

**Post Office Horizon IT Inquiry**

**(For the Attention of Sir Wyn Williams, Inquiry Chair)**

**Submission from Criminal Cases Review Commission (“CCRC”)**

**28<sup>th</sup> January 2021**

**Introduction**

1. The Criminal Cases Review Commission (CCRC) is the statutory body created in 1997 to investigate alleged miscarriages of justice and refer appropriate cases for appeal. Our jurisdiction covers the criminal courts of England, Wales and Northern Ireland. The CCRC has the power to refer a conviction, sentence, verdict or finding to the appropriate appeal court where there is a “real possibility” that such an appeal would succeed. Since starting work nearly 24 years ago, the CCRC has referred over 750 cases to the appeal courts. Around two thirds of those appeals have succeeded.
2. As CCRC Chairman, Helen Pitcher OBE, has said: it is important to remember that as well as eroding confidence in the justice system, miscarriages of justice can have severe and wide-ranging effects on the victims of those miscarriages and on their families.<sup>1</sup>
3. Between March 2015 and January 2021, the CCRC received applications from 75 individuals who were formerly sub-postmasters (“SPMs”), or managers or counter assistants in Post Office branches, who had been convicted of or who had pleaded guilty to theft, fraud or false accounting in cases where the Post Office was the victim (the “Post Office applicants”). The Post Office applicants submitted that there was new evidence concerning (i) failings in the Post Office’s Horizon computer system and (ii) the response of Post Office Ltd (“POL”) to those failings which was relevant to the safety of their convictions.
4. As of 22 January 2021, the CCRC has referred the convictions of 51 of the Post Office applicants to the appropriate appeal court<sup>2</sup> on the basis that the prosecutions amounted to an abuse of process. The convictions in 6 of these cases<sup>3</sup> have been quashed and POL has indicated that it will not oppose another 38 of the appeals (which are due to be heard in March 2021).<sup>4</sup> The

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<sup>1</sup> The CCRC is aware of relevant and relatively recent academic research on the harms of wrongful conviction in the work of Dr Laura Tilt of the Centre for Criminology at Oxford University: Tilt, Laura. *The Aftermath of Wrongful Convictions: Addressing the Needs of the Wrongfully Convicted in England and Wales*. University of Oxford, 2018. More information about the work can be found here: [The aftermath of wrongful convictions: addressing the needs of the wrongfully convicted in England and Wales - ORA - Oxford University Research Archive](#)

<sup>2</sup> The Crown Court for those convicted in the magistrates’ court (8 cases) and the Court of Appeal (Criminal Division) for those convicted in the Crown Court (43 cases).

<sup>3</sup> All of which were convictions from the magistrates’ courts.

<sup>4</sup> All of which relate to convictions from the Crown Court.

CCRC continues to receive applications from new Post Office applicants and currently has 20 cases under consideration.

5. This submission sets out, in some detail, the basis on which the CCRC referred the cases of the Post Office applicants. It does so in terms drawn almost verbatim from the documents, called Statements of Reasons, that the CCRC sent to the Court of Appeal referring the cases and setting out the reasons for the conclusions that there is a real possibility that the Court would quash the convictions.

## Background

6. The IT system used in Post Office branches is known as Horizon.<sup>5</sup> By recording transactions, Horizon calculates how much cash and stock should be in an individual branch at any given time. In accordance with their contract, SPMs were expected to count the cash held at their branch each day and enter a daily cash declaration onto Horizon. If at the end of the relevant trading period (approximately each month) there was a discrepancy between the cash on hand and the figures generated by Horizon, the SPM was required by their contract to make good the difference.<sup>6</sup> The convictions which the CCRC was asked to review typically arose after POL auditors found that the physical cash and/or stock in a particular branch was less than that declared by the SPM.
7. Alleged problems with the Horizon system were first reported by Computer Weekly in 2009 and concerns were raised by a Member of Parliament in 2012. This led POL to appoint a firm of forensic accountants, 'Second Sight', to investigate these concerns. In 2013, a mediation scheme was established and overseen by a working group, chaired by a former Lord Justice of Appeal. However, following concerns that the parties had lost faith in the process, the working group was wound up in March 2015.
8. Approximately 580 former SPMs, Crown Office employees, managers and counter assistants brought civil claims for damages against POL relating to the alleged deficiencies in the Horizon system. 62 of the civil claimants had criminal convictions in connection with shortfalls at the Post Office branches at which they formerly worked. These proceedings eventually led to the "Common Issues" judgment<sup>7</sup> in March 2019 and the "Horizon Issues" judgment<sup>8</sup>, delivered on 16 December 2019. Both judgements were delivered by the Honourable Mr Justice Fraser ("Fraser J"). The civil proceedings concluded shortly before the Horizon Issues judgment was handed down, after the claimants and POL reached a settlement.

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<sup>5</sup> The original version, introduced in 1995 is sometimes referred to as "Legacy Horizon" and the current version, known as "Horizon Online", is sometimes referred to as "HNG-X".

<sup>6</sup> The civil claim against POL established that there was no option on Horizon to dispute the figures. A SPM was obliged to accept the figure generated by Horizon before rolling over to the next trading period.

<sup>7</sup> *Alan Bates & Ors v Post Office Ltd (Judgment (No 3) "Common Issues"* [2019] EWHC 606 (QB).

<sup>8</sup> *Alan Bates & Ors v Post Office Ltd (Judgment (No 6) "Horizon Issues"* [2019] EWHC 3408 (QB).

## Summary of the CCRC's grounds for referral

9. The CCRC decided to refer the cases of the Post Office applicants because, in light of the findings of the High Court in the “Common Issues” and “Horizon Issues” judgments, it was satisfied that there was a real possibility that the Court of Appeal will conclude that it was an abuse of process to prosecute these cases and that the convictions are thereby unsafe.
10. There are a number of findings in the High Court judgments which, taken together, are of significance to the safety of the Post Office applicants' convictions. These are set out in detail below, however, in the CCRC's view, the most important points are:
  1. That there were significant problems with the Horizon system and with the accuracy of the branch accounts which it produced. There was a material risk that apparent branch shortfalls were caused by bugs, errors and defects in Horizon.
  2. That POL failed to disclose the full and accurate position regarding the reliability of Horizon.
  3. 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.
11. The CCRC is of the view that there are two lines of argument that the prosecutions amounted to an abuse of process, at least one of which could be applied to each of cases which the CCRC has referred to the appeal courts. In summary, the arguments are that:
  1. The reliability of Horizon data was essential to the prosecution and conviction of the Post Office applicant and that, in the light of the High Court's findings, it was not possible for the trial process to be fair.
  2. The reliability of Horizon data was essential to the prosecution and conviction of the Post Office applicant and that, in the light of the High Court's findings, it was an affront to the public conscience for the Post Office applicant to face criminal proceedings.

## The relevant findings from the High Court judgments

- A) There were numerous bugs, errors or defects in the Horizon system which were capable of causing – and did in fact cause – shortfalls in Post Office branches
12. One of the key questions which was explored in the course of the civil proceedings was whether – and if so to what extent – there was the potential for bugs, defects or errors in the Horizon system to cause discrepancies or shortfalls in SPMs' branch accounts and, more generally, whether such bugs,

defects or errors might have undermined the reliability of Horizon accurately to process and record transactions. The crucial finding on this subject appears at paragraph 969 of the Horizon Issues judgment:

“...all the evidence in the Horizon Issues trial shows not only was there the potential for this to occur, but it actually has happened, and on numerous occasions. This applies both to Legacy Horizon and also Horizon Online.”

13. In terms of the extent of the bugs, defects or errors in Horizon, Fraser J stated that:

“Over the years of both Legacy Horizon and Horizon Online, the total number of software bugs, defects and errors in Horizon considered by the experts is far greater than the number to which Fujitsu have admitted. This is shown in the appendix to this judgment summarising the number of bugs, errors and defects, and their years of operation. The total number of software bugs, defects and errors in both versions of Horizon is very important information...” [paragraph 336].

14. After listing 29 accepted bugs, Fraser J said:

“...in my judgment, that number of accepted bugs, even on the Post Office’s own case about their effect, and the non-acceptance of the eight others, is a sizeable number. It is approximately a ten-fold increase in the number admitted by the Post Office prior to the Horizon Issues...” [paragraph 682].

15. The CCRC observes that these findings indicate that there are far more bugs, defects and errors in the Horizon system than were accepted during the prosecutions of any of the SPMs who have applied to the CCRC. Fraser J’s conclusion was that, on the evidence he had heard, there were 25 different bugs<sup>9</sup> with the potential to impact upon branch accounts, and that with 22 of those bugs<sup>10</sup> there was evidence of actual lasting impact to branch accounts having occurred.<sup>11</sup>

16. Fraser J’s assessment of the likelihood of Horizon bugs, defects or errors causing discrepancies in branch accounts appears from paragraph 970 onwards of the Horizon Issues judgment:

“...in terms of likelihood, there was a significant and material risk on occasion of branch accounts being affected in the way alleged by the claimants by bugs, errors and defects” [paragraph 970].

“...In my judgment, there is a material risk that such a shortfall in a branch’s accounts was caused by the Horizon system during the years

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<sup>9</sup> Or 26 different bugs, if bug number 6 was considered to consist of two separate bugs.

<sup>10</sup> Or 23 if bug number 6 was considered to consist of two separate bugs.

<sup>11</sup> Paragraph 425 of the Technical Appendix to the Horizon Issues Judgment.

when both Legacy Horizon and HNG-X were in use, which is 2000 to 2010 and 2010 to 2017 respectively...” [paragraph 978].

In relation to five important sorts of error, Fraser J found as follows:

“I do not consider that the measures and/or controls that existed in Legacy Horizon, or HNG-X prevented, detected, identified, reported or reduced to an extremely low level of risk any of the [five sorts of error]. Indeed, I reject the Post Office’s case that there was such an extremely low level of risk. That is, in my judgment, a wholly complacent and unjustified position that has existed for many years, based on my findings in the Technical Appendix.” [paragraph 989].

17. The CCRC observes that it was the consistent position of POL throughout the period of the prosecutions of the Post Office applicants, that there was an extremely low risk of bugs, defects or errors in the Horizon system causing shortfalls in branch accounts. At one trial of a CCRC case the prosecution’s stance was that “Horizon is a tried and tested system in use at thousands of post offices for several years, fundamentally robust and reliable”. As recently as October 2018, before the Court of Appeal in *R v Butoy* [2018] EWCA Crim 2535, the respondent’s position was:

“whilst, as with any computer system, errors from time to time may crop up, Horizon is considered to be largely reliable. [The Post Office] say the proportion of alleged and detected defects related to post office branch accounting is minuscule in comparison with the overall operation of the system which is used in some 11,600 post offices and multiple in branch users daily to provide financial services and counter operations on a national scale” [Paragraph 11 of judgment].

