

Working Paper 5  
The Perils of Independent Review  
The Swift and Knight Review

The Evidence Based Justice Lab  
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## The Swift Review

### Executive Summary

This paper analyses an independent review conducted by two public law barristers, one of who was previously the Treasury Devil and is now a High Court judge. It identifies a number of problems with the review:

1. The choice of two public law barristers on what was predominantly, insofar as it was a legal matter at all, a review associated with questions of criminal justice not public law.
2. The limited evidence base and legal framing of the review, leading to a report that was arguably less objective than it might have been.
3. As a particular example, the failure to speak to Sir Anthony Hooper, Chairman of the PO's Mediation Scheme are worthy of probing. His exclusion is concerning and the reasoning given for it is unconvincing.
4. Particular concerns about the evidence of one of the review's informants and the apparent identification of potentially misleading evidence by that witness.
5. The ways in which the identification of fundamental problems with the operation of the Horizon system were discussed and handed back to PO for action.
6. The failure to consider the full import of a tainted position on remote access, which had led PO to mislead Parliament and others.
7. A failure to spot conflict of interest and/or independence problems in external lawyers relied upon to conduct and/or supervise criminal prosecution review work.

The paper also identifies:

8. Ways in which the review, if accurate, appears to show the involvement in the review work of 2013-105 (and possibly beyond that) of leading counsel at the *Hamilton* appeals as more extensive than disclosed to the Court of Appeal. If Swift is accurate, there is the possibility that the Court of Appeal was misled about that involvement.
9. The way the review work was reported to Parliament appears to be, at least arguably, misleading. It suggested there was no systematic problem when the report's conclusions suggested both specific and systematic problems with the operation of Horizon. The way in which the Review's findings were reported to Government require investigation.
10. The Chairman, Tim Parker's, decision not to show the review report to his board is alleged to have been on the advice of PO General Counsel, Jane Macloed. If correct, our view is that this advice was probably either wrong or given in a situation of conflict of interest.
11. The Swift Review revealed to the PO Chairman that secret remote access to Horizon was possible in 2016. The Chairman discussed the review with PO's General Counsel (Macloed). The Bates litigation, roundly criticised by the High Court judge dealing with it for being misleading, was founded in part, until 2019, on the basis that secret remote access was not possible. Given Macloed and Parker were involved in the litigation, and it appears to have been run on

## The Swift Review

an incorrect basis that was or ought to have been known to them, the extent of that involvement it needs investigation.

## 1.1. Introduction

As a result of a well-targeted Freedom of Information Request (FOI) from Eleanor Shaikh – an activist supporting Post Office Victims - a critical document has been unearthed.<sup>1</sup> We will call it the Swift Review (or the Review), although it's a joint report from Jonathan Swift QC, former First Treasury Counsel and now High Court judge, and Christopher Knight both of 11 Kings Bench Walk Chambers. When we speak of Swift we are speaking as a shorthand for the report drafted by both authors not just the more senior author.

This document raises many issues for the Williams Inquiry and potentially for professional disciplinary investigations looking at matters beyond the Swift Report, such as the Bates litigation and the conduct of the criminal appeals. This working paper was also written to shed light on important general issues for those who commission or conduct independent investigations.

By way of background, the Swift Review was a review commissioned by the incoming Chair of Post Office (Tim Parker, now outgoing) from two public law barristers, in answer to requests from the Government (sole shareholder of the Post Office) that Parker as Chairman of the Post Office take concerns expressed about Horizon and Horizon-based prosecutions seriously. There is evidence that a Panorama programme, which suggested Horizon was not as secure as Post Office had been saying it was and that there may have been miscarriages of justice, was influential in informing the Government's concerns.

The report provides an interesting lesson in how “independent” reviews, even reviews conducted by esteemed members of the Bar can, deliberately or otherwise, sanitise or conceal wrongdoing in organisations.

We can see sanitisation is what eventually happened in this case because the first public information on the review said this:<sup>2</sup>

Apr 2016 Preliminary conclusion of the review by the POL Chair finds no systematic problem with the Horizon system.

That description emerged in a written submission by a government minister (Paul Scully) to a Select Committee in March 2020. The impression sought to be given is probably fairly described as *nothing of substance to see* here. As we shall see this is a misleading summary of a report in which there was a great deal of substance to see. We turn towards the end of this document to the question of whether Parliament was misled by this answer, and if so, by whom? Although we are not able to answer the latter question definitively, another critical question that we cannot be sure of on the papers is whether the misleading, if indeed it took place, was done deliberately or recklessly. For those reasons we concentrate on ways in which this independent review may have been flawed. We do so

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<sup>1</sup> '2015/16 Review into Post Office's Horizon System Instigated by BIS Minister - a Freedom of Information Request to Department for Business, Energy and Industrial Strategy' (*WhatDoTheyKnow*, 19 January 2022) <[https://www.whatdotheyknow.com/request/201516\\_review\\_into\\_post\\_offices](https://www.whatdotheyknow.com/request/201516_review_into_post_offices)> accessed 17 September 2022.

<sup>2</sup> Paul Scully, Written evidence submitted by the Department for Business, Energy and Industrial Strategy (POH0006) March 2020, <https://committees.parliament.uk/writtenevidence/1007/html/>

partly because of the concern that independent reviews are prone to be used as tools of corporate reputation management rather than as genuine reviews, designed to examine a body of evidence from an objective standpoint and provide a descriptive account. This review was not, on our analysis, without the characteristics of a genuine review; it yielded critical points which if properly actioned might have led to miscarriages of justice coming to light significantly sooner, but it was ultimately used for reputation management. The reasons for this may lie in the way the review was set up, managed, and conducted.

### 1.2. How were the authors chosen?

An interesting starting point for considering the review is how and why the authors were chosen. It is of some note that the review team were public lawyers not, for instance, criminal lawyers. Jonathan Swift QC was, or had been, First Treasury Counsel, the Government's most senior counsel in civil cases, and is now a High Court judge.

We can assume the authors have very substantial experience and excellent professional skills and judgment, but as their report notes, many of the matters raised before them relate to the conduct of criminal proceedings, in which they are not expert. Similarly, they are not computer or accounting experts, and a substantial part of their report relates to understanding the Horizon system's potential vulnerabilities. On technical matters they were able to speak to the consultants (Deloitte) already working for Post Office on some issues associated with Horizon and to Second Sight who had until 2015 been investigating Horizon.

One potential justification that might be offered for instructing public lawyers is the Post Office's quasi-public nature as a government owned company and the nature of the review. In essence it was a review of the Post Office's governance of complaints about Horizon, the associated prosecutions, and other matters generally related to those two things. That said, no matters of public law are raised in the review: the legal matters, insofar as they are raised at all, relate to criminal law and commercial law (agency). Indeed, it would not be unfair to characterise the review as not one engaged in the provision of legal advice. It is more a management review conducted through legal spectacles.

An advantage of it having been done through legal spectacles is that it may be sufficiently legally informed to garner legal professional privilege. That, and lawyers' supposed facility with evidence and facts, might be the reasons for instructing lawyers, but that still does not explain why these two barristers were chosen.

A practical impact of having public lawyers reviewing matters is that in their ordinary work they tend to review against two standards: legality (was anything done unlawfully or without legal power) and Wednesbury unreasonableness (a test generous to the decision-maker requiring quite marked unreasonableness to be criticised as unlawful). That public lawyers might conduct this kind of 'light touch' review might be another explanation, but one does not have the sense from the report that the review is of that kind. This is true even though there are

ways in which the benefit of the doubt is given to the Post Office through the review, which we will come to.

The instructions might more plausibly be explained by Swift's status and experience as Treasury Counsel. He would be well used to defending government against accusations of wrongdoing. For a variety of reasons associated with this, one in such a position might be used to advancing a position where problematic issues levelled against organisations and institutions are downplayed or 'explained away'. Swift would certainly have been well used to doing so for the Government. In this way, it is not at all unlikely that Swift would have been seen as a safe pair of hands who would not over-react to the everyday frailties of organisations or be overly sympathetic to the complaints of outsiders.

We are not implying anything sinister or inappropriate here; organisations instruct advisers who they believe they can trust, but that is the sort of choice that can have an important impact on the review that results.

Although independent, advisers have an ethical obligation (restrained by other obligations including the obligation to act independently) to act in the best interests of the client. An interesting unknown is how far such factors influence decision-making by the legal professionals in situations of doubt. We do know that lawyers are influenced by notions of client loyalty. There is of course economic interest in maintaining good relations with a client. But there is also social psychological work that shows how lawyers subconsciously shape their judgements to clients' interests. We discuss these in some detail later, but for now note that such work shows how advising on liability and quantum is impacted by client loyalty probably sub-consciously even in the absence of actual incentives to do and say what the client wants.<sup>3</sup> Both conscious and unconscious biases may impact on how evidence is weighed, and findings (positive and adverse) are presented to clients.

