

For Hearing 27<sup>th</sup> April 2023

IN THE MATTER OF A PUBLIC INQUIRY  
THE POST OFFICE HORIZON IT INQUIRY

- (1) TRACY FELSTEAD
- (2) SEEMA MISRA
- (3) JANET SKINNER
- (4) LEE CASTLETON
- (5) NICHOLA ARCH
- (6) VIJAY PAREKH
- (7) SATHYAN SHIJU

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SUMBMISSION ON COMPENSATION

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1. The lateness of this submission is much regretted. Circumstances precluded it being made before now.
2. The engagement of the Chair with issues of compensation is welcomed. It is very unlikely that the progress in respect of, for example, insolvency issues, could have been made, but for the Chair's engagement. Whilst writing, I mention Ms Laura Nicholls, Senior Technical Adviser in the Chief Technical Officer's Team at the Government Insolvency Service. Ms Nicholls has been unfailingly helpful and constructive in seeking to resolve complex issues, assisted, it may be said, by the helpful written opinion of Ms Catherine Addy K.C..
3. It is surprising, on the second anniversary of the quashing by the Court of Appeal of an unprecedented 39 wrongful convictions on 23 April 2021, to be writing in connection with the unfairness of the arrangements made to compensate the Post Office's victims. Those arrangements: (1) lack independence, (2) lack transparency; (3) are unprincipled; and (4) are incoherent. Accordingly, the present arrangements fail basic tests for a fair compensation scheme. For reasons outlined, it is suggested that the only way to resolve the present shortcomings of the various compensation arrangements, and to maintain the confidence of claimants for compensation – speaking for those whom I represent, is for an individual with appropriate judicial

experience to be appointed to oversee/manage all 3 existing schemes. (It being acknowledged that, in relation to the “OHC” scheme, this may entail special adjustments, given that the ‘scheme’ is in fact litigation for damages for malicious prosecution (but *whether* it should be so limited is open to serious question, for reasons set out in my letters of March and April to Minister Hollinrake).)

4. The structural problems with the compensation schemes have resulted in wholly disproportionate time and effort being diverted to addressing unsatisfactory aspects (below), rather than progressing claims.
5. For any ‘compensation scheme’ worthy of the name, as distinguished from the determination of legal rights, by court or arbitration process, there are two requirements:
  - (a) That such a scheme be independent.
  - (b) That such a scheme be fair.
6. Independence may be seen as an element of fairness, but it is often treated as a separate free-standing requirement.
7. Fairness carries with it at least the requirements of:
  - (a) Transparency.
  - (b) Reasonableness.
8. The requirement for reasonableness includes, but is not limited to, the requirement that like circumstances be treated in a consistent way. (This is a major failing under the present arrangements, as I have elaborated in my letter to Minister Hollinrake of 1 April 2023.)
9. There are at present 3 separate schemes for payment for harm inflicted upon its victims by Post Office Ltd over 20 years. While familiar, the schemes are:
  - (a) Residual litigation in the ‘**Bates**’ group civil litigation that was last before the Court in December 2019, that was otherwise settled

under the Deed of Settlement of 10 December 2019 immediately following circulation of the draft judgment of Mr Justice Fraser in **Bates v Post Office Ltd (Horizon Issues) No 6.** [2019] EWHC 3408 (QB). That (residual) litigation concerns claims for the tort of malicious prosecution by the Post Office. Those claims are made by those who were parties to that litigation and who were prosecuted and convicted by the Post Office on misleading, incomplete and unreliable evidence. Those claims are the residue of all the other civil claims (causes of action) that were asserted by “Convicted Claimants” in that litigation but which were surrendered by them, unaccountably,<sup>1</sup> for £0.00, the only claim being preserved being for malicious prosecution, that being contingent upon an appeal court, in due course, quashing their convictions. (Dubbed the “Overturned Historical Convictions” or **OHC scheme**. But it is *not* a compensation scheme, but rather civil litigation for damages in against the Post Office, as represented by its solicitors Herbert Smith Freehills LLP.)

- (b) A scheme recently announced by the Department of Business and Trade called the **DBT GLO** scheme. This is an *ex gratia* (non-rights-based) compensation scheme devised by the government, the owner and sole shareholder in Post Office Limited, established in recognition that the compensation paid to not-convicted claimants in the **Bates** civil litigation under the group litigation order (GLO) was inadequate, when set against compensation available under the Historic Shortfall Scheme (HSS) established as a term of the settlement of the **Bates** GLO litigation for those who

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<sup>1</sup> It remains puzzling why the Convicted Claimants under the 2019 Settlement Deed surrendered all their civil claims, but for contingent malicious prosecution, for £0.00. As a matter of logic, it might be thought that those claims be attributed value also, contingent only upon an appeal court quashing their conviction. The claims manifestly *had value*, subject only to the contingency that a claim for damages not be a collateral attack on the (jury) verdict. That contingency was satisfied in the self-same way as the preserved claim for malicious prosecution. It had the result that any payment made to a Convicted Claimant, prior to April 2021 was *ex gratia* and not as of right.

are victims of the Post Office but who were not participants (claimants) in the **Bates** civil proceedings settled under the terms of the Settlement Deed in December 2019. The reason for this is that most of the compensation paid by the Post Office (upwards of 80%) was paid out to the funders of that litigation (Therium), the insurers, and to the claimants' lawyers. That outcome (that those who with great difficulty established that Horizon was an unreliable system apt to have caused the losses experienced by them, were seriously financially disadvantaged by having brought/been parties to that litigation) was rightly seen by the government and Parliament to be unfair. This scheme is administered by the government through DBT that owns the Post Office through UKGI and HM Treasury – that is itself paying the compensation for all the 'schemes', it being recognised that Post Office Limited does not have the resources to pay the level of the claims now made against it.

- (c) The Historical Shortfall Compensation (or **HSS**) scheme, a legal rights-based *extra* judicial scheme established pursuant to the express terms of the December 2019 settlement agreement of the GLO civil litigation for those who were victims of the Post Office but not parties to the civil litigation. This is a compensation scheme for the purpose of settling otherwise free-standing claims by those who suffered loss and damage as a result of the Post Office's conduct for losses falsely alleged against them in reliance upon its flawed Horizon accounting system. This scheme was established by the Post Office Ltd in conjunction with its solicitors Herbert Smith Freehills LLP and is supervised by it - the same firm that acts for the Post Office Ltd in the continuing **Bates v Post Office** litigation under the OHC claims (i.e. (a) above).

10. Much could be written about the various shortcomings with the existing arrangements for payment to those wronged by the Post Office – and in due course

may be (Sir Ross Cranston's initial review of the flawed Griggs compensation scheme for the HBOS/Lloyds Reading fraud extends to 134 pp.). The most obvious objection is that the three existing arrangements contribute to perpetuating the injustice inflicted upon its victims by the Post Office its Board and its lawyers, over 20 years. The present arrangements do little to assuage, indeed augment, distrust of the Post Office and those connected with it.

### **No Independence**

11. A point to which insufficient regard has been paid is that, as a matter of law, the present arrangements militate against fair compensation being paid to the Post Office's victims. Without elaboration, obvious points are:
  - (a) English company law is predicated upon the maximisation of shareholder value. That is to say, the directors of a company are in law duty bound to act in the interests of the shareholder(s). Accordingly, the Board of the Post Office is bound to act in the interests of the government. So the HSS scheme and payments made by the Post Office under that scheme is subject to that constraint/duty. The Board has a duty to ensure as little compensation as possible is paid because that is in the interest of the government as its shareholder. Any averments by the Post Office about its concern for fairness require to be read against that legal constraint.
  - (b) Under the OHC payments, – i.e. settlement of outstanding claims in litigation - not only does the Post Office's Board owe a duty to its shareholder to settle claims for as little as possible, HSF is duty bound, as its solicitors, to act in the interests of the Post Office. Recent steps have been taken to seek to ameliorate the intrinsically adversarial nature of the OHC scheme, but these cannot change its fact as a 'zero-sum game'.
12. Concrete examples of how this works in practice could be given, but are not necessary for present purposes.

