

Working Paper 3
The Conduct of Horizon Prosecutions and Appeals

The Evidence Based Justice Lab
Post Office Scandal Project
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Richard Moorhead,* Karen Nokes, Rebecca Helm***
*University of Exeter, School of Law
**Faculty of Laws, UCL



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All errors and opinions are our own or attributable to the vagaries of Microsoft Word and Zotero.

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Executive Summary

This report primarily considers the professional conduct issues arising from the prosecution of post office employees and sub-postmasters/ mistresses (SPMs) by Post Office Limited. Drawing primarily on the Court of Appeal's decision and the hearings in *Hamilton* we explore, in particular:

- Interviews not being conducted fairly or properly
- Prosecutions in the absence of sufficient and sufficiently robust evidence
- Failures to investigate reasonable lines of enquiry
- Improper charging and pressure to plead guilty
- Failures to disclose
- The use of allegedly misleading evidence
- What is revealed by the Clarke advices?
- The adequacy of what happened after the Clarke advices
- Professional concerns relevant to the handling of appeals
- The handling of an independent investigation

We explain the professional conduct issues that may be raised by the events as revealed above to assist professional regulators, the Williams Inquiry, and professionals in the criminal justice system and beyond to reflect on current practices in legal work.

For good reasons, Criminal Court of Appeal processes are not vehicles for individual accountability; nor are academic working papers. We explore in what follows several concerning matters which may give rise to the need for such accountability. Our view is that the scale and impact of the wrongs, particularly the consequences visited upon SPMs, means these matters need urgent and rigorous investigation.

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1. Introduction

The Post Office Horizon scandal encompasses the treatment of Sub-postmasters and mistresses and other employees of Post Office Limited from about 2000 to 2021. As Post Office Limited is referred to in many documents as POL, we adopt Post Office and POL interchangeably. The cases cover sub-post masters/mistresses (SPMs) but also other POL employees. For ease we generally refer to all such people as SPMs.

The scandal covers several distinct areas of activity:

- the creation and management of SPM contracts;
- the enforcement of alleged shortfall debts under those contracts;
- the investigation and prosecution of SPMs and others for such shortfalls;
- the handling of an independent investigation by Second Sight and an associated scheme of investigation and mediation;
- responses to complaints and investigations by Parliament;
- the conduct of civil litigation, and, in particular, POL's defence of Group litigation (*Bates*) brought by over 500 SPMs; and,
- the defence of a Criminal appeal (the *Hamilton* appeal) which overturned 39 convictions partly on the basis that the prosecutions in those cases were an affront to the public conscience.

This paper covers an initial analysis of criticisms that can be made of the prosecution of SPMs following Horizon shortfalls; the conduct of the *Hamilton* appeal; and some issues in relation to the Second Sight Investigation. It is based predominantly on information from the *Bates* judgments and the *Hamilton* case. It is part of our broader project looking at issues in corporate governance; criminal justice; and professional regulation, as well as government and parliamentary accountability. In a previous paper we surface professional misconduct and civil procedure issues in particular.¹

We hope that later papers will deepen the analysis and cover other elements of the case.

2. Overview

For those of you who have not read our first Working Paper, we have provided an overview in this section. Those more familiar with events may wish to proceed to Section 3 (page 7).

From 1999 POL rolled out an accounting and point of sale system, Horizon, which they depended on to provide an accurate record of all transactions carried

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

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out by SPMs and their staff. Horizon was supplied and, to a degree, managed, by a sub-contractor, Fujitsu. It was a system developed out of a benefits system being developed with the Department for Work and Pensions (DWP) until DWP pulled out.² Evidence suggests difficulties with the system from the beginning.³

Where income to the branch did not match the transactions on Horizon, shortfalls were shown in branch accounts. POL's contracts sought to make the SPMs liable for these shortfalls where they were at fault (e.g. if negligent), although POL treated any shortfall as the SPMs legal responsibility. The design of the system required that the SPMs accept the shortfalls as accurate statements of account to be able to continue trading. POL also insisted SPMs pay POL the shortfall amounts immediately, or sometimes by way of instalments.

Horizon did not have any function for disputing transactions. This omission was a deliberate part of its design, decided by the Post Office.⁴ SPMs could raise concerns or disputes to statements via helplines (the Horizon Helpdesk and the National Business Support Centre), who encouraged SPMs to agree accounts in the interim and allow for any corrections to be made later if there were errors. POL would often seek to enforce shortfalls in these accounts as debts, even where they were disputed in this way, without sufficient investigation. Court judgments suggest investigations of queries and concerns relating to Horizon, frequently raised by SPMs, were inconsistent and often inadequate, if they were conducted at all. POL staff, in particular auditors, and Fujitsu staff were involved in such investigations. Horizon training was limited and did not appear to include any explanation for identifying or handling shortfalls.⁵

Fujitsu recorded Horizon problems, referred through to Fujitsu from the Horizon Helpline, in files known as a PEAKs. Fujitsu's responses to more common problems fed into Known Error Logs (KELs) which recorded a range of problems and bugs in Horizon.⁶ ARQ (audit) data was also available. Evidence suggests that on occasion Fujitsu mischaracterised PEAK records as indicating user-error rather than being unexplained, or potential or actual Horizon errors. There is evidence that this had financial benefits for Fujitsu under their contract with POL, as they avoided contract penalties if errors were user not system-error. The judge in *Bates* (Fraser J) was undecided on whether these financial benefits impacted on the behaviour of staff within Fujitsu.⁷

In England, prosecutions of SPMs for criminal offences said to be evidenced by the Horizon shortfalls were mainly brought by Post Office lawyers. Prosecutions began in 2000 and POL are said to have stopped prosecuting save

² *Bates v Post Office Limited Judgment (No6) "Horizon Issues" [2019] EWHC 3408 [14]*.

³ *Bates No 6 455, Hamilton 96*

⁴ *Bates No 6 300*

⁵ *Bates No 3 104, 142*

⁶ *Hamilton 17*

⁷ *Bates No 6 181, 182, 493*

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in limited circumstances in 2014.⁸ There were an estimated 736 such prosecutions where charges typically included theft, fraud, and false accounting and relied solely or mainly on Horizon data.⁹ In many cases, guilty pleas to false accounting were accepted, with more serious charges (usually of theft) being dropped, or not pursued (e.g. by being left to ‘lie on the file’), following the plea. The more serious charge was typically dropped on the condition that SPMs admitted to covering up shortfalls whilst they sought time to contest or pay them. At least some SPMs allege this ‘covering up’ was based on advice from the helpline. The evidence suggests POL sought to manage prosecution and pleas in ways that limited criticism of Horizon and consistent with maximised recovery of shortfalls. In at least four cases, forgoing criticism of Horizon was a condition of more serious charges against SPMs being dropped.

Problems with Horizon began to be reported by journalists; in particular, Karl Flinders at Computer Weekly published a story in 2009, with MPs acting on complaints, and SPMs becoming organised as the Justice for Sub-Post Masters Alliance in the same year. With political pressure building, an independent review was agreed by POL to be conducted by Second Sight who were appointed in July 2012. A related process of investigation and mediation for former and current SPMs was also brought in part way through the investigation. Second Sight became concerned about obstruction of their investigations by POL, and in turn, POL complained internally about the approach of Second Sight’s investigations and Second Sight seeking to stray beyond, in their view, the remit agreed at the start of the process. Second Sight’s investigation and the mediation scheme was terminated in March/April 2015. POL’s CEO, Paula Vennells and a Second Sight director/partner gave evidence to a Parliamentary Select Committee in February 2015 where Vennells said, “If there had been any miscarriages of justice, it would have been really important to me and the Post Office that we surfaced those.”

SPMs brought the Group litigation (*Bates*) which commenced in 2017. Their claims were for damages for financial loss, personal injury, deceit, duress, unconscionable dealing, harassment, and unjust enrichment arising out of POL’s operation of the Horizon system. The case was hard-fought. POL and Fujitsu’s approach to disclosure was inadequate and their evidence and arguments were subject to severe criticism by the High Court judge hearing the case, Mr Justice Fraser.¹⁰ In particular, disclosure of KELs were denied on a variety of grounds which were false or unwarranted. The existence of PEAK’s was only discovered by the claimants’ expert in 2018, which led to the very late disclosure of these records. Several witnesses were found to have misled the court and been otherwise inadequate; important elements of the Post Office’s case were put which were contradicted by their own witnesses’ evidence; and, serious

⁸ Paula Vennells, ‘Paula Vennells to Darren Jones MP, Chairman of the Business, Energy and Industrial Strategy Select Committee’ (24 June 2020) <<https://committees.parliament.uk/publications/1621/documents/15462/default/>>.

⁹ ‘The Final Reckoning’ <<https://www.postofficetrial.com/2021/04/the-final-reckoning.html>> accessed 14 July 2021.

¹⁰ ‘*Bates & Ors v Post Office Ltd* [2017] EWHC 2844 (QB) (Bates No 1))’ <<https://www.bailii.org/ew/cases/EWHC/QB/2017/2844.html>> accessed 9 July 2021.

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criticisms of the claimants were made, which were not evidenced and should have been if they were to be put properly before the court. The case settled in 2019 before cases were fully adjudicated by the court. The judge referred a file to the Director of Public Prosecutions saying the evidence of some Fujitsu witnesses required investigating.

The *Hamilton* judgment in 2021 dealt with 42 appellants (three brought posthumously¹¹) prosecuted and convicted between 2003 and 2013.¹² Their cases were referred to the Court of Appeal by the Criminal Cases Review Commission (CCRC). The *Hamilton* judgment condemned the approach of POL to investigating and prosecuting 39 of those cases, finding that their approach was an affront to the public conscience. Failures to investigate cases properly and disclosure failings were found to be deliberate.

In criticising the Post Office prosecutions, the Court of Appeal did not need to make findings about who knew what, and when; who may have misled whom; or who was responsible for the corporate and professional failings. They did not need to do so to decide the appeals before them. The evidence shows that certain decisions and information connected with these cases were shared at the Post Office at Board level. The Board includes non-executive directors, including a Government appointee, given POL's sole shareholder is the Secretary of State for Business Energy and Industrial Strategy.

These crucial questions remain without answers; and whilst this report cannot answer them, we conduct an analysis which may assist in shedding more light on the problems the scandal highlights.

3. Criminal Prosecution and Appeal Handling

An estimated 736¹³ SPMs were prosecuted on the basis of Horizon information of whom 59 have so far successfully appealed those convictions. Many more appeals are believed to be pending. The *Hamilton* and *Bates* cases provide a detailed sense of the problems in the investigation, prosecution, and post-prosecution conduct of the cases. The Court of Appeal found that many of the convictions *offended the public conscience*. We can get a good overall sense of why from this paragraph from their judgment:

137. In those circumstances, the failures of investigation and disclosure were in our judgment so egregious as to make the prosecution of any of the "Horizon cases" an affront to the conscience of the court. By representing Horizon as reliable, and refusing to countenance any suggestion to the contrary, POL effectively sought to reverse the burden of proof: it treated what was no more than a shortfall shown by an unreliable accounting system as an incontrovertible loss, and proceeded as if it were for the accused to prove that no such loss had occurred. Denied

¹¹ Julian Wilson, Peter Holmes and Dawn O'Connell

¹² *Hamilton and Others v Post-Office [2021] EWCA Crim 577*.

¹³ ??? <https://www.bbc.co.uk/news/business-56718036>

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any disclosure of material capable of undermining the prosecution case, defendants were inevitably unable to discharge that improper burden. As each prosecution proceeded to its successful conclusion the asserted reliability of Horizon was, on the face of it, reinforced. Defendants were prosecuted, convicted and sentenced on the basis that the Horizon data must be correct, and cash must therefore be missing, when in fact there could be no confidence as to that foundation.

We examine those general and serious failings under the following headings:

- Interviews not conducted fairly or properly;
- Prosecutions in the absence of sufficient and sufficiently robust evidence;
- Failures to investigate reasonable lines of inquiry;
- Improper charging and pressure to plead guilty;
- Failures to disclose;
- Allegedly misleading evidence from Gareth Jenkins;
- The Clarke advices;
- What happened after the Clarke advices; and
- The conduct of the appeals.
- The handling of the independent investigation

A point of general importance, impacting on many of the issues below, was that the investigation and prosecution of SPMs took place against a background of contract implementation, management, and enforcement which Fraser J (in the *Bates* litigation) found oppressive. POL's approach to contracting and enforcing the POL-SPM relationship behaviour, as well as the management of information about Horizon's flaws, provides the context for Horizon-based prosecutions where the power balance was firmly in POL's favour:

appellants understood, and were led by POL to understand, that they were required to make good any shortfall shown by Horizon, whether or not they accepted that there was a genuine shortfall, and whether or not there was any negligence or dishonesty on their part. They further understood, and were led to understand, that they would be liable to be dismissed if they did not do so.¹⁴

¹⁴ *Hamilton* 22

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Typically, what occurred when shortfalls were revealed was that SPMs were required to accept them and make good the shortfall, whether they challenged the shortfall or not. When SPMs reported shortfalls to the relevant helpline, staff on the helpline often advised them to accept the shortfalls and to wait and see if they would be corrected later by way of TCs (Transaction Corrections). When investigations did occur, they sometimes led to Fujitsu staff attributing the problems to user-error in the absence of evidence and sometimes contrary to evidence. Shortfalls, some of which had been pointed out to POL by SPMs themselves, were sometimes followed by audits. It was those audits that led to other actions including investigatory interview (although these were not consistently interviews under caution); termination and suspension; and prosecution. Alleged shortfalls threatened first the SPM's finances, then their livelihoods (the ability to continue to trade), then their reputations and liberty, without an adequate legal and evidential basis.

3.1. Interviews not conducted fairly or properly

POL has indicated that interviews that it conducts and has conducted under caution are carried out and conducted within the provisions of Code C of the Police and Criminal Evidence Act (PACE).¹⁵ However, interview practice appears to have been inconsistent; making it unclear to us whether interviews that commonly led to prosecutions were properly treated as investigatory interviews subject to PACE requirements. There are various suggestions that interviews were conducted improperly or unfairly. Examples included:

- Accompaniment and representation being limited unreasonably. For example, Mr Abdulla (SPM) was told that if he attended an interview he “may be accompanied at the interview by a friend, who must be a Royal Mail employee, a registered Sub Office Assistant, or a Sub-postmaster, who may also be a representative of the National Federation of Sub-postmasters.”¹⁶ Given the potential for interviews to lead to prosecutions, there needed to be freedom for an SPM to bring a legal representative of their own choosing. This would be a legal obligation if the interview was conducted under PACE. There is also the potential for any Post Office solicitors relying on such interviews to be party to the taking of unfair advantage of the SPMs.¹⁷
- There were occasions when interviewers were either under-prepared, mislead interviewees, or were given inadequate information. A transcript

¹⁵ ‘FOI Request FOI2018/00566, POL Response 10 December 2018’; Vennells (n 8); Justice Select Committee, ‘Oral Evidence: Private Prosecutions: Safeguards, HC 248 Tuesday 25 May 2021 Ordered by the House of Commons to Be Published on Tuesday 25 May 2021.’ <<https://committees.parliament.uk/oralevidence/2245/pdf/>>.

¹⁶ *Bates* No 3 256

¹⁷ Currently Para 1.1 SRA Code of Conduct. Analogous duties are in earlier versions of the Code, although further work is needed to establish whether similar obligations cover the entirety of the relevant period.