Again, this is not a criticism of the authors of the report. It is simply part of the background to understanding how independent investigations are subject to influences that are difficult to control and mitigate, even if well run. It is worth noting, though, that picking a safe pair of hands, understandable as that motive would have been if had been the reason, might reinforce some of those biases.

### 1.3. How good was the evidence base and how was it managed?

The next question to be addressed is the evidence on which the Review was based. The report says the authors were granted and received unrestricted access to documentation through Post Office's legal department. That only takes one so far, particularly as we know that undisclosed information has been a feature of Post Office litigation to date.<sup>4</sup> How far the Review may have requested

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<sup>3</sup> See the work referred to in Andrew M Perlman, 'A Behavioral Theory of Legal Ethics' (2015) 90 Indiana Law Journal 1639 in particular.

<sup>4</sup> Richard Moorhead, Karen Nokes and Rebecca Helm, 'Issues Arising in the Conduct of the Bates Litigation, Post Office Project: Working Paper 1' (University of Exeter 2021) <<https://evidencebasedjustice.exeter.ac.uk/wp-content/uploads/2021/08/WP1-Conduct-of-the->

documents to be told they did not exist, or did not ask for obviously important documents which should have been volunteered to them we do not know.

It follows that, the briefing and instructions provided to the Review is crucial. The following documents might have been expected to be referred to as matters considered by the Review team but are not mentioned. The implication of their omission may well be that they did not have them or have knowledge of them. They include the infamous Clarke advices (on the unreliability of Gareth Jenkins as a witness and the shredding of meeting notes on disclosure) and the Detica report. The Detica report<sup>5</sup> indicated, amongst many other things, that “Post Office systems are not fit for purpose in a modern retail and financial environment” and that there needed to be “a concept of quality control and rigour in the investigation process.” Nor are the concerns expressed by Ernst & Young about security issues in relation to Horizon mentioned.<sup>6</sup> The Known Error Logs, crucial documents summarising known problems, are not recorded as sources of information for the Review or for the Post Office Investigation Reports that formed the central plank of their mediation scheme (para 69).<sup>7</sup>

As well as reviewing documentation, the authors met with Lord Arbuthnot (the leading politician taking up the cause on behalf of Sub-Post Masters (SPMs)), Second Sight (who had been independently investigating Horizon and case brought under Horizon until 2015), Deloitte, Fujitsu and, in particular one of their engineers, Gareth Jenkins, and Angela Van den Bogard of the Post Office. Alan Bates of the Justice for Sub-Postmaster’s Alliance was invited to a meeting with them but declined because of his loss of trust in the Post Office.

This *dramatis personae* points to a substantial weakness in the evidence base and approach of the Review, the perspective of the complainants (the SPMs) is missing save insofar as provided indirectly by Arbuthnot and Second Sight. Whilst the authors would have had a detailed understanding of the nature of many of the SPMs’ concerns, they would have been keen to present their own position as independent and balanced.

Moreover, the importance of speaking to some SPMs is not only in their ability to relay evidence about what happened, but in understanding their perspective and the impact of Post Office behaviour on their lives. This speaks to the moral intensity of the decisions subject to the Review, which we discuss below. Given the review was designed to look into whether Post Office had done sufficient to address complaints raised about Horizon the failure to speak to SPMs is particularly concerning. Whilst it may have been done to make matters

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Bates-Litigation-020821.pdf>; Richard Moorhead, Karen Nokes and Rebecca Helm, ‘The Conduct of Horizon Prosecutions and Appeals, Post Office Project: Working Paper 3’ (2021).

<sup>5</sup> JL Ferrari and S Coyle, ‘Fraud and Non-Conformance in the Post Office; Challenges and Recommendations, G-119 Fraud Analysis (“the Detica Report”)’ (Detica, BAE Systems 2013).

<sup>6</sup> Such as Minutes of POL’s Risk and Compliance Committee showing that not all risks identified by the Ernst & Young audit had been addressed. *Bates No 6* para 791

<sup>7</sup> Those reviews were sometimes seen by Swift to be “overly robust in rejecting anything other than operator error” (para 169). Evidence in *Bates* subsequently suggests on occasion Fujitsu mischaracterised PEAK records as indicating user-error rather than being unexplained, or potential or actual Horizon errors, possibly to avoid contract penalties. See, *Bates No 6* 181, 182, 493

easier, quicker, and cheaper for the review, this lopsided-ness in the evidence base reflects a view also, perhaps, which is seen in the report, that the recall and viewpoints of SPMs are faulty and inexpert.

It also underlines the way in which the Review is plainly heavily dependent on information supplied by Post Office and Fujitsu, mostly via Post Office's legal department (para. 3). In some, but not all, respects the Report can be read as being rather credulous with respect to that information. The description of training provision, for instance (para 37 to 39) is at significant odds with SPM experiences as recorded in the Bates litigation<sup>8</sup> and evidence given to the Williams Inquiry.<sup>9</sup> SPMs and employees working in Post Offices have been highly critical of Horizon training and support (concerns which Swift somewhat brushes off). Swift also seems to accept that shortfalls were investigated, and so implicitly that all were properly investigated, as a matter of routine (paragraph 54) a view which can now be seen as flawed.

Such evidential biases can be structural features of a review which has limited time and resources to gather and assess evidence but the absence of victim perspectives in their evidence base is, given the terms of reference, something which is a more fundamental criticism here. It magnifies ways in which the process is vulnerable to various other biases,<sup>10</sup> where the Post Office view of evidence and procedures is allowed to dominate decision-making.

As we will see later, there is also some indication in the report that Post Office may have sought to influence the Review's substance by ensuring its views on plea pressure (bullying SPMs into guilty pleas as it is put) and agency (SPMs are commercial actors with the burden to prove Post Office failed) were taken into account. There would, it seems reasonable to assume, have been no such influence from anyone speaking for SPMs at that stage. Independent reviews of this kind naturally favour the paymasters and main points of communication with those paymasters. It introduces vulnerabilities to poor judgement which need to be carefully countered.

Most curiously, Sir Anthony Hooper, a former Court of Appeal judge and chairman of the mediation working group, was also not talked to as part of the Review. For reasons which bear investigation, and we hope are investigated by the Williams Inquiry, that process was seen as not being, "directly within the scope of our concern as they are second order process matters." This phrasing bears the unfortunate hallmarks of legalistic excuse making without proper foundation.

Whether it was the Swift team or the Post Office that ruled him out of scope is a very interesting question. Sir Anthony Hooper appears to have, at some stage during the life of the mediation scheme (between 2013 and 2015), told a senior

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<sup>8</sup> *Bates v Post Office Judgment No 3 'Common Issues'* [2019] EWHC 606 (QB); *Bates v Post Office Limited Judgment (No6) "Horizon Issues"* [2019] EWHC 3408.

<sup>9</sup> See the *Human Impact Hearings*, [https://www.postofficehorizoninquiry.org.uk/hearings/listing?hearing\\_type=81&witness=All](https://www.postofficehorizoninquiry.org.uk/hearings/listing?hearing_type=81&witness=All) last accessed 25<sup>th</sup> October 2022

<sup>10</sup> Donald C Langevoort, 'Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis' [2012] Wis. L. Rev. 495; Jennifer K Robbennolt, 'Behavioral Ethics Meets Legal Ethics' (2015) 11 Annual Review of Law and Social Science 75.



person within Post Office that he did not think the SPMs he had seen were likely to have been dishonest and that the problems the scheme was dealing with were likely to have been caused by Horizon.<sup>11</sup> His view of the complaints handling, as independent chair of the mediation scheme, would have been profoundly important on any ordinary interpretation of the Review's terms of reference: it was the primary way of dealing with the complaints from 2013. That was doubly the case given very public concerns about that the mediation scheme voiced by James (now Lord) Arbuthnot MP.<sup>12</sup> The omission is all the more interesting as some in Post Office may have been aware of Sir Anthony's doubts. The reasons for not speaking to him, and why Swift specifically mentions his exclusion, are worthy of probing. His exclusion is concerning and the reasoning for it is unconvincing.

### 1.4. How legal tests can shift the balance of reviews

The structural evidential advantage in favour of the Post Office might also be reflected in some judgements made within the Review about matters of law. The authors accept and dwell on the claim that SPMs are agents of the Post Office. They are partly relying on the High Court's decision in Lee Castleton's case.<sup>13</sup> Whilst it is not surprising that Swift would accept the argument in the judgment,<sup>14</sup> it is accepted by Swift without the Review (or the original court) hearing from anyone capable of arguing the other side. Here we see a way in which structural advantage of an erroneous legal judgement (*Castleton*) has accumulated over time and contributed to arguably poor decision making. It is of note too that the reviewers did not look at the actual contract between Post Office and SPMs (para 17), although one suspects this would not have made much difference.

