Working Paper 7

The First Flat Earther:
How 'clever' strategy might drive professional error

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Richard Moorhead,* Sally Day,*
*** Karen Nokes****
* University of Exeter, School of Law;
** Faculty of Laws, UCL

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Executive Summary

In the Bates litigation, Mr Justice Fraser famously decried the Post Office's defence as being equivalent to saying the world was flat. He identified a range of problems. One of these was the legal framing of the Post Office's relationship with sub-postmasters. That legal framing asserted that sub-postmasters were agents of the Post Office who, each time they signed off Horizon statements of account, were agreeing to those accounts in a way that made them very difficult to disprove.

The agent's statement of account strategy appears to have originated in the case of Lee Castleton. This paper considers the genesis of that strategy as explained by the barrister responsible for it, Mr Richard Morgan (now a KC).

That strategy may also partly explain why there are questions over the conduct of the Castleton proceedings and the conduct of Mr Morgan himself.

While we consider those questions here, we are not trying to prove or excuse professional misconduct on his part. Questions as to whether there has been misconduct are for Sir Wyn William's Inquiry and the professional regulators.

What we are mainly trying to do is explore the case as an example of how litigation case strategy, particularly artful case strategy, may be one driver of professional error.

In layman's terms, 'clever' ideas may blind us to reality or give us excuses to pretend that the world is how we want it to be rather than how it is. That latter point was a central criticism that Mr Justice Fraser made of the Post Office's case in Bates. Another way of putting it is that we can all be bewitched by our own analysis in ways that cloud our decision-making.

We also show how clever strategy and the tactical defence of that strategy may be inconsistent with the overriding principle which governs our civil courts. It suggests there may be a misalignment between professional cultures, rules and practices and principle that is supposed to put justice and proportionality at the heart of civil justice.

We offer this paper up for discussion and would welcome thoughts on anything we have missed, over- or under-emphasised, or got wrong.

Introduction

A central part of the Post Office (PO) story is how the Post Office managed to shift the risk and responsibility of its faulty accounting system away from itself and onto the sub-postmasters (SPMs).

They did this in part by shifting the burden of proof, practically and legally, onto those least able to challenge the Horizon accounting system. Part of that strategy was initially established through Lee Castleton's case. It involved suing him for debt in a way which tested the viability of what we later call the 'Chancery line'.

In civil cases, the burden of proof lies with the claimant. So, when the Post Office sued SPMs for debts they claimed were owed, the Post Office would ordinarily have had to prove those debts on the balance of probabilities. They would have had to prove to the court that on the balance of probabilities, Horizon was working correctly.[1]

The Post Office instructed a barrister, Richard Morgan (now a KC), to present Lee Castleton's case. As a result, he advised on evidence and case strategy. In the Lee Castleton case, he saw an opportunity to take a different approach to a conventional debt claim.

His strategy was based on the law of agency. His strategy was to persuade the court that Lee Castleton was the Post Office's agent and that, when he signed off the Horizon account each week, as he was required to do under his contract with the Post Office, he was agreeing to the Horizon figures as a "statement of account" signed by their agent. This put the burden on Lee Castleton (and other SPMs) to prove that Horizon was not working correctly. Essentially, the burden of proof was reversed. It is an argument that succeeded in the High Court in Post Office Ltd v Castleton [2007] EWHC 5 (QB), although it was later rejected when given fuller scrutiny in the High Court by Fraser J in Bates v Post Office Ltd in 2019.

This is only one way in which the burdens of Horizon's failure were put upon those least able to deal with them. Horizon terminals provided little evidence for SPMs to rely on when raising problems; evidence for an audit trail, for instance, was largely held in ways inaccessible to the SPMs, and neither Post Office nor Fujitsu typically provided such data to those stating that there were problems. SPMs were dependent, as Lee Castleton was, on ringing a helpline, and hoping that might lead to a matter being investigated and any error corrected by way of a transaction correction. Whether that happened and how long it took after any error was logged was uncertain. Typically, all the SPM knew was that their terminal had not balanced: they did not know why, even if it was subsequently corrected.

This paper deals with Mr Morgan's (the barrister's) evidence on that point as an indication of how and why such a litigation strategy was developed and how it may have contributed to the Post Office's initial success in this case. This strategy lies one of the seeds of the disaster that is the Post Office Scandal.

We do not argue here that Mr Morgan necessarily foresaw such a disaster. We do, however, seek to show how the strategy appears to have influenced the conduct of the Castleton case and, in particular, decisions that were taken regarding the disclosure of evidence in his case (by Mr Morgan and by his instructing solicitors). There are questions about the propriety of those decisions.

[1] The controversial presumption that computers are in order at the material time in the absence of evidence to the contrary might also have assisted the Post Office but that does not feature in the court judgment. See, et al. Bohm, 'The Legal Rule That Computers Are Presumed to Be Operating Correctly – Unforeseen and Unjust Consequences' <https://www.benthamsgaze.org/wp-content/uploads/2022/06/briefing-presumption-that-computers-are-reliable.pdf>.

As a result, this is a story of how a "clever" case strategy, or as Counsel to the Inquiry calls it a “nice legal point,” can create a divergence between justice and truth and how that divergence can increase incrementally as the case strategy is implemented. In the Castleton case, we see the beginnings of that divergence and questionable decisions on disclosure in particular.

The other point this paper notes is what we call, with an academic flourish, the *professional imaginary*. This is a phenomenon we have noticed elsewhere in the Inquiry evidence. It is a tendency for the lawyers giving evidence to say, ‘*I can’t remember what I did do, but what I would have done was…’*, and so on, before giving an explanation of what they imagined was the professional thing to do: the professional imaginary. One of the difficulties with those adopting this position is that the Inquiry has an interesting tendency to take the lawyers to documents which suggest the professional imaginary is just that, imaginary rather than real; an imagining of what they would like to think or be able to say they had done based on professional good practice.

A casual reader might think we are implying here that the professional imaginary suggests witnesses are lying to the Inquiry. It is not intended to convey that. The idea of the professional imaginary explores what other factors could be at play when witnesses invoke a rosy view of what they would have done. As individuals, we conceive of ourselves as moral beings. There are powerful psychological forces at play here. We all have unconscious drivers to maintain a positive self-concept and can easily succumb to overconfidence bias – especially when wider environmental factors are also supporting this.[2] The professional imaginary gives insight into what, with hindsight, we would like to think we would have done, and why when we come up against evidence of what we have actually done, we struggle to explain it.

Described that way, one might see, knowing what we know now, why the Post Office ran a ‘flat earth’ defence of Horizon in the Bates litigation. This all-encompassing metaphor covers a multitude of sins on the part of the Post Office and its lawyers in the Bates GLO litigation: running a case which did not fit the underlying facts; which paid scant if any regard to evidence contrary to the case; which failed to disclose and resisted disclosure of material facts harmful to their case; and presented a legal position at odds with the underlying truth of the situation.

Mr Morgan might be described as the ‘first flat earther’ or the first architect of its prototype: he was the first to suggest and run the agency argument in the case against Lee Castleton, and, as we will see, it appears to have led to similar problems. The agency argument allowed the Post Office to present the case that Horizon data could be *presumed* correct as a matter of law and allowed Mr Morgan to do so in the face of significant evidence to the contrary. And this also seems to have been accompanied by self-serving judgements about what

[2] Jennifer K Robbennolt and Jean R Sternlight, ‘Behavioral Legal Ethics’ (2013) 45 Arizona State Law Journal 1107.

evidence was relevant and needed to be disclosed. It was one reason, amongst many, for the apparent blindness shown to Horizon's flaws.

The professional and legal context

The following understanding of the professional and legal context informs our analysis of Mr Morgan's evidence. In broad terms, the professional ethics question is whether Mr Morgan has balanced his obligations to his clients appropriately with his obligations to the court and the administration of justice, and done so with sufficient honesty, integrity, and independence. A secondary, related issue is whether the proceedings against Lee Castleton were brought for improper or collateral purposes.

We do not arrive at a definitive position on that balancing exercise but seek to explore the evidence and consider the social and psychological reasons that may help explain how that exercise was carried out.

It is fair to say that our analysis suggests that the outcome of the balancing exercise was to lean very heavily toward the interests of the client, the Post Office, rather than other elements of the professional code. Whether that leaning was professionally improper is a crucial question, but it is not a question this paper resolves. We concentrate on illuminating the processes that might be at work here.

Professional obligations

Mr Morgan's core duties [CDs] under the BSB Code of Conduct most relevant to the handling of this case include:[3]

> CD1 You must observe your duty to the court in the administration of justice.
>
> CD2 You must act in the best interests of each client.
>
> CD3 You must act with honesty, and with integrity.
>
> CD4 You must maintain your independence.
>
> CD5 You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.
>
> CD6 You must keep the affairs of each client confidential.