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of one interview shows the interviewer stating there were no TCs (Transaction corrections) when there were,¹⁸ even when specifically challenged by the SPM being interviewed.¹⁹ They seem to have done so believing there were none.²⁰

- A more general problem was the assertion in audits and interviews (and helpline calls) that the SPMs were the only ones experiencing Horizon problems. For example, following her suspension based on a Horizon indicated shortfall Deirdre Connolly, one of the SPMs, was told by a POL investigator that she was the only person having problems with Horizon.²¹
- Admissions were extracted under pressure to admit errors, with the alternative being facing charges of theft.²² In Mr Abdulla's interview, for example, he was told "I've got two choices here I either call it an error or I say its's theft."²³
- Interview questioning strategies were lacking in fairness, objectivity, and forensic utility, e.g. being conducted in a way designed to require the interviewee to prove a negative. Tracey Felstead's interview, "under caution by two of POL's investigators at Peckham Police Station," included being asked, "can you demonstrate how you did not steal the money?" and, whether she could satisfy the officers that she did not have "any responsibility for the missing eleven thousand". The Court of Appeal noted, "that these questions in essence asked Ms Felstead to prove that she did not commit a crime."²⁴

Second Sight's investigations suggested, "With the exception of any interview conducted in accordance with the Police and Criminal Evidence Act (1984) we note that the interviewee is not allowed to be legally represented, although Post Office says that they may be accompanied by a 'friend'."²⁵ And that policy and practice on what such friends could do might have contradicted each other.²⁶ They also suggested interviews were carried out to extract admissions rather than investigate the true reasons for shortfalls.²⁷

¹⁸ *Bates* No 3 258

¹⁹ *Bates* No 3 259

²⁰ *Bates* No 3 259

²¹ <https://www.postofficetrial.com/2019/08/post-office-vs-mental-health-its-been.html>

²² *Bates* No 3 260

²³ *Bates* No 3 260

²⁴ *Hamilton* 185

²⁵ Second Sight, 'Initial Complaint Review and Mediation Scheme: Briefing Report - Part Two' (2015) para 25.4.

²⁶ *ibid* 25.5-25.8.

²⁷ *ibid* 25.9.-25.10.

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Even if POL had not accepted they were bound by PACE requirements, the Private Prosecutors' Association (PPA) Code for Private Prosecutors Conduct, a voluntary code indicating best practice standards which binds its members,²⁸ indicates:

3.2.1 Investigations by and for private prosecutors should be conducted impartially, objectively and independently.

3.2.2 In conducting an investigation, the investigator should comply with paragraph 3.5 of the CPIA Code of Practice:

"In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide which material on the computer it is reasonable to inquire into, and in what manner."

The Code indicates that interviews with suspects, "should comply with the PACE Codes of Practice to the extent that they are applicable." (para. 3.5.1)

3.2. Prosecutions in absence of sufficient and sufficiently robust evidence

In all, or almost all, of the cases successfully appealed in *Hamilton*, POL could not provide any proof of an actual loss beyond Horizon data itself. A terse passage repeated regularly by the Court of Appeal illustrates this:²⁹

It appears there was no evidence to corroborate the Horizon evidence. There was no investigation into the integrity of the Horizon figures. There was no proof of an actual loss as opposed to a Horizon-generated shortfall.

In several cases, POL's own investigators had pointed to a lack of critical evidence.³⁰ Typically there was no evidence of dishonesty, bar the alleged shortfall itself. Second Sight wrote to the BIS Parliamentary Select Committee with an example:³¹

3.2. The following represents anonymised extracts from a single complete legal file held by Post Office, regarding a case that has

²⁸ It is not known if POL are a member of the Association.

²⁹ *Hamilton* 261

³⁰ E.g. *Hamilton* 259

³¹ Ian Henderson, 'Written Evidence Submitted by Second Sight Support Services Ltd (POH0028): BRIEFING NOTE TO BIS Select Committee' (June 2020) <<https://committees.parliament.uk/writtenevidence/6580/html/>> accessed 8 July 2021.

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been accepted for Mediation. This case involved a charge of Theft that was withdrawn at trial. "REDACTED" represents the name of the former Sub-postmaster.

a) On 17 May 2006 the Post Office Investigator reported:

Having analysed the Horizon printouts and accounting documentation

I was unable to find any evidence of theft or that the cash figures had been deliberately inflated." (My emphasis)

...

The prepared statement seems to intimate that she didn't receive adequate training at the time and that the manuals were old and out of date. It also suggests that she didn't receive any training in respect of other matters.

It also refers to an alleged £1,500 error, which doubled to £3,000 when attempts were made to correct it and another error of £750. No dates are supplied in respect of these alleged errors. It also suggests that 'The Post Office systems are shambolic' and details alleged problems encountered. It states that all staff use the same Horizon user name, again citing lack of training as the reason for this.

...

In my opinion, this indicates that a charge of Theft would be likely to fail, because Post Office's own Investigator found no evidence to support such a charge. In addition, the admitted password sharing created a situation where it was not possible to link any loss or theft to a named individual, an essential element in proving a charge of Theft. No more detailed investigation was ever carried out by Post Office.

b) On 26 June 2006 the Principal Lawyer of the Criminal Law Division of Royal Mail (the Prosecuting Authority on behalf of Post Office at the time) stated:

"In my opinion the evidence gave rise to offences of theft / false accounting"

c) On 15 November 2007 the Principal Lawyer of the Criminal Law Division of Royal Mail advised:

"As you know there has been some discussion as to whether or not pleas to false accounting would be acceptable. I note this would be agreeable providing that REDACTED were to repay the full amount."

d) REDACTED was subsequently charged with 1 count of Theft and 14 charges of False Accounting

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e) On 16 November 2007 the Principal Lawyer of the Criminal Law Division of Royal Mail stated:

"I have forwarded the memo to Counsel. I have informed him that whilst there is no outright objection to proceeding with False Accounting, there is a concern as to recovery of Money. We have to date been able to recover where False Accounting only is charged though on one or two cases the Defence will argue against. Whilst a plea to Theft would be preferable, in the event of non-payment the intent would be to proceed to confiscation."

f) The forwarded memo stated:

"I am never confident with False accounting charges in relation to recovery under POCA 2002 and the theft charge makes life so much easier. The defendant has General Criminal Conduct under the proposed charges and this would be so with just the false accounting however we have been challenged once before when proceeding to POCA where only false accounting was charged, and I would probable be more inclined to except Particular Criminal Conduct when dealing with confiscation in that scenario. I fully understand the balance of cost in court time against recovery and if the charge of theft was dropped for a guilty plea then I would still believe it appropriate to follow to confiscation..."

g) On 19 November 2007 REDACTED pleaded guilty to 14 counts of False Accounting. The Prosecution agreed to leave the count of Theft on file, providing prompt repayment of the losses by REDACTED was made.

A letter dated 19 November 2007 from the Principal Lawyer of the Criminal Law Division of Royal Mail stated:

"it has been made clear to the Defence that there must be some recognition that the Defendant had the money short of theft and that a plea on the basis that the loss was due to the computer not working properly will not be accepted." (My emphasis)

Mr. Henderson, a director of Second Sight, goes on to suggest that the approach breaches "CPS" Guidance to Prosecutors in that, amongst other things, "the Prosecution knew that there was insufficient evidence to support a charge of theft, but proceeded with it nonetheless." Under the Private Prosecutors' Association (PPA) Code, "The prosecuting solicitor and any counsel instructed

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must be satisfied that the facts alleged amount to a prima facie case and that they are or will be supported by evidence.”³²

The note also reveals lines of defence which would have raised disclosure and investigative obligations.

3.3. Failures to investigate reasonable lines of inquiry

A central plank of the CCRC referral to the Court of Appeal was that, “the level of investigation by POL into the causes of apparent shortfalls was poor, and that the Post Office applicants were at a significant disadvantage in seeking to undertake their own enquiries into such shortfalls.”³³

Hamilton reveals there were many cases where SPMs raised lines of defence querying or challenging Horizon. At least 13 SPMs in *Hamilton* had raised concerns about Horizon prior to being investigated, through calls to the helpline, calls to the National Business Support Centre, queries raised with their Contracts Manager, or correspondence during audits. Many more SPMs raised concerns about Horizon during investigative interviews and once prosecutions had begun. The evidence is that these challenges/defences were typically not investigated. For example:

- Of Julian Wilson (appealing posthumously), the Court of Appeal said, “there is nothing to suggest any ARQ [Audit] data was obtained. POL did not investigate any of the criticisms of Horizon made by Mr Wilson historically and during his detailed interview. There was no evidence to corroborate the Horizon evidence. There was no proof of an actual loss as opposed to a Horizon-generated shortage.”³⁴
- Mr Abdulla’s explanations for errors do not appear to have been investigated even though the person dealing with his appeal against termination of his appointment as an SPM indicates he has investigated in some way.³⁵ There is a suggestion by the judge that the appeal may have been prejudged.³⁶
- POL ignored collateral witnesses and evidence in Mrs Howard’s case:³⁷ “There was no investigation into the matters raised by Mrs Howard in interview. There was no examination of the numerous calls that she had

³² Para. 5.1.1

³³ *Hamilton* 57

³⁴ *Hamilton* 177

³⁵ *Bates* No 3 264

³⁶ *Bates* No 3 265

³⁷ *Hamilton* 345

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made to the Helpline. None of the other staff at the branch was interviewed.”

- There was a lack of ‘where the funds went’ evidence [e.g. extravagant spending or debts to be paid off] to support allegations of theft, e.g. Mrs Henderson’s case.³⁸

One of the explanations for failures to properly investigate may have been incompetence in the investigative team. Mrs Dickinson, security team leader at the POL,³⁹ was criticised during *Bates* for a lack of key knowledge about how Horizon and the terminals used in the system worked.⁴⁰

Such failures to investigate sometimes were marked by further red flags, which might have indicated a need to investigate to a reasonable prosecutor, such as shortfalls and audits taking place immediately after events associated with Horizon problems, such as the installation of ATM⁴¹ and the shift to Horizon online.⁴² Similarly, evidence of SPMs making good alleged losses or bringing shortfalls to POL’s attention, which might indicate good faith, were ignored with dishonesty nonetheless being asserted.⁴³

Beyond possible incompetence, some insight into the way lines of defence were dismissed is indicated by an attendance note in July 2010 relating to the appellant Rubina Shaheen. It contained a complaint that, “she is using solicitors who have jumped on the Horizon bandwagon.”⁴⁴ And showed the need to prosecute successfully was, at least sometimes, seen as existential for the organisation. A POL lawyer’s attendance note records:⁴⁵

However, it is absolutely vital that we win as a failure could bring the whole of the Royal Mail system down. Counsel’s concerns is that juries will still believe in conspiracies and there don’t need to be many people on the jury who do believe in conspiracy for us to have a problem.”

An October 2010 memo from, “a senior lawyer in POL’s Criminal Law Division reported the successful prosecution of Seema Misra,” as, “an unprecedented attack on the Horizon system” which, “the prosecution team had been able to ‘destroy’, and s/he hoped, that ‘the case will set a marker to dissuade other defendants from jumping on the Horizon bashing bandwagon.’”⁴⁶

³⁸ *Hamilton* 159

³⁹ *Bates* No 3 452

⁴⁰ *Bates* No 3 460

⁴¹ *Hamilton* 239

⁴² *Hamilton* 258

⁴³ For example, *Hamilton* 263-264

⁴⁴ *Hamilton* 93.i

⁴⁵ *Hamilton* 93

⁴⁶ *Hamilton* 91.iii

There might be interpreted as evidence of a less than professionally disinterested approach to winning and reporting on cases. It would be interesting to understand why the attack was described as unprecedented. Was the lawyer unaware of the volume and nature of complaints against Horizon made generally? This seems unlikely. Simon Clarke's advice picked up on the pervasiveness of such defences (see below). The memo may well be referring to the fact that, unusually, and what may have been for the first time, the case had proceeded to a full defence with expert evidence.⁴⁷

3.4. Improper charging and pressure to plead guilty

Concessions made by POL at the *Hamilton* appeal and the Court of Appeal's findings indicate serious criticism of the following approaches to prosecution and plea, which were variously described as "unacceptable", "irrational", "improper", and evidence of undue pressure:⁴⁸

- In the absence of evidence of theft, POL held, "open the threat of the theft charge," as leverage in plea deals.⁴⁹ They did this even where the absence of evidence of dishonesty was reported by POL's own investigators. SPMs have stated that they pleaded guilty to avoid the theft charge against them, which was often dropped when they pleaded guilty to false accounting.⁵⁰ Of the 20 appellants in *Hamilton* who pleaded guilty to false accounting only, at least 14 had initially also been charged with theft or attempted theft and at least one had initially also initially been charged with fraud. The fact that defendants felt pressure to plead guilty was problematic for defendants in individual cases but also the body of cases more widely, since pleading guilty meant cases avoided full scrutiny in court. Had it occurred in more cases, this may have brought issues with Horizon to light earlier.
- Holding the theft charge open as leverage goes against the Code for Crown Prosecutors, "Prosecutors should never proceed with more charges than are necessary just to encourage a defendant to plead guilty to a few" and "should never proceed with a more serious charge just to encourage a defendant to plead guilty to a less serious one."⁵¹ Although private prosecutors are not legally obliged to follow the Code for Crown Prosecutors, POL lawyers indicated they did follow the Code in reassuring their own CEO about prosecution

⁴⁷ See the discussion of Mr Butoy's case below for an earlier case.

⁴⁸ *Hamilton* 115

⁴⁹ *Hamilton* 114

⁵⁰ For example, see the case of Rubbina Shaheen who pleaded guilty to ensure a theft charge against her was dropped <https://www.bbc.co.uk/news/uk-england-50747143>.

⁵¹ <https://www.cps.gov.uk/publication/code-crown-prosecutors>

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policy⁵² and in liaising with the CCRC.⁵³ The PPA Code notes a prosecutor, “must conduct his case moderately, albeit firmly. [And....]

must observe the highest standards of integrity, of regard for the public interest and duty to act as a minister of justice (as described by Farquharson LJ) in preference to the interests of the client who has instructed them to bring the prosecution.’⁵⁴

- In some cases it seems POL threatened to pursue charges of theft (despite not having evidence to substantiate them) because defendants did not admit that they had “had the money short of theft” as part of the basis on which the case would be sentenced.⁵⁵
- In at least 4 cases, POL threatened to hold open charges of theft (despite not having evidence to substantiate them) if defendants did not agree to forego criticism of Horizon.⁵⁶ Where theft was not directly provable and the shortfall may not have been a real loss, seeking to prevent criticism of Horizon in mitigation of the charges plead guilty to was improper, as noted in *Hamilton*.⁵⁷ Dropping a theft charge, should have prevented POL advancing a case that the Defendant had stolen money, and “should have left the way open to [the Defendant] to suggest that there was no actual loss and she had only covered up a shortfall Horizon had created.”⁵⁸
- Conditioning the dropping of theft charges on repayment of alleged shortfalls placed undue pressure on SPMs, and suggested POL was using the prosecution process to enforce repayment.⁵⁹

POL’s financial interest is plainly an important element explaining their behaviour. Discussing the case of the lead appellant, Josephine Hamilton, POL conceded that the approach to pleas, “lends itself not only to the allegation that the condition of repayment in return for the dropping of theft placed undue pressure on Ms. Hamilton, but also more widely that POL was using the

⁵² Vennells (n 8).

⁵³ Justice Select Committee (n 15).

⁵⁴ Private Prosecutors’ Association Code for Private Prosecutors, paras. 9.2.1 and 9.2.2 citing *R v Zinga* [2014] 1 Cr. App. R. 27

⁵⁶ *Hamilton* 116 and 117

⁵⁷ *Hamilton* 114 and 146

⁵⁸ *Hamilton* 162

⁵⁹ *Hamilton* 114

prosecution process to enforce repayment.”⁶⁰ The Court of Appeal agreed that this was the impression given,⁶¹ yet were, “not persuaded by submissions that POL had an *improper* financial motivation for pursuing prosecutions with a view to obtaining confiscation or compensation orders” (*our emphasis*).⁶² The implication appears to be that they accepted POL’s Counsel’s submission that it *can be* legitimate for a prosecutor to consider the possibility of confiscation proceedings (relying on *R (Kombou) v Wood Green Crown Court* [2020] 2 Cr App R 28),⁶³ without deciding whether it was or was not an improper motivation in this case. They did not need to decide whether it was an improper motivation to deal with the appeals.

As a result, the Court of Appeal decision does not grapple fully with the influence of economic self-interest on the public interest obligations of POL as a private prosecutor. They confined themselves to noting suggestions of influence and finding the behaviour itself, such as pleas on the basis the defendant had the money, improper. Perhaps their point is that the motivation was not improper in the eyes of this court but the behaviour that manifested was. The potential importance of financial motivations also appears in the *Bates* judgment. There Fraser J notes the financial incentives when Fujitsu downgraded PEAKs to ‘user-error’. Fraser J does not conclude that these influences *necessarily* led to the decisions by all those involved but it is one factor discussed by him as possibly relevant.⁶⁴

3.5. Failures to disclose

A central plank of the CCRC referral to the Court of Appeal was that, “POL failed to disclose the full and accurate position regarding the reliability of Horizon.”⁶⁵ Whilst prosecuting, they were under an obligation to, “disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused” under the Criminal Procedure and Investigations Act 1996 (CPIA). Under the same statute, post-conviction prosecutors must disclose material that comes to light that casts doubt upon the safety of the conviction, and all criminal investigators and prosecutors are obliged to properly maintain and retain disclosure records.⁶⁶

⁶⁰ *Hamilton* 114.