It seems reasonable also to say the inclusion of the agency point in the review is a curious one. There is no real need for it. They say this means, "the burden of proof is on the agent to show that the account is wrong" (para 19). And, "it is important that the relevant legal context be clearly set out as it clearly shows the nature of POL's own obligations." (para 21). It is so clear to them they do not explain when or how it has made a difference. The review does *not* set out how this shapes the obligations of Post Office or how it has impacted on the judgment of Swift but we must assume, it seems, it has affected how the authors saw the evidence before them. It may be one reason they downplay evidence of SPMs concerns (engaged with only second hand in any event). It appears to be a subtle legal justification for deciding against the SPMs in situations of uncertainty, a legal rationalisation for discounting SPM viewpoints, or a tilting

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<sup>11</sup> Nick Wallis, The Great Post Office Trial <https://www.bbc.co.uk/programmes/p09ljxwc>

<sup>12</sup> 'MPs Force Inquiry into Post Office Subpostmaster Mediation Scheme' (*ComputerWeekly.com*) <<https://www.computerweekly.com/news/2240238523/MPs-force-inquiry-into-Post-Office-subpostmaster-mediation-scheme>> accessed 17 September 2022.

<sup>13</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>14</sup> Lee Castleton conceded he was an agent whilst a litigant in person and so the matter did not receive full scrutiny in that case. In Bates the idea of agency was roundly rejected.

## The Swift Review

of the burden against them. As it turns out, Bates shows it was also an erroneous view of the contract properly understood.<sup>15</sup>

Again, an interesting question is where this view came from: was it a view they were invited or encouraged to take as shaping their review? If so by whom and on what basis? This may be one of several arguments deployed by Post Office's legal team to manage the review towards safer conclusions. In the same way as sexual misconduct investigations that rely on criminal evidence standards can lead to investigations which evidentially favour the accused over the accuser,<sup>16</sup> so the agency standard here shapes, it seems, the balancing exercises in favour of Post Office management.

The legal framing is important not least because Swift's view is redolent of the arguments run in the Bates litigation.<sup>17</sup> It prefigures the nature of the case offered in Bates: did Swift shape that strategy or was the Swift Report merely reflecting Post Office thinking? One of the reasons for the problematic arguments run by Post Office in *Bates* was that evidence was led which described how management thought the system *should be running* rather than how it was actually working on the ground. The *prescriptive* was favoured over the *descriptive*. The agency argument helps them to do that.

Swift sometimes relies on how things ought to have been working (or presumably how the authors were told it was working) rather than evidence of how it was actually working. Again, this is not surprising, it is a structural feature of such investigations, but it is an important emphasis of the point made above, that information sources from the business (here Post Office) come with the assumptions of those providing the information and with the organisational culture and biases baked in.

The Post Office in *Bates* also relied on information from Gareth Jenkins. Jenkins effectively gave evidence by proxy by providing information to Post Office/Fujitsu staff who gave evidence in *Bates* without being called himself. The Bates trials took place in 2019. Jenkins was a Fujitsu Engineer discredited as unreliable by Simon Clarke's advice in 2013. And we see above that Swift too spoke to Jenkins. A concern then is that Swift may have heard and accepted evidence from Jenkins and the management line within Post Office without subjecting it to sufficient critical scrutiny. Another way of putting the situation is it suggests the review looked at the organisation's work largely in and on their own terms. Given the history which the Swift authors would have been aware of, this is a concerning approach to take.

The Swift authors seem much influenced too by a concern that evidence of false accounting was widespread. The nature of this evidence is not clear. There is a very interesting question, not discussed by Swift at all, whether there was any dishonesty by SPMs in false accounting cases given they were frequently *advised* to accept accounts (by Helpline and Post Office staff) to keep trading.

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<sup>15</sup> *Bates v Post Office Judgment No 3 'Common Issues' [2019] EWHC 606 (QB)* (n 8) 3.

<sup>16</sup> This is not the place to consider the rights and wrongs of this approach. There are arguments on both sides.

<sup>17</sup> *Bates No 6* (n 8).

SPMs may effectively have been directed or encouraged towards giving false accounts as a requirement of them continuing trading.<sup>18</sup> This is another instance where the absence of consideration of SPM perspectives, and knowledge of the criminal law, may have led to flawed judgments. As public lawyers, they appear to have simply accepted a position offered to them by the Post Office.

The evidence base and the legal frameworks applied limit what authors can or are likely to find. It is worth mentioning here, that in spite of these limitations, the Review does identify presciently several very important and substantial weaknesses in Post Office's approach which we will come to later.

### 1.5. The Gareth Jenkins Problem

It may be recalled that Gareth Jenkins was a Fujitsu employee giving evidence as an expert witness in various criminal proceedings up to, it seems, 2013. As an employee he lacked the requisite independence to give expert evidence, and the importance of that was realised and magnified in 2013 when Post Office were advised by Simon Clarke, a barrister working at Cartwright King, that Mr Jenkins was a witness who may have given misleading evidence and whose evidence should not be relied on in criminal proceedings.<sup>19</sup> Clarke said the discovery was profoundly important for Post Office prosecutions past and future.

In the Bates litigation, when the 2013 advice on Jenkins' unreliability was unknown to the Post Office's opponents, suspicions were raised about Post Office's decision not to call him. This was partly because of his apparent importance as a source of information to those that did give evidence. In effect, he gave evidence by proxy; he provided a good deal of information to witnesses who then gave evidence for the Post Office in *Bates*. The High Court judge, concerned about the accuracy of the evidence he had heard, referred matters to the DPP in 2019, and the Metropolitan Police now appear to be investigating.

It is very interesting, against that background, that Mr Jenkins is identified as one of the people the Swift team met when meeting Fujitsu. On the face of it he appears to be a source of evidence for the Review itself despite Clarke's warning as to his reliability. This of course underlines in the strongest terms questions about the Review's evidence base.

A singularly important question is whether the Swift Review was aware of concerns expressed by Simon Clarke in his advices in 2013 by the time they completed their report. If the Review was aware of the Clarke advices, what was the purpose in meeting him and what impact did it have on their report?

We have reasons to think the Swift team should have had *some* awareness. They had, according to the Report, read "advice" from Mr Brian Altman QC and they separately list four advices given from him. We might assume, although it

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<sup>18</sup> R v Eden (1971) 55 Cr. App. R. 193

<sup>19</sup> *Hamilton and Others v Post-Office [2021] EWCA Crim 577*; Moorhead, Nokes and Helm, 'The Conduct of Horizon Prosecutions and Appeals, Post Office Project: Working Paper 3' (n 4).

## The Swift Review

is not made clear, that all four were read and so we might infer from this that they read the Altman General Review. Altman's "General Review" dated 15 October 2013, is described in a disclosure note put before the Court of Appeal in the *Hamilton* case in 2020 as having, "extensively referred to the Clarke Advice and its contents and conclusions".<sup>20</sup> If Swift read the General Review they ought to have been aware of the existence of the Clarke advices and the problems with Jenkins' evidence, if that was set out as described in Altman's General Review.

Conversely, no mention is made in the Swift Review of the Clarke advices nor of the problems with Gareth Jenkins' reliability as identified there. Interestingly though when Swift considers the evidence that remote access into Horizon is possible, which we discuss more fully below (Section 1.6, p.14), they make a reference to Gareth Jenkin's evidence. It is worth quoting the passage in full which discusses evidence that secret remote access to Horizon was possible (even though Post Office and Fujitsu had been denying it) (para. 147):

Second, the Deloitte reports, or at least the information contained within them, may be disclosable under POL's on-going duties as a criminal prosecutor. We suspect that it is likely that such functionality would have been something an SPMR's defence team would have considered relevant to their case, even if the likelihood of remote Fujitsu interference is very limited. We do not know whether this information has been provided to the CCRC. But given that POL used a Balancing Transaction in 2010, it cannot say that the functionality was not known to it, and we have seen no reference to such capabilities in the witness evidence given by Gareth Jenkins of Fujitsu. These are matters on which specialist legal advice from external counsel, perhaps Brian Altman etc, should be sought and we so recommend.

This is an important paragraph for a variety of reasons, but for now let us dwell on the significance of the sentence about Jenkins. That sentence brings two matters together: Swift's view that Post Office must have known that remote access was possible and the omission of reference to "such facilities" (remote access functionality) in Gareth Jenkins' witness evidence.<sup>21</sup>

The question is, why link these two points? With hindsight the possibility that presents itself is they have apprehended *but do not say* that Jenkins may have misled the court; if so, they are the second lawyers to spot this after Clarke. If they have spotted this, why not say so clearly? And if they were also aware of the Clarke advices and/or the doubts expressed about Jenkins in that why not emphasise the point as reinforcing a concern already known about? They were, after all, aware that Parker was a new Chairman coming into the organisation for the first time. It is a vital piece of information to leave out. If they have not spotted the problem, it is difficult to see why they have they linked the two things.