13. It is disappointing to see that, in recent correspondence, DBT has aligned itself closely with the position adopted by HSF in the OHC scheme.
14. Any statements made by the Post Office or others on its behalf that it is concerned to see that “fair” compensation is paid must be read as subject to the foregoing constraints that require that the minimum possible payment is made. All the indicators are that the present arrangements are directed towards that end.
15. The central structural problem with the present arrangements is that there is no counterbalance. DBT have sought to suggest that an independent panel and an independent firm of solicitors provide that function – as a sort of ‘fall-back’. They do not – the requirement is that there be independence at the point where an applicant for compensation engages – not once there is ‘an issue’. The absence of any proper independence in oversight of the various arrangements will tend all compensation paid to be skewed in favour of the Post Office/the government.
16. If a lesson was needed in how lack of true independence works out in practice, Professor Sir Ross Cranston’s review of the Independent Griggs review in the “Cranston Report” provides what might be seen as a template for the present circumstances.  
[https://www.cranstonreview.com/Content/Documents/The%20Cranston%20Review\\_v2.pdf](https://www.cranstonreview.com/Content/Documents/The%20Cranston%20Review_v2.pdf) Sir Ross found that Professor Griggs’ independence was compromised.
17. The objection, that has previously been made, is that none of the existing arrangements are independent. They don’t even pretend to independence. The 3 ‘schemes’ are administered by:
  - (a) The Post Office’s solicitors – OHC.
  - (b) The Post Office’s owner and sole shareholder (DBT/UKGI) – GLO.
  - (c) The Post Office itself (overseen by HSF) – HSS.
18. As is elsewhere noted, the OHC is in truth not compensation but is the continuation of litigation. The most grievously harmed victims of the Post Office remain locked

in adversarial litigation on a residual head of claim (malicious prosecution) constrained by the 2019 Deed of Settlement. Those who were not convicted are engaged in a quasi-inquisitorial process administered by DBT unconstrained by the 2019 Deed. This is not only unsatisfactory, it is ultimately insupportable in justice and fairness. It has material effects.

19. Should the point about independence require any additional support (that ties in with the next point), I recently received a letter in connection with observations made by me in January 2023 in connection with an HSS scheme claim; the author of/signatory to the letter being Mr Simon Ricaldin of the Post Office. Mr Ricaldin has overall responsibility within the Post Office for compensation. The letter was headed “Without Prejudice”. The Post Office is in a position to determine both if and what compensation is paid.
20. Further, no argument for the continuing participation of Herbert Smith Freehills in the operation/management or supervision of the HSS scheme is available that is capable of being reconciled with established legal principle.
21. The role of HSF in the Post Office GLO litigation is yet to be considered. It is reasonably clear, however, that HSF played an important role, not only in replacing Womble Bond Dickinson as the Post Office’s lawyers in negotiating the December 2019 Settlement Deed, but also in events leading up to that settlement, including, it may appear, in acting as lawyers for the litigation oversight committee chaired by Tim Parker. It is very possible that HSF were engaged in the attempt to bring about the recusal of the trial judge.
22. The *measure or dimension* of the requirement for independence and confidence in the fairness of a scheme is necessarily informed/affected by the manner in which the litigation that gave rise to the requirement for the compensation scheme was conducted. As an objection to the present arrangements there appears to be no available answer other than that the Post Office’s averment, and that of others on its behalf, that it wishes to see fair compensation paid. That is no more than bare assertion.

### **No Transparency**

23. A fundamental problem is that there is no proper transparency in the arrangements.
24. It has already become apparent that the ENE undertaken by Lord Dyson is problematic. The exercise was undertaken between HSF for the Post Office and Hudgells Solicitors in Summer 2022. The problem with the ENE is that it is fact-sensitive and the determinations are all subject to undertakings/a requirement for additional undertakings. That is unsatisfactory. The ENE binds those who were parties to its terms, but not others. Both the DBT and HSF proceed on the basis that the ENE is to be treated as providing parameters/evaluation for those not party to it. It has been suggested that others were invited to participate, but on examination that contention doesn't stand-up.
25. Similarly, correspondence is routinely marked WP or WPSATC.
26. Importantly, there are fundamental problems with all the schemes in that there is no consensus as to what it is that the Post Office's victims are being compensated for. Two examples suffice:
  - (a) Claimants under the OHC arrangements would in principle have a claim for the 'lost years' caused by the Post Office's concealment of its knowledge from 2013, at the latest (more likely 2010) that the basis for its prosecutions was arguably – on evidence then available to it (that Horizon lacked requisite “integrity” to support findings to the criminal standard of proof) – unsound. It is strongly arguable that the Post Office's withholding of that information from those it had convicted was abusive in obstructing access to the court – a constitutional right that any court would take extremely seriously. If so, putting to one side obvious issues in connection with different causes of action contributing/causing similar/the same losses, such claims, as *intentional torts*, where made good, support exemplary damages. The Post Office's position is that all and any such claims are precluded by the terms of the 2019 Settlement Deed. As has elsewhere been pointed out, that



position puts in sharp relief the distinction between the OHC arrangements and the arrangements for GLO compensation under the DBT scheme, where perforce the 2019 Settlement Deed is treated as *non-binding* for the purpose of paying *ex gratia* (not rights-based) compensation that is explicitly intended to place an applicant in the position that they would have been in, but for the wrong and harm inflicted upon them by the Post Office. That is neither the purpose nor the effect of the OHC scheme. That outcome is incapable of rational justification.

- (b) There is a major issue in connection with claims that are classified as variously claims for “Horizon Shortfalls” and claims that are either classified as not being Horizon claims or else are claims where it cannot with confidence be said that the claims are only “Horizon claims”. This recently arose in connection with my client Mrs Nichola Arch. Mrs Arch was prosecuted for theft but acquitted. Her prosecution took place so long ago that there are virtually no contemporaneous documents available. Accordingly, when it came to the payment of interim compensation, the question arose as to whether Mrs Arch’s prosecution fell within the terms of the DBT scheme – in short was hers a “Horizon” case or might the prosecution have been brought on other possible grounds? The circumstances gave rise to correspondence between DBT and Mrs Arch in which it was explained that the “... *definition covers cases “in which the reliability of Horizon data was essential to the prosecution because there was no evidence of the alleged shortfall other than the balance shown by Horizon, and in which there was no independent evidence of an actual loss from the branch account at the post office concerned, as opposed to a Horizon-generated shortfall”.*” (My underlining.)

27. The narrowly restrictive definitional provision under (b) above is apt to give rise to significant injustice. The restriction and limitation owes its origin to the Court of Appeal decision in **Hamilton v Post Office Ltd** [2021] EWCH Crim 577. On

behalf of Mrs Arch I submitted a Note to DBT. For completeness I attach (with her permission) a copy of that Note to these written submissions. Mrs Arch was very fortunate indeed to have given both oral and written evidence to this Inquiry of the circumstances of her prosecution. That evidence is of great importance. Many will not have had that advantage. Similarly, Mrs Arch was perhaps fortunate to have legal representation. Many others, in a similar position, may find the problem confronting them less easy to address and perhaps difficult, if not impossible, to overcome.

28. The “Horizon date was essential to the prosecution” taxonomy of claims is arguably a false dichotomy or class of claims, predicated as it is on the Court of Appeal’s judgment in **Hamilton**. But **Hamilton** itself was largely (in effect exclusively) based upon the CCRC’s reading of Fraser J’s **Horizon Issues** judgment. That judgment in turn was necessarily only on preliminary issues in the **Bates** litigation. As is elsewhere noted, Fraser J knew only the half-of-it and was in any event, as his judgment made clear, only concerned with Horizon – and the Post Office’s contention that it was a reliable and robust system. Horizon was only one of a raft of problems confronting the Post Office from 2013 – but the only one to have been judicially considered. The Post Office and the government have latched on to the Court of Appeal’s approach and treat it in effect as determinative that issues and claims other than arising out of Horizon shortfalls are outwith compensation arrangements. The analysis, and therefore the conclusion, are both arguably flawed (I have elsewhere given examples of both (enormous) unattributed suspense account funds and ATM endemic error).

### **CONCLUSION/RECOMMENDATION**

29. While the engagement of the Chair on the compensation issues is greatly welcomed, it is understood that that is not part of the remit of this Inquiry. Further, while the engagement is welcomed, it is necessarily subject to the other demands and priorities of this Inquiry.
30. It is impossible for those whom I represent to have confidence in either the independence or the fairness of the existing compensation arrangements. All the existing arrangements are overseen by the Post Office, its owner, the government,

and/or its solicitors. To that extent the arrangements are structurally skewed in the Post Office's/the government's favour.