⁶¹ *Hamilton* 147

⁶² *Hamilton* 136

⁶³ *Hamilton* 111

⁶⁴ *Bates No 6* 182

⁶⁵ *Hamilton* 57

⁶⁶ *Hamilton* 60 and 61. See also Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003.

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62. Section 23 of the CPIA requires the Secretary of State to prepare a code of practice containing provisions designed to secure, amongst other things –

“(a) that where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued;

(b) that information which is obtained in the course of a criminal investigation and may be relevant to the investigation is recorded;

(c) that any record of such information is retained;

(d) that any other material which is obtained in the course of a criminal investigation and may be relevant to the investigation is retained ...”

These obligations, the Court of Appeal decided, were not met, and on occasion were not met deliberately. Failures to disclose noted by the Court in Hamilton were:

- ARQ [audit] data was sometimes obtained by POL but often was not and sometimes only limited ARQ data were obtained, even where it was obtained it was not apparent that it, or all of it that was relevant, had been disclosed.⁶⁷
- Where disclosure requests were made, and even when problems with Horizon were expressed in the defence statement, no disclosure of Horizon difficulties was made.⁶⁸
- Horizon difficulties were not investigated through interrogation Horizon data when raised by defendants as part of their case.⁶⁹
- Specific matters material to the defendant’s branch were not disclosed. In the case of Margery Williams, the SPM who took over from her also suffered problems with balancing the accounts. There were emails from that SPM to POL about problems with Horizon, that the court notes “do not appear” to have been disclosed to Mrs Williams.⁷⁰ Similarly, in the case of Ian Warren, there continued to be financial irregularities after a new SPM took over from Mr

⁶⁷ *Hamilton* 144 (Hamilton), 151 (Thomas), 166 (Hall), 207 (Misra), 219 (Ishaq) ARQ data provided to the defence; 251 (Buffrey), 253 (Gill), 260 (Capon), 264 (Parekh), 298 (Sayer).

⁶⁸ *Hamilton* 181

⁶⁹ *Hamilton* 182

⁷⁰ *Hamilton* 316.

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Warren, but it is not clear that the existence of those irregularities was disclosed.⁷¹

- As far as we can tell no evidence that PEAKs or KELs had been disclosed in any civil litigation or criminal prosecution.⁷² The *Bates No 6* decision showed the materiality of these documents.
- The ability of Fujitsu to amend Horizon data in branch without the knowledge of the SPM was not disclosed until late in the High Court litigation.⁷³ One such instance of remote access was acknowledged to have occurred in or around 17 October 2012.⁷⁴
- In relation to the prosecution of Seema Misra, “a defence request for disclosure of Horizon data was met with objections based upon the cost of obtaining such information from Fujitsu.” The Court of Appeal criticised this as resistance on grounds of cost and convenience, not law.⁷⁵
- In 2010, disclosure of one item was prevented by POL’s disclosure officer on the case on the basis that it was sensitive, “relating to integrity of Horizon system, supplied with accompanying letter by defendant”. That sensitivity was said to be because it “Could be used as mitigation, i.e. to blame Horizon system for loss.” The court viewed the failure as “plainly wrong” whether or not the defendant was actually prejudiced in that case, because such a “serious error” lay uncorrected by anyone supervising the disclosure officer.⁷⁶
- Advice from Martin Smith of Cartwright King to Jarnail Singh, said, “that he would instruct to tell the Crown Court that Horizon works perfectly. That email was sent long after Jarnail Singh, POLs senior criminal lawyer, was aware of the problems with a receipts and payments mismatch bug.”⁷⁷ We discuss this receipts and payments mismatch bug in the next section.
- In 2 November 2010, “a legal executive reported that he had asked the defence solicitors if they intended to serve any expert evidence, but had not mentioned Seema Misra's case to them: “They can find that out for themselves.”⁷⁸ It is possible this indicates a reluctance

⁷¹ *Hamilton* 326.

⁷² *Hamilton* 18

⁷³ *Hamilton* 16

⁷⁴ *Bates* No 3 542

⁷⁵ *Hamilton* 91

⁷⁶ *Hamilton* 91ii

⁷⁷ Tim Moloney QC, *Hamilton Transcripts*

⁷⁸ *Hamilton* 93ii

to disclose the problems with the Receipts and Payments Mismatch bug and the Jenkins evidential problems, which we discuss below. It also suggests a failure to proactively and professionally consider prosecution disclosure obligations, instead waiting for defence lawyers to challenge and push them on disclosure.

We are aware of other reports that it appears were not disclosed in criminal proceedings and which may be relevant, such as the Ernst & Young management letter that raised concerns over “privileged access rights” in 2011 and the Detica BAE System report on 1 October 2013 on “Fraud and Non-conformance in the Post Office” which is said to have raised serious concerns about Horizon and was commissioned by POL’s then General Counsel and their Head of Security.⁷⁹

3.5.1. Seema Misra’s trial and the RPM bug

Seema Misra’s case was amongst the first where expert evidence was commissioned by the defence to challenge the workings of the Horizon system at trial.⁸⁰ As noted above, POL staff referred to her lawyers making an “unprecedented” attack on Horizon. The defence sought unsuccessfully to stay the case based on lack of disclosure at the opening of and during the trial as well as applying prior to the trial for proper disclosure. The judge declined these applications. Her original trial had been aborted in May 2009 when she raised issues of Horizon reliability after which numerous disclosure requests followed.⁸¹ Seema Misra’s eventual trial took place at a time when the evidence showed disclosure about Horizon evidence was giving rise to some sensitivity. Computer Weekly had run a story criticising Horizon, and two MPs had been making representations to the relevant Government Minister on behalf of constituents.⁸² We can see this from two documents.

The first is a report on Horizon’s integrity, in August 2010, prepared by POL’s Head of Product and Branch Accounting (Rod Ismay). It was copied to, inter alia, POL’s Head of Criminal Law. It stated that Horizon was robust. On cases which had attracted adverse comment it said, “we remain satisfied that this money was missing due to theft in the branch”. Successful prosecution was treated as evidence in support of this.⁸³ The report considered, “the merits of an independent review, not because of any doubt about Horizon but to help give

⁷⁹ ‘Complaint to the Parliamentary and Health Service Ombudsman (The “Ombudsman”) Submitted on Behalf of the Justice For Sub-postmasters Alliance (The “JFSA”), December 2020’ (2020) <https://www.jfsa.org.uk/uploads/5/4/3/1/54312921/jfsa_complaint_to_parliamentary_ombudsman_1_december_2020.pdf>.

⁸⁰ At least 4 cases involved defence expert evidence: Butoy, Graham, Misra, and Thompson. Mr Butoy’s case appears to predate Mrs Misra’s

⁸¹ Hamilton 200

⁸² *Hamilton* 23

⁸³ *Hamilton* 24

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others “the same confidence that we have”.⁸⁴ A review was rejected with this warning given by the report’s author:⁸⁵

“It is also important to be crystal clear about any review if one were commissioned – any investigation would need to be disclosed in court. Although we would be doing the review to comfort others, any perception that POL doubts its own systems would mean that all criminal prosecutions would have to be stayed. It would also beg a question for the Court of Appeal over past prosecutions and imprisonments.”

One might have thought, an independent and objective prosecutor would see that this report meant that thinking about and deciding not to conduct a review because it would give rise to disclosure obligation was something which ought to be disclosed. The Ismay report creates the problem it seeks to avoid. We have seen no indication that it was disclosed or even considered for disclosure.

The second document refers to a “Receipts /Payments Mismatch issue notes” meeting dated October 2010. This appears to have taken place a few days before the Seema Misra trial. In the context of the Bates litigation, Fraser J described it as, “a most disturbing document... concerning the accuracy of Horizon,” revealing a problem which, “If widely known could cause a loss of confidence in the Horizon System by branches,” as well as having, “Potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data,” and, “It could provide branches ammunition to blame Horizon for future discrepancies.”⁸⁶

The meeting, as far as we know, did not involve lawyers but did involve staff from both Fujitsu and POL. Those attending discussed the disclosure of the bug to SPMs affected by it (these were not SPMs being prosecuted). The bug would not have been apparent to SPMs at counter but led to potential shortfalls on their accounts. Meeting attendees explicitly canvassed not letting SPMs know of the problem partly on the basis that knowledge of the bug had the potential to impact on legal cases where Horizon’s integrity was being disputed. Solutions canvassed at the meeting included imposing losses on SPMs without them knowing about the bug; that is, imposing fake losses on innocent SPMs. Altering Horizon accounts remotely to correct for losses was considered but this risked alerting SPMs to the fact their data could be altered remotely without their knowledge (something POL denied the ability to do until 2019).

It is clear this note comes to the attention of the criminal law team within POL. Mr Justice Picken in the Hamilton final hearing refers to an email of 8 October 2010 to members of the POL legal team, about, “repercussions in future prosecuted cases and on the integrity of Horizon on our system.”⁸⁷ Rob Wilson (Head of the Criminal team at the time) and Mr Jamail Singh, “who was very

⁸⁴ *Hamilton* 24

⁸⁵ *Hamilton* 24

⁸⁶ *Bates No 6 429*

⁸⁷ Mr Justice Picken in the *Hamilton Transcripts*

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prominent within the prosecutions of the sub-postmasters all the way through the prosecutions” were sent the email.⁸⁸ Counsel for one group of Appellants, Mr Moloney QC claims this shows,⁸⁹

“at the higher level, which involved all the heads of department, the concern about how this might affect prosecutions, how it might affect branches, how it might affect civil actions. We then see it move down and the same concerns reflected in within the criminal prosecutions department, as evidenced by the contents of the email that my Lord has just alighted.”⁹⁰

It is worth emphasising that in Seema Misra’s case, her lawyers sought to halt the trial because requests for disclosure had not been met and, according to the evidence given by Mr Jenkins in the trial itself, it appears it may have been the first where he gave evidence on a substantial challenge to the system using expert evidence; so there were internal and external reasons for focusing POL’s minds on disclosure and yet disclosure did not happen.

Seema Misra’s trial began on 11 October 2010, three days after the email. Material relating to the receipts and payments mismatch bug was not disclosed to her lawyers indeed was not considered for disclosure. POL’s counsel in *Hamilton* conceded it should have been, despite having been discussed at a meeting only days before the trial.⁹¹ This failure to disclose is discussed by the Court of Appeal in these terms:⁹²

...Although it was only a matter of days before her trial that discussions about the issue had taken place – and a report by Mr Jenkins proposing a fix had been written – there is no information to suggest that the RPM bug was considered for disclosure, and it was not disclosed to the defence. The bug only appeared in Horizon Online in 2010 and did not have an impact on Legacy Horizon, which was the version of the system in issue in Mrs Misra’s trial. Nevertheless, POL has properly conceded that it ought to have been considered for disclosure – and indeed disclosed – in Mrs Misra’s trial where issues of Horizon reliability were involved. Why disclosure was so important

On disclosure more generally, the Court of Appeal concluded:⁹³

It was POL’s clear duty to investigate all reasonable lines of enquiry, to consider disclosure and to make disclosure to the appellants of anything which might reasonably be considered to undermine its case. Yet it does not appear that POL adequately considered or made relevant disclosure of problems with or

⁸⁸ *Hamilton* Hearing Transcripts, Moloney

⁸⁹ *Hamilton* Hearing Transcripts, Moloney

⁹⁰ *Hamilton* Hearing Transcripts, Moloney

⁹¹ Altman QC in *Hamilton* Hearing Transcripts

⁹² *Hamilton* 206

⁹³ *Hamilton* 122

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concerns about Horizon in any of the cases at any point during that period. On the contrary, it consistently asserted that Horizon was robust and reliable. Nor does it appear that any attempt was made to investigate the assertions of SPMs that there must be a problem with Horizon. The consistent failure of POL to be open and honest about the issues affecting Horizon can in our view only be explained by a strong reluctance to say or do anything which might lead to other SPMs knowing about those issues. Those concerned with prosecutions of SPMs clearly wished to be able to maintain the assertion that Horizon data was accurate, and effectively steamrolled over any SPM who sought to challenge its accuracy.

Inadequate disclosure was absolutely central to the prosecution's failings, in and of itself, but also because POL's approach to it effectively reversed the burden of proof and did so for offences of dishonesty.⁹⁴

The appellants were denied the material which could have been used to question that assertion. They were, moreover, in the very difficult position of being charged with offences of dishonesty committed in breach of their employer's trust. They are likely to have been advised that imprisonment is very often imposed for such offences, and that the mitigation which would be available to them if they pleaded guilty could therefore be of particular importance. Many may well have felt that they had no real alternative but to plead guilty on the most favourable basis which could be agreed with POL.

In justifying a finding on Ground 2, that the prosecutions successfully appealed were an affront to the public conscience and/or conscience of the court to prosecute at all, failures to disclose and failures to investigate properly were described as deliberate in the *Hamilton* judgment.⁹⁵ The court agreed that, "these are not cases of 'simple' non-disclosure," given, "institutional reluctance on the part of POL to investigate and disclose anything which would or could compromise the perceived integrity of Horizon."⁹⁶ The court comes close to saying the decisions were taken in bad faith, without deciding that:⁹⁷

Moreover, whilst it is not necessary for an accused who relies on category 2 abuse to prove that the prosecutor acted in bad faith, we are troubled by contemporaneous internal documents in which POL expressed concern that disclosure in one case of problems with Horizon could have an impact on other cases.

They also emphasise they are attributing blame to POL as an organisation rather than making findings about what individuals did or believed.⁹⁸

⁹⁴ *Hamilton* 125

⁹⁵ *Hamilton* 129

⁹⁶ *Hamilton* 95

⁹⁷ *Hamilton* 135

⁹⁸ *Hamilton* 136

3.6. Allegedly misleading evidence from Gareth Jenkins

The Court of Appeal noted one further problem of particular importance. Mr Gareth Jenkins, of Fujitsu, gave written or oral evidence in several criminal cases, including at Seema Misra's trial.⁹⁹ Information from him also features heavily, albeit without him having given evidence himself, in other witnesses evidence produced by POL in the *Bates* case.¹⁰⁰

Mrs Misra's defence relied, in part, on her own expert evidence suggesting that Horizon faults may have caused some of her shortfalls.¹⁰¹ Gareth Jenkins' evidence was also instrumental in another SPM's (Mr Ishaq's) case: "The fact that Mr Jenkins provided witness statements in itself suggests that POL did not disclose the full and accurate position regarding the reliability of Horizon."¹⁰² In another SPM's (Mr Butoy's) case, "Fujitsu employees attested to Horizon's reliability. Ultimately, the issue of Horizon's unreliability was not pursued at trial – possibly because the defence experts had struggled to understand the Horizon system."¹⁰³

Mr Jenkins' evidence is not the only focus of concern. In a civil case, Lee Castleton's case,¹⁰⁴ another employee of Fujitsu, Anne Chambers gave evidence. After the last Bates judgment, Fraser J wrote confidentially to the Director of Public Prosecutions, saying:¹⁰⁵

in order to give fully truthful evidence to the court... namely the prosecution of Mrs Misra and the civil claim against Mr [Lee] Castleton, both Mr Jenkins and Mrs Chambers respectively should have told the court of the widespread impact of (at the very least) the bugs, errors and defects in Horizon that they knew about at the time that they gave their evidence.

The Court of Appeal pay attention to this issue by saying this,¹⁰⁶ "It is not necessary for us to decide whether any POL or Fujitsu witness deliberately lied in a witness statement or oral testimony, or was "economical with the truth", because they have sufficient basis to find Ground 2 made out.

⁹⁹ *Bates* No 6 77. Altman QC submits in the Hamilton hearings that Jenkins gave oral evidence only once. In two other cases he provided witness statements and he provided statements in relation to eight other individuals.