Under the Bar's rules, the duty to the court in the administration of justice (CD1) overrides any other core duty save (generally) confidentiality.[4]

[3] We have relied on the BSB Handbook rules as stated in 2024. A more precise analysis would require the wording of the Bar's Code in 2007 although in broad terms the position would, we believe, have been similar. https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance/the-bsb-handbook.html

[4] See the guidance at gC1 in the Code

Under rC3, barristers "owe a duty to the court to act with independence in the interests of justice," which "overrides any inconsistent obligations which you may have (other than obligations under the criminal law)". It includes (rC3.1) not "knowingly or recklessly" misleading or attempting to mislead the court (which includes not being complicit in another person misleading the court, gC4 or doing so inadvertently and failing to correct it); or rc3.2 (not abusing their role as an advocate) and rc3.5 ensuring "that your ability to act independently is not compromised."

The independence obligation to the court is thus stronger, in theory, under the rules than CD2 (the best interests of the client). rC4 explicitly states that "Your duty to act in the best interests of each client is subject to your duty to the court." However, under rC5, "Your duty to the court does not require you to act in breach of your duty to keep the affairs of each client confidential."

It is worth emphasising given the questions that are raised about the handling of adverse evidence in this case, that recklessness is defined as, "being indifferent to the truth, or not caring whether something is true or false." (gC4.3)

The obligation to protect one's client's interests is (gC6) that,

> "You are obliged by CD2 to promote and to protect your client's interests so far as that is consistent with the law and with your overriding duty to the court under CD1. Your duty to the court does not prevent you from putting forward your client's case simply because you do not believe that the facts are as your client states them to be (or as you, on your client's behalf, state them to be), as long as any positive case you put forward accords with your instructions and you do not mislead the court. Your role when acting as an advocate or conducting litigation is to present your client's case, and it is not for you to decide whether your client's case is to be believed."

CD2, expressed in these terms, gives rise to a real tension for advocates: the difference between running a case one does not believe and misleading the court can be a fine line.

The Code of Conduct provides some assistance. "If there is a *risk* that the court will be misled unless you disclose confidential information," the barrister must get permission to disclose that information or cease to act (gC11) and if they become aware of a document that has not been disclosed but ought to be, the barrister cannot continue to act unless it is disclosed.

The guidance does not address real difficulties: at what point does a lawyer 'know' rather than simply 'believe' something is untrue and misleading or improperly arguable? As we have seen, the rules require action when there is a risk the court will be misled. Properly managed disclosure obligations should also protect against this.

Court rules *require* the disclosure of documents (in civil cases) or material (in criminal cases) that assist one's opponent. Disclosure obligations are central to the effectiveness of an adversarial system. A lawyer can, then, more comfortably bring or defend a problematic case in the knowledge their opponent has the material to

counter them and allow the court to make a fair and accurate decision on what is actually true.

In civil cases, as in this case, the rules are as follows under the *CPR - Rules and Directions:* CPR 31.6 standard disclosure requires a party to disclose, for example, documents which "(i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case." And under CPR 31.7 (1), "When giving standard disclosure, a party is required to make a reasonable search for [those] documents."

Reasonableness of *search* is influenced (31.7(2) by, "(a) the number of documents involved; (b) the nature and complexity of the proceedings; (c) the ease and expense of retrieval of any particular document; and (d) the significance of any document which is likely to be located during the search."

There is further protection in rule 31.7 (3) "Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document." Similarly in Woods v Martins Bank (1958) 1WLR 1018 Salmon J stated that "it cannot be too clearly understood that solicitors 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].'

To summarise duties to the client are subservient to duties to the court not to mislead, including not to do so recklessly (indifferent to truth) and to disclose documents adverse to their case, with similar obligations requiring a proper, reasonable search.

Improper purposes

The second background issue is whether the conduct of the proceedings was abusive or improper.

There is a tort of bringing proceedings for improper or collateral purposes (see, for example, *Kings Security Systems Ltd v King & Anor* [2021] EWHC 325 (Ch)). In Goldsmith v Sperrings Ltd [1977] 1 WLR 478 Lord Denning MR (page 489C) opined:

> "In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it."

The courts are very reluctant to recognise abuse of this kind unless the party alleged to be improper does not have a genuine cause of action even if they can be shown also to have an ulterior purpose or mixed motives. This is because "a judicial trek through the quagmire of mixed motives would be… a dangerous and

needless innovation."[5] That said, conducting, “proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the Defendant problems of expense, harassment, commercial prejudice or the like *beyond those ordinarily encountered in the course of properly conducted litigation*,”[6] (our emphasis) may be an abuse. Although, “bringing of legal proceedings for the purpose of achieving the natural consequences of the litigation, such as a defendant’s financial ruin, is not an improper purpose.”[7]

In *Amersi v Leslie* [2023] EWHC 1368 (KB), a case decided other than on abuse grounds, the court cited Lord Phillips MR in *Dow Jones & Co Inc v. Jameel*:

> “It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.”

In relation to the Castleton case, as we will see, there are two main arguments: one is whether the case was being brought simply to recover a debt or whether the case was brought for a broader purpose. That broader purpose could be described in terms friendly to the Post Office as to assist in the management of Horizon debts more broadly within the business (by discouraging claims against Horizon which they regarded as ill-founded). In terms of emphasising the potential impropriety of the purpose, Lee Castleton alleges he was told if he continued to defend the claim that the Post Office would ruin him.

As we can see above, the way the courts typically think about abuse means even a desire to ruin someone through an otherwise legitimate claim, still less helping the Post Office strategically with cases of this kind, *might* not be as an improper purpose if it was reviewed by a court. That said, it is worth mentioning here the courts have often considered this question in quite narrow contexts, before a case gets to trial, and so might look more sympathetically on abuse arguments in Lee Castleton’s case which did get to trial (and where the Post Office had evidence of Horizon problems that it did not disclose).

Whether ruining someone as a byproduct of legitimate litigation would be regarded by the courts as an abuse or not, the case law suggests the courts *might* consider it an abuse if the expense, harassment and so on of bringing the case was beyond that which would ordinarily be encountered.

In this sense, arguments that Post Office, and more particularly for the purpose of this paper, Mr Morgan, engaged in an abuse of purpose would require proof of an improper collateral purpose, which the courts are generally resistant to, but the argument would be considerably stronger if there was *excess* in the pursuit of that purpose.

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[5] *Broxton v McClelland and another [1995] EMLR 485*.

[6] ibid.

[7] ibid.

Morgan's professional imaginary and the Inquiry's documents

The architect of the Chancery Strategy, Mr Richard Morgan (now KC), gave evidence to the Inquiry in late 2023. He sought to present his role in limited terms as an advocate instructed on an isolated debt case. He strongly resisted lines of questioning suggesting this was a case he had recognised at the time as being of strategic importance to the Post Office.

We hear from Richard Morgan about what we will call by way of shorthand, the Chancery strategy, and which Counsel to the Inquiry called "Your nice legal point" (78:1; 84:5).

We call the case strategy here the 'Chancery strategy' because Richard Morgan discusses how he saw the case being a product of his Chancery background (151:1), a strategy based on the agency argument.[8]

Sixteen years after the case, he was called on to explain whether he saw the case as a profound miscarriage of justice. In parrying the allegation, he describes his role in one sentence, towards the end of his evidence, as follows:

> "I was asked to prove the case that I did on the basis of documents signed by Mr Castleton, whose truth were not challenged by Mr Castleton." (187:2–5)

Mr Morgan frames his retainer (the basis on which he took the case) in narrow terms. The language seems to seek to distance himself from responsibility for the case strategy. We can see some inaccuracies in the quote above: he was not, as he seeks to say there, *asked* to prove the case on an agency basis: *he* suggested they try and prove the case on that basis, and he did so deliberately to avoid having to prove the reliability of Horizon.

Jason Beer KC takes him to task on this point because it is very clear indeed that Mr Castleton *was* challenging the truth of those documents, as we will see. In this sense,it was a case based on a fiction. Although Morgan sought to present the Horizon records as true, in a rather artful way, a way encouraged by the Chancery argument and successful in the Castleton case, Lee Castleton certainly challenged them.