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<sup>20</sup> Altman et al, 'Regina v Hamilton & Others, Disclosure Note in Relation to the Context for "the Clarke Advice"'.  
<sup>21</sup> This may mean transcripts or more likely witness statements.

## The Swift Review

It is also worth noting that the Review reports early on that the documentary evidence included Second Sight reports, advice from Brian Altman QC, witness statements from Gareth Jenkins and various other Post Office and Fujitsu documentation. Why identify Jenkins specifically in the list? Was he the only or main witness whose statements they reviewed and if so, why was that? Or if not was his presence in the evidence base being emphasised for other reasons? One possibility is they were aware of doubts about his evidence, and mention that in a somewhat oblique or coded way, the other is that the Post Office legal team sent them his witness statements as a dominant part of the explanation of their case as to how Horizon ran. The Post Office had done so despite Clarke's warnings in 2013 not to rely on Jenkins' evidence.

If the Post Office legal team chose to include Jenkins, possibly as the main evidence source, the extent to which they knew about Clarke's advice about Jenkins is particularly important. The advice on Jenkins was delivered in July 2013 and the Review began in October 2015. Given the importance and potential impact of the advice concerning Jenkins, one would expect that memories would not have faded in this time. Moreover, it was apparently referred to as noted above in Altman's General Review, which we might assume familiarity with (or it being re-read as part of instructing the Review team). The Review ought to or would have been aware of the problem.

Interestingly, Post Office through their legal team indicated they had responded to the Clarke advice by ceasing to use Jenkins as an expert witness before the Court of Appeal.<sup>22</sup> The impression given is that they had accepted Clarke's advice but we know Jenkins was important to the evidence given in Bates in 2019 and it appears to evidence given to Swift in 2016.<sup>23</sup> This is arguably misleading and in a significant way. The Post Office were trying to resist the second ground of the appeal criticising their general handling of prosecutions. A visible failure to respond promptly to Clarke would likely have counted against them.

We emphasise the point that Swift appears to refer to problems with Jenkins' evidence too obliquely because independent reviewers are, it fair to say we think, aware of the risks that review findings can be brushed under the carpet. Allowing a freshly identified apparent problem in Jenkins' evidence to be mentioned so obliquely would risk being missed or ignored by the client. It might be that they noticed something incongruous and did not consider its seriousness, perhaps because they were not criminal practitioners, although at the risk of repeating ourselves, the Altman General Review (if read and as described) should have put them on notice of it.

For that reason, it seems unlikely that the Swift Review *was* fully appraised of the contents of the Clarke advices, but there is a strong argument that either way the Swift Review has soft pedalled a serious problem with Post Office

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<sup>22</sup> Altman et al, 'R v Hamilton & Others: Submissions on Behalf of the Respondent in Relation to the Application by Nick Wallis for Access to Papers in the Proceedings' (2020) para 11.1.

<sup>23</sup> A separate document, the Disclosure Note in Relation to the OCtext for the Clarke Advice is more specific. It indicates Jenkins evidence was not relied on in any further POL prosecution.

prosecutions (relying on potentially misleading evidence) in addition to the problem of non-disclosure of remote access functionality (which they do emphasise the seriousness of, as we can see below).

It is important to get to the bottom of this if at all possible. If they were soft-peddalling, they were presumably persuaded that the omission was not as significant as it would appear to be given Clarke's advice. The critical question then is on the basis of what evidence or representations was the significance of the Jenkins omission downplayed (if that *is* what happened?). If they were not soft-peddalling and had remained ignorant of Clarke, had they not read the relevant Altman advice (as implied by the report) or is the Altman advice not as clear as it was suggested to be in the Court of Appeal (which opens up the question was the Court of Appeal misled about the Altman Review?).

Our analysis so far has concentrated on reasons why the Review was likely to be prone to judgements and presentation favouring Post Office's position on Horizon in spite of its independence. The handling of the Jenkins issue shows how the evidence base was incomplete and/or the approach to analysis was insufficiently balanced or expert.

Let us turn now to the concerns the report does identify which Swift recommends the Post Office address.

### 1.6. Remote access

Remote access, the ability to access the Horizon system remotely and later data within it, was a bone of contention until part way through the *Bates* litigation. The Post Office denied the full extent of remote access until part way through the second Bates trial.<sup>24</sup>

Swift contains an extensive section on remote access. It points to a weakness in Horizon. The system could be remotely accessed by Fujitsu, to alter/inject account entries, and this could be done without there being knowledge on the part of SPMs or records of it, including through the use of fake digital signatures. The system was, in other words, insecure and this had not been disclosed to those convicted for Horizon shortfalls.

Swift took the trouble to underline the significance of these findings. They can be summarised as saying:

1. POL and Fujitsu have been maintaining, including in Parliament, that branch balances could not be remotely altered. Indeed, the Review was apparently prompted by the Government Minister (Baroness Neville-Rolfe) wanting to get to the bottom of allegations in Panorama, publicly denied by Post Office, that remote access was possible and widely used.
2. The evidence that suggested remote access was possible came from a whistleblower (Richard Roll who appeared in the Panorama

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<sup>24</sup> *Bates No 6*, 539

programme) but also, and this is what persuades Swift, from Deloitte in their reports to the Post Office in 2014.

We note that what Jenkins told Swift about remote access, if anything, when they met is not discussed in the Review document.

Swift is worth quoting on remote access for the tenor and analysis as this would (or should) have impacted on how readers of his report understood the significance of what he was saying:

1.45. It seems to us that the Deloitte documents in particular pose real issues for POL. First, both the existence of the Balancing Transaction capability [which made remote changes to transactions] and the wider ability of Fujitsu to 'fake' digital signatures are contrary to the public assurances provided by Fujitsu and POL about the functionality of the Horizon system. Fujitsu's comment we quote above seems to us to be simply incorrect, and POL's Westminster Hall Response is incomplete. To the extent that POL has sought to contend that branch data cannot be remotely 'amended' because a Balancing Transaction does not amend existing transactions but adds a new one, we do not consider this is a full picture of Horizon's functionality. The reality is that a Balancing Transaction is a remotely introduced addition to branch records, added without the need for acceptance by the SPMR, which affects the branch's balance; that is its express purpose. POL has always known about the Balancing Transaction capability, although the Deloitte reports suggest the digital signature issue is something contrary to POL's understanding.

This shows that Post Office has been seen to be misleading others about Horizon functionality about which *it had always known* and that it may not have understood the faking digital signatures point. This comes close to saying, without quite doing so, that Post Office's public position has been deliberately misleading. It is delicately put, perhaps partly because they do not need to determine whether people knowingly or recklessly misled parliament, perhaps partly to soften the blow for their client.

Given the potential for independent reviews to be opportunistically read, this is a regrettable approach. A better approach would have averted to the potential that information flows on this have been misleading, potentially deliberately so, and consider the impact of that on the information flows on Horizon in general and into the Review in particular. Moreover, clarity about matters of such concern is paramount if they are to ensure their Review's lessons are properly conveyed to the client and others who might be misled by it.

An important further point is that Tim Parker chaired Post Office through the Bates litigation. In that litigation the idea that 'secret' remote access was possible was denied until mid-way through the second major trial of the matter, yet he was told this was possible in early 2016.

The pill is sweetened in what follows next.

## The Swift Review

146. We recognise that the existence of the two matters highlighted by Deloitte are most likely to be wild goose chases, It is improbable that they have been used beyond the identified instance. However, in the light of the consistent impression given that they do not exist at all, we consider that it is now incumbent on POL to commission work to confirm the position insofar as possible. Accordingly we make a recommendation to that effect.

The first sentence is a surprising claim in the light of Richard Roll's evidence to the Panorama programme to which the Review refers. This indicated there were "lots of errors" when they "went in the back door and made changes" (para. 87). They do not evaluate those claims even though they do report, "We have been provided with various correspondence between POL and the BBC in which POL complains about the reporting of the BBC. We do not propose to address any of that material." (para. 88)

Given that the Swift Review has spotted that Post Office has misled others about this functionality; given the concerns of the SPMs; given Deloitte's view that further checking of the impact of bugs on accounting errors could be expected; and given Roll's statements to Panorama, it is surprising that the mollifying wild goose suggestion was made. It may simply reflect the client-friendly structuring of the Review which we have commented on already, it may be a response to lobbying by Post Office, or be it may be a genuine view at the time; it is certainly an odd phrase: in effect they are recommending that PO embark on what they regard as probably a wild goose chase. Roll's view is treated with careful disdain (at para. 137 Roll's comments are minimised as ambiguous and unclear. "It is difficult to deal with or respond to those comments as a result." (para. 136)). This is a somewhat strange approach given the much more detailed description of Roll's allegations garnered from Second Sight (para 142, footnote 8). and given they recognise in another section of the report a plausible basis for Roll's statements, "that Fujitsu would use the functionality to correct system bugs without drawing them to the attention of POL or SPMRs in order to avoid any form of contractual penalty" (para. 142) and Second Sight appeared to hold evidence of what Roll's allegations were which the Swift Review did not appear to seek (para 145, footnote 8).