¹⁰⁰ See our first Working Paper, Moorhead et al (2021) *Issues arising in the conduct of the Bates Litigation*, <https://evidencebasedjustice.exeter.ac.uk/current-research-data/post-office-project/>.

¹⁰¹ HN

¹⁰² *Hamilton*

¹⁰³ *Hamilton* 336

¹⁰⁴ 'Post Office Ltd v Castleton [2007] EWHC 5 (QB) (22 January 2007)' <<https://www.bailii.org/ew/cases/EWHC/QB/2007/5.html>> accessed 21 July 2021.

¹⁰⁵ 'Fujitsu Staff under Criminal Investigation Named' <<https://www.postofficetrial.com/2020/11/fujitsu-staff-under-criminal.html>> accessed 27 July 2021.

¹⁰⁶ *Hamilton* 134

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It is worth noting, that the *Hamilton judgment* also points to an instance of concern in a renewed application for appeal before the Court of Appeal, *R v Butoy* [2018] EWCA Crim 2535. In that case, “There was a detailed investigation into Horizon, including securing the ARQ data, but there was no disclosure of what is now known about Horizon's unreliability as determined by Fraser J. On the contrary, there was an agreed fact which attested to the reliability of the Horizon system.”¹⁰⁷ This too may indicate a concern that the court was misled.

We can get a closer sense of the problems, and what POL was told about them in 2013, from the Clarke Advices.

3.7. The Clarke advices

Mr. Clarke was a Barrister working for a solicitors' firm Cartwright King. The firm was instructed by POL in 2013 “to advise on the impact of Horizon issues and to protect the reputation of Post Office Limited.”¹⁰⁸ We notice the juxtaposition of prosecutorial obligations and POL's reputation and query whether it was appropriate to give, and to accept, such instructions given the need for independence and fairness in reviewing prosecutions.

Advice given by him in July 2013 was disclosed in November 2020 in the course of the Hamilton proceedings.¹⁰⁹

Counsel for POL indicated to the Court of Appeal that the Clarke advice “came into being” because of Second Sight's interim report dated 8 July 2013 which raised concerns about various matters including Horizon bugs. “It had come to the attention of Mr Clarke and his solicitor, at Cartwright King, that it was Gareth Jenkins that had given Second Sight [information about bugs].” Mr Clarke wrote one advice on the 15 July, reporting on the Receipts and Payments Mismatch bug and the local suspense bug. His advice noted convictions where defences expressly or implicitly asserted Horizon failures and pleas from SPMs to false accounting or fraud who said, “that they had been covering up inexplicable losses.”¹¹⁰ Frequent complaints about deficient training and customer support were also noted. He noted too that Gareth Jenkins, of Fujitsu, had provided expert evidence in various cases on the robustness and integrity of Horizon,¹¹¹ and observed that:

Mr Jenkins had ended most of those statements as follows:

¹⁰⁷ *Hamilton* 339

¹⁰⁸ Letter from Mr Cash to Susan Crichton and Hugh Firmington 2 August 2013, referred to in Sam Stein QC's submission in Hamilton Transcripts

¹⁰⁹ *Hamilton* 82

¹¹⁰ *Hamilton* 83

¹¹¹ *Hamilton* 84

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"In summary I would conclude by saying that I fully believe that Horizon will accurately record all data that is submitted to it and correctly account for it."

Mr Clarke, "summarised the statements as Mr Jenkins saying that there was nothing wrong with the system." But,¹¹²

85. ...Mr Clarke went on to say that Mr Jenkins had been aware of at least two bugs which had affected Horizon Online since September 2010, one of which was still extant and would not be remedied before October 2013, but had failed to say anything about them or about any Horizon issues in his statements. He expressed the firm opinion that if Mr Jenkins had mentioned the existence of the bugs, that would undoubtedly have required to be disclosed to any defendant who raised Horizon issues as part of his or her defence.

86. Mr Clarke advised that Mr Jenkins had failed to comply with the duties of an expert witness and should not be asked to provide expert evidence in any future prosecution. We are aware that there is an issue as to whether Mr Jenkins had been used by POL as an independent expert witness, a role which he could not fulfil for the simple reason that he was an employee of Fujitsu. We do not think it necessary to say anything about that issue, because whilst it may be important in other contexts, it does not affect our consideration of POL's breach of its disclosure obligations. That is because the following conclusions expressed by Mr Clarke are equally applicable whether Mr Jenkins prepared his statements as an independent expert or as an employee of Fujitsu with particular knowledge of Horizon:

"- Notwithstanding that the failure is that of [Mr Jenkins] and, arguably, of Fujitsu Services Ltd, being his employer, this failure has a profound effect upon POL and POL prosecutions, not least because by reason of [Mr] Jenkins' failure, material which should have been disclosed to defendants was not disclosed, thereby placing POL in breach of their duty as a prosecutor.

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

- Further, there are also a number of current cases where there has been no disclosure where there ought to have been. Here we

¹¹² *Hamilton* 85

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must disclose the existence of the bugs to those defendants where the test for disclosure is met.”

The Court of Appeal indicate that, “Given that SPMs had been complaining about Horizon for well over a decade, we are bound to say that we find it extraordinary that it was necessary for Mr Clarke to advise in those terms”.¹¹³ The advice went further than this saying,

Dr Jenkins’ credibility as an expert witness is fatally undermined. He should not be asked to provide expert evidence in any current or future prosecution.¹¹⁴

Mr Clarke gave another advice on 2 August 2013. It is in some ways even more worrying. Mr Clarke indicates he had advised POL on 3 July 2013 on,¹¹⁵ “the creation of a single hub to collate all Horizon-related defects, bugs, complaints, queries and Fujitsu remedies, so there would be a single source of information for disclosure purposes in future prosecutions.” Weekly conference calls had been set up to monitor progress. These may have involved CK personnel. After the third of these Mr Clarke,

said, the following information had been relayed to him:

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

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

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

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

In response to this:

89. Mr Clarke then set out the relevant provisions governing disclosure. He emphasised the seriousness of any attempt to abrogate the duty to record and retain material, observing that a decision to do so may well amount to a conspiracy to pervert the course of justice. He ended with the following:

¹¹³ *Hamilton* 87

¹¹⁴ Clarke Advice of 15 July 2013, Sam Stein QC in *Hamilton* Transcripts

¹¹⁵ *Hamilton* 88

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

The advice makes plain obligations under the Criminal Procedure Investigations Act 1996 and the associated Code of Practice which includes the duty to record material relevant to investigation where it is not already recorded, including information relating to the work of experts.¹¹⁶ And says:¹¹⁷

"The duty to record and retain material cannot be abrogated. To do so would amount to a breach of the law and, in the cases [or the case] of solicitors and counsel, serious breaches of their codes of conduct. Accordingly, no solicitor, no firm of solicitors, and no barrister, may be party to a breach of the duty to record and retain."

The Court of Appeal indicate that this is,

"even more extraordinary than the fact that he needed to write his earlier advice. The need to give it suggests there was a culture, amongst at least some in positions of responsibility within POL, of seeking to avoid legal obligations when fulfilment of those obligations would be inconvenient and/or costly to POL."

This, alongside the note of the receipt and payments mismatch bug meeting and the Ismay report, are two of the strongest indications of deliberate non-disclosure or bad faith by POL in the handling of disclosure in light of concerns to protect Horizon's integrity and the reputation of POL. The Clarke advice is particularly important as it explicitly relates to disclosure decisions in criminal cases and it shows a witness apparently, although not necessarily deliberately or recklessly, misleading the court in ways which undermine the witness's credibility.

3.8. What happened after the Clarke advices?

As the Clarke Advice of 13 July emphasised POL's breaches of their duty as a prosecutor had a "profound effect": "there are a number of now convicted defendants to whom the existence of bugs should have been disclosed, but was not."¹¹⁸ The same advice indicates, "I have already advised on the need to conduct a review of *all* POL prosecutions, in order to identify those who ought to have had the material disclosed to them." (*our emphasis*)¹¹⁹ This is sometimes

¹¹⁶ 'Criminal Procedure and Investigations Act 1996 (Section 23(1)) Code of Practice' para 4.1, 5.1 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf>.

¹¹⁷ Clarke Advice 3 August 2013, Sam Stein QC *Hamilton* transcripts

¹¹⁸ Clarke Advice 13 July 2013, Hamilton Transcripts, submissions by Sam Stein QC.

¹¹⁹ Hamilton Transcripts

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referred to as the ‘CK Sift Review’. It appeared to take place against disclosure tests which are not made explicit in the *Hamilton* hearings, and does not appear to have taken in *all* POL convictions based on Horizon: “The CK Sift Review only looked at prosecutions from 2010 onwards.... It was concluded in 2014.”¹²⁰

In the main *Hamilton* hearing, Brian Altman QC for POL indicated the Clarke Advice of 15 July 2013, led to:¹²¹ “a post-conviction disclosure exercise in which the Second Sight interim report and the Rose Report were to be disclosed in cases which Cartwright King deemed to be appropriate,” The Rose report (June 2013) was an internal POL report which showed, Horizon (Credence) data making it, “appear that a reversal had been done by the SPM, when in fact it had been done by the Horizon system.”¹²² This was something also known to Gareth Jenkins according to the Rose report. It is important evidence of the capacity to make remote alterations to data on which POL relied in dealing with shortfalls.

An observation we would make at this point is that this description suggests that the review was limited in the cases it looked at and that it was limited in the documents it considered for disclosure.

A letter from Paul Marshall to the Court of Appeal in November 2020 when he resigned from the case,¹²³ indicates that POL’s Board were, in some shape and form, told of the Jenkin’s problems in August 2013, and that Mr Brian Altman QC had become involved in 15 October 2013. This is sometimes described as the Altman General Review.

Paula Vennells, in June 2020, described an unnamed senior QC becoming involved in 2014 (perhaps getting the date wrong or referring to a further piece of work) and to a case by case review as part of the Complaints Review and Mediation Scheme (the “Scheme”):

31.Regarding the question of evidence, first, as I say, it was my understanding from discussions with the in-house legal team and Post Office’s external criminal solicitors that Post Office applied the same procedures and tests as the CPS regarding the collating and consideration of evidence. Secondly, in cases involving technical IT issues, we often obtained input and evidence from Fujitsu (which at the time I believed was acting properly). Thirdly, an additional layer of oversight was provided by the courts and the CCRC. Fourthly, in July 2014, Post Office engaged a senior criminal QC to advise on the response to a letter received from the CCRC regarding convictions relating to Horizon, and also to advise on prosecution related issues. In referring to this advice I do not and do not intend to waive any

¹²⁰ ‘Oral Submission to Support the Application to Receive the Clarke Advice’ <<https://www.postofficetrial.com/2020/12/oral-submission-to-support-application.html>> accessed 15 July 2021.

¹²¹ *Hamilton* Transcripts, Altman, p. 66

¹²² *Bates No 6* 227, 916, 917

¹²³ Written when Mr Marshall resigned from acting in the *Hamilton* case.

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privilege of Post Office or myself, if any, over the advice the criminal QC gave.

32. As regards the question of what checks were in place to make sure prosecutions were based on sound evidence, the Board and I were assured by in-house and external lawyers that the Code for Crown Prosecutors was being followed and therefore that the first limb of that test (i.e. was there a realistic prospect of conviction on the evidence) was being dealt with properly. Whether the specific evidence was sound in any one case was a matter for their judgment and not mine: it would have been wrong for me to become involved unless of course I became aware of a systemic problem, which I did not. I should add that Post Office was also mindful of its disclosure obligations in relation to convictions. When we went through the Scheme, Post Office lawyers considered each and every case in the Scheme where there had been a conviction in order to assess whether there was anything that had emerged from the Scheme which Post Office was obliged to disclose.

In relation to the instruction to shred documents discussed in the August Clarke advice, Brian Altman QC's explains to the Court of Appeal that Mr Scott (the Head of Security's) "wholly erroneous view of disclosure obligations.... came to the attention of the Post Office's senior criminal lawyer [Jarnail Singh], who immediately expressed concern, and he asked Cartwright King to advise." The email requesting advice read:

"I know Simon is advising on disclosure [that's a reference to Simon Clark]. As discussed, can he look into the common myth that emails, written communications, et cetera, of meetings, if it is produced, it is then available for disclosure. If it is not, then technically it isn't. Possibly true of civil cases, NOT CRIMINAL CASES?"

This email is dated 1 August 2013 and was replied to on 2 August by Simon Clarke's advice referred to above. The issue, "was escalated to Post Office's general counsel," by a letter from another lawyer at Cartwright King, Andy Cash, with the 2 August advice attached. It is unclear from Mr Clarke's advice, which reports anonymously on his sources, whether the advice was prompted by Simon Clarke discovering the problem rather than Mr. Singh raising it off his own initiative. The August Clarke advice itself refers to "information having been relayed to me" and his being told that, "Some at POL do not wish to minute the weekly conference calls."¹²⁴ The letter enclosing the August Clarke advice also states, ""It is fully accepted you may wish to take a second opinion on the views expressed." This, coupled with the unattributed sources of concern, seems surprising and may suggest an organisation where speaking up for propriety on this matter was difficult; the disclosure advice is basic law, indeed the court

¹²⁴ Hamilton Transcript, Sam Stein QC submissions, reading from Clarke advice, pp. 89 and 90

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comments unfavourably on the need for POL to receive such advice at all given that POL should have been aware of their obligations.

POL's General Counsel, Susan Crichton, writes to a Mr Cash at Cartwright King on 16 August. Why this takes 14 days is not explained, although somewhat surprisingly she indicates she had not seen his letter of the 2 August with the Clarke advice. We do not know if it was escalated slowly, or it was somehow missed. She then goes on to discuss Mr Clarke's advice saying she is,

deeply concerned at the suggestion in Simon's note that there may have been an attempt to destroy documentary material generated in connection with the Horizon calls. Specifically any minutes of the calls.

I note that Simon's advice doesn't suggest that material connected to the operation in Horizon itself may have been compromised.

The Post Office is committed to conducting its business in an open, transparent, and lawful manner. Any suggestions to the contrary would not reflect Post Office Limited's policy and would not be authorised or endorsed by Post Office.

...

I confirm that we will continue to hold the Horizon calls for the foreseeable future and that minutes of those calls are and will be seen to be taken.

It is worth dwelling on this response for a moment. It treats the shredding allegation as a suggestion and does not indicate whether this has been investigated and whether documents were shredded. It could even be read as a denial of the problem. It seeks some comfort in rebutting an allegation not made: that material connected to Horizon itself is not suggested to have been compromised. This is rather beside the point as the shredding compromised what is supposed to be the scrupulous management of disclosure. It does not mention what has happened to the handwritten notes which were to be sent to the Director Security; material which would also have been potentially disclosable.

A policy protocol was written to, "Ensure that each and every person complies with the duties and responsibilities set out in clause 5." This seems to have been put in place in mid-October (more or less two months later) and there is a suggestion in the Hamilton transcripts that it was drafted by Mr Clarke, although this is not confirmed.

It is around this time that Susan Crichton leaves POL, with Chris Aujard joining POL as interim GC in October 2013.¹²⁵

It should be noted that despite the concerns raised in the Clarke advice, Mr Altman submitted that no minutes were in fact destroyed. He does not deal with

¹²⁵ <https://www.linkedin.com/in/chris-aujard-4950837/?originalSubdomain=uk>

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the notes sent to the director of security and it is not clear these were retained or disclosed.

In June 2021, General Counsel for POL wrote to the Justice Select Committee to say Mr Clarke's August advice had been "swiftly followed" and that the minutes had not been destroyed.¹²⁶ No mention was made of the notes.

Appellant counsel in *Hamilton* criticised the post-Clarke advice disclosure review work for confining itself to, "particular issues at a particular period of time." The problems meant counsel should have advised, "an independent inquiry [take place] into what had been happening within the Post Office."¹²⁷ The Appellants also submitted Horizon problems and the facts behind the Clarke advice should have been disclosed to SPMs generally, not on the limited basis of the CK Sift and Altman review.¹²⁸

"It would have influenced the decision of any responsible prosecutor in this area, because that is to say, in circumstances where Horizon was a live issue, it became all the more imperative that this disclosure was made by this prosecuting body."