31. The only way in which present shortcomings can satisfactorily be addressed is by all the compensation arrangements being restructured under the management of someone with appropriate judicial experience – assisted as necessary by a properly constituted and qualified secretariat. That was the solution that became inescapable for the HBOS/Lloyds Reading IAU fraud compensation scheme now chaired by Sir David Foskett. That scheme is considerably simpler than the arrangements for compensation now required because of the Post Office's misconduct over 20 years (not least, in that the basis for compensation in the HBOS scheme is clearly defined/circumscribed). The anticipated objection, that this will cause further delay and inconvenience, is in truth no objection; fairness and justice are not matters of convenience and expediency. Arrangements can readily be made to extend the interim payment arrangements that already exist to accommodate any delay.
32. The immediately foreseeable alternative is further litigation. The judgment in **Post Office Ltd v Castleton** [2007] EWHC 5 (QB) was likely obtained by fraud.<sup>2</sup> The Post Office has declined to pay Mr Castleton's costs in that claim as a condition for setting aside the judgment.

PAUL MARSHALL

24<sup>th</sup> April 2023

2-3 Gray's Inn Square

Annex: Submission to DBT on behalf of Mrs Nichola Arch 15 March 2023

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<sup>2</sup> **RBS v Highland Financial Partners LP** [2013] EWCA Civ 328, [106] per Aikens LJ. (Judgment obtained by RBS by fraud – suppression of facts.)

RE: NICHOLA ARCH v POST OFFICE  
A HORIZON CASE?

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**NOTE** (*Rev 1*)

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*15<sup>th</sup> March 2023*

Caveat/Qualification

*This is not a legal opinion and it neither is, nor is it intended to be, other than a summary of some of the points that can be made. It is intended as a discussion document. It is not to be taken to be Mrs Arch's 'case' on the issue raised/addressed. None of the points made should be taken to bind Mrs Arch in any way. The points made in outline may be further developed, amplified or revised as appropriate.*

*Mrs Arch reserves the right to refer to this document as she chooses.*

1. This Note is written on behalf of Mrs Nichola Arch at the invitation of Rob Brightwell, Deputy Director, Business Resilience, Department for Business and Trade following a conversation with the writer on 7 March 2023.
2. The substance of the reason for this Note is that an issue/question has arisen in connection with the claim of Nichola Arch against the Post Office for compensation under the government scheme for (not-convicted) participants in the 'Bates' GLO litigation, that was compromised in December 2019 following a trial before Mr Justice Fraser (immediately prior to judgment being handed-down by the judge). The essential question, as I understand it, is whether Mrs Arch can bring her circumstances within what the Court of Appeal Criminal Division have classified as

a “Horizon case”<sup>1</sup>? The solicitors’ firm Freeths wrote to DBT on 2 March an email that included the statement: “*Unfortunately we do not hold any contemporaneous/evidential documents for Nichola including any documents relating to her criminal prosecution and trial.*” In my view this statement should cause no difficulty, either for DBT or for Mrs Arch.

3. For reasons that I shall outline, there are compelling reasons (and evidence) not only for the conclusion that Mrs Arch’s prosecution was a ‘Horizon case’, but, further, that it is an early example of what may be considered to be a paradigm of a ‘Horizon case’. That is to say, a prosecution where the false and unsupported - and unevidenced - inference was drawn that a Horizon shortfall, that is to say an apparent discrepancy between payments and receipts, as supposedly evidenced by the Horizon computer data (alone), constituted/disclosed dishonesty and theft on the part of the postmaster in question. (That such a contention should have been sustained in so many instances, with success (*viz* conviction), raises important and serious questions about the reliability and effectiveness of the judicial process that, to date, remain wholly unaddressed.)
4. Mrs Arch is a core participant in the statutory Post Office Horizon IT Inquiry, chaired by Sir Wyn Williams. She was the first of three former postmasters with whom Sir Wyn discussed their experiences, prior to the formal opening of the inquiry. Mrs Arch was the last former postmaster from whom Sir Wyn heard evidence of the devastating human impact of the harm inflicted by the Post Office upon the victims of its conduct.

#### **A FALSE DICHOTOMY**

5. What follows in the discussion under this heading is provided for information (it is not intended (perhaps self-evidently) to make the point good). It is likely that the issue identified is a continuing cause and source of serious injustice. It is the product of the Court of Appeal, in its judgment in Hamilton v Post Office [2021] EWCA Crim 577, having done nothing more than the bare minimum that was required to determine – and adjudicate upon – the outcome of the appeals. That is an

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<sup>1</sup> DBT letter to Mrs Arch dated 28 February 2023: “*That definition covers cases “in which the reliability of Horizon data was essential to the prosecution because there was no evidence of the alleged shortfall other than the balance shown by Horizon, and in which there was no independent evidence of an actual loss from the branch account at the post office concerned, as opposed to a Horizon-generated shortfall”.*”

approach, but it is one that wholly disregards the Court of Appeal’s second function – that is to say its ‘supervisory’ role for the inferior courts. Many would consider that the court ought to have gone on to consider why, in so many manifestly similar instances, innocent people had been wrongly convicted on seriously incomplete and unsatisfactory evidence, and as a result became victims of the miscarriage of justice on a scale hitherto unknown – that is to say, why the courts had failed to operate as intended and as they should?<sup>2</sup> Why the court did not do so admits of no easy or obvious answer. (The failure of the legal system is not an issue with which Sir Wyn Williams is seized.)

6. This issue, accordingly, engages with the dichotomisation by the Court of Appeal Criminal Division (Holroyde, Pickin and Farbey) in the judgment of the court, reported as Hamilton v Post Office Ltd [2021] EWCA Crim 577, of those appeals that it considered to be “Horizon cases” on the one hand, and those that in its judgment were not “Horizon cases” on the other.
7. The dichotomy appears to be canvassed by the CCRC in referrals under s. 9 of the Criminal Appeal Act 1995, and, more particularly and importantly for present purposes, in the judgment of the court at paragraphs [77], [132], [135], [137], [138]. Applying that dichotomy/taxonomy, the appeals of [GRO] , [GRO] and [GRO] were dismissed. (In effect, the default position appears to be ‘if not a Horizon shortfall case’ the Post Office’s prosecution was unimpeachable and its evidence has been treated as reliable and the resulting conviction not ‘unsafe’ – the litmus test for a successful appeal. The remaining 39 appeals were, in every instance, allowed on both grounds of appeal – i.e. “first” and “second” category abuse of process of the court by the Post Office as prosecuting authority. The second is the very serious conclusion that the Post Office was engaged in conduct likely to undermine the criminal justices system and/or public confidence in it.
8. The essential distinction, that appears to have commended itself to the Court of Appeal, but on which there was it appears to have been no argument and no (relevant) evidence (a feature, perhaps not without irony, in each of the prosecutions successfully appealed), is that if a person was prosecuted on the sole basis of evidence

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<sup>2</sup> A question that plainly resonates, ironically, with the Post Office’s experience with Horizon itself.

of (typically) an unexplained balancing error in their Horizon account, then the appeal against conviction has been allowed (because the reliability of Horizon data was essential to the prosecution), but if that was not the sole/only basis for their prosecution and other data/evidence was available as the basis for a prosecution, the appeals failed, as happened with [GRO], <sup>[GRO]</sup> and [GRO]. Further, it appears to be the case (perhaps remarkably) that appeals have only been allowed by appeal courts where the Post Office has accepted that there were disclosure failures in connection with Horizon (*viz* ‘first category’ abuse of process is not contested).

