**IN THE MATTER OF THE POST OFFICE HORIZON IT INQUIRY**

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**'PHASE END' CLOSING SUBMISSIONS:**
**PHASE 4**
***On behalf of* POST OFFICE LIMITED**

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## INTRODUCTION

1. These submissions are made on behalf of Post Office Limited ('POL')[1] in accordance with the Chair's directions of 20 December 2023. They are necessarily brief, in accordance with those directions, and (as with POL's 'phase end' submissions for Phases 2 and 3) are primarily made for the purpose of highlighting a number of key issues and themes arising from the evidence heard to date in Phase 4,[2] rather than seeking to address each of the issues in the Completed List of Issues considered in Phase 4 in turn.[3]

2. In particular, these submissions identify a number of points where it is clear that POL got it wrong, and critical findings should follow, for which POL apologises, as set out more fully below. No-one who has read and watched the evidence in Phase 4 could be in any doubt that the Horizon IT scandal is indeed the most widespread miscarriage of justice in British legal history, and that its roots lay in fundamental structural failings. Since the ◎◎adings of Mr Justice Fraser, POL has taken real steps to try to put right that which it had so seriously got wrong previously. POL instructed external lawyers and counsel to undertake a huge post-conviction disclosure exercise to facilitate and expedite the bringing and concession of appeals in cases where convictions were potentially tainted by Horizon issues. More recently, as the Inquiry is aware, POL instructed its external lawyers to undertake a pro-active review of ◎◎es in all remaining cases where no appeal or application to the CCRC has been bought in order to try to identify cases where there appears to have been a miscarriage of justice, and to pro-actively encourage appeals in such cases. POL recognises that there is much still to be done, but is committed to remedying the injustices.

3. These submissions also seek to clarify some aspects of the legal framework governing prosecutions, and related evidence. In this respect POL relies upon the expert reports of Jonathan Laidlaw KC ('JLKC'), including Part 2 in which he has considered and responded to Part 2 of the expert report of Duncan Atkinson KC ('DAKC').[4]

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[1] POL uses the same abbreviations ("POL" and "Fujitsu") as in its Phase 2 closing submissions (see footnote 2).
[2] References to transcripts in this document are given in the form T day/month/year [page:line – page:line].
[3] Given that Gareth Jenkins is yet to give his Phase 4 evidence, Jarnail Singh will be returning in Phase 5/6 to finish his Phase 4 evidence and when the Inquiry will also be hearing from a number of relevant Cartwright King witnesses these submissions are necessarily incomplete in any event.
[4] Unfortunately, it was not possible for JLKC to finalise Part 2 of his report in advance of DAKC giving evidence on 18 & 19 December 2023 in circumstances where DAKC's Part 2 was not available until 29 November 2023 (with

4. These submissions are structured as follows:
   (1) Criminal policies and procedures:
      a. Scope of the duty of reasonable investigation (§8-§15);
      b. Timing of administration of a caution (§16-§17);
      c. Duty to advise Postmasters of their rights in interview (§18);
      d. Scope of the duty to provide disclosure prior to interview (§19);
      e. Scope of the duty to provide disclosure prior to plea (§20-§21);
      f. Circumstances of plea (§22-§24);
      g. *R v Eden* (§25-§27);
      h. Relevance of the confiscation regime (§28);
      i. Instruction of expert witnesses (§29);
      j. Distinction between Offender Reports and Discipline Reports (§30); and
      k. Further specific matters (§31-§34).
   (2) Criminal Case Studies: case specific points (§35-§44).
   (3) Policies and procedures: suspension, termination and civil recovery:
      a. Recorded policies and procedures (§45-§49); and
      b. Applicable standard for disclosure and conduct of proceedings (§50-§54).
   (4) Civil Case Studies:
      a. Cleveleys (Wolstenholme) (§55-§70);
      b. Marine Drive (Castleton) (§71-§82); and
      c. Broader governance issues (§83-§85).
   (5) ARQ data (§86-§96).
   (6) Remote access (§97-§105).

5. Before addressing those themes, POL notes, with profound regret, that as with Phase 3, there has been evidence that, in respect of a number of POL employees:
   5.1. There was a mindset that presumed that where issues arose in relation to Postmasters the most likely explanation was dishonesty;
   5.2. There was a mindset, even setting aside any issue of dishonesty, that such issues as did arise with the Horizon system were always due to user rather than system error; and
   5.3. There was strong resistance to countenancing the existence of any flaws in the Horizon system.

6. The effect of these mindsets was, similarly, compounded by the fact that:
   6.1. The organisation and hierarchy of POL was such that junior employees did not feel able to escalate issues upwards which resulted in insufficient overview being taken at appropriately senior levels;[5] and
   6.2. Some important roles in both the security and criminal law teams were occupied by individuals who did not have sufficient understanding of the obligations attaching to their roles.

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an addendum provided on 12 December 2023). It was disclosed to the Inquiry at the earliest opportunity as soon as it was completed.

[5] See for example the evidence of Andrew Hayward (T10/10/23 [119:12 – 120:13]) and David Posnett (T6/12/23 [177:1 – 178:10]).

7. Again, POL fully recognises that the Inquiry is likely to be critical of these aspects of past behaviour and procedures.[6]

## (1) CRIMINAL POLICIES AND PROCEDURES

### (a) Scope of the duty of reasonable investigation

8. POL recognises that a fundamental investigatory and prosecutorial duty is to pursue all reasonable lines of investigation whether pointing towards or away from guilt. Whilst the consistent picture painted by evidence from POL investigators and lawyers is that they were aware of this obligation upon them and had received training on it, it is also clear that, in a number of cases, there was a failure properly to meet those obligations. This is a matter of the most profound regret.

9. The question of whether a particular line of investigation was reasonable in a particular case will necessarily be a case and fact-specific exercise. The Part 2 report of JLKC acknowledges a number of case studies where POL investigators failed to pursue reasonable lines of investigation and where POL lawyers failed to identify this and advise that they be pursued. However, there are also a number of case studies where JLKC disagrees with DAKC's view that certain lines of investigation were reasonable or required on the individual facts of the case study. To the extent that there is disagreement as to whether a particular line of investigation was reasonable (and therefore necessary) in any given case study, POL respectfully invites the Inquiry to prefer the evidence of JLKC, as being a better reflection of the reality of the generally accepted and generally practised approaches by other investigative and prosecutorial bodies at the relevant time, rather than the 'counsel of perfection' advanced by DAKC.

10. In assessing the scope of the reasonableness of investigations into the reliability of Horizon data, it may assist the Inquiry to consider the range of independent and external experienced prosecutors who did not consider it to be reasonable or necessary to require POL investigators to conduct a wholesale investigation into the reliability of Horizon data beyond obtaining the standard evidence and assurances from Fujitsu:
    10.1. The evidence from devolved jurisdictions, where prosecutorial decisions were taken by independent public prosecutors who were able to direct/require further investigations if such were considered to be necessary or reasonable.[7]
    10.2. In a number of POL prosecutions, including the case study of Seema Misra, applications by the Defence to the Court for directions for disclosure and further investigation were rejected by the trial Judge.[8]
    10.3. All POL cases prosecuted in the Crown Court were prosecuted by independent counsel who owed a professional duty to advise if a case required further

[6] See too paragraphs 7-8 and 27-32 of POL's written 'phase end' submissions for Phase 3 on the issue of POL's contemporaneous understanding of Postmasters' contractual obligations.

[7] See, for example, the evidence of Shiels (T31/1/24 [23:7-16]), Teale (T26/1/24 [32:25-33:18]) & Winter (T26/1/24 [32:25-33:18]).

[8] See, for example, the Judge's ruling in Misra as set out at §121 of Section 11 of Part 2 of JLKC's report on p.244 [the transcript of the hearing is UKGI00014994].

investigation.[9] It is noted that these counsel would also have prosecuted for the CPS and could be expected to apply the same generally accepted standards to POL prosecutions as they would in CPS cases.[10]

10.4. Prosecutions after 2012 were advised upon and conducted by Cartwright King as an independent firm of experienced criminal solicitors.

In assessing the mindset of POL investigators and prosecutors, particularly in relation to the scope and reasonableness of further inquiries, the Inquiry ought fairly to assess that mindset in light of the guidance that they were receiving from external sources who appeared to validate their approach.

11. The Inquiry will also wish to have careful regard to the repeated assurances that reached POL lawyers and investigators from Fujitsu that Horizon was reliable.[11] Individuals within POL, who themselves had no or very limited technical understanding, could reasonably be expected to place considerable reliance on those assurances. Furthermore, the approach by POL prosecutors and investigators in assuming the reliability of Horizon data must be seen in light of Parliament's decision to legislate to remove s.69 PACE, leaving a presumption of the reliability of data.

12. As such, for the reasons set out by JLKC, unless and until a POL investigator or lawyer had actual or constructive knowledge of problems with Horizon capable of causing discrepancies in branch accounts (or a suspect had explicitly raised this as an issue in their case), the Inquiry might consider it unfair and unrealistic to criticise them for not having considered an investigation into the reliability of Horizon data to be a reasonable line of investigation.[12] Moreover, even in cases where the reliability of Horizon data had been explicitly raised by the defence or the existence of issues with Horizon was known (actually or constructively), the Inquiry will wish to consider whether, on the facts of that case, it would have been considered reasonable to expect more than the obtaining of evidence from Fujitsu to address the reliability of the data in that instant case.[13]

13. Additionally, the extent to which investigating the reliability of Horizon data was a reasonable line of investigation in any given case would necessarily depend on what the nature of the case was and what other evidence was available to corroborate the Horizon

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[9] See DAKC's evidence at T5/10/23 [122:21 to 123:15].

[10] See, for example, JLKC's observations at §46 to §48 of Section 8 of Part 2 of his report (at p.170).

[11] The Inquiry has seen many such assurances provided by Fujitsu in e-mails and witness statements (including expert evidence) to the effect that Horizon was reliable, and many POL witnesses gave evidence that such assurances reassured them that Horizon was reliable (e.g. Winter at T26/1/24 [47:10-23] and Harbinson T22/11/23 [21:15-22:7]).

[12] Although POL accepts that, as a corporation aggregate, it had knowledge of the existence of bugs, errors or defects in Horizon on the basis that such knowledge existed somewhere within the organisation (e.g. solely within the IT function), this is not the same as a concession or specific finding (either by Fraser J or the Court of Appeal) as to who knew what and when. The Inquiry may ultimately find itself wishing to make general criticisms of POL's failure to ensure that this information was funnelled to those who needed to know it. However, before making any criticism of the actions (or inactions) of individuals or specific teams in respect of any specific case study within Phase 4, the Inquiry must consider whether that individual or team had actual (or constructive) knowledge of those bugs, errors or defects at the time of the case under consideration.

[13] DAKC acknowledged that it was not necessarily inappropriate for POL to seek expert evidence from Fujitsu as to the reliability of Horizon (see fn 58 below).

evidence. As the Court of Appeal made clear in *Hamilton & Others [2021] EWCA Crim 577* and the various appeals that have followed it, a failure to investigate and disclose Horizon issues would not have been unfair or unreasonable such as to render a conviction unsafe if Horizon reliability was not "essential". Where the Horizon data was corroborated by admissions in interview,[14] or by other evidence (including circumstantial evidence) independent of Horizon reliability,[15] the Court of Appeal do not consider POL's failure to investigate or disclose Horizon reliability issues to be unfair or unreasonable.

14. This is particularly relevant in respect of Pensions & Allowances ('P&A') frauds, which represented a significant proportion of POL prosecutions up until 2006. In P&A fraud cases, the investigation did not relate to an audit shortfall.[16] Rather, the allegations were often based on physical evidence (including forged or stolen foils). In overclaim or re-introduction P&A fraud cases, where the investigation was based on the discrepancy between vouchers entered onto Horizon by the Postmaster and the vouchers sent to the DWP processing centre at Lisahally, the reliability of the Horizon record was usually corroborated by non-Horizon evidence.[17] [18]

15. It is, however, acknowledged by and on behalf of POL that once a point was reached where investigators or lawyers had actual or constructive knowledge of Horizon issues, then it would have been incumbent on them properly to investigate Horizon reliability before relying upon Horizon evidence within a prosecution.

(b) Timing of the Administration of a Caution

16. Although the evidence demonstrates that Postmasters were always cautioned prior to questioning by POL investigators in interview (see below), it has been suggested during

[14] See the Court's discussion of the case of Stanley Fell at §388 to §415 of *Hamilton*.

[15] See the cases of Cousins (§361 to §387) and Hussain (§416 to §446) within the *Hamilton* judgment, as well as the cases of Allen and Robinson at §62 et seq in *Allen & Others* [2021] EWCA Crim 1874, Cameron at §24 et seq in *White & Another* [2022] EWCA Crim 435, and the case of *O'Donnell* [2023] EWCA Crim 979.

[16] The nature of P&A frauds was that the offender would either over-claim for a legitimate P&A voucher or make a claim on a stolen/forged voucher or re-introduce a genuine voucher (i.e. claiming twice for the same voucher). The effect of all of these frauds would be to generate a surplus in the branch which could be stolen. The fraud would often be detected following reconciliation of the physical vouchers at the DWP processing centre at Lisahally who would identify stolen/forged vouchers or identify the lack of a voucher to support an overclaim/re-introduction. As such, the fraud did not generally involve any audit shortfall. On the contrary, the absence of a surplus in the accounts was part of the circumstantial picture which demonstrated that the transaction was not an error (by the Postmaster or Horizon), since an erroneous transaction would necessarily produce a surplus in the branch accounts (see §386 of *Hamilton* and also, for example, the evidence of Kevin Shiels T31/1/24 [20:9] and Les Thorpe T30/1/24 [21:11-24]).