It is clear that the High Court has entirely rejected that position, concluding instead that there was a “significant and material risk” of bugs, defects or errors causing shortfalls.

18. In support of his conclusions on this subject, Fraser J referred to the high volume of transaction corrections (“TCs”)<sup>12</sup> issued by POL each year. He quoted Mr Coyne’s expert evidence that:

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<sup>12</sup> POL’s solicitors described Transaction Corrections in the following way during the Horizon Issues trial: “Transaction Corrections are issued by Post Office to correct transient discrepancies in branch accounts in order to restore the correct position.” (paragraph 779, Horizon Issues judgment). When reaching its overall findings on the Horizon Issues, the High Court concluded that the process of Transaction Corrections was as follows: “The Post Office has a central accounting function that comes to a decision that an adjustment has to be made to a branch’s accounts, as the branch transaction data (which comes from Horizon) is not consistent with the data the Post Office has received from its clients or suppliers. This adjustment is the result of a human process and is made by way of the issuing of TCs to a particular branch... [paragraph 1028] “...A TC is then sent by the Post Office to the SPM and the SPM processes such TCs by accepting them. By that acceptance, the correction that is the subject of the TC will enter the branch accounts on Horizon...” [paragraph 1029].

“I have worked and designed banking systems, stock broking systems. I have never seen the need for tens of thousands of transactions per week to have a human intervention. That suggests that something is going wrong. It is working outside of process on a larger scale than I would have expected.” [paragraph 782, Horizon Issues].

Fraser J commented:

“This is a great number of transactions per week that require manual intervention – over 10,000, on the numbers provided by Fujitsu. I consider that Mr Coyne is correct when he says “this suggests that something is going wrong”. I do not accept that on a properly functioning and robust system there should be such a high number as that every week. I accept Mr Coyne’s evidence in his answer at [782] above.” [paragraph 788].

and then concluded:

“...The sheer scale of the number of TCs issued by the Post Office each year – which is over one hundred thousand for many of the years that are the subject of the group litigation – supports my conclusion that there was a significant and material risk of inaccuracy in branch accounts as a result of bugs, errors and defects in the Horizon System (both Legacy Horizon and HNG-X).” [paragraph 971].

“I accept Mr Coyne’s evidence that there are far more TCs than expected even now, compared with comparable systems in the banking and finance sectors...” [paragraph 977].

19. Fraser J also commented on the fact that a high percentage of TCs were later shown to have been wrongly issued:

“...77% of TCs issued in respect of Santander transactions which were challenged by SPMs [were] upheld. It is obvious that if 77% [were] upheld, this means that 23% of TCs were not upheld, in other words were TCs that should not have been issued. I do not consider that a ratio of approximately 1 in 4 TCs being incorrectly issued can be properly described as the process “working well”, particularly as each TC would have a direct impact upon branch accounts. In my judgment, for the process of issuing TCs to be “working well”, the level of accuracy required would be far higher than 77%, and in excess of 90% (if not in the high 90s as a percentage) at the very least. Nor do I consider that to be unrealistically or unachievably high, given TCs impact upon branch accounts, the accuracy of which is required to be very high, and expected by the Post Office to be such that shortfalls in branch accounts have to be paid by the SPMs.” [paragraph 860].

20. Fraser J’s overall conclusion regarding the reliability of Horizon was:

“...Legacy Horizon was not remotely robust. The number, extent and type of impact of the numerous bugs, errors and defects that I have found in Legacy Horizon makes this clear...” [paragraph 975].

“HNG-X, the first iteration of Horizon Online, was slightly more robust than Legacy Horizon, but still had a significant number of bugs, errors and defects. This was particularly so in the years 2010 to 2015, but also after that. This is clearly demonstrated from the findings in the Technical Appendix... I find that the robustness of HNG-X was questionable and did not justify the confidence routinely stated by the Post Office (prior to February 2017) in its accuracy...” [paragraph 976].

Fraser J defined a “robust” system as one that is “strong or effective in all or most conditions” and “robustness” in this context as “the ability of any system to withstand or overcome adverse conditions” and “the effectiveness of the system in managing the risk of imperfections” [paragraph 54]. The CCRC observes that his findings in relation to the robustness of the Horizon system establish that it is far from being the reliable record of the state of branch accounts which it was presented as being by POL during the prosecutions which are under consideration.

21. Having reached his overall conclusion on the reliability of the Horizon system, Fraser J also noted an internal POL document, which appeared to indicate POL’s own view of the quality of its IT systems:

“This document forms an update to the IT Strategy approved in July 2016 by the PO Board. In July we outlined that IT was not fit for purpose, expensive and difficult to change.” [paragraph 953, Horizon Issues judgment; quoting from ‘the Technology Strategy Update Decision Paper’ of 30 January 2017].

22. Fraser J commented that

“...a conclusion in terms that the IT is “not fit for purpose” is not something that would have been reached lightly in an IT strategy document, or approved lightly by the Post Office Board. The Post Office Board is a serious level within the organisation. The Board are not likely to be involved in, nor to have brought to their attention, matters that are anything other than serious, considered and fully researched.” [paragraph 957].

B) The SPMs who gave evidence in the civil trial about Horizon not working as it should had been truthful in their accounts of what had happened. There was some independent evidence which corroborated their accounts of experiencing problems with Horizon, and which supported their contention that Horizon could not be relied upon to produce accurate data.

23. In reaching his conclusions regarding the likelihood of bugs, defects or errors in Horizon causing shortfalls in branch accounts, Fraser J heard evidence from

five SPM claimants of incidents in which Horizon had not worked as it should in practice. He found:

1. “Those claimants who gave examples of specific incidents specified them as well as they could, and in my judgment truthfully and accurately...” [paragraph 926]. The CCRC observes that these ‘specific incidents’ involved SPMs experiencing shortfalls in branch accounts after having carried out normal branch activities.<sup>13</sup> Fraser J found that all five SPM witnesses had given truthful and accurate evidence. By way of example, of Mr Latif he stated: “Mr Latif had been a trainer trusted by the Post Office to train other SPMs... if one is to take an objective and sensible view of the evidence of a previously trusted SPM, whom the Post Office itself has used to train other SPMs for some years, who stated that he did something correctly and X occurred, then meeting that with a bare assertion that X simply cannot have happened is not particularly sensible, nor is it persuasive.” [paragraph 927].
2. There was independent evidence which corroborated the SPMs’ accounts of experiencing problems with Horizon and which supported their contention that Horizon could not be relied upon to produce accurate data:
  - a. “The PEAK<sup>14</sup> plainly records the involvement of ROMEK, the Royal Mail’s own engineering personnel, as follows. ‘ROMEK have been to site and state that they have actually seen the phantom transactions, so it is not just the PM's word now’. The significance of this entry is obvious, and notable. Mrs Van Den Bogerd<sup>15</sup> agreed that this was ‘independent site visit corroboration of the problem by Royal Mail’s own engineers at the branch’, and she also agreed that this was ‘clearly not user error any more’ [paragraph 211].
  - b. “Fujitsu would ignore information directly from the Post Office itself that demonstrated that a SPM was not at fault. ROMEK engineers observing specific matters occurring, or in this case the Post Office’s own auditors ruling out user error, were simply ignored” [paragraph 493(2)].

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<sup>13</sup> For example, Mr Latif, who described shortfalls following transfer from one stock unit to another (paragraphs 85-99 of Horizon Issues judgment); and Mr Tank, who described shortfalls in connection with a power failure, and also in connection with the printing of mail labels (paragraphs 100-120 of Horizon Issues judgment).

<sup>14</sup> Paragraph 621 of the Horizon Issues judgment provides the following explanation regarding PEAKs: “The experts agreed the following about PEAKs and their content. ‘PEAKs record a timeline of activities to fix a bug or a problem. They sometimes contain information not found in KELs about specific impact on branches or root causes – what needs to be fixed. They are written, by people who know Horizon very well. They do not contain design detail for any change. They are generally about development activities and timeline rather than about potential impact. PEAKs typically stop when development has done its job, so they are not likely to contain information about follow-on activities, such as compensating branches for any losses.’

<sup>15</sup> A Post Office witness who was a senior director at POL (‘Business Improvement Director’) at the time of the High Court proceedings.

- c. “Other references in the documents show both Romec engineers, and even Post Office auditors, being recorded in PEAKs as witnessing events supporting the type of occurrences that underpin the claimants’ case. These were ignored by those at Fujitsu tasked with completing these PEAKs, and conclusions are shown in those PEAKs being drawn by Fujitsu that flew in the face of what had occurred...” [paragraph 927].

C) POL failed to disclose to SPMs and to the Courts the full and accurate position in relation to the reliability of the Horizon system

24. There are a number of findings in both the Horizon Issues judgment and the Common Issues judgment which indicate that SPM defendants and the criminal courts would have been deprived of full and accurate information about the reliability of the Horizon system. Such information was in the possession of POL and/or Fujitsu but was not disclosed:

1. “...the Receipts/Payments Mismatch issue notes... likely to be a 2010 document [are] highly relevant to the Horizon Issues... The document was marked Commercial in Confidence and is, according to the trial bundle index, a memo of a meeting. The issues notes document stated: ‘What is the issue? Discrepancies showing at the Horizon counter disappear when the branch follows certain process steps, but will still show within the back end branch account. This is currently impacting circa 40 Branches since migration onto Horizon Online, with an overall cash value of circa £20k loss. This issue will only occur if a branch cancels the completion of the trading period, but within the same session continues to roll into a new balance period. At this time we have not communicated with branches affected and we do not believe they are exploiting this bug intentionally. (emphasis added)... Impact –
  - The branch has appeared to have balanced, whereas in fact they could have a loss or a gain
  - Our accounting systems will be out of sync with what is recorded at the branch
  - If widely known could cause a loss of confidence in the Horizon System by branches
  - Potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data
  - It could provide branches ammunition to blame Horizon for future discrepancies.” [paragraph 428, Horizon Issues].
2. “The second unsatisfactory aspect which arose from [Mr Godeseth’s] evidence is the approach of Fujitsu as demonstrated in various documents, including the PEAKs and KELs, but also in particular in the

Receipts/Payments Mismatch issue notes. To see a concern expressed that if a software bug in Horizon were to become widely known about it might have a potential impact upon 'ongoing legal cases' where the integrity of Horizon Data was a central issue, is a very concerning entry to read in a contemporaneous document. Whether these were legal cases concerning civil claims, or criminal cases, there are obligations upon parties in terms of disclosure. So far as criminal cases are concerned, these concern the liberty of the person, and disclosure duties are rightly high. I do not understand the motivation in keeping this type of matter, recorded in these documents, hidden from view; regardless of the motivation, doing so was wholly wrong. There can be no proper explanation for keeping the existence of a software bug in Horizon secret in these circumstances." [paragraph 457, Horizon Issues].