It is against this background that they note the problem with Gareth Jenkins evidence discussed above. This shows they understand the materiality of the problem of remote access to potential appeals and defences. It appears to be an indication that they have spotted some of the deficiencies in evidence provided to the Courts by Jenkins that Clarke too spotted and yet appear to be downplaying them somewhat rather than drawing them together to draw the kinds of conclusions that Fraser J and the Court of Appeal do in *Bates* and *Hamilton*. An important question is why?

### 1.7. Pressuring to Plead Guilty

A second area of strong concern voiced by the Swift Review is Post Office prosecution practice around charging and plea. The Review is plainly concerned



that SPMs may have felt improperly pressured into pleading guilty to false accounting.<sup>25</sup> Again, the emphasis in the text is striking:

this issue is one of real importance to the reputation of POL, and is something which can feasibly and reasonably be addressed now ....Cartwright King were not asked to consider the sufficiency of the evidence when undertaking their disclosure review. We do not think it is safe to infer that any advice Cartwright King gave on POL's position on any appeal must have involved a full evidential review. The allegation that POL has effectively bullied SPMRs into pleading guilty to offences by unjustifiably overloading the charge sheet is a stain on the character of the business. Moreover, it is not impossible that an SPMR would have felt pressurised into pleading guilty to false accounting believing it to be less serious when they might not otherwise have done so.

The way the Review rehearses some arguments against their own view (that Cartwright King have already reviewed these cases and the view that false accounting is not necessarily less serious than theft) suggests to us that they may have faced some resistance on this recommendation. The ‘not impossible’ part may have emanated from Brian Altman QC advising in March 2015 (he says, we are told, it is not helpful to say theft and false accounting charges are of different seriousness). In this way the Review seems to suggest Altman may have already advised on the pressure to plead concern. It is not clear why he was asked to advise or by whom, although the date suggests it comes shortly after Paula Vennells’ appearance before the Select Committee where she denied any evidence of miscarriages of justice.

Altman’s advice on this point seems rather questionable for the reasons given by the Review team in para. 1.6. A theft charge in the context of these cases was, and was likely to be perceived as, more serious (as we think any criminal practitioner would have said). There are three possibilities here: we are wrong; Altman may have been mistaken/his advice taken out of context; or his judgment here may have been influenced by a desire to protect the prosecutions and Post Office’s reputation rather than advise independently and fairly (which in advising on a prosecution he is arguably obliged to do).<sup>26</sup>

Swift’s response is to say inappropriate pressure to plead needs to be reviewed, but only after advice on whether, “the bringing of a charge without sufficient evidence to produce a realistic prospect of conviction could be said... to cast doubt on the safety of the conviction.” They suggest Altman might advise (para 108) and supervise any subsequent review of those convictions (para 109).

The wisdom of the suggestion raises a point about conflicts of interest and independence.

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<sup>25</sup> They view this as applying to 18 cases (para. 100).

<sup>26</sup> The position has become clearer as a result of Counsel to the Inquiry’s opening speech in October. Our initial reading of that is that Altman’s advice may have been taken somewhat out of context which raises interesting questions of its own.

### 1.8. Failure to spot conflicts of interest/lack of independence

The Review notes the work done by Cartwright King and Brian Altman QC on disclosure in the period 2013-2015. Perhaps surprisingly, the Review did not note a potential conflict of interest in Cartwright King reviewing prosecutions, some of which it had prosecuted (para. 96). Had this been properly addressed, and it should have been, it would have raised a flag over the Review work done. It is an obvious problem: they have marked their own homework. Being able to independently advise, without conflicts of interest, even if the task is approached in good faith, is going to be difficult here and they should not have been asked to do it. This point is nowhere adverted to or discussed in the Swift Review. Against this background we also note that, although not criminal experts the Review authors declared themselves content that Post Office had acted reasonably in handling disclosure in past criminal proceedings by reviewing some of that work. As with other positive findings, this has the potential to be decontextualised and misused, especially given the value of making the statement is to be doubted given their own expertise, particularly as it is unqualified in the paragraph where they state it.<sup>27</sup>

The preference for asking Altman to advise on matters<sup>28</sup> they raise in the Review shows that on critical matters they lack professional experience in the legal field most germane to the matter they have been asked to investigate for the Chairman. It also suggests a willingness to hand back those same issues to someone who has had a substantial role in them over previous years, given he has advised at least four times. As with Cartwright King, this too gives rise to problems of independence and conflict of interest which should have been considered and addressed. Altman's prior involvement was plainly extensive.

Given the Swift Review's failure to spot the potential conflict of interest with Cartwright King, one should not be surprised that they made the same mistake with Brian Altman. The Swift Review would have felt rather squeamish about suggesting an esteemed QC had too much prior involvement in the case to be truly independent. It is perhaps a little more surprising given the report notes Altman has already taken a particular line on the seriousness of theft charges relative to false accounting charges; this should have alerted the Review team to a potentially overly robust approach by Altman to defending prosecutions. There are other examples of clients becoming too wedded to advisers who are then implicated in wrongdoing because they lack the necessary professional detachment.<sup>29</sup>

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<sup>27</sup> The limitations of their expertise are mentioned in the previous paragraph. We would not want to labour the point, but such a critical, positive statement needs the qualification resting alongside it.

<sup>28</sup> Inappropriate pressure to plead and the failure to disclosure remote access in particular.

<sup>29</sup> ~ Richard Moorhead, 'The Levitt Report: Independence Frayed' (*Lawyer Watch*, 11 September 2021) <<https://lawyerwatch.wordpress.com/2021/09/11/the-levitt-report-independence-frayed/>> accessed 21 October 2021.

### 1.9. Altman's involvement

The extent and depth of Mr Altman's involvement is important. As far as we are aware the only involvement of Mr Altman disclosed to the Court of Appeal whilst he was Counsel in the *Hamilton* case was the General Review. We noted in a previous post how representations about Post Office's response to relying on Gareth Jenkins may have been misleading. This adds weight to concerns about the extent to which Altman's prior involvement in the Post Office case was understood and before the Court of Appeal in the *Hamilton* case.<sup>30</sup> In *Swift*, Brian Altman is noted as having advised four times: 02 August 2013 (interim advice), 15 October 2013 (the General Review), 31 October 2013 and 8 March 2015. Interestingly also, Altman is said to have "considered Cartwright King's actual decisions in a sample of cases" (para. 96). This is contrary to what the Court of Appeal was told in *Hamilton*.

"To ensure that the post-conviction review being conducted by Cartwright King was appropriate, the Respondent instructed Brian Altman QC, among other things, to conduct a review of the process (*although not the individual decisions in reviewed cases*). The resultant document entitled 'General Review' by Brian Altman QC dated 15 October 2013 extensively referred, among other matters, to the Clarke Advice and its contents and conclusions;"<sup>31</sup> (para. 14.2) [our emphasis]

This underlines questions as to whether Altman was sufficiently independent to advise and represent in the *Hamilton* appeals. It also raises a question as to whether what was said about Altman's prior involvement to the Court of Appeal was accurate and appropriate (it is possible *Swift* got it wrong).

### 1.10. Were problems systemic? Was Parliament misled?

The history by which Parliament was (we think) misled bears investigation. It begins with Tim Parker reportedly telling the relevant government minister (Baroness Neville-Rolfe) close to the time the report is delivered,

"the QC is about to report. He had found no systemic problem. TP thought the issue might have passed it [sic] peak interest"<sup>32</sup>

This suggests, and we should bear in mind it is a civil servant's note of a meeting not Parker's actual words available to us, that Parker has been briefed on the report before he had it and that the briefing and/or his summary of it downplays the report significantly. Presumably *Swift* and/or the Post Office

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<sup>30</sup> Moorhead, Nokes and Helm, 'The Conduct of Horizon Prosecutions and Appeals, Post Office Project: Working Paper 3' (n 4).

<sup>31</sup> Altman et al (n 21) para. 14.2.

<sup>32</sup> 'Note of a Meeting with Tim Parker, 26th January 2016' <<https://www.whatdotheyknow.com/request/823579/response/2099393/attach/html/4/Information%20for%20release%2013.pdf.html>> accessed 18 September 2022.

## The Swift Review

legal team had a hand in briefing him: raising questions about the nature of that briefing and Parker's interpretation of it.