What was actually disclosed and to who, is not very clear from the case papers we have been able to consider. It seems to have been confined to cases conducted since 1 January 2010 and the test deployed was whether,

"during the currency of any particular prosecution should/would POL have been required to disclose some or all of that material to the defence?" In cases in which convictions had been obtained, this also meant considering material for disclosure, which might cast doubt on the safety of the conviction."

...Cartwright King advised that disclosure should be made in 26 cases and further advised that a further 4 on-going prosecution cases should be discontinued. It appears that 7 of the current Court of Appeal/Crown Court Appellants referred by the CCRC were the recipients of post-conviction disclosure in 2013/14 pursuant to the CK Sift Review exercise5.

As we can see from the discussion of the CK Sift above, the disclosure considered appears to have been limited to Second Sight's Second Report and the Rose Report. It would not have disclosed the note of the Receipt/Payment Mismatch Issues Note; or the disclosure management (shredding) problems discussed in the Clarke advice; nor the Clarke advices themselves (the latter we assume were presumed to be privileged, but the evidence underlying them was

¹²⁶ Ben Foat, 'Extraordinary Submission: Inquiry on Safeguards in Private Prosecutions, 28 June 2021' <https://committees.parliament.uk/publications/6917/documents/72648/default/>.

¹²⁷ Hamilton Hearing Transcripts, Moloney

¹²⁸ Hamilton Hearing Transcripts, Moloney

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not); nor, it seems, that a Fujitsu witness had failed to make material disclosures on bugs and remote access and may have given misleading evidence.

As we have seen in Section 3.5 and 3.5.1 above POL conceded that greater disclosure should have been made and the court found deliberate non-disclosure occurred.

We have also noted that in March 2020 Paul Scully MP gave written evidence to the BEIS Select Committee indicating that:¹²⁹

Sept 2015 The Post Office Minister commissions POL's new Chair to undertake a review of POL's Horizon system and handling of postmaster issues. Support is provided by a QC

Apr 2016 Preliminary conclusion of the review by the POL Chair finds no systematic problem with the Horizon system. Review halted following legal proceedings lodged against POL by the JFSA. CCRC also initiate review the POL cases.

It is not known to us who this support was given by.

It is not known whether any information associated with this review was disclosed to the Appeal teams in *Hamilton*. That Counsel for some of the appellants should suggest that POL failed in its handling of disclosure, and that this complaint was not met with a rebuttal, suggests it might not have been disclosed, but there are other possibilities. That Government felt sufficiently concerned to commission a review by POL's Chairman is an important indicator of the Government's awareness of potential problems and also that there may have been material about the safety of convictions known to POL, and possibly to Government, which had prompted that review.

3.9 The conduct of the appeals

Leading counsel for POL during the appeal was Mr Brian Altman QC, a senior and respected member of the Bar. He not only conducted the appeal hearings but was also involved previously in advising on POL/Horizon matters. In particular, Mr Altman produced a document entitled "General Review" dated 15 October 2013, which we are told, "extensively referred to the Clarke Advice and its contents and conclusions".¹³⁰ Our working assumption is that he read the Clarke advice in 2013.

We have found no indication of when Mr Altman was instructed, but this suggests it was around the same time or shortly after Cartwright King were

¹²⁹ Paul Scully, Written evidence submitted by the Department for Business, Energy and Industrial Strategy (POH0006) March 2020, <https://committees.parliament.uk/writtenevidence/1007/html/>

¹³⁰ Altman et al, 'Regina v Hamilton & Others, Disclosure Note in Relation to the Context for "the Clarke Advice"'.

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instructed. POL were, “in correspondence with the CCRC from 12 July 2013 in relation to the matters arising out of the Second Sight review.”¹³¹ As we have noted above POL’s CEO refers to advice from a Senior QC but gives 2014 as the date.

It appears, therefore, Mr Altman was instructed around the time when a variety of other events were prompting significant questions about Horizon evidence. As well as the July Clarke advice such events included:

- *June 2013* – an internal POL report (the Rose Report) showed Horizon (Credence) data making it “appear that a reversal had been done by the SPM, when in fact it had been done by the Horizon system.”¹³²
- *8 July 2013* – Second Sight’s interim report is published on the Post Office website.
- *August 2013* – POL’s external solicitors write to the POL’s Board to indicating concerns about the Fujitsu computer engineer who had given evidence at Mrs Misra’s trial.¹³³
- *From 12 July 2013*, “the Respondent was in correspondence with the CCRC ...in relation to the matters arising out of the Second Sight review”.¹³⁴
- *2 August 2013* – the August Clarke advice discussing ‘shredding’ and potentially perverting the course of justice is escalated to POL’s General Counsel,¹³⁵ who responds on 16 August.
- *September 2013* – Ian Henderson (Second Sight) says he met with the Head of IT from Fujitsu who admitted that “*remote access not only was possible but frequently occurred.*”¹³⁶ If this is correct, we imagine, although this is speculation, that this was disclosed to POL staff liaising with Second Sight.
- *18 September 2013*– Minutes of POL’s Risk and Compliance Committee show that not all risks identified by the Ernst & Young audit had been addressed.¹³⁷

¹³¹ *ibid.*

¹³² *Bates No 6* 916, 917

¹³³ ‘Marshall Spells It out: Speech to University of Law’ <<https://www.postofficetrial.com/2021/06/marshall-spells-it-out-speech-to.html>> accessed 1 September 2021.

¹³⁴ Altman et al, ‘R v Hamilton & Others: Submissions on Behalf of the Respondent in Relation to the Application by Nick Wallis for Access to Papers in the Proceedings’.

¹³⁵ Sam Stein QC’s submissions in the Hamilton Transcripts

¹³⁶ Evidence of Ian Henderson to the BEIS Select Committee 10 March 2020

¹³⁷ *Bates No 6* para 791

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- *1 October 2013* - Detica, part of BAE, issues a report “Fraud and Non-conformance in the Post Office, Challenges and Recommendations”; this report was commissioned by John Scott (Head of Security) and Susan Crichton, General Counsel.¹³⁸
- *October 2013* – a POL disclosure protocol document produced in an apparent response to the allegations of shredding of disclosure emails and minutes.
- *In about October 2013* – Susan Crichton ceases to be General Counsel around now and Chris Aujard is appointed Interim General Counsel.

We do not know how much of this, if any of it, Mr Altman was aware of and how his instructions were framed. If he was fully and properly instructed to advise POL on disclosure obligations and the broader context for the CK Sift then most, and potentially all, of these points might have been expected to be included in proper instructions. The quality of instructions: what Mr Altman was told, what documents he was shown; and how he advised, is plainly important to how disclosure was managed from 2013 onwards. The Bates litigation is suggestive of POL not always giving full or accurate instructions on Horizon problems.

The POL’s Counsel team, led by Mr Altman, indicate when contesting the publication of the Clarke advice in November 2020, that “the Respondent instructed Brian Altman QC, among other things, to conduct a review of the process [of post-conviction review conducted by Cartwright King] (although not the individual decisions in reviewed cases).”¹³⁹ We know that this included consideration of the July Clarke advice, but we have seen no information to suggest whether it included also the August (Shredding) advice. We would expect full and proper instructions to him to have included that advice also; failure to do so would raise important questions about the competence and integrity of those giving the instructions. As well as whether they were acting in the best interests of the client and adhering to their obligations as prosecutor.

We do not know what “among other things” refers to.

Submissions drafted by Altman and his team of counsel resisting the Wallis application in November 2020 to publish the July Clarke Advice, sought, “to dispel some of the misconceptions about the Advice and the manner of its disclosure that have been introduced by the written and oral submissions by those representing the Appellants Misra, Skinner and Felstead”¹⁴⁰ (the solicitors Aria Grace, Paul Marshall and/or Flora Page). In particular that, “the matters raised in the Clarke Advice were not hidden by the Respondent.”¹⁴¹ They make the point that the CCRC was aware of the main contents of the July Clarke

¹³⁸ 21 September 2020 FOI 2020/00679 – Fraud and Non-conformance in the Post Office https://www.whatdotheyknow.com/request/fraud_and_non_conformance_in_the .

¹³⁹ Altman et al (n 131).

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

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Advice, saying the General Review was *summarised* for the CCRC in 2014 and the general review was provided to them in full in 2015.¹⁴² We do not know how closely and to what extent the General Review reflects the content of the Clarke advice in July (beyond the untested claim that it, “extensively referred [to]... its contents and conclusions,”¹⁴³ and whether it includes *any* information from the August advice. Rather crassly, given the apparently very substantial influence of Mr Jenkins over evidence given in the Bates case in particular, the submissions also seek credit for the respondent, ceasing, “to rely on Mr Jenkins as an expert witness.”¹⁴⁴

The CCRC’s response (dated 24th November) to hearing of the Clarke advice in 2020¹⁴⁵ was to say they had probably never had it; to emphasise its potential relevance to the Hamilton appeals; to serve a notice requiring it to be provided to them by POL; and, to suggest the advice be sent to the Metropolitan Police as part of their investigation prompted by Mr Justice Fraser at the end of the *Bates* case.

What the submissions do not provide is an explanation for the timing of disclosure of such an important document. They say, in essence, that although the July Clarke advice had been provided in response to a request from some of the Aria Grace solicitors, it would have been disclosed as “part of Tranche 3 GDR disclosure” in December in any event.¹⁴⁶ That begs the question as to whether such an important document was disclosed at the first practicable opportunity. At what point did it come to the attention of POL’s legal team and how long between that and disclosure? We do know that lead Counsel for POL’s team was aware of it in 2013; others may have been too.

The timing of disclosure of the August advice raises similar issues. One of the notable points about the POL legal team’s written response to the Wallis application is that no mention is made of the August advice. POL’s disclosure note to the Court of Appeal in November 2020 is specifically confined to the 15 July advice. There is no indication that the August advice was disclosed in November alongside the July advice. Our working assumption is that it was not; the first time we can see it having been mentioned is on the first day of the full Hamilton hearings in March 2021. Did POL’s legal team have the August advice when seeking to dismiss concerns about the publication of the Clarke advice, when saying the Clarke advice was not a “smoking gun,” and in seeking to argue against Ground 2?

This is a matter which requires full investigation. In our view, the August advice was highly relevant matters before the court in November 2020. Legal

¹⁴² *ibid* 14.3 and 14.4.

¹⁴³ *ibid* 14.2.

¹⁴⁴ Altman et al (n 131).

¹⁴⁵ ‘CCRC Letter to the Court of Appeal about the Clarke Advice’ <<https://www.postofficetrial.com/2021/01/ccrc-letter-to-court-of-appeal-about.html>> accessed 27 July 2021.

¹⁴⁶ Altman et al (n 131) para 14.4.

privilege should not stand in the way of disclosure.¹⁴⁷ In any event, we do not see how a statement or advice that evidences a possible perversion of the course of justice can be privileged given the crime-fraud exemption. By way of final emphasis, a prosecutor would be obliged to resolve any doubts about disclosure in favour of the appellants. We return to the question as to whether these documents were disclosed with sufficient alacrity in our conclusions.

The question to be investigated becomes wider and more serious if one considers that the timing of disclosure had the potential to impact on the pursuit of Ground 2 (that POL's prosecutorial behaviour an affront to the public conscience). Whether the C.A. would hear Ground 2 was very much alive at the time of disclosure. The decision to permit this ground to be heard was only taken on December 17 (with judgment being handed down on 15 January 2021).¹⁴⁸

The timing of the disclosure of the Clarke advices had at least two important impacts on this. One is it may have impacted on appellant's decisions to pursue Ground 2. Only three appellants pursued Ground 2 initially, and it is not inconceivable that, as the appeal progressed towards a hearing, they would lose heart. One of the original counsel of this group refers to them taking some "flak" for pursuing Ground 2.¹⁴⁹ Once disclosed, the resolve of these appellants would have been stiffened, particularly given the August advice. Disclosure of either advice may also have had an impact on the thinking of other appellants and their legal teams, who initially (and at the December hearing) resisted the three appellants' case for Ground to be heard on the basis that it risked delaying their successful appeals.¹⁵⁰ With POL willing to concede most of the Hamilton appeals on Ground 1 (and Ground 2 being conceded in a handful of cases) POL were plainly alive to the possibility that Clarke's advice(s) would never come to public attention. As the POL's submissions on Nick Wallis' application to publish indicated:¹⁵¹

"Subject to the Court's view on whether the Court is obliged to consider ground 2 of the Statement of Reasons (and/or give leave to Mr Marshall to advance new second limb abuse submissions), it may be that the Clarke Advice will never be a document referred to during legal argument, as it would be unlikely to be relevant to any submissions advanced under the CCRC's first ground;

¹⁴⁷ See, Cordery on Privilege section 1-071 and *R. v Skingley and Burrett*. Prosecutors can assert privilege in certain circumstances (See Cordery para. 3-453), but if withholding certain information would conflict with their obligation of fairness then they must disclose or not proceed; para 4.2.3 of the PPA Code, "the private prosecutor must not withhold material that meets the test for disclosure on the basis that it attracts legal professional privilege"

¹⁴⁸ 'Hamilton & Others v Post Office Ltd [2021] EWCA Crim 21 (15 January 2021)' <<https://www.bailii.org/ew/cases/EWCA/Crim/2021/21.html>> accessed 24 August 2021.

¹⁴⁹ 'Marshall Spells It out: Speech to University of Law' (n 130).

¹⁵⁰ 'Hamilton & Others v Post Office Ltd [2021] EWCA Crim 21 (15 January 2021)' (n 144).

¹⁵¹ Altman et al (n 131) para 17.7.

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Secondly the timing of disclosure may have impacted on the arguments to be made in seeking leave before the Court. As already noted, it is not clear to us whether the August Clarke advice had been disclosed at this stage. The hearing for leave to hear Ground 2 in December refers to disclosure being incomplete and unlikely to be completed until February of 2021.¹⁵² The first public reference to it is on the first day of the full hearing, where it is prominently discussed.

There was also significant reputational advantage in POL delaying, and potentially preventing, disclosure of both advices; as well as harm to the SPMs. If neither advice had been discussed in open court, the likelihood of it being published was significantly reduced.¹⁵³ This would have significantly limited the reputational impact of the appeals on the Post Office, and the extent of the exoneration provided to the SPMs. It would have, very likely, substantially diluted the criticism the Court of Appeal would have made of POL and their lawyers. As Mr Mably QC, appointed as advocate to the court on the application for leave to hear Ground 2 submitted to the Court of Appeal:¹⁵⁴

...in deciding whether the court should permit argument on Ground 2, and on the premise that the court will allow the appeals on Ground 1, the overarching principle is that the court should act in the interests of justice. Factors to be considered relate to the efficient and expeditious administration of justice and the interests of an appellant in being vindicated on as wide a basis as possible. The legitimate interests of an appellant, and the wider public interest, may militate in favour of deciding an additional ground. Reputational interests of the appellants may be important. Issues of alleged abuse of the process are serious, and it may be undesirable for them to be side-stepped because the appeals will succeed on another ground. It is for the court to decide, weighing all relevant factors, whether it is in the interests of justice that Ground 2 be determined even if appeals will be allowed on Ground 1.

If the August Clarke advice was not disclosed by the December leave hearing, the Court of Appeal decided the balancing of the interests of justice at the leave hearing without a true sense of the problems within POL and may have decided to allow POL to side-step an important limb of concern, both to the judicial process but also to the public interest in POL's conduct.

Whilst the Court of Appeal found that failures to disclose over the years were deliberate, it should also be noted that the Court of Appeal praised, "solicitors and counsel instructed by POL," for, "a very extensive exercise in reviewing millions of documents in order to consider, and make, post-conviction

¹⁵² 'Hamilton & Others v Post Office Ltd [2021] EWCA Crim 21 (15 January 2021)' (n 144) para 21.

¹⁵³ Once both are discussed on the first day of the full appeal hearing disclosure and publication is permitted; see the first day of the Hamilton hearing transcripts.

¹⁵⁴ 'Hamilton & Others v Post Office Ltd [2021] EWCA Crim 21 (15 January 2021)' (n 144) para 26.

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disclosure... diligently and thoroughly.” And they indicated that the appellants, “have all relevant documentation, including important documents which were not only not disclosed to the appellants at the time of their prosecutions but also not disclosed in the High Court proceedings before Fraser J.” They did not consider why the Clarke advice, known to Mr Altman in 2013, was disclosed until late in the Hamilton proceedings.