3. "The attendees at this meeting [in September 2010] included at least one member of Post Office (rather than Fujitsu) personnel, Andrew Winn of POL Finance. There were obviously legal cases going on at the time, hence the reference in the underlined bullet point to 'ongoing legal cases'. If these were criminal cases, the Post Office would be the prosecuting authority, with certain important duties. If these were civil cases, the Post Office would be a party with disclosure obligations. An affected branch would believe it had balanced its accounts correctly; it would not have done so. There is an evident concern amongst those at the meeting which is recorded in this document that this issue should not become 'widely known' in order to avoid causing 'a loss of confidence in the Horizon System'. Fujitsu do not seem to have been particularly prompt in either identifying the problem or reacting to it." [paragraph 430].
4. "...there are sufficient entries in the contemporaneous documents to demonstrate not only that Fujitsu has been less than forthcoming in identifying the problems that have been experienced over the years, but rather the opposite. The majority of problems and defects which counsel put to Mr Godeseth, and which were effectively admitted by him, simply would not have seen the light of day without this group litigation." [paragraph 459].
5. "Based on the knowledge that I have gained both from conducting the trial and writing the Horizon Issues judgment, I have very grave concerns regarding the veracity of evidence given by Fujitsu employees to other courts in previous proceedings about the known existence of bugs, errors and defects in the Horizon system. These previous proceedings include the High Court in at least one civil case brought by the Post Office against a sub-postmaster and the Crown Court in a greater number of criminal cases, also brought by the Post Office against sub-postmasters and sub-postmistresses. After very careful consideration, I have therefore decided, in the interests of justice, to send the papers in the case to the Director of Public Prosecutions, Mr Max Hill QC, so he may consider whether the matter to which I have referred should be the subject of any prosecution."

[Comments of Fraser J when handing down the Horizon Issues judgment; see Transcript of Proceedings dated 16<sup>th</sup> December 2019].<sup>16</sup>

6. “The PEAK [from December 2007] stated ‘Worth noting that the branch did not have any issues with the mismatched transactions because this was fixed before they did the roll. The branch is not aware of this and it's best that the branch is not advised.’” [paragraph 366] “...this showed that on not all occasions were SPMs advised of impacts on their branch accounts of particular problems...” [paragraph 367].
7. “...Fujitsu knew [since at least February 2006], to take Callendar Square as an example, that this bug existed in Horizon.<sup>17</sup> They knew that it had affected branch accounts. It was not, as the Post Office puts it “unnecessary and inappropriate” to notify SPMs of this... Post Office ought to have notified, at the very least, all those SPMs whose branch accounts had been impacted by this bug that this had occurred, and that it had occurred as a result of a software bug. The fact that the integrity of Horizon data was a live issue at this time should not have influenced the decision to notify SPMs of a software bug...” [paragraph 442].
8. “...Fujitsu personnel routinely refer in such documents to the known existence of bugs, without this (so far as the documents deployed in the trial are concerned) being communicated to the SPM in question in these terms. In places there is even debate at Fujitsu shown in the documents about whether the Post Office and/or SPMs should be told...” [paragraph 935, in the “Overall Conclusions” section of Horizon Issues].
9. “A theme contained within some of the internal documents is an extreme sensitivity (seeming to verge, on occasion, to institutional paranoia) concerning any information that may throw doubt on the reputation of Horizon, or expose it to further scrutiny...” [paragraph 946]
10. “...There seems to be a culture of secrecy and excessive confidentiality generally within the Post Office, but particularly focused on Horizon.” [paragraph 36, Common Issues].<sup>18</sup>

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<sup>16</sup> In the event, Fraser J wrote to the DPP by letter dated 14 January 2020, detailing his concerns regarding the Fujitsu witnesses. The CCRC understands that the DPP, having considered the letter, referred the matter to the Metropolitan Police. There is one aspect of the 14/01/2020 letter which the CCRC would seek to clarify – according to the CCRC’s analysis, the Fujitsu witness **did** give evidence about the Callendar Square bug when he gave evidence at the trial of the former SPM in question. That much is clear from the Transcript of his trial evidence.

<sup>17</sup> “By February 2006, Anne Chambers and others at Fujitsu knew that this bug ‘had been around for years’.” – Paragraph 425 (2) Horizon Issues.

<sup>18</sup> In relation to this “culture of secrecy”, see also the High Court’s findings regarding the entrenched attitudes of some Post Office witnesses in the group litigation, and the findings that some Post Office and Fujitsu witnesses had sought to mislead the High Court in their evidence.

25. The High Court found that this “excessive confidentiality” in relation to disclosure of information about problems with Horizon was also demonstrated by the approach of POL and Fujitsu to the civil proceedings:
1. “I have commented upon the approach of the Post Office to disclosure in this litigation before, and not in favourable terms. At the first CMC in October 2017, I said in a short ruling on disclosure that the Post Office had been “obstructive” in its pre-action behaviour in this respect, and that its attitude to disclosure up to that point had been somewhat less than ideal. In Judgment (No.3) I made some further criticisms...” [paragraph 623, Horizon Issues].
  2. “The claimants submitted in their opening that the Post Office’s approach to disclosure had the effect of impeding the claimants from obtaining a full view of the documents and the totality of the Horizon system. I agree with that submission. However, balanced against this, it does have to be remembered that the claimants did not issue any applications for disclosure...” [paragraph 624].
  3. “...It is obvious that [as regards disclosure] the Post Office has had to rely upon Fujitsu to a large degree... Fujitsu has, so far, shown itself not to be entirely reliable in this respect. Fujitsu are also responsible for the Post Office making a directly incorrect important statement in its EDQ<sup>19</sup> about retention of KELs, which led to the disclosure of about 5,000 of these some months after the trial closed” [paragraph 652(8) Horizon Issues].
  4. “...Fujitsu had powers which, until shortly before the trial started, Fujitsu sought to keep from the court, and may not even have fully disclosed to the Post Office. Because the extent of these powers was kept secret in this way, the Post Office finds itself now having made misleading public statements previously. If one looks back to an earlier case management hearing and reconsiders how Fujitsu, through the Post Office, sought to portray the contents and lack of importance and relevance of PEAKs and KELs, then it can be seen that there has been a pattern of considerable defensiveness over the Horizon System. There has certainly been a lack of transparency, and a lack of accuracy in description.” [paragraph 934, Horizon Issues].
26. In light of these serious findings, the CCRC considers that there are grave doubts about whether relevant information about the reliability of Horizon was made available to the criminal courts and to those SPMs who were prosecuted by POL on the basis of Horizon data. The above findings make clear that any failure to provide that information rested with POL and also with Fujitsu. The CCRC considers that there is a significant risk that the criminal courts and the Post Office applicants were deprived of full and accurate information about the reliability of the Horizon system, and hence about the reliability of the

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<sup>19</sup> ‘Electronic Documents Questionnaire’.

accounting information which the system produced, which was said to demonstrate cash shortages in the branches in question.

D) If a shortfall in accounts could not be explained, POL adopted the default position that SPMs must be responsible. The level of investigation by POL and Fujitsu was poor.

27. There are a number of findings in both the Horizon Issues judgment and the Common Issues judgment which indicate that it was the default position of POL and Fujitsu to hold SPMs responsible for shortfalls, and that this assumption operated in the place of an objective and fair investigation. The relevant findings are:
1. "...Post Office's default position regarding their SPMs... is that shortfalls and discrepancies are not caused by the Horizon system, therefore those that do occur can only be the responsibility of SPMs. This conclusion means that the Post Office fraud prevention and debt recovery procedures will be used against SPMs in this position, unless an SPM can show that the shortfall or discrepancy was not their fault..." [paragraph 462, Common Issues].
  2. "...unless the SPM could identify with precision the day and time of the fault he or she alleged, the Post Office will not assist. This is clear from the entry "Can agent provide specific day and timeframe for alleged fault?", where if the answer is "No" the following entry states "Advise unable to progress further until can do so." This is a 2012/2013 document, but I find as a fact that it correctly identifies the Post Office's approach to this issue raised by SPMs from the introduction of Horizon onwards." [paragraph 566, Common Issues].
  3. "...if Fujitsu could not track down the cause then it was assumed the SPM was responsible, in other words user error would be used as a default setting for investigations. This matches the evidence of an enormous number of PEAKs in the Technical Appendix." [paragraph 177, Horizon Issues].
  4. "On the PEAKs that were used in the Horizon Issues trial, Fujitsu would routinely assign lower categories of importance to reported matters that were directly impacting SPMs' branch accounts. They would also routinely assign user error to reported matters, not because they had uncovered user error, but because they could not explain what had occurred. It seems to have been used as a default setting..." [paragraph 493(4), Horizon Issues].
28. The judgments describe POL and Fujitsu adopting a form of tunnel-vision on this issue, which ultimately turned into "institutional obstinacy or refusal to consider any possible alternatives to their view of Horizon, which was maintained regardless of the weight of factual evidence to the contrary"

(paragraph 928, Horizon Issues judgment). Fraser J added the following observations on this subject:

1. “This approach by the Post Office has amounted, in reality, to bare assertions and denials that ignore what has actually occurred, at least so far as the witnesses called before me in the Horizon Issues trial are concerned. It amounts to the 21st century equivalent of maintaining that the earth is flat.” [paragraph 929, Horizon Issues judgment].
  2. “The problem with the Post Office witnesses generally is they have become so entrenched over the years, that they appear absolutely convinced that there is simply nothing wrong with the Horizon system at all, and the explanation for all of the many problems experienced by the different Claimants is either the dishonesty or wholesale incompetence of the SPMs. This entrenchment is particularly telling in the Post Office witnesses who occupy the more senior posts...”<sup>20</sup> [paragraph 545, Common Issues judgment].
  3. “...they remain steadfastly committed, in their collective psyche, to the Post Office party view... They give me the impression that they simply cannot allow themselves to consider the possibility that the Post Office may be wrong, as the consequences of doing so are too significant to contemplate.” [paragraph 547, Common Issues judgment].
29. The CCRC considers that these findings give rise to serious concerns as to whether POL carried out thorough and objective criminal investigations in the cases of those SPMs who were prosecuted on the basis of Horizon data in connection with shortfalls at their branches. The CCRC observes that the Criminal Procedure and Investigations Act 1996 (“CPIA”) applies to POL investigators who are investigating whether a person should be charged with an offence<sup>21</sup> and also applies to POL prosecutors<sup>22</sup>. Section 23(1)(a) of the CPIA requires the Secretary of State to prepare a code of practice designed to ensure 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”. The CPIA Code of Practice (published in 2005 and revised in March 2015), which also applies to POL investigators<sup>23</sup>, sets out this requirement in the following terms:

“In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from

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<sup>20</sup> In connection with the entrenched attitude of witnesses for the Post Office – as found by the High Court – the CCRC notes that Fraser J also concluded that at times Post Office and Fujitsu witnesses had expressly sought to mislead him in their evidence (see paragraphs 417-425 of Common Issues, regarding Mrs Van Den Bogerd; and paragraphs 294-296 of Horizon Issues, regarding Mr Dunks).