He also writes a more revelatory letter to the Minister which provides a much fuller, if still somewhat watered down, account of the Review.<sup>33</sup> A point of particular note is that no mention is made of the point that Parliament has been deliberately or otherwise misled on the issue of remote access.

How Parker reports the more serious matters to the Minister in his letter is interestingly bland. He says this:

Further work is also underway to address suggestions that branch accounts might have been remotely altered without complainants' knowledge. In particular the security controls governing access to digitally sealed electronic audit store of branch accounts over the life of the Horizon system, will be reviewed.

This is at best a limited rather than full and candid description of the Review's findings and is potentially misleading. There is no mention of the need to address disclosure problems associated with remote access to convicted (and sometimes jailed) defendants, an obvious and central concern given the genesis of the Review. A very switched on reader, familiar with the history of the matter, as some of the civil servants should have been, might perhaps spot the significance of what is being said in the letter but dialling down and removing of some of the report's key points is concerning.

Those familiar with the uses of independent reviews in corporate life will recognise the tendency for carefully phrased accounts of problems to be further editorialised outside the Review itself. It is one of the reasons authors of reviews need to be very clear about summarising, describing and marking adverse findings with appropriate weight lest their reports not be used to sanitise wrongdoing. Given the nature of the Review and its subject matter, we would anticipate Post Office lawyers having been involved in drafting Parker's letter to the Minister. This is something which requires investigation in our view. We should note that it is possible that further work might have been done between the Review's report in February and April which might justify some of the differences in the letter and the Review.<sup>34</sup> The most likely candidate for this happening is further legal advice on matters of disclosure, which Swift suggested might be sought from Brian Altman QC.

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<sup>33</sup> 'Letter from Tim Parker to Baroness Neville-Rolfe, 4 March 2016' <<https://www.whatdotheyknow.com/request/823579/response/2099398/attach/html/3/Information%20for%20release%2015.pdf.html>>.

<sup>34</sup> Although this seems unlikely, there is some discussion of follow-work having been carried out, Email 16 September 2020 entitled "POL Litigation/Governance – Confidential"

## The Swift Review

As Tom Cooper, Director of UKGI since October 2017 and Non-Exec Director of the Post Office since 27 March 2018<sup>35</sup> observed in UKGI/BEIS discussions about Parker's failure:<sup>36</sup>

"I don't see how, even with rose coloured specs on, anyone would see a green light in the QC's report, although it's possible that is how it was presented to Tim given where it was described to the Minister in the letter he wrote updating her on progress."

Neville-Rolfe is not fully satisfied with the letter<sup>37</sup> yet her own civil servants quell her disquiet by downplaying the significance of the work the Review advises needs to be done, saying, "all of these areas have previously been explored by Post Office's own team and advisors, including independent legal advisors."<sup>38</sup> This is wrong, and one wonders where the basis of this statement originated.

Interestingly it appears the civil servants did not ask for, or at least, see, the report in 2016. According to the Post Office, the Review was first disclosed to the government (in the person of UKGI) on 16 March 2020, in anticipation of a Select Committee hearing.<sup>39</sup> Astonishingly, but perhaps relatedly, we are told Parker did not share the Review document with his Board, and he appears to blame legal advice for this (see below). It's worth emphasising here that they get the report in the same month as the misleading statement to Parliament is made. Either the statement was made with knowledge of the reports contents or it was made and then not corrected. They took the time to chastise Parker, as we shall see, but do not appear to have addressed this problem.

If the letter Parker sends is misleading and if any solicitors were involved in its drafting, they would be at risk of having been complicit in misleading others if they contributed significantly to the letter's content by commission or omission. The SRA Code of Conduct Rule 1.4 requires solicitors:

...do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client).

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<sup>35</sup> <https://www.ukgi.org.uk/career/tom-cooper-director/> and <https://corporate.postoffice.co.uk/en/governance/our-structure/our-board/>

<sup>36</sup> 'Cooper Email to Senior Civil Servants in UKGI/BEIS, "Re: Highly Confidential.POL Litigation/Governance" 27 August 2020'.

<sup>37</sup> Neville Rolfe email 10 March 2016, <https://www.whatdotheyknow.com/request/823579/response/2099402/attach/html/3/Information%20for%20release%2016.pdf.html>

<sup>38</sup> Mem from ShareEx to Neville-Rolhe, 9 March 2016 <https://www.whatdotheyknow.com/request/823579/response/2099402/attach/html/4/Information%20for%20release%2017.pdf.html>

<sup>39</sup> 'Letter to from Sarah Munby (Permanent Secretary, BEIS) Tim Parker, "Post Office", 7 October 2020'.

### 1.11. Keeping the report from the Board

Putting to one side the concerns about Parliament, the Review is a document that presented matters of serious concern. The Post Office needed to act on them. And yet, Tim Parker reportedly did not show the Review to the Board. We do not know if the CEO saw it, or asked to see it, although she was aware the Review was being conducted. It suggests the Board may have been kept in the dark as to the precise content of the report.

Parker is reported as offering an explanation for this; that he was advised against disclosing the report to the Board by the Post Office's General Counsel at the time, Jane Macleod, on the basis it was privileged and given the prospect of litigation from the Justice for Sub-Post Masters Alliance (the JFSA).

Discovery of this leads to Parker being chastised for not challenging the legal advice he had received. The BEIS permanent secretary's (Sarah Munby's) letter to Parker states,

"we understand that you were advised at the time by the Post Office's general counsel that for reasons of confidentiality and preserving legal privilege the circulation of the report should be strictly controlled."<sup>40</sup>

And also this,

"as a rule, we think it quite difficult to envisage any circumstances where issues of legal privilege or confidentiality should prevent relevant information from being shared with a company's board."<sup>41</sup>

In the background to this letter UKGI's General Counsel, Richard Watson, had advised that, whilst there might be situations, such as a conflict of interest with a Board Member,<sup>42</sup> that such a report would not be disclosed, "There is no risk of the company's legal privilege being lost or confidentiality being breached simply by legal advice it has received been disclosed to the board."<sup>43</sup> Tom Cooper (UKGI Director and Non-Exec in Post Office) says Parker, "made a significant error of judgement in accepting legal advice that the QC report and, as a consequence the follow-up work, should not be shared with the board."<sup>44</sup>

We agree with the UKGI view on privilege. Were such advice given, it might have sprung from a misunderstanding of the effects of Three Rivers which places limits on the privilege that attaches to communications from and to people

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<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

<sup>42</sup> There was no suggestion there as such a conflict here

<sup>43</sup> 'Richard Watson Email to Senior Civil Servants in UKGI/BEIS, "Re: Highly Confidential. POL Litigation/Governance" 27 August 2020'.

<sup>44</sup> Email 16 September 2020 entitled "POL Litigation/Governance – Confidential"

who do not represent the client for the purpose of giving advice.<sup>45</sup> There can be little if any doubt that Parker, as Chairman of the Board, seeking advice on what the Company should properly do, is acting as an agent of the Company. Similarly, and given that Parker is the Company's agent in this regard, it would be extraordinary if the Board was not seen as capable of receiving and acting on the advice as the client. Furthermore, it is,<sup>46</sup>

"well-established that it [Legal professional privilege] covers, ...any communication (again, whether written or oral) passing on, considering or applying that advice internally (Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Limited (The Good Luck) [1992] 2 Lloyd's Rep 540 ("The Good Luck") at pages 540-1 per Saville J, and USP Strategies Plc v London General Holdings Limited [2004] EWHC 373 (Ch) ("USP Strategies") at [19(c)] per Mann J)."

Suggesting that communicating the advice to the Board would lead to privilege being abandoned is thus a very odd suggestion. If Parker has accurately recorded the advice from Post Office's General Counsel then it is advice which was almost certainly ill- or under-considered and wrong or advice given for another motive. It is not in our view entirely uncommon for lawyers to assert legal professional privilege thoughtlessly or inappropriately, partly because, as Hickinbottom LJ discusses with approval in a recent leading case, legal advice privilege is hard,<sup>47</sup> and partly because it is convenient and easier to assert privilege over information one would like to remain secret than it is to think clearly about the matter.

Another reason for thinking the advice to keep the report away from the Board, if given and properly described, would have been ill-considered is that if the advice was to Parker and not the Company, then all the communications with the Review that did not come through Parker would have not been privileged following *Three Rivers (No5)*.<sup>48</sup> Moreover, the General Counsel would not be in a position to advise on privilege in such circumstances: there would be what should have been a clear and obvious conflict of interest. The General Counsel acts for the Company and if Parker is not an agent of the Company for these purposes, she cannot advise him.

Privilege is a jealously guarded principle identified by the courts as essential to the rule of law. Here we get an example of how, deliberately, or otherwise, the principle's inappropriate application can lead to real problems. It is part of the causal matrix leading to partial reporting of the Review. As too may be legal advice drawing the sting of Swift's most serious findings. We do not know if

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<sup>45</sup> *Three Rivers Council v the Governor and Company of the Bank of England (no 5)* [2002] EWHC 2730 (Comm).