9. It is likely that the Court of Appeal’s dichotomising and the CCRC’s analysis are similarly flawed and simplistic. The reason for this is that the Court of Appeal’s approach (and the CCRC’s before it) was informed by very limited (constricted) evidence.
10. The burden of that evidence was itself provided by the judgment of Mr Justice Fraser in Bates v Post Office Horizon Issues (No. 6) [2019] EWHC 3408.<sup>3</sup> That judgment itself, with respect to the judge, while a masterly account, was limited by what now appears to itself have been limited and unsatisfactorily constricted disclosure by the Post Office. That is to say, even on the *Horizon Issues* trial, the Post Office failed to give important and highly relevant disclosure: *Ismay* was not disclosed, the Post Office’s board’s notification to its insurers of risk in 2013 was not disclosed, and Detica’s October 2013 report (below) was not disclosed. Each of these constitutes a serious and material disclosure failure by the Post Office – a failure that is entirely separate from the issues that were considered by the Court of Appeal in its Hamilton judgment.
11. Perhaps the most important single document that appears not to have been disclosed in that (GLO) litigation was a document submitted by a firm called Detica Net Reveal (“Detica”), a consulting division of British Aerospace (BAE Systems). In October 2013 Detica, having undertaken several months of detailed analysis of Post Office’s systems, transactions and resilience, specifically resilience to fraud, in an

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<sup>3</sup> The CCRC explained that it ceased to pursue its own inquiries and waited for Fraser J’s judgment before deciding whether to refer cases to the Court of Appeal pursuant to the Criminal Appeal Act 1995 – some of which had been subject to consideration by the CCRC from around 2013/2014. (That does not begin to justify the delay for the purposes of Art. 6 ECHR.)

extensive report (that is likely to have cost the Post Office several hundreds of thousands of pounds - if not more - in consultancy fees) that was circulated at the highest levels within the Post Office (and ought to have been considered by the board) concluded and advised the Post Office that its systems were “not fit for purpose” in a modern retail environment. That conclusion was not narrowly concerned with Horizon. Specifically, Detica concluded that the Post Office was unable reliably to reconcile data from disparate sources.

12. One example of repeated systemic error identified by Detica was in ATM transactions. These were *typically* prone to reconciliation error. Detica concluded that ATM error could not be accounted for by fraud alone. That wasn't a Horizon issue.
13. ATM errors gave rise to enormous Post Office suspense account balances (tens of millions). Second Sight in their 2015 Final Report observed (2.18): “In addition to the credits being taken to Post Office’s General Suspense Account we have been informed very recently that at each year end substantial unreconciled balances existed on many of the individual suspense accounts. These unreconciled balances for the 2014 financial year were approximately £96 million in respect of Bank of Ireland ATMs and approximately £66 million in respect of Santander. These unmatched balances represent transactions from individual branches that occurred in the preceding six months”.
14. The Post Office’s ATM errors were separate from problems with, and bugs in, Horizon. Accordingly, even on that point alone, the Court of Appeal’s dichotomy between “*Horizon cases*” and “*not Horizon cases*” issues is plainly flawed and somewhat simplistic. That it has become an entrenched, if lazy, tool for analysis is regrettable.
15. The Detica report appears not to have been disclosed in the “Bates” GLO litigation and was not before the Court of Appeal.<sup>4</sup> The reason for such an important

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<sup>4</sup> The Detica report of October 2013 was referred to in the writer’s written submissions to the Court of Appeal on behalf of the appellants Misra, Felstead and Skinner (whose appeals were successful) but those submissions were not maintained and pursued by Lisa Busch Q.C. in March 2021 after the writer ceased to be involved in the appeals from December 2020 and the Court of Appeal, rather unfortunately, was not invited to admit the October 2013 Detica report in evidence. Had it considered the Detica report, the dichotomy between ‘Horizon cases’ and ‘non-Horizon cases’ would



document that was widely circulated at the highest levels within the Post Office not being disclosed remains an important, but to date unanswered, question. It was likely a very important document in the Post Office's strategic decision, from 2014, to cease prosecuting its postmasters and employees for Horizon "shortfalls".

16. It is not known if the government, as the Post Office's owner and sole shareholder was privy to the 2013 Detica report.
17. Regardless of the (in)correctness of the dichotomy drawn by the Court of Appeal between those cases that it considered to be "Horizon cases" and those that were not Horizon cases, there are a number of reasons for the view that it is overwhelmingly likely that Nichola Arch's prosecution *was* a "Horizon case" and not of the category "not a Horizon case" according to the Court of Appeals' (unsatisfactory) taxonomy of appeals.
18. It appears to be accepted, at least in principle, that if Mrs Arch's prosecution was for a Horizon shortfall – and was therefore a "Horizon case" within the Court of Appeal's homespun formulation, then in principle her prosecution (*ex hypothesi* without admission) may be treated as, further, a malicious prosecution. But the argument runs, so far as is understood, '*Mrs Arch was not successfully prosecuted and therefore her circumstances are different from other prosecution cases and it cannot be said with confidence, that she was prosecuted only for a Horizon shortfall without other evidence*'. This, for reasons outlined below, is a surprising position for DBT/the Post Office to adopt.
19. As a preliminary observation, it is remarkable for it now to be suggested that Mrs Arch's claim does not, or may not, fall within the "Horizon cases" category of claims, as identified by the Court of Appeal. Such a view can only be the product of ignorance and/or disregard of the account given by Mrs Arch in interview with Sir Wyn Williams in January of 2021, and more particularly in her written and oral evidence to the Inquiry in March 2022.

**MRS ARCH'S EVIDENCE TO SIR WYN WILLIAMS WAS THAT SHE WAS PROSECUTED FOR A HORIZON SHORTFALL**

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not have been available and would almost certainly not have been articulated and adopted in the way it was.

20. Mrs Arch was one of the first people with whom Sir Wyn Williams consulted prior to the opening of the Post Office Horizon IT Inquiry (“the Inquiry”). Mrs Arch’s account, that is both eloquent and was considered by Sir Wyn Williams to be important, is at: <https://www.youtube.com/watch?v=D5m1nvtBTZ8>.
21. It is self-evident from that brief account that Mrs Arch is explaining to Sir Wyn the problems with reconciling balances on her Horizon system. The reason for her suspension was, as she explained to him, that she was £28,000 short. (In her witness statement of 15 March 2022 Mrs Arch refers to the sum being £32,000.<sup>5</sup>)
22. In her written evidence to Sir Wyn Williams by a statement dated 15 March 2022 Mrs Arch explains what happened to her between paragraphs [6] and [23]. It is to be borne in mind that by this time Mrs Arch had been running post office branches on a *locum* basis, without difficulty and with success (it was her original business model), since 1997. Because of the importance of this evidence, that so far is known is not disputed or challenged – and there appears to be no available documentary basis for doing so, it merits full citation. Mrs Arch’s evidence<sup>6</sup> is that:

#### “HORIZON INSTALLATION AND TRAINING

6. *During the summer of 2000 the Post Office contacted me to say that our office would be one of the first to go on the rollout scheme of the new Horizon system. I was really chuffed about this, because at that time we were doing everything manually and balancing on a Wednesday evening took us ages. Having modernised the shop I was looking forward to a modern computer system.*
7. *In autumn 2000 an engineer came to the branch and installed the equipment in the morning. A gentleman came with him, who showed me how to use the system while the business was open. I had customers coming in and out of the shop and the post office, and I was learning how to use Horizon at the same time. At lunch time the gentleman left me with a*

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<sup>5</sup> Nothing turns on that difference. In any event it was not the amount for which she was prosecuted. The Post Office had, she explained, “found” some of the allegedly missing monies. (A feature found also in other cases.)

<sup>6</sup> The writer played no part/had no role in the preparation of Mrs Arch’s witness statement to the Inquiry.

*manual, a massive manual in all fairness, very comprehensive. He told me that everything I needed to know was in the manual but I should ring the helpline if I got stuck and they would be able help me. And then he went, and that was that. I'd done no balancing whatsoever, because this was only during a morning on a normal day. I wasn't frightened of the equipment in anyway, so I wasn't too concerned about that. I thought, no, we'll give it a go.*

8. *By then I'd employed a part time member of staff as well. I had to show her what I had been shown, hoping that I was showing her the right things, obviously, because I had only had a couple of hours myself.*

## SHORTFALLS

9. *Problems began in the first week of using Horizon.*
10. *When people came in to collect pensions they would come in with a pension docket in a pension book. The pension docket would tell us the amount to give them. Under the old-fashioned system we would stamp it, tear it out and keep it. And that would account for the money paid out. Under the new system we barcoded the docket. Each day we had to send the dockets off to Ireland, so they would be out of the building. The only record we had left in the office was on the computer system in front of us, which gave a total of daily allowances. Before I sent the dockets off I checked to make sure what the computer said was what I had got, and it was, so I thought 'lovely.'*
11. *I did this each day as I thought it wouldn't hurt to do a bit of manual work alongside Horizon, just to make sure that I was doing it right and that I had not missed something out. Each day before I sent the dockets off to Ireland I would add them up on my calculator and compare my total with what it said on Horizon. I used a printer calculator, which I kept in the office and then put just put the date on the top so that I would have my paper trail.*
12. *During the first week all the daily totals were right, the cash was right, and the customers had the right money, but at the end of the week Horizon*

showed I was £1,000 short. I could not correct the weekly total without changing the daily totals, which I knew were right, and the dockets had left the building. So I rang the helpline and explained the problem. I was simply told to wait for a correction notice. I said I'd rather not wait because I could see what the problem was. The woman on the helpline then told me that my attitude was all wrong, that I was 'anti-computer,' and that I should leave it for the computer to correct.