<sup>21</sup> See sections 1(4) and 26 of CPIA 1996.

<sup>22</sup> See section 2(3) of CPIA 1996.

<sup>23</sup> Paragraph 1.1 of the CPIA Code of Practice, which confirms that investigators other than police officers who are charged with the duty of conducting a criminal investigation shall have regard to the relevant provisions of the CPIA Code.

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.”<sup>24</sup>

The CCRC further observes that POL prosecutors are under a corresponding duty to ensure that all reasonable lines of inquiry have been pursued.<sup>25</sup>

30. The CCRC is mindful that a number of the criticisms in the High Court judgments regarding poor levels of investigation relate to Fujitsu. The CCRC recognises that Fujitsu did not itself have responsibilities under CPIA, or have any duties *vis a vis* the criminal courts. Nevertheless, the CCRC considers that the findings against Fujitsu are of clear relevance to the criminal cases of the Post Office applicants. Fujitsu was the third party contractor which was in possession of much of the data which POL needed to rely upon when prosecuting the cases in question. An important aspect of the duty of POL investigators to pursue all reasonable lines of inquiry was therefore to take reasonable steps to assure themselves that they had obtained relevant information from Fujitsu. It was likewise incumbent on POL investigators to take reasonable steps to probe and scrutinise the answers which they received from Fujitsu regarding Horizon, and to assure themselves of the quality and thoroughness of Fujitsu’s own enquiries into Horizon problems. The CCRC has applied these considerations wherever Fujitsu’s enquiries are referred to.
31. In the light of the above High Court findings, the CCRC is concerned that POL investigators did not pursue all reasonable lines of inquiry, but instead routinely assumed a theory of the case which was adverse to the SPMs under investigation without putting that theory to the test. The CCRC is also concerned that POL investigators did not pursue all reasonable lines of inquiry with Fujitsu, and did not give adequate scrutiny to the quality and thoroughness of Fujitsu’s own enquiries into Horizon problems. The CCRC is further concerned that POL prosecutors did not ensure that all reasonable lines of inquiry which might have pointed away from the SPMs’ guilt had been pursued before the decision to prosecute was made. The CCRC’s concerns on this issue are supported by the following additional findings of Fraser J:
  1. “In my judgment, the stance taken by the Post Office [to a particular reported Horizon error] at the time in 2013 demonstrates the most dreadful complacency, and total lack of interest in investigating these serious issues, bordering on fearfulness of what might be found if they were properly investigated. This SPM, whose branch was known to the Post Office, should obviously have been asked for further details (if further details were required for an investigation), and the Post Office and/or Fujitsu should plainly have investigated the matter as a matter of some

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<sup>24</sup> Paragraph 3.5, CPIA Code of Practice.

<sup>25</sup> See Code for Crown Prosecutors at 3.2 – 3.6. Although the Code is issued primarily for prosecutors in the CPS, POL has confirmed that its own prosecutors also follow the Code (see paragraph 25.7 of “Reply of Post Office Limited to Second Sight’s Briefing Report - Part Two”, April 2015).

importance. By 2013 Horizon was an extraordinarily controversial subject; there can simply be no sensible excuse for the Post Office's failure to try and understand this particular subject... [paragraph 219, Horizon Issues judgment].

2. "Fujitsu do not, on the face of these documents shown to Mr Parker, appear to me to have properly and fully investigated these myriad [Horizon-related] problems, nor did Fujitsu categorise such incidents correctly. They also seem to have moved away, in their investigations, from concluding that there were any issues with the software wherever it was possible for them to do so, regardless of evidence to the contrary, an approach that has been carried into the Fujitsu evidence for the Horizon Issues trial..." [paragraph 494, Horizon Issues judgment].
  3. "...The entirety of the text relating to any investigation by the Post Office in respect of Mrs Dar's numerous issues and experiences (including with the Helpline, the way that she was told to report disputes) is the single sentence "Post Office Limited's investigations have now concluded". It is not said what those investigations consisted of; what issues were investigated; how they were investigated; over what period of time; how long that took; or any other basic information. The suggestion in the sentence is that there was some sort of investigation, but the accuracy of that statement may become clearer in later phases of these proceedings. Certainly no outcome of any investigation in terms of any detail was put to Mrs Dar." [paragraph 360, Common Issues judgment]
32. In the light of these findings – and in the context of POL's combined status as victim, investigator and prosecutor of the offences in question – the CCRC considers that there are reasons for significant concern as to whether POL at all times acted as a thorough and objective investigator and prosecutor, ensuring that all reasonable lines of inquiry were explored. The CCRC further considers that this concern applies to POL's approach throughout the period 2001 to 2013. Although general awareness of problems with the Horizon system has undoubtedly increased in recent years, the CCRC considers that POL was on notice regarding alleged problems with Horizon throughout the period in question. Accordingly, POL was under a duty to make all reasonable inquiries into those alleged Horizon problems, in order to satisfy itself that it was bringing criminal prosecutions based upon sound evidence as to branch accounts.

E) POL did not consult the best sources of evidence when challenging SPMs about shortfalls in branch accounts

33. The Horizon Issues judgment contains findings that are critical of the sources of data used by POL and Fujitsu when investigating shortfalls in branch accounts, namely:
  1. "The experts are agreed... that the Post Office does not consult the audit data. The actual text of that entry is the 'Post Office does not consult the

full audit data (unfiltered ARQ Data) before deciding how to handle discrepancies and issuing Transaction Corrections.’ Regardless of this agreement, it is obvious on the factual evidence that the Post Office does not do so. Indeed, throughout both the Common Issues trial and the Horizon Issues trial, it has been increasingly obvious that the Post Office uses sources other than the audit data when it is challenging SPMs about what they have actually done in their branch Post Offices...” [paragraph 905].

2. “One point that occupied the parties a great deal in the Horizon Issues trial... is that Fujitsu raised a charge to the Post Office for audit data requests (also called “ARQ requests”) above a certain number per year. The numbers that were discussed were in the amount of hundreds of pounds per request. The parties could not agree on what these charges were...” [paragraph 919] “...That charges are raised by Fujitsu to the Post Office is not an adequate answer, in my judgment, to the Post Office’s failure to consult or provide the audit data in cases such as those in [paragraph 912] above. There are some contemporaneous references within Post Office documents suggesting this may have been a disincentive in some cases to raising ARQ requests of Fujitsu...” [paragraph 920]. “...Part of that very attractive commercial arrangement (attractive for Fujitsu) may be charges that Fujitsu is entitled contractually to raise for ARQ requests. Part of an attempt to reduce the expense of the contract by the Post Office may be a reluctance to raise such requests...” [paragraph 922].
  3. “Such private commercial arrangements between the Post Office and Fujitsu... do not, in any way, justify any failure to seek the audit data – the best evidence – in cases where SPMs are being suspended and/or having their appointments terminated, particularly in circumstances where there are so many bugs acknowledged as existing, and also at a time (much earlier than this judgment in 2019) when Fujitsu knew there were bugs in Horizon such as Dalmellington and Callendar Square, and also given the Credence data has been shown to have been wrong on occasion...” [paragraph 923].
  4. “I am surprised that the desirability - if not the actual and basic need - to consult the audit data is a controversial point. In my judgment it is not only good practice to consult the audit data, given the very purpose of audit data within a complex IT system such as this one, but it is also obvious common sense. There is little point in having audit data if it is not consulted in the circumstances that I have identified above.” [paragraph 924].
34. The CCRC considers that these findings add to the concerns which are expressed above that POL failed to pursue all reasonable lines of inquiry before prosecuting the Post Office applicants, and that the criminal courts and the Post Office applicants were deprived of full and accurate information about the reliability of the Horizon system when the prosecutions took place.

F) SPMs would not always have been aware of the causes of problems at the time. They were at a significant disadvantage in terms of access to relevant information.

35. There are a number of findings in both the Horizon Issues judgment and the Common Issues judgment which indicate that SPMs were at a significant disadvantage in their ability to access information relevant to alleged shortfalls. The following findings are of importance on this issue:

1. "...The experts agreed that the causes of some types of apparent or alleged discrepancies and shortfalls may be identified from reports or transaction data available to SPMs. Other causes of apparent or alleged discrepancies and shortfalls may be more difficult, or impossible, to identify from reports or transaction data available to the SPMs, because of their limited knowledge of the complex back-end systems. I would add that the subject matter of every PEAK referred to in the Bug Table, and the sort of problems that initiated the creation of each of those PEAKs, plainly could not be investigated by the SPM or SPMs in question in each case on the material that Horizon made available to those SPMs." [paragraph 997, Horizon Issues judgment].
2. "Because the reports and data available to SPMs were so limited, their ability to investigate was itself similarly limited. The expert agreement to which I refer at [998] above makes it clear in IT terms (based on the transaction data and reporting functions available to SPMs) that SPMs simply could not identify apparent or alleged discrepancies and shortfalls, their causes, nor access or properly identify transactions recorded on Horizon, themselves. They required the co-operation of the Post Office." [paragraph 100, Horizon Issues judgment].
3. "...nowhere in the training (or the interview, or anywhere else) is there any recognition of how to deal with a shortage, discrepancy or disputed TC of any order of magnitude, still less those of these six Lead Claimants, and if the steps instructed on these laminated instructions<sup>26</sup> were followed, there would be shortages in the cash accounts of branches where these occurred." [paragraph 437, Common Issues judgment].
4. "One point which I found of great interest is that Mr Longbottom, who has done many transfer audits over many years, confirmed that an outgoing SPM is not permitted to leave with any documentation whatsoever when they hand over their branch...<sup>27</sup> This therefore means that no records or documents are available to them once they leave..." [paragraphs 484-485, Common Issues judgment].
5. "Claimants were themselves unable to carry out effective investigations into disputed amounts because of the limitations on their ability to obtain the necessary information from Horizon... The introduction of Horizon

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<sup>26</sup> i.e. a "handout" used in the training of SPMs that was in evidence before the High Court.