<sup>46</sup> *R (on the application of Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35 [45].

<sup>47</sup> *ibid* 1.

<sup>48</sup> *Three Rivers Council v the Governor and Company of the Bank of England (no 5)* [2002] EWHC 2730 (Comm) (n 43).

such advice was given or by whom.<sup>49</sup> We can, we think, have at least moderate confidence Parker's letter had the benefit of some legal input. How much and of what import time will tell.

### 1.12. Independence and good quality judgement through a behavioural lens

We conclude our analysis by looking at the Swift Review through a behavioural lens. When considering questionable work by lawyers, a behavioural approach does not assume the cause is lawyers behaving badly, being stupid, or susceptible to pressure from the clients.<sup>50</sup> Indeed it assumes, "[m]any ethical lapses result from a combination of situational pressures and all too human modes of thinking".<sup>51</sup> These combinations are legion, and the Swift Review may provide many examples.

The first of these weaknesses concerns the lawyer's relationship with the client and more specifically, client loyalty. Client loyalty runs deep with professionals even in circumstances demanding independence. Yet professionals, including lawyers, are demonstrably and subconsciously influenced towards client interests when making professional judgements.<sup>52</sup> Client identity may also have a role to play when it comes to the lawyer-client relationship. In particular, larger organisations are better able to 'capture' the professional firm and individual professionals within it, by controlling the nature and cost of the work being undertaken by the lawyer. Thus, some clients take on the role of the 'powerful consumer' with the potential to become 'sovereign', impacting negatively upon professional autonomy and objectivity.<sup>53</sup>

Confirmation bias, recalling and relying on information consistent with a preferred solution may be part of the explanation here.<sup>54</sup> Lawyers like any

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<sup>49</sup> Again, matters have become somewhat clearer, if not yet clear, as a result of Opening Speeches and submissions made to the Second Phase of the Inquiry.

<sup>50</sup> Jennifer K Robbennolt and Jean R Sternlight, 'Behavioral Legal Ethics' (2013) 45 Arizona State Law Journal 1107.

<sup>51</sup> *ibid.*

<sup>52</sup> Linda Babcock and others, 'Biased Judgments of Fairness in Bargaining' [1995] *The American Economic Review* 1337; Don A Moore, Lloyd Tanlu and Max H Bazerman, 'Conflict of Interest and the Intrusion of Bias' (2010) 5 *Judgment and Decision Making* 37; Don A Moore and others, *Auditor Independence, Conflict of Interest, and the Unconscious Intrusion of Bias* (Citeseer 2003) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.9.2829&rep=rep1&type=pdf>> accessed 9 March 2014

<sup>53</sup> Ronit Dinovitzer, Hugh Gunz, and Sally Gunz, 'Origins, Applications, and Developments' (2015) *The Oxford Handbook of Professional Service Firms*, 113; Theodore Eisenberg and Jonathan R. Macey, 'Was Arthur Andersen different? An empirical examination of major accounting firm audits of large clients' (2004) *Journal of Empirical Legal Studies* 1 263; Kevin Leicht and Mary L. Fennell. *Professional work: A sociological approach*. (2001) Blackwell Publishers

<sup>54</sup> Perlman (n 3).



decision maker can fall prey to engaging in confirmatory information processing, where the lens of existing beliefs shapes the consideration of new information.<sup>55</sup> Thus, the preliminary instructions given to those conducting any review together with the initial tranche of information may well ‘bend’ the judgments made about information that is provided further down the line. Dual-processing, two qualitatively different modes of human information processing, also plays a part.

As Langevoort explains, lawyer-decision making is often, “driven by intuition and feelings as much (or more) than explicit deductive or inductive reasoning,” and that there is, “a motivational goal being pursued, a preference in favor of the client's stated intentions to which the lawyer's mind is trying to work its way.”<sup>56</sup> Langevoort talks about this as a way of getting comfortable with the problematic behaviour of clients, with lawyers engaging, “in cognitive co-dependency rather than professional independence.” Lawyers depend on information from the client, as we can see well in this case, but they also tend to consider that information, and reflect it back in ways favourable to the client. This effect of the ‘client favourable lens’ is also influenced by the extent of the duration of the professional-client relationship.<sup>57</sup> Similarly, the commercial context favours the optimistic construal of uncertainty because, “Being positive facilitates motivation, cooperation, and trust from others.”<sup>58</sup> This is similar to the safe pair of hands argument made earlier in this paper; the safe pair of hands can be relied on to be helpful in their interpretation of matters for the client; is constructive in their approach; and, therefore worth listening to and paying for.

It is worth emphasising these ways of thinking are partly inadvertent, borne of unconscious, automatic processing before one considers the more conscious desires of lawyers to protect and maintain their reputation and relationship with the client. The idea that ‘Horizon is not systemically flawed’ and the downplaying of the practical consequences of remote access may be examples of this phenomena.

Another pertinent point is lawyerly caution when dealing with controversy, especially controversy that they might need to suggest their client is responsible for. Mishandling this threatens their reputation and relationship with the client. Moreover, “Lawyers tend to shy away from labelling behavior as ‘misconduct,’ and are seemingly more comfortable discussing issues involving ‘gray areas’ or ‘incivility.’”<sup>59</sup> We see evidence of this in the way the misleading of Parliament, and the omissions in Jenkins’ evidence is dealt with. This has the advantage of reducing the sense of moral intensity around these findings. If Swift had more overtly considered the possibility that lies had been told about the remote access

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<sup>55</sup> Don A Moore and George Loewenstein, ‘Self-Interest, Automaticity, and the Psychology of Conflict of Interest’ (2004) 17 *Social Justice Research* 189.

<sup>56</sup> Langevoort (n 9).

<sup>57</sup> ‘Conflicts Of Interest And The Case Of Auditor Independence: Moral Seduction And Strategic Issue Cycling | Academy of Management Review’ <<https://journals.aom.org/doi/abs/10.5465/amr.2006.19379621>> accessed 26 September 2022.

<sup>58</sup> Langevoort (n 9).

<sup>59</sup> Robbennolt and Sternlight (n 47).

their conclusions might well have been different, and not just in tenor. The implications of that possibility for instance should have been considered when weighing Richard Roll's evidence.

The perceived moral intensity of a decision ("the nature, magnitude, probability, and timing of any potential consequences") is important.<sup>60</sup> Proximity here is important too. If victims remain abstract, it is less likely that emotions such as sympathy are engaged; it is cognitively easier to take unpalatable decisions if the victims concerned stay 'unknown.'<sup>61</sup> The moral intensity of the judgements formed in Swift are distanced from the fate of the SPMs: a report which had begun by speaking to them, understanding and emphasising the impact of Post Office decisions on their lives might have come to somewhat different conclusion. It is notable that the Williams' Inquiry has taken a very different approach to Swift for good reasons, beyond the presentational.

Similarly, through looking at the investigation through legal spectacles important limits are placed on the judgements formed. In one sense this can appear fairer, the standards applied are legal standards veneered in objectivity. The approach is also narrower. The task can shift from looking at the justice of a situation to justifying a response on narrowly juridical grounds.

Some suggest this degrades lawyerly judgement on ethicality, "lawyers' expertise at parsing rules, paying attention to exceptions and loopholes, interpreting text, and making arguments on both sides of an issue, while commendable in many ways, can also be problematic in this context."<sup>62</sup> It can reduce right and wrong to a verbal game, a kind of arbitrariness, especially when the facts are uncertain. The agency arguments, the sterile focus on what constitutes the Horizon system, and the ways in which bullying into guilty pleas and disclosure issues are reframed as matters of expert criminal law judgment can all be seen as ways of shifting the issues towards a position helpful to the Post Office.

Some of those legal framings of issues carry their own freight. Langevoort's work looks at banks and how banks disdained "any sense that they owed special fiduciary-like obligations to their institutional customers- [as] a way of distancing themselves so as to rationalize hyper-competitive behavior toward the customers, too."<sup>63</sup> Similar functions are played by the agency argument, certainly as advanced in the Bates case, and perhaps in the evaluation of evidence in the Swift Review. The agency argument was an intellectual tool for shifting responsibility, and therefore blame, onto the victims of the Horizon Scandal.

The Swift Review's legal framing, and lack of particular, criminal law, expertise, also leaves ultimate responsibility for the biggest concerns expressed in the report to someone else (and someone we would argue probably lacks the necessary independence to deal with them). It passes the parcel. This has the

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<sup>60</sup> *ibid.*

<sup>61</sup> Moore and Loewenstein (n 52).

<sup>62</sup> Robbennolt and Sternlight (n 47).