[17] See the cases of Cousins (§361 to §387 of *Hamilton*) and the case of *O'Donnell* for examples considered by the Court of Appeal.

[18] POL notes that in Scottish cases where appeals have been allowed, COPFS have not provided reasoned explanations for its concessions and the Scottish Courts do not provide reasoned judgments identifying the basis for the successful appeal, and so the basis upon which the conviction has been quashed is not always clear. It may also be relevant to note that the majority of such cases relate to P&A frauds in which the prosecution was based on physical evidence rather than primarily on Horizon records (even if the defence had sought to raise concerns about Horizon within the case), or cases in which the suspect made seemingly reliable admissions in a PACE compliant interview, and the Court of Appeal of England & Wales has upheld convictions in such cases.

questions asked by (or on behalf of) Core Participants that Postmasters should have been cautioned and afforded a right to legal advice prior to being asked any questions about shortfalls either by auditors or investigators.[19] Any such suggestion is misconceived and wrong in law.

17. The obligation to caution a person arises only at the point where there are objective grounds to suspect that a criminal offence has been committed by the person being questioned.[20] It therefore follows that auditors and POL investigators are permitted to ask questions of Postmasters without administering a caution in circumstances where it is not yet clear that a crime has been committed.[21] As such, unless there were already objective grounds to suspect a crime (which would rarely be the case at an audit) an auditor (or investigator) would be entitled to ask a Postmaster if they had an explanation for an apparent audit shortfall without first administering a caution, and any answers provided would be prima facie admissible in evidence in subsequent proceedings. [22] Moreover, DAKC's evidence confirmed that it was good practice for auditors or investigators to take a contemporaneous note of any significant statement made by a Postmaster during such questioning and to ask the Postmaster to sign the note to confirm its accuracy.[23]

(c) Duty to advise Postmasters of their rights in interview

18. The Inquiry has now had the benefit of transcripts of the interviews in case studies, and has also seen copies of the standard forms that were used by POL investigators in every interview and signed by the interviewees during the interviews to confirm that they understood the rights referred to therein.[24] Moreover, the Inquiry has seen that interviewees were reminded of their rights after breaks in the interview. The Inquiry has also seen that, in addition to the rights to which an interviewee was entitled as a matter of law, POL also voluntarily provided interviewees with an additional right to a Post Office "friend" to assist them. The Inquiry has not only seen from the transcripts and signed forms that the interviewee's rights forms were invariably used in interviews, but it has also heard evidence from every investigator who has been asked during Phase 4 confirming that POL investigators were trained and required to use the forms in every interview. The evidence demonstrates that POL investigators assiduously complied with the duty to advise Postmasters of their rights in interviews, and any suggestion

[19] See, for example, the questioning of Paul Whitaker at T16/11/23 [71:13 to 72:10].
[20] *Nelson & Rose* [1998] 2 Cr App R 399, CA
[21] *James* [1996] Crim LR 650, CA
[22] Given that an investigator's remit included both criminal and contractual matters, the mere fact of the attendance of an investigator does not mean that there exist reasonable grounds to suspect that a criminal offence has been committed by the person being questioned.
[23] See §284(a) of DAKC's second report. The evidence from the case studies and by POL investigators confirms that this is something that was done as a matter of course.
[24] Examples of the CS001 and CS003 forms setting out the rights can be found at POL00074412 and POL00045345 respectively. An example of an interviewing officer cautioning an interviewee and taking them through the rights form can be found in the transcripts of Ms Adedayo's interview at pages 3 to 10 in POL00066742 and then she was reminded of those rights at pages 1 and 2 of POL00066745 when the interview resumed after a break to change the tapes.

(whether within Human Impact evidence or otherwise) to the contrary is factually incorrect.[25] [26]

(d) Scope of the duty to provide disclosure prior to interview

19. The Inquiry has heard evidence from a number of investigators that pre-interview disclosure was provided to the legal representatives for an interviewee in advance of the interviews in order to assist them to take instructions and advise their clients. Although there had been a suggestion that POL investigators had acted unfairly or improperly in not providing unrepresented interviewees with such pre-interview disclosure, DAKC's evidence confirmed that POL's approach was wholly in compliance with the approach adopted by the police in accordance with Home Office guidance.[27]

(e) Scope of the duty to provide disclosure prior to plea

20. The Court of Appeal have emphasised in *Hamilton & Others* and the cases which followed it that a prosecutorial duty to investigate and disclose issues with Horizon did not arise in every case. The obligation to investigate and disclose issues relating to Horizon arises only in cases where the reliability of Horizon data was "essential" to the prosecution either because proof of an essential element of the offence was wholly reliant on evidence from Horizon (with no evidential corroboration independent of Horizon) or because the Defence had placed Horizon reliability into issue such as to generate a CPIA duty to investigate and make disclosure. It therefore follows that in cases where Horizon reliability was not "essential",[28] there was no duty to disclose Horizon issues prior to the taking of a guilty plea (or at all).

21. In cases where there was an obligation to investigate and disclose Horizon issues, the point at which the obligation crystalised depends upon the facts and circumstances of the case:[29]

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[25] See POL's 'phase end' closing submissions for Phase 3 at §68 on the suggestion that evidence in Phase 1 stands as being "*unchallenged*".

[26] It will be noted that the rights forms were different in devolved jurisdictions to reflect the different rights existing in those jurisdictions. In particular, in Scotland, prior to *Cadder v HM Advocate* in 2010, an interviewee had no entitlement to legal representation in interview (and Mr Quarm's suggestion that the lack of representation rendered his interview unfair was rejected by the Court, T30/1/24 [64:13-22]).

[27] T18/12/23 [48:18 to 50:12].

[28] For example, in a case where the reliability of the Horizon data was corroborated by contemporaneous admissions or by other non-Horizon physical or circumstantial evidence (e.g. in P&A frauds).

[29] It has been suggested to a number of witnesses that POL was under an obligation to disclose to defendants that there had been a number of complaints about Horizon from other postmasters (and to disclose details of those complaints). Although there may be circumstances in which this might be appropriate, such as where the defence may be assisted by notice of further lines of inquiry (per Tatford T15/11/23 [86:1-24]), the fact of unproven or unverified complaints would not ordinarily be disclosable, even in cases where Horizon reliability was in issue. As Warwick Tatford advised at §4 and §5 of his advice of 5/1/10 [POL00044557], the test to be applied when considering the disclosability of complaints about Horizon from other postmasters was whether the material was "*capable of casting an objective doubt on the reliability of Horizon*" and that "*the mere assertion by a sub-postmaster that a loss should be attributed to computer error is not capable of amounting to the sort of objective material that ought to be disclosed.*" This approach was agreed by Mrs Misra's defence counsel and, more importantly, DAKC agreed that

21.1. The CPIA obligation to pursue reasonable lines of inquiry is one which arises at the point at which the line of inquiry becomes a reasonable one to pursue. In a case where there is no evidence of a shortfall save from Horizon, investigating the reliability of the Horizon data is likely to be a reasonable line of inquiry from the outset.[30] In other cases, such a line of inquiry might only become reasonable to pursue at a later stage following, for example, the defence raising concerns as to Horizon reliability in a defence statement during prosecution proceedings.[31]

21.2. The CPIA duty to disclose Horizon issues does not arise until after charge, when Court proceedings are underway. A prosecutor's statutory duty to disclose unused material to the accused is triggered by a not guilty plea being entered in the Magistrates' Court, or a case being sent for trial at the Crown Court.[32] The duty to keep disclosure under review thereafter is a continuing one, and there is a particular duty to review any defence statement served by a defendant and to disclose further material depending upon the matters raised in that defence statement.[33]

21.3. Given the statutory trigger points for disclosure, the CPIA does not provide an accused with an entitlement to see the prosecution's evidence or disclosure prior to entering their plea.[34] [35]

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this approach was "*consistent with the CPIA*" (§369 & §370 of Vol 2 of his Report). Similarly, the CPIA disclosure duty did not require POL to disclose a running commentary on enquiries being made in respect of Horizon reliability, since the CPIA duty is to follow the reasonable line of investigation and then disclose the results if they meet the disclosure test. POL acknowledges that the position would be different once the "tipping point" (per section 2.1 of JLKC's Part 2 Report) had been reached, because at that point there would have been a need for a fundamental investigation into Horizon reliability.

[30] Of course, the question of what sort of inquiries are reasonable may well depend on the circumstances and the state of belief of the investigator at the time as to Horizon reliability. For the reasons given by JLKC in his report, if an investigation were taking place at a time prior to the investigator gaining actual or constructive knowledge of Horizon issues, a reliance on the assumption or regularity and/or a mere assurance from Fujitsu might be reasonably sufficient. An investigation taking place after the investigator has actual or constructive knowledge of Horizon issues would require a greater level of scrutiny and evidence of reliability.

[31] Such as, for example, in the case of Misra when she raised Horizon for the first time at her initial trial date on 2 June 2009 (having previously advanced a defence that the money had been stolen by an employee).

[32] See s.1 CPIA 1996.

[33] See s.7 CPIA 1996.

[34] Suggestions have been made at various points (e.g. T5/12/23 at p.,87) that POL should have obtained and disclosed all of its evidence (e.g. the Fujitsu witness statements producing ARQ data) prior to the commencement of a prosecution and the entering of the pleas (so that the accused had the evidence prior to deciding whether to plead guilty). Such a view is not consistent with the statutory scheme or general criminal practice. Moreover, the Sentencing Council Definitive Guideline on reductions in sentence for guilty pleas emphasise that part of the reason for the discount on sentence for an early admission and guilty plea is because it saves "time and money on investigations" and §F1 emphasises that full credit should not be afforded to defendants who delay pleading guilty in order to assess the evidence against them (https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.pdf).

[35] Although there are some surviving common law disclosure obligations which might require pre-committal disclosure, (including where disclosure might assist an accused: to make an early application to stay the proceedings as an abuse of process; to make representations about the trial venue or a lesser charge; or to prepare for trial effectively), the effect of the CPIA means that such common law disclosure is not appropriate for matters which would properly be for argument before a trial Judge or as part of the trial process (see *ex parte Lee* at 318F). As such, disclosure of issues relating to Horizon reliability should generally have been a matter for CPIA disclosure.

(f) Circumstances of plea

22. In four of the case studies,[36] acceptance of the defendants' pleas was made conditional upon their agreeing not to criticise Horizon and/or to make full repayment of the alleged Horizon shortfall. POL acknowledged within *Hamilton & Others* that such an approach was wholly inappropriate in the circumstances of those cases,[37] and profoundly regrets that it happened.

23. It is, however, important for the Inquiry to distinguish between the circumstances, such as in the above four case studies, where it was improper to make acceptance of the pleas conditional in such a way, and other cases where POL refused to accept a basis of plea criticising Horizon or where acceptance of a plea or a decision not to prosecute was conditional upon repayment of loss:[38]

23.1. The Code for Crown Prosecutors states that "*It must be made clear to the court on what basis any plea is advanced and accepted. In cases where a defendant pleads guilty to the charges but on the basis of facts that are different from the prosecution case, and where this may significantly affect sentence, the court should be invited to hear evidence to determine what happened, and then sentence on that basis.*" As DAKC implicitly acknowledged,[39] it would not be appropriate for a prosecutor to accept or agree a basis of plea which did not accord with the position shown by the prosecution evidence.

23.2. It therefore follows that, if a prosecutor believed that there was evidence which showed that Horizon was not responsible for a loss, it would not be appropriate for them, simply in the interests of expedience, to accept or agree a basis of plea which asserted that Horizon was responsible for that loss. To that extent, if a prosecutor reasonably believed that the evidence in the case demonstrated that Horizon was not the cause of the loss, that prosecutor would be entitled, and arguably obliged, to refuse to accept a basis of plea blaming Horizon for the loss if it was believed that it may make a difference to sentence.[40]

23.3. DAKC acknowledged that the question of whether a suspect had "*made reparation*" was a relevant factor to be considered in relation to the prosecutorial assessment of the public interest limb of the test when considering charging.[41] Given that the

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[36] Jo Hamilton, Hughie Thomas, Allison Henderson and Alison Hall.

[37] See §113 to §117 of *Hamilton & Others*.

[38] This issue is addressed in more detail by JLKC at section 2.11 of Part 2 of his Report (§73 to §78 and also within his analysis of the case studies).

[39] See §171 to §177 of Vol 1 of his Report.

[40] Whether a prosecutor did reasonably believe that the evidence showed that Horizon was not to blame will be a fact and case specific question depending on the extent of their actual or constructive knowledge of Horizon issues and the extent to which there had been an investigation and evidence obtained in relation to Horizon reliability in the case in question.

[41] See §639 of Part 2 of DAKC's report. §4.17(i) of the Code for Crown Prosecutors states that the factors which might mean that the public interest was less likely to require prosecution also include the extent to which the suspect had put right the loss or harm (albeit a suspect should not avoid prosecution solely because they had repaid the loss). Similarly, DAKC agreed that where there was sufficient evidence to prosecute, the question of whether the Postmaster had repaid the loss would be a factor that a prosecutor should legitimately consider when assessing the public interest test and whether a caution might be a sufficient and proportionate disposal (see T18/12/23 [78:6-15]).

Code for Crown Prosecutors requires consideration of the public interest when considering the acceptance of pleas, it would not necessarily be improper for a prosecutor to conclude that acceptance of a plea would only be appropriate if the defendant repaid the loss.