The 'I was just a lawyer following instructions' defence is a common way of denying personal and professional responsibility. Morgan deploys it. He says he was simply retained to act in a civil debt claim (130:16); recovering the debt was his only focus (192:20-21); he was not instructed on disclosure (113:20-23 and 180:13-14); it was a 'single one-off case' (127:11); and he 'was not instructed to try and establish the integrity of Horizon' (131:7-11). He was simply instructed to appear at trial (176:25) and amend the pleadings (177:1). By virtue of this narrow framing of his involvement, he distances himself, limiting his role to that of merely executing instructions. It is not a full description of his obligations; he retains

[8] In broad terms a "Chancery Background" indicates a background in the types of commercial/property cases typically brought in the Chancery Division of the High Court.

responsibility fo disclosure issues that he becomes aware of whether or not the client instructs him to advise on it (and he is in fact asked to advise on specific disclosure issues in the case in any event). The narrow framing and an inability to recall a number of critical matters given the passing of time is an important part of his denial of responsibility.

This narrow framing is relevant because it presents the Castleton case in the abstract as an isolated debt case. The stripping away of context serves as a useful mechanism for Morgan to rationalise the efficacy of the litigation strategy he devised.

He denies any awareness of the Post Office's tactical position in the running of the litigation: "I have no idea what the tactical position of [the Post Office] was in this litigation or what reasoning was behind it." (120:17). Morgan's memory of the case as an isolated debt case, however, does not align with the written evidence. That tends to suggest he was, or ought to have been, aware of the broader tactical position:

- Morgan advised that the "costs [of bringing the case] were going to be out of all proportion to the amount at stake" (1 20:23 – 25) and "a drop hands settlement should be attempted" (121:3). That is, he advised that the Post Office and Castleton would be better to agree to discontinue the case without either party paying anything to the other. He said he, "thought it was commercial madness" to proceed with the case (121:12). It would be surprising if Counsel was a mere bystander here, proceeding with a case on an uneconomic basis without understanding, and perhaps challenging, *why* their client wanted to proceed so irrationally.
- Morgan says he has no idea why Castleton might have been considered a test case (129:8–10) but it is so described (according to a solicitor's attendance note) in a conference in his chambers: "Mandy Talbot said that the difficulty is this has almost become a test case in spite of itself. The Post Office other solicitors' cases are waiting and watching on this." (128:23–129:1 and POL00069622). He disputes the tenor of the attendance note that and suggests, Mandy Talbot "was [not] saying that it should be run as a test case. It's more of an observation by an individual as to what she thought was happening to the case ." In other words, she might have regarded it as a test case, but he was not *running* it as a test case; rather, he was: "running the case to the best of my ability, in accordance with my instructions." (130: 11-13). In her evidence to the Inquiry, Mandy Talbot identifies the Castleton case as a 'test' case at least six times (See Transcript for 28 September 2023, (50: 24-25), (51: 1-5), (55: 16-19), (64: 20-23), (68: 12-14), (177: 10-16)).
- Stephen Dilley's attendance note of a discussion on 9 November 2006 records Dilley telling Morgan that the motivation for the case proceeding was to show the computer system wasn't wrong and to deter other sub-postmasters from bringing a claim (134:19-23). Morgan denies this being any part of his thought process (136:6-11), although he also says that he

doesn't recall this information being conveyed to him, and says he is surprised at seeing this information recorded in the attendance note. So, although not being able to recall this information, he is also asserting it did not affect his decision-making.

- In the November before Lee Castleton's trial, there was a discussion about settlement where Mr Castleton was asked to agree to a statement (in a Tomlin Order settling the case) where he would formally recant all allegations against Horizon. Morgan is reported as commenting on the draft order at the time as being unwise because it meant that by "making a song and dance we highlight a sensitivity" (142:3) (presumably about Horizon). Morgan states that he hadn't previously read this note (as the order wasn't in the bundle sent to him) and doesn't want to commit to something that he hasn't read (143:3-4).

Despite Mr Morgan's denials, it is apparent that protecting the integrity of Horizon was a central concern of his clients and that he was probably aware of that.

His evidence that the case was an isolated debt case is not much supported by what is documented as having happened after the Castleton case either:

- Mr Morgan advises the Post Office on ensuring "maximum advantage" is derived from the judgment on Castleton (145:5-146:2; 147:10-20; 150:15-16). His written advice (147:10-20) outlines how to manage the reverse burden of proof that the case helps them establish (149:10–16) and remove the need to have auditors prove the loss before reclaiming alleged debts (150:12–14).
- Morgan gave early, legal advice to POL in a number of other cases: Aslam and Bilku in 2007 (48:16-20), Darlington in 2011 (48:24-25 and 49:1) and Prosser in 2012 (49:3-8) (other civil recovery cases).
- On 12 June 2012, a conference takes place with Morgan, Daniel Margolin (a junior barrister from Morgan's chambers), Gavin Matthews (solicitor from Bond Pearce), Susan Crichton (General Counsel at the Post Office), and Hugh Flemington (another in-house lawyer at Post Office). This appears to have been advice given at the time when Shoosmiths were indicating 85 or so clients were consulting on potential claims against the Post Office (52:7-12). There is a reference to an impasse being reached and advice being sought as to how to break the impasse (50:15-19). Morgan has little recollection of the Post Office's request for advice (51:15-16).
- An attendance note of the 2012 conference appears to centre on whether to commission an independent expert into Horizon. Morgan says he cannot recall any discussions about the obtaining of an independent report on Horizon (53:10-14). He does not recall whether he actually advised (an attendance note records bullet points which suggest he did, but the note may record a shared view or the views of the Post Office lawyers rather than his advice). The attendance note records the view that the Post Office would be damned if they did instruct an expert and damned if they did not

get expert evidence (54:11-14). Whether he so advised or not he indicates it is “a sensible expression of what it [an independent review] would achieve” (53:22-23).

- In 2014, Morgan was contacted by Linklaters (a solicitors firm instructed by the Post Office at the time) to advise Post Office Limited; there are records of three short telephone conversations, and Morgan is unsure but thinks he then met with Christa Band of Linklaters and Paula Vennells of POL (then CEO) (163:17–22) in March 2014 (167:11). Morgan says that he thinks that POL wanted to know what they could do about issues to do with the accuracy of Horizon being raised (165:10-15). Morgan’s response is to refer then back to his ‘2007 advice’ with the reliance on the paper trail of accounts signed by the SPM (165:13-15).

The 2012 conference attendance note seems to have been prompted by Shoosmiths (through Access Legal, then its consumer claims arm) threatening 85 or so cases:[9]

> Summary of Conference at Maitland Chambers Tuesday 12 June 2012
>
> In attendance: Richard Morgan QC (Counsel) Daniel Margolin (Counsel) Gavin Matthews (Bond Pearce) Susan Crichton (POL) Hugh Flemington (POL)
>
> - It was recognised that an impasse has been reached in relation to the Horizon litigation which POL is seeking to address. The question is what is the best way of breaking that impasse.
> - The proposal to instruct an Independent expert to prepare a report on the Horizon system is the highest risk response to the issue. What will it achieve? It will not be able to address any of the civil/criminal cases dealt with under "Old Horizon". Will it seek to review particular cases? If so, which ones?
> - Whatever the findings of the expert report it not resolve the problem. POL will be "damned if they do and damned if they don't". If the findings are that there are no issues with Horizon people will see that as a "whitewash" whereas if the findings are negative that will open the floodgates to damages claims by SPM's who were imprisoned for false accounting and Access Legal will start to pursue all the civil cases they are currently sitting on.
> - POL will always have this problem - some people will never trust computers and will always believe they have an inherent problem.

[9] ‘POL00006484 - Summary of Conference with Counsel at Maitland Chambers about Horizon’ (*Post Office Horizon IT Inquiry*, 12 June 2012) <https://www.postofficehorizoninquiry.org.uk/evidence/pol00006484-summary-conference-counsel-maitland-chambers-about-horizon> accessed 29 February 2024.

> - A less risky approach is to agree to take the relevant MP's privately through particular cases in which they are interested.
>
> - POL needs to engage with its stakeholders by perhaps sending out a questionnaire about Horizon to SPM's getting their views and seeking to address the more sensible ones. This is more a PR exercise.
>
> Richard Morgan QC is happy to discuss the possible approaches and merits of each with the Board of POL at any time.

In general, Mr Morgan seeks to distance himself from this note saying it is not clear whether it records his advice or points that were put to him. Some points he accepts sound like the kind of advice he would have given, and others do not. He suggests this was a short conference (30 minutes according to the records kept by his chambers system) and should not be really considered to be advice. He sees advice not to investigate problems in the Horizon system, on the basis that to do so may invite claims, as legitimate (58:2-7), although later recognises he might be wrong (59:12-13). It could be interpreted in two ways. He was nervous about the specific reliability of Horizon and the difficulty of showing it was robust, or he was worried in general about proving (any) computer systems were not flawed.

The decision not to investigate in the face of burgeoning claims was relevant to civil liabilities but also relevant to the Post Office's duties as a prosecutor; Morgan says he would not have advised on that given he was not a criminal practitioner (57:21-25).