13. We carried on checking the daily totals manually for another week, but the following week the shortfall doubled exactly to £2,000. The daily totals were all correct, all the customers had had their money, and the cash on my manual side was correct, **but the weekly total was now £2,000 short.**

14. I rang the helpline again. I was concerned that I would not get a correction notice because the daily totals were correct, and I was sending the dockets off with the correct daily type-out. I was told not to be silly, that the system would rectify itself,<sup>7</sup> that there would be teething problems on the roll-out and I should be patient. **Every week the shortfall doubled. I rang the helpline every single week to say what was happening and that I could see it happening.** I carried on doing the manual work because I could see the problem happening.

#### AUDIT AND INVESTIGATION

15. **By week six the shortfall had doubled again to £32,000.** I rang the helpline and asked for something to be done, as I had not received any error notices. Two days later I arrived at work and there were three people at the door. I recognised the auditor. I had been in the business for eight years by then and had had a few audits in the past in different offices, and it wasn't a problem. I did not recognise the other two people, but they said they were also auditors. To be honest, I was chuffed to bits. I thought great, we're going to get to the bottom of this.<sup>8</sup> I told them straight away

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<sup>7</sup> This is precisely what Mrs Seema Misra was told when she identified and complained of similar experience/problems.

<sup>8</sup> A sentiment that is identical to Miss Janet Skinner's when auditors attended her branch – in 2006. She was also pleased that at last someone would get to the bottom of what was happening.

*that I had had a problem with the new computer system from day one and had been calling the helpline.*

16. *One of the gentlemen went into the post office and did the audit. There was no room for me to go in or the lady who was with him. We just stood out in the stockroom, had a chat, drinking coffee, and then at about 10:30 he came out and he said yes you're £32,000 short. I said yes that's exactly what I've told the helpline. I also said I had put it to nil each Thursday in order to reboot the system and run a fresh week, as the helpline had told me to do. I told them I had all the written paper copies as well, but they said they did not want them as they could see what was happening.*
17. *The auditor then told me they needed to ask me more questions and that it would be better if they could do so at the Stroud Crown Office, 6 miles away, because there was more room there. They insisted that I go with them in their car rather than driving myself, saying that parking in Stroud was difficult. I was 29 years old and I thought, oh well, that that makes sense. On the way there the lady, who sat in the back with me, made comments about what a lovely area Chalford was, and how expensive it must be to live there. I said my partner and I could only afford a small shared ownership properly as houses were so expensive, but we wanted to settle as he was born in the area.*
18. *When we arrived at Stroud Crown office I was taken through a side door to a little room with a key code on the door and recording equipment on the desk. I walked in and the door locked after me, and they were in the room with me. I was told that the interview would be recorded. When I asked why, the man said 'I don't actually think you realise the sort of trouble you are actually in.' I said 'well I haven't done anything.' He told me to stop messing around, saying he was ex-CID, that he had met people like me before, that I should stop lying and stop wasting his time. He said he knew I had stolen the money and all I needed to do was to tell him what I had done with it. I said I hadn't taken a penny and offered both mine and my partner's bank statements, and also tried to tell him that I knew what was causing the problem. He said 'no, you don't'. This went*

*on continually, and I kept repeating myself. I then said that I thought I needed somebody there with me. I was told that I would only need someone if I was worried, or if I was hiding something. I did not want them to think I was guilty so I agreed not to have anyone with me.*

19. *The interview continued until quarter past four in the afternoon. I was locked in the room throughout, with nothing to eat or drink. Eventually they said they would drive me back as they were not getting anywhere. They said they knew I had taken the money, they would get to the bottom of it, and they would ensure that I never ever step foot in that building again. And so, they dropped me off outside my post office and took the keys. I couldn't get into the shop or the post office at all. I had no access to my paperwork, my till, all my stock- everything was locked in.*
20. *So I drove home, absolutely hysterical. I was terrified and did not know what to do. As soon as I got home I rang my partner and my Mum and told them what had happened. They arrived within minutes, and told me to calm down, saying of course I hadn't stolen any money and it would sort itself out. But I was frantic about what we were going to live on. Steve, my partner was a self-employed tree surgeon at the time and his work was sort of hit or miss without the shop and my post office salary.*

## SUSPENSION AND TERMINATION

21. *I then received a call from the subpostmaster, who told me that the Post Office investigators had been to his house and had told him to suspend me, or they would go after him instead. He could not cope with that, as he was a 74 year old man who lost his wife of 48 years just four and a half months previously. I thought it was an awful position to put him in, but I understood that he had to suspend me. He also told me that the shop had to stay shut until the Post Office contacted him - I was not allowed to go in and get my stock.*
22. *About two weeks later he told me that the Post Office had been in touch and told him that he had to sack me. When I asked why he said he did not know. He told me that the Post Office had also said I had to empty the shop, although I was not allowed in the building myself. So I arranged*

*for my partner and a friend to go up on the Saturday morning and empty the shop completely. I had nowhere to store the stock and had to dump a lot of it in the end. A friend also managed to sell some of the stock at a car boot sale so we would have some money to live on.*

23. ***I wasn't allowed in the post office. I wasn't allowed to take any paperwork whatsoever-including my handwritten records. That all had to remain.*** *The cash register and everything we purchased had to stay, even though we bought all the shop fittings, the brand new flooring, all gone. So that was the end. That day everything ended.” [Emphasis supplied.]*

23. Mrs Arch’s account of the prosecution case at her trial is vivid and compelling (statement paragraphs [25]-[27] and [32]-[36]):

25. *On my doctor's advice I decided to get a solicitor. We applied to the Post Office to get all my written paperwork back, and for access to my branch. **The Post Office completely refused to supply anything.** We then requested a copy of the recorded interview record. **They refused to give me that as well.** Later, when I joined the JFSA, **I applied for the interview record again but was told that it had been destroyed.** [Emphasis supplied.]*

26. *I was stuck in a place where everybody knew I was innocent but we had nothing to prove that. That was my element of hope as well, as there was nothing to prove I was guilty either, so I felt I could not give up.*

27. *About 12 months later I received a letter from the Post Office charging me with theft and fraud. In the end they had charged me with theft of £24,000 as they had found £8,000 of the shortfall.*

[Omitted text]

32. *The following April I received notification that my case had been transferred from Gloucester Crown Court to Bristol Crown Court. My solicitor had found a barrister who said he would see me on the day of the trial and he would discuss things with me when I got there.*

33. *I remember the trial like it was yesterday- even the music that was playing on the radio in the car on the way there. The Post Office had arranged for two witnesses to give evidence against me- the subpostmaster and my part time employee. They hadn't been allowed to speak to me at all once they'd been told that they were now Post Office witnesses, which really upset me because they used to be my friends. But as it happened, they might as well have been my witnesses because they were so lovely, and said they knew I hadn't done anything wrong. Meanwhile, nearly a year before I was charged I had given the Post Office every bank statement of mine for the last four years, and Steve's even though he was nothing to do with it, so they had all that information and could see exactly how I paid for what, and how I paid bills and everything else. The Post Office also called two elderly customers as witnesses, who simply confirmed that they collected their pensions from the Post Office.*

