Detica report commissioned by Post Office's head of security, John Scott, and its Legal and Compliance Director, Susan Crichton.

June 2013 - Helen Rose, a fraud analyst employed by the Post Office submitted a report: "... it is just that I don't think that some of the system-based correction and adjustment transactions are clear to us on either credence or ARQ logs. However, my concerns are that we cannot clearly see what has happened on the data available to us and this in itself may be misinterpreted when giving evidence and using the same data for prosecutions"

June 2013 - Second Sight Interim Report suggested that there was a conflict of evidence on whether "remote access"² to branch accounts was possible. Also identified the Receipts and Payments Mismatch bug.

Mid-2013 CK Sift begins according to a letter from Peters & Peters: "Cartwright King reviewed all cases conducted since 1 January 2010 (both Crown Court and Magistrates' Court) in which the primary or main evidence against the defendant was based on Horizon data ... Over the course of a number of months, Cartwright King carried out a sift of 308 case files, a second sift of 229 cases, and a full review of 53 cases"

3 July 2013 – Simon Clarke advises PO in conference to create of a single hub to collate all Horizon-related defects, bugs, complaints, queries and Fujitsu remedies, so there would be a single source of information for disclosure purposes in future prosecutions. POL accepted that advice and set up a weekly conference call.

² Sometimes referred to as 'super-user' access rights.

15 July 2013 - Clarke Advice: “Notwithstanding that the failure is that of [Mr Jenkins] and, arguably, of Fujitsu Services Ltd, being his employer, this failure has a profound effect upon [the Post Office] and [the Post Office] prosecutions, not least because by reason of [Mr Jenkins’s] failure, material which should have been disclosed to defendants was not disclosed, thereby placing [the Post Office] in breach of their duty as a prosecutor.

By reason of that failure to disclose, there are a number of now convicted defendants to whom the existence of bugs should have been disclosed but was not. Those defendants remain entitled to have disclosure of that material notwithstanding their now convicted status. (I have already advised on the need to conduct a review of all [the Post Office] prosecutions so as to identify those who ought to have had the material disclosed to them. That review is presently underway.)”

2 August 2013 - Shredding Advice: Simon Clarke said that he had been informed

“(i) The minutes of a previous call had been typed and emailed to a number of persons. An instruction was then given that those emails and minutes should be, and have been, destroyed: the word ‘shredded’ was conveyed to me.

(ii) Handwritten minutes were not to be typed and should be forwarded to POL Head of Security.

(iii) Advice had been given to POL which I report as relayed to me verbatim: ‘If it’s not minuted it’s not in the public domain and therefore not disclosable.’ ‘If it’s produced it’s available for disclosure - if not minuted then technically it’s not.’

(iv) Some at POL do not wish to minute the weekly conference calls...

Regardless of the position in civil law, any advice to the effect that, if material is not minuted or otherwise written down, it does not fall to be disclosed is, in the field of criminal law, wrong. It is wrong in law and principle and such a view represents a failing to fully appreciate the duties of fairness and integrity placed upon a prosecutor’s shoulders”

August 2013 – PO notified their insurers of a risk

September 2013 – A SPM called Martin Griffiths committed suicide

October 2013 – Detica report made available to the Post Office’s General Counsel, its Chief Financial Officer, Chief Information Officer, Chief Technical Officer, and to others whose identity has been withheld. Conclusions to the report included one entitled *Fraud and non-conformance*: “Post Office systems are not fit for purpose in a modern retail and financial environment. Our primary concern here relates to the difficulty in reconciling information from multiple transaction systems both in terms of timelines, structure and access....

An interim report by Second Sight, and the accompanying commentary by unions and parliamentarians suggests that the Post Office will be challenged to respond comprehensively and openly about the changes to be enacted when the final report is published.”

October 2013 - Chris Aujard joins as General Counsel at the Post Office and either then or in November Susan Crichton leaves

15 October 2013 - Altman Advice Not disclosed, but the Clarke Misra Advice (below) quotes from it as giving the relevant disclosure test post-conviction.

From end 2013 / start 2014 – the Post Office stopped prosecuting Horizon cases

Jan 2014 - Clarke Misra Advice applying the test as set out by Altman, Simon Clarke advises that Mrs Misra does not need to be provided with any further disclosure.

Early 2014 - CK Sift Review ends and apparently concludes that none of the prosecutions reviewed were unsafe, in that no action is apparently taken to re-open them.

July 2014 – PO engages “a senior QC” to advise on its response to a letter from the CCRC regarding Horizon convictions

December 2014 – during Parliamentary scrutiny, Minister Jo Swinson relies on Second Sight and Sir Anthony Hooper’s engagement: “in such a situation what I

would normally propose doing is to get a team of forensic accountants to go through every scenario and to have the report looked at by someone independent, such as a former Court of Appeal judge.... We have to look at the details and the facts, and that has to be done forensically. That is why Second Sight, the team of forensic accountants, has been employed and why we have someone of the calibre of Sir Anthony Hooper to oversee the process.”

January 2015 – PO deadline for Martin Griffiths’ widow to agree to their compensation offer

3 Feb 2015 – Ian Henderson of Second Sight gives evidence to Select Committee:

“... we have seen no evidence that the Post Office’s own investigators were ever trained or prepared to consider that Horizon was at fault. That was never a factor that was taken into account in any of the investigations by Post Office that we have looked at.

That is a matter of huge concern, and that is why we are determined to get to the bottom of this matter, because we think that there have been prosecutions brought by the Post Office where there has been inadequate investigation and inadequate evidence to support some of the charges brought against defendants ... this ... is why we need to see the full prosecution files... “

Mrs Paula Vennells C.B.E questioned by Mr Nadhim Zahawi M.P declines to agree to the committee’s invitation to hand-over the prosecution files to Second Sight.

March 2015 – PO sacks Second Sight and winds up the independent body set up to administer the mediation scheme, chaired by Sir Anthony Hooper -

On 10 March this was announced unilaterally by PO. Sir Anthony Hooper has said since that he told “Post Office Senior Management” that he did not think the SPMs were stealing, and that the problems were most likely being caused by Horizon. He was subject to an NDA, but when released from it he gave an interview to Nick Wallis in time for this episode broadcast in June 2020: <https://www.bbc.co.uk/sounds/play/m000jp2m> (around 3 mins in).