That such an important piece of advice, with ramifications beyond his expertise was probably given in a rather casual way is perhaps indicated by Mr Morgan's description of events:

> "Some people turned up in chambers and we had a preliminary discussion about the possibility of being instructed, so the suggestion that this represents concluded, considered advice, I think, is putting it a little high…The way you're suggesting that this is a record of a definitive piece of advice, given after a consideration, I think is perhaps a little unfair" (63:6-16).

In one sense, there is a compartmentalisation of responsibilities by expertise which militates against *anyone* taking responsibility for the overall effect of advice being given. So, for instance, Morgan appears to distance himself from the implications for criminal cases of the advice he has given for civil matters by saying, "I don't remember anybody ever talking me through what was going on. I don't even remember people telling me about criminal proceedings if I'm right. I can't recall any occasion in which anybody ever talked about how they did things in criminal trials or even the existence of criminal trials" (79:2-9). This seems unlikely given that the note records the existence of criminal cases. He stresses that in these post-Castleton cases, he was asked to give only general advice (52:18-24) or as an "initial preliminary approach" (47:22-24), drafting a defence and counterclaim in only one case (48:1-3).

It is also worth pointing out that Morgan is in no position to say what the nature of any advice is if he cannot remember it. He is in a struggle between what he says he can recall about those events and what the documents show. Of the 2012 conference, he says: “The document says what it says. You can attribute to me the high-level answers if you want to, but I just don't remember saying it.” (55:12-14) Regardless of what his advice actually was, and how tentatively it was offered given the brevity of, and the material available at, the meeting, it suggests he was or should have been aware of some of the broader strategic significance of the case and the relationship of his work to criminal cases (whether advised on that or not).

Why was the ‘nice legal point’/Chancery view case taken?

Morgan describes his case strategy as the way a Chancery practitioner would see the case: an “account produced by an agent.” (117:18-20). He claims that, in essence, it was about whether the figure for cash and stock at the end of the period could be evidenced by documents other than Horizon (65:13), and the using of Lee Castleton’s own documents or those verified by him as a “clean cut way through to proof of the loss” (74:21). There is a shift away from the use of and reliance on Horizon data. Morgan proposes that Horizon data is not a key element of Lee Castleton’s defence in the case; Castleton’s reliance was on “written figures” (113:9-11).

There are a couple of big difficulties with this approach. One is that the documents Lee Castleton was verifying *came from* Horizon (although Morgan suggests that some of the documents at least had validity outside of Horizon). The second is that Mr Castleton had verified documents as true in the sense that they were records of figures that Horizon had produced, but was also plainly disputing the *validity* of what Horizon had produced. As the judge in the case noted, the statement of account but not its validity was admitted; in summary Lee Castleton is admitting Horizon *says* the money is missing but not that the money *is* missing.

In this sense the Chancery approach has an air of unreality about it; it is taking a “nice legal point” in a way that avoids engaging with the underlying substance and wider context of the situation. The judge finds that Mr Castleton has not shown Horizon to be faulty, that the Post Office witnesses suggest Horizon was working fine (including what turns out to be problematic evidence from Chambers and Booth), the Post Office audit shows the money that Horizon says is missing is missing (a circular argument as the audit depends on Horizon data but an argument the judge seems to have accepted) and so Castleton owes the money.

So in Castleton’s trial, the judge did not close his mind to the possibility that Horizon was not working but the evidence he considered was limited. The evidence as disclosed by the Post Office was limited, and Mr Morgan succeeded in persuading the judge to exclude evidence as to what was happening in other post offices, as we will see. The presentation of what evidence there was, was also likely to have been hampered by Mr Castleton being a litigant in person. As we discuss

below, professional rules and court practices do not significantly impact on the risks that such litigants are substantially disadvantaged.

The effect of going down the Chancery route was to significantly demphasise, rather than entirely exclude, the possibility of evidence being called regarding Horizon's reliability. In this way, it removed the need for the Post Office to *prove* its reliability.

Where did this strategy come from?

Mr Morgan appears to have seen quickly when dealing with the case that proving, "forensically that an entire computer network operated properly was going to be a very difficult, if not impossible, exercise" (72:14–17). And, "I recognised that there were going to be problems proving the case in one way and I suggested that an agent's account was a better way of dealing with it or that that was the way to prove the case" (77:5-9).

Morgan denies, somewhat equivocally, the strategy was formulated to avoid evidential problems:

> "I'm not sure that at the time I said or gave advice to Post Office that they shouldn't use Horizon because of the difficulties but they should use the agent's account. I just simply said, 'You should use the agent's account route.'" (77:10-15).

The agent's account approach forces the work of proof onto Lee Castleton, but it also appears to impact how the Post Office and its lawyers handle and think about the case.

This exchange captures how Mr Morgan wishes to put the point across(78:6-20):

> Q. So your evidence is that you came up with a nice legal point because not of any actual knowledge about problems with Horizon but because you presumed there would be such problems or at least it would be difficult to show that there weren't such problems?
>
> A. Yes. It's just too -- it's a £25,000 claim and a computer system like Horizon struck me, back in 2006, as being a huge beast with all sorts of things that were going on, not the least of which would be upgrades to software, dropping out of dial-up networks, or ISDN or ADSL or whatever was being used at the time. So why have a difficult case when you can have an easy case?:

Essentially, Morgan's core advice for the Castleton case was to focus on Castleton signing off on his accounts reversing the burden of proof: "the Post Office derives a significant advantage in litigation if the sub-postmaster bears the burden of proof to show that the account sued on by the Post Office, such as the Cash Account (Final), is wrong, rather than the Post Office having to prove that the account sued on is right" (149:3-16). A core piece of advice Morgan stresses that he gave was this: "the advice that I gave is that there was a nice, clean cut way through to the proof of the loss, by going by way of accounts stated or an agent's running account" (74:19-23). In essence, the case was that if Castleton was submitting figures, and signing them off at the end of each trading period (as his

contract required him to do as a condition of continued trading), he was vouching they were right (69:20-25).

It is worth emphasising that Mr Morgan is not breaching professional conduct rules if he puts forward a case based on what his clients had told him, which is not self-evidently false. Putting to one side whether the rules allow too low a standard of conduct, he does not have to believe in the validity of the analysis if it is properly put (in particular if it is not misleading and disclosure is properly handled).

On the genesis and context of this strategy, the written evidence shows:

- In August, the partner in charge of the case at Bond Dickinson (Tom Beezer) wrote to the PO's in-house lawyer, Mandy Talbot, to say that Morgan's view was that the case was "dependent upon the accountancy evidence stacking up in our favour" (85:21-25). Despite this, for reasons discussed below, accountancy advice was commissioned but not used.
- The same record of advice suggests Morgan developed the agency approach to get away from needing to prove Horizon's reliability. This seems to be premised initially on the view that there were records they could do this from that were not derived from Horizon:

> "…A further point made by Richard Morgan was that we should endeavour to move the main area of focus in the case away from the Horizon system if possible. Richard suggested a method to do that would be to prove (if possible) the physical cash losses at the Marine Drive branch by reference to all the other documentation created around the transactions, not simply by reference to what was in fact recorded on the Horizon system…
>
> "RM – with denial of paragraph 7 if we are saying there was a duty to account there was no particular worry about the errors."[10]

This suggests that the strategy *was* developed at least in part in response to concerns that any errors in Horizon could be used as a stick to beat the Post Office cases with, but it is also consistent with Mr Morgan's claim that this was simply a clean way to prove a debt.

Therefore, an important background question is: Was Morgan concerned about errors in the system? There is evidence consistent with this view.

Morgan plainly raises the system's reliability at around the time the agency approach is being formulated. He asks questions about the Horizon system and "integrity of the Fujitsu product" generally (87:4-6), to which he does not get an answer. He receives general assurances through his instructions, rather than on the basis of expert evidence, for instance, that there were no problems with Lee Castleton's system from Bond Pearce (110:18 & 20).

[10] https://www.postofficehorizoninquiry.org.uk/evidence/pol00072741-telephone-attendance-note-adrian-bratt-conference-tom-beezer-stephen-dilley

In asking whether raw data in the system can be changed (90:12-25), he also raises what has now become known as the issue of 'remote access': the potential for data in the Horizon system to be changed remotely, without proper controls and without the knowledge of the SPMs. This would be a major insecurity in the system. Morgan makes enquiries to which he doesn't get an answer but that he would have "liked to have known" the answers to (92:11).

He raises concerns about the evidence from Mr Booth (who had experienced Horizon problems in Castleton's branch when running it after Mr Castleton was suspended) and asks Fujitsu to explain this (101:14-19). He says he asked a large number of questions about Fujitsu/Horizon but didn't get anything back (181:14-17 and 177:2-3) but he never followed up on these enquiries. This apparently didn't raise alarm bells sufficient for him to rethink the strategy.