34. *My turn came on the afternoon of day two. I had to sit separately from everyone else with two prison wardens next to me. When I got into the witness box the Post Office's barrister went absolutely berserk. He chucked a bundle of Pension dockets at me because he was getting so annoyed. My barrister had told me to go in, to say what I knew and nothing more, and not to try to solve problems with the Post Office's case for them. And so every time the Post Office's barrister asked what I had done with the money, I told them that I did not have the money. **He said 'well, you must have had the money.** We all know you've had the money. You've gone on holiday for a week. The Post Office paid for that. So why don't you just tell us you've had the money.' I said 'I've not had any money.' He said, 'do you know what this is?' It was a docket in a plastic clear bag. I said 'yes that's a pension docket.' He said 'you duplicated those yourself so you could take the money. You've made them pay out to people, but you didn't pay it out. You popped it in your purse.' I said 'no I didn't.' **I told him that the daily totals were right and I had evidence to show that, but I couldn't access it.** And he replied that he was not interested in what I said as the computer was the most high-tech equipment you could wish for, and **no one else had had any problems with it.** He insisted that **I should***



***just say what I had done with the money so they could all go home.*** [Emphasis supplied.]

35. *When the judge came to sum up after 3 days he told the jury to study the evidence that had been put before them and decide what crime they could actually see had been committed. And I felt that he had believed me. The jury went off for about an hour and came back with a unanimous verdict that I was innocent. And the judge told me I could go.*

36. *I left the court and fell to my knees in the corridor. This was 2 and a half years after everything. I didn't know what to do, so I was absolutely howling. ...”.*

24. Mrs Arch’s account shares many obvious similarities with the account of the investigation and prosecution of others. The circumstances bear a striking resemblance to Tracy Felstead’s prosecution, save that she was convicted.
25. It is striking that Mrs Arch’s evidence is that the Post Office withheld documents from her. This a point to which it will be necessary to return.
26. Mrs Arch gave oral evidence to Sir Wyn Williams. She was the last witness to give evidence on the human impact of the Post Office’s conduct on 17 March 2022.
27. In the course of her evidence she was asked by Counsel to the Inquiry:

MR BLAKE Moving on to the prosecution, about 12 months later you were notified of the prosecution. What were you charged with?

Mrs ARCH Theft and fraud. They'd charged me for £24,000 of theft. They'd found -- apparently, they'd found £8,000, and fraud for making the accounts correct for business on the Thursday.

MR BLAKE Was that a letter that came through the post?

MRS ARCH Yes.

MR BLAKE How were you when you saw that letter?

MRS ARCH I would safely -- I was absolutely shattered.”

28. The inference that Mrs Arch’s case was a pure “Horizon shortfall” case is obvious not least from her oral evidence to Sir Wyn Williams (Transcript p 134):

MRS ARCH “...The barrister was really -- the Post Office barrister was very aggressive. He was very frustrated with what he would describe as my attitude, the fact that I was wasting everybody's time by denying it. He threw a bundle of pension dockets actually at me, at one point, and, luckily, the judge of the case stopped it and said, "That's enough, she's not going to say any different now, so can you move on", and he just sat down then and, yeah, it went to deliberation at that point.

MR BLAKE So there came a time for the judge's summing-up. What do you remember about that?

MRS ARCH I genuinely -- I'm absolutely convinced he believed me because he pointed out to the jury -- straightaway he said, you know, "Obviously when you go to deliberate and consider everything that you have heard, please, **please consider whether a crime has actually even happened here**", and when he said that I thought, "He knows, he knows I've done nothing".

29. Consistently with the evidence that Mrs Arch gave to Sir Wyn Williams, the Inquiry has also received other evidence from those with first-hand expert knowledge of the problems that were encountered with the Horizon software at the time of and shortly after roll-out.

30. Mrs Arch's problems were well-known at the time that she recounts her having experienced them.
31. Mr Andrew Simpkins, a senior IT managing consultant, and by background a computer programmer engaged in senior management roles for large scale IT projects, who was engaged in the Horizon project roll-out and in the Live Trial to 2000, gave the following evidence to Sir Wyn Williams, by a witness statement made by him on 13 September 2022 that was put in evidence to the Inquiry on 3 November 2022:

“30. At the time I left Horizon I was not so much worried as to whether known faults had been fixed. It was rather that the system delivered into Rollout had an ongoing vulnerability to error due to its complexity and lack of transparency. When errors arose over time during live operation, as they do in all systems, **it would be difficult if not impossible for postmasters and postmistresses to understand what had gone wrong. So a situation arose where they could not validate their own financial information, and yet they were held accountable for it.**”

(Emphasis supplied.)

32. Mr Simpkins, in his oral evidence on 3 November 2022, gave the following evidence to Sir Wyn Williams (Transcript pp 92-93) in response to questions from Mr Jason Beer Q.C., Counsel to the Inquiry:

MR BEER *This explains why the branch staff had difficulties with cash accounts and stock unit balancing, as reported during the live trial. So there is another issue, which is how the system works -- although the branch staff can use it, they are not too clear on how it works, either.*

*Obviously, they don't have to understand it at a technical level, but to cut to the chase here, one of the things that I only discovered reading some of the postmaster testimonies, and has come out in some other literature, is that when the postmaster had a problem with his cash account -- you know, he had a deficiency, he had an*

*unexplained deficiency -- **there is nothing that he could do to understand how that had happened.***

MR BEER *So he could not interrogate the system?*

MR SIMPKINS *He could not interrogate the system.*

*[omitted text]*

*But I can remember evidence from some of the postmasters who were saying "Well I want some evidence of" -- I suppose you might say an audit trail, "Where is the audit trail that explains my deficiency"? As we know, they could not produce the audit trail **and the Post Office refused to give them that information...**".*

[Text in bold typeface supplied.]

33. At the end of his oral evidence, Counsel to the Inquiry put to Mr Simpkins:

MR BEER *"That's what you say in your last sentence: **"So a situation arose where they could not validate the integrity of their own financial information ..."***

MR SIMPKINS ***So they could not validate it,..."***

34. On 9 November 2022 Mr John Simpkins, an employee of Fujitsu and the team leader for software support centre (SSC) on Horizon, gave evidence to Sir Wyn Williams.

35. In the course of his evidence it emerged that errors encountered in the Horizon system that were communicated to the Horizon helpdesk by postmasters that were unresolved, despite being acknowledged, were allocated as postmaster responsibility. That is to say, known unresolved errors that were not specifically attributable to fault in the Horizon system were posted as the responsibility of postmasters. The following exchange took place in connection with "phantom transactions" in 2000. Questioned by Ms Flora Page (Q), Mr Simpkins (A), gave the following evidence to Sir Wyn Williams:

MISS PAGE *I'm going to start .... With the third supplemental agreement.... To give you a little ... chronology, it was signed in January 2000, so relatively early in the national rollout. You were working then, weren't you, in the SSC?*

MR SIMPKINS *Yes.*

MISS PAGE *One of the issues that is clear from that third supplemental agreement is that the technical people in Fujitsu, and indeed as a result of that agreement it is clear that Post Office also knew, that there would be cash account errors caused by reference data, also caused by other technical faults and that, in some cases, they anticipated that they would only be picked up by subpostmasters phoning the call centre. Is that something that you can sort of accept from me, in terms of the interpretation of the agreement?*

MR SIMPKINS *I can accept that, yes.*

MISS PAGE *All right. Well, were you and your team ever alerted to that?*

MR SIMPKINS *If the -- we would take the calls -- sorry, so they would contact either MBSC or HSH and then, if it was HSH it would, if it was a software issue, hopefully find its way to us and then we would investigate them based on that, but I don't know about the agreement.*

MISS PAGE *Well, obviously, you would be alerted if a subpostmaster came to you -*

MR SIMPKINS *Yes.*

MISS PAGE *-- through the lower lines of support, and you would know that you were speaking to a subpostmaster, but my question was: did anyone at Fujitsu, in your management structure or in any fashion, let you know and your team know that there would be or there could be faults, which would only become apparent because a subpostmaster alerted the helpdesk to that and that might come to you up through the chain?*

MR SIMPKINS *Not particularly. I can't recall being told that there would be faults that only a subpostmaster may notice, but we did identify faults based off calls from subpostmasters. So it was definitely a thing we did and we did identify faults based on those calls. If we identified a fault, we would scope the fault and, once it was recognised -- and identify who was affected by that, so I think I'm saying the team knew that there were issues that subpostmasters were identifying that weren't being picked up by automated things in the data centre.*

MISS PAGE *All right. Well, in that case, can we please look at document number POL00028743. When it comes up, you will see that it's a PEAK from 2001. It is sometimes quite hard to read these PEAKs. If we perhaps -- can you read it? Are you able to?*