<sup>27</sup> This same point has been raised in a number of the applications to the CCRC.

limited the Claimants' ability to access, identify, obtain and reconcile transaction records... The introduction of Horizon limited the Claimants' ability to investigate apparent shortfalls, particularly as to the underlying cause thereof..." [paragraph 569 (findings 34, 50 and 51), Common Issues judgment].

6. "...For a SPM to demonstrate they were not at fault, if there was a loss, could be verging on nigh on impossible. Firstly, they would have to concentrate upon and analyse all of the branch records for every single transaction within the particular trading period. That would be an onerous burden for a single SPM. Secondly, those records would only be between the branch and the Post Office; SPMs have no access to data between the Post Office and its clients, and are not able to obtain it.... a SPM simply does not have access to the type of information that would make such an onerous exercise possible even in theory." [paragraph 655, Common Issues judgment].
  7. "...Suspended SPMs are not only entirely excluded from the Post Office part of their premises, they appear to be excluded (in some cases) from the entire premises, and also are completely denied access to any information or records. Given the severe effect upon a SPM of having their appointment terminated, it is not only important, but I would go so far as to say crucial, that they are given a reasonable opportunity to meet the case being brought against them by the Post Office. It is difficult to see how they can have such an opportunity if they are denied access even to copies of information or records..." [paragraph 886, Common Issues judgment].
36. The CCRC considers that these findings give rise to serious concerns about the ability of SPMs who were prosecuted to carry out their own investigations in aid of their defence. In particular, there are significant concerns regarding the SPMs' ability to access relevant data. In the CCRC's view it is arguable that, in view of the limited sources of information which were available to them, the Post Office applicants were at a significant disadvantage in meeting the prosecution case against them, that is, there was no 'equality of arms' between them and the POL prosecutors.
37. The CCRC observes that its own inquiries corroborate Fraser J's finding that it would be "difficult or impossible" for SPMs to investigate alleged discrepancies or shortfalls with the records and data available to them. The CCRC instructed expert forensic accountants to analyse transaction logs from a particular Post Office branch, in an effort to investigate whether there might be any credible alternative explanation for shortfalls in branch accounts. In the event, the transaction logs alone - in the absence of full audit data - proved to be inadequate for this purpose. The CCRC has encountered a number of examples of apparent anomalies in the branch transaction logs, which have only been fully understood following further analysis of the audit or 'ARQ' data by Fujitsu. The CCRC understands that such ARQ data would not generally have been available to the Post Office applicants when they were under investigation by POL. The CCRC considers it to be telling that, even with the

assistance of expert forensic accountants, the CCRC was not able to conduct a full and thorough review of branch transactions in the absence of audit data.

G) SPMs had no way of disputing shortfalls within the Horizon system.

38. Fraser J found at numerous points in the Horizon Issues judgment and in the Common Issues judgment that there was no effective way for an SPM to dispute branch shortfalls within the Horizon system itself. In the Horizon Issues judgment, he said:

“...So far as disputed amounts are concerned, an SPM cannot dispute a discrepancy or any figure on Horizon, or record on Horizon that they have raised a dispute. Horizon records figures even when they are not correct, and there is evidence of figures on Horizon being known to be incorrect by the SPM and the Post Office, or both. A dispute is normally raised by a SPM through contacting the helpline, which is a telephone service which was widely referred to in the Horizon Issues trial...”  
[Paragraph 1024]

39. This finding corresponded with the following observations in the Common Issues judgment:

“This evidence made it yet further clear that all that “settling centrally” did was transfer an amount of a shortfall into a “holding account”, which would then be charged to the SPM. They could pay it the Post Office [*sic*] by debit or credit card; they were not required to pay it immediately. It was an alternative to that SPM immediately physically adding the cash amount to make up the shortfall that way. It was not an alternative to a SPM “accepting it” – as has been seen, “settle centrally” was an option reached on the Horizon terminal only after the button “Accept Now” had been clicked. The phrase “settle centrally” was used by the Post Office for the majority of the Common Issues trial at least, as though it was synonymous with disputing a transaction correction in some way, or otherwise connected with a process on Horizon when an unexplained shortfall and the SPM wished to challenge it. This is incorrect...” [Paragraph 301]

40. In relation to raising a dispute via the Helpline, the High Court found that:

“It is therefore the case that the only route for any SPM to challenge specific items with which they did not agree (such as TCs) or discrepancies or shortfalls in the figures generated by Horizon was the Helpline. However, the Helpline does not seem to have operated in that way, and on the evidence before me for the issues in this trial, the matters in dispute reported to the Helpline were not treated differently even when they were reported. The Lead Claimants’ evidence made it clear that just getting through to the Helpline was an achievement in itself, and when this was finally accomplished, the experience would be variable at best, and does not seem to have come close to resolving

any of the disputes. Some operators would assist with getting Horizon to permit rollover into the next trading period by suggesting 'work arounds'. These 'work arounds' did not resolve disputed items. No particular investigation appears, in the case of any of the six Lead Claimants, to have been initiated by reporting a dispute to the Helpline.....It is therefore the case that, on the evidence before me, the Helpline did not operate for the Lead Claimants in the manner that the Post Office contended for..." [Paragraphs 555, 556, 558, Common Issues].

41. Fraser J's conclusions that, at the end of the branch trading period, there was no effective way for an SPM to dispute apparent discrepancies within the Horizon system, that a dispute could only be raised by calling the telephone Helpline, and that doing so did not in practice resolve disputes, in the CCRC's view provides important context to the criminal prosecutions of the Post Office applicants. These conclusions add to the concerns set out above regarding the lack of 'equality of arms' between POL and the Post Office applicants. The CCRC considers that the absence of any mechanism within Horizon for disputing apparent discrepancies made it more difficult for SPMs to bring about a proper investigation into those matters. The CCRC notes, in that connection, Fraser J's observation that "no particular investigation appears, in the case of any of the six Lead Claimants, to have been initiated by reporting a dispute to the Helpline" (paragraph 556, Common Issues). Moreover, the CCRC considers that Fraser J's finding that it was not possible to record on Horizon that an SPM had raised a dispute would also have made it more difficult for the Post Office applicants to evidence, after the event, that they had 'settled centrally' but were *not* accepting fault for apparent shortfalls.

H) POL routinely overstated the contractual obligation on SPMs to make good losses.

42. The Common Issues judgment concluded that, in respect of any loss for which POL sought to hold an SPM responsible, there was a contractual obligation on POL to show that there had been a loss and that it had been caused through the negligence, carelessness or error of the SPM<sup>28</sup>. However, Fraser J also found that POL, in its communications with SPMs, had misstated the contractual obligations on them:

"[T]here is a lot to be desired from the Post Office's behaviour as identified in the cases of the Lead Claimants... 1) Even though the Post Office's own case on the relevant provision in the SPMC<sup>29</sup> dealing with liability for losses requires negligence or fault on the part of a SPMC, this was routinely and comprehensively ignored by the Post Office, who sent letters of demand for disputed sums in express terms as though the SPM had strict liability for losses. These letters entirely

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<sup>28</sup> See paragraph 653, Common Issues.

<sup>29</sup> SPM Contract.

misstated the legal basis of a SPM's liability, even where they had been appointed under the SPMC." [paragraph 723].

[In relation to letters sent to a particular SPM, Mr Sabir, in January and March 2010:] "There can be no excuse, in my judgment, for an entity such as the Post Office, to misstate, in such clearly express terms, in letters that threaten legal action, the extent of the contractual obligation upon a SPM for losses. The only reason for doing so, in my judgment, must have been to lead the recipients to believe that they had absolutely no option but to pay the sums demanded. It is oppressive behaviour." [paragraph 222].

43. Fraser J's finding that POL behaved oppressively towards SPMs by routinely overstating the SPMs' contractual obligation for branch losses provides, in the CCRC's view, further important context to the criminal prosecutions of SPMs. The CCRC observes that it reinforces other findings of Fraser J that it was the default position of POL to hold SPMs responsible for discrepancies and that this assumption operated in the place of an objective and thorough investigation into the possible cause(s) of apparent branch shortfalls.

l) Remote access to branch accounts was extensive, and branch accounts were in fact altered without SPM's knowledge. It would appear in the accounts as though such actions had been carried out by SPMs.

44. The question of whether Fujitsu were able remotely to access and alter branch accounts was a contentious one for a number of years leading up to and then during the civil litigation. Ultimately, Fraser J's conclusions on this issue were:
1. "...Fujitsu could remotely insert a transaction into the accounts of a branch using a counter number which was the same as a counter number actually in use by the SPM (or an assistant). This would appear to the SPM from the records that they could see (and anyone else looking at those records) as though the inserted transaction had been performed in the branch itself. This information was only disclosed by Fujitsu (and therefore the Post Office) in this group litigation in January and February 2019. Even Mr Godeseth, a very senior person in Fujitsu so far as Horizon is concerned, said that he did not know this before." [paragraph 321, Horizon Issues judgment].
  2. "...After service of Mr Roll's 2nd witness statement, Fujitsu finally came clean and confirmed (via Mr Parker) that what Mr Roll said was correct. Data could be altered by Fujitsu on Horizon as if at the branch; under Legacy Horizon, transactions could be inserted at the counter in the way Mr Roll described. This could be done without the SPM knowing about this. Mr Godeseth also confirmed that it would appear as though the SPM themselves had performed the transaction. This is directly contrary to what the Post Office had been saying publicly for many years." [paragraph 532, Horizon Issues judgment].

3. “The design abilities of the roles to which I have referred was very wide – as a single example only, the experts agreed that anyone with the APPSUP<sup>30</sup> role could pretty much do whatever they wanted. The answer to this issue is therefore that these facilities had the potential to affect the reliability of a SPM’s branch accounts to a material extent. Further, the evidence shows clearly that there were instances when this in fact occurred...” [paragraph 1016, Horizon Issues judgment].
45. The CCRC considers that these findings regarding remote access add to the concerns which are set out above regarding the overall reliability of Horizon, and also add to the concern that the criminal courts and the Post Office applicants were deprived of full and accurate information about the Horizon system. If full and accurate information about remote access had been available at the time of the prosecutions in question, it would have made it difficult for POL to present the accounting data on which many of the prosecutions were founded as inherently reliable.

## **Observations of the Court of Appeal (Civil Division) on the Common Issues Judgment**

46. POL sought to appeal against the Horizon Issues judgment but were refused permission by the Court of Appeal (Civil Division) on 22 November 2019. When refusing permission, Coulson LJ observed that:

“The judgment followed a trial of 6 weeks in which the electronic bundle was vast. The core documents alone filled 60 lever arch files. There were 20 witnesses of fact who gave oral evidence. The judgment is 320 pages and 1122 paragraphs long. In relation to the Common Issues, in the words of Lewison LJ in *Fage*, the trial and the subsequent judgment were manifestly ‘the first and last night of the show’. No judge will ever know more about this case generally, and the Common Issues specifically, than Fraser J.” [paragraph 2].

Later adding:

“...just standing back for a moment, there is an underlying point of common sense or commercial reality which, in my view, runs through every part of this application for permission to appeal. The PO describes itself as ‘the nation’s most trusted brand’. Yet this application is founded on the premise that the nation’s most trusted brand was not obliged to treat their SPMs with good faith, and instead entitled to treat them in capricious or arbitrary ways which would not be unfamiliar to a mid-Victorian factory-owner (the PO’s right to terminate contracts arbitrarily, and the SPMs alleged strict liability to the PO for errors made by the PO’s own computer system, being just two of many

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<sup>30</sup> ‘APPSUP’ was described in the Horizon Issues trial as a very powerful ‘permission’ or level of access to the Horizon system. APPSUP is discussed at paragraphs 388-398, 527, 540, 695, 869, 1013 and 1016 of the Horizon Issues judgment.

examples). Given the unique relationship that the PO has with its SPMs, that position is a startling starting point for any consideration of these grounds of appeal.” [paragraph 11].

47. The Court of Appeal’s decision also included the following findings on Fraser J’s approach to various aspects of the Common Issues trial:
1. “These detailed conclusions were therefore based (either wholly or in large part) on the judge’s findings of fact, which were themselves based on the mass of documentation and oral evidence that he heard. In the circumstances of this case, there is no basis on which those findings could or should be reopened.” [paragraph 21, regarding Ground 2(b), Implication of the Duty of Good Faith].
  2. “...The judge dealt carefully with why the duty was implied in this case (see for example his analysis of the law from [705]-[727] and then his application of that to the facts at [728]-[738]). There were no arguable errors of law in that analysis.” [paragraph 22, regarding Ground 2(b), Implication of the Duty of Good Faith].
  3. “...The judge had done more than he was required to do to furnish detailed answers to the issues between the parties...” [paragraph 55, regarding Ground 5, Discretions and Powers].

### **Admissibility of High Court findings in criminal appeal proceedings**

48. Having considered some of the key findings of the High Court in the Common Issues and Horizon issues trials, the CCRC has gone on to consider how the appeal courts might view the admissibility of those findings in criminal appeal proceedings brought by the Post Office applicants.
49. Firstly, the CCRC has considered relevant legal authorities on this question, as follows. In *R v D and J* [1996] 1 Cr.App.R 455 the Court of Appeal held that:

“[A]s a matter of principle the combination of sections 2(1) and 23 of the Criminal Appeal Act 1968 enabled the Court hearing an appeal in a criminal case to consider judgments made by a judge in another court who had considered issues which were identical to or similar to the issues which were tried by a jury in criminal cases or which bore on those issues; however, reference would only be allowed to the judgment where the judge had made a specific finding relevant to an issue which arose on the appeal” [from headnote at 455].

“It is right that the court will be cautious when looking at documentation which is not strictly admissible in evidence. However, in appropriate circumstances the court will do so” [page 460 E].

“[T]he Court will not shut its eyes to matters which have occurred subsequently to the trial if those matters are relevant to the subject-matter of the appeal” [page 461B].

50. In *R v A* [2006] EWCA Crim 905 the Court of Appeal (Criminal Division), relying on the decision in *D and J*, admitted and considered the impact of an unrelated civil judgment in care proceedings in which the expert relied upon by the prosecution in the appellant’s criminal trial had been subject to adverse comment.
51. *D and J* was also relied upon in *R v Islam* [2007] EWCA Crim 1089, where the Court of Appeal admitted and considered the impact of a Family Division District Judge’s finding that the complainant had lied and manipulated evidence in relation to allegations of violence against her, similar to the allegations on which the appellant had been convicted.
52. In *R v Dorling* [2016] EWCA Crim 1750 – which was a CCRC referral – the Court of Appeal admitted as fresh evidence a County Court judgment which undermined the credibility of prosecution witnesses. In the course of the appeal the prosecution conceded the admissibility of the civil judgment.
53. In addition to considering the legal authorities, the CCRC has had regard to the nature, scale and depth of the analysis carried out by the High Court. Fraser J considered a large volume of evidence in the course of the High Court proceedings, and conducted a very detailed analysis of the relevant matters. As noted above, this prompted the Court of Appeal (Civil Division) to state: “No judge will ever know more about this case generally, and the Common Issues specifically, than Fraser J.” As regards the level of detail of his analysis of the Horizon issues, Fraser J made the following comments when handing down his judgment:

“The Horizon Issues trial involved very detailed analysis of the Horizon computer system. In the year of its inception in 2000 up to 2018, in order to address the Horizon issues, both the evidence and the judgment that I have just handed down considered in great detail the contents of contemporaneous documents within Fujitsu and the Post Office dealing with the operation of the Horizon system generally, but particularly in respect of the known existence of Fujitsu of bugs, errors and defects in Horizon.” [transcript of proceedings, 16/12/2019, at page 3C].

54. The CCRC has seen nothing in the course of its review which would provide a proper basis for seeking to go behind any of Fraser J’s findings as set out above. Further, the CCRC considers that it is in the interests of justice for the Post Office applicants to be able to rely on those findings<sup>31</sup>, given that they are

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<sup>31</sup> In this connection, the CCRC reminds itself that the Court of Appeal’s discretion to receive fresh evidence on appeal is a wide one focussing on the interests of justice - *Erskine, Williams* [2009] EWCA Crim 1425.

of clear relevance to the criminal prosecutions, and were made after such a comprehensive analysis of the available evidence.

55. In all of the circumstances, and in light of the authorities referred to above, the CCRC considers that there is a real possibility that the appeal courts will conclude that the findings of the High Court are admissible in criminal appeal proceedings brought by the Post Office applicants.

### **Abuse of process in the criminal courts**

56. In *R v Maxwell* [2010] UKSC 48<sup>32</sup> the Supreme Court set out the two categories of abuse of process:

“It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court’s sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will “offend the court’s sense of justice and propriety” (per Lord Lowry in *R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42, 74G) or will “undermine public confidence in the criminal justice system and bring it into disrepute” (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F).”

#### Abuse of process where it is not possible to have a fair trial

57. In *Connelly v DPP* [1964] AC 1254 Lord Devlin stressed the importance of the courts accepting their “inescapable duty to secure fair treatment for those who come or are brought before them”.
58. The CCRC observes that where evidence is unavailable, lost or destroyed, this can lead to a position where a defendant suffers such serious prejudice that they are unable to have a fair trial and, consequently, a trial judge will stay the proceedings as an abuse of process. In this regard, the CCRC notes the comments of Fulford LJ in the recent decision in *R v PR* [2019] EWCA Crim 1225:

“71. It is clear that imposing a stay in situations of missing records is not a step that will be taken lightly; it will only occur when the trial process, including the judge’s directions, is unable adequately to deal with the prejudice caused to the defence by the absence of the

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<sup>32</sup> At paragraph 13; subsequently followed by the Privy Council in *Curtis Francis Warren and others v Her Majesty’s Attorney General of the Bailiwick of Jersey* [2011] UKPC 10, at paragraph 22.

materials that have been lost. The court should not engage in speculation as to what evidence might have become unavailable but instead it should focus on any 'missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case'..."

59. The CCRC has also considered the case of *DPP v Fell* [2013] EWHC 562 (Admin) (which was cited in *PR* at 68), in particular the following paragraph:

"...the burden of proof is on the party seeking a stay; the standard of proof is a balance of probabilities, the civil standard. The party seeking a stay must make good to the civil standard that, owing to the missing evidence, he will suffer serious prejudice to the extent that no fair trial can be held and that, accordingly, the continuance of the prosecution would amount to a misuse of the process of the court. [...] the grant of the stay in a case such as this is exceptional. It is, effectively, a measure of last resort. It caters for and only for those cases which cannot be accommodated with all their imperfections within the trial process. It is of course a very different situation where evidence has gone missing through some serious culpability or bad faith on the part of the prosecutor or investigator."

60. It is clear that matters which may result in a stay of prosecution may also lead the Court of Appeal to conclude that a conviction was unsafe and should therefore be quashed. In *Togher and Others* [2001] 1 Cr App R 457, the Court of Appeal confirmed that abuse of process was not only a consideration at the time of trial, but could also be significant where the prosecution had already secured a conviction. At paragraph 30 the Court of Appeal stated:

"...if it would be right to stop a prosecution on the basis that it was an abuse of process, this court would be most unlikely to conclude that, if there was a conviction despite this fact, the conviction should not be set aside."

61. In considering whether it was possible for criminal proceedings against the Post Office applicants to be fair, the CCRC has also had regard to the European Convention on Human Rights. As the Court said in *R v Stratford Justices ex p Imbert* [1999] 2 Cr App R 276:

"...since the question whether a prosecution should be stayed as an abuse of process arises because it is suggested that the accused cannot have a fair trial or that it would be unfair to try him, the court in deciding the issue can have regard to article 6 and to the jurisprudence on it."

62. More specifically, when considering whether it is possible for an accused to secure fair treatment during a criminal prosecution the CCRC observes that an important consideration is whether there is 'equality of arms' between the

prosecution and the defence. This has been held to be an inherent feature of a fair trial in accordance with Article 6 of the European Convention on Human Rights:

“...each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a disadvantage vis-à-vis his opponent” *Dombo Beheer BV v Netherlands* (1993) 18 EHRR 213

“...[the defendant has] the right to have at his disposal, for the purpose of exonerating himself or to obtain a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities” (emphasis added). *Jespers v Belgium* (1981) 27 DR 61<sup>33</sup>

Abuse of process where it would be an affront to the public conscience for the accused to be tried

63. In *Heston-Francois* [1984] QB 278 the Court stated that “oppressive conduct savouring of abuse of process” might result in a conviction being quashed as unsafe or unsatisfactory.

64. In *R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42 (at 74G) Lord Lowry stated that “a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process... because it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of a particular case”.

65. In *R v Latif and Shahzad* [1996] 1 WLR 104 (at page 112F) Lord Steyn discussed the argument for staying criminal proceedings as an abuse of process where those proceedings would: “undermine public confidence in the criminal justice system and bring it into disrepute”. Lord Steyn went on to conclude (at page 112G):

“In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed.”

66. The CCRC has had particular regard to those authorities where an incomplete or misleading picture of the case has been presented to the Court by the

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<sup>33</sup> See also *Ocalan v Turkey* [2005] ECHR (Application 46221/99), *Foucher v France* [1997] ECHR 13 (Application 22209/93), and *Faig Mammadov v Azerbaijan* [2017] ECHR (Application 60802/09).

prosecution, either wittingly or unwittingly. Some of the authorities suggest that this can give rise to an independent abuse of process argument in and of itself. In *R v Mullen*, at page 157 it was stated that:

“Additionally, the need to encourage the voluntary disclosure before trial of material and information in the hands of the prosecution relevant to the defence is a further matter of public policy to which it is also necessary to attach great weight. Omission to make such disclosure clearly is a matter to be taken into account, on the exercise of this Court's discretion following a conviction.”<sup>34</sup>

67. In *R v Early & Others* [2002] EWCA Crim 1904, at paragraph 10, it was stated that:

“Judges can only make decisions and counsel can only act and advise on the basis of the information with which they are provided. The integrity of our system of criminal justice depends on judges being able to rely on what they are told by counsel and on counsel being able to rely on what they are told by each other...Furthermore, in our judgment, if in the course of a public interest immunity hearing or an abuse argument, whether on the voir dire or otherwise, prosecution witnesses lie in evidence to the judge, it is to be expected that, if the judge knows of this or this Court subsequently learns of it, an extremely serious view will be taken. It is likely that the prosecution will be regarded as tainted beyond redemption, however strong the evidence against the defendant may otherwise be.”

68. The CCRC understands that, where an appeal court considers abuse of process arguments which are connected with an alleged ‘affront to the public conscience’, it will conduct a “discretionary balance... with regard to the particular conduct complained of and the particular offence charged”<sup>35</sup>. In the *Warren* case, the Privy Council referred to this exercise in the following terms:

“Implicitly at least, this determination involves performing a ‘balancing’ test that takes into account such factors as the seriousness of any violation of the defendant’s (or even a third party’s) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct;

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<sup>34</sup> In this regard the CCRC has also considered *S(D) and S(T)* [2015] 2 Cr. App. R. 27, which confirmed that prosecution failures to make proper disclosure might be so serious that, even though a fair trial could take place once they had been rectified, to allow the proceedings to continue would offend the court’s sense of justice and propriety or would undermine public confidence in the criminal justice system and bring it into disrepute.

<sup>35</sup> *R v Mullen* [1999] 2 Cr.App.R. 143, at page 158.

and the seriousness of the offence with which the defendant is charged.”<sup>36</sup>

69. The CCRC recognises that the Post Office cases are of a different nature to previous authorities on the subject of abuse of process. The CCRC also recognises that the jurisdiction to stay proceedings – or to quash a conviction – as an abuse of the process of the court “should not be widened in scope to meet particular needs unless there is a very clear reason for doing so”.<sup>37</sup> However, the CCRC observes that there is no definitive list of scenarios which constitute an abuse of process, and that where the law in this field needs to develop in the interests of justice in the case in question, then it will do so. In *R v Martin (Alan)* [1998] 2 WLR 1, Lord Lloyd emphasised this point, stating that: “the categories of abuse of process like the categories of negligence are never closed”. This same point was underlined in *AG’s Reference (No 2 of 2001)* [2003] UKHL 68, where Lord Bingham explained that:

“The category of cases in which it may be unfair to try the defendant of course includes cases of bad faith, unlawfulness and executive manipulation... but... the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases... where the delay is of such an order, or where a prosecutor’s breach of professional duty is such, as to make it unfair that proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear...” [paragraph 25].

### **The prosecution of the Post Office applicants as an abuse of process**

70. The CCRC considers that two potential arguments regarding abuse of process can be developed in the light of the High Court judgments. Each will be explored in detail below but, in summary, the two potential arguments are:
1. It was not possible for the trial process to be fair where – in the context of the evidence of the case in question - the reliability of Horizon data was essential to the prosecution and conviction of the Post Office applicant. This is in the light of the numerous and material findings of the High Court, but most importantly the following conclusions:
    - a. That there were significant problems with the Horizon system and with the accuracy of the branch accounts which it produced. There was a material risk that apparent branch shortfalls were caused by bugs, errors and defects in Horizon.

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<sup>36</sup> Paragraph 24, quoting from Lord Brown’s dissenting judgment in *R v Latif*, who was himself quoting from Professor A L-T Choo in *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2<sup>nd</sup> ed (2008), at page 132.

<sup>37</sup> *R v DS* [2020] EWCA Crim 285

- b. That POL failed to disclose to the Post Office applicants and to the criminal courts the full and accurate position regarding the reliability of Horizon.
  - c. That the level of investigation of apparent shortfalls by POL (and by Fujitsu) was poor, and that the Post Office applicants were at a significant disadvantage in seeking to undertake their own enquiries into such shortfalls.
2. The Post Office prosecutions were an affront to the public conscience. In the light of the numerous and material findings against POL by the High Court – but particularly the three points summarised above – criminal proceedings should not have been brought in the first place in any case where, in the context of the evidence of the case in question, the reliability of Horizon data was essential to the prosecution case against the Post Office applicant.

It was not possible for the trial process to be fair in the absence of a full and accurate understanding of significant reliability issues with the Horizon system

71. The CCRC considers that the findings of the High Court, taken as a whole, represent a fundamental shift in understanding of the operation of the Horizon system, and particularly of the reliability of that system and the branch accounts which it produced. The CCRC observes that over the course of many years the foundation of POL's investigation and prosecution of individual Post Office applicants was that the data which was retrieved from the Horizon system was accurate and could be relied upon. Prosecutions were commenced and pursued on that basis, and defendants were provided with legal advice and considered how to plead in the same context.
72. The CCRC considers it at least arguable that the foundation of POL's approach to the criminal prosecutions has now been materially undermined by the High Court's conclusions, in particular by the following findings:
  1. Legacy Horizon was not remotely robust.
  2. HNG-X, the first iteration of Horizon Online, was slightly more robust than Legacy Horizon, but still had a significant number of bugs, errors and defects.
  3. There was a significant and material risk of inaccuracy in branch accounts as a result of bugs, errors and defects in the Horizon System (both Legacy Horizon and HNG-X).
  4. There is a material risk that shortfalls in branch accounts were caused by the Horizon system during the years when both Legacy Horizon and HNG-X were in use (2000 to 2010, and 2010 to 2017 respectively).

5. There was independent evidence which supported the SPMs' version of events – including from ROMEK, the Royal Mail's own engineering personnel, and from the Post Office's own auditors.
  6. POL failed to disclose to SPMs the full and accurate position in relation to the reliability of the Horizon system.
  7. POL (and also Fujitsu) adopted the default position that SPMs must be responsible for shortfalls. The level of investigation by POL and Fujitsu was poor.
  8. SPMs were at a significant disadvantage in terms of access to relevant information which might have enabled them to investigate and challenge alleged shortfalls.
  9. SPMs had no way of disputing shortfalls within the Horizon system.
  10. POL routinely overstated the contractual obligation on SPMs to make good losses.
  11. Remote access to branch accounts was extensive, and some branch accounts were in fact altered without the SPM's knowledge. It would appear in the accounts as though such actions had been carried out by the SPM.
73. It now appears that the prosecution and trial of individual Post Office applicants took place in the absence of a full and accurate understanding, on the part of the court and of the applicants, of the significant reliability issues with the Horizon system and of POL's approach to alleged shortfalls. The High Court judgments establish that there was a material risk of errors in Horizon data, that the level of investigation by POL was poor, and POL's default assumption was that shortfalls were attributable to the branch. There was also a persistent and sustained failure by POL over many years to disclose relevant information of the sort which might have enabled applicants to defend their case, in circumstances where individual applicants were at a significant disadvantage in themselves accessing that information.
74. In relation to the findings which indicate significant reliability issues with the Horizon system, the CCRC observes that, if those findings had been known about at the time of the prosecutions in question, they might have been presented as rebutting the common law presumption that the Horizon computer system was working properly<sup>38</sup>. POL would then have been under a duty to prove beyond reasonable doubt that the system was in fact working properly, and that it was reasonably reliable in the accounts that it produced. In view of the strength of the High Court's findings regarding the reliability of Horizon, the

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<sup>38</sup> That is, the common law presumption that, in the absence of evidence to the contrary, "mechanical instruments were in order at the material time" (approved by the Divisional Court in *Castle v Cross* [1984] 1 WLR 1372, 1377B, per Stephen Brown LJ).

CCRC considers that POL prosecutors would have found it difficult to discharge that burden.

75. The CCRC considers that the findings regarding the poor level of investigation and of disclosure by POL are particularly significant in the context of the criminal proceedings. The CCRC takes the view that those findings by the High Court give rise to a cogent argument that POL failed adequately to discharge its duties - under CPIA 1996 - as an investigator and/or a prosecutor. In the light of the High Court judgments, there are significant concerns that POL investigators and prosecutors did not ensure that all reasonable lines of inquiry were pursued, but instead routinely assumed a theory of the case which was adverse to the SPMs under investigation. The High Court judgments also raise significant concerns that POL prosecutors did not ensure that all material was disclosed which was capable of assisting the Post Office applicants.
76. In considering whether POL adequately discharged its duties as investigator and prosecutor, the CCRC has considered the question of how far those duties extended to third party material. Specifically, it has considered whether – and if so to what extent – POL was required to make reasonable inquiries of its third party sub-contractor, Fujitsu. In this connection, the CCRC notes that a number of the High Court’s findings are critical of actions of Fujitsu staff in failing to complete thorough and impartial investigations into branch shortfalls, and in failing to be transparent about reliability issues with Horizon.
77. The CCRC takes the view that, in accordance with CPIA, POL’s duties as an investigator and prosecutor clearly extended to ensuring that reasonable inquiries were made of Fujitsu. The criminal investigations in question were conducted on the assumption that the accounting information from the Horizon system was sound and reliable and there appears to have been no inquiry into the possibility that this might not be the case, even where the Post Office applicant denied responsibility for the shortfall. It was likewise incumbent on POL as a prosecutor to bring criminal cases on the basis of sound evidence as to branch accounts. POL prosecutors were under a duty to present reliable evidence to the criminal courts, and to ensure that the courts were not misled (whether knowingly or otherwise). If POL prosecutors failed to ensure that all reasonable inquiries had been undertaken regarding the reliability of Horizon (including via inquiries of Fujitsu), then there remained a clear risk that they would present unreliable evidence to the criminal courts.
78. Furthermore, the CCRC is not aware of any legal principle whereby the prosecutor could absolve itself of its obligations under the CPIA by reference to the fact that certain categories of information are in the possession or control of a third party sub-contractor. The CCRC considers that this would be contrary to logic and to the principles set out in the CPIA and associated guidance.
79. In any event, even if the CCRC is not correct in its analysis regarding POL’s obligations under the CPIA, the CCRC considers that there is a more fundamental point. It was not possible for the trial process to be fair if the courts were not presented with accurate and reliable information. Whether because of

failings by POL, or by Fujitsu staff, or by a combination of the two, the CCRC considers that – in light of the High Court’s findings – there is a cogent argument that the criminal courts were deprived of a full and accurate understanding of reliability issues with the Horizon system.

80. In all of the circumstances the CCRC considers that there are now serious concerns about the overall fairness of the criminal proceedings against the Post Office applicants. In the absence of the full understanding which has now emerged from the High Court judgments, the CCRC considers it at least arguable that it was not possible for the trial process to be fair in any case where – in the evidential context - the reliability of Horizon data was essential to the prosecution case against them. Viewed in terms of Lord Devlin’s words in *R v Connelly*, the CCRC considers it at least arguable in light of the High Court judgments that in such cases the courts were not in a position “to secure fair treatment” for the Post Office applicants.

The prosecutions of the Post Office applicants were an affront to the public conscience and should not have been brought

81. The CCRC has also considered the second category of abuse of process, which is concerned with the need to protect the integrity of the criminal justice system and to prevent proceedings which would be considered an affront to the public conscience. In this connection, the CCRC reminds itself that a stay of criminal proceedings may be granted – or a conviction quashed – where the court concludes that in all the circumstances it would “offend the court’s sense of justice and propriety” for the conviction to stand (per Lord Lowry in *R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42, 74G) or where it would “undermine public confidence in the criminal justice system and bring it into disrepute” (per Lord Steyn in *R v Latif and Shahzad* [1996] 1 WLR 104, 112F).
82. A number of the authorities which address this form of abuse of process concentrate on instances of bad faith on the part of investigators and/or prosecutors. However, the second category of abuse of process is not limited to cases involving bad faith. This much was made clear in *AG’s Reference (No 2 of 2001)* [2003] UKHL 68, where Lord Bingham said:

“The category of cases in which it may be unfair to try the defendant of course includes cases of bad faith, unlawfulness and executive manipulation... but... the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases... where the delay is of such an order, or where a prosecutor’s breach of professional duty is such, as to make it unfair that proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear...” [paragraph 25].

83. In the CCRC’s view, the High Court findings summarised above are no less important to a consideration of whether there has been a second category

abuse of process. When those findings are considered in the round, the CCRC considers that there is a cogent argument that, in the words of Lord Steyn in *R v Latif and Shahzad*, it was an “affront to the public conscience” for POL to bring criminal proceedings in any case where the reliability of Horizon data was essential to the prosecution case (when viewed in the evidential context) against the Post Office applicant in question.

84. The CCRC also reminds itself of the comments of the South African Court of Appeal in *S. v. Ebrahim* 1991 (2) S.A. 553, as cited with approval by Lord Griffiths in *R v Horseferry Road Magistrates’ Court, Ex p Bennett* [1994] 1 AC 42, at 74G:

“...the fairness of the legal process [had to be] guaranteed and the abuse thereof prevented so as to protect and promote the integrity of the judicial system. The state was bound by these rules and had to come to court with clean hands...”

85. The CCRC considers that the Common Issues and Horizon Issues judgments read as a whole raise significant doubts about whether POL can be said to have approached the prosecutions of SPMs “with clean hands”, an expression which the CCRC considers to include acting in good faith as a fair-minded and objective prosecutor. The CCRC reminds itself of Fraser J’s comments at paragraph 1111 of the Common Issues judgment:

“The Post Office describes itself on its own website as “the nation’s most trusted brand” (at <http://corporate.postoffice.co.uk/our-heritage>). So far as these Claimants, and the subject matter of this Group Litigation, are concerned, this might be thought to be wholly wishful thinking. Trust is an element of an obligation of good faith, a concept which I find is to be implied into the contracts between the Post Office and the SPMs because they are relational contracts. The Post Office asserts that its brand is trusted by the nation, but the SPMs who are Claimants do not trust it very far, based on their individual and collective experience of Horizon”.

86. Furthermore, and whilst acknowledging again that findings of bad faith are not a prerequisite with regard to the second category of abuse of process, the CCRC notes with concern the following findings in the High Court judgments:

1. POL deliberately chose not to disclose full details of defects in Horizon because they might have an impact on ongoing legal cases (paragraph 457, Horizon Issues judgment).
2. POL “routinely and comprehensively” overstated the contractual obligations on SPMs to make good losses. The High Court concluded that there was no excuse for this, that it must have been done to make SPMs believe they had no choice but to pay, and that it was “oppressive behaviour” by POL (paragraphs 222 and 723, Common Issues judgment).

87. The CCRC is concerned by this evidence that POL, which was victim, investigator and prosecutor in the cases in question, consciously deprived defendants and the courts of a full and accurate understanding of the reliability of the Horizon system; and that it behaved oppressively to SPMs by overstating their contractual obligations.
88. When considering the second category of abuse of process the CCRC has remained mindful that, in deciding whether to quash a conviction on second category grounds, the appeal court will balance competing interests: see e.g. *R v Mullen* and *Warren*. Those authorities make clear that the Court must consider not only the gravity of any bad faith or misconduct and the seriousness of the violation of the defendant's rights, but also the seriousness of the offences in question.
89. In terms of the 'balancing exercise', the CCRC does not consider that the offence types in the Post Office cases – namely false accounting, fraud, or theft, often involving substantial sums of money – were so serious that the appeal court would necessarily conclude that they outweighed any arguable 'second category' abuse of process. In all of the circumstances, the CCRC remains of the view that the High Court's findings give rise to a cogent argument that individual Post Office prosecutions in which the reliability of Horizon data was essential to the prosecution case (when viewed in the evidential context) were an affront to the public conscience and should not have been brought.

### **Guilty pleas**

90. In *R v B(hatti)* (CACD, 19 December 2000, unreported), the Court of Appeal observed that a guilty plea is "highly relevant to the issue whether the conviction was unsafe in that the appellant had been fit to plead, had known what he was doing, had intended to plead guilty and had done so without equivocation and after receiving expert advice."
91. In *R v Kelly & Connolly* [2003] EWCA Crim 2957, it was said:
- "Ultimately, however, the test is of the safety of the conviction. For the reasons expressed in *Bhatti*, the scope for finding that an unequivocal and intentional plea of guilty can lead to an unsafe conviction must be exceptional and rare. However, undue pressure or errors of law or unfairness in the trial process may all be of such an important causative impact on the decision to plead guilty that the conviction which follows on such a plea can, in an appropriate case, be described as unsafe....Ultimately, as the authorities emphasise, it is a question of fact in each case."
92. The CCRC has also taken into account the recent case of *R v Jones* [2019] EWCA Crim 1059 in which it was said (at paragraph 25):

“...it is of course very rare to admit an appeal against conviction where an unambiguous guilty plea has been entered or to admit fresh evidence under s.23 of the Criminal Appeal Act 1968 in those circumstances but it is beyond argument that there is a discretion to do so.”

93. In *Togher* the Court of Appeal said that a conviction should be liable to be quashed on the ground of abuse of process, even after a guilty plea, if the appellant had been unable to apply for a stay at trial because the facts constituting the abuse of process had not been disclosed by the prosecution. The Court of Appeal said (at paragraph 33):

“The circumstances where it can be said that proceedings constitute an abuse of process are closely confined. It has to be a situation where it would be inconsistent with the due administration of justice to allow the pleas of guilty to stand.”

94. In *R v Early and Others* [2002] EWCA Crim 1904, the Court of Appeal said:

“10...a defendant who pleaded guilty at an early stage should not, if adequate disclosure had not by then been made, be in a worse position than a defendant who, as a consequence of an argument to stay proceedings as an abuse, benefited from further orders for disclosure culminating in the abandonment of proceedings against him.”

“18. It is a matter of crucial importance to the administration of justice that prosecuting authorities make full relevant disclosure prior to trial and that the prosecuting authorities should not be encouraged to make inadequate disclosure with a view to defendants pleading guilty.”

95. The CCRC has paid close attention to the above authorities and notes in particular that in *Togher* and *Early* the Court of Appeal highlighted that guilty pleas had been entered without the benefit of adequate disclosure from the prosecution. The CCRC considers it to be of clear importance that a defendant who is considering his or her plea should have an accurate understanding of the prosecution case against them, and is not misled about the strength of that prosecution case.
96. The Post Office applicants who had pleaded guilty were prosecuted, and required to decide how to plead, in circumstances where they had incomplete and indeed misleading information about the reliability of Horizon. The legal advice which these applicants were given by their representatives, including on the fundamental issue of the plea which they were to enter, was likewise given in the context of a wholly incomplete and inadequate understanding of the overall reliability of Horizon. The CCRC therefore considers it arguable there was significant unfairness in the proceedings which led to the guilty pleas. The CCRC is therefore of the view that there is a real possibility that these convictions will be quashed, notwithstanding the guilty pleas.

## Conclusion

97. In summary therefore, the CCRC's referrals are based on two strands of argument that, in light of the findings of the High Court as set out in Fraser J's judgments in the civil case, there is a real possibility that the relevant appeal courts will conclude that these prosecutions amounted to an abuse of process and, as result, quash the convictions.
98. The cases of the Post Office applicants cover a broad range of circumstances and several different offences (including theft, fraud and false accounting). As noted above, some of the applicants pleaded guilty, whereas others were convicted after trials. It is ultimately for the appropriate appeal court to consider each case on its merits and decide whether to quash the convictions on the basis of the arguments set out above.<sup>39</sup> As noted at the outset of this submission, a number of the convictions referred by the CCRC have already been quashed and POL have indicated that they do not intend to oppose the majority of the cases that are waiting to be heard by the Court of Appeal.<sup>40</sup>

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<sup>39</sup> The relevant appeal courts have been provided with the CCRC's analysis of how these arguments apply to the circumstances of each of the cases which have been referred.

<sup>40</sup> It is, however, important to note that it is for the Court of Appeal to decide whether the convictions are unsafe and should be quashed, not the prosecuting authority.