Because the burden of proving Horizon was flawed now fell on his opponent, Morgan did not have to worry about it as much as he might otherwise have done and perhaps should have done. This complacency about the need for proof may have impacted his vigilance on disclosure decisions.

Morgan describes his actions in raising such concerns across the life of the case as taking steps to flesh out weaknesses (91:15-16) and spot where the "landmines might lie in my path to the trial" (91:16-17). Thus, it is clear that understanding potential problems with Horizon was an important part of risk management for Morgan, which raises the question of why he decided not to follow up on his initial enquiries (96:7-8).

Another passage of his evidence shows how he saw the evidence-gathering process around Horizon errors. Counsel to the Inquiry discusses, "what evidence was and wasn't disclosed to you about bugs, errors or defects… and the extent to which this informed or didn't inform the nice legal point that you developed." Mr Morgan is taken to a point where he asks about:

> "…other than the Bajaj and Bilkhu cases how many other allegations have been made and how many have come to trial and the outcomes of those. These need to be of a particular issue of persistent shortfalls allegedly attributable to the computer system." (95:2-8)

Notice in passing how there is a bit of closing down of the kinds of shortfall error that he is interested in: there needs to be a *particular* issue thought to be a *persistent* shortfall error. Mr Morgan cannot remember why he made this request but indicates,

> "I'd want to know if there was some deficiency in the Horizon System that was causing artificial losses. If there was a problem in there, I wanted to know about it sooner rather than later. The last thing one wants to do is to get to three or four weeks before trial and find that there's been some finding somewhere else that there is a real problem. It's all about risk management and understanding the profile of the evidence." (95-96)

The sense that this is a tactical, adversarial approach is sustained by the follow-up answer as Counsel to the Inquiry probes around what Morgan is doing at this point. Mr Morgan indicates:

> A. …**I'm trying to find out what's going on**. I'm saying what – you know, **without being so crude as to say "Give me full and frank disclosure**", I want to know are there any unexploded landmines that I'm going to step on if I go down a particular course? **Is there anything that's going to come out that I should know about now? Generally, with sophisticated firms of solicitors, they know that that's what you're asking them** when you say, "What's out there?" I think I would have assumed that with Mr Beezer and Mr Dilley.
>
> Q. Did you ever get an answer to this question. We've asked about the Fujitsu having access question; did you get an answer to this question?
>
> A. I think in relation to this question, and it's only because of documentation that I've read recently, I think that the Bilkhu case hadn't even been issued. I hesitate to ask a question – I think I'm right in that and I don't think I ever got an answer in relation to Bajaj.
>
> Q. But what about the wider question?
>
> A. I didn't get an answer in relation to that, no at least I – sorry. That sounds very definite. I do not recall now an answer to that then. (97)
> **[Our emphasis in bold]**

The approach of a 'sophisticated firm of solicitors' is code that is not explored in this exchange in the Inquiry. Why not ask for full and frank disclosure from the client, for instance? Why be worried about what might come out as opposed to what evidence might actually exits? This seems especially strange in light of Morgan's own admission that "what's going on" is necessary information to ascertain.

One explanation may be to avoid knowing of evidence that sinks their claim, unless it is highly likely to be raised by their opponent. The 'sophistication' of the approach might be discerned in this evidence of what the Bond Pearce partner, Tom Beezer, asked of Mandy Talbot: "I understand that Royal Mail/Post Office know of no issues with the Fujitsu system and are confident that it operates correctly. Please discuss with me if you have a different view." (87:4–10) One interpretation of what Mr Beezer is saying is, 'Here is the parapet, does anyone want to put their head above it?'

To a degree, the Chancery strategy is accompanied by a limited and, perhaps performative, request for evidence that might undermine it. To understand how the Chancery argument appears to work on Mr Morgan's thinking, it is worth noting that, when describing the approach, Morgan is able to hold two inconsistent views of the case at the same time (exacerbated perhaps by the significant amount of time that had passed since the case was handled).

So, Morgan says he could not imagine 'then' somebody signing off a Horizon account that is not correct (152:8–9), and yet *he knows* that Castleton was alleging

that Horizon was functioning incorrectly and that *he did sign off incorrect accounts*. Castleton also had to sign off his accounts each week to be able to keep trading under his contract and challenged them by constantly raising them with the Horizon helpline.

Indeed, Morgan maintains in his evidence that Castleton did not state the Horizon IT system was faulty. When evidence is presented that clearly demonstrates Castleton *did* communicate this, Morgan says he did not *interpret* Mr Castleton's meaning in that way.[11]

A theme implied by some of the questioning but not directly put is whether Morgan realised he was advancing a case strategy that in the round might be misleading. The 'sophisticated' approach to evidence management suggests a reluctance to think too hard about Horizon's vulnerabilities. In thinking purely 'tactically' about the difficulties he must avoid if he is to win the case, has Mr Morgan lost sight of a broader ethical principle?

Counsel takes him to exchanges from the initial court hearing (an unofficial transcript that Mr Morgan queries the provenance of). It appears to be prompted by Morgan asserting that, "at no stage during the trial, so far as I can recall, did Mr Castleton say that his figures were wrong". It encapsulates Morgan's defence against criticism of the strategy, and it appears that his defence is incorrect. It is the point at which the professional imaginary and documentary evidence most vividly collide.

Jason Beer KC points out:

> Mr Castleton was saying, "Yes, I signed the accounts that were produced for me by the Horizon System, not within my branch. I was signing that there was a discrepancy, a shortfall, between the cash and the stock which the system said I should have, and the cash and stock which I, in fact, had and I was reporting that at the time". It's not something that's only emerged years later, is it?
>
> A. Well, my impression of his evidence, and that may be a false impression and it's the impression that the judge formed and it's the impression that one gets from reading the Defence as well, is that the figures that were signed off by him were what was actually present and were a fair and true reflection of what had occurred.
>
> Q. He was signing off that there was a discrepancy, that there was a shortfall --
>
> A. Yes.
>
> Q. -- and contemporaneously reporting that it wasn't his responsibility. He was reporting that back to the Post Office wasn't he? That's what he was saying.

[11] See pp 156 -160 in Morgan's transcript and (67:25), (119:8), (159:17); pages 81- and pp. 105-106

> A. But there was a discrepancy between what he'd got and what he ought to have --
>
> Q. Yes.
>
> A. -- and that's what a loss is.
>
> Q. Even if it was generated by Horizon?
>
> A. Well, that may be where we differ because, at the end of the day, what he actually has and the business that he's done, if there's a discrepancy between that and what he ought to have, then that's a shortfall.
>
> Q. Even if one of those is produced by a computer which he says is faulty?
>
> A. Well, I'm -- sorry, hang on. I'm not quite sure what you say is the bit that's faulty. (158:13 to 159:25)

Counsel points out, not for the first time, that Castleton had explained to Post Office (and to Post Office's lawyers) why he said the system was creating phantom figures:

> But that was his case, wasn't it? It wasn't only something that emerged years later before Mr Justice Fraser and it may be that it wasn't very well articulated by Mr Castleton, being a litigant in person, but showing you the two things I have, the opening and the evidence, the evidence and the point were there, weren't they?
>
> A. I didn't understand them to be there in that way at the time, nor did I understand them to be there on the basis of paragraph 3 of the amended defence and Counterclaim at **LCAS0000294**. (160:15 to 161:1)

Paragraph 3 of the Amended Defence and Counterclaim, states it is, "admitted that the Defendant produced weekly Balance Lists and personally produced, signed off on and submitted to the Claimant Cash Accounts final as alleged in paragraph 7…" This supports what Mr Morgan is saying, but the next paragraph says, "Such alleged losses as the said weekly Balance Lists and Cash Accounts (Final) appeared to show were illusory, not real."

A point of some importance is whether the Inquiry accepts that Mr Morgan did not understand at the time that Mr Castleton was saying the Horizon records that he had signed off as true and fair were, in fact, disputed. Mr Beer is putting to him that it was very much in plain sight and central to Mr Castleton's case. It is hard to see how Mr Morgan could fail to understand this most obvious of points, which was not lost on the judge in the trial either. Our best explanations are either he is simply sticking to a bad argument made in the heat of the moment during his examination in the Inquiry or it is an example of how the 'chancery strategy' and effluxion of time has warped his own understanding of the case.

When thinking of a clever legal framing for facts, lawyers can get caught up in their own 'logic', which permeates other behaviours. So, for instance, Mr Morgan called a statement of account a *Castleton* document rather than a *Horizon* document (68:2–5) and a *primary* document (68:13) because Lee Castleton signed it.