Mr Altman’s involvement, via the General Review, in disclosure review in 2013, raises a question as to whether Mr Altman should have conducted the appeal. He advised when the most concerning elements of POL’s practices were exposed internally. Part of the appellants case was critical information /or documents, had not been disclosed, and ought to have been. One of the arguments was that the Clarke advice or the matters underlying it ought to have been disclosed. Indeed, a specific concession was made on this point by M Altman for POL as regards Seema Misra’s case:¹⁵⁵ the bugs disclosed in the Clarke advice which Gareth Jenkins failed to disclose, should have been disclosed to Seema Misra’s legal team, and disclosed or considered for disclosure in all cases thereafter.¹⁵⁶ The disclosure that occurred following advice from Clarke and Altman is not clear from the court’s decision, but it was conceded and found to be unsatisfactory. The court finding that non-disclosure was deliberate may mean deliberate failures occurred pre-or post 2013. This is not clear. What is clear is that an event which Mr. Clarke viewed as having a profound impact on POL as a prosecutor limited, and inadequate disclosure after that was not disclosed.

Consideration of cases for disclosure was confined, for example to cases from 2010, and the only documents considered for disclosure were Second Sight’s Second Report and the Rose Report. Rather than consider whether POL now had material that casts doubt on the safety of the convictions,¹⁵⁷

“senior in-house counsel at Cartwright King carried out a case review to determine the essential question: “Had POL been possessed of the material contained within the Second Sight interim report and Helen Rose reports during the currency of any particular prosecution should/would POL have been required to disclose some or all of that material to the defence?” In cases in which convictions had been obtained, this also meant considering material for disclosure, which might cast doubt on the safety of the conviction.

If accurately describing the post-Clarke disclosure regime, and the test it applied, it is not the correct test that was being applied. It suggests the emphasis was on the narrower issue (do we disclose the Second Sight and Rose reports) rather than the broader issue: what information do we know that we need to disclose. And also it applied a hindsight test, should POL have disclosed

¹⁵⁵ See n 156 and associated text.

¹⁵⁶ Hamilton Transcripts, Day ?? p. 16

¹⁵⁷ Altman et al (n 127).

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information back in 2010, rather than do POL have information now (2013/4) that casts reasonable doubt on the safety of convictions?

There is some likelihood that the test came from the CK Sift or Mr Altman's review. Paula Vennells, CEO during the 2013 crisis period, has suggested she relied on reassurances provided by lawyers internal and external to satisfy herself that prosecutions were being dealt with and had been dealt with appropriately. In important respects, the advice was likely material to how POL's disclosure regime was implicated.

Mr. Altman's own involvement in 2013 is not, we think, discussed in the main appeal hearings, although it is briefly discussed in written submissions on Nick Wallis' application to publish the July Clarke advice. Given its absence, it is worth noting one occasion when Mr Altman's involvement in the main Hamilton hearings might have come into view, but did not.

At one stage, in conceding that the receipt and payments mismatch bug arising in 2010, should have been disclosed to Seema Misra and anyone prosecuted after her, and discussing why that disclosure did not happen, Mr Altman says,

"We do not know. Was it incompetence? Was it individuals not understanding their duties? Or was it deliberate?"

He says *we*, including him, *do not know*, when he knows at least something about what occurred (although it is said he did not advise on individual cases). He does not tell or remind the court that he was involved in advising on the process during the crisis period of 2013. Or why his review, and the CK Sift, did not ensure the disclosures were made, in spite of Mr Clarke's very robust advice about the profundity of the challenge posed to their prior problems.

Whilst we do not suggest that the court has been misled here, the response perhaps shows the sensitivity and difficulty in discussing matters in which he appears to have been involved and suggests to us an actual or perceived conflict of interest which should be investigated. His own role is in some ways part of the appeal because what happened in 2013 is vital to understanding whether the POL prosecuted unconscionably. This is part of what Sam Stein QC, for the main group of appellants, remind the Court of Appeal was, "13+ years of failures of disclosure that has only latterly been accepted by the Post Office".¹⁵⁸ We do not know whether his role was positive, neutral, or a negative one; but we know that he had one.

In his defence it might be argued that it is not unusual for a lawyer to have his own handling of aspects of the case become part of the case (e.g. service or filing problems). This might be particularly likely in Mr Altman's line of work given the frequency with which disclosure problems drive miscarriage of justice cases. We think the centrality of disclosure problems, and the separation in time between the appeal and Mr Altman's advice in 2013 are such as to suggest that, the risk of a perceived conflict is not of the more routine type.

¹⁵⁸ Hamilton Transcripts

There are other moments where greater, clearer, independence would have been helpful to the way the case can be perceived. The raising of potential contempts against two barristers (Flora Page and Paul Marshall) was criticised by Page’s Counsel as having, “all the appearances I regret to submit of being a prosecutor in this matter in the way in which it originally arose,”¹⁵⁹ saying that the Court of Appeal had been “pulled and pushed” towards an inquisitorial contempt procedure.¹⁶⁰

Whether the disclosures made by Page and Marshall are best considered as a contempt or not, we do not think it unreasonable in principle that the disclosures were raised before the court. Treating it as a potential contempt had the foreseeable effect, though, of Page and Marshall resigning from the case and could have led to Ground 2 being dropped. Had that occurred the Clarke advices may not have been disclosed; POL’s reputation would have been protected; and the Court of Appeal would not have had the fuller view of POL’s conduct.

Although it appears Mr Altman considered Clarke as part of his General Review in 2013, the Court sought his assistance in formulating contempt allegations when the matter was raised by him, and some assistance it appears was given.¹⁶¹ Judges know they need to handle contempt proceedings with great care and it seems especially surprising that they called on Mr. Altman to help given the history of this case. The need for exceptional independence and care is, for instance, emphasised in case law on contempt where it is sometimes recommended that contempt applications are brought by lawyers not involved in the handling of the case from which the allegations derived.¹⁶²

3.10 The handling of the independent investigation

A matter which is not dealt with in *Hamilton* in any detail but which forms part of the backdrop to the commissioning of the Clarke advice, and the way in which POL handled potential miscarriages of justice, is the setting up and management of the independent investigations conducted by Second Sight. They were asked to do this in July 2012. Although POL paid for the work, the Justice for Sub-Postmasters Alliance (JFSA), and at least one of the MPs, James (now Lord) Arbuthnot were involved in their appointment.¹⁶³

¹⁵⁹ ‘Transcript: Court of Appeal Hearing 3 Dec 2020’ para 159 <<https://www.postofficetrial.com/2020/12/transcript-court-of-appeal-hearing-3.html>> accessed 19 July 2021.

¹⁶⁰ Ibid. 192

¹⁶¹ The Transcripts refer to POL counsel drafting grounds for contempt against Flora Page.

¹⁶² ‘Navigator Equities Ltd & Anor v Deripaska [2020] EWHC 1798 (Comm) (17 July 2020)’ <<https://www.bailii.org/ew/cases/EWHC/Comm/2020/1798.html>> accessed 25 August 2021.

¹⁶³ ‘Horizon Trial: Day 4 - Ian Henderson’s Witness Statement’ <<https://www.postofficetrial.com/2019/03/horizon-trial-day-4-ian-hendersons.html>> accessed 27 July 2021; ‘Raising Concerns With Horizon; Appendix The Second Sight Inquiry - the Detail’.

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A document, signed on behalf of POL, Second Sight and the Justice for Sub-Postmasters Alliance (JFSA) describes the remit as,¹⁶⁴

"... To consider and advise on whether there are any systematic issues and/or concerns with the "Horizon" system, including training and support processes, giving evidence and reasons for the conclusions reached.

"The Inquiry is not asked to investigate or comment on general improvements which might be made to Horizon, or on any individual concern raised (see below) save to the extent that it concludes that such investigation or comment is necessary to address the remit."

A brief overview of the process has been given by one of Second Sight's Directors, Ian Henderson:

Our work started in the summer of 2012. Initially, Post Office were co-operative and appeared committed to the agreed goal – "to seek the truth, irrespective of the consequences".

Within a few days of our appointment, we asked for 2 actions to be taken:

- Issue a Post Office wide "litigation hold" that would prevent any further documents being destroyed; and
- Send all of the prosecution files then held by Post Office to a third-party scanning bureau. This ensured that these vital documents would be preserved and made more readily available. This comprised approximately 4,000 documents and was known as CD1.

In September 2012 I met with Gareth Jenkins, the lead engineer for Horizon, at the head office of Fujitsu in Bracknell. I was told that approximately 10 members of staff from Post Office were permanently based in Bracknell, dealing with various issues including bugs, errors and defects.

I was also told that Fujitsu routinely used remote access to branch terminals for various purposes, without the knowledge or specific consent of individual sub-postmasters.

Within days of being provided with CD1, we realised that we may be looking at a significant number of miscarriages of justice. There was a lack of effective investigation, multiple disclosure failures and conduct by prosecutors that needed to be considered by experts in criminal law and prosecutions.

¹⁶⁴ 'Raising Concerns With Horizon; Appendix The Second Sight Inquiry - the Detail' (n 159) the document is undated but was clearly issued before 28 February 2013.

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At about this time, the attitude of Post Office changed. Requests for further documents and explanations were taking longer and longer to be provided.

Second Sight's appointment was terminated by POL on 10 March 2015.¹⁶⁵

The litigation hold that Henderson referred to can be contrasted with what he says about the documents provided to him to help with his witness statement in the *Bates* litigation. During their investigation they had received and considered a very large number of documents which were returned to the Post Office in a well-ordered fashion when terminating the agreement.

The documents now made available to me, which I am informed ordered in the manner disclosed by POL in litigation, have no folder structure, have had meta data removed and no longer have the date and time stamps associated with the original documents."¹⁶⁶

Gareth Jenkins had, he said, told him on 13 September 2012 that remote access to branch terminals was possible from Fujitsu and that it was used occasionally to deal with problems.¹⁶⁷ Henderson had requested email records of the POL employees working at Fujitsu at the time to establish what was going on. Those email requests were not met, save for a small number of inconclusive emails being provided. The issues discussed in the interim report POL on 8 July 2013.¹⁶⁸ Investigation of XML data also showed problems which might indicate remote access occurring but Second Sight were not able to complete their investigations prior to contract termination.¹⁶⁹ Second Sight concluded that in some circumstances Horizon could be systemically flawed from a user's perspective, and that POL had not necessarily provided an appropriate level of support."¹⁷⁰

In the Interim Report Second Sight felt it necessary to clarify that their remit was not only to, "look only for defects in the software code of Horizon," but also to examine (amongst other things):¹⁷¹

"the effectiveness of POL's audit and investigative processes, both in assisting SPMRs who called for help in determining the underlying root cause of shortfalls and in providing evidence for other action by POL such as in Civil and Criminal Proceedings."

¹⁶⁵ 'Horizon Trial: Day 4 - Ian Henderson's Witness Statement' (n 159) para 1.3.

¹⁶⁶ *ibid* 1.4.

¹⁶⁷ *ibid* 2.2.

¹⁶⁸ *ibid* 2.3.

¹⁶⁹ *ibid* 2.5 and 2.6.

¹⁷⁰ *Hamilton* 26

¹⁷¹ Second Sight, 'Interim Report into Alleged Problems with the Horizon System' (2013) para 1.4.

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This was said to be necessary because of, “the profound impact on the SPMRs involved in almost all of the cases we have examined.”¹⁷²

Their Interim Report refers to various problems with collecting evidence on the matters they were investigating related in part to disorganisation and a seven-year document retention policy (meaning after seven years documents were typically destroyed). It also referred to POL disclosing defects in Horizon Online which impacted 76 branches¹⁷³ and “took some time to identify and correct.”¹⁷⁴ These included a receipts and payments mismatch bug and a local suspense account problem which had “resulted in branches being asked to make good incorrect amounts.”¹⁷⁵ It does not explore miscarriages of justice, although Mr. Henderson’s explanation above suggests they reached the view that this might be an issue early on.

A report completed after their investigation had been terminated indicated concerns that POL had reneged on undertakings to provide access to all relevant documents in their possession.¹⁷⁶ This contrasted markedly, they said, with how the Inquiry had begun:¹⁷⁷

“When we started our work on these important matters in July 2012, we believed there was a shared commitment with Post Office to “seek the truth” irrespective of the consequences. This was reflected in us being provided with unrestricted access to highly confidential and sensitive documents, including legal advice relating to individual cases.”

The documents they needed access to included: legal files relating to investigations or criminal prosecutions; email records relating employees working at the Fujitsu office in 2008; and transactional records relating to items in Post Office's Suspense Account(s).¹⁷⁸ In broad terms these matters would have enabled Second Sight to follow lines of inquiry into potential miscarriages of justice; remote access (which it might be recalled POL denied was possible until very late in the Bates litigation); and, the Post Office enriching itself from Horizon errors through the suspense account.

Post Office had sought to say to Second Sight that reviewing individual investigations and prosecutions (as well as some other matters) was outside their remit and that their own review enabled them to say, ““Having now completed its reinvestigation of each of the cases, Post Office has found no reason to conclude that any original prosecution was unsafe”¹⁷⁹ This seems to be a

¹⁷² *ibid* 1.7.

¹⁷³ *ibid* 6.4.

¹⁷⁴ *ibid* 8.2.

¹⁷⁵ *ibid* 6.10.

¹⁷⁶ Second Sight (n 25) para 4.1.

¹⁷⁷ Second Sight (n 167) para 26.1.

¹⁷⁸ Second Sight (n 25) para 2.1.

¹⁷⁹ *ibid* 2.5.

misleading description if it encompasses the Clarke advice. An interesting question is whether and how this statement derives from the work of the lawyers involved in that review and who is responsible for the apparently misleading statement.

It is also worth observing that whilst the report refers to limited support for some concerns about the quality of investigation and handling of prosecutions, these do not refer to miscarriages of justice. The report showed, with some evidence, why Second Sight thought it likely that remote access powers existed and were being used,¹⁸⁰ and why Horizon errors may have sometimes enriched POL at SPMs expense.¹⁸¹ The review of Jo Hamilton's case referred to above, which points clearly to inappropriate prosecution practices, was not discussed here, although it was sent to a Select Committee in 2020 in response to Paul Vennell's testimony that, "If there had been any miscarriages of justice, it would have been really important to me and the Post Office that we surfaced those", whilst denying Second Sight access to prosecution files.¹⁸²

The report also expresses concern at the way in which the, "the independent body set up to administer the Scheme ('the Working Group') chaired by Sir Anthony Hooper, a retired Court of Appeal Judge," was "wound up with immediate effect" on 10 March 2015 by POL, "the day before we were due to circulate a draft of this Report to all members of the Working Group." And, "the day that Post Office notified us that our contract to conduct an independent investigation into the matters raised by Applicants was being terminated."¹⁸³ They appear to view POL's opinion on remit as nonsensical, given that SPM concerns were often centred on investigation and prosecution for shortfalls. They also suggest non-cooperation with central lines of inquiry of the Inquiry, "appear[s] to represent a policy decision, taken at a senior level within Post Office, which is contrary to the undertakings previously provided to Second Sight, to Applicants, to the JFSA and to MPs."¹⁸⁴

The report did identify a raft of ways in which, "in some circumstances Horizon can be systemically flawed from a user's perspective,"¹⁸⁵ but also, "that Post Office's investigators have, in many cases, failed to identify the underlying root cause of shortfalls prior to the initiation of civil recovery action or criminal proceedings. This includes cases where Applicants brought to the Auditors' or Investigators' attention their own suspicions as to the underlying root causes of their branch's losses."¹⁸⁶ With investigators having, "defaulted to seeking evidence that would support a charge of false accounting, rather than carrying

¹⁸⁰ *ibid* 2.9 to 2.12.

¹⁸¹ *ibid* 2.19.

¹⁸² Henderson (n 30).

¹⁸³ Second Sight (n 25) para 2.8.

¹⁸⁴ *ibid* 3.1.

¹⁸⁵ Second Sight (n 167) para 26.8.

¹⁸⁶ Second Sight (n 25) para 25.1.