MR SIMPKINS *I can read it, yes. I think this was in my pack as well.*

MISS PAGE *It will have been. If we look in closely at 12.58 on 14 April, it says the "pm" -- I presume meaning postmaster: counters. He says he has had to pay out over £1,500 in losses that are due to these problems. He has informed POCL they can suspend him because he is refusing to make good any further losses." He asks for a face-to-face meeting: "[He] feels very strongly about this and says he is willing to take POCL to a tribunal/court because of the stress he has suffered because of the problems." ...*

MISS PAGE *I see. If we go on a bit further, if we go as far as page 4, please, and about halfway down we can see: "This is an update for yesterday's call [this is in capitals] made by the pm ... PowerHelp server was down ... "Call was taken over by STSA Donna Moulds and the following information was manually logged: "PM would like to add to the current complaint that transactions are currently appearing and disappearing on screen and also the PM's counter printer has not been working either. "PM had a message on screen stating [about the] transaction then the screen froze and timed out. When logged back in, the transaction was not on screen. PM rebooted the printer, and a receipt for this transaction was printed. Now the printer won't print any receipts", et cetera. A bit further*

down, it says at 9.33: "PM would like to add that on the 18th April ... the PM spoke to Gareth from the Environmental Team. Gareth advised the PM that he will be in touch with him before the end of the month to investigate any problems. It is now past the end of the month, and still nothing has been done." If we carry on down a bit, please. This is at 9.35: "PM feels the system is unreliable. PM cannot trust this system." He says again that he wants to speak to someone face-to-face. It is quite clear, as far as this postmaster is concerned, that he is saying that this is not his fault, he has not done anything wrong, the system is unreliable, yes?

MR SIMPKINS *Yes, this was a phantom transactions call, wasn't it?*

MISS PAGE *It was, that's quite right and, indeed, if we go down to page 10, we can see that reference to phantom transactions. I think a little higher -- Well, while we're here we can see that it is closed down on the basis that: "I am therefore closing this call as [it is] no fault in product." A bit higher up we can see, under 12 November 2001 Patrick Carroll: "**Phantom [transactions] have not been proven in circumstances which preclude user error. In all cases where these have occurred a user error related cause can be attributed to the phenomenon. I am therefore closing this call as no fault in product.**" But if we look further up and, in fact -- I mean, you may be able to confirm it for us without us looking further up, **the phantom transactions that the user is referring to were, in fact, witnessed, weren't they --***

MR SIMPKINS *Yes, by the Romec engineer.*

MISS PAGE *-- by a Romec engineer, exactly. Yet, this later entry says "**Well, we will just close this down, there's no fault, it must be user error.**"*

MR SIMPKINS *Yes, I did read through it. I don't remember Pat Carroll researching this one. I know he did do a lot of monitoring and things like that, that's all*

*in the call, and I don't know if this comment is after -- for after those -- those were put in place but, yes, **I agree it doesn't read well.***"

[Emphasis supplied.]

36. It may perhaps be suggested that in fact Mrs Arch was prosecuted on evidence that went beyond simply a Horizon shortfall - or on evidence other than her Horizon account balances, so that the reliability of Horizon data may not have been *essential* to her prosecution.
37. First, there is no evidence whatever to support such a view, which appears merely imagined. In contrast, Mrs Arch's recollection is clear and vivid.
38. The Post Office of course has an established track record, without any evidential basis for doing so, for simply contending that witnesses are liars. It adopted this approach, conspicuously without success, before Mr Justice Fraser. In the *Horizon Issues* trial it was repeatedly put to witnesses who gave evidence of experiencing unaccountable and inexplicable shortfalls, that they were simply giving false evidence. As Fraser J noted, those allegations and challenges to postmaster evidence had no factual or evidential basis beyond bare assertion, they were rejected by the court.
39. As against that observation, the following exchange with Sir Wyn Williams is salutary, and the Post Office, and the Department of Business and Trade are invited to take note of it (Transcript p 137)  
(<https://www.postofficehorizoninquiry.org.uk/sites/default/files/2022-03/POH%2017%20March%202022.pdf>):

SIR WYN WILLIAMS: “..I'm wondering what evidence they may have called, either read or orally, to establish that money was missing.

Mrs ARCH They literally went by the weekly balance sheet of what Horizon told them.



SIR WYN WILLIAMS: Well, I think you've answered my question now. So there was evidence before the jury about what Horizon had said?

Mrs ARCH Yes, yes, they had the documents, the weekly report.

SIR WYN WILLIAMS: Yes, that's fine.

Mrs Arch Every week.

SIR WYN WILLIAMS: Thank you.”

40. The obvious, indeed inescapable, conclusion is that Mrs Arch was prosecuted for the *shortfalls* of which she had repeatedly notified the Post Office that she was experiencing. To use a contemporary formulation, ‘you couldn’t make it up’; but the Post Office did – a view that appears from Mrs Arch’s evidence to have been taken by the trial judge.
41. It seems that the DBT is not as readily satisfied by Mrs Arch’s explanation as Sir Wyn Williams was. It may be that Sir Wyn would be as surprised and disappointed by this as Mrs Arch herself is. Neither the Post Office nor DBT are able to offer any other, alternative, explanation.

#### **ACQUITTAL BY THE UNANIMOUS JURY’S VERDICT**

42. Second, Mrs Arch was acquitted. Invariably (and I think the word applies literally) where prosecutions have been brought on grounds other than Horizon shortfalls and have succeeded, the CCRC has either not had the requisite confidence to refer under the Criminal Appeal Act 1995, or else appeals that have been referred by the CCRC have failed. Notable instances are the three cases in the March/April 2021 appeals reported as Hamilton. The plain logical and legal inference is that had there been any evidence of dishonesty, - *or any evidence at all*, other than unexplained Horizon shortfalls, Mrs Arch is likely to have been convicted. That she was not convicted is overwhelmingly likely to be attributable to the jury being (properly) directed by an unusually sensible and astute court in connection with the absence of evidence other than an unexplained shortfall. No reasonable prosecutor would

have prosecuted Mrs Arch. No evidence of theft, no evidence of *mens rea* – *i.e.* dishonesty, no evidence of any proceeds of any alleged dishonesty (*viz* criminal property) and no evidence of any unlawful act.

**THE DESTRUCTION OF DOCUMENTS BY THE POST OFFICE AND PERVERTING THE COURSE OF JUSTICE**

43. It is convenient to briefly touch on the applicable principles.
44. The essential complaint (as it is understood) is that there is no documentary evidence in the hands of the Post Office to support the contention that Mrs Arch was prosecuted solely/only for a Horizon shortfall – and thus that her case was a “Horizon case”. It is suggested that it may follow that Mrs Arch cannot show that she was prosecuted for a Horizon shortfall without there having been other evidence (so that the reliability of Horizon data cannot with confidence be said to have been “essential” to her prosecution – in the Court of Appeal’s formulation). Consequently, any claim that she may have, must accordingly fall outside the DBT government *ex gratia*<sup>9</sup> compensation scheme, shortly to be introduced.
45. That is to confuse or elide a number of different issues that are in truth separate.
46. First, as noted, Mrs Arch is perfectly clear that she was prosecuted for the £32,000 (later reduced by the “found” £8,000) shortfall identified upon the so-called auditors attending her branch. She had previously repeatedly reported experiencing increasing shortfalls.
47. It matters not that the Post Office does not retain documentary evidence that is consistent with or supports Mrs Arch’s account. In order to displace it is necessary for the Post Office to show she was prosecuted other than for a Horizon shortfall. It is legally insupportable (and wrong) to suggest either that:
  - a. It is necessary for there to be documents that evidence the basis upon which Mrs Arch was prosecuted; or

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<sup>9</sup> In the sense that it is implemented in express recognition that the December 2019 settlement was unsatisfactory and unfair. It is thus compensation superadded to the settlement sum.

- b. That Mrs Arch has any burden to show that she was not prosecuted for an offence other than an offence that was disclosed/evidenced by a Horizon shortfall.

The latter is to reverse the burden of proof – a technique which the Post Office has adopted with some success – but which was explicitly deprecated by the Court of Appeal in Hamilton.