One can get a sense of the adversarial blindness of the approach from this brief piece of evidence from Mr Morgan where he is trying to assert Castleton gave evidence that the statements of account were true and fair, when what Castleton appears to be saying in fact is that the figures were not made up by him:

> I put to him, quite aggressively at one point, that, in fact, he was making up the figures, for instance for cash that he had received, and he maintained his position throughout, as he was perfectly entitled to do, that his accounts were true and accurate. (71:7-12)

What Mr Castleton is saying is that Horizon created the figures; it was not him who 'made them up' but bugs.

If one looks at the transcript of Lee Castleton's cross-examination, the position also appears clear. For example, Mr Morgan puts to Mr Castleton, "You admit that there is an apparent shortfall of £25,758", to which Mr Castleton's reply is, "The key word there is apparent."[12] Mr Castleton does not accept that the computer produced figures are entries produced and entered by him.[13] When asked a leading question about whether the arithmetic is wrong, he asks to show them transaction records which he implies would show the Horizon entries are inaccurate but the judge declines insisting he just answer the question put.[14]

Frankly, the idea that Mr Castleton did not challenge the truth of these documents is ludicrous, save in the semantic sense that he agreed the statements of account were the figures produced by Horizon. Mr Castleton *clearly* challenges the truth of the documents. As Lee Castleton says during his opening speech, "You'll find that all of those losses have had calls and assurances from the Post Office themselves that they would look into the reason as to why those losses were occurring." (155:20-23)[15] As the judge opines in the opening, "The biggest issue in this case seems to be whether the computer was working properly isn't it?"[16]

Interestingly, in spite of the ways in which Jason Beer takes him to the documentary evidence to the contrary, Mr Morgan maintains throughout his entire evidence to the Inquiry that Mr Castleton accepted that Horizon accounts were true.

Towards the end of his evidence, he is asked if Lee Castleton's case is not a dreadful miscarriage of justice. His statement is that "I was asked to prove the case

[12] See POL00069279 p. 18

[13] See POL00069279 p. 19

[14] See POL00069279 p. 27-28

[15] See LCAS0000197 unofficial transcript, p. 12

[16] See LCAS0000197 unofficial transcript, p. 14

that I did on the basis of documents signed by Mr Castleton, whose truth were not challenged by Mr Castleton" (187:2–5). He sticks to his Chancery gun, and though asked repeatedly, does not concede that a miscarriage of justice has occurred.

Managing evidence of Horizon problems?

Might Mr Morgan's strategy have infected the management of the evidence in the Castleton case? A critical issue here, as with all the Post Office cases, is disclosure.

We have already seen how the Chancery strategy removed the need to prove the integrity of Horizon, and that Mr Morgan comforted himself that Horizon was operating properly based on assurances from Bond Pearce (110:18&20) and that POL had professed a "degree of confidence that Horizon was a sound system." (77:22-25). Not for the first time (and certainly not for the last we surmise) is the sense that the Post Office's legal strategy ran on confidence and instructions rather than meaningful evidence.

As we have stated, Morgan asked a large number of questions about Horizon (181:5-6). As he notes, "I didn't get answers." (177:1–3). He does not recall being told anything in response to his enquiries as to whether Horizon data could be altered (90:12-25); about system manipulation (73:16); and error incidents that had been reported (73:18–20): "I don't recall ever being told that there were incidents or weaknesses and the issue seemed to fall away" (73:19–21). Had he known the true position (92:5–10), that Fujitsu could access and alter information in an unrecorded way, he appears to accept that would be extremely adverse information that might alter the "dynamic between counsel and lawyers" (93:2–4).

And yet there was evidence of problems. The temporary sub-postmaster who replaced Lee Castleton experienced problems with Horizon. These were small in financial terms but important in principle, as they showed Horizon might lose transactions (101:6–7); they seem to be explained to the court on an inaccurate basis (102:7-25). Anne Chambers indicated in her evidence to the Inquiry in September 2023 that the evidence should not have been presented as if the disappearing transactions Mr Booth had suffered were a failure of Mr Booth.[17] This was because it was a problem with Horizon, not Mr Booth.

When the Falkirk/Callendar Square receipts and payment mismatch bug[18] is drawn to Morgan's attention at the start of the trial (102:13–18) his approach is to say that they need evidence as to why it is not a problem relevant to Lee Castleton's case (102:13–18). Although he also indicates it probably needs to be disclosed, he decides to delay disclosure (102:19–25) and see if the judge thinks it is relevant.

[17] Chambers Transcript 27 September 2023 (133:18-19)

[18] The Callendar Square/Falkirk bug affected legacy Horizon users; it generated duplicate financial transactions.

As the trial develops, he feels able to treat it as inadmissible because of a ruling the judge made in his favour against calling evidence from other branches about Horizon problems apparently made at Morgan's request (104:19–24; 106:3–13). Morgan resists Castleton's requests to call witnesses from other sub-branches who have experienced problems with Horizon.

The implication appears to be that evidence that Morgan thought he might have to disclose is rendered inadmissible because of his own submissions to exclude all but limited evidence on what is going on in other branches. Ultimately the bug was not disclosed (106:23-25; 106:20–25).

We might get a flavour of Mr Morgan's approach to such issues in his opening, where he says, "Because what I think Mr Castleton intends to do is to say that if any other Postmaster has ever experienced a problem with Horizon, then that is relevant to his trial".[19] And he invites the judge to exclude such evidence. This, in effect, prevents Lee Castleton from evidencing Horizon's problems because Mr Morgan has persuaded the judge it is speculative desperation on his part.

We also know that there was a decision not to disclose the fact that 12-15,000 calls were being received on the helpdesk per month, although Mr Morgan says he was not involved in this decision (178:24). This evidence is highly significant. It suggests significant volumes of problems operating Horizon and, potentially, dealing with Horizon errors.

He says he does not remember any BDO report (who began providing accountancy evidence on the operation of Horizon). BDO had provided "some indication of possible problems with Horizon" according to their initial letter to the solicitors that double entry "is not being put through" on Horizon. BDO's report wasn't finalised because (according to Stephen Dilley) Counsel was satisfied the case was made out on witnesses of fact and had advised they not disclose it (e.g. 193:18-20).

The report contained evidence of bugs that were not disclosed.

Mr Morgan agrees he would have advised they did not need to disclose on the basis it was privileged. This is a legitimate reason for not disclosing the report, but it does not relieve the lawyers involved, including Mr Morgan, of considering whether they have been put on inquiry for other documents that needed to be disclosed (relating to the underlying errors that BDO had discovered). They should have stopped to think: what is the evidential basis for the errors in the report, and whether they needed to disclose them?

The witness statements of Mr Dunks in the Castleton case contained a reference to 'Known Error Logs' (KEL). The Known Error Logs were not disclosed and would have, along with the helpline calls, painted a very different picture of Horizon's reliability.

[19] LCAS0000197 unofficial transcript p. 50

Years later, the Post Office was found to have resisted disclosure of KELs in the Bates litigation on an improper basis, including their irrelevance—they were highly relevant—and the Post Office's lack of access to them (also incorrect).

There are interesting signs of the potential for mutual irresponsibility problems to mark the handling of disclosure. Mr Morgan emphasises he wasn't instructed on disclosure (e.g. 113:20-23 and 180:13-14) although the evidence suggests he advised on some important disclosure questions (the disclosure of the BDO report and the Falkirk/Callendar Square Bug) discussed above.

There is also an interesting remark where Morgan says Counsel hates to be asked to advise on disclosure (179:10-11). This may speak subconsciously, to the cognitive clarity created when Counsel can operate a case strategy unencumbered by more detailed concerns in the evidence being managed by 'sophisticated' solicitors. Indeed, this may be one of the tactical benefits of separating advocacy and litigation functions.

We are not insinuating anything necessarily sinister in this; rather, we are emphasising the way in which case strategy and fact management can lead to a lack of clarity about the underlying obligations to ensure cases are *not* put on a misleading basis. The reluctance to engage in questions of disclosure is a way of managing the labour and risk of litigation, which *enables* the person nominally responsible for the strategy before the court to have limited responsibility and accountability for the problems now being exposed.

It also reduces the risk of accidental exposure to damaging evidence. Morgan can devise a strategy and then claim he was asked to do it; he can rely on lawyers to manage the evidence under him, even if they go a bit too far in squeezing out (deliberately or accidentally) adverse evidence. He is able to run the case in court untainted by any issues that could complicate the presentation of the chosen strategy. An interesting question is whether this is a sensible division of labour or an example of a structured form of willing blindness.

Ambush etc.

There are other dimensions to the tactics which are problematic. Parts of the case are run on a basis seen by those instructing him as brinksmanship and ambush. Whilst Morgan denies engaging in an ambush, a telephone note of a call on 16 October with Mandy Talbot and Stephen Dilley present suggests that they see it as ambushing the other side: "When we serve these 15 witness statements on them, they will be knocked reeling a bit" (124:23-24).