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out an investigation into the root cause of any suspected problems.”¹⁸⁷ They said:

25.21. We are aware of cases where criminal charges have been brought which appear to have been motivated primarily by Post Office's desire to recover losses. In some cases, those criminal charges do not seem to have been supported by the necessary degree of evidence and have been dropped prior to trial, often as part of an agreement to accept a guilty plea to a charge of false accounting, so long as the defendant agreed to repay all of the missing funds.

POL minutes suggest that they had concerns about the quality of Second Sight's work and that they were extending beyond their remit. The concerns that Second Sight's report partly evidences prefigures many of Fraser J's findings in the Bates litigation and, in milder form than they manifested in the Court of Appeal, many of the concerns identified in *Hamilton*. The closing down of access to legal papers may coincide with the institution of the CK Sift, the Altman Review, and/or (given Second Sight's emphasis on legal objections being placed in the way of their access to documents) the change in General Counsel in October 2013. The lines of inquiry being pursued by Second Sight proved both prescient and germane to the cases that followed and provided a warning to POL of the problems that lurked in their prosecutions. Those difficulties were paralleled, but in less detail, in the Clarke advices. It is an important, so far unpursued, element of the case as to why more substantial disclosure of concerns identified by Second Sight do not appear to have been made. It seems likely that there would have been documentation and evidence arising from interactions with Second Sight which were not disclosed to appellants or defendants

A question of great significance to the operating culture of POL is the extent to which any information emanating from Second Sight, along with the other indications of concern about Horizon and/or prosecutions in 2013, prompted a full and proper consideration of the implications of the problems exposed for past and future prosecution. The Altman and CK Sift reviews seem to have been the immediate response and, yet this did not produce an adequate response, partly because of its emphasis on the Second Sight Interim and Rose reports. It underlines the need for an independent and objective investigation into the CK Sift and Altman review, the adequacy of them and of POL's response to them.

As was noted in our first Working Paper, Second Sight's own ability to engage with evidence giving in the civil case was inhibited by a confidentiality agreement.¹⁸⁸

¹⁸⁷ *ibid* 25.3.

¹⁸⁸ Moorhead, Nokes and Helm (n 1).

3.11 Conclusions

The Court of Appeal found that, “POL deliberately chose not to comply with its obligations” of disclosure. And that,

“These were very serious failures by POL to fulfil its obligations as a prosecutor. We are driven to the conclusion that throughout the period covered by these prosecutions POL's approach to investigation and disclosure was influenced by what was in the interests of POL, rather than by what the law required.”

For reasons we discuss below, it is understandable but concerning, that such an awful miscarriage of justice can end, if it does end at *Hamilton*, without a more detailed examination and, where appropriate, calling to account.

In what we discuss above we can see that key documents or events came to the attention of, or involved, lawyers within POL in 2010. 2010 was an important year because Horizon was attracting adverse publicity. More particularly still Seema Misra's legal team were mounting the kind of robust defence that POL had managed to avoid or defeat in the past. Horizon and POL's failure to disclose evidence on Horizon was under a more sustained assault. The lawyers would have been attuned to the importance of adverse evidence and the significance of disclosure.

We know too, from the Ismay Review, that in 2010 there were discussions about conducting an independent review into Horizon to assuage critics. A review was dismissed partly because of concerns that such a review would be disclosable, and might give them legal difficulties. Separately, a bug came to light and a meeting took place which showed resistance to handling that bug openly for fear it might influence legal proceedings. That meeting was days before Seema Misra's trial. A note about the bug meeting was emailed to lawyers with responsibility for criminal prosecutions in POL, yet no disclosure of that information took place.

An expert witness for POL, in fact an employee of Fujitsu and not an independent expert, had evidence which they failed to mention in when giving evidence about two bugs and the ability to access Horizon remotely. Such information opened up defences to anyone prosecuted on the basis of Horizon that the system was unreliable and insecure. An explanation for these failures to disclose is not given; two possibilities present themselves in the evidence we have seen. One is that the desire to protect Horizon and the POL brand overcame the lawyers' obligations as prosecutors and as officers of the Court; it was clear the lawyers saw the trial as an important one to defend and win. The second is that they formed the view that the bugs post-dated the allegations against Mrs Misra and so did not need to be disclosed. At *Hamilton*, it should be noted, this was not offered as an excuse; POL conceded disclosure should have been made. In any event, it does not deal with failure to disclose evidence of remote access. The likely basis is that disclosure errors opened up legitimate lines of inquiry that should have been pursued by a prosecutor and disclosed to the defence.

These aspects of 2010 provide the clearest examples of flawed prosecutorial behaviour and what appears to be, on current evidence, the failure of senior

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lawyers in POL to recognise and/or address them. They took place in a broader context. The ways in which POL's interest were prioritised over SPMs when investigated and then prosecuted for criminal conduct includes:

- Inhibiting representation at interviews, particularly legal representation (some of which appears to have been manifest in contracts with SPMs).
- Interviews being conducted incompetently or with inadequate preparation or inappropriately: to find a basis to charge rather than to investigate, inducements offered to admit wrongdoing and other pressure put.
- Investigations that point to a lack of critical evidence were not appropriately dealt with when charging decisions were made or trials proceeded with.
- Charging took place in the absence of evidence of critical elements of the charge (dishonesty in particular).
- Failures to fairly investigate lines of defence when raised at all, or basing his investigations on inadequate data (such as management data rather than the more detailed data from which management data was derived) and not interviewing relevant witnesses
- Failure to attend to red flags (such as SPMs prosecuted for Horizon-related problems which continue after they have left). Failure to disclose evidence of these red flags.
- Prosecution tactics around charging and plea apparently related to the need to protect Horizon and the post office brand from attack, suggesting a lack of professional disinterest.
- Although not found by the Court of Appeal to be entirely illegitimate behaviour, plea and charging decisions apparently related to the desire to seek recovery of debts rather than prosecution the public interest.
- Specific and deliberate failures to disclose information during prosecution and post-conviction. Routine non-disclosure of Horizon data.
- Resistance of requests for disclosure on inappropriate grounds including cost.
- Evidence that disclosure was not properly supervised.
- The Court of Appeal appears to raise a concern that disclosure decisions may have been taken in bad faith given the institutional reluctance generally around disclosure and specific discussions on the receipts and payments mismatch bug.

Our principal interest in this paper is in the role of prosecution lawyers. POL lawyers would have conducted or had responsibility many of these problematic

steps, and supervised or been aware of most, perhaps all of the others. The solicitors and their firms instructed to conduct prosecutions on POL's behalf and barristers at the private Bar instructed to conduct the advocacy may, depending on their instructions and how they responded to them, have acted in ways adding to the problems or not challenging them when they should have.

This latter work is largely hidden from view so far; we know little about it. As does the work of lawyers in or acting for Fujitsu, if they became involved, for instance, in discussions about disclosure of Horizon evidence. Similarly, Paul Scully's evidence, noted above, suggests to us government lawyers may have become involved too. Nor do we know how external lawyers were selected and managed. We are told of other (i.e. non-Post Office) private prosecution work where outside lawyers instructed no longer get cases if they do not toe the party line on cases. How external lawyers were managed by POL is an important part of any review.

The lawyers do not bear sole responsibility for what went wrong with Horizon prosecutions and appeals, but as prosecutors and officers of the court they do bear particular responsibility for many of these problems. The Court of Appeal note, we think importantly, the failure of any evidence showing people speaking up in the face of such widespread problems.¹⁸⁹

3.8.1. Ethical Obligations Relevant to Prosecutions and Trials

The general professional and ethical rules applicable to all lawyers apply to the lawyers working within POL. Thus a solicitors duty to protect the rule of law and the administration of justice, and obligations such as those on a solicitor not to use their role to take unfair advantage (of SPMs in plea negotiations for instance). Although lawyers owe an obligation to protect their client's best interests and not to disclose confidential information without the client's consent, the most acute ethical infractions will have occurred if lawyers have knowingly or recklessly been complicit in, or have themselves engaged in, misleading the court. The disclosure failures around Seema Misra's case are a particular concern in this regard.

A lawyer's obligation to protect the administration of justice for Solicitors and duty to the court in the administration of justice for Barristers is pre-eminent among professional obligations.¹⁹⁰ That position is emphasised and deepened by disclosure obligations on prosecutors and the *Statement of Ethical Principles for Crown Prosecutors* ("DPP's Statement"). Although POL were not Crown Prosecutors, they have indicated they regarded themselves as adhering to the same standards.¹⁹¹ In any event the statement provides a useful distillation of the conduct one should expect of all prosecutors. It is likely to be influential on

¹⁸⁹ *Hamilton* 130

¹⁹⁰ CD1, gC1 BSB Code of Conduct; SRA Principles and associated guidance, <https://www.sra.org.uk/solicitors/standards-regulations/principles/> last accessed 17 September 2021

¹⁹¹ Justice Select Committee (n 15).

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professional regulators and disciplinary tribunals when considering allegations of professional misconduct.

The 2009 statement, issued by the Director of Public Prosecutions emphasises a, “commitment to internationally agreed standards of probity, fairness, openness and accountability in our dealings with others, whether they are victims, defendants or other criminal justice legal professionals.” And, “Prosecutors must not knowingly participate in, or seek to influence, the making of a prosecution decision in regard to any case where their personal or financial interests or their family, social or other relationships would influence their conduct as a prosecutor.”¹⁹²

It may be, although this is another unknown, that lawyers within POL had performance related bonuses, or other forms of performance management which would have affected the way they handled cases. Some of the discussion of cases and their outcomes suggests an importance attached to winning cases which was lacking in professional detachment or independence, itself a potential breach of Professional Codes. More pertinently still, the DPP’s Statement emphasises:

3.5 Prosecutorial discretion in deciding whether to initiate or continue a prosecution, in the selection of charges, in the acceptance of pleas and in any other matter, shall be exercised independently and impartially, in accordance with the law.... When making such decisions, prosecutors must not allow themselves to be influenced by individual, sectional or political interests or media pressures.

...

4.2 Prosecutors must maintain the highest standards of fairness and impartiality at all times.

The failures to investigate (or disclose) potential lines of defence is a strong theme running through Hamilton. This too is covered by the Statement

4.6 To ensure the fairness and effectiveness of prosecutions, prosecutors must:

endeavour to ensure that all reasonable enquiries are made and the results disclosed in accordance with law, whether that points towards the guilt or the innocence of the defendant;

endeavour to ensure that the facts are presented fairly and that all relevant authorities are drawn to the courts attention, whether they are in the favour of the prosecution or defence;

In July 2013 the Clarke advice explained much of this in the context of one particular problem: Gareth Jenkins, a Fujitsu employee purporting to give evidence as expert.¹⁹³ POL were told his evidence placed, “the Post Office

¹⁹² Para. 3.3

¹⁹³ Although we do not dwell on it here, as an employee Mr Jenkins lacked the necessary independence to be called as an expert.

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Limited in breach of their duty as a prosecutor,” and had a “profound effect” on POL and POL as prosecutor. Clarke emphasises that, “there are a number of now convicted defendants to whom the existence of bugs should have been disclosed, but was not.”¹⁹⁴ He also said that these defendants remain entitled to such disclosure and may then bring appeals. We know that as a result of this advice a process of review was put in place, whereby Mr Clarke’s firm reviewed a large number of prosecutions to decide what further disclosures should take place. POL were also advised on how to improve their management of Horizon relevant disclosure. We know too that Mr Clarke advised on instructions from a senior POL employee to shred minutes of disclosure management meetings. The Director of Security, leader of the department that oversaw POL’s initial investigations into shortfalls, was said to have issued this instruction. This prompted the sternest of warnings that POL risked abrogating its duties as prosecutor and perverting the course of justice; a criminal offence that typically carries a prison sentence.

We know too that Brian Altman QC was asked to advise in 2013 and did so on the process of review. We do not know anything very precise about the nature or substance of those instructions. We know that Clarke’s advice ‘recognised’ that POL might want to get a second opinion on what he had said in response to a proposed shredding of documents in August; it may have been that second opinion was contained within such advice. And we know that POL’s prosecutorial team indicate that the review was general and not concerned with individual cases. We know too that this included considering at least one of Clarke’s advices (the July advice), from which it can be inferred that Mr. Altman will have read that in detail.¹⁹⁵ We do not know if he saw, read, or advised on the August advice. Whether Brian Altman reviewed that advice is not known, but he is shown to have considered the advice from Simon Clarke from days earlier which indicated a prosecution witness was unreliable.

The outcome of these reviews was disclosure in a modest number of cases. By the time of *Hamilton*, POL had conceded this was wholly inadequate and, in some cases conceded their conduct was an affront to the public conscience. The Court of Appeal found it was an affront in most of the cases before it. The nature of the instructions given in the review; whether this constrained the review in any way; how that review was undertaken; the substance of decisions on it; and the tests which formed the basis of the review itself are all legitimate and important areas for further scrutiny. We also need to raise the questions as to what was known and advised on by Brian Altman in this process given his subsequent representation of POL in the appeal itself. It is vital to understand how his own prior involvement in the case sits with his representation of POL in the *Hamilton Appeals*.

A matter of particular interest is how the discovery of problems were understood. There are four elements to them:

¹⁹⁴ Clarke Advice 13 July 2013, *Hamilton Transcripts*, submissions by Sam Stein QC.

¹⁹⁵ Altman et al (n 131) para 14.2.

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1. The bugs that Gareth Jenkins had failed to disclose, against evidence that Jenkins gave that Horizon operated essentially without problems.
2. The evidence that remote access was possible and did occur (which was contained in the Rose Report).
3. The knowledge that Gareth Jenkins had probably misled the court.
4. Knowledge that disclosure management obligations had been abrogated, with an instruction to shred documents by a senior POL employee. POL now denies that minutes were shredded.

These matters came to light in 2013, but some of the information about 1 (and possibly 2) was considered by POL lawyers internally in 2010. The four elements were a substantial, probably the main, reason the Court of Appeal held non-disclosure had been deliberate. It indicated a pattern of behaviour and a failure to consider the prosecutor's obligations. Consistent with the Attorney General's guidelines on disclosure, and the Supreme Court's decision in *Nunn* there is an obligation to consider, and usually disclose, any material coming to light after conviction which might cast doubt on the safety of the conviction.¹⁹⁶

For reasons which have not been fully explained the 2013/14 post-conviction disclosure exercise appears to have been confined to considering two documents: Second Sight's Interim Report and the Rose Report. This would have disclosed some of the information available on Points 1 and 2 above; but not 3 (although a defendant's lawyer with knowledge of Jenkins' evidence, a limited group in all likelihood, might infer it) and not 4. The disclosure exercise is also confined in time to convictions from 2010 onwards, on the basis (it seems) that the main bug affecting Jenkins evidence arose in 2010. There is good reason to doubt the appropriateness of this timeframe: all convictions based on Horizon were potentially unsafe given there was evidence of significant bugs and of the possibility of remote access.

Regardless of the actual dates involved, there is an important question about why disclosure was seen in such narrow terms. Items 1 to 4, as the Court of Appeal's judgment suggests, were seen by the Court as demonstrably relevant to the safety of all convictions based wholly or mainly on Horizon evidence. There would also have been a reasonable basis for would-be-appellants to seek further investigations given there was a real prospect of further material emerging which affects the safety of a conviction.¹⁹⁷

It may have been that advice was sought on a limited basis: whether the Rose and Second Sight report ought to be disclosed. We know there was other evidence relevant to weaknesses in Horizon and POL's inappropriate approach to disclosure: the Ismay Report, and E&Y's letter about lack of controls around

¹⁹⁶ The Supreme Court, 'R (Nunn) (Appellant) v Chief Constable of Suffolk Constabulary and Another (Respondent) [2014] UKSC 37' <<https://www.supremecourt.uk/cases/uksc-2012-0175.html>> accessed 23 August 2021.

¹⁹⁷ *ibid.*

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Horizon's remote access to give two examples. It seems reasonably likely that other information was given to POL by Second Sight which was disclosable given this was the trigger for the Clarke advice. We do not know how fully the lawyers instructed to advise POL (such as Mr Clarke and Mr Altman) were appraised of, or should have probed into, other information of this kind.