23.4. Whilst a willingness to accept a plea to false accounting in place of a theft charge would not necessarily imply a lack of confidence in the evidential merits of the theft charge (it may, for example, simply reflect a legitimate consideration of whether a plea to false accounting was in the public interest allowing for the factors set out in the Full Code Test),[42] it would, however, be inappropriate for a prosecutor to require reparation from a defendant as a condition of accepting a plea to false accounting in a case where there was no evidence either of an actual loss or that the loss was due to theft by the defendant.[43]

24. During Phase 4, criticism was levelled at POL lawyers (and prosecuting counsel) for seeking the views of the investigators prior to accepting pleas. Such criticisms were misconceived as it would be normal (indeed, required) for a CPS prosecutor to seek the views of an investigating police officer in a publicly prosecuted case in such circumstances.[44]

(g) *R v Eden*

25. The Court of Appeal decision in *R v Eden* [1971] 55 Cr App R 193 does not state that it was improper to charge both theft and false accounting. Rather, it states that it is improper to charge them both to cover the same criminality (inviting the jury to treat them as standing or falling together). It is perfectly proper to charge both offences where they are put either as alternative counts or where they are intended to reflect different criminality. It would, however, be improper to charge both offences simply as a means to exert pressure on a defendant to plead guilty to false accounting.[45]

26. In many cases prosecuted by POL, it would have been entirely appropriate on the prosecution case,[46] to charge both theft and false accounting. The alleged offending would often encompass both the theft of POL funds and then the covering up of the

[42] T19/12/23 [15:25].

[43] Per *Hamilton & Others* at §113 to §117.

[44] See §67 at p.350 of Part 2 of JLKC's Report. This is because the investigator is likely to be the most familiar with the facts and details of the investigation which might be helpful in assessing whether any plea (or basis of plea) is evidentially justified, and the circumstances of the investigation and offender which might be relevant to the lawyer's assessment of the public interest in accepting the pleas or not. Moreover, §9 of the Code for Crown Prosecutors (§10.3 of the 2010 edition), makes clear that the views of the victim are a proper consideration to take into account in deciding whether to accept guilty pleas offered by the defence.

[45] See §62 and §211 to §217 of Part 1 of JLKC's report. Although DAKC's first report adopted a different interpretation of *Eden*, when DAKC gave evidence, his explanation largely accorded with JLKC's (see T5/10/23 [56:18 to 57:8] and T6/10/23 [27:14 to 32:10]).

[46] Subject to there being sufficient evidence to make good the prosecution case.

theft by falsifying branch accounts over a period of time. This represented two distinct offences which would commonly have both been charged in such cases by the CPS.[47]

27. In his evidence, Rob Wilson suggested that he had given instructions to POL's criminal lawyers not to charge both theft and false accounting because "*it was wrong because R v Eden effectively said you should pin your colours to the mast.*"[48] Mr Wilson's evidence on this point may not be reliable and Mr Wilson may simply be confused and/or misremembering details long after the event. Not only is his understanding of *Eden* mistaken, but the fact that POL lawyers (including Mr Wilson himself) regularly charged both offences suggests that no such instruction was ever given.

(h) Relevance of the confiscation regime

28. Suggestions have been raised with a number of witnesses either that consideration of confiscation inappropriately affected decisions relating to charging or acceptance of pleas, and also that the conduct of confiscation proceedings was unfair because POL recovered more than its actual loss. In response to such suggestions, the Inquiry might wish to bear the following in mind:
    28.1. Section 80(2) of Proceeds of Crime Act 2002 ("POCA") requires the Court, in assessing the benefit figure in a loss case, to uplift the value of the loss to account for RPI inflation between the date of the offence and the date of the confiscation order. As such, in any case where the confiscation order is made a significant period after the offending, the benefit figure will necessarily exceed the actual loss to POL.[49] It is this statutory requirement, and not any impropriety by POL, which led to recovery of more than POL's actual loss in all affected cases.[50]
    28.2. In fact, because indictments faced by Postmasters often ranged over a period of more than six months or included three or more charges from which the defendant had benefitted, POL would have been entitled to apply the statutory assumptions under s.10 POCA which could easily have resulted in a confiscation order significantly in excess of the actual loss figure.[51] The fact that POL did not seek to apply these assumptions and therefore recover larger sums is a matter that the

[47] It was clear, for example, from Warwick Tatford's advice in the case of Seema Misra [POL00051586] that the two counts were not intended to be seen as alternatives, and neither did an acceptance of guilt of false accounting properly or adequately reflect the entirety of the alleged criminality in Mrs Misra's case. Clearly, Mr Tatford (an experienced prosecutor for the CPS as well as POL) perceived the charging of both offences here to be proper within the meaning of *Eden* and not merely a device to exert pressure on Mrs Misra to plead guilty to false accounting.

[48] T12/10/23 [130:15 to 132:1].

[49] See also §66 of DAKC's addendum report in which DAKC observed whilst dealing with the case of Mr Wilson, that the confiscation order included an RPI uplift which meant that there was "*a 102% recovery.*"

[50] This is, of course, subject to the more fundamental question of whether there ever was an actual loss on the facts of the specific case in question. However, in a case where the fact and amount of the loss was corroborated and reliable (and not a Horizon error), recovery by POL through confiscation of a sum which was inflated to account for RPI was not only appropriate but required by statute.

[51] Per s.75(2)(b) and (c) of POCA.

Inquiry might wish to consider when assessing whether POL was wholly and improperly motivated by maximising recoveries.[52] [53]

28.3. Consideration of the implications for recovery of losses via compensation is a proper factor for a prosecutor to bear in mind when making charging decisions and decisions as to the acceptability of pleas.[54] The Court of Appeal has made clear that, although it is not appropriate for a prosecution to be motivated solely by the prospect of financial gain for the prosecutor, it is perfectly proper, and in many cases obligatory, for prosecutors to consider the possibility of confiscation proceedings at the time of charging.[55]

(i) Instruction of Expert witnesses

29. POL accepts and acknowledges that it failed properly to instruct expert witnesses in cases that it prosecuted:[56]

29.1. It is clear from the case studies that POL investigators and lawyers failed properly to appreciate the difference between evidence of matters of fact from a witness with expertise in the subject (e.g. an explanation of how Horizon worked), with matters of opinion evidence which would be admissible only from a properly instructed expert witness (e.g. an opinion on whether Horizon was working properly in the branch in question and whether shortfalls could have been caused by Horizon error). A number of POL witnesses gave evidence that they considered witnesses from Fujitsu giving evidence as to Horizon reliability to be giving evidence of fact and not expert opinion evidence.[57] This error appears to have been responsible for much of the subsequent failure properly to instruct Fujitsu witnesses as to their duties and responsibilities as expert witnesses.

29.2. It is acknowledged that POL failed to ensure that Gareth Jenkins was properly instructed as an expert witness in any of the cases where he provided expert

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[52] In relation to the suggestion that has been raised on numerous occasions during Phase 4 that improper charges were pursued because it made confiscation easier due to the problem with proving actual loss by theft, the Inquiry will note that had POL not declined to apply the statutory assumptions, the burden of demonstrating that the defendant had not stolen the money would properly have been on the defendant by virtue of s.10. As such, POL's evidential challenges in proving the fact of loss stemmed from its decision not to take advantage of the statutory scheme provided by Parliament.

[53] See too the unequivocal evidence that the conduct of investigations were not influenced by performance objectives including bonuses for financial recoveries: e.g. Daily (T/23/1/24 [51:13 – 62:6]), Posnett [T/5/12/23 [54:15-25]), Ward (T/1/2/24 [36;4-17]).

[54] See §23.3 and footnote 39 above.

[55] For example, see *R (Kombou) v Wood Green Crown Court* (2020) 2 Cr App R 28, as set out in §111 of *Hamilton & Others*.

[56] This topic is addressed in more detail in Part 2 of JLKC's report at section 2.12 (§79 et seq) and in his analysis of the case studies, particularly that of Seema Misra.

[57] See, for example, Rob Wilson's evidence at T12/12/23 [35:11 - 36:25]. This error related to Gareth Jenkins' status as a witness up until mid-way through the preparations for the prosecution of Seema Misra (see Singh at T1/12/23 [26:22 - 27:6] and Tatford T15/11/23 [54:2-20]). It also affected the evidence of Penny Thomas and Andy Dunks whose evidence was a mixture of fact and opinion (the opinion related to their assessments, insofar as they were provided, on whether Horizon was working reliably in the branch, whether Horizon errors might be responsible for shortfalls, and whether the matters raised in calls to helplines might have been related to Horizon issues causing discrepancies).

evidence by way of a statement.[58] Although the evidence shows that both Warwick Tatford and Jarnail Singh did impress upon Gareth Jenkins the obligation to disclose any known issues with Horizon which might undermine his analysis,[59] it is acknowledged that POL did not provide sufficiently clear and explicit written instructions on this point, nor to ensure that Mr Jenkins' statements/reports complied with the requirements of the Criminal Procedure Rules, including the provision of appropriate disclosure schedules.[60]

29.3. The failure properly to advise Mr Jenkins as to his duties of disclosure is particularly regrettable in circumstances where, by the time of the Misra trial, a number of POL lawyers had been copied into emails attaching reports of a known bug in Horizon Online.[61] Given that those lawyers were aware from that time of the existence of at least that bug in Horizon Online, their failure to ensure that the bug was disclosed in Mr Jenkins' reports in subsequent Horizon Online cases (and more generally) is difficult to understand.

29.4. It is acknowledged that POL's approach of instructing Mr Jenkins to provide a "standard" witness statement attesting to Horizon reliability was an inappropriate one, particularly in circumstances where it was already known (or should have been) that concerns were being raised as to Horizon reliability. Any such report ought properly to have been case-specific and involved Mr Jenkins examining the ARQ data and the Message Store data in the case to form a view as to whether the Horizon data was reliable or not.

29.5. Although it is not inherently improper for prosecutors to suggest amendments and clarifications to expert reports that they have instructed, it is incumbent on the prosecutors to ensure that previous drafts of reports are listed on the schedule of unused material and where a previous draft contains something that undermines the prosecution case or assists the defence that draft should be disclosed in accordance with the prosecution's CPIA obligations. POL's lawyers failed to ensure that this happened.[62]

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[58] There was some suggestion during Phase 4 that it was inappropriate for POL to instruct Gareth Jenkins as an expert due to his lack of independence from the subject matter. Such suggestions were misconceived. The Court of Appeal has repeatedly made clear that the mere fact that a witness is a member of the team that investigated the offence (or closely associated to that team) would not necessarily disqualify him from acting as an expert witness [see, for example, *R. v. Gokal* [1999] 6 Archbold News 2, CA and *Stubbs* [2006] EWCA Crim 2312]. As acknowledged by DAKC, an expert witness need not be functionally independent from a party in a case provided the expert is aware of his or her duty of independence (T6/10/23 [51:21 - 53:20]). Mr Jenkins' statements all included the necessary statement confirming that he was aware that his duty as an expert lay to the Court and not to his employer or the party instructing him (see, for example, the opening paragraph of POL00059474).

[59] See §11 and 90 of Warwick Tatford's statement (WITN09610100) and the third paragraph of Jarnail Singh's e-mail of 5/2/10 (p.5 of POL00114272).

[60] See T6/10/23 44:21 - 54:5.

[61] See POL00055410, POL00028838 and POL00001733, and T12/12/23 [91:15 - 110:1].

[62] The failure was not only of POL's internal lawyers within the Criminal Law Team, but was also shared by POL's external lawyers, Cartwright King. Although Warwick Tatford accepted in his evidence that he failed to ensure that Mr Jenkins' report contained all of the required elements for an expert report (T15/11/23 [53:22-65:17]) and that he failed to ensure that the amended drafts of the report were scheduled and disclosed (T15/11/23 [159:7-167:1]), Mr Tatford's failures can be significantly mitigated by the fact that he did believe that he had advised both POL and Mr Jenkins as to Mr Jenkins' expert disclosure duty (T15/11/23 [63:15-18 & 72:1-73:15]) and §88-90 of WITN09610100] and also that Mr Tatford had no knowledge of the existence of any bug other than the Callender

29.6. In any event, the partisan way that Mr Jenkins was instructed to attack or discredit a defendant's case, as opposed to reviewing the evidence and forming an independent expert opinion, represented a regrettable and improper understanding of the role of an expert on the part of POL's criminal law team.

(j) Distinction between Offender Reports and Discipline Reports

30. A number of witnesses were asked about §2.15 of the POL internal guide to the preparation of case files dealing with Offender reports and Discipline Reports.[63] That paragraph, dealing with Discipline Reports, refers to the need to exercise care when including such failures in security, supervision, procedures and product integrity within the report because the report will be disclosed to the suspect. It has been suggested that this paragraph suggests that POL investigators were advised to omit references to Horizon failures to prevent disclosure of those failures to suspects facing criminal investigation and prosecution. Such a suggestion is misconceived:

30.1. That paragraph deals only with the preparation of Discipline Reports and not Offender Reports. The former is concerned with potential internal disciplinary proceedings (where no CPIA duty of disclosure applies).

30.2. In relation to Offender Reports, which are the type of report considered by lawyers and other decision makers concerned with potential criminal prosecutions, §1.24 of the same guidance emphasises that any such failures in security, supervision, procedures and product integrity must be included in the Offender report and highlighted. Any affected suspect who might be subject to a criminal investigation would be covered by §1.24 and so the relevant lawyer and decision maker would have their attention drawn to the failure.

30.3. Moreover, POL's Casework management policy notes at §3.1 that whilst security or operational procedure failures should not be disclosed in interview, they must be included in the offender report and considered for disclosure under CPIA 1996.[64] As such, the policies specifically emphasise that any such failures should not only be drawn to the attention of any decision maker in relation to a prosecution, but also that they should be considered for disclosure under the CPIA.[65]

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Square bug which was disclosed. Some further mitigation for the lawyers concerned can be derived from the fact that in all of the cases where expert evidence was served from Mr Jenkins, the failures to comply with the Criminal Procedure Rules requirements for expert reports (including the provision of disclosure schedules) was never identified by the Judge or by defence counsel or solicitors.