The impact of these tactics might not seem egregious to lawyers accustomed to hard-fought High Court litigation, but it should be remembered that shortly before the trial, around the time of a period of hospitalisation for stress-related ill health, Castleton becomes a litigant in person. Barristers, unlike solicitors, do not have a specific obligation not to take unfair advantage of litigants in such circumstances, but must not abuse their role as advocates.

One can get a sense of the cool, client-centred approach to legal risk that lies behind the Chancery strategy if one reads his advice after the Castleton trial. Here we see Mr Morgan advising the Post Office how to maintain the reversal of the burden of proof when suspending or firing a sub-postmaster:[20]

> …if and when it is decided that a sub-postmaster is to be suspended or removed from post, he should be required, in accordance with the terms of his contract, to produce and sign a final account to the date of his removal, whether or not the Post Office has conducted its own audit. The purpose of requiring this is simply to rely on the reversal of the burden of proof and remove the necessity (though not the desirability) of having to call the auditors to prove the loss.

As we know, that attitude of reversal of evidential burdens sadly permeated the Post Office's approach far beyond this moment and this trial.

There is also the question of whether Lee Castleton's position as a litigant in person was exploited. He became unrepresented relatively late in the case, so the question can be confined, in the main, to the trial and its aftermath.

Lee Castleton, like any layperson, was always going to struggle in a conventional court. Judges in such courts may tend to take too passive an approach to managing cases involving litigants in person, leaning significantly on the legal representatives of their opponent.[21] The difficulties posed by being unrepresented are acute.[22]

There is guidance for solicitors and barristers on how to deal with the difficulties posed when opposing unrepresented litigants. It faces in two directions, as can perhaps be most clearly seen by a passage aimed at solicitors:[23]

- Knowing and using law and procedure effectively against your opponent because you have the skills to do so, whether that be against a qualified representative or a LiP, is not taking 'unfair advantage' or a breach of any regulatory code.
- You owe a paramount duty as a lawyer to the court and the administration of justice.

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[20] 'WBON0000023 - Lee Castleton Civil Case Study: Post Office Limited - Advice from Richard Morgan Following POL v Castleton' <https://www.postofficehorizoninquiry.org.uk/search?search_api_fulltext=WBON0000023>.

[21] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 Social & Legal Studies 405.

[22] See. ibid; Liz Trinder and others, 'Litigants in Person in Private Family Law Cases' (Ministry of Justice 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf>; Gráinne McKeever and others, 'Litigants in Person in Northern Ireland: Barriers to Legal Participation And' (Ulster University 2018).

[23] The Law Socety, The Bar Council and CILEX, 'Litigants in Person: Guidelines for Lawyers June 2015' (2015) <https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/litigants_in_person_guidelines_for_lawyers_-_1_june_2015.pdf>.

- Your duty to the court will take precedence if it conflicts with your duty to your client.
- You should tell your client if your duty to the court outweighs your obligations to them.
- You must not take unfair advantage of a LiP.
- However, you are under no obligation to help a LiP to run their case or to take any action on a LiP's behalf. Moreover, you should be aware that by doing so you might, depending on the circumstances, be failing in your duties to your own client.

There is no similar passage for barristers (who are not under an obligation not to take unfair advantage but have a, perhaps analogous duty, not to abuse their role as advocates). The guidance generally is of very limited use: it states the paramountcy of obligations to the court but aside from specific obligations, such as requiring courts not to be misled and ensuring relevant cases and statutory provisions are before the court, does not suggest further ways in which the duty might manifest or limit zeal on the client's behalf.

It may be because Mr Castleton is unrepresented that Mr Morgan deploys rhetorical devices (e.g. Horizon documents are referred to as "Castleton documents") and limited, really rather meaningless, admissions that Horizon accounts were signed off as true accounts, alongside arguments preventing witnesses of fact being called, to neuter Mr Castleton's defence's and bolster Mr Morgan's reluctance to disclose evidence he had decided probably *did* need to be disclosed. His own arguments have persuaded the judge and shifted the notion of relevance in his favour.

The likelihood is that the absence of a skilled opponent discourages reflection on the vulnerabilities and problems in his approach. As a result, he may have failed to properly reflect on disclosure (or one cannot discount the possibility that he deliberately or recklessly failed to disclose documents he ought to because he knew he was unlikely to get caught out).

Conclusions

The Chancery point that Mr Morgan relied on was helpful tactically because it encouraged the kind of 'flat earth thinking' that the Post Office were so vigorously criticised for in the Bates case. It ran on the assumption that Horizon worked well; it elevated the sub-postmasters signing off of statements of account to a presumption that they were true and put the burden of disproving those statements on those without the evidence to do so. Resistance to disclosing evidence that might assist compounded the problem. It did not prove the reliability of Horizon, but unless significant evidence emerged, it did the next best thing. It insulated Horizon against legal attack.

It might be argued that the 'statement of account' strategy was, at root, misleading. It suggests SPMs accepted Horizon accounts because they were signed off by them when it is plain, in Mr Castleton's case, that they were not accepted. An argument more reaonsbale and still consistent with the Chancery point was, whether he accepted them or not, he has signed for them and so has to prove that the accounts are wrong.

In professional ethics terms, the key question is whether the strategy meant the case was presented in a way that was deliberately or recklessly misleading. Was it misleading to imply that the accounts were true when he was aware that (a) the Post Office was desperate to neutralise Horizon challenge; (b) his questions about the fundamental operation Horizon were never answered; and (c) a draft experts report revealed conceptually significant (if financially minor) problems had occurred in Mr Castleton's branch?

Deliberate misleading is something professional tribunals take a lot of persuading of. On recklessness, a question would be whether Mr Morgan's approach to Horizon flaws was, (to use the definition of recklessness from the Bar Code of Conduct) to be, "indifferent to the truth, or not caring whether something is true or false." Does the 'sophisticated' approach to evidence management support this line of criticism? Are the problems with disclosure (some of which might be attributed to Mr Morgan in spite of him not advising in general on disclosure) signs of knowing indifference? Asserting Horizon's robustenss in the Castleton case in the face of undisclosed evidence to the contrary derived from Mr Castleton's branch would also assist with this argument.[24]

The counterargument would be that the 'Chancery line' was a way of looking at the case, based on a legitimate line of argument,[25] and one that had real tactical merit. On this reading, Mr Morgan simply understood that his best chance of winning was to allow Mr Castleton to fail to prove his own case.

Under this idea Mr Morgan is simply taking advantage of every argument he can make in favour of the Post Office. If he can argue the burden of proving Horizon failures falls on his opponent, he should. If he can convince himself disclosure is unreasonable or evidence that errors are insignificant and so do not need to be disclosed, this is open to him, and so on. Professional rules place only minimal constraints on the making of arguments; a point merely needs to be properly arguable, which is a low threshold. It enables seeing cases as tactical rather than truth-seeking,[26] rendering tactical adversarialism a central feature, a dysfunctional

[24] Hodge Jones & Allen's closing submissions to the Inquiry on Phase 4 allege an amendment to the Reply and Defence to Counterclaim makes positive assertions about Horizon reliability which are unsupported by evidence (paras 53-54) https://www.postofficehorizoninquiry.org.uk/sites/default/files/2024-02/SUBS0000027.pdf

[25] Albeit one rejected by Fraser J in *Bates v Post Office Judgment No 3 'Common Issues'[2019] EWHC 606 (QB)* (n 1).

[26] Sorabji persuasively argues that truth-seeking is at the heart of civil justice. See John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (1st ed, Cambridge University Press 2014).

vanity one might say, of our civil justice system. This is inspite of the system's professed belief in the overriding objective which requires (and required then):[27]

> (1) …the court to deal with cases justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing and can participate fully in proceedings and that parties and witnesses can give their best evidence….

Professional rules permit adversarial tactics, but in this case, they can be seen to have defeated the overriding objective. Is that the fault of the strategy's architect or the system?

To understand the professional propriety of what was done, it is too simple to say as Morgan did, "I don't think there was anything I could do. I had a case. My obligation was to run it to the best of my ability, in accordance with my instructions" (130:9-13). Whatever the instructions, he developed the strategy and took several decisions around the execution of that strategy, including seeking the exclusion of evidence of Horizon complaints beyond Castleton's branch and some of the questionable disclosure decisions.

If they were decisions that a reasonable practitioner in those circumstances would not take, and therefore decisions lacking in integrity, if disclosure plainly should have been given, for instance, then there is the potential to find professional misconduct. Or if the strategy as led and executed by Mr Morgan was so excessive as to be abusive, it might similarly be found to be professional misconduct (although the Post Office's aggressive insistence on not compromising the case – save on the most favourable terms to the Post Office – in spite of the commercial madness of so doing might be more properly laid at their not Mr Morgan's door).