48. As noted, there appears to be no documentary evidence that weakens, let alone undermines Mrs Arch’s evidence. In the circumstances it is the best evidence. No witness is likely to have a better recollection of events than Mrs Arch.
49. But that is not the end of the issue. There are other important material considerations.
50. Lord Diplock famously put the point in British Railways Board v Herrington [1972] UKHL 1, 31 ([1972] 1 All ER 749):

*“The Appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.”*

51. There is now a line of cases not involving document destruction which follows Herrington. Brooke LJ in Wiszniewski v Central Manchester Health Authority [1998] 1 Lloyd’s Rep. (Med) 223 identified principles in which adverse inferences may be drawn from the absence of evidence from particular witnesses.
52. Charles Hollander in his (well regarded) text *Documentary Evidence* (12<sup>th</sup> Ed.) records the judge’s observations in Earles v Barclays Bank plc [2009] EWHC 2500 (QB) “In cases where there is a deliberate void of evidence, such negativity can be used as a

weapon in adversarial litigation to fill the evidential gap and so establish a positive case.” Hollander comments: “Thus if there was no evidence on a point, the court could rely on the inferences drawn from the destruction of documents to provide evidence otherwise absent. Indeed it is because of this possibility that in criminal cases s. 38(3) of the Criminal Justice and Public Order Act 1994 provides that a person may not be convicted on an inference drawn from a failure to give evidence.” Hollander concludes the section citing *Infabrics v Jaytex* [1985] FSR 75, “*if you haven’t troubled to retain the documents, why shouldn’t the court make assumptions as to their content against you?*” and comments, “So the principle is more one of fairness than depending upon deliberate destruction.” (That was the principle articulated on behalf of Mrs Arch in the course of discussion on 7 March 2023.)

53. The jurisdiction of the court here (*viz* a presumption against a person responsible for the absence of evidence) is of great antiquity and goes by the maxim *omnia praesumuntur contra spoliatorem*. Applications include *R v Arundel* (1617) 89 Eng. Rep 258 and *Armory v Delamirie* (1721) 1 Stra. 505.
54. The proposition that follows from this discussion is that, irrespective of Mrs Arch’s own evidence referred to above, *the non-existence of documents in connection with Mrs Arch’s prosecution (if that is true, which is not to be taken to be accepted, without more) is entirely the responsibility of the Post Office*. Accordingly, it does not lie with the Post Office, in reliance upon that (asserted) fact to contend that Mrs Arch cannot show that she was not prosecuted for an offence other than a Horizon shortfall such as to thereby make her case a “Horizon case” within the Court of Appeal’s formulation. Any such contention carries the vice that it is a requirement to prove a negative (even though double). In my view any court would almost certainly conclude, regardless of Mrs Arch’s own positive evidence (above), from the absence of evidence preserved by the Post Office that Mrs Arch’s case was other than a Horizon case, that it *was* indeed a Horizon case. Such a conclusion will more readily be reached by the court where:
  - a. The Post Office, over a very long period, systematically withheld from those it prosecuted, important evidence. (This is accepted by the Post Office.)
  - b. The Post Office is known to have engaged in the destruction of documents that it considered to be unhelpful (*q.v.* the August 2013 “Shredding

Advice”). (The Post Office and its employees were seemingly so inured to wrongdoing that this appears to have elicited no protest, still less whistleblowing.)

55. The position will be *a fortiori* where the Post Office engaged in the systematic obstruction of rights of appeal, by the suppression and withholding of evidence, required in fairness as a matter of law to be disclosed to those it had convicted, as it appears it did, thereby causing years of delay in the hearing of appeals. As has elsewhere been noted by the House of Lords, such delay (and violation of statutory right) is of the utmost importance and consequence in the administration of justice, the reason being is that lost time is in truth incalculable.

#### **CONCLUDING OBSERVATIONS**

56. From the foregoing discussion:
- a. Mrs Arch’s unchallenged (extensive and vivid) evidence is that from the outset following installation of Horizon - as one of the first to receive it - she experienced repeated shortfalls/balancing issues with her Horizon terminal. She reported these and complained of this over a period of time. For those shortfalls she was in due course prosecuted following a ‘branch audit’ (in truth nothing more than a cash-check against Horizon records). There is no evidence available that weakens or undermines that contention. Furthermore, Mrs Arch in terms, in answer to a question from Sir Wyn Williams, identified the basis upon which she was prosecuted.
  - b. Mrs Arch’s account is now reinforced/supported by evidence given to the Williams’ Inquiry that it was known, at the time of roll-out, that postmasters such as Mrs Arch had no means of validating/verifying the figures produced by Horizon. That is precisely the experience of which Mrs Arch has given evidence to the Inquiry and that she has, in some detail, described. Further, balancing problems that were identified but not explicitly attributed to Horizon software issues were, it now appears, routinely knowingly wrongly attributed to postmaster actions – with resultant (false) contractual liability to make good (Simpkins, above).

- c. Mrs Arch was acquitted. It appears, including by elementary probability, that had there been evidence *other* than a shortfall at Mrs Arch's Horizon terminal/in her account balances, she would have been more likely to have been convicted of an offence. Further, those postmasters who were prosecuted for offences that were not 'Horizon cases' appear to be in a significant minority. In the same vein, the Post Office's strategic decision in or about early 2014 was to cease prosecution for shortfalls. (A detailed analysis of Post Office prosecutions, even two years after the Court of Appeal's Hamilton judgment, appears yet to be produced.)
- d. As a matter of law, in any event, (i.e. irrespective of the (reasonably extensive and full evidence given by Mrs Arch herself) the absence of documentary evidence from the Post Office would likely be treated by the court as the basis for drawing inferences adverse to the person responsible for its absence (q.v. Hollander, above), in this case the Post Office as prosecuting authority, as a matter of justice and fairness. That will be all the more so when there is evidence of other (extensive) misleading and unfair conduct on the part of the person in whose possession the documents once were. In common with many others, Mrs Arch's evidence to Sir Wyn Williams was that the Post Office repeatedly withheld documents from disclosure. That it routinely did so is well-attested. It appears to have done so habitually and as a conscious policy. (That is entirely separate from the Post Office practice of withholding evidence, for its own benefit and advantage to facilitate convictions, as it plainly did.)
57. As noted at the start of this, by now somewhat lengthy, note, it is surprising that it should be suggested either that Mrs Arch's circumstances do not fall within what the Court of Appeal has been pleased to classify as 'Horizon cases' – or else that there is insufficient evidence that it does. The reverse is, in fact, the case.
58. As suggested above, not only is it clear that Mrs Arch's prosecution *was* a 'Horizon case', her prosecution may be considered to have been a *paradigm* of a Horizon case. The only remarkable feature of her prosecution, that separates and distinguishes it from the ordinary run of Post Office prosecutions, is that she was acquitted of the charges against her. The strong inference is that the trial judge was alert to the fact

that *the only evidence* against Mrs Arch appears to have been the Horizon data. That Mrs Arch's evidence to Sir Wyn Williams. That is not only unchallenged but, it would appear, is *incapable* of being disputed or challenged<sup>10</sup>. Mrs Arch's evidence to Sir Wyn that her trial judge directed the jury to consider whether there had been any offence committed at all, is a question that might with advantage have been left to juries in other cases.

59. I look forward to receiving confirmation that Mrs Arch's case will now be treated by DBT as a 'Horizon case' and, for confirmation that Mrs Arch is eligible for and will receive interim payment of compensation.
60. Given the effluxion of time, not least, since Mrs Arch's prosecution, and the harm inflicted upon her by the Post Office in the destruction of her business, livelihood and aspirations, it will be disappointing should Mrs Arch receive less than £71,105.69 on an interim basis.
61. It is fair to Mrs Arch for me to say that it is regrettable and disappointing, and I can say for her, personally seriously distressing, that 21 years' after she was acquitted of the serious and false allegations made against her by the Post Office, that resulted in the loss of her business, her good name in her community, her livelihood, and the consequences of which have undermined her health, her claim to compensation as a 'Horizon case' is now subject to question and challenge; that, in the face of clear and compelling evidence of her experience given by her to Sir Wyn Williams in the public inquiry. That the Post Office may not now retain documents from 2001-2002, relating to what it then did in its investigation and prosecution of Mrs Arch, is nothing to the point.

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15<sup>th</sup> March 2023

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<sup>10</sup> Other than, perhaps, by it being said that Mrs Arch's evidence to Sir Wyn Williams is simply untruthful. That boat may, however, for the Post Office have sailed?