[63] POL00038452.

[64] POL00104777 at p.2 of 6

[65] Lest it be thought that the instruction at §3.1 not to disclose such matters in interview is an inappropriate lack of disclosure, it must be remembered that pre-interview disclosure is intended solely to enable the interviewee's legal representative to understand the nature of the suspected offence. There is no obligation under the CPIA or PACE Codes of Practice to disclose material capable of undermining or assisting prior to interview. Such obligations can only arise subsequent to charge. On the contrary, §11.1A of the PACE Code C specifies that "*Before a person is interviewed, they and, if they are represented, their solicitor must be given sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it (see paragraphs 3.4(a) and 10.3), in order to allow for the effective exercise of the rights of the defence. However, whilst the information must always be sufficient for the person to understand the nature of any offence (see Note 11ZA), this does not require the disclosure of details at a time which might prejudice the criminal investigation.*"

(k) Further specific matters

*The conduct of interviews*

31. As is clearly acknowledged in JLKC's report,[66] there were some interviews by POL investigators in which their conduct of the interview was unfair and inappropriate, and POL deeply regrets this. However, it should be remembered that such impropriety was the exception rather than the rule, and the overwhelming majority of interviews were conducted in a fully PACE-compliant way.[67] Similarly, an interview conducted properly with an appropriate degree of firmness may be perceived as oppressive by the interviewee. If an interview had been conducted in an inappropriately confrontational way, the trial process can properly deal with that conduct.[68] It will also be remembered that interview transcripts would ordinarily be edited, by agreement between the prosecution and defence counsel, to remove improper questioning or inadmissible comment by the interviewing officer.[69]

*John Scott's instruction in relation to the shredding of minutes*

32. The Inquiry has heard the evidence of John Scott in relation to his instruction that minutes of the weekly 'hub' meetings which had been established to discuss Horizon issues should be "scrapped" or shredded,[70] and will form its own views on the credibility of Mr Scott's answers. However, it is important to recognise how POL reacted to the issue. Upon discovering the instruction, Jarnail Singh phoned Martin Smith of Cartwright King on 31 July 2013 and, on 1 August 2013, sent an e-mail to Martin Smith seeking formal advice to confirm his view that even if there was any truth to the "common myth" that there need not be disclosure in civil proceedings if no written record existed, that was certainly not the case in relation to criminal cases.[71] An advice from Cartwright King was provided on 2 August 2013, and sent to Hugh Flemington (POL Head of Legal) and Susan Crichton (POL General Counsel).[72] POL Legal explicitly supported Jarnail Singh and unequivocally directed that no documents should be destroyed, and that minutes of the weekly Horizon issues meetings should be taken, centrally retained and disclosed where appropriate, and a formal protocol was put in place to this effect.[73] Despite John Scott's instruction, copies of the minutes were retained and the very minutes of the meetings to which the instruction related have been

[66] See Section 2.5 of Part 2 of JLKC's Report at §33 et seq.
[67] See Part 2 of JLKC Report. The failures in isolated cases by individual investigators does not mean that that POL investigators were not properly trained and instructed in the proper conduct of interviews. It should be remembered that a proportion of police interviews would include similarly inappropriate aggressive and confrontational questioning.
[68] A defendant who had experienced inappropriate questioning may wish to place the improper questions before the jury to demonstrate the prosecutorial unfairness. Alternatively, any admissions obtained through an unfair or improper interview could be excluded under s.76 or s.78 PACE.
[69] See DAKC's evidence at T18/12/23 [51:2 to 53:11].
[70] T11/10/23 [23:2 to 64:4].
[71] POL00139746.
[72] See POL00006799 and POL00298236.
[73] See POL00141574, POL00006797, POL00128997 & POL00139696.

disclosed to the Inquiry.[74] Accordingly, if the Inquiry considers that criticism is due for the instruction in relation to the minutes, it should be remembered that the instruction was John Scott's alone and did not reflect POL's views more generally.

*The drafting of Mr Bradshaw's statement in the case of Wylie*

33. Whilst being questioned about POL00120723 (a witness statement in the case of Wylie), Stephen Bradshaw stated that the witness statement (at p.5 of that document) dealing with POL's confidence in the Horizon system had been drafted for him by Cartwright King.[75] However, in order properly to assess this evidence, it is necessary for the Inquiry to understand the context. This witness statement was not an evidential statement to be relied on as evidence before the jury at trial attesting to Horizon reliability but rather simply an accurate statement of POL's corporate position as used in a number of similar cases.[76] As such, there was nothing improper about the statement being drafted by Cartwright King in the terms that it was.

*Horizon issues capable of affecting branch accounts*

34. A number of Horizon issues have been examined during Phase 4. The Inquiry is invited to have careful regard to the difference between those Horizon issues which might have affected branch accounts and those which could not. This is particularly significant when assessing the state of mind of POL investigators and lawyers. Knowledge of a bug which could not affect branch accounts could not reasonably lead an investigator or lawyer to consider that such an issue could be responsible for shortfalls.[77]

## (2) CRIMINAL CASE STUDIES: CASE SPECIFIC POINTS

35. The majority of the case studies relate to cases where POL had already conceded in the criminal appeals that the convictions were unsafe. Whilst this provides the Inquiry with a helpful insight into how things went wrong in those cases, it is important for the

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[74] See POL00083933, POL0083934 & POL00089719.

[75] T11/1/24 [17:12 to 23:2].

[76] Ms Wylie's defence solicitors had written to POL (POL00141393) noting that POL had instructed Second Sight and therefore appeared not to have confidence in Horizon. As such, the solicitors requested a statement of position from POL so they could consider an application to stay the prosecution (or adjourn it until after Second Sight reported). Mr Bradshaw's statement (at p.5 of POL00120723) was simply a response to this request and was no more than a true and accurate description of POL's corporate position. It was not an attestation to Horizon reliability from his own knowledge/opinion, and could not have been used in evidence at trial as such (he not being an expert), but was served as evidence to answer the defence query and to be used in any application to stay the prosecution. Mr Bradshaw's statement was a "cut & paste" from an equivalent statement provided by Sharron Jennings in another case where the same defence request had been made (POL00133643). To that extent, Mr Bradshaw is right that it was a standard statement provided by other investigators too.

[77] An example of the latter category would be the ARQ Record Duplication Issue, which involved an issue with the ARQ data spreadsheets extracted from the audit vault (the process of extraction meant that some transactions appeared twice on the spreadsheet). POL lawyers and investigators were alerted to the issue and the need to check affected spreadsheets using the "workaround" provided by Fujitsu, but were also aware that the issue related to the extraction and not to the underlying ARQ data. As such, provided the POL investigator or lawyer was using either the workaround or the re-extracted data (which did not contain the duplications), they would have no reason to doubt the integrity of the underlying data simply because of this issue.

Inquiry not to lose sight of the fact that the selected sample of case studies is not necessarily representative. The Court of Appeal and CCRC have identified that the convictions were safe in a significant proportion of cases where appeals have been brought, and the Pro Active Case Review undertaken by members of the Independent Bar (2 KCs and 3 juniors) has identified that in the majority of those cases where no appeal has been brought and there are sufficient papers to enable a view to be reached, there is no evidence to suggest that Horizon issues rendered the convictions unsafe.[78] The Inquiry may also be assisted in this regard by reference to the Overarching Narrative, provided to the Inquiry on 2 October 2023, in respect of the 88 representative sample cases reviewed by POL's current criminal lawyers (Peters & Peters and their instructed counsel).

36. The fact that the case studies considered by the Inquiry may not be representative of the generality of cases considered by POL's investigators and lawyers is significant. In particular, it is impossible for the Inquiry fairly to assess the credibility and/or reasonableness of the evidence given by witnesses to the Inquiry that they believed that Horizon evidence was reliable and that shortfalls were likely to have been caused by criminality on the part of Postmasters without remembering that in the vast majority of cases investigated and prosecuted by POL, the Postmasters admitted to criminality in interview and subsequently pleaded guilty to the matters charged.[79]

37. Part 2 of JLKC's report addresses the case studies and, subject to the matters set out above arising out of evidence to the Inquiry not considered by either expert, POL adopts JLKC's analysis.

38. The one case study upon which POL would wish to add specific comments is that of Oyeteju Adedayo. The Inquiry will be aware that this is the sole case study where POL does not accept that the conviction was unsafe,[80] and where her appeal was conceded solely on public interest grounds.[81]

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[78] This is based solely on papers in POL's possession. The review may reach a different conclusion in light of any fresh evidence served by an appellant if an appeal were advanced.

[79] And also that even in cases where the Postmaster did not make contemporaneous admissions at audit or in interview, but instead asserted that the losses were unexplained (or due to Horizon), in very many cases the Postmaster subsequently pleaded guilty, thereby lending credence to the investigators' belief that they were guilty and Horizon was reliable. For the purposes of the Inquiry assessing the reasonableness or genuineness of the investigators' belief in Horizon reliability, what matters is whether the investigator(s) believed the admissions/guilty pleas to be reliable at the time and not whether in fact it was. This remains the case even if fresh evidence subsequently emerged during appeal proceedings or this Inquiry to cast doubt on the reliability of the admission or guilty plea on the facts of a particular case. Moreover, even with what is now known of Horizon and the conduct of investigations, the CCRC and the CACD (and the Pro-Active Case Review conducted by independent counsel on behalf of POL based on the evidence available) have identified nothing on the facts of many convictions that would render the admissions and/or guilty pleas unreliable or unsafe.

[80] This view has been reached by two independent criminal KCs instructed to review all of the evidence (including her evidence to the Inquiry) and is also shared by JLKC and, to an extent, DAKC at §181/2 of Vol 2 of his report (although, when questioned on behalf of Ms Adedayo, DAKC accepted that deficiencies in Natasha Bernard's questioning and investigation left a "*potential*" that her confession was unreliable (T19/12/23 [202:14]).

[81] The Inquiry will note that the CCRC having referred the case for appeal, POL was obliged not only to consider whether there was sufficient evidence for a realistic prospect of conviction on a retrial but also whether a re-trial

38.1. Because of the page limit on closing submissions, it is not possible to set out POL's position fully in respect of Ms Adedayo's case within these submissions and so the observations within JLKC's Part 2 Report (at section 6) are adopted.

38.2. It is important to remember that the CCRC's conclusion that there was a "real possibility" that a court might believe Ms Adedayo should not be taken as a finding that the CCRC thought her account to be credible nor that a Court would be likely to do so.[82]

38.3. Ms Adedayo has given numerous inconsistent and contradictory accounts to the CCRC and the Inquiry to explain her contemporaneous confessions,[83] none of which have been tested by cross-examination.[84] Similarly, the Inquiry has not had the benefit of hearing evidence from Mr Valani which contradicts Ms Adedayo's most recent accounts.

38.4. Although, when questioned on behalf of Ms Adedayo, Natasha Bernard accepted that Ms Adedayo's confession in her contemporaneous interviews was contradictory,[85] the questions asked involved presenting decontextualised answers from only parts of Ms Adedayo's interviews. Read together and in context, it is clear that Ms Adedayo was speaking about different tranches of monies and was not inconsistent about the amounts. Whilst it is acknowledged that Ms Bernard's interview failed sufficiently to clarify certain answers from Ms Adedayo, the interviews do contain clear and unambiguous admissions (particularly in light of the signed confession previously provided to the auditor which contained details about which the auditor could not have previously been aware).

38.5. Given the possibility that Ms Adedayo's case may be subject to litigation, the Inquiry should exercise caution before making findings in circumstances where, unlike a future court, it has not heard evidence tested by cross-examination.

39. None of the observations set out above are intended in any way to detract or resile from the apologies that POL has already made. At the outset of Phase 2 of the hearings POL apologised unreservedly for the suffering and damage caused to every person who has been affected by the Horizon IT scandal. That included not only Postmasters directly affected by POL's failures, but to all others, including in particular their families, whose lives have been impacted by those failures. Having heard the evidence in relation to the criminal case studies POL emphatically reiterates that apology.

40. Whilst the particular facts of every case are unique, it is clear from JLKC's expert report that the nature of POL's failures were all too regrettably consistent. In short, his view is that the evidence has broadly demonstrated that POL failed in a large number of cases

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was in the public interest, and it was solely on the public interest limb of the test that POL conceded the appeal (see §31 of JLKC's report at p.125/6).

[82] The test applied by the CCRC in deciding whether to refer is the "real possibility" test under s.13 CCA 1995 (see JLKC's Part 2 Report at §30 on p.125 and DAKC's evidence (T19/12/23 [64:1-24]).

[83] See JLKC's Part 2 Report at section 6 dealing with Ms Adedayo's case.

[84] See POL's 'phase end' closing submissions for Phase 3 at §68 on the suggestion that evidence in Phase 1 stands as being *"unchallenged"*.

[85] T10/11/23 [55:21 to 66:15]

by way of: (i) inappropriate questioning or approach in interview; (ii) failure to pursue reasonable lines of inquiry based on what was known at the time; (iii) inappropriate charging decisions based on what was known at the time; (iv) inadequate consideration / conduct of disclosure; (v) the way in which expert evidence was obtained; and (vi) improperly making the acceptance of a plea conditional on not criticising Horizon and/or making repayment.

41. For some Postmasters[86] only one of these types of failure occurred; for others there were two,[87] three, [88] four,[89] or even five[90] such types of failures. Whilst there is obviously not a direct correlation between the number of different types of failure on the part of POL and the impact on each of the Postmasters (and their families) – indeed, just one failure is obviously one too many – cases where there are multiples or even many multiples of failures are obviously particularly egregious in terms of POL's governance and accountability. So, whilst POL recognises the differences between the cases, and recognises its particular culpability where there were multiple such failures, its apology to every one of these individuals is the same: it is profoundly sorry.