<sup>63</sup> Langevoort (n 9).

further advantage of diffusing responsibility for what happens next, something we have yet to hear about in full.

A final point worth emphasising is the vulnerability of all of us to the problem of social proof: a willingness to rely heavily on the apparent perceptions of others when forming judgements on ‘the facts’ of a situation. Judgments on false accounting, the nature of the relationship as an agency one, the systemic fitness of the computer software, and the assertion that the handling of prosecution disclosure seemed reasonable, might all be examples of that occurring here. It may have been accompanied by groupthink, “the strong tendency to ignore concerns or risks that are inconsistent with a group’s preferred interpretation of the situation it faces.”<sup>64</sup> In this mode of thinking, members of the group develop shared beliefs and norms which hinder critical thinking, the very thinking required in a review of this kind. Again, the interpretation of Roll’s evidence is an example.

We see occasional signs of the Swift authors’ resisting groupthink, in relation to the claims that pleading theft and false accounting together may have been done improperly for instance, but groupthink also appears to be one mechanism by which concerns about remote access are downplayed or the belief that false accounting (and therefore dishonesty was widespread) came to form in the minds of the Swift Review.

Whether what we have seen in the handling of the review is merely poor decision-making or something more sinister is something that may be explored in the Inquiry. There are certainly substantial questions beyond the Review’s authors about the instructions given to the Review, its evidence base, and the way its findings were managed for dissemination. For now it is worth learning more about how forensic judgement and decision-making can be undermined by particular frailties.

Blessed by hindsight it is easy to say the review team made mistakes, as we have. We do not think, though, concerns about hindsight bias should soften the criticisms much. It would be regrettable in the extreme if we just shrugged our shoulders and say even the best make mistakes or it’s the process, not the person. Here the mistakes are sometimes concerning in size and number but more importantly still the consequences of those mistakes were important. The report was used to, and in some ways contributed to, a cover-up of systemic and operational weakness and a failure to face up to a lack of honesty in the organisation. People bear responsibility for the processes and the judgements they take within them, and those judgements were flawed. There is no room for complacency when so many people’s lives were blighted.

Protecting against such weaknesses in the future is a harder task. It is a key task for those managing legal work, their own or others. Independence is much more than a word, and is not guaranteed by instructing a lawyer with a practising certificate, even, perhaps especially, one with acres of experience. Deeper thought and more sophisticated practice is needed to make independent investigations better.

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<sup>64</sup> Robbennolt and Sternlight (n 47).

### 1.13. Conclusions

Our critique has the benefit of hindsight. Independent reviews are difficult, and for that reason we would not want to overly emphasise criticisms of the authors. There are problems with their analysis and presentation of the findings that are important and there are ways in which the evidence base they had was inadequate, for which responsibility largely, but perhaps not totally, lie elsewhere. The approach taken and the problems exposed can be seen as exemplars of difficulties that need to be managed if independent reviews are to independently and fairly arrive at conclusions of substantive value. As we can see, the capacity for independent reviews to be misrepresented, and for senior lawyers' judgements to be used to sprinkle the holy water of justice on unjust and improper behaviour can lead to serious problems. They help create a legality illusion.

There are links between weaknesses in the Swift report, and especially its handling by the Post Office, that are associated with the misleading of Parliament, and aggressive and misleading litigation strategy so roundly criticised in Bates. Moreover errors or misjudgements in Swift, whether caused by faulty briefing or problems with the Review itself, meant an opportunity to surface and deal with life-shattering miscarriages of justice years sooner rather than later was lost. Swift is not the cause of the original problem, but they are part of the causal chain; they had an opportunity to break the chain. It is possible in fact that the Review served to strengthen that chain.

The failings we would identify can be summarised as follows:

1. The reviewing lawyers did not have the most appropriate legal expertise, as public rather than criminal lawyers. They also may have lacked the necessary forensic expertise to deal with computing evidence. Expertise is important; it impacts the ability to exercise independent judgement and the ability to challenge and refute the propositions provided by those instructing you.

2. There are subtle psychological biases which play on all lawyers (indeed all humans) which need careful thought and management. This should be borne in mind when considering the type of lawyer to be instructed to conduct a review and how they go about their task. Having a safe pair of hands who understands the needs of business has value but also gives rise to potential difficulties.

3. The evidence base had structural flaws not corrected by the Review (e.g. minimising the extent and weight given to SPM evidence, and not following up on Roll's evidence).

4. The handling of the evidence base by Post Office is particularly important. A number of crucial documents are not mentioned (the Detica Report and the Clarke advices) and may not have been before the Review and the reasons given for not speaking to Sir Anthony Hooper are unconvincing. His exclusion from the review is concerning. The reasons for this need investigation.

5. The framing of investigations is important. Those frames can be legal ones; here agency arguments tilted the analysis in a direction favourable to the Post Office, as did the association of SPM perspectives with widespread false accounting (and so dishonesty). Frames can also be conceptual ones: the

identification of the software as the ‘system’ also operated to tilt the analysis towards a position helpful to the Post Office.

6. Positive news has to be given carefully if it is to be given at all. One might question the wisdom of speculating that probing into remote access was a wild goose chase for instance. And identifying the software as ‘the system’ and then portraying the system as fundamentally sound poses obvious risks of misrepresentation, even allowing for hindsight bias on our part. It emphasises a positive finding whilst other, and associated negative findings (that undermine it) are more muffled.

7. The implications of negative findings are not always explored in important ways. A particularly interesting example is the noted omissions in Gareth Jenkins’ evidence which suggests Swift identified material omissions in evidence he may have given in criminal proceedings. The significance of this error can only be fully understood if we know whether Swift had sight of the substance of Clarke’s advice.

8. The Review essentially analyses some of the review work previously undertaken by Post Office instructed lawyers, who themselves lacked the necessary independence to conduct the work. It is perhaps unsurprising that this is unsatisfactory. Suggesting that questions essential to the outcome of the review be referred back to these lawyers compounds the error.

9. In the absence of a summary of its own, the Post Office and/or its Chairman appears to have editorialised the report in ways which present a misleading picture of it. The reasons and mechanisms for that bear investigation.

10. The Review appears to show the involvement of leading counsel for the Post Office in Hamilton in the case during 2013-2015 was more extensive than it was understood to be. The Review’s description of what was done by that Counsel in 2013-2015 also differs materially from how it was described to the Court of Appeal. We do not yet know if that same Counsel had further involvement in response to the Swift review. During the Hamilton case the Post office failed to explain why disclosures had not occurred in the cases before the Court of Appeal. The extent of their own Counsel’s involvement in that failure post-conviction is important not least because the Post Office was so keen to avoid criticism for its handling of cases as an affront to justice.

11. The Chairman of the Post Office, Tim Parker, led the Post Office whilst it litigated a case on a misleading basis (Bates). The General Counsel, at the time, Jane Macleod, also signed the statement of truth verifying the defence.<sup>65</sup> Both attended a Board meeting where the decision was taken to apply to recuse the High Court judge in Bates (although Parker abstained from voting with a conflict of interest).<sup>66</sup> A central part of that case was a denial that secret remote access was possible, a claim only withdrawn late in the case. The Swift report had informed Parker that secret remote access was possible in 2016 and that Post

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<sup>65</sup> ‘Horizon Trial: Day 1 - Post Office IT “Not Fit for Purpose”’ <<https://www.postofficetrial.com/2019/03/horizon-trial-day-1-post-office-it-not.html>> accessed 3 October 2022.

<sup>66</sup> ‘Minutes of a Call of the Board of Directors of Post Office Ltd Held on 18 March 2019 17:15 HRs’.

Office already knew about it. Parker's role in the stewardship of the litigation is thus extremely important, as was Macloed's involvement in the Review and the litigation. Parker has for a significant period been chairman of HMCTS.

12. Parker was reportedly advised by General Counsel for the Post Office at the time, Jane Macloed, that he should not disclose the Swift Report to the Board as it risked vitiating professional privilege. This advice was probably wrong and if it was not wrong it placed Macloed into a potential conflict situation. The veracity of the report needs exploring, but we believe it not uncommon for legal professional privilege arguments to be used to avoid disclosing information which is inconvenient rather than for reasons of law.

13. Parliament appears to have been misled about the report by the then relevant Minister, Paul Scully. There is no suggestion he did so knowingly but the problem would likely have been apparent to the senior civil servants in BEIS and UKGI at or shortly after the time he put in evidence to the Select Committee, but we have not seen any public correction.

14. Human frailties in decision-making can sometimes lead to erroneous judgements of the kind we see in the report. The ways in which the evidence before Swift was limited and the persistence of an untruth about remote access in the Bates defence suggest this may be a tale of more than frailty but we hope the analysis is of use to those who need to consider how better to manage independent reviews in the future. Client loyalty runs deep and needs to be carefully managed if independent reviews are to be as objective and thorough as possible.