Mr Clarke is rightly praised in the Court of Appeal for his advice on these matters. What is not explained or considered is how it is that the disclosure after his advice is so limited and whether he or others involved advised and acted to the required standards in what followed. In 2013 Mr Clarke thought it likely that the Courts had been misled previously; that better disclosure management needed to be put in place; and, that there was an immediate attempt to abrogate such a process sufficiently serious to be construable as a criminal offence. Some, perhaps all, of Mr Clarke's concerns were considered by Mr Altman when he did his general review. We also know that another firm of solicitors wrote to warn the board of a problem with Horizon related evidence.

This broad picture is inconsistent with the narrow disclosure that occurred; but we do not know what Mr Clarke's advice on actual disclosure was (during the 'CK Sift' that took place after the Summer of 2013). Nor do we know how Mr Altman advised. He indicates before the Court of Appeal that "we do not know" why the disclosure that should have happened did not happen. To simplify, there are three main possibilities: the instructions were limited in some way, which may not have indicated a broader need to disclose; Mr Clarke and Mr Altman advised correctly on the need for broader disclosure, but that advice was not followed; or, their advice incorrectly indicated narrow disclosure of the kind that took place was appropriate.

We know also that the advice Mr. Clarke, at least, was requested to give was also framed in terms of advising on reputational issues as well as disclosure. An interesting question is whether such a framing of the advice is consistent with the obligations of prosecutor. Should instruction in those term have been declined as undermining his independence given the public interest in fair prosecution?

Given that one crucial strand of the appeals centred on inadequate disclosure and the fact that Mr Altman appears to have advised on disclosure in 2013 in the light of at least one of the Clarke advices, there is an important question about whether he was sufficiently unencumbered by actual or perceived conflicts of interest to advise and represent POL. Whether there is an actual or perceived conflict of interest is accompanied by a related question whether he is sufficiently independent given his prior involvement in the case. A core duty for Barristers is that "You must maintain your independence"¹⁹⁸ That obligation of independence is underlined doubly for prosecutors. The Private Prosecutor Associations' Code notes:

¹⁹⁸ BSB Code of Conduct, CD4

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'It is well known to every practitioner that counsel for the prosecution must conduct his case moderately, albeit firmly.

...'Advocates...who have conduct of private prosecutions must observe the highest standards of integrity, of regard for the public interest and duty to act as a minister of justice (as described by Farquharson LJ) in preference to the interests of the client who has instructed them to bring the prosecution.'

Cordery discusses independence, in the context of solicitors, as follows:¹⁹⁹

The concept that solicitors should act independently lies at the heart of both the solicitor-client relationship and the duty to the court. It is closely linked to the duty not to act in a conflict of interest and to uphold the proper administration of justice. However, the duty of independence is wider. It encompasses the duty to be objective and be uninfluenced by commercial or other interests. More importantly, it is a duty to be independent of government. The need for a legal profession to be independent of the state lies at the heart of a democratic constitution.

It quotes, Lord Neuberger, President of the Supreme Court, in the 2012 Upjohn lecture:²⁰⁰

"A vibrant, independent legal profession is an essential element of any democratic society committed to the rule of law. It is not merely another form of business, solely aimed at maximising profit whilst providing a competitive service to consumers. I am far from suggesting that lawyers ought not seek to maximise their profits, or ought not provide a competitive service. What I am saying is that lawyers also owe overriding specific duties to the court and to society, duties which go beyond the maximisation of profit and which may require lawyers to act to their own detriment, and to that of their clients."

The SDT commented on the importance of solicitor's independence in the matter of *David Peter Barber*,²⁰¹ concerning a firm taking loans from a client:

"Raleys [the firm] had had a long (over 100 years) association with the NUM [the client]. They were rightly proud of having served the Mining Community over many years and were proud to be the nominated NUM Lawyers. The difficulty which that situation created was that the lawyers become too close to their client and too reliant upon it. That kind of situation eats away at the independence of the lawyers and blinds them to their duties under the Professional Rules of

¹⁹⁹ Corder, section [309].

²⁰⁰ Lord Neuberger, 'Reforming Legal Education' (Association of Law Teachers Lord Upjohn Lecture, November 2012) – see: www.supremecourt.uk/docs/lord-neuberger-121115-speech.pdf.

²⁰¹ SDT Case 9698-2007, 21 July 2009.

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Conduct of the Profession, especially towards their individual clients.' (Para 273)'

The SRA published a report entitled '*Independence, Representation and Risk*' in 2015. This report looked at the extent to which law firms may sacrifice elements of their independence in order to satisfy large clients with significant buying power. The report suggested that:²⁰²

"...in the context of the lawyer-client relationship, the following matters have the potential to influence the independence of any given lawyer: (i) the balance of power between lawyer, firm and client; (ii) the reliance of the lawyer and/or firm on the client for business; (iii) the willingness and potential for lawyers and firms to say 'no' to clients; (iv) the acceptance by lawyers and firms that affirming independence may have negative financial consequences; (v) the closeness of the lawyer and/or firm to the client; (vi) law firm culture and the ownership and management of ethics, compliance and risk; and (vii) the ways in which firms structure and distribute incentives'.

Two specific threats to lawyer independence were highlighted by the report, namely: 'i) the risks arising from clients seeking to put pressure on the way in which legal opinions are drafted; and (ii) third-party payers seeking, in some contexts, to influence the behaviour of advisers to other parties on a transaction (often by dictating who those lawyer advisers could be) – for example, a borrower telling its funder bank which lawyers that bank can use on the loan'.

We think that it is right to ask the question whether Mr Altman was by the time he came to the Hamilton hearing independent enough to only represent his client and to ensure that the proceeding were being appropriately argued.

Something of his role in 2013 is put before the Court of Appeal by POL's team, when hearing an application from the journalist Nick Wallis to publish the July Clarke advice. So we are not suggesting his participation in 2013 was not disclosed; although knowledge about his involvement is limited.

We do not know enough to say whether a conflict arises, but it is reasonable to ask the question: is there a substantial risk or appearance of a conflict? Mr Altman was involved, to an extent not fully understood yet, in reviewing disclosure in 2013, when there were multiple reasons for thinking there were serious difficulties with Horizon prosecutions past and present. Disclosure problems were a central part of the case against POL. Proper disclosure did not occur. This may have nothing to do with Mr Altman's advice or the advice may have been an important part of the causal chain. Mr Altman plainly has an interest, separate and potentially different from his client, in how the court perceives his role. As such there is a clear question as to whether Para. 3.4 of the DPP's Statement is breached:

²⁰² Coe and Vaughan, *Independence, Reputation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms*: www.sra.org.uk/globalassets/documents/sra/research/independence-report.pdf?version=4a1ab7

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Prosecutors must not act as an advocate in any case in which their action or decision is the subject matter of litigation, or in which, for any other reason, they are likely to be called as a witness.

Similarly, rC21.2 of the Bar Standards Board Code of Conduct prohibits the acceptance of instructions to act in a particular matter if “there is a conflict of interest, or real risk of conflict of interest, between your own personal interests and the interests of the prospective client in respect of the particular matter.”²⁰³

We should note, however, that the matter of Mr Altman’s involvement in 2013 is not discussed at all in the final hearing of the case. We also note the likelihood of delicate matters being dealt with during the case in 2020/21 where the need for independence was particularly acute: the raising of potential contempts and the disclosure of the two Clarke advices in particular.

The timing of the disclosure of the August Clarke advice risked the Court of Appeal deciding whether to hear Ground 2 without a sense of the scale of wrong being uncovered in POL. The Court of Appeal could have decided, but did not, not to hear Ground 2. The parties were also, it seems, asked to deal with Ground two in the absence of this very important evidence.

Part of 4.6 of the DPP’s Statement says Prosecutors must:

endeavour to ensure that evidence which is favourable to the defendant or which undermines the prosecution case is disclosed *as soon as reasonably practicable* in accordance with the law, the Attorney Generals Guidelines on Disclosure and the requirements of a fair trial; *(our emphasis)*

A question must be whether it was impracticable to disclose such evidence and in time for the Court and the parties to have it when Ground 2 decisions were taken. The risk of prejudice to the parties and to the administration of justice was significant.

Another way of looking at this is that public prosecutors must, “strive to be, *and to be seen to be*, consistent, independent, fair and impartial”. *Our emphasis*)²⁰⁴ Given his involvement, was Mr Altman capable of being, and being seen to be, independent, fair, and impartial? As Mr Altman notes in pointing out POL’s own failure to explain why disclosure did not happen, he says,²⁰⁵

The why, the why it didn't happen, we have out, you may recall, in our short response skeleton of 8 January. We don't know. Was it incompetence? Was it individuals not understanding their duties? Or was it deliberate? There is no

²⁰³ <https://www.barstandardsboard.org.uk/the-bsb-handbook.html?part=&audience=&q=conflict+of+interest> last checked 15 September 2021

²⁰⁴ Statement of Ethical Principles for the Public Prosecutor, para. 3.1d, last accessed 6 October 2021, <https://www.cps.gov.uk/legal-guidance/ethical-principles-public-prosecutor-statement>

²⁰⁵ Hamilton Appeal Transcripts

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evidence before the court to say which it was, but the plain fact of the evidence is it was not disclosed

The difficulty is Mr Altman presumably knows more than he can say, because of client confidentiality, but there is also the potential point that he may have his own interest to protect. Discreet silence here may have minimised reputational damage to the Post Office but it may not have served the interests of fairness or justice which Prosecutors are supposed to serve.

3.8.2. Other Issues

There are a range of other issues which we have not commented on, at least in such detail, in this paper but which we think it important to acknowledge:

- What these cases tell us about private prosecutions is of critical importance to the future and regulation of such prosecutions. There is evidence to link the handling of the cases to the reputation management and financial interests of POL (both in terms of minimising the costs of investigation and in terms of securing recovery).
- The case is plainly relevant to whether an organisation can act as victim, investigator, and prosecutor with the requisite independence. A great many problems with the conduct of cases stem from the adequacy of their investigation and processes around Horizon such as audit. The structural conflicts of private prosecution have been exacerbated by the commercial desirability of protecting its brand and the reputation of the Horizon System. Sensitivity to reputation formed part of POL's instructions to and it is also reasonably clear that decisions about plea were influenced by the desire to seek compensation. Seeking confiscation, for instance, would have smoothed the path significantly in procedural and evidential terms. Perhaps surprisingly, the Court of Appeal was slow to question the legitimacy of such factors having some influence. There is a significant case for prohibiting private prosecutors, save perhaps those that are properly considered public authorities, from being able to seek confiscation orders.
- The debate about reliance on computer evidence is of vital importance; especially given examples, such as Seema Misra's case, of judges refusing requests for disclosure.
- Whether any documents relevant to the management of disclosure or otherwise relevant to the prosecution of SPMs for Horizon shortfalls were destroyed and, if so, whether that destruction was considered for disclosure to any applicants? POL indicates that the minutes that were said to have been shredded were not shredded. There is no indication that we have seen of what happened to the handwritten notes that participants in disclosure meeting were asked to forward to the Director of Security. The extent to which POL lawyers did or should have investigated and the alacrity with which

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they responded to the August Clarke advice is important: the protocol put in place to deal with the shredding was said to have been signed off in October 2013 (having been raised in August).

- The extent to which criticism of Mr Jenkins evidence was known to personnel dealing with the Bates litigation is important with regard to disclosure made within those proceedings and the decision not to call Mr Jenkins in the group litigation.
- The procedural and substantive standards that apply to professional conduct in this critical area are not as clear as they need to be. Documents such as the Code for Crown Prosecutors, the Code of Practice under the Criminal Procedure and Investigations Act, and the statement of ethical principles for Crown Prosecutors should explicitly apply to all investigators and prosecutors pursuing criminal investigations or proceedings. POL have conceded their application in this case (although individual lawyers in POL might yet dispute that). There is no reasons that we can see for not having the same standards apply across the board to all prosecutors, at least on the kinds of issues identified above. Professional regulators, such as the SRA and BASB could make plain quickly that this is indeed how they see the professional obligations on its own members.
- There are similar issues around the application of PACE interview standards. Logic dictates they should apply to all investigations that may give rise to prosecution. On the information as it appears in Hamilton the boundary between PACE and other interviews is not clear and may have been abused. If PACE standards are not applied to investigative interviews, the presumption should be that any material should not be available at a criminal trial.
- The debate about quality and funding of representation in the criminal justice system, particularly for legally aided defendants, and potential pressures to plead guilty created by sentencing guidelines allowing a change in sentence ‘type’ when defendants plead guilty.

Overall, it is worth observing, without criticising the Court itself, how relatively general its consideration of the wrongs in *Hamilton* is. It is one reason why the Court of Appeal makes criticisms at an organisational not individual level. Accountability for these failings needs to go beyond such facelessness. The conduct of the original criminal cases; the various reviews prosecutions/disclosure/appeals; and the conduct of the Hamilton appeal itself all, in our view, require investigation.

The inadequacy of only finding organisational wrongdoing is underlined somewhat by the current Post Office CEO indicating the reputational damage to

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POL is limited.²⁰⁶ More important is the need to find out what happened, and why mistakes or misdeeds occurred. Some of those lawyers identified above may have been negligent, complicit, prime movers, or entirely innocent of the wrongs laid at their door. There is vital learning for corporate governance, professional decision-making, and regulation. Some of that learning will point to cultural problems and good-faith mistakes; some may point to professional misconduct, even, potentially, criminal misconduct. More importantly still, the SPMs wronged by the injustice set out in Hamilton deserve that those individuals responsible are held to account for mistakes or deliberate misdeeds which devastated lives.

The reasons why the Court of Appeal did not delve into individual responsibility may be twofold. Firstly, limited time to hear cases and a heavy docket militates against more detailed consideration. The Court only needs to go into enough detail to decide the appeals: individual accountability, and professional responsibility, is beyond what it needs to and is set up to deal with. The second reason is that the Court formed the view that non-disclosure was deliberate and raises but does not decide whether matters were held in bad faith.²⁰⁷ Deliberate, bad faith non-disclosure, whether by employees of POL or lawyers might amount to a criminal offence. The Court would also have been mindful that two Fujitsu's employees were being investigated following the Bates case.²⁰⁸ In relation to deliberate and/or bad-faith decisions in investigation and prosecution, the offence of perverting the course of justice may be relevant. This is committed where someone: (a) acts or embarks upon a course of conduct, (b) which has a tendency to, and (c) is intended to pervert, (d) the course of public justice.⁵ It is an offence, "concerned with the course of justice and not merely the ends of justice."⁶ The offence plainly covers concealing (or deliberately failing to disclose) evidence. And having, or believing one has, laudable motives for seeking to influence the course of justice is not a defence in itself;¹⁰ even attempts to persuade a dishonest witness to tell the truth can amount to perverting the course of justice: "Even if the intention of the meddler with a witness is to prevent perjury and injustice, he commits the offence if he meddles by unlawful means."¹¹ And even, a *lawful* threat, or exercise of a *legal right* can constitute an act intended to pervert the course of justice, "if the end in view is improper."¹² We do not know if the facts might indicate such an offence or by whom, but it is something which ought to be borne in mind.

There are also ways in which the problems manifest in the POL prosecutions, the defence of them, the handling of trials, and the appeals might be symptomatic of broader problems in the criminal justice system. Overcharging, failures to disclose, and inadequate defence work have featured regularly in miscarriages of justice, and academic and policy criticism of the criminal justice system. We hope to look at some of these issues in a later paper.

²⁰⁶ Jane Croft and Harry Dempsey, 'Post Office Struggles to Recover from a Bruising Scandal' *Financial Times* (23 August 2021) <<https://www.ft.com/content/15099cd9-9a74-4696-ae54-ff871740c619>> accessed 25 August 2021.

²⁰⁷ *Hamilton* 135

²⁰⁸ *Hamilton* 134

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It is possible to see the cases not as an aberration corrected, if belatedly, by the appeal system, but as symptomatic of a deeper malaise. This can be true even though these were private prosecutions, conducted in a context where POL saw defending Horizon as an existential problem for the business. The *Hamilton* appeal judgments are again too superficial, despite their acuity and strength of criticism, to stand as the last word on accountability for these failings. It is not good enough to say that the POL prosecution strategies were flawed and failed without also identifying the lines of accountability. After all someone devised the strategy, someone signed it off, someone designed it, someone implemented it and someone managed it; others then endorsed it, defended it and protected it. Those people need to account for their actions and justify what was done.

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