42. The case studies in the devolved jurisdictions were not considered by DAKC or JLKC and therefore not addressed separately in this context, but POL's apology to all those affected by the Horizon IT scandal should be understood to encompass all those whose cases were considered, even if not by way of a case study, during the Phase 4 hearings.

43. As the Inquiry is aware, senior executives at POL (including Nick Read, CEO, and Simon Recaldin, Head of the Remediation Unit, as well as other senior individuals) have been engaging in a significant number of restorative meetings with Postmasters, and there are a large number of further such meetings already scheduled. POL would like to take this opportunity to reiterate their willingness to meet and listen to any Postmaster, including of course those who were case studies in the Phase 4 hearings who they have not yet met. Their voices deserve to be heard directly by POL, particularly having now heard directly from those who failed them, and whose failures are ultimately POL's failures.

44. Quite apart from the particular views expressed in JLKC's report, having heard all the evidence in Phase 4 it is clear that, irrespective of the state of knowledge of individual lawyers and investigators at any particular time during the relevant period, during that time POL as an organisation held within it knowledge that there were issues with Horizon, and it is equally culpable for its failure as an organisation to ensure that this knowledge reached the investigators and lawyers. POL has accepted that position in the CACD, which has informed its approach to conceding appeals as appropriate, but

[86] Lisa Brennan, Carl Page and Janet Skinner.
[87] Jo Hamilton, Peter Holmes, Joan Bailey and Lynette Hutchings.
[88] Tahir Mahmood, Seema Misra, Julian Wilson and Khayyam Ishaq.
[89] Grant Allen, Anne Sefton, Angela Nield, David Blakey and Alison Hall.
[90] Hughie Thomas and Allison Henderson.

it is something that it is only right that POL also apologises for in the context of this Inquiry.

## (3) POLICIES AND PROCEDURES: SUSPENSION, TERMINATION AND CIVIL RECOVERY

### (a) Recorded policies and procedures

45. POL's civil policies, procedures and practices have not been subject to the same degree of scrutiny in Phase 4 as its criminal policies, procedures and practices. Accordingly, POL's submissions are relatively brief, but address the policies and practices of auditors, contract advisers and appeal managers who made the decision to suspend and terminate contracts as well as debt collectors.[91]

46. With regard to auditors, the Inquiry will be aware that the Audit Process Manuals were the principal documents for the relevant period. These show that:
    46.1. The primary purpose of POL branch audits was to (i) verify assets (cash, stock, vouchers, foreign currency etc); and (ii) verify compliance with certain POL procedures. That (relatively narrow) purpose remained entirely consistent throughout the relevant period. As both a consequence and a cause, auditors were not required to hold any formal qualifications or undertake external training. There was no broader investigative function to be performed by auditors (e.g. for the purpose of detecting where any money had actually gone). POL submits that the narrow focus of auditors' work was not inherently objectionable, but was deeply problematic in the absence of an adequate further investigatory function to get to the bottom of discrepancies.
    46.2. For the majority of the relevant period, there was an expectation that Postmasters (when invited and/or requested to do so by auditors) *would* submit proposals for making good and/or actually make good discrepancies identified during audit by way of various mechanisms. This was plainly incompatible with their independent role as an auditor.[92]

47. With regards to contract advisors and appeal managers there is more detailed documentation of the guidance available to them regarding suspensions, appeals and termination, from which it appears that:
    47.1. Throughout the relevant period, the approach to suspension and termination was relatively consistent: following a referral from an auditor, a contract adviser would initially decide whether to suspend or not. They would then turn their mind to whether the Postmaster should have their contract terminated. £1,000 was repeatedly cited as the size of a discrepancy that would warrant suspension.

[91] There is no central repository of policies and guidance at POL for the entirety of the relevant period, such that the documentation which has been produced cannot offer a complete or definitive picture of what guidance was available when. Specifically, documentation prior to the split between Royal Mail Group and POL is particularly limited.

[92] Where an audit was conducted following a robbery or burglary, the Postmaster was also required to make good the loss by way of recording it in their suspension account and/or seeking to recover the loss by way of an insurance claim.

Where the Postmaster was summarily terminated, they had a right to appeal that decision until the right to an appeal was removed in the Network Transformation Contracts from 2011 onwards.

47.2. POL's attitude to suspension and termination evolved. POL acknowledges that its policies and procedures were initially weighted against Postmasters in significant respects: there was an expectation that responses to discrepancies were 'robust', there was no right to legal representation, and a 'no-fault' termination with three months' notice without any appeal process. There was no right to remuneration during a suspension and backdated compensation was at POL's discretion. Finally, POL's guidance identified a failure to accept responsibility as an aggravating factor in deciding whether to terminate a contract. This would place a Postmaster into the invidious situation of accepting potentially inaccurate data or losing their post office.

47.3. However, following the intervention of Second Sight and the instigation of the branch support programme, POL did seek to act in good faith and partially rebalance their policies and procedures so they were more equitable. POL introduced a presumption that Postmasters would not be suspended during an investigation; and a new sanction of a 'suspended termination' was introduced which operated as a final written warning.

47.4. Whilst criticisms can be made of POL's process, the documentary evidence does show that appeals were taken seriously and heard in good faith. Appeal managers were senior staff who received additional training—they were reminded of the need to ensure that the principles of natural justice were applied and that their role was to undertake a full rehearing. POL, however, accepts that there was no recorded mechanism of disclosure within the appeal process.[93] This is a significant oversight given that Postmasters may not have had access to their former property and the underlying Horizon data that led to their termination. It is also a matter of deep regret that appeals were removed in the Network Transformation Contracts.[94]

48. The most critical task undertaken by contract advisers and auditors was whether a reference should be made to the Security Team. A legitimate criticism can be made that the factors that informed this decision were not comprehensively recorded during the relevant period. However, it does appear that the following were the key considerations:

48.1. The Security Team would only consider Postmasters where there had been a suspension.

48.2. In practice, the Security Team would only consider discrepancies which were greater than £1,000 and the discrepancy could not be explained away by outstanding transaction corrections.

48.3. Debts above £5,000 would typically engage the Security Team.

48.4. Nevertheless, the limited guidance is clear that these amounts were only guides and that the full merits and circumstances (including any admissions) were to be considered by contract advisers and auditors. POL submits that at a broad level, there is nothing inherently objectionable about these criteria, but when applied

[93] As demonstrated in Mr Castleton's case.

[94] The right to a review (with remuneration) has been reinstated (POL00027984)

with limited information or presumptions against Postmasters they had the potential to operate unfairly and did operate unfairly.

49. With regard to debt collectors, POL submits that the policies and procedures adopted by POL were typical and proportionate. Equitable set-off was used to recover debts for existing Postmasters but this was nearly always under a negotiated programme. For former Postmasters, lower value debts were written off through internal processes (typically three 'Dunning' letters). Higher value debts were passed up for a letter before action from a solicitor. If that did not yield a recovery, a view was taken on whether recovery was proportionate taking into account the viability and cost of recovery. If a debt was less than £3,000 it was not pursued and if the debt was less than £10,000, recovery was only attempted after ascertaining the financial position of the Postmaster.

(b) Applicable standard for disclosure and conduct of proceedings

50. Counsel to the Inquiry's ("CTI") questioning of Mr Dilley in relation to the Marine Drive (Castleton) case study[95] proceeded on the basis that the approach to be adopted by POL in civil proceedings differed from claimants generally because it was a "*publicly owned company*". As such, it was suggested that it was inappropriate for POL to have adopted a strategy of brinksmanship,[96] or to have advised that a step should not be taken (disclosure of an expert report commissioned by POL) because it might increase the number of claims brought against it. CTI's questioning of Richard Morgan KC went further and suggested that different considerations in principle would and should have applied to civil litigation involving a "*public authority or a public corporation*" as distinct from a private corporation.

51. POL has carefully considered this proposition, and sought to understand what the legal underpinning for it might be, as it would obviously have far-reaching implications including in particular the nature and scope of the criticisms that could fairly be directed at POL's conduct of the GLO.

52. By way of starting point, POL notes that it is far from clear that POL is in fact a "*public authority*" for the purposes of administrative law, such that public law principles would have applied to any civil litigation conducted by it. In *R (Sidhpura) v POL* [2021] EWHC 866, a challenge to the HSS, Holgate J accepted for the sake of argument, but did not determine, that POL was, at least for some purposes, a public authority, for the purposes of analysing whether a "*a public law element has been injected into the dispute*" (§30). However, he went on to find that there was no possible basis for argument that the HSS had any public law character or engaged any principle of public law (§43). Notably, in reaching this conclusion he found that any dispute that was not resolved under the HSS

[95] This point was not raised in the Cleveleys (Wolstenholme) case study, but logically were CTI's approach to be right then it would apply equally to any civil recovery proceedings.

[96] This involved pressing for an early trial date in circumstances where the result would either be that Mr Castleton would submit a late expert report, in which case POL could ask for the trial date to be vacated (and by implication POL could then submit its own in response), or he would not submit any expert report, which was regarded by Counsel as being beneficial to POL.

would be resolved by the county court or arbitration *"applying private law principles to what remains throughout a private law dispute"* (§42).

53. As for POL's status as a *"public corporation"*,[97] not only is that a sectoral classification operated by the Office of National Statistics[98] rather than a determinative indicator that administrative law principles would have applied to civil litigation conducted by it, but as set out above it is difficult to see why the conduct of civil litigation would have had any public law character or engaged any principle of public law such that those principles would have been engaged in any event.

54. POL notes that whilst Fraser J (as he then was) criticised very many aspects of POL's conduct of the GLO, and found in the CIJ that there were a number of implied terms in the Postmasters' contracts with POL which might arguably mean in some circumstances that there ought to have been greater sharing of information by POL with the Postmasters, at no time did he suggest that POL's conduct in civil litigation fell to be judged by any higher standard than that applicable to any other limited company, irrespective of the identity and nature of its shareholder. Any conclusion by the Inquiry that POL does fall to be judged by a higher standard would therefore not only be inconsistent with the view of Holgate J and (impliedly) with the view of Fraser J, but would have far wider ramifications than just for POL. It would affect the approach to civil litigation required to be taken by every other *"public corporation"* or company owned by the state. Indeed, taken to is logical conclusion it would also lead to a higher standard applying every time a public body or authority is engaged in private law litigation. This is because there is no reason of principle why a different approach should be confined to cases where the public authority's participation in the litigation is through owning or controlling an incorporated entity. There is no suggestion in legislation, the Civil Procedure Rules or case law that a different standard should apply to the public sector when engaging in private law litigation.

## (4) CIVIL CASE STUDIES

### (a) Cleveleys (Wolstenholme)

55. The Cleveleys case is an early example of allegations being made by a Postmaster that defects in Horizon were causing loss. As such it is, understandably, of particular interest to the Inquiry. POL accepts that it failed in a number of respects in the Cleveleys case, which are considered below, and sincerely apologises to Mrs Kay (née Wolstenholme) for these. In particular, it recognises and deeply regrets the impact its handling of her suspension and ultimate termination of her contract had on her and her family, both financially and, of course, psychologically.

[97] As reflected on the Government website https://www.gov.uk/government/organisations/post-office

[98] See §6 of the Cabinet Office Guidance at https://assets.publishing.service.gov.uk/media/5a74d700e5274a59fa715592/Classification-of-Public_Bodies-Guidance-for-Departments.pdf

56. Mrs Kay became Postmaster in the Cleveleys branch a few months before Horizon was introduced.[99] She encountered early problems with Horizon and after several months decided that she was no longer prepared to use Horizon at all until the problems were sorted out. This situation led in due course to the suspension of her contract on 30 November 2000 and eventually to its termination.[100] POL accepts that in suspending and then terminating Mrs Kay's appointment, POL failed to give full and proper consideration to all matters that it should have; and also failed properly to investigate the allegations relating to Horizon which were being made at that time. As well as its actions being unfair to Mrs Kay, an early, and potentially valuable, opportunity to identify issues with Horizon was thereby missed.

57. POL issued proceedings against Mrs Kay on 23 April 2001,[101] initially seeking only delivery up of various pieces of equipment (or their value). Mrs Kay defended the claim on various bases including that there was an implied term that the computer system provided by POL would be fit for purpose which she said was not the case. No particulars were pleaded either in the original or amended versions of the Defence.

58. In a witness statement disclosed to Core Participants on 2 February 2024[102] Mrs Kay has set out her recollection as to how her complaints about Horizon were dealt with at the time, although that statement is necessarily untested.[103] The most detailed evidence in relation to such matters is set out in the call logs, which were provided to Mr Jason Coyne, although some further detail appears in the draft letter that Mrs Kay has estimated that her father wrote, but did not send, in January 2004.[104] It is submitted that in all the circumstances the Inquiry cannot make any further findings in relation to that evidence than Mr Coyne himself did at the time. This is considered further below.

59. The Inquiry is reminded of POL's acceptance – as set out in its Closing Submissions for Phase 3 and summarised above – that at the relevant time it had a mindset which included firm beliefs that: issues which did arise with Horizon were always due to user rather than system error; and there were no flaws in Horizon.[105] Faced with a vague and unparticularised case, of relatively low value, POL appears to have felt that there was little incentive to look into matters particularly deeply. That is not either to criticise Mrs Kay for the way she presented her case; and nor is it to excuse POL for the approach which it took. But it is a relevant piece of context.

60. In Mrs Cottam's witness statement, prepared for the purposes of the proceedings against Mrs Kay,[106] Mrs Cottam sought to give the impression that Mrs Kay's complaints

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[99] See para 5 of Julie Wolstenholme's witness statement dated 10/11/03 in *POL v Wolstenholme*: POL00118219 @ internal p.249

[100] See Particulars of Claim in *POL v Wolstenholme* [POL00118218 @ p.5]

[101] POL00118218 @ p.3

[102] WITN09020100, paras 9-15.

[103] As CTI noted in his oral submissions on 2 February 2024. Nor was the content of that statement put to Ms Oglesby or Elaine Cottam (née Tagg) when they gave evidence.

[104] WITN09020114

[105] POL's Phase 3 Closing para 4

[106] POL00118219 @ internal p.5

evidenced operational misuse rather than faults with Horizon. Even if that was a sincerely held view at the time, it was a serious omission not to have drawn the attention of the Court to the entirety of the relevant call logs including, crucially, those which showed Mrs Cottam herself conveying to the Helpdesk, on Mrs Kay's behalf, allegations which appeared on their face to allege defects in Horizon.

61. It was appropriate that expert evidence be sought and the Court sensibly directed that the parties appoint a joint expert, Mr Coyne. Mr Coyne's report[107] is an important document. It is, as he states in the covering letter, really just a *"brief note"*[108] based on the information which he had been provided with, which he lists. Mr Coyne explains in his witness statement for the Inquiry[109] that he created an Excel spreadsheet, "Analysis of the PO logs" which he exhibits to his statement for the Inquiry.[110] The various calls which Mrs Cottam was taken to by the Inquiry were included in that document so that it appears that Mr Coyne was provided with the full suite of relevant call logs, despite Mrs Cottam not drawing them to the attention of the Court herself.[111]

62. Mr Coyne provided a brief summary of some of the evidence he had reviewed. He was critical of aspects of Horizon's performance and preferred Mrs Kay's version of events to POL's. On the evidence before him he was obviously entitled to reach those conclusions. However, he was not able to, and did not, conclude that any Horizon malfunction had actually caused loss to Mrs Kay. He raised the possibility that that had occurred but, rightly on the evidence before him, went no further. Again, no criticism of Mr Coyne is intended. He acted properly. His views were carefully expressed and he made it clear that he had reached provisional conclusions based on the limited information made available to him and that further investigation and data would be required if he was to arrive at a firmer view.

63. POL emphasises that in making these points it is not trying to distance itself from the errors that were made or to suggest that Mr Coyne was mistaken. However, that evidence was, as he acknowledged, limited, and while the Inquiry may well conclude that POL should bear some share of responsibility for the fact that evidence was lacking, it is submitted that the Inquiry should not proceed on the basis that it was proved at the time, or has since been proved, that Mrs Kay's losses were caused by bugs, errors or

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[107] WITN0021001 @ p.20
[108] WITN0021001 @ p.19
[109] WITN0021001 @ para 44
[110] WITN00210102
[111] Reference to the call on 24 February 2000 which Mrs Cottam was taken to at T 7/11/23 [47:17 – 50:2] as FUJ000121246: WITN00210102 @ row 19: note that there are 2 entries on the spreadsheet for 24/2/00 but row 19 has the same call ref (224009) as the document which Mrs Cottam was taken to by CTI;
Reference to the call on 31 March 2000 at 5.35 pm which Mrs Cottam was taken to at T 7/11/23 [50:3 – 54:2] as FUJ000121296: WITN00210102 @ row 39: again there are 2 entries but row 39 has the same call ref (3311342) as the document which Mrs Cottam was taken to by CTI]; and
Reference to the call on 2 November 2000 which Mrs Cottam was taken to at T 7/11/23 [54:3 – 64:24] as FUJ00055145: WITN00210102 @ row 83: note call ref (11021413) is the same as appears on the document to which Mrs Cottam was taken by CTI under "ORIGREF" in "References" box. However, note that Mr Coyne gives the date of this as 7/11/00 and not 2/11/00 as appears on FUJ00055145, although there is another entry of 2/11/00 in Mr Coyne's spreadsheet – see row 85 in particular Column G "Blue screen reported by Elaine"

defects in Horizon. POL was reliant on what it was told by Fujitsu and they made no suggestion that the Cleveleys branch had been affected by bugs – in fact the evidence suggests that Fujitsu was convinced that there were no such problems, albeit that that conviction appears not to have been based, as it should have been, on a proper and detailed analysis of the allegations made by Mrs Kay and underlying data.

64. The reaction to Mr Coyne's report needs to be carefully considered – and it is important not to confuse internal reactions (i.e. within POL and Fujitsu where it was reasonably assumed that observations, although as we now know, inappropriate, were being privately made) and external reactions (i.e. what was communicated to Mr Coyne and Mrs Kay):
    64.1. POL was concerned at Mr Coyne's conclusions: Susanne Helliwell, POL's solicitor, recalled that both she and Mr Cruise of POL, then her primary contact at POL, were shocked and surprised;[112]
    64.2. Mr Baines of POL wrote to Mr Lenton-Smith of Fujitsu on 5 February 2004[113] and asked Fujitsu to consider the report and, if Fujitsu did not agree, to suggest what could be provided to Mr Coyne that might lead him to change his findings.

65. Fujitsu's response was set out in a Note which was appended to a letter from Mr Lenton-Smith of Fujitsu to Mr Baines.[114] The Note does not wrestle with the fundamental points which Mrs Kay was alleging (albeit without being particularised in her pleaded case) but instead focuses on explaining the function and objectives of the Helpdesk and on setting out a comparison of Cleveleys with other branches. This approach was plainly flawed.

66. Fujitsu's Note was provided to Mr Coyne and he provided his response to it in an email to Ms Helliwell dated 27 February 2004.[115] Mr Coyne was, understandably, not persuaded to change any of his views.

67. Fujitsu's internal view of matters is set out in a report dated 29 March 2004.[116] Paragraph 3.0 sets out criticisms of Mr Coyne. A number of points arise from this report:
    67.1. First, the criticism of Mr Coyne was unfair and inaccurate. Mr Coyne was provided with limited information and reached valid views based on that information. He made it clear that he required further information to arrive at definitive views but none was provided. He should not have been the subject of criticism, even internally;
    67.2. It is unclear whether all of the detailed data really was unavailable. The Inquiry has heard more general evidence which suggests that further data would or should have been available and it may be that more strenuous and co-ordinated efforts would have resulted in detailed data being uncovered (in addition to the call logs) with the result that a more definitive account as to what had happened

[112] T 26/7/23 [140:1-140:4]
[113] POL0009537
[114] FUJ00121512
[115] FUJ00121535
[116] POL0009537

would have been revealed. That said, there is no evidence that those dealing with the dispute at POL (or Fujitsu) either knew or suspected that additional data was available.

68. POL recognised in light of these events that its position in the case was weak and appears to have made a payment in of £25,000 which was not accepted by Mrs Kay.[117] POL then sought advice from counsel and Mr Brochwicz-Lewinski provided an Advice dated 26 July 2004.[118] The Advice analyses why, on the evidence before him, he thought POL's case would fail.[119] He also concluded that as a result of the computer evidence, POL would be found not to have grounds for summary termination so that Mrs Kay was entitled to three months' notice of termination. He considered various other heads of loss claimed by Mrs Kay and concluded that they probably would not succeed. Following receipt of that Advice, the case settled, shortly before the trial was due to commence.[120] The terms of that settlement have not been located.[121]

69. In summary, it is submitted that the following points can fairly be made:
    69.1. When Mrs Kay first raised her concerns and complaints about Horizon i.e. when she was still in post, POL and Fujitsu missed an early opportunity properly and fully to investigate the allegations that she made, and failed to take all relevant matters into account when deciding to suspend her;
    69.2. Fujitsu, for its part, failed to consider all that Mrs Kay had said or to consider what it knew generally about various issues with Horizon which might have been highly relevant to her situation;[122]

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[117] Note that in May 2004, an internal POL IT Risk Register assessed the risk of "*Damage to reputation of Post Office and potential future financial losses if PO loses court case relating to reliability of Horizon accounting data at Cleveleys Branch Office*" at £1 million. [POL00120833]. This risk assessment was escalated to David J Mills, POL's CEO, who attended a meeting of the "IT Commercial Team" where this risk was raised, and requested further information, including on who at POL was instructing lawyers in this case (POL00158493).

[118] POL0011822

[119] POL0011822 @ para 17

[120] To the extent the Inquiry is interested in the source of instructions in this case, we note from the documents identified and produced by POL that:
- The liaison between POL Legal (Jim Cruise and Mandy Talbot) and Agents Debt team appears to have mostly been conducted by Carol King (Branch Control and Conformance Manager) [POL-0147317]
- The approval for the settlement was sought and obtained from Jennifer Robson (Debt Recovery Section Manager) and Victoria Noble (Head of Transaction Processing) [POL-0147318, POL00142492, POL00158488]
- The case appears to have been flagged to David J Mills, POL's Chief Executive [POL0158493] and to Rod Ismay, Tony Marsh and Tony Utting [POL0142483, POL00158510, POL-0143796, POL00158511, POL00158512]

[121] It is noted that in a presentation given by Dave Smith of POL some years later [the presentation is undated but it states - POL00090575 @ p4 – that it was being delivered shortly before Mr Smith left POL and that was in March 2010 – see WITN05290100 @ para 9], he reported that the case had settled for "*£187.5k (cost included)*" [POL00090575 @ p.5]. It is possible that that is the correct amount (and it is accepted that this currently appears to be the only evidence available of the actual level of settlement) but equally this is very much higher than the sort of sums being referred to by Mr Brochwicz-Lewinski, and it is striking that this is the amount which Mrs Kay apparently said she wanted in April 2004: [FUJ00121602 – email dated 6 April 2004 from Mr Cruise to Mr Holmes] it is of course possible that she held out for that full sum but it is submitted that it is more likely that settlement was arrived at somewhere between that figure and POL's payment in amount of £25,000, and that Mr Smith's figure was incorrect. Mrs Kay does not include this information in her witness statement of June 2023.

[122] T 28/7/23 [8:15 – 8:24]

69.3. Had these matters been investigated at that stage, it is possible that a more definitive answer would have been obtained about what was happening at the Cleveleys branch – and whether there really was a problem with Horizon;

69.4. Similarly during the course of the proceedings and in particular when POL and Fujitsu received Mr Coyne's report, there was another opportunity for some thorough investigation to take place. A further opportunity was missed;

69.5. All of that said, it is submitted that, save in two respects, POL's conduct of the litigation itself was conventional and proper. Mrs Kay advanced a case which was essentially unparticularised and which POL genuinely believed was misconceived. POL was reliant on Fujitsu telling it if there really were problems with Horizon and Fujitsu said quite the reverse.

69.6. The two respects in which the litigation was not conducted appropriately are that: (a) Mrs Cottam's witness statement plainly should have exhibited and considered all relevant calls including those made by Mrs Cottam herself; and (b) the heavy-handed attempt to persuade Mr Coyne to change his views, particularly on a flawed basis.

69.7. Once it became clear that Mr Coyne was (quite reasonably) not going to change his views, it was obvious that POL was going to lose the case, so that it became sensible to settle it on the best available terms. However, that did not mean that POL realised that Mrs Kay's allegations were true, only that there was insufficient evidence to contradict them. The distinction is important.

70. Within POL there was a level of anxiety about this case and a concern that an adverse judgment would or might set a precedent which would be detrimental to POL's commercial interests. In itself, such a concern was not improper but importantly it should not have prevented a proper investigation from being carried out.

(b) Marine Drive (Castleton)

71. Before turning to the details of its submissions, POL also wishes to apologise to Mr Castleton. POL is profoundly sorry for the impact its conduct had (and continues to have) on Mr Castleton and his family. The injustice Mr Castleton endured was both the result of systematic failures but also the decisions of individuals employed by POL. POL does not need the benefit of hindsight to make these admissions: POL should have dealt with his case differently at the time.

72. The Inquiry has heard from many witnesses who had a part to play in the overall story. Many were doing their job conscientiously and should not be criticised. Others could or should have ensured that POL paused from time to time and reflected on what was being done and why. The Inquiry is invited to distinguish between these two groups.

73. Many aspects of POL's treatment of Mr Castleton prior to his termination were deeply regrettable:

73.1. Mr Castleton reached out and made many calls,[123] he requested an audit to try to uncover the root cause,[124] and it was obvious from the start (which POL has always recognised) that he was honest. Mr Castleton's experience with the Horizon Systems Helpdesk ('HSH') was woeful: no Postmaster should have to have been as persistent as he was. That alone should have marked Mr Castleton out as someone who deserved thorough and considered assistance;

73.2. An analysis of the call logs[125] reveals that the HSH team were keen to close calls and pass matters back to NBSC: the logs suggest a refusal to countenance the possibility that there had been a software or hardware failure;

73.3. Catherine Oglesby made significant attempts to assist (and in POL's submission the Inquiry should be slow to criticise her) but it is accepted that these were not sufficient to bottom out an explanation of the events in Mr Castleton's branch;[126]

73.4. The audit Mr Castleton requested did not (and nor was it intended to) consider the adequacy of Horizon either in the branch or generally. Worse, the standard checklist – which contained standard potential criticisms such as leaving the safe open – was, in the subsequent proceedings, wrongly treated, at least initially, as applying to the Marine Drive branch;[127]

73.5. The decisions to suspend, and then terminate, Mr Castleton's appointment were consistent with POL's mindset and policies at the time.[128] The more fundamental issue is whether POL should have allowed the underlying situation to arise;

73.6. Anne Chambers commented in her "Afterthoughts" on the Castleton case[129] that there was a failure to carry out a full technical review of all the evidence before proceedings were commenced. That is a fair criticism;

73.7. POL accepts with hindsight that it should have gone much further in trying to determine what was actually going on before taking any decision about suspension or termination.

74. POL's conduct during civil proceedings contained many regrettable elements:

74.1. It remains unclear as to which individual actually took the decision to issue proceedings against Mr Castleton.[130] The case ought to have been looked at by

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[123] In his witness statement he states that he made 91 calls over 12 weeks: WITN03730100, page 2, paragraph 17. POL does not dispute that figure.

[124] John Jones had never before come across a situation where it was the Postmaster who was asking for an audit to be carried out T 29/9/23 [15:2 – 15:8]

[125] POL00082560, electronic pages 3 to 11 (printed pages 2406 to 2414). POL00074476.

[126] POL submits that neither Ms Oglesby nor Mr Jones should be singled out for criticism for their decision to suspend and ultimately terminate Mr Castleton's contract once it is placed in its full context. They were confronted with growing losses with no known cause and Mr Castleton had declined to fully follow Ms Oglesby's suggestions as to how to eliminate possible causes: POL, however, accepts that Ms Oglesby erred when she removed documents without creating a ledger of those documents removed. However, that was as much a fault of POL for failing to have a policy to deal with evidence during investigations as it was Ms Oglesby's error.

[127] This failure was never fully explained at the Inquiry either by Helen Rose (whose evidence it was) or Stephen Dilley (who ought to have picked the point up at least by the time of Helen Rose's second witness statement).

[128] Which is to explain the actions of the individuals concerned but not to excuse the relevant policies at a corporate level.

[129] FUJ00152299

[130] Mandy Talbot's suggestion seemed to be that proceedings were issued on a "business as usual" basis and there is no evidence of any careful consideration being given before this important decision was taken. T 28/9/23 [35:3 – 36:10]

someone with proper knowledge and understanding of the history of the branch and of Mr Castleton's attempts to get matters resolved; and the possibility of arriving at a collaborative solution before launching formal proceedings ought to have been explored. This not only reveals a failure of governance on POL's part but a failure fully to document and assess the merits and impacts of civil recovery;

74.2. POL should also at least have considered the impact on Mr Castleton and his family and continued to do so on an ongoing basis. Mandy Talbot's evidence suggests that no consideration was given to this at all, either in this case or in general.[131] This was a serious failure and POL would emphasise that this is not part of its culture now;

74.3. It is unclear whether the clear view of Mr Morgan KC and Mr Dilley – namely that in light of the approach being taken, the case against Mr Castleton would not set any precedent about the reliability of the Horizon system as a whole – was communicated or understood by those in POL who were following the progress of the case. However, given the way that the case was explained to the court, POL's in-house lawyers ought to have had no difficulty in understanding that this was in truth not a trial about the robustness of the overall Horizon system;

74.4. The proposal that Mr Castleton declare his confidence in Horizon as part of any settlement was unenforceable and high handed given that POL were not seeking such a declaration from the courts;

74.5. Despite this, there can be no doubt that the case was seen as acquiring a greater importance in POL than was merited in the circumstances. It seems likely that executives at POL were not carrying out a close analysis of the issues but were taking a broader brush approach which focused more on the message that could be worked up and communicated to the wider community of Postmasters;

74.6. These substantial errors of judgement betray a lack of experience, compassion and insight on the part of those undertaking the litigation on behalf of POL. There was a clear governance failure.

75. Notwithstanding these substantial criticisms, POL submits that there are some contextual points for the Inquiry to consider when drawing the most accurate lessons:

75.1. Mr Castleton was legally represented for the majority of the proceedings – it was only on or about 20 November 2006 that he started acting in person,[132] by which stage the trial was only a few weeks away. The Inquiry has not heard from Mr Castleton's own lawyers or seen what advice they gave him. It has to be assumed that he received robust and frank advice about the merits of his ambitious counterclaim, initially put at £250,000. It was this counterclaim which raised the stakes that elevated the status of the claim out of the auspices of a simple debt claim before the County Court;

75.2. Although POL could and should have paused before issuing proceedings, there is nothing inherently objectionable about pursuing a debt in the circumstances that POL, a custodian of public money, believed to exist. Mr Castleton's successors had run the branch without issue. Mr Jones concluded that there was

[131] T 28/9/23 [90:24 – 91:7]

[132] Stephen Dilley's ws WITN04660100 @ para 288

no more that he could investigate and that Mr Castleton had not implemented some of the recommendations made to him by Catherine Oglesby;[133]

75.3. Similarly, there is nothing inherently objectionable in principle about fighting an appropriate case as a test case robustly to deter meritless cases later on;[134]

75.4. At the outset, the claim amounted to litigation for a 5-figure sum intended for the County Court which was commenced many years before the Justice for Postmasters Alliance was formed or the GLO instigated—this started as a 'bread and butter' claim;

75.5. It is also clear that POL made real efforts to arrive at a settlement with Mr Castleton – at one point it even seemed that the parties had reached an agreement although Mr Castleton ultimately declined to sign off on that.[135]

76. A number of potential criticisms were advanced against the representatives of POL:

76.1. It was suggested to Mr Dilley that POL ought to have provided more extensive disclosure. The Inquiry is invited to be careful not to judge matters by reference to what is now known about the problems in Horizon. POL faced an unparticularised case – even after Mr Castleton had provided some Further and Better Particulars – and was under an obligation to keep costs proportionate. Further, Mr Castleton was legally represented when disclosure was carried out: if Mr Castleton's lawyers had had concerns about the scope of disclosure then they could and should have issued an application for specific disclosure. It has also to be borne in mind that Mr Castleton's pleaded case stated that he was able to prove that Horizon was not working properly from the material already available to him, by "*a manual reconciliation of the figures contained within [the balance snapshot documents created by the Defendant during the course of his tenure] that the apparent shortfalls are nothing more than accounting errors arising from the operation of the Horizon system*";

76.2. A suggestion was made to Mr Morgan that he should have understood that Mr Castleton disavowed the accounts he signed and that he only signed them so that he could proceed with the next day's trading. But that was not how Mr Morgan understood how Mr Castleton's case was pleaded and nor, it is clear, did the Judge;

76.3. Potential criticisms were advanced regarding procedural claims run by POL; specifically, the decision to retain the December 2006 trial date if possible so that the pressure was kept up on Mr Castleton. These were legitimate and commonplace decisions in the context of civil litigation; and

76.4. Mr Morgan rightly identified at the time that it would be a considerable challenge for POL to prove that there was nothing wrong with Horizon: as well as the conceptual difficulty of proving a negative, the scale of Horizon meant that that was not a realistic aim for a modest debt-recovery action. He saw, however, that it was not necessary to run such a case since Mr Castleton expressly avowed the

[133] T 29/9/23 [32:1 – 32:17]

[134] Where such a strategy becomes problematic is where, as here, sight is lost on the personal impact of the defendant (in this case Mr Castleton), where the importance of being seen to "win" trumps all other considerations or where, also as in this case, it becomes clear that the case is not actually going to be a test case at all.

[135] Stephen Dilley's witness statement WITN04660100 @ para 255

accounts he had signed and that was sufficient for POL's purposes. The case was fought and won on that basis.

77. Against that background, it is submitted that the Inquiry should be slow to criticise any of the external lawyers involved in the Castleton litigation. Both Stephen Dilley and Richard Morgan KC provided long and detailed witness statements and provided full accounts of the decisions which they took. They had a job to do and they did it in accordance with their instructions and the relevant rules. Both of them robustly advised POL of prospects of recovery, the scope of the case and the risks involved. Any decision to continue litigation rests with POL alone.

78. Anne Chambers' evidence was important. Although the case did not hinge on whether Horizon was reliable, Mr Castleton criticised its reliability.

78.1. Mrs Chambers gave careful and thorough evidence before the Inquiry. She made some serious criticisms of POL and Fujitsu and was clearly not taking any party line, either in her evidence at the trial or the Inquiry. She explained how she had investigated matters: carefully in 2004; again more thoroughly in preparation for the trial in 2006; and yet again in preparation for giving evidence to the Inquiry. Despite all this effort over a period of almost 20 years, she was unable to identify any specific problem with Horizon at Mr Castleton's branch:[136] and said that if there was an error in Horizon it is one that *"left no evidence and that nobody has ever found…if there could even be such an error"*[137];

78.2. Mrs Chambers wrote an internal Fujitsu memo dated 29 January 2007 which set out her "Afterthoughts on the Castleton Case".[138] She made important and justified observations and criticisms of the process she had experienced. Those criticisms were principally directed at Fujitsu but it seems that the only response from Mrs Chambers' superiors in Fujitsu was that Mrs Chambers was given a *"pat on the head"*[139] by Fujitsu's Security Manager, Brian Pinder:[140] there is no evidence that the recommendations were widely discussed internally at Fujitsu - still less actioned – or shared with POL. Had they been, there is a chance that changes would have been made.

79. Following the judgment, POL should not have treated the Castleton decision as though it proved that Horizon was problem-free. There was no expert evidence in the case and it was not the basis on which the case was pleaded or fought.

80. However, once judgment had been obtained against Mr Castleton, POL took the ordinary steps that any successful litigant is likely to take in order to obtain the amounts which had been ordered to be paid. These actions, in principle, should not be the subject of criticism since any successful litigant is entitled to seek recovery of the amounts

[136] T 27/9/23 [148:7 – 150:17]
[137] T 27/9/23 [150:15 – 150:17]
[138] FUJ00152299
[139] T 27/9/23 [90:8 – 90:10] - the phrase was CTI's but Mrs Chambers agreed with it
[140] FUJ00152300

ordered to be paid. That said, it is accepted that in the circumstances of this case POL could and should again have reflected on whether it was appropriate to seek a full recovery.

**Conclusion**

81. Overall, there are significant lessons to be learned from the Castleton case but the Inquiry must be astute to the limits of the findings which can be made and of the nature of those lessons.

82. POL accepts that:
    82.1. POL should have made a greater effort at the outset to determine the underlying cause of the discrepancies in the branch and been supportive and transparent about potential issues, including the possibility of errors in Horizon;
    82.2. Instead of resolving the matter fully and certainly, POL limited its efforts to proving the narrow point that there was no specific evidence that the Horizon operations in Mr Castleton's branch were not at fault. POL failed to take an appropriate and similar interest in finding out what was actually going wrong at the branch;
    82.3. POL pursued the litigation (including after judgment had been obtained) with a level of aggression which was disproportionate to the sums at stake and which disregarded the effect of the litigation on Mr Castleton and his family. However, the Inquiry cannot conclude that there was a bug, error or defect in the Marine Drive branch. There is no evidence to that effect – indeed Mrs Chambers suggests that that was not the case. Similarly, the Inquiry cannot conclude that the case was wrongly decided by the Judge at the time. A perfectly understandable and proper legal approach to proving POL's loss was taken and was not challenged by Mr Castleton;
    82.4. Having taken the case to trial and judgment, neither Fujitsu nor POL learned the lessons which they should have from the overall experience. Mrs Chambers' careful "Afterthoughts" document should have been discussed and actioned within Fujitsu, who in turn should have shared those lessons with POL.

(c) Broader governance issues

83. The Cleveleys and Marine Drive case studies also provide some insight into broader governance issues at POL in relation to civil litigation and its emerging understanding of Horizon issues.

84. The cases are directly linked by Mandy Talbot whose job title during the relevant period was "Litigation Team Leader" or "Principal Lawyer", although she sought to characterise her role as being "*just a case worker*". She was not involved in the decision to bring proceedings in either case, but once involved she appears to have been central to the instructions being given. In particular,

    84.1. In the Cleveleys case:

84.1.1. Ms Talbot was recorded in 2004 as having wanted to '*throw money*' at Mrs Kay, to keep Mr Coyne's expert report out of the public domain if possible, and to "*keep [Mrs Kay's] mouth shut*";

84.1.2. When seeking advice on evidence and quantum POL's instructions had asked counsel to take into account the fact that POL was anxious for Mr Coyne's report "*to be given as little publicity as possible*". In her evidence to the Inquiry Ms Talbot sought to suggest that neither she nor POL had anything to hide from public view, and that she may have wanted the report to be given little publicity to avoid affecting the relationship between POL and Fujitsu. POL recognises that the Inquiry may find this suggestion unconvincing.

84.2. In the Marine Drive case:

84.2.1. Ms Talbot became involved from October 2005 as a recipient of a summary of the case from Mr Dilley. Soon afterwards she spoke to Mr Dilley and asked why Bond Pearce had issued the claim when reliability was unclear.[141]

84.2.2. Around the same time she emailed her line manager (Clare Wardle), Head of Commercial (and possibly acting Head of Legal) (Nicky Sherrott) and other employees noting that "*if the Horizon evidence is not up to the job this will have serious ramifications for the business*".[142]

84.2.3. In her evidence to the Inquiry she denied that her concern was the adequacy / reliability of Horizon, and denied that her concern was based on her experience in the Wolstenholme case. She refused to accept any connection between the Wolstenholme and Castleton cases, and never mentioned Wolstenholme to the external solicitors acting for POL in Castleton or to the counsel instructed by them, despite '*the integrity of the Fujitsu product generally*' being raised as an issue. Moreover, she denied that her approach to the Castleton case was influenced by the Wolstenholme case despite having queried why external solicitors had issued the claim "*when reliability was unclear*". Again, POL recognises that the Inquiry may find these suggestions unconvincing.

84.2.4. In any event, Mr Dilley's summary of the case, and Ms Talbot's response, were subsequently escalated to Dave Hulbert[143] and Keith Baines.[144] There is currently no evidence as to what, if anything, they did as a result.

84.2.5. On 23 November 2005 she emailed a series of senior people, including David X Smith (POL Head of IT), Jennifer Robson (Debt Recovery Section Manager), Tony Utting, Rod Ismay and Clare Wardle (Head of Civil Litigation), with the title "*Challenge to Horizon*".[145] In that email she summarised the facts in the Marine Drive case, and set out Mr Bajaj's

[141] POL00070574

[142] POL00107423

[143] Service Manager, Ops Control

[144] Fujitsu Contracts Manager.

[145] This document was not put to Ms Talbot as it was disclosed by POL in October 2023 as part of a disclosure assurance exercise, shortly after she gave evidence.

challenge to the validity of Horizon data, which had included him writing an article in The Sub Postmaster November 2005 edition in which he sought information from other postmasters in a similar situation (and his solicitors had indicated that a class action was possible). She stated that if the challenge was not met "*the ability of POL to rely on Horizon for data will be compromised and the future prosperity of the network compromised*", and suggested that POL/Fujitsu should (among other things) "*investigate and identify whether or not they do hold any data upon the number of complaints made by postmasters about the Horizon system since inception and whether or not it can be broken down into statistics about valid problems / resolutions / errors by postmasters*".

84.2.6. As a result of that email, and discussion at a meeting called by David X Smith on 25 November 2005, a workshop was organised for 6 December 2005 whose attendees included Keith Baines (Fujitsu Contract Manager), Ms Talbot, Marie Cockett and Graham Ward, as well as other senior managers.[146] The actions arising from the workshop included the recording and co-ordination of the number and nature of challenges to Horizon, and to consider the appointment of an independent expert to report on both Horizon's generic reliability and on individual challenges that were made, and for David X Smith to be briefed on the meeting's recommendations.

84.2.7. In April 2006 Ms Talbot expressed her view to Mr Dilley that if POL were seen to compromise on Marine Drive "*the whole system will come crashing down*", and noted that Mr Castleton was speaking to Mr Bajaj, such that POL's "*clear line to industry must be that we are taking a firm line with Castleton*".[147]

84.2.8. Ms Talbot denied having been the origin of the strategy and instructions in the Castleton case, but was unable to identify any other individual who might have given her those instructions, particularly on the need to send a message to the industry.

85. The significance of the contemporaneous evidence, and in particular the 2005 workshop, is that there appears to have been a much more co-ordinated understanding and approach to cases involving challenges to Horizon than had previously been understood to be the case. Whilst Ms Talbot was clearly a key part of POL's approach, the strategy appears to have been led by more senior employees within POL (including in particular Mr Smith, Mr Hulbert and Mr Baines). Based on the evidence currently before the Inquiry it does not appear that these issues were raised at Board (or any executive group below Board) level, but that will obviously be an issue of considerable importance in Phase 5/6.

[146] POL00119895.

[147] POL00072669

## (5) ARQ DATA

86. One of Fraser J's findings in the HIJ was that POL should use ARQ data instead of POL management data,[148] and it is implicit in his findings that he considered ARQ data to be a more reliable data set.[149] The evidence heard by the Inquiry suggests that ARQ data was not as reliable as Fraser J (and POL) believed. The Inquiry will be deeply concerned about the issues which emerged regarding ARQ data. POL shares those concerns.

87. John Simpkins, a Fujitsu Team Leader in the Software Support Centre ("SSC"), explained that ARQ data was filtered from the full Message Store that was available to Fujitsu.[150] Fujitsu had access to the raw Message Store[151] and Mr Simpkins' evidence was that it was unwise to base conclusions as to the health and integrity of the data that Horizon had produced based only on filtered ARQ data (i.e. the only data which was made available to POL),[152] and that he would not have been prepared to draw conclusions without access to the raw Message Store.[153]

88. POL did not have access to Message Store – nor to the Known Error Log,[154] which might have provided POL with much greater insight into the true state of the Horizon software. The only way in which Fujitsu communicated some information about bugs, errors and defects to POL was through the Service Management Portal and any reports that were provided through that route.[155] The Inquiry has not heard any evidence that POL was told about any of the issues about ARQ data through this route.

89. Despite Fujitsu's clear understanding of the limitations of the ARQ data, it seems that no attempt was made to share this information with POL. As far as Mr Simpkins is concerned, no one in the SSC was asked to provide advice – even within Fujitsu - as to the range of data available and which therefore ought to be presented for the purposes of civil or criminal investigations,[156] and to his knowledge no-one in Fujitsu ever explained the limitations of the data that was being provided to POL.[157] From the evidence which the Inquiry has so far heard, it seems that there was a complete disconnect between those in Fujitsu who were supplying the ARQ data to POL, and those in Fujitsu who understood the limitations of that data: if the two groups were completely separate (which seems, at the very least, unlikely) one would have thought that the need for communication between them would have been all the more obvious.

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[148] HIJ para 286

[149] Note that the experts in the case appeared to understand that ARQ data could be filtered (since they distinguished between "full audit data" and "unfiltered ARQ Data") - see eg HIJ para 687, 3rd Joint Statement, para 4 – although this is not a distinction with Fraser J appears to have considered in detail

[150] T 17/1/24 [16:13-17:9]: note that there was a suggestion made to Mr Simpkins that the data had been "manipulated": there is no evidence that the date was changed, however, so that it is submitted that "filtered" is the better term

[151] T 17/1/24 [37:6 – 39:16]

[152] T 17/1/24 [39:19 – 40:2]

[153] T 17/1/24 [42:23 – 43:6]

[154] T 17/1/24 [28:13 – 28:15]

[155] T 17/1/24 [29:4 – 30:13]

[156] T 17/1/24 [44:20 – 45:3]

[157] T 17/1/24 [48:11 – 48:14]

90. In fact it seems that the contradictions inherent in Fujitsu's position (i.e. knowing, at least on a corporate level, that filtered ARQ data was not a sufficient basis for final conclusions to be reached; and that Fujitsu was fully aware of that fact but POL were not) at no stage caused anyone at Fujitsu to pause and look either to improve the situation or, at the very least, to inform POL of it.[158]

91. In fact, the situation was significantly worse than that since there is evidence that Fujitsu took positive steps to conceal relevant matters from POL. This emerged most clearly in the evidence from Peter Sewell who from 2007 to 2009 was the Operations Team Manager within the Security Team, overseeing Penny Thomas, Andy Dunks and Neneh Lowther.[159]

92. Mr Sewell occupied a senior role within the security team and was involved in many important communications. In his evidence before the Inquiry, however, he sought, unconvincingly, to downplay the role that he had played. For example,[160] although he was at pains to claim otherwise,[161] the contemporaneous documents make it clear that he was involved in considering and advising on the draft witness statements which were being prepared (both by Penny Thomas and Andy Dunks) in 2005-2006. This included an important discussion concerning whether it could properly be said in a template witness statement that none of the calls made by the Postmaster would have had an effect on the integrity of the information held on the system – obviously a central element to the evidence to be provided. None of the – understandable – reservations being expressed by Fujitsu personnel were communicated to POL.

93. Even when Fujitsu did make some relevant communication with POL, there is evidence that it was not full and frank. Fujitsu identified an issue relating to the unreliability of the EPOSS code in late 2007 which resulted in a branch trading statement showing a discrepancy: an issue referred to by Mr Patterson as the Riposte Lock Event.[162] The relevant Peak was PC0152376[163] and was dated from 20 December 2007. On 2 January 2008 Gerald Barnes had noted within the Peak that *"The fact that EPOSS code is not resilient to errors is endemic"* but in his view there was *"little point fixing it in this one particular case because there will be many others to catch you out"*.[164]

94. Fujitsu allowed this serious issue to rumble on for many months. A meeting was held in relation to it in August 2008[165] and Mik Peach reported on 11 August 2008 that the issue was occurring 35 times per week and that 1820 events were known to have caused a discrepancy.[166] It would seem that Fujitsu carried out a significant amount of work in

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[158] T 17/1/25 [75: 12 – 76:19]
[159] Peter Sewell's witness statement: WITN09710100 @ para 11 & para 32
[160] FUJ00122151
[161] T 18/1/24 [24 :4 – 31 :15]
[162] WITN06650330 @ paras 75-116: Fujitsu's (William Patterson's) third witness statement
[163] FUJ00155231 @ p.4
[164] FUJ00155231 @ p.7
[165] FUJ00155231 @ p.1
[166] FUJ00155231 @ p.3

relation to the issue: nevertheless, Mr Sewell accepted that the fact that it was reported to him that the issue caused no financial impact *"in the vast majority of cases"*[167] was not satisfactory.[168]

95. Internally, in a Change Proposal document dated 13 October 2008, [169] Fujitsu was clear that the solution being adopted (of manual checking) was unsatisfactory since, amongst other things, it was error prone and time consuming. It also invalidated *"certain statements made within the current witness statement"*, although there is no evidence that that was acted upon by Fujitsu. The document was not intended to be seen by POL.[170]

96. The communication that was eventually sent to POL in January 2009[171] was incomplete and inaccurate. Instead of being told the true situation, namely that there had been a widespread and long-standing problem which potentially undermined the reliability and accuracy of evidence that had been given, POL was told that there had been an isolated occurrence in December 2007, that the resulting financial imbalance had been corrected, and a software correction applied across the estate in November 2008. This was a seriously misleading account of the seriousness and extent of the problem; even Mr Sewell seemed to accept that,[172] as did Mr Patterson.[173]

**(6) 'REMOTE ACCESS'**

97. The Inquiry has heard evidence about 'remote access' both in Phase 4 and in earlier Phases. It seems likely that further evidence on the topic will be heard in subsequent Phases as well. It is therefore all the more important to be clear before the start of Phase 5/6 about what that concept actually means in this context.

98. Access to data using remote means in order to view that data is uncontroversial. It is the ability to change that data remotely which is key. Further, it is crucial to distinguish between an ability to change data and balances in a Postmaster's accounts with and without the knowledge of the Postmaster. Fujitsu and POL always knew that Fujitsu could change information in a Postmaster's accounts with the Postmaster's knowledge since that was frequently done e.g. by Transaction Corrections, which the Postmaster was required to accept.

99. In the light of the HIJ it is now clear that, from the outset of the Horizon contract, Fujitsu had the ability to change data in branch accounts without the Postmaster's

[167] FUJ00155263
[168] T 18/1/24 [60:25 – 63 :2]
[169] FUJ00155272
[170] T 18/1/24 [72:4 – 72 :8]
[171] FUJ00155399
[172] T 18/1/24 [108 :23 – 109 :16]
[173] T 19/1/24 [81 :17 – 82 :8]

knowledge.[174] It is equally clear that POL never had any such ability: Mr Simpkins accepted that that was the case.[175]

100. The way in which it became apparent that Fujitsu had this ability emerged during the HIT and is set out in some detail in the HIJ, in particular in relation to Steve Parker's evidence. During Phase 5, the Inquiry may want to gain a better understanding of the unsatisfactory way in which that evidence emerged and of whether and if so what steps Fujitsu took properly to explain the true situation to POL.

101. The remaining question is therefore when POL knew that Fujitsu could change information in Postmasters' accounts without their knowledge (and, implicitly, without any such changes always being recorded and auditable).

102. It is apparent from Fujitsu's document, Customer Service Operational Change Procedure, dated 18 March 2004,[176] which was sent to John Bruce of POL, that at least some individuals within POL were aware from at least 2004 that Fujitsu would in principle be able to correct customer data on the live system, and because user data was involved, if the data to be changed had a financial impact on POL then approval had to be given by a senior POL manager (and Fujitsu's policies contained procedures to limit and record any such). The understanding within POL was that in such circumstances the Postmaster would be aware of the correction.

103. The earliest contemporaneous document that the Inquiry has considered dates from November 2010[177] in which a POL employee (Lynne Hobbs) emailed Mike Granville (Head of Regulatory Strategy) and Rod Ismay (subsequently also sent to John Breeden (National Contract Manager North) in December 2010) in which she said:

*"I found out this week that Fujitsu can actually put an entry into a branch account remotely. It came up when we were exploring solutions around a problem generated by the system following migration to HNG-X."*

104. It is, of course possible that IT personnel within POL knew of this facility earlier (and indeed Anne Chambers' evidence was that some POL personnel may have known of it as at December 2007).[178] For completeness, it should be noted that there is also a

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[174] HIJ para 534

[175] T 17/1/24 [92:9 – 93:7] POL is of course aware of the article in *The Times* on 15 January 2024 entitled "*Post Office could change accounts remotely, claims whistleblower*". In principle this would concern a different type of remote access, i.e. the potential for the misuse of a Postmaster's user ID and password which had been provided to them previously by the Postmaster for a helpdesk operative to make the changes to live accounts. In this situation then the helpdesk operative would only have been able to make the same changes as the Postmaster not the same type of changes which Fujitsu were capable of making. Moreover, POL is not aware of any case in which a Postmaster was convicted in which a Postmaster raised the fact that they had previously provided their user ID and password to a helpdesk operative. In the event that more information is provided to POL as to the nature of this allegation it would, of course, consider it further.

[176] POL00029282

[177] The email chain is POL00088956

[178] T 3/5/23 [33:23 – 34:14]

reference in an email dated 23 October 2008[179] from Andrew Winn of POL to Alan Lusher, also of POL, to Fujitsu's ability to impact branch records *"via the message store"* but this is said to have been subject to *"extremely rigorous procedures in place to prevent adjustments being made without prior authorisation – within POL and Fujitsu"*.

105. However, as set out in the HIJ, Paula Vennells was told as late as 30 January 2015 by members of her senior team that neither POL nor Fujitsu was able to edit transaction data without the knowledge of a Postmaster,[180] and this understanding appears to have remained in place up until pre-action correspondence exchanged for the purposes of the GLO. It is anticipated that during subsequent Phases, the Inquiry is likely to want to investigate how this situation came about and who in POL and/or Fujitsu was responsible for providing this erroneous information.

[179] POL00029710

[180] HIJ para 522