A difficulty with accepting the legitimate tactics argument is that Mr Morgan does not put it that way when giving evidence on his approach to the Inquiry. He says, "I was asked to prove the case that I did on the basis of documents signed by Mr Castleton, whose truth was not challenged by Mr Castleton." This was wrong. Their truth was challenged. It is clear from reading the transcript of Mr Castleton's evidence to the Court, for instance, that Mr Castleton challenged the truth of the Horizon records regularly and vehemently.[28] The second sentence of the court judgment says, "The statement of the account, *though not its validity*, is

[27] Civil Procedure Rules, 1.1 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01#1.1

[28] 'POL00069279 - Transcript in The High Court of Justice Queen's Bench Division, POL and Lee Castleton' (*Post Office Horizon IT Inquiry*, 8 December 2006) <https://www.postofficehorizoninquiry.org.uk/evidence/pol00069279-transcript-high-court-justice-queens-bench-division-pol-and-lee-castleton> accessed 5 March 2024.

admitted."[29] Two of Mr Castleton's witnesses also challenged Horizon: Dorothy Day and Christine Train.[30]

Had Morgan defended his decisions on a factually accurate basis then one might tend to see the professional misconduct points as weak, but there is a puzzle presented because, as things stand, he has defended himself on a basis rather *contradicted* by the documentary evidence. Mr Morgan knew at the time Mr Castleton was contesting the truth of Horizon and was probably also aware at the time the case was brought of the strategic benefits to the client of fighting and winning an uneconomic case with a strategy that did not involve them in proving Horizon debts or Horizon reliability.

His decision to present the strategy from a professional imaginarium of simple propriety does not in itself indicate professional impropriety. It may simply be a sign of complacency or his embarrassment at sharp (but not improper) practice, or an advocacy strategy adopted before the Inquiry (a simplification of what actually happened to get the Chancery point across or avoid a debate about the morality of his actions). It is possible, too, that the very strategy has contaminated his recollection (if so, over time, he may have misled himself).

Whatever the explanation, the first flat earth strategy has an embarrassed architect but also one who does not, perhaps cannot, offer up an accurate account of what he did and why. Various self-serving biases may have flattened his own understanding of what happened. He cannot (or does not) defend its reality, but defends a fictional version of it.

If we put to one side whether the strategy was recklessly misleading, lacking in integrity, or the product of sharp but legitimate tactics, and the difficulties he faced in explaining himself, what remains to be explored is the *impact* the Chancery strategy may have had on the decisions that flowed from it. We end this paper by trying to summarise that chain of thinking and what may have influenced it:

- Richard Morgan's strategy emerged from a confluence of factors: the wording of the contract itself; Mr Morgan's Chancery background; his general concerns about proving the reliability of any complex computer system; and/or perhaps the specific problems he did or may have sensed were likely in Horizon.
- That strategy would likely have encouraged or allowed him to see such specific problems as part of the 'business as usual' problems of any complex software system – i.e. Horizon was not flawed, it merely had normal 'glitches'; (to use a phrase often employed by PO withnesses before the Inquiry).

[29] *Post Office Limited v Castleton* [2007] EWHC 5 QB, para 1.

[30] 'POL00069279 - Transcript in The High Court of Justice Queen's Bench Division, POL and Lee Castleton' (n 30).

- There is a sense in other evidence given to the Inquiry, that the client's (the Post Office's) responses to more conventional strategies of proving Horizon were resisted. As were, at least later in the case, any suggestions that settling the case would be sensible. The client's assurances that Horizon was robust, which largely seemed to amount to strong statements of belief in Horizon (e.g. 77:22-25), cemented the strategy as in accordance with the client's desires.
- That same strategy had the added utility of providing, if the case succeeded, a defence, both legal and psychological, to the fears of a flood of problems should they lose. The beauty of the strategy, from Post Office's viewpoint, was it was a fight they could wage without having to evidence the reliability of their system – their (typically outgunned) opponent bore the evidential burden.
- A system of "sophisticated" evidence management, which allowed the Post Office and its lawyers to wait until an opponent raised a problem to attack it, encouraged a lassiez-faire attitude to Horizon evidence. Interestingly, we note in Castleton, the Post Office did call Anne Chambers to support the reliability of the system. She expressed concern to the Inquiry about disclosure failures and her being treated as an expert defending the system when giving evidence rather than as a mere witness of fact.[31] Here we see a specific signal of how "sophisticated" evidence management jarred with those who understood Horizon. Mr Morgan may have been unaware of her concerns.

1. The sophisticated evidence strategy enabled a somewhat double-edged approach: Morgan felt able to be interested in Horizon risks so he had some sense of "where it could all go wrong for me" (91:18-19) but did not need to delve into those risks (because he was not going to have to prove the system was robust). This may have discouraged him from thinking more clearly about the disclosure of such evidence.
2. This double-edged approach may also explain why:
    a. The initial commitment to get and use independent accounting evidence seems to weaken as the case progressed (that such evidence begins to raise material problems with Horizon, when the mind is perhaps most closed to the possibility of disclosing such evidence, may be an additional or better explanation for this weakening).
    b. Initial questions about the general reliability of the system are not pursued to resolution.
    c. Explanations given by Post Office staff/lawyers as to why Horizon is robust or why problems can be ignored are accepted without thorough scrutiny.

[31] Chambers Transcript 27 September 2023

3. Just as the perceived relevance of undisclosed evidence was diminished in this account, so was the cases' broader significance: framing the retainer narrowly, as being instructed on a debt claim (130:16), as not instructed on criminal law aspects (56:16-20); or on disclosure (e.g. 113;20-23). In these ways he constructs for himself a limited sphere of responsibility.

- The lack of evidence supporting Horizon's general robustness is technically justified, in his mind and up to a point forensically, because under the strategy, it is not needed. The strategy may also encourage the discounting of specific evidence against Horizon (mostly emerging later in the case) because it is for his opponent to evidence those.
- In essence, Morgan's case relies on repeatedly repeating (especially when cross-examining) that Lee Castleton signed Horizon records weekly as a true account, ignoring evidence that contradicts this as not his concern but his opponent's.
- The flaw in this approach is that he cannot ignore evidence that should have been disclosed. The strategy may have encouraged him to ignore it rather than weigh it objectively.

4. Disclosure rules provided him and the other lawyers with ways of arguing, should he need to, or ways of persuading himself that non-disclosure was justified; they did not lead to disclosure.

5. It may follow that the application of disclosure tests to adverse evidence is influenced by a warped notion of relevance derived from the statement of account approach.

- As a result, perhaps Morgan's assessment of whether evidence is relevant is determined or heavily influenced by the Post Office's own case theory rather than their opponent's case theory. Matters of relevance and reasonableness are seen through the Post Office's eyes, not through a more neutral lens. It is an obviously wrong way of thinking about matters leading to either non-vigilant, expedient or perhaps even improper decisions about disclosure.
- Motivated reasoning is almost certainly at work here. This describes the way that "people are more likely to arrive at conclusions that they want to arrive at, but their ability to do so is constrained by their ability to construct seemingly reasonable justifications for these conclusions."[32] The BDO report is a classic example; Morgan is probably right that it is privileged and so the report is not disclosable, but having found a reason not to disclose something which might give them difficulty he does not appear to stop to think more deeply about disclosure of evidence underlying the report. The errors revealed in that report should have put him and his instructing solicitor on alert that evidence of errors underlying the report probably

[32] Ziva Kunda, 'The Case for Motivated Reasoning' (1990) 108 Psychological Bulletin 480.

needed to be disclosed. By the time the case came to trial, his opponent was unrepresented. So his strategy is untested by serious opposition.

- The boundaries between impropriety, carelessness, wishful thinking, and overconfidence are likely blurred further by the pressure of the moment; psychologically this shifts decisions towards expediency.[33] One might surmise that this is especially likely in and around trial and when facing an unrepresented opponent.

We will never know, although the Inquiry (or a disciplinary tribunal should the case be investigated) may form a view, on the professional judgements made by Mr Morgan. We can see with some clarity that the explanation he offers the Inquiry is unsatisfactory (indeed probably wrong); and does not fit the documentary evidence; but we can see too (although he does not really offer this explanation) that his thinking may have been clouded by taking an adversarial, tactical view rather too set on winning and rather less concerned with truth.

Although the civil justice system is supposed to be geared towards truth-seeking, an advocate's role is not as long as they do not mislead others, especially but not exclusively courts. They disclose evidence when they should and behave with integrity (including not abusing their role as advocates). This raises really interesting questions as to whether an advocate's duties are appropriately defined by the