

Working Paper I

# Issues arising in the Conduct of the Bates Litigation

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## Conduct of the *Bates* Litigation

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All errors are our responsibility.

## Conduct of the *Bates* Litigation

### Executive Summary

This paper sets out the concerns raised about the conduct of Group Litigation brought against Post Office Limited by Sub-Post Masters and Mistresses.

It highlights concerns about the overall strategy and conduct of POL, Fujitsu employees, and the lawyers involved on their behalf.

The breadth and depth of those concerns raises questions as to whether the overall conduct and management of the litigation in turn highlights potential professional misconduct. There are also specific concerns raised that may give rise to allegations of professional misconduct in and of themselves.

This paper outlines important issues about the apparent conduct of the lawyers involved and the blurring of responsibilities between clients, especially organisations, and their legal teams which we expect to address in subsequent analyses. For professional regulators, this raises significant questions about the adequacy of their regulation of in-house advisers and the independence of outside advisers.

The case also raises in stark form many of the concerns courts raise from time to time in relation to litigation culture in civil courts in particular. That suggests a need for reflection and action on how better to ensure an appropriate litigation culture and more responsible professional conduct from lawyers.

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# Conduct of the *Bates* Litigation

## 1. Introduction

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

The scandal covers a number of distinct areas of activity:

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

This paper covers an initial analysis of criticisms made about the Bates litigation in the Bates judgments themselves, and with some reference to the decision and submissions in the *Hamilton* case. It is part of our broader project looking at issues in corporate governance; criminal justice; and professional regulation, as well as government and parliamentary accountability, in the context of the Post Office Scandal.

Whilst we surface potential issues relating to professional misconduct and civil procedure in particular, we do not analyse all of these in depth. We are more interested at this stage in highlighting the concerns raised in the cases and hearing from interested practitioners and others about the substance of that analysis. Later papers will deepen the analysis and cover other elements of the case.

To aid readers not familiar with this most complex of cases we set out a brief overview. Given the length of this paper, some readers may prefer to concentrate on Section 1 where we set out the overview and Section 3 where we summarise what we think this analysis shows and some of the questions it raises.

### 1.1. Overview

From 1999 POL rolled out an accounting and point of sale system, Horizon, which they depended on to provide an accurate record of all transactions carried out by SPMs and their staff. Horizon was supplied and, to a degree, managed, by a sub-contractor, Fujitsu. It was a system developed out of a benefits system being developed with the Department for Work and Pensions (DWP) until DWP

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pulled out.<sup>1</sup> Evidence suggests difficulties with the system from the beginning.<sup>2</sup> A Select Committee report in 1999 noted:<sup>3</sup>

It is evident that a combination of factors — repeated delays and failures to reach important milestones: the demands of ICL [Fujitsu's predecessor] to recoup their expenditure by either a higher transaction charge or an extension of the period during which such charges would be payable: doubts about the resilience and relative obsolescence of the technology — led Ministers to a collective loss of faith in the programme.

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

Horizon did not have any functionality for disputing transactions. This was a deliberate part of its design, decided by POL.<sup>4</sup> SPMs could, and often did, raise concerns or disputes to statements via helplines (the Horizon Helpdesk and the National Business Support Centre), although, as detailed below these concerns were not sufficiently investigated. POL would often seek to enforce shortfalls as debts, even where they were disputed in this way.

Court judgments suggest investigations of queries raised were inconsistent and often inadequate, if they were conducted at all. POL staff, in particular auditors, and Fujitsu staff were involved in such investigations. Horizon training was limited and did not appear to include any explanation for identifying or handling shortfalls.<sup>5</sup> Fujitsu recorded Horizon problems, referred through to Fujitsu from the Horizon Helpline in files known as a PEAKs. Fujitsu's responses to more common problems fed into Known Error Logs (KELs) which recorded a range of problems and bugs over the life of the case on a day-to-day basis.<sup>6</sup> ARQ (audit) data was also available. Evidence suggests Fujitsu frequently mischaracterised PEAK records as indicating user-error rather than being unexplained, or potential or actual Horizon errors. There is evidence that this had financial benefits for Fujitsu under their contract with POL, although Fraser J was undecided on whether these financial benefits impacted on behaviour.<sup>7</sup>

In England, criminal prosecutions of SPMs in relation to shortfalls identified by Horizon were brought, mainly by POL lawyers.

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<sup>1</sup> *Bates v Post Office Limited Judgment (No6) "Horizon Issues" [2019] EWHC 3408 [14]*.

<sup>2</sup> *Bates* No 6 455, *Hamilton* 96

<sup>3</sup> 'House of Commons - Trade and Industry - Eleventh Report' <<https://publications.parliament.uk/pa/cm199899/cmselect/cmtrdind/530/53016.htm>> accessed 21 July 2021.

<sup>4</sup> *Bates* No 6 300

<sup>5</sup> *Bates* No 3 104, 142

<sup>6</sup> *Hamilton* 17

<sup>7</sup> *Bates* No 6 181, 182, 493

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Prosecutions began in 2000 and POL stopped prosecuting in 2014. There were an estimated 736 such prosecutions.<sup>8</sup> Charges typically included theft, fraud, and/or false accounting, and relied solely or mainly on Horizon data without proof of actual loss other than the shortage identified by Horizon. In many cases, charges of theft were brought against SPMs but pleas to false accounting were accepted, with the theft charge being dropped or not pursued. This was typically on the basis that SPMs admitted to covering up shortfalls whilst they sought time to contest or pay them. The evidence suggests POL sought to manage prosecution and pleas in ways that limited criticism of Horizon and which were consistent with maximised recovery of shortfalls. In some cases, POL only agreed to drop the theft charge if SPMs agreed to forgo any criticism of Horizon.

Disclosure of relevant evidence in most, if not all, cases was absent; if it occurred at all it appears to have been confined to ARQ (audit) data and sometimes only limited ARQ data (e.g., only a dip sample checked for evidence of zero transactions, but not for bugs, errors, defects, or evidence of theft). Some evidence suggests disclosure of evidence was resisted because it would be detrimental to Horizon's reputation. The contract between Fujitsu and POL meant that requests for evidence, beyond minimal levels, incurred significant costs for POL. Thus, the contracts appear to have had the potential to incentivise over-recording of user error as an explanation of Horizon problems and discouraged the full investigation of Horizon problems during the investigation and prosecution stages of the case.

In some criminal cases evidence was given by a Fujitsu witness or witnesses who appear to have given misleading evidence.

Fujitsu could amend branch accounts and insert new transactions remotely (i.e., without attending a branch) without the SPM being aware of this, and without the transaction being identifiable as having been inserted by Fujitsu in the transaction data. The ability to do this was denied initially and only fully admitted by POL and Fujitsu in January 2019, during the *Bates* case, and having been previously denied. Although this "remote access" power was there to correct errors, there was evidence it was not adequately controlled or recorded. This vulnerability was not disclosed to any of the SPMs who were prosecuted.

Problems with Horizon began to be reported by journalists; Karl Flinders of Computer Weekly published a story in 2009, with MPs acting on complaints, and SPMs organised as the Justice for Sub-Post Masters Alliance. An independent review was agreed by POL to be conducted by Second Sight, who were appointed in July 2012. A related process of investigation and mediation for former and current SPMs was also brought in [part way through the investigation]. Second Sight became concerned about obstruction of their investigations by POL, and in turn, POL complained internally about the approach of Second Sight to the investigations straying beyond, in their view, its remit. Second Sight's initial work in 2013 had led to POL commissioning legal advice which led to the Clarke advice discussed below. The Clarke advice discussed misleading evidence and a potential perversion of the course of justice. POL's CEO gave evidence to a Parliamentary Select Committee in February 2015 where the CEO said, "'If there had been any miscarriages of justice, it

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<sup>8</sup> 'The Final Reckoning' <<https://www.postofficetrial.com/2021/04/the-final-reckoning.html>> accessed 14 July 2021.

would have been really important to me and the Post Office that we surfaced those.” One of Second Sight’s Directors gave evidence at the same committee which pointed to obstruction of their investigations. Second Sight’s investigation and the mediation scheme were terminated in 2015.

SPMs brought the *Bates* case which commenced in 2017. Their claims were for damages for financial loss, personal injury, deceit, duress, unconscionable dealing, harassment and unjust enrichment arising out of POL’s operation of the Horizon system. The case was hard-fought. POL and Fujitsu’s approach to disclosure was inadequate and their evidence and arguments were subject to severe criticism by the High Court judge hearing the case, Mr Justice Fraser.<sup>9</sup> In particular, disclosure of KELs were denied on a variety of grounds which were false or unwarranted. The existence of PEAKs was only discovered by the Claimants’ expert in 2018 which led to the very late disclosure of these records. A number of witnesses were found to have misled the court and been otherwise inadequate; important elements of the Post Office case were put which were contradicted by their own evidence; and, serious criticisms of the claimants were made by POL, which were not evidenced and should have been if they were to be put. The case settled in 2019 before cases were fully adjudicated by the court. The judge referred a file to the Director of Public Prosecutions saying the evidence of some Fujitsu witnesses required investigating.

The *Hamilton* judgment in 2021 dealt with the appeals of 42 appellants (three brought posthumously<sup>10</sup>) prosecuted and convicted between 2003 and 2013, referred to the Court of Appeal by the CCRC.<sup>11</sup> That judgment condemned the approach of POL to investigating and prosecuting. Thirty-nine of the appeals were allowed, and in each of these 39 cases the court found POL’s approach was an affront to the public conscience. Failures to investigate cases properly and disclosure failings were found to be deliberate. Advice from a barrister working in a solicitors’ firm instructed by POL in 2013 (the Clarke Advice) warned POL of their serious disclosure failings, and reliance on evidence from a witness who had, in his view, misled the court in previous prosecutions. It also revealed a senior POL employee, the Director of Security, had instructed that records relevant to the proper management of disclosure be shredded. Matters of substance revealed by that advice were not disclosed to relevant convicted SPMs. Nor were they disclosed in the *Bates* litigation. The security team was responsible for the investigations criticised by the Court of Appeal.

At the *Hamilton* hearing these disclosure failings cast a long shadow over the conduct of POL and potentially the lawyers involved in those cases. One lawyer involved in advising on disclosure in the POL case, apparently advising in October 2013, after the Clarke advice, was lead counsel for POL in *Hamilton*. In *Hamilton*, POL conceded that what was discovered in the Clarke advice should have been disclosed to Seema Misra, one of the SPMs who successfully appealed her conviction in *Hamilton*, but had not been. This concession suggests to us that it needed to be disclosed in other cases and was not.

In criticising the POL prosecutions, the Court of Appeal did not make findings about who knew what, and when; who may have misled whom; or, who

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

<sup>10</sup> Julian Wilson, Peter Holmes and Dawn O’Connell

<sup>11</sup> *Hamilton and Others v Post-Office* [2021] EWCA Crim 577.



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was responsible for the corporate and professional failings. They did not need to do so to decide the appeals before them. The evidence shows that certain decisions and information were shared at Board level. The Board includes non-executive directors, including a Government appointee, given POL's sole shareholder is the Secretary of State for Business Energy and Industrial Strategy. That evidence included the Clarke advice, which warned of a risk of perverting the course of justice, reaching at least as high as the General Counsel in August 2013 and Bond Dickinson (the firm that became Womble Bond Dickinson, the main solicitors for POL in the *Bates* litigation) writing to POL's Board in August 2013 to indicate Mr Jenkins may have given incomplete evidence in a case and that there was an issue with disclosure obligations.

The who knew what, and when; who may have misled whom; or, who was responsible for the corporate and professional failings questions remain without answers; and whilst this report cannot answer them, we do conduct an analysis which may assist in shedding more light on the problems the scandal highlights.

### 2. Conduct of the *Bates* litigation

584 claimants<sup>12</sup> brought a group action for damages for financial loss, personal injury, deceit, duress, unconscionable dealing, harassment and unjust enrichment arising out of POL's operation of the Horizon system.<sup>13</sup> The claimants were granted a Group Litigation Order in the name of Alan Bates, a leading campaigner and founder of the Justice for Sub-Post Masters Alliance (JSFA). The case was "bitterly contested".<sup>14</sup> It was tried and managed by Mr. Justice Fraser, the judge in charge of the Technology and Construction Court.

POL deployed three different leading counsel on the main case and a fourth for the recusal application.<sup>15</sup>

We have organised the judge's criticisms under the following categories.

- Overall conduct of the claim
- Running arguments contrary to evidence
- Alleging misconduct without necessary evidence
- Misleading pleadings
- Confidentiality and Privilege
- Evidence minimisation and destruction
- Limits on Henderson's evidence
- Disclosure problems
- Disclosure problems attributable to Fujitsu
- Evidence that is evasive, unreliable, or misleading
- Not calling Mr. Jenkins
- POL's expert evidence
- The recusal application made by Lord Grabiner
- CPR concerns

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<sup>12</sup> *Bates* No 6 57

<sup>13</sup> *Bates & Ors v Post Office Ltd* [2017] EWHC 2844 (QB) (*Bates* No 1))' (n 9) 1.

<sup>14</sup> *Bates v Post Office Judgment No 3 'Common Issues'* [2019] EWHC 606 (QB) [10].

<sup>15</sup> *Bates* No 6 23

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### 2.1. Overall conduct of the claim

Fraser J was plainly concerned about the overall conduct of the claims. He expressed particular concern about excessive cost and the overall conduct of the litigation by POL. On claims worth 18.7 million costs at the time of the *Bates* No 6 judgment, which covered the second of the two trials in the case which took place before it settled, costs were in the order of £27 million or higher.<sup>16</sup> POL's costs grew by 1 million in one month in 2019.<sup>17</sup> One witness's partial, misleading, and incomplete evidence in chief (discussed in Section □) is seen as explained, "by the Post Office's approach to the litigation. The Post Office has appeared determined to make this litigation, and therefore resolution of this intractable dispute, as difficult and as expensive as it can."<sup>18</sup>

He was also concerned about the nature of a significant number of the arguments run by POL during the litigation and at trial:

- The meaning of the agreed issues in *Bates* No 6 was disputed by POL after they had been agreed in ways seen as "regrettable,"<sup>19</sup> seeking to narrow the issues in ways not discussed at case management,<sup>20</sup> and criticising drafting agreed by their own (previous) leading counsel of agreed issues.<sup>21</sup>
- POL, "has resisted timely resolution of this Group Litigation whenever it can, and certainly throughout 2017 and well into 2018," by, for example, arguing that "the six Lead Claimants' cases should not be treated as representative of the other Claimants."<sup>22</sup>
- Their approach to this and the definition of "bugs, errors or defects" sought to narrow issues in Post Offices favour.<sup>23</sup> The judge's analysis suggests, although he does not say this, that their arguments run contrary to the plain words of the defined common issues.<sup>24</sup>
- Challenging the honesty of witnesses and then urging the judge to only make findings on their credibility should those findings go the Post Office's way; the judge described this as "a peculiarly one-way approach".<sup>25</sup> This is one of several points at which the judge appears to be concerned with hypocritical inconsistencies in the running of the case.<sup>26</sup>
- POL made an opening which their leading counsel described as a "challenge to the court" about where the court's sympathies might lie. The judge criticised this as having been made out of a fear of "objective

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<sup>16</sup> *Bates* No 6 59

<sup>17</sup> *Bates* No 6 59

<sup>18</sup> *Bates* No 3 544

<sup>19</sup> *Bates* No 6 (n 1) para 20.

<sup>20</sup> *Bates* No 6 21

<sup>21</sup> *Bates* No 6 23

<sup>22</sup> *Bates v Post Office Judgment No 3 'Common Issues'* [2019] EWHC 606 (QB) (n 14) para 14.

<sup>23</sup> *Bates* No 6 26

<sup>24</sup> *Bates* No 6 33 no thanks

<sup>25</sup> *Bates v Post Office Judgment No 3 'Common Issues'* [2019] EWHC 606 (QB) (n 14) para 21.

<sup>26</sup> *Bates* No 3 675

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scrutiny of its behaviour”, or “other reasons” and an attack on his objectivity.<sup>27</sup> It was also seen as praying in aid “dire consequences” to such an important business as an attempt to put the court “*in terrorem*”.<sup>28</sup>

- POL adopted an “extraordinarily narrow” approach to relevance seeking to strike out large amounts of evidence as a result. The approach was, “along the lines that any evidence that is unfavourable to the Post Office is not relevant.”<sup>29</sup> As an example, they called evidence on how Horizon training worked well, and sought to strike out evidence from the claimants that it did not.<sup>30</sup>
- POL’s attempts to strike out large parts of one of the claimant’s (Mr Abdulla’s) evidence could not “sensibly be maintained.”<sup>31</sup>
- Refusing to accept the common themes that linked cases may have been part of a “divide and rule” approach by the Post Office.<sup>32</sup>
- Denying some SPMs made “long-term and expensive commitments in respect of their relationship with the Post Office” was, “an example of the attrition approach of the Post Office to this litigation.”<sup>33</sup>
- Denying the relevance of the way in which shortfalls were disputed and how branch trading statements were produced was found to be “incomprehensible” to “any sensible consideration” of common issues 12 (the extent and effect of SPM’s being agents of POL) and 13 (whether SPMs bore the burden of disproving Branch Trading Statements created under Horizon).<sup>34</sup>
- Arguments about contract construction were, “both circular” and an “overly intricate attempt to sow confusion and obscure the true issues in the case.”<sup>35</sup>
- The judge appears to criticise POL for trying to argue that there is no such thing as a relational contract against a line of authorities on the subject.<sup>36</sup>
- Some of the implied terms that are denied by POL are found to be surprising,<sup>37</sup> “extreme in nature” and “wholly incorrect in law”.<sup>38</sup>
- Arguments about some SPMs training their assistants that suffered, “from a complete lack of logic,” and, “fly in the face of commercial, business and indeed common sense.”<sup>39</sup>
- POL were criticised for not making “well-founded” submissions on the claimants approach to the impact on different SPM of Horizon defects.<sup>40</sup>

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<sup>27</sup> *Bates v Post Office Judgment No 3 ‘Common Issues’* [2019] EWHC 606 (QB) (n 14) para 28.

<sup>28</sup> *ibid* 30.

<sup>29</sup> *Bates* No 3 34

<sup>30</sup> *Bates* No 3 34

<sup>31</sup> *Bates* No 3 272

<sup>32</sup> *Bates* No 3 416

<sup>33</sup> *Bates* No 3 569.26

<sup>34</sup> *Bates* No 3 570

<sup>35</sup> *Bates* No 3 671

<sup>36</sup> *Bates* No 3 703

<sup>37</sup> *Bates* No 3 758

<sup>38</sup> *Bates* No 3 761

<sup>39</sup> *Bates* No 3 952

<sup>40</sup> *Bates* No 6 64

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- POL's submissions on whether one claimant's (Ian Henderson's) evidence was restricted by a protocol agreement (a form of NDA or non-disparagement agreement) provided a summary which was not factually accurate about the questions posed or answers given.<sup>41</sup>
- POL potentially sought to strike out evidence because of the risks of bad publicity.<sup>42</sup>
- Warnings to the judge to "be careful" about the finding he made and to mind the sensitivity of issues appear to indicate a heavy-handed (aggressive?) attempt to manage the judge (this is our criticism not his, although he is plainly irritated).<sup>43</sup>
- Counsel for POL in closing submissions made criticisms of the judge's approach to disclosure that the judge suggests were not enthusiastically advanced which raises the question as to why they were made.<sup>44</sup>

It should be noted that there are one or two occasions where the judge criticises the approach of "both parties", although the vast majority of criticisms are directed at POL.<sup>45</sup>

### 2.2. Running arguments contrary to the evidence

A central problem was running a case contrary to the evidence. Whether this was bad luck, negligence, or related to POL or Fujitsu or people within those organisations seeking to mislead POL and the court, is not clear.

POL's initial denial that there was no capacity to dispute transactions within the Horizon system was one such situation which Fraser J commented on:

This shows that the Post Office had been advancing a case, at least for a substantial part of the Common Issues trial, which was directly contrary to the evidence of its own witnesses of fact in the later Horizon Issues trial. I find this difficult to understand or explain.<sup>46</sup>

Certain claims about how contract management was dealt with, such as the sending out of contract documents, did not, he said, appear to have a basis in reality.<sup>47</sup>

POL/POL's lawyers were criticised for seeking to reduce evidence of fact by way of, "submission, or points made 'on instruction'."<sup>48</sup> This was a point the judge described as "fundamental" as they sought to introduce evidence that could not be tested in cross-examination.<sup>49</sup> Importantly, matters put on instruction as

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<sup>41</sup> *Bates* No 6 198

<sup>42</sup> *Bates v Post Office Judgment No 3 'Common Issues'[2019] EWHC 606 (QB)* (n 14) para 15.

<sup>43</sup> *Bates* No 3 35

<sup>44</sup> *Bates* No 6 564

<sup>45</sup> *Bates v Post Office Judgment No 3 'Common Issues'[2019] EWHC 606 (QB)* (n 14) para 30.

<sup>46</sup> *Bates* No 6 258

<sup>47</sup> *Bates* No 3 91

<sup>48</sup> *Bates* No 6 69, 70, 71.

<sup>49</sup> *Bates* No 6 71

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facts were, at least sometimes, “completely wrong”.<sup>50</sup> The judge opined, “It simply is not procedurally acceptable, or fair, for evidence of this nature to be given by way of submission ‘on instruction’, before finding one such instance not substantiated on the documents.”<sup>51</sup> Counsel for the Post Office had, “entirely unwittingly, and on instruction, provided misleading information to the court,” about failures to disclose audit documents from the Royal Mail.<sup>52</sup>

They were criticised for introducing evidence (from Fujitsu) which was of no assistance and which was also inaccurate.<sup>53</sup>

Interestingly about £0.5 million was spent by POL on “internally appointed experts for the purposes of determining its litigation strategy;” material associated with this was privileged and not disclosed to the defence’s expert.<sup>54</sup> The judge described this as “highly unusual” having “entirely separate experts, instructed directly by a party, without the involvement either of that party’s solicitor or their counsel” and indeed, their expert.<sup>55</sup> We do not know the identity and nature of this team, and the professional qualifications of its members. Were there lawyers with an obligation to the court and the administration of justice for instance? The possibility that strategy and disclosure decisions were taken or influenced by a group separate from the legal team and POL’s board and potentially without professional obligations raises important matters for investigation, particularly given the critical place expert evidence and the disclosures driven by expert investigation had in *Bates*. We do know POL had a litigation committee which appears to have consisted of POL’s Chairman and CFO, two non-execs, one appointed by Government and the other the Senior Independent Director, and that it was attended on occasion by members of the litigation team, in-house, outside Counsel and POL’s solicitors in the litigation.<sup>56</sup>

### 2.3. Alleging misconduct without necessary evidence

The Post Office counter claimed for fraud<sup>57</sup> and at trial sought to cross-examine various witnesses on their honesty and credibility. As the judge notes, “Fraud is the most serious allegation that can be brought in civil litigation and there are special rules in relation to pleading it, which means that a pleading containing a fraud allegation should be subject to particular scrutiny before it is served.”<sup>58</sup> rC9 of the Bar Standards Board Handbook indicates Counsel’s duty to act with honesty and with integrity and includes a requirement, not to draft any document containing, “any allegation of fraud, unless you have clear instructions to allege fraud and you have reasonably credible material which

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<sup>50</sup> *Bates* No 6 382

<sup>51</sup> *Bates* No 6 378 and 379

<sup>52</sup> *Bates* No 6 565.2

<sup>53</sup> *Bates* No 6 161

<sup>54</sup> *Bates* No 6 556

<sup>55</sup> *Bates* No 6 558

<sup>56</sup> ‘POSTMASTER LITIGATION SUBCOMMITTEE, Minutes of a Meeting of the Postmaster Litigation Subcommittee Held on 24 April 2019’.

<sup>57</sup> *Bates* No 6 59

<sup>58</sup> *Bates* No 6 548

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establishes an arguable case of fraud”.<sup>59</sup> That evidence did not appear to be available at trial for at least some of the challenges made.

Many of the concerns outlined above were apparent in the judge’s criticism of the POL’s case here. For example;

- One SPM’s (Mr Bates’) evidence was criticised “in robust terms” as “implausible... Wholly unconvincing... Risible, meaningless, nonsensical and weak....[and] plainly wrong.”<sup>60</sup> Those criticisms were rejected by the judge.<sup>61</sup>
- One SPM’s (Mrs Stubbs’) recall is queried, and it is suggested she received, and “probably” signed, documents which the judge found she did not.<sup>62</sup> The judge described these submissions as, “bold,” and paying, “no attention to the actual evidence”, and seeming to “have their origin in a parallel world.”<sup>63</sup>
- One SPMs (Mr Sabir’s) credit is attacked in a way which, “fundamentally ignores the reality of the situation”.<sup>64</sup>
- SPMs were cross-examined on how they could dispute transactions when their evidence was correct and in line with POL’s own evidence and eventual agreement of the process.<sup>65</sup>
- A point about one SPM’s (Mr Abdulla’s) computer experience which the judge found to be “a point of utter superficiality and of no relevance whatsoever” was taken and elevated “far above the importance it merited”.<sup>66</sup> Mr Abdulla was said to have “lied frequently and brazenly” and introduced evidence which was “new and obviously untrue”.<sup>67</sup> The hostile points were made perfectly properly by POL’s Counsel, the judge said, but were not accepted.<sup>68</sup>
- Counsel for the Post Office put questions to one SPM (Mr Patny Senior) which should have been put to his son, who was also a witness. Allegations of dishonesty were made where, “there was no evidence from any witness called to the Post Office to support the allegation of dishonesty.”<sup>69</sup> Allegations of user error were also made without evidence in any of the supporting documents.<sup>70</sup>
- In relation to a “fairly robust attack” on one SPM’s (Mr Latif’s) evidence including on his credibility, the judge indicated that rebuttal evidence that should have been called if they wanted to mount that line of attack was not called.<sup>71</sup> The Post Office is criticised for cross-examination which was “simply unhelpful”.<sup>72</sup>

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<sup>59</sup> BSB Handbook, Version 4.3, rC9.2c

<sup>60</sup> *Bates* No 3 121

<sup>61</sup> *Bates* No 3 123

<sup>62</sup> *Bates* No 3 137

<sup>63</sup> *Bates* No 3 138

<sup>64</sup> *Bates* No 3 223

<sup>65</sup> *Bates* No 3 228

<sup>66</sup> *Bates* No 3 266

<sup>67</sup> *Bates* No 3 269

<sup>68</sup> *Bates* No 3 269

<sup>69</sup> *Bates* No 6 134, 139

<sup>70</sup> *Bates* No 6 136

<sup>71</sup> *Bates* No 6 91

<sup>72</sup> *Bates* No 6 92

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- A point was put to one SPM (Mr Tank) that he was essentially stealing but this did, “not seem to have any basis in fact” and was un-evidenced assertion.<sup>73</sup> The judge held, “the serious accusations are not made out.”<sup>74</sup> The POL also cross examined “on technical grounds” in ways which the witness could not sensibly, usefully answer.<sup>75</sup>
- For Mr Latif and Tank, lines of cross-examination by POL were seen as inconsistent or “directly contrary” with the evidence later given by the Post Office witnesses.<sup>76</sup>
- One SPM (Mrs Burke) was cross examined in ways inconsistent with the evidence of a POL witness (Mrs Van Den Bogerd). The judge said, “what was very clear to me is that Mrs Burke had done absolutely nothing wrong in that situation.”<sup>77</sup> Mrs Van den Bogerd said she had corrected her statement and communicated that to the Post Office solicitors before the trial. “If that is true, I do not see how counsel for the Post Office could have cross-examined on the basis of her uncorrected statement.”<sup>78</sup> The implication may be that, if Mrs Van den Bogerd’s evidence is correct the solicitors were negligent in not ensuring the statement reached counsel, or Counsel was wrong in not appreciating he was cross-examining on the basis of the incorrect statement.

### 2.4. Misleading pleadings

POL’s defence was also found to contain statements about remote access which were, “factually untrue in at least one highly important respect... The ability of Fujitsu to insert transactions to a branch account remotely, without the SPM being aware of this, and without the transaction being identifiable in the transaction data.”<sup>79</sup> The judge finds the statement misleading.<sup>80</sup> The judge points out that the origin of those statements is largely evidence from Fujitsu employees.<sup>81</sup>

The judge points out that POL’s counsel having admitted the problem before Master Fontaine in the first case management hearing, “wasted no time in bringing what he claimed was the truth, ‘the accurate set of facts’, to the knowledge of the claimants. ...[And yet] the accurate set of facts did not emerge at that time either.”<sup>82</sup> The true position was only accepted by 29 January 2019, eight days after the recusal application was submitted.<sup>83</sup>

539. I consider the significance of the previously factually untrue statements to be considerable. The statement was made publicly by the Post Office, turned out not to be factually correct, and the

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<sup>73</sup> *Bates* No 6 103

<sup>74</sup> *Bates* No 6 117

<sup>75</sup> *Bates* No 6 108

<sup>76</sup> *Bates* No 6 95, 104, 106

<sup>77</sup> *Bates* No 6 208

<sup>78</sup> *Bates* No 6 208

<sup>79</sup> *Bates* No 6 533

<sup>80</sup> *Bates* No 6 545

<sup>81</sup> *Bates* No 6 532

<sup>82</sup> *Bates* No 6 536

<sup>83</sup> *Bates* No 6 536

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Post Office gave an explanation and said the full set of facts was now available. The situation was pleaded to by the Post Office in its Generic Defence, with a statement of truth. That too turned out not to be correct, and the true position has only emerged in the Horizon Issues stage of the litigation as a result of the evidence of Mr Roll, which I have dealt with above. It was only following his written evidence that Mr Parker, and Mr Godeseth – both senior Fujitsu employees – prepared their supplementary witness statements correcting their first statements. These first statements, as I have explained above, were simply untrue in that important respect. These witnesses had previously stated that this was not possible. Mr Parker said Fujitsu did not have the power to do this.

Whilst the problems appear to have emanated from information provided by Fujitsu, “the Post Office must bear some responsibility for such incorrect statements having been made before, both publicly and in its pleadings.”<sup>84</sup>

### 2.5. Confidentiality and Privilege

POL’s behaviour prior to and during the case was marked by “a culture of secrecy and excessive confidentiality generally within the Post Office, but particularly focused on Horizon.”<sup>85</sup> This, “culture of excessive secrecy at the Post Office about the whole subject matter of this litigation,” he says is, “directly contrary to how the Post Office should be conducting itself. I do not consider that there can be a sensible rational explanation...”<sup>86</sup>

The judge criticises POL for what appears to be excessive redaction, which includes concealing the name of a working group called “X” [Project Sparrow is our assumption] and other redactions which the judge appears to regard as more serious and, “not quite so easily explained”.<sup>87</sup> Documents produced by three people, none of whom were an in-house solicitor, had the content redacted where privilege was asserted on the basis of legal advice and litigation privilege.<sup>88</sup>

Emails about the termination of one SPM’s (Mr Bates’) contract have sender’s names and addresses redacted, concealing their identity. This was asserted as having been done for data protection reasons, and Fraser J dismisses any suggestion that they might have been privileged.<sup>89</sup> Given that documents disclosed in litigation are subject to an implied undertaking that the recipient will not disclose or use them elsewhere,<sup>90</sup> the need for redaction in the absence of privilege is questionable. This may have the implication that redaction disguises who knew about the problem, as well as reducing the ability of the claimants (and their lawyers) to make sense of disclosed information. Indeed, at least one

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<sup>84</sup> *Bates* No 6 543

<sup>85</sup> *Bates* No 3 36

<sup>86</sup> *Bates* No 3 560, 561

<sup>87</sup> *Bates* No 3 37, 39, 42, 120

<sup>88</sup> *Bates* No 3 37, 39

<sup>89</sup> *Bates* No 3 120

<sup>90</sup> *Riddick v Thames Board Mills Limited* (1977) QB 881



## Conduct of the *Bates* Litigation

of POL's witnesses struggled with the same difficulties when giving evidence from redacted documents.<sup>91</sup>

“Redactions had been incorrectly applied by the Post Office and/or its solicitors to some of the relevant documents.”<sup>92</sup> Having asked for a review, “an unredacted version was disclosed of a document dated 25 June 2014 entitled “Branch Support Programme”. This had been co-authored by Mrs Van Den Bogerd. The purpose of this document was to “Update the Post Office Executive Committee on the progress of the Branch Support Programme.” Three of the redactions the judge inferred were related to, “improvements to reduce the amount of debt incurred by, and suspensions, of SPMs, and reduce the audit losses.” And were, “not consistent with a view that the debt/suspensions/audit losses are incurred by carelessness on the part of SPMs or criminal activity. It is also hard to see how it could be justified that these had been redacted originally.”<sup>93</sup> In other words, the redactions had the effect of concealing that the Post Office Executive committee had knowledge of flaws relating to Horizon flaws.

### 2.6. Evidence minimisation and destruction

A common response to shortfalls was to dismiss or suspend the SPM “responsible” for the shortfall and to bar them from the branch. When dealing with terminating SPM contracts there appears to have been a policy of minimising record retention. Mr Longbottom (POL auditor) confirmed outgoing SPMs were not allowed to take any documentation with them (with justification claimed, somewhat incredibly, under the Official Secrets Act).<sup>94</sup> The temporary SPM who replaced one SPM (Mrs Stubbs), who resigned under pressure from POL with £30,000 of disputed shortfalls outstanding, was instructed, “to destroy all paperwork related to her appointment.”<sup>95</sup> Another SPM (Mrs Dar) had records removed when she was suspended, “these were not given back when she requested this.”<sup>96</sup>

One might surmise, although the judge does not discuss this, that there was a pronounced risk of challenge or litigation at this stage and yet evidence was being destroyed, even before one considers the potential impact on any contemplated prosecutions. What the judge does say is, “The reason for instruction to destroy documents is wholly unclear, and in my judgement, I cannot conceive of any justifiable reason to destroy such documents.”<sup>97</sup>

Although not an issue of confidentiality or privilege, the judge expresses surprise at the failure of Post Office to ensure a recording of an interview can be unencrypted and made available in proceedings.<sup>98</sup> And he describes the

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<sup>91</sup> *Bates* No 6 246

<sup>92</sup> *Bates* No 6 246

<sup>93</sup> *Bates* No 6 247

<sup>94</sup> *Bates* No 3 483

<sup>95</sup> *Bates* No 3 166 and 723.1

<sup>96</sup> *Bates* No 3 360

<sup>97</sup> *Bates* No 3 166

<sup>98</sup> *Bates* No 3 293, 295

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frustration of a request from an auditor for transaction logs as potentially, “an example of internal suppression of material”.<sup>99</sup>

The handling of the grant funding agreement (GFA) for the National Federation of sub-postmaster’s (NFSP) led to criticism of the NFSP’s independence<sup>100</sup> and the Post Office’s approach to transparency.<sup>101</sup> Interestingly, the judge notes there had been a “highly suspicious” alteration to the NFSP website, during the course of the trial, indeed after the cross-examination of one SPM (Mr Beale), with the possible intention of making the Post Office’s case about transparency around the NFSP GFA appear stronger than it was.<sup>102</sup>

Part of the explanation for such secrecy given by Fraser J is a culture of righteousness and a (misplaced in his view) belief in Horizon:

545. 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. When even a Post Office auditor, Mr Longbottom, attempts to go beneath this veneer, properly to investigate an unexplained shortfall, and finds that he is not provided with the documents he considers necessary, very considerable doubts arise about the approach adopted at the Post Office to its overall control of information

As we will discuss in a later paper, the Clarke advice disclosed instructions to shred minutes and send notes of meetings to Security, related to an expert witness from Fujitsu giving unreliable and misleading evidence to the Crown Court.<sup>103</sup> Another witness, referred to the DPP by Fraser J, gave evidence in the civil trial of one SPM (Lee Castleton).<sup>104</sup> Clarke’s advice referred to the risk of perverting the course of justice posed by the handling of evidence and alleged shredding of records relevant to POL’s management of disclosure.

Ian Henderson has said that when Second Sight commenced their work they asked POL to put a litigation hold on all documents, seeking to ensure no material evidence is lost or destroyed.<sup>105</sup> Ian Henderson gave evidence in *Bates*, and the judge accepted, that the documents provided in the litigation were not the complete set of data provided to Second Sight, which also had the virtue of being well organised. “I do not know why the claimants were not given, in disclosure, the same documents, prepared and collated in the same way, as the Post Office themselves had received from second sight.”<sup>106</sup>

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<sup>99</sup> *Bates* No 3 483

<sup>100</sup> *Bates* No 3 577

<sup>101</sup> *Bates* No 3 598

<sup>102</sup> *Bates* No 3 589, 594

<sup>103</sup> Transcripts of Hamilton Hearings discussing Simon Clarke’s Advice of 15/07/13

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

<sup>105</sup> ‘Second Sight Were Told about Remote Access in 2012’ <<https://www.postofficetrial.com/2021/07/second-sight-were-told-about-remote.html>> accessed 21 July 2021.

<sup>106</sup> *Bates* No 6 186

### 2.7. Limits on Henderson's evidence

Another way in which POL's approach to its handling of Horizon cases can be seen was the restrictions imposed on the evidence of Ian Henderson (a director of Second Sight). Henderson was one of the Second Sight investigators charged with independently investigating SPM cases, having been initially instructed by POL to do so in July 2012.

Fraser J describes the limitations on his evidence as arising by agreement with him or the parties, although Henderson referred to the restriction being imposed on him.<sup>107</sup> Those restrictions derive from a letter purporting to govern the mediation scheme after its creation.<sup>108</sup> The clause of particular interest sought to ensure Second Sight Directors and Personnel:<sup>109</sup>

"will not, act, directly or indirectly... against Post Office or any of its officers, directors or employees save to the extent a) that it is expressly agreed in writing by Post Office that the work proposed to be undertaken will not have a material adverse effect on Post Office's commercial or financial interests or reputation, or b) as required by applicable law or by the mandatory rules or requirements of any regulatory authority, government department or agency to which Second Sight is subject or c) as required by an order of a court of competent jurisdiction."

The restriction imposed, "to avoid any "material adverse effect on Post Office's commercial or financial interests or reputation" is expressed in very wide terms." They were similar to terms in the National Federation of Subpostmasters GFA criticised in Judgment No.3.<sup>110</sup> Henderson confirmed to the judge that his evidence was narrower in scope than it would have been but for this agreement.<sup>111</sup>

6. In this case the restriction has been imposed by the Post Office and agreed by the claimants. It is regrettable, in my judgment, that any witness of fact feels their evidence to be restricted by any existing agreement with a party to that litigation. Apart from anything else, it is something of a contradiction for a witness, who swears or affirms that their evidence is "the truth, the whole truth and nothing but the truth" to then add that there is such a restriction. This appears to contradict the requirement to tell the whole truth. However, the court has never been asked to become involved in resolving any dispute between the parties in this respect.

The judge's view was:<sup>112</sup>

"It is regrettable, in my judgment, that any witness of fact feels their evidence to be restricted by any existing agreement with a

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<sup>107</sup> *Bates* No 6 67, 190

<sup>108</sup> *Bates* No 6 190. The judge describes as, "a curiosity that the detailed terms in the letter of engagement were produced by the Post Office ...about half way through the process."

<sup>109</sup> *Bates* No 6 191

<sup>110</sup> *Bates* No 6 193

<sup>111</sup> *Bates* No 6 195

<sup>112</sup> *Bates* No 6 191.6 and .7

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party to that litigation. Apart from anything else, it is something of a contradiction for a witness, who swears or affirms that their evidence is “the truth, the whole truth and nothing but the truth” to then add that there is such a restriction. This appears to contradict the requirement to tell the whole truth. However, the court has never been asked to become involved in resolving any dispute between the parties in this respect.

7. I do not consider that any such restriction – the scope of which I am in any case unaware – will have had any effect upon my consideration of the correct answers to the Horizon Issues, or the answers themselves.

### 2.8. Disclosure problems

Potential abuse of privilege and excessive secrecy extended into further concerns about disclosure. Under the disclosure model adopted for the case, the parties were obliged to “disclose, regardless of any order for disclosure made, known adverse documents, unless they are privileged.”<sup>113</sup> The judge notes, this, “plainly includes any documents that refer to bugs, errors or defects or the operation of Horizon system that led to potential impact on branch accounts.”<sup>114</sup> Qualitatively and quantitatively significant disclosures were made very late in the trial and after its conclusion.

Some criticism is also made of the claimants’ solicitors not being properly cooperative with requests for disclosure,<sup>115</sup> but the judge makes extensive and detailed criticism of POL’s lawyers and Fujitsu. The overall approach to disclosure, the judge found, “impeded the claimants from obtaining a full view of the documents and the totality of Horizon system.”<sup>116</sup> Disclosing late, in the middle of trial, such large volumes of documents, and failing to act expeditiously when discovering relevant documents were said to be disruptive to the proceedings, and increasing cost and delay was, “the antithesis of cooperation, which the civil procedure rules expressly require.”<sup>117</sup>

Specific criticisms highlighted in the judgment were:

- In the case of one SPM (Mrs Stockdale), Womble Bond Dickinson declined to respond to precisely drafted requests for disclosure and appear to offer preservation of the documents as a concession.<sup>118</sup> A second request for disclosure was resisted on the basis that Mrs Stockdale needed to specify the transactions being challenged and in a way the judge describes as “wholly illogical”.<sup>119</sup> Partial disclosure was met with another request again refused for reasons given by Womble Bond Dickinson which are criticised as, “simply unsupportable”; they are said

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<sup>113</sup> *Bates* No 6 568

<sup>114</sup> *Bates* No 6 569

<sup>115</sup> *Bates* No 6 650

<sup>116</sup> *Bates* No 6 624

<sup>117</sup> *Bates* No 6 625

<sup>118</sup> *Bates* No 3 520.

<sup>119</sup> *Bates* No 3 521

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to be resisting disclosure of documents which are, “highly relevant and clearly disclosable”.<sup>120</sup>

- To resist, as POL solicitors did, disclosure of the KELs because the claimants had, “not particularised any factual basis on which Horizon was defective”<sup>121</sup> was, “simply wrong and, in my judgement, without any rational basis,” and to suggest, as they did, that such documents might not exist was, “somewhat misleading.”<sup>122</sup>
- A response to a request for internal memoranda was described as “obstructive”.<sup>123</sup>
- The court was told that Royal Mail was refusing to disclose material when they had not even been asked for the material in question and when asked to disclose the material did so readily.<sup>124</sup>
- A factual explanation given to the court about the very late disclosure of over 2000 documents on instructions was factually wrong.<sup>125</sup>
- Various concerns are raised about POL’s approach to the KELs including POL saying that they were beyond their control, and that the information contained in them indicates only trivial errors with leading counsel telling the court at one stage, that the KELs do not contain, “the kind of bugs, errors and defects that the claimants wishing to pursue... So far as Post Office is aware.”<sup>126</sup> Unfortunately, “the explanation of what the known error log was, what it contains, and its lack of relevance, was not remotely accurate.”
- Once both experts were allowed to view the KELs it became clear that they were, “highly relevant”.<sup>127</sup> POL’s arguments that KELs were not within their control was, the judge found, wrong: there was a contractual right to be provided with them. One of their main submissions was, “plainly wrong” and their argument, “verging on entirely unarguable.”<sup>128</sup> Information provided to the court through leading counsel was “extraordinarily inaccurate”.<sup>129</sup> Suggestions that the documents were not relevant were “similarly unsustainable”.<sup>130</sup> A large part of the problem appears to be attributed to the Post Office not understanding the system and Fujitsu not providing accurate information.
- The claimant’s expert witness (Mr Coyne) discovered the existence of PEAKs when he visited Fujitsu in 2018. A request was made for them in July 2018 and in September, two weeks before expert reports were due to be exchanged, 218,000 PEAKs were disclosed. A further 3,866 were disclosed in October 2018, two weeks after the experts’ first reports.<sup>131</sup>

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<sup>120</sup> *Bates* No 3 522

<sup>121</sup> *Bates* No 6 576

<sup>122</sup> *Bates* No 6 577

<sup>123</sup> *Bates* No 6 580

<sup>124</sup> BN 6/566

<sup>125</sup> *Bates* No 6 565.3

<sup>126</sup> *Bates* No 6 586 – 590

<sup>127</sup> *Bates* No 6 592

<sup>128</sup> *Bates* No 6 603 – 605

<sup>129</sup> *Bates* No 6 606

<sup>130</sup> *Bates* No 6 609

<sup>131</sup> *Bates* No 6 615

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And, “a large quantity of further documentation” was disclosed very late in the day.<sup>132</sup> 5000 KELs were later disclosed by the Post Office well after the trial ended, having been told by Fujitsu that there were not retained and then being told they were in fact retained.<sup>133</sup>

- Explanations given for this late disclosure were inaccurate.<sup>134</sup> A witness statement by Mr Parsons, of POL’s solicitors, was, “highly unsatisfactory” and contained an explanation which was, “extraordinarily opaque” with a “wholesale lack of any explanation of when” the documents came to light: it is described as “puzzling” given the witness statement was, “ordered specifically to explain what is already a highly unusual situation.”<sup>135</sup> Furthermore, it was found to be, “verging on the extraordinary” that a document discovered during the trial took more than two months to be disclosed to the claimants, particularly given the issues between the parties,” and the absence of any reason why investigation should delay disclosure:<sup>136</sup>

620. The conclusion to be drawn from this is that disclosure was given in a manner that could only have disrupted and delayed proper investigation of the issues contained in the documents. In this specific case, that includes the Drop and Go bug. That document should have been provided to the claimants very rapidly once it came to the attention of the Post Office’s solicitors, not kept “for the next couple of months”, as Mr Parsons puts it.

As the judge notes, the various disclosure problems, “should also have led to the Post Office beginning to doubt what it was being told by Fujitsu.”<sup>137</sup>

We turn now to Fujitsu.

### 2.9. Disclosure problems attributable to Fujitsu

As noted above, some failures to disclose were attributable to Fujitsu incorrectly stating documents were not available when they were.<sup>138</sup> Also, when the claimants sought metrics which a Fujitsu document indicated would be used to measure problems experienced by POL,<sup>139</sup> they were told by Fujitsu, (through the Post Office’s solicitors) that Fujitsu believes that it does not record problems in such a way that would allow this [analysis without] disproportionate effort and cost.” This was contradicted by written evidence from Mr Godeseth (of Fujitsu) who indicated that the reporting system had not been implemented and that the records did not exist.<sup>140</sup>

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<sup>132</sup> *Bates* No 6 616

<sup>133</sup> *Bates* No 6 593

<sup>134</sup> *Bates* No 6 617

<sup>135</sup> *Bates* No 6 619

<sup>136</sup> *Bates* No 6 619

<sup>137</sup> *Bates* No 6 592

<sup>138</sup> *Bates* No 6 628

<sup>139</sup> *Bates* No 6 322 – 324

<sup>140</sup> *Bates* No 6 325

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Another example relates to the Callendar Square bug. Evidence available by early 2006 within Fujitsu showed that it had been known about within Fujitsu for several years, and had “probably” existed, since 2000. A spreadsheet from Anne Chambers, a Fujitsu employee, dated 22 December 2015 relevant to this existed but was disclosed very late. On disclosure failures here, Fraser J said,<sup>141</sup>

“Post Office's solicitors' letters were obviously not factually inaccurate. Nor can the Post Office's own legal team have known about the Anne Chambers' spreadsheet until very early 2019, otherwise disclosure of such an important document would surely not have been given only on 27 February 2019, only seven working days before the Horizon Issues trial began. I do not know why the Anne Chambers' spreadsheet of 22 December 2015 was only disclosed to the claimants a mere 7 working days before the start of the Horizon Issues trial, and it is not necessary to speculate.”

The failures to disclose Horizon problems in *Bates* were roundly criticized by Fraser J and he highlighted evidence suggesting this was wholly or partly done in response to concerns about potential or ongoing litigation, criminal or civil. One crucial meeting, attended by, amongst others, Gareth Jenkins of Fujitsu and Andrew Winn of POL Finance, which probably occurred in 2010, had expressed concern about revealing the Receipts/Payments Mismatch bug as part of its fix because of a:<sup>142</sup>

“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... 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.

458. The degree to which either, or both of, Fujitsu and/or the Post Office, expressly or constructively, knew exactly what and when, is for future trials in this litigation, and I make no findings in that respect in this judgment. They are not necessary in order to resolve the Horizon Issues and I do not speculate.

459. In my judgment, however, there are sufficient entries in the contemporaneous documents to demonstrate not only that Fujitsu has been less than forthcoming in identifying the

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<sup>141</sup> *Bates* No 6 426

<sup>142</sup> *Bates* No 6 437

## Conduct of the *Bates* Litigation

problems that have been experienced over the years, but rather the opposite.

The note of the meeting which discloses the facility to amend transactions and discusses non-disclosure of a receipts and payments mismatch bug was sent to members of POL's in-house legal team in 2010 just before Seema Misra's trial. Rob Wilson (a POL prosecuting lawyer) and Mr Jamail Singh, "who was very prominent within the prosecutions of the sub-postmasters all the way through the prosecutions" were sent the email.<sup>143</sup> This trial was possibly the first where Horizon was subject to robust challenge from a defence expert, and failures to disclose evidence by POL was a live issue.

We have seen already how the ability to inject transactions, which might look like they had been performed by SPMs, was only disclosed in January or February 2019.<sup>144</sup> Second Sight were told of Fujitsu's ability to do this in 2012 and in its final report on 9 April 2015 stated, "Our current, evidence-based opinion is that Fujitsu/Post Office, did have and may well still have the ability to directly alter branch records without the knowledge of the Subpostmaster."<sup>145</sup>

In summary, Fraser J describes Fujitsu as having "sought to keep from the court," its remote access powers, and states that they "may not even have fully disclosed [these] to the Post Office. Because the extent of these powers was kept secret in this way," POL, "made misleading public statements," and the way, "Fujitsu, through the Post Office, sought to portray the contents and lack of importance and relevance of PEAK s and KELs...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."<sup>146</sup>

### 2.10. Evasive, unreliable, or misleading evidence

There are various ways in which the evidence of witnesses was unsatisfactory, especially witnesses called by POL, with attempts by some of them to mislead the court also being subject to heavy criticism. We do not explicitly cover all of those here, preferring to deal with them when we come to corporate governance and organisational culture questions in a later paper. Instead, we concentrate here on issues which *might* be said to relate to the work of the lawyers involved in some way. The below is a relatively brief summary of some extensive problems discussed in the judgment:

- In *Bates No 3*, which recorded Fraser J's judgment following the Common Issues trial, the judge notes that most of POL's 14 witnesses did not have, "direct evidence to provide in relation to the six lead claimants" but rather often gave evidence on the type of things that (in their view) should have happened.<sup>147</sup> The implication appears to be this was of limited value. And they did so in spite of the judge finding the

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<sup>143</sup> Hamilton Hearing Transcripts, Moloney

<sup>144</sup> *Bates* No 6 321

<sup>145</sup> 'Second Sight Were Told about Remote Access in 2012' (n 105).

<sup>146</sup> *Bates* No 6 934

<sup>147</sup> *Bates* No 3 535.



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Post Office must have known its processes for forming the SPMC contract were inadequate.<sup>148</sup>

- Mrs Van den Bogerd’s evidence failed to include “highly relevant matters [harmful to POL’s case].<sup>149</sup>
- Mr Beale’s (Head of Agent Development and Remuneration at POL) evidence was, “hard to reconcile with the actual documents”.<sup>150</sup> PR driven and similarly problematic evidence was a problem with the evidence of other POL witnesses (specifically Mr Breedon,<sup>151</sup> Mr Dance,<sup>152</sup> Mrs Ridge, Mr Longbottom,<sup>153</sup> and Mr Haworth).<sup>154</sup>
- “[T]he house Post Office style”, of “more senior of its management ...[was] to glide away from pertinent questions, or questions to which the witness realised a frank answer would not be helpful to the Post Offices cause.”<sup>155</sup> And evidence was, “slanted more towards public relations consumption rather than factual accuracy. It did not match the contents of the documents to which I referred...”<sup>156</sup>
- Mrs Rimmer’s written evidence, “embarked upon argument with gusto,”<sup>157</sup> rather, “evidence that should be given by a witness of fact”.
- Evidence may not have been drafted by the witness at all but by the litigant solicitors. The judge does not pursue this because witnesses were not generally not cross examined on who wrote the statement, but he points to problems with the evidence of a number of witnesses called by POL: Mrs Rimmer<sup>158</sup> Mrs Elaine Ridge, Mr Trotter<sup>159</sup> Mr Dunks,<sup>160</sup> and Mr Godeseth<sup>161</sup>
- Mr Dance’s evidence contained, “statements about matters of which he had no knowledge whatsoever.”<sup>162</sup> Mr Haworth purported to have knowledge of documents which he admits he has never seen.<sup>163</sup> Evidence from Mrs Ridge, contained “wishful thinking”.<sup>164</sup> Mr Smith’s evidence was based on data, “almost all of” which came from others, “was plain incorrect,” and was, “so vague as to be wholly unhelpful.”
- Mr Dunks stated things as being from his own recollection where the judge found, “he must been working for another document, which he was

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<sup>148</sup> *Bates* No 3 540

<sup>149</sup> *Bates* No 3 544

<sup>150</sup> *Bates* No 3 371

<sup>151</sup> *Bates* No 3 397

<sup>152</sup> *Bates* No 3 451

<sup>153</sup> *Bates* No 3 488

<sup>154</sup> *Bates* No 3 502

<sup>155</sup> *Bates* No 3 375

<sup>156</sup> *Bates* No 3 375

<sup>157</sup> *Bates* No 3 393

<sup>158</sup> *Bates* No 3 394

<sup>159</sup> *Bates* No 3 532

<sup>160</sup> *Bates* No 6 285

<sup>161</sup> *Bates* No 6 443

<sup>162</sup> *Bates* No 3 446

<sup>163</sup> *Bates* No 3 502

<sup>164</sup> *Bates* No 3 478

## Conduct of the *Bates* Litigation

not prepared to identify.”<sup>165</sup> He also sought to “assert things as being true which he had no independent knowledge of.”<sup>166</sup>

- Mr Trotter’s evidence is criticised because his, "written evidence in chief was not only so general, but so inaccurate."<sup>167</sup>
- Mr. Godeseth’s knowledge was sometimes, “very vague”<sup>168</sup> and he relied on evidence from others which was “simply wrong”<sup>169</sup>
- Mr Godeseth's written evidence, “bore very little semblance to the picture that had been portrayed in his written witness statements,” and,<sup>170</sup>

“On some extremely important factual matters, such as the dates when Fujitsu had become aware of a particular bug, or the spreadsheet exercise by Anne Chambers prepared in 2015 (and disclosed in 2019), his written evidence was simply directly wrong. On others, such as the headline points omitted on the Callendar Square Bug that have been set out in [425] above, very important central elements detrimental to Fujitsu were simply omitted.

A number of elements of evidence and problems with Horizon, including Horizon Online being put on red alert because of problems during its pilot. Fraser J pointed found that,<sup>171</sup>

“Not one of these different problems was referred to in Mr Godeseth's witness statements of which there were three. Witness statements are supposed to be accurate, and in a case such as this one with such centrally important issues, accuracy is clearly important. Quoting only selectively from, or wholly ignoring, contemporaneous documents prepared by (say) Mr Jenkins, who was the extensive source of much of the evidence, is not only unhelpful, it presents an entirely misleading evidential picture. It is not necessary to consider further how many personnel at Fujitsu may have assisted Mr Godeseth in producing such documents. Their content was wholly misleading in their original written form. Fortunately the cross-examination of Mr Godeseth led to a far clearer picture in so far as his evidence is concerned.

- Mr Parker’s (Fujitsu) written evidence said of injecting items into Branch accounts remotely “in express terms that this could not be done by Fujitsu at all,” evidence that was obviously incorrect,<sup>172</sup> and “inaccurate and misleading”.<sup>173</sup>

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<sup>165</sup> *Bates* No 6 294

<sup>166</sup> *Bates* No 6 294

<sup>167</sup> *Bates* No 3 530

<sup>168</sup> *Bates* No 6 326.

<sup>169</sup> *Bates* No 6 443

<sup>170</sup> BN 6/454

<sup>171</sup> *Bates* No 6 456

<sup>172</sup> *Bates* No 6 472

<sup>173</sup> *Bates* No 6 473

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- Mr Parker also adapted his evidence as the case developed. Apparently co-terminus with Mr Godeseth's evidence, which indicated that POL's case was failing, Fujitsu conducted extra searches using "one of the commands ...in fact used to inject transactions" into Horizon. It showed another Fujitsu's witness (Mr. Parker) about to give evidence had produced a witness statement that, "was wholly deficient"<sup>174</sup> The decision to do this so shortly before he was about to give evidence was "curious". And a decision was apparently taken not to amend his witness statement but simply to write a letter, although it is not clear by whom a decision was taken (Mr Parker said he was advised to do this).<sup>175</sup> There is no indication as to whether the decision to do further searches was a direct response to Mr Godeseth's evidence. Indeed, the judge finds there is "no credible explanation" for failing to include the correct search terms originally and then subsequently including them at such a late stage.<sup>176</sup>
- Mr Memery (Fujitsu) "omitted some highly material matters" including, "any reference to the Ernst & Young management letter for the year ending 27 March 2011" a crucial document ...collating concerns about privileges and other critical matters.<sup>177</sup>
- Mrs Van Den Bogerd attracted particular attention as, "The most senior witness for the Post Office [and] ...a very senior person within the Post Office organisation"<sup>178</sup> involved in, "the litigation for some time."<sup>179</sup> We discuss elsewhere what the judge described as the entrenched, obstinate, partisan, and misleading elements of her evidence. It is worth noting here, "a disregard for factual accuracy"<sup>180</sup> in her claim to, "have just seen" evidence signed by her in her witness statement "just a few days earlier".<sup>181</sup> Her reluctance, "to give evidence that would be unhelpful to the Post Office's case"<sup>182</sup> extended to,

"documents obtained in the litigation, which Mrs Van Den Bogerd had herself authored (some co-authored with other people) where she had internally accepted problems and difficulties with Horizon that are contrary to the position adopted by the Post Office formally in this litigation. In one, dated 24 October 2016 (a co-authored paper with a Marc Reardon) they had stated: "Horizon Help (the in-branch operational support tool) has since its introduction over a decade ago fallen short of delivering the in-branch self-help functionality that was promised as part of Horizon roll-out and that postmasters and their assistants desperately need."<sup>183</sup>

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<sup>174</sup> *Bates* No 6 467, 469

<sup>175</sup> *Bates* No 6 468

<sup>176</sup> *Bates* No 6 474

<sup>177</sup> *Bates* No 6 503 and 504

<sup>178</sup> *Bates* No 3 409

<sup>179</sup> *Bates* No 3 410

<sup>180</sup> *Bates* No 3 441

<sup>181</sup> *Bates* No 3 417-418

<sup>182</sup> BN 3 419

<sup>183</sup> BN 3 419

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- This “honest and candid internal recognition of the situation”, was inconsistent with POL’s, “formal position” of defending, “the help available to SPMs as being wholly satisfactory.”<sup>184</sup> Rather than putting such matters in her witness statement, she had left them out because of the length of her witness statement. Given that, “what information was relevant to go in there or not,” was her judgement.<sup>185</sup> And a

“very great number of detailed points [were] put to her ...based on internal Post Office documents over the years, which demonstrate an internal view of unsatisfactory performance at odds with the Post Office position in the case. This therefore must mean that Mrs Van Den Bogerd is an extremely poor judge of relevance. Her judgment also seems to have been uniquely exercised to paint the Post Office in the most favourable light possible, regardless of the facts.”<sup>186</sup>

- In *Bates* No 6 her oral, but interestingly not written, evidence had, in Fraser J’s judgment, improved,<sup>187</sup> being more realistic,<sup>188</sup> but there were still problems:

- She gave evidence of inconsistent contemporaneous evidence<sup>189</sup> and written evidence “simply not sustainable on the facts.”<sup>190</sup>
- She claimed to be unaware of key documents and facts<sup>191192</sup> and made highly significant omissions.<sup>193</sup>
- Her oral evidence directly contradicted her written evidence (on Mr Latif’s case), “the accurate statement is the exact opposite of how it had been put in her witness statement,”<sup>194</sup> in ways that could not be explained as simply failing to make oneself clear.<sup>195</sup> The judge pointed out,

“Witness statements are supposed to be factually accurate, and care must be taken in future rounds of this group litigation that they are drafted in accordance with the rules. Making statements that are the exact opposite of the facts is never helpful, to put it at its mildest. It is also the opposite of what witness statements are supposed to be.”<sup>196</sup>

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<sup>184</sup> BN 3 421

<sup>185</sup> BN 3 424

<sup>186</sup> *Bates* No 3 425

<sup>187</sup> *Bates* No 6 204

<sup>188</sup> *Bates* No 6 206

<sup>189</sup> *Bates* No 6 113

<sup>190</sup> 207

<sup>191</sup> *Bates* No 6 07

<sup>192</sup> *Bates* No 6 211

<sup>193</sup> *Bates* No 6 244

<sup>194</sup> *Bates* No 6 222

<sup>195</sup> *Bates* No 6 226

<sup>196</sup> *Bates* No 6 249

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- Her evidence sometimes tended to speculate on plausible explanations helpful to POL where it could, rather than factual evidence.<sup>197</sup>

In relation to some of these problems, there is a strong suggestion she and/or her evidence was badly prepared.<sup>198</sup>

It is therefore very surprising that she had not seen many of the important documents that Mr Green put to her in cross-examination. Some, such as the master PEAK on phantom sales, one of the recurring issues on Horizon, would have been the obvious place for anyone, still less a team of ten, to start when considering preparation of evidence for a witness statement. She explained that there was some pressure of time in terms of how long was available to her to prepare the statement, and this was further explained in supplementary re-examination, but I do not accept insufficient time as a valid explanation for her lack of knowledge on such important points. For example, she told me that at the time of preparing her witness statement, she had not even heard of the Callendar Square bug, one of two bugs that the Post Office accepted some time ago had been present in the Horizon system. This is an extraordinary gap in her knowledge. She did not know that there was a KEL dealing with failed recoveries, originally raised by Anne Chambers in Fujitsu as long ago as 2010, which is called KEL acha959T and which was updated most recently in 2017. This described failed recoveries, and seemed on its face to accept that these would recur, and was very close to the experience of both Mr Tank and also Mrs Burke. I do not see how Mrs Van Den Bogerd (assisted by her team of ten, and with the benefit of the Post Office's considerable resources) could seek to give accurate evidence in the Horizon Issues trial without referring to this KEL, still less without even knowing about it. I am also somewhat disappointed – putting it at its very best for the Post Office – that a team of ten could have assisted Mrs Van Den Bogerd in preparing a witness statement that was so inaccurate on such important points as I have identified above.

252. Although my findings on her evidence in the Common Issues trial cannot be ignored, I am of the view that her approach in the Horizon Issues trial to answering questions was far more constructive and aligned to what is expected of any witness giving evidence in court, particularly a senior witness of an organisation such as the Post Office. **I do however consider that this litigation, and indeed her cross-examination, is a very expensive way for a senior director at the Post Office to become educated about the myriad issues contained in the documents that were put to her. Either the team of ten people assisting her with her evidence had the aim of**

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<sup>197</sup> *Bates* No 6 249

<sup>198</sup> *Bates* No 6 251

**producing entirely one-sided evidence in chief, or they were unaware of all the documents relied upon by the claimants. Either alternative is highly regrettable. (our emphasis)**

Overall, POL's approach to evidence is described in these terms:<sup>199</sup>

928. The approach by the Post Office to the evidence of someone such as Mr Latif demonstrates a simple 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. That approach by the Post Office was continued, even though now there is also considerable expert evidence to the contrary as well (and much of it agreed expert evidence on the existence of numerous bugs).

929. 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.

Remarkably, by the end of proceedings, POL's closing submissions claimed, "...a clear picture emerged of Fujitsu as an organisation which was thorough, professional and conscientious and which took considerable care to ensure that matters were properly investigated and dealt with."<sup>200</sup> A conclusion that the judge said could not be drawn from the evidence on which it was based or on, "the totality of the evidence taken together."<sup>201</sup> He emphasised to the contrary: evidence that Fujitsu staff repeatedly using misleading closure codes to attribute Horizon problems to user error; failures to convey information on known bugs to the SPMs affected, including explicitly debating (with POL) not disclosing problems which may have led or lead to loses that would not be apparent to SPMs; and, the very late disclosure of volumes of relevant documents.<sup>202</sup>

At the hearing when his final judgment was handed down, Fraser J announced a referral to the DPP in the following terms:<sup>203</sup>

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

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<sup>199</sup> BN6

<sup>200</sup> *Bates* No 6 935

<sup>201</sup> *Bates* No 6 935

<sup>202</sup> *Bates* No 6 935

<sup>203</sup> 'Horizon Trial Judgment Is Handed down - Inc Transcript'  
<<https://www.postofficetrial.com/2020/01/horizon-trial-judgment-is-handed-down.html>>  
accessed 14 May 2021.

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greater number of criminal cases, also brought by the Post Office against sub-postmasters and sub-postmistresses.

### 2.11. Not calling Mr Jenkins

Gareth Jenkins was employed by Fujitsu. A “large amount of the evidence,” given by witnesses in *Bates No 6* was, “information directly given to them by Mr Jenkins.”<sup>204</sup> The judge appears to regard him as having been “closely involved in the litigation.”<sup>205</sup> His name, along with Anne Chambers, features regularly in PEAKs referred to in the judgment. His evidence was important to specific prosecutions and its failing were discovered and then, arguably, managed rather than fully disclosed following the Clarke Advice in July 2013 (which indicated that Mr Jenkins was an unreliable witness and had given misleading evidence in criminal cases).

There was neither a witness statement nor oral evidence from Mr Jenkins, which the Claimants’ lawyers queried. POL did not explain why before or during the hearings for *Bates No 6*.<sup>206</sup> An explanation was subsequently provided by way of submissions not evidence in their closing submissions.<sup>207</sup>

The judge noted that, “it is entirely a decision of the parties which witnesses they choose to call”.<sup>208</sup> Gareth Jenkins, a senior Fujitsu employee recently retired, “was obviously widely available to the Post Office and a source of the great amount of information” by their witnesses, including their expert.”<sup>209</sup> Their expert’s reliance on some information from Mr Jenkins only emerged during his cross-examination and was not disclosed in his report (one of the failures in his approach which are discussed below, Section 2.12). Given the judge’s comments on other witnesses called by POL from Fujitsu, it seems fair to infer that he was likely to be a far more relevant witness of fact than any other witness.

Written closing submissions from POL did seek to offer an explanation:

“144. [The claimants] understandably complain that Mr Jenkins and the other source of Mr Godeseth's information could have given some of this evidence first hand. However:

144.1 Taking into account that Mr McLachlan's evidence specifically addressed things said or done by Mr Jenkins in relation to the Misra trial, Post Office was concerned that the Horizon Issues trial could become an investigation of his role in this and other criminal cases.

144.2 Moreover, Post Office was conscious that if it only adduced first hand evidence in the trial, it would end up having to call more witnesses than could be accommodated within the trial timetable.

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<sup>204</sup> *Bates No 6 77*

<sup>205</sup> *Bates No 6 510*

<sup>206</sup> *Bates No 6 77*

<sup>207</sup> *Bates No 6 77*

<sup>208</sup> *Bates No 6 508*

<sup>209</sup> *Bates No 6 508*

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144.3 Furthermore, so far as Post Office was aware, the relevant parts of Godeseth 2 were most unlikely to be controversial. For example, the Misra trial was a matter of public record, the four bugs were covered by contemporaneous documentation and Post Office had no reason to doubt Fujitsu's account of the documents it held."

513. In a footnote to paragraph 144.2 of the closing submissions, the Post Office added ".....As noted above, had its witnesses only given first hand evidence, Post Office estimates that some 34 additional witnesses would have been required."

The judge queried 144.1 as not being a valid reason for his absence. If he had been called the claimant would have been entitled to cross-examine him on any inconsistent statements he had made in other proceedings, if relevant to the *Bates* case.<sup>210</sup> He also pointed out that no limit had been placed on the number of witnesses the Post Office could call and they could have called Mr Jenkins as well as Mr Godeseth. And whilst it was up to them to decide who to call, they knew they would bear the consequences for any evidence deriving from Mr Jenkins would have less force because it had not been tested in cross-examination.<sup>211</sup> Curiously the claimants did not invite the court to draw adverse inferences from his not being called.<sup>212</sup>

The Clarke advice reveals reasons to substantially doubt the reliability of evidence given by Mr Jenkins in criminal proceedings where he was seen to have given misleading evidence. This was not disclosed in *Bates* and arguably should have been. Submissions to that effect were made in *Hamilton* by Sam Stein QC:<sup>213</sup>

In no way do we criticise Mr de Garr Robinson Queen's Counsel or his team, nor indeed those who instruct him, Bond Dickinson LPP. It seems that the material, on any analysis, cannot have been provided to the litigation team, otherwise it seems doubtful that they would have put forward any excuse as to the failure as to why they didn't call Dr Jenkins.

It is possible that Mr Stein is being generous, here as it was the disclosure of a communication from Bond Dickinson to the POL Board about Gareth Jenkins shortly after the two Clarke Advices referred to in *Hamilton* which led to the disclosure of the Clarke Advice in the *Hamilton* case. This suggests some in the firm had known about the Clarke Advice or the problems with Gareth Jenkins' evidence, but we do not know if those people remained in the firm and were part of the *Bates* litigation team.

CPR 1(2) (a) aims to ensure that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence. Fraser J is restrained in his criticisms of not calling Jenkins, given the presumption of adversarial justice that it is for the parties to call the evidence they choose. Fraser J was not aware that the Clarke advice said, "Dr Jenkins'

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<sup>210</sup> *Bates* No 6 514.4

<sup>211</sup> *Bates* No 6 516

<sup>212</sup> *Bates* No 6 514.6

<sup>213</sup> *Hamilton* Trial Transcripts.



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credibility as an expert witness is fatally undermined. He should not be asked to provide expert evidence in any current or future prosecution.”<sup>214</sup> He was not allowed to give evidence directly in the civil litigation but he appears to have given substantial evidence by proxy. There is an argument that the decision not to call had the effect of misleading the claimants and the court if taken with any knowledge of Jenkin’s history; and, it appears to have been a potential explanation for a great deal of the inaccuracy in POL’s witness statements and original defence.

Sam Stein QC for some of the appellants submitted in *Hamilton* that it was:<sup>215</sup>

difficult to excuse the Post Office's actions in seeking to put forward at least the basis of points before the High Court reliant upon Dr Jenkins and then seeking to provide an excuse as to why he has not been called within that litigation, considering the background material.

In no way do we criticise Mr de Garr Robinson Queen's Counsel or his team, nor indeed those who instruct him, Bond Dickinson LPP. It seems that the material, on any analysis, cannot have been provided to the litigation team, otherwise it seems doubtful that they would have put forward any excuse as to the failure as to why they didn't call Dr Jenkins.

He also criticises them for, “providing an explanation as to why they are not calling Mr Jenkins which doesn't appear at any stage to coincide with the Clarke advices.”<sup>216</sup> This he says is evidence supporting the claim of corporate malfeasance in the context of the *Hamilton* judgment.

### 2.12. POL’s expert evidence

POL’s expert (Dr. Worden) was criticised in a number of ways:

- For taking a “wholly artificial” approach to the impact of bugs on sub-postmasters, and seeking to artificially narrow the issues before the court.<sup>217</sup>
- Sending a supplementary report apparently at his own instigation, saying it led to a material change of opinion “not prompted by the Post Office or its lawyers.”<sup>218</sup> Puzzlingly, the judge found there was a significant change of opinion by him.<sup>219</sup> He had plainly consulted with POL’s lawyers on doing this.<sup>220</sup>

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<sup>214</sup> *Hamilton* Transcripts

<sup>215</sup> *Hamilton* Transcripts

<sup>216</sup> *Hamilton* Transcripts

<sup>217</sup> *Bates* No 6 698 and 702

<sup>218</sup> *Bates* No 6 709

<sup>219</sup> *Bates* No 6 722

<sup>220</sup> *Bates* No 6 728

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- Both Post Office and their expert sought, “effectively to redraft” Horizon Issue 1, “in terms more favourable to its [POL’s] case.”<sup>221</sup>
- In assessing the robustness of the system he followed, “a wholly flawed methodology,”<sup>222</sup> that made a “significant omission” in its approach.
- His reasoning was sometimes, “entirely circular,”<sup>223</sup> and made inappropriate assumptions.<sup>224</sup> One part is described as, “so riddled with plainly insupportable assumptions as to make it of no evidential value.”<sup>225</sup>
- He was found to be plainly demonstrating, “a partisan view on evidence of fact. ... [Which was] simply not the correct approach for any expert to adopt.”<sup>226</sup> The judge refers at one stage to, “a raft of slanted analyses”<sup>227</sup> and another to Dr Worden’s, “particularly egregious failure to maintain the necessary standard of impartiality.”<sup>228</sup>
- He relied, “heavily” upon information from Mr Jenkins without that being identified. “This means that Dr Worden was given access to information that was not made available to his opposite number contrary to guidance in *ICI v Merit* [2018] EWHC 1577 (TCC).<sup>229</sup> Mr. Jenkins’ involvement was, “simply hidden” and, “nowhere was there a note or summary of all the information that had been given to Dr Worden by Mr Jenkins.”<sup>230</sup>
- His “partisan view of the evidence of fact of Mr Roll,” and his enthusiastic and acute awareness of Fujitsu’s position meant he, “was not entirely independent of the Post Office’s”.
- And, “his conclusions were not reliable.”<sup>231</sup>

This suggests significant and multiple breaches of the Expert’s obligations under CPR 35; especially CPR 35.3 requiring them to treat duties to the court as overriding.

### 2.13. [The recusal application made by Lord Gribiner](#)

The cross-examination of Mr Godeseth appears to have been a seminal point in the *Bates No 6* trial. His evidence made, “it clear, not only that this remote access existed,” but also gave, “specific examples of Fujitsu personnel manipulating branch accounts, and leading to discrepancies in branch

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<sup>221</sup> *Bates* No 6 759

<sup>222</sup> *Bates* No 6 809

<sup>223</sup> *Bates* No 6 819.9

<sup>224</sup> *Bates* No 6 820

<sup>225</sup> *Bates* No 6 826

<sup>226</sup> *Bates* No 6 844

<sup>227</sup> *Bates* No 6 844

<sup>228</sup> *Bates* No 6 876

<sup>229</sup> *Bates* No 6 880

<sup>230</sup> *Bates* No 6 880

<sup>231</sup> *Bates* No 6 902

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accounts.”<sup>232</sup> Such evidence and the findings on it were likely to be publicly damaging for them.<sup>233</sup>

It is interesting, therefore, and a matter which Fraser J noted in *Bates No 6* that the timing of the recusal application was coterminous with POL’s case taking a very substantial turn for the worse. It also notable that Counsel for POL leading on the Horizon Issues trial “did not know very much about it”.<sup>234</sup>

“Very slightly before the end of Mr Godeseth’s cross-examination – about 30 minutes or so – the Post Office sought to bring the Horizon Issues trial to an end by issuing their recusal application seeking to remove me as the Managing Judge, and to have the trial re-started at some indeterminate point in the future before another judge.”<sup>235</sup>

POL indicated that the recusal application was made in response to the handing down of the Common Issues judgment (*Bates No 3*) and the time taken from then until the application was as expeditious as sensible and possible.<sup>236</sup>

The Common Issues Trial judgment was handed down on 15 March 2019. FOI disclosures of board minutes (heavily redacted) on 18 March and again on 20 March shows that, “The Board has approved both an appeal and the application for recusal...we anticipate the application is likely to be notified to the Claimant’s lawyers and to the judge later tomorrow.” The application was made on the 21 March.

POL instructed Lord Grabiner QC to conduct the application which was declined by the judge himself. POL appealed that on the papers and Coulson LJ declined their application for leave.

His judgment is incandescent.<sup>237</sup> The Court of Appeal judge describes the application at various points as “without substance”, “misconceived”, and “particularly egregious”. It is described as significantly misrepresenting the case that was before the court, both the issues and how POL ran its own case, and he points to their aggressive strategy on cross-examination backfiring. “[N]o realistic criticism can be made of the findings of fact” by the judge let alone one suggesting bias. Parts of the application are “wholly unjustified” and wholly unpersuasive”; the timing of the application is described as discourteous and showing a “singular lack of openness” (ordinarily a judge would be approached before an application is made, say by letter).

There is also an incident where Grabiner explains to Fraser J any delay in the bringing of the application being caused by them taking the view of “another very senior person” who it is intimated is either a judicial figure or barrister. Coulson LJ criticises this as “presumably made *in terrorem*” (*in terrorem*,

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<sup>232</sup> *Bates No 6* 553

<sup>233</sup> *Bates No 6* 553

<sup>234</sup> ‘*Bates & Ors v Post Office Ltd (No 4)* [2019] EWHC 871 (QB) (09 April 2019)’ para 284 <<https://www.bailii.org/ew/cases/EWHC/QB/2019/871.html>> accessed 28 July 2021; ‘Horizon Trial: Day 8 - Going Postal’ <<https://www.postofficetrial.com/2019/03/horizon-trial-day-8-going-postal.html>> accessed 28 July 2021.

<sup>235</sup> *Bates No 6* 463

<sup>236</sup> ‘Post Office Trial: *Bates v Post Office Recusal Hearing Transcript*’ <<https://www.postofficetrial.com/2019/04/bates-v-post-office-recusal-hearing.html>> accessed 8 July 2021.

<sup>237</sup> ‘Court of Appeal Recusal Decision’ <<https://www.postofficetrial.com/2019/05/court-of-appeal-recusal-decision.html>> accessed 8 July 2021.

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meaning ‘serving or intended to threaten or intimidate’). Coulson even gives some cautious credence to the idea that the application was a purely tactical (and potentially therefore illegitimate) move:

Indeed, the mere making of these applications could have led to the collapse of that sub-trial altogether. Although I can reach no concluded view on the matter, I can at least understand why the SPMs originally submitted on 21 March that that was its purpose.

Taking a recusal application at this point in proceedings, in its manner and timing, and in its substance is open to significant scrutiny. An interesting signal of board culture and its relationship to legal strategy may emerge should it be possible to probe the board decision on the recusal application. It went to a vote and it is commonly suggested that votes tend to suggest a poor corporate culture. Importantly too it shows an aggressive, controversial application, was made without the full support of all the Board. Moreover it was made without their lead counsel at the trial in which recusal was sought being aware, or at least fully aware, of the nature of the application.

### 2.14. CPR concerns

Part 1 of the Civil Procedure Rules sets out the overriding objective that binds the courts and parties, with the aim of, “enabling the court to deal with cases justly and at proportionate cost.”<sup>238</sup> “Saving expense,” and, “dealing with the case in ways which are proportionate,” are, as all litigators are aware, emphasised. So is, ensuring that the matters before the court are, “dealt with expeditiously and fairly.” Parties are placed under a duty to help the court to further the overriding objective (CPR 1.3). The Court of Appeal’s decision in *Denton v White* [2014] EWCA Civ 906 emphasises the need for parties to cooperate. Parties who take points “opportunistically and unreasonably,” breach their duty under CPR 1.3.<sup>239</sup> They are warned that, “The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective.”<sup>240</sup> *Denton* is a case about relief from sanctions, and the court considers remedies in cost sanctions. But professional conduct rules similarly emphasise the primacy to duties to protect the rule of law and the administration of justice and do so in priority to duties to the client where there is a conflict. The breadth and gravity of Fraser J’s observations on the conduct of the defendants in this case raise a question as to whether the overall conduct of the litigation is so seriously below acceptable standards as to amount to professional misconduct. Nor, given the case of *Farooqi* and guidance issued by the SRA can solicitors rely on ‘client instructions’ as absolving them from responsibility for litigation strategy and tactics.<sup>241</sup>

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<sup>238</sup> CPR 1.1 (1)

<sup>239</sup> *Denton v White* [2014] EWCA Civ 906 [40].

<sup>240</sup> *ibid* 43.

<sup>241</sup> *Farooqi & Ors, R v* [2013] EWCA Crim 1649 (EWCA (Crim)).

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The disclosure failings in the case are particularly concerning. “[S]olicitors owe a duty to the court, as officers of the court, to go through the documents disclosed by their client to make sure, as far as possible, that no relevant documents have been omitted from their client’s [list].”<sup>242</sup> There is an obligation to warn a client about the need to identify and preserve documents when litigation arises.<sup>243</sup>

“Both solicitors and counsel (as officers of the court) bear a heavy responsibility to ensure that their clients fully comply with these duties. They must make their clients appreciate from the start their obligation to make full and honest disclosure, to avoid suppressing documents and to preserve documents from loss or destruction. Where a solicitor becomes aware that a client refuses to comply with their disclosure duties, they may be duty-bound to withdraw, or even to notify the court. Barristers are similarly required to cease to act for a client who refuses to authorise them to make some disclosure to the Court which their duty to the Court requires them to make ...”<sup>244</sup>

In *Earles v Barclays Bank* (2009) EWHC 2500 (QB) the High Court emphasised the duty to conduct a thorough search for electronic documents.

The decisions in *Bates* and *Hamilton* contemplate that POL and/or Fujitsu may have deliberately impeded disclosure; but also raises questions about the extent to which solicitors and barristers involved within, and instructed by, Fujitsu and especially POL’s lawyers, having conduct of the litigation and hearings, met their obligations to the court. The problem is both a general one and a specific one. Did the lawyers fail to properly advise on, supervise, and scrutinise what was done? General failure to identify and disclose PEAKs and KELs saw the specific resistance of disclosure on the basis that KELs contained trivial, irrelevant information only (suggesting that the lawyers involved had not scrutinised these documents unless they were misleading the court when putting forward those arguments). An example of another specific failing was Mr Parsons of POL’s solicitors taking two months to hand over plainly relevant material in breach of CPR 31 which requires immediate disclosure.<sup>245</sup>

An interesting point is raised by the ‘highly unusual’ existence of a separate internally appointed expert team said to have assisted in determining litigation strategy without involvement of POL’s solicitor or counsel. This may have compromised the independence of POL’s instructed lawyers (although whether they can be criticised on this count might depend on the extent of their knowledge about the group and what the group actually did) and casts a further shadow over the probity of the POLs litigation strategy and approach to disclosure.

Who this group was, what they did, and knew, are all matters of significant interest in explaining POL’s approach to Horizon problems and the litigation. If the group contained any lawyers, they owed professional obligations to the court

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<sup>242</sup> *Woods v Martins Bank* (1959) 1 QB 55.

<sup>243</sup> *Rockwell Machine Tool Co Limited v Barrus* (1968) 2AER 98.

<sup>244</sup> AAS Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th Edition) (Sweet & Maxwell 2021) 815.

<sup>245</sup> CPR 31.11(2) “If documents to which that duty extends come to a party’s notice at any time during the proceedings, he must immediately notify every other party.”

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and to protect the rule of law and administration of justice. The nature and operation of this group requires thorough investigation given the association of the strategy, deliberately, recklessly, or negligently perhaps, with repeated misleading of the court.

In relation to the problems with witness statements and in particular the suggestion made, and sometimes evidenced, that witnesses statements were drafted for them and, as it transpired in oral evidence, in ways directly contrary to their evidence. Witness statements are, where practicable, required to be in the witness's own words and language.<sup>246</sup> They can only contain evidence they are competent to give in chief at trial; opinion and speculation have no place in a witness statement, and where their evidence is derived other than from their direct knowledge they must indicate the source of that knowledge. The false statements identified by Fraser J in several witness statements could have exposed those witnesses to proceedings for contempt of court having been, "prepared in anticipation of or during proceedings and verified by a statement of truth, without an honest belief in its truth."<sup>247</sup>

As with disclosure the question as to responsibility for these problems remains to be investigated. Some witnesses appear to have engaged in deliberate attempts to mislead, whereas other problems may be explained by inadequate processes for the production and submission of evidence to the courts. The failure to identify the sources of information (especially that coming from Gareth Jenkins) and forensic approach to proving the case, which was to call witnesses who could not give direct evidence of matters germane to the court's consideration of the issues and not to call those who could raise significant questions of general and specific failings. Here, again, the lawyers' professional obligations to the court are relevant.

### 3. Summary and Conclusions

The *Bates* judgments show Fraser J's concern that a deliberately non-cooperative approach to the litigation may have been taken by POL with a view to making the litigation as difficult and as expensive as possible. Indeed, the criticisms made go further than obstruction to suggest the possibility of deliberate disruption. Such disruption is antithetical to the overriding principle to which all civil litigation is subject. The list of CPR failings we have examined in outline in the previous section are both wide and deep. Excessive cost is driven by taking points Fraser J found were of weak or no substance. This was done on substance, procedure, and evidence. The implication appears to be that pleadings, disclosure, witness statements and submissions were handled in ways either below expected standards or with an eye on disruption or non-cooperation.

It follows that the conduct of both internal and external lawyers merits further, thorough investigation. Even if the substance of many problems lies in the attitude and approach of POL and Fujitsu personnel, and we do not yet know how true or not this is, there is a real question to be considered as to how practitioners, owing obligations to the court and the administration of justice,

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<sup>246</sup> Practice Direction 32, para. 18.1

<sup>247</sup> CPR 32.14

and duty bound to protect their own independence, should have responded when dealing with a case riven with difficulty but run on such an aggressive basis.

Take the example of asserting facts “on instructions”, after evidence has been repeatedly exposed as problematic. This would have misled the court had those facts not been exposed as false. Even if, as we assume, this was not done knowingly or recklessly, the repetitive nature of the difficulties for counsel may be suggestive of deep problems within the defence team and/or client. This would be concerning at any time, but is particularly worrying given an apparently scorched earth litigation strategy.

POL’s arguments advanced by Counsel also sought to undermine or unpick the logic of the group litigation order. There were attempts to revise and narrow in POL’s favour agreed issues central to the trial, through argument, cross-examination and the presentation of their own evidence, including by their expert. There are what the judge seems to experience as inappropriate attempts to limit the findings he should make on the evidence before him. Fraser J indicated POL sought, through arguments made by Counsel, to undermine objective scrutiny and place the court *in terrorem* (in fear). The tenor of Fraser J’s remarks suggest this strayed beyond fearless advocacy into disruption. Points taken by POL’s lawyers were variously described as surprising, extreme, wholly incorrect in law, circular, overly intricate, aimed at sowing confusion, and obscuring the true issues.

Counsel’s cross-examination of the claimant’s witnesses often challenged their honesty and credibility. POL’s lawyers were entitled to do so if they had evidence on which to base their criticisms. Those challenges were regularly rejected by the judge, but more importantly still from a professional ethics perspective, some attacks on the character of witnesses were criticised for lack of evidence, and not being founded in the realities of the situation. Sometimes, the judge found, they were made in the absence of any evidence at all.

A persistent, if unresolved, concern that witnesses did not write their own witness statements and that those witness statements did not bear proper relation to underlying documentary evidence, calls into question the competence or professionalism with which evidence was managed and drafted. Judicial notice of a party line in giving evidence is also worrying. A particular concern is that written witness statements were found to be misleading when oral evidence was not. Critical questions include: by whom, on what basis, and after what process were such statements drafted and checked? Concerns about a party line in witness evidence are perhaps attributable to the culture of those organisations or perhaps attributable to the litigation strategy having been managed to that end.

This led to the Post Office running a case contrary to the evidence which emerged at trial. Pleadings contained factually untrue information and statements that were misleading. When problems such as these became apparent, admissions of mistake from POL’s counsel accompanied by claims that the true facts had now been given, also proved to be inaccurate. Although many of these problems might be attributable to Fujitsu not disclosing accurate information, POL and their lawyers were responsible for the litigation and managing it. Again, the process for collecting, understanding, and testing documentary and witness evidence is called into question.

We do not know how the process was organised between Fujitsu and POL, although there is evidence that one Fujitsu person in particular (Gareth Jenkins) played an important role in providing information to those who gave evidence

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for POL. We are also told in *Bates* that internally appointed experts assisted in determining litigation strategy without the involvement of POL's solicitor or counsel. We do not know whether any lawyers were involved in this group or the reasons for the apparent separation in approach. Fraser J describes this as "highly unusual"; it requires thorough investigation given the way the judge found a number of elements of POL's case misleading. We have already highlighted the introduction of evidence by submission and on instruction. There are other troubling aspects to the management of evidence in this case. Documents were disclosed with excessive redactions, some of which proved to have no justification. One redaction concealed evidence of POL's executive committee having knowledge of Horizon flaws. Policies of document management appeared to have been implemented when suspending or terminating SPM contracts, a time when prosecution was in contemplation or imminent, which had limited information to the claimants. One witness's evidence was apparently inhibited by a contract with POL in the manner analogous to a non-disclosure agreement.

The nature and extent of the judge's criticisms of POL and Fujitsu witnesses are concerning. Witnesses were chosen who could only give evidence of limited probative value: they could not give germane, direct evidence on many matters before the court. They could give evidence on what should have happened, not what did happen. POL's lawyers indicated this was done to keep the number of witnesses down and the trial within manageable bounds. The judge found a good deal of evidence was geared toward reputation management rather than relevance (what the judge referred to as PR driven evidence). Written and oral evidence was hard to reconcile with, or contradicted by, documentary evidence. Statements sometimes contained evidence about matters which the witness in question had no knowledge of at all. A number of witnesses failed to include critical material on which the witness could give evidence but did not, because those matters were harmful to the POL case.

Preparation by the team supporting a senior POL witness, Mrs Van den Bogaert, is called into question: the judge suggests they were either unaware of all the documents the claimants were relying on or they sought to produce entirely one-sided evidence in chief. This seems to suggest the handling of evidence production might have sometimes been incompetent or inappropriate. That point may well apply more broadly given the judge's similar concerns about other POL and Fujitsu witnesses. An interesting question is whether any laxity in evidence production provided fertile ground for the misleading evidence presented by some witnesses.

Significant amounts of evidence of fact and evidence from the Defendant's impact was based on information apparently supplied by a Fujitsu employee, Gareth Jenkins, who did not submit a witness statement or give oral evidence. The full extent of witnesses' reliance on information from him was not disclosed as it should have been. One particular example is the POL's expert (Dr Worden). His evidence was found to be inadequate, partisan, and lacking in independence.

POL's reasons for not calling Mr Jenkins included that the Horizon issues trial should not become an investigation into his role in prior criminal cases. Evidence disclosed in the Hamilton appeal indicates Mr Jenkins was discovered to have given what appears to have been misleading evidence in prior criminal cases, where evidence of bugs had not been disclosed. Documents associated with the management of this problem were said to have been shredded,



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apparently to limit disclosure. It is at least arguable that this information should have been disclosed in *Bates* too. It also indicates an individual believed to have given misleading evidence in prior cases was relied upon as a substantial source of information in an exceptionally important piece of civil litigation. The extent of any awareness of the past problems with Mr Jenkins' evidence and management of this problem is a matter of the highest importance in getting to the bottom of POL's approach to the litigation and the broader handling of criminal cases and the appeal.

Although not known at the time of the *Bates* judgments the problems with Mr Jenkins evidence *were* known at high levels of POL in 2013. The General Counsel at the time, amongst others, appears to have received the Clarke advice documenting concerns about reliability, misleading evidence, and the risk of perverting the course of justice and POL's Board seems to have been written to about problems with Jenkins' evidence in a criminal case by the firm of solicitors representing them in the subsequent *Bates* litigation. As well as being relevant to knowledge of information about the Jenkins problem, and concerns that various courts may have been misled, including the High Court in *Bates*, this prior knowledge and involvement may have affected judgements about how to handle the group litigation.

Whether that is so or not, disclosure of evidence was resisted in ways showing a lack of appropriate cooperation by POL's lawyers. Some of their arguments were described by the judge as illogical, unsupportable, wrong, verging on the entirely unarguable, and unsustainable. They resisted disclosure of material which was, in the judge's view, both highly relevant and clearly should have been disclosed. Factual explanations about reasons for nondisclosure, or late disclosure, were also wrong, suggesting the court was misled on these. A vital set of documents, PEAKs, well known to Fujitsu personnel, were discovered by the claimant's expert in 2018 and only disclosed subsequent to that discovery.

Although a large part of the disclosure problems can be attributed to Fujitsu employees not providing accurate information, Fraser J also attributes it to the Post Office not understanding the Horizon system. That criticism might potentially also be extended to POL's lawyers, supported by the frequent submission of factually incorrect and misleading points during the hearings.

A recusal application was made alleging bias against Mr Justice Fraser part way through the Horizon Issues trial (*Bates No 6*). This was made without the usual warning, and before one of POL's witnesses had completed giving evidence damaging to POL's own case. There are suggestions mentioned in the relevant judgments that the application may have been run for tactical reasons and that a particular point made in the application was an attempt to place the court *in terrorem* and so inappropriate. The criticisms of the application made by Lord Justice Coulson raise a question as to whether the application had the merit necessary to be capable of being properly brought. We do not read the judgment as saying the application was unarguable, simply a very poor one. Whether it was in fact an arguable application would be one issue to be considered but not the only one in considering the recusal application from a professional conduct perspective. Lawyers bringing such applications are responsible, in part, for strategy as we discuss below and must be mindful of both the client's interests but also the interests of justice. They do not simply act on instructions. Whether Lord Gribner is at fault here, if there be any, or any

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problem lies with the broader legal team is a matter which merits investigation. A level of concern and intrigue is added to the matter by leading counsel in the trial at the time not appearing to have a proper understanding of the application (through no apparent fault of his own). Responsibility for the conduct of the litigation, and independence as regards its conduct, may have been weakened, deliberately or otherwise, by apparently splitting the conduct of this matter from the main case.

The decision to make the recusal application was taken with the approval of POL's board, with the government appointed non-executive director present but not voting.<sup>248</sup> That there was a vote may suggest concerns within POL about the case strategy were running high. If the trial had been aborted, the extent of wrongdoing in this case, and the culpability of the organisations and some individuals involved, may have not come to light. The CCRC application made subsequently may have been affected as may the bringing and conduct of the criminal appeals in *Hamilton*, particularly as regards the crucial second ground of appeal. If the application was made for tactical reasons, an interesting question is whether these outcomes may have been within the contemplation of some of the participants in that decision. This needs investigation.

By way of a summary, we highlight the main professional conduct issues potentially raised by this evidence. We have not analysed each of these in depth, given the preliminary nature, and length, of this working paper.

### Lawyers' obligations to justice

A key question arising from the comments of Mr Justice Fraser are whether the POL's lawyers put their duty to their clients ahead of their duty to protect the administration of justice and the rule of law and their obligations as officers of the court?

The approach to the case clearly led to the court being given misleading information repeatedly: through pleadings, submissions, evidence, and cross-examination. An issue as regards the lawyers involved, and which warrants further exploration, is whether this may on occasion have been done knowingly or recklessly. The repeated nature of the problems may go some way to counter any argument that all of the problems can be blamed on the clients or their witnesses. The breadth of problems with the POL's case perceived by Fraser raise a question as to whether the case was being run with a Nelsonian eye to the weaknesses in evidential and factual submissions. How POL's legal team responded to the POL's case unravelling over the course of the litigation, especially in the Common Issue and Horizon trials are unknown and also demands exploration.

An interesting question, is whether, as it became apparent that POL (and Fujitsu) witnesses were not being honest, there came a point at which the lawyers involved should have resigned. For example, SRA guidance states:<sup>249</sup>

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<sup>248</sup> Minutes of a call of the Board of Directors of Post Office Ltd held on 18 March 2019 17:15 HRs

<sup>249</sup> Solicitors Regulation Authority, 'Balancing Duties in Litigation' (November 2018) <<https://sra.org.uk/risk/resources/balancing-duties-litigation.page>> accessed 13 February 2019.

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If a solicitor knows that a client's case is not honestly brought, they must not act. Where there is suspicion or the context is high-risk, the solicitor's duty to the administration of justice, the court and the public interest demand proper checks of the instructions and evidence.

The accretion of incidents of misleading must or should have prompted escalating concern and reflection. It is worth bearing in mind Fraser J's focus on the way in which Van den Bogerd's evidence was prepared here whilst bearing in mind SRA guidance:<sup>250</sup>

Solicitors must still, however, take the greatest care not to mislead the court or to permit their client to do so. If their client continues to do so despite advice, the solicitor should cease to act.

In relation to the management of information: the extent to which witness evidence was prepared which was contrary to actual evidence given, and the references to the existence of a party line may suggest there has been witness coaching going on. If it has, by whom? Have lawyers responded appropriately to red flags raised around the evidence, for instance in the Common Issues Trial?

Counsel for POL changed a number of times, although this may be explained by timetabling and other difficulties.

Presenting what the judge called a 'flat earth' case raises a question as to whether the case put forward in some of its specifics was properly arguable. A number of individual submissions and arguments in court and sometimes in correspondence (on disclosure in particular) were dismissed in such strong terms as to suggest they might not have been properly arguable. This would breach Bar rules.<sup>251</sup> Whilst significant leeway for sometimes straying beyond robust advocacy of one's client's case might be allowed in the heat of battle during a hearing, the repeated and extensive nature of the concerns is of particular note.

Issues are also apparent regarding adherence to the CPR and the text of prior agreements/orders. Late disclosure was not solely attributable to the client but was delayed by POL's solicitors too.

The SRA guidance on balancing duties in litigation identifies that, "Excessive or aggressive litigation... includes repeatedly litigating the same point and using overbearing techniques... [and] accusing the other of criminal conduct without any cause."<sup>252</sup> POL appear to try to reopen issues agreed at prior hearings. Other indicators of inappropriately aggressive litigation the SRA has regard to include disproportionate costs and harm to vulnerable individuals.

There could be an argument that the case in its totality was run on an approach that is misleading. Mr J Fraser found *some* awareness of bugs, over a number of years within POL. And, that behind the scenes ... a number of people within the Post Office ... realised that there were difficulties with the Horizon system. Some of that knowledge may be with lawyers employed or instructed by POL and engaged in Bates. As we have seen knowledge of problems with Mr Jenkins evidence extended to some members of POL's solicitors firm, to in-house lawyers in POL, and to POL's Board in 2013. Some although not all

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<sup>250</sup> *ibid.*

<sup>251</sup> rC9.2b

<sup>252</sup> *Balancing Duties in Litigation*

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involved, at least at Board level, will or may have moved on by the time of *Bates*; the extent to which knowledge of events in 2013 was maintained is an important question.

Not calling Mr Jenkins poses the issue as to who took the decision not to call Jenkins and on what basis? Who was aware of the Clarke advice, and did that have any bearing on the decision for instance? It is particularly interesting that one of the concerns was that, if called, cross-examination in *Bates* could, “become an investigation of his role in this and other criminal cases.” Clarke said, “Dr Jenkins’ credibility as an expert witness is fatally undermined. He should not be asked to provide expert evidence in any current or future prosecution.”<sup>253</sup> Yet Jenkins’ was a central figure in the preparation of evidence by POL’s witnesses. In seeking to rely on evidence from Mr Jenkins though the evidence of Mr Godeseth, amongst others, and, in respect of some written evidence in particular, the Judge found that misleading as we have seen. Jenkins may also have had a role in relation to the litigation strategy group referred to elsewhere; and information emanating from him may have been a significant factor in the bringing of the robust but “flat earth” case that POL attempted to mount in *Bates*.

### Independence compromised?

Lawyers are required to advance their clients best interests but also to protect their own independence. The SRA’s guidance on balancing professional obligations during litigation indicates

"A solicitor is independent of his client and having regard to his wider responsibilities and the need to maintain the profession's reputation, [they] must and should on occasion be prepared to say to [their] client 'What you seek to do may be legal but I am not prepared to help you do it'."<sup>254</sup>

In *Farooqi* the Lord Chief Justice, Lord Thomas emphasised Counsel’s responsibility for strategies taken before the court. He said, “the client’s “instructions” were irrelevant when it came to strategy. The client does not conduct the case.”<sup>255</sup>

“that is the responsibility of the trial advocate. ... The advocate is not the client’s mouthpiece, obliged to conduct the case in accordance with whatever the client, or when the advocate is a barrister, the solicitor “instructs” him.”

What is meant by strategy and what is properly and legitimately thought of as instructions is a matter not well developed in the law of professional conduct. Without definition there is a danger of an accountability gap: lawyers justify problematic litigation strategy and tactics on the basis of the client’s instructions; and clients justify their actions based on legal advice.

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<sup>253</sup> Clarke advice as read out by Sam Stein in Hamilton Transcripts and see Hamilton 86

<sup>254</sup> *In the matter of Paul Francis Simms, Solicitors Disciplinary Tribunal, 2002, cited in Balancing Duties in Litigation (SRA, 2018).*

<sup>255</sup> *Farooqi & Ors, R. v [2013] EWCA Crim 1649 (n 242).*

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The way in which litigation strategy appears to have been formulated, partly at least, by a separate group within POL is a concern, especially given the strategy adopted on the case, which was fatally and aggressively adversarial. It raises a question as to who had conduct of the litigation and also whether that group involved any lawyer.<sup>256</sup> It also raises the question as to whether the lawyers failed to protect their own independence sufficiently in sorting their own responsibilities from the client's instructions.

The management of evidence may suggest a lack of competence, supervision, or independent scrutiny by members of the legal teams. We have tended to frame the concerns above in terms of their impact on the public interest and, of course, the interests of SPMs, as the ones most directly affected. It is also possible to see in the raft of problems Fraser J identifies competence concerns as regards handling the case: understanding facts; drafting witness statements; and so on.

As we have noted already, the judge said POL's lawyers advanced hostile cross-examination without calling evidence in support. This is sanctionable under professional rules where serious misconduct is alleged in the absence of supporting evidence. It raises the question as to whether there was a sufficient basis to permit the making of the allegation in court. It may also indicate predatory litigation.<sup>257</sup> Predatory litigation tends to be discussed in terms of bringing claims without evidence. In this case defences were run without, and contrary to, the evidence (albeit often evidence emerging late). Predatory litigation presumably can encompass an analogue of predatory defence, perhaps better described as spurious defence. Predatory litigation is also marked by disproportionality of approach, of which there appears to be abundant evidence.<sup>258</sup>

### Drawing matters together

This paper reveals wide and deep concerns about the conduct of the *Bates* litigation by POL (and Fujitsu given their centrality to disclosure and evidence) and their lawyers. At the very least, the concerns emphasise the need to take the handling of litigation strategy, evidence gathering, disclosure, and evidence preparation with greater care than appears to be the case here. Whether the breaches of CPR suggested by Fraser J's judgment were accidental, negligent, reckless or deliberate and who is responsible for such flaws needs investigation. The exceptionally detailed analysis and strongly worded criticisms of Fraser J in *Bates* are illuminating but leave many questions unanswered. Answers and action are needed if professional standards and civil justice are to be meaningfully protected.

Accountability for the strategy, and operationalisation of that strategy, should not be allowed to rest unscrutinised behind legal professional privilege nor need it do so should professional regulators investigate adequately. One reason is the significant potential for professional misconduct charges to flow

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<sup>256</sup> We do know that POL had a litigation sub-committee which included Tim Parker (Chairman), Alistair Cameron (CFO), Tom Cooper (Non-Exec appointed by Government) and was attended by various lawyers from Herbert Smith Freehills and Womble Bond Dickinson, David Cavendar QC and Ben Foat (POL's GC) in April, Minutes of a Meeting of Postmaster Litigation Sub-Committee 24 April 2019

<sup>257</sup> See *Balancing Duties in Litigation* (SRA), BSB Code of Conduct rC9.3

<sup>258</sup> Solicitors Regulation Authority (n 250).

against a number of the lawyers involved in this case. Fraser J's concerns are strong ones, but he is not making findings of professional misconduct; that requires proper investigation with the lawyers involved having the opportunity of accounting for the problems identified by him. Their explanations may shed fresh light on what appears to have gone wrong here.

We will discuss in a later paper the incentives and cultures that may be at work on lawyers and POL decision-makers here. There are references in the papers to a belief that attacks on Horizon were an attack on POL's Brand. Lawyers instructed by them are plainly sensitive to the reputational concerns of POL. The contract between POL and Fujitsu discouraged the accurate reporting of Horizon problems by Fujitsu, and the detailed investigation of shortfalls by POL when investigating and prosecuting. A more detailed consideration of POL-Fujitsu contract and relationship may reveal other incentives and problems impacting the relationship, power balance, and behaviours including in litigation. The split of responsibilities may have encouraged blame shifting and irresponsibility. Who created the contractual relationship and with what intentions may be important here; the genesis of the Horizon system from a failed project may mean that known problems were being hedged in the contract between Fujitsu and POL, for instance.

A very important point is how much of the "corporate memory" relating to Horizon from initial project design, testing and implementation, and the subsequent aftermath, was retained within the in-house (and outside legal) teams who were then subsequently involved in the litigation. Factors like this may partly account for an aggressive litigation strategy protecting individual reputations as well as the reputation of their organisations.

Our analysis raises important issues about the blurring of responsibilities between clients, especially organisations, and their legal teams. The team within a team of 'experts; dealing with litigation strategy is one interesting aspect of this but not the only one. The Post Office Scandal shows the deployment of law and legal work in a number of ways: the formation of contracts; the substance of those contracts; the characterisation and enforcement of debts under those contracts; the prosecution of alleged wrongs; the commissioning and shaping of mediation and independent investigation; and the presentation of corporate governance and decision making in parliamentary and other contexts. This suggests an enormous power has been wielded through law, without proper accountability, and with professional regulation providing apparently insufficient protection against failures. Responsibility for legal risk and decision-making is a critical challenge for corporate governance and professional regulation. And there is a risk of privilege has been abused: concealing factual information and shielding egregious decisions from scrutiny.

At various stages of the scandal, the actors within Fujitsu and POL will have thought, and will most certainly argue, that they thought they were doing the right thing, faced with difficult decisions based on incomplete information. Thinking about the sometimes legitimate (and illegitimate) reasons motivating problematic behaviours may help shape policy responses. The hubris shown in POL's litigation strategy may have deep roots in the culture of the organisations involved but also in a style of litigation which various civil justice reforms have sought to design out. Sought to, yet failed. The case raises in stark form many of the concerns courts raise from time to time in relation to litigation culture in civil courts in particular. That suggests a need for reflection and action on how better

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to ensure an appropriate litigation culture and a more properly responsible legal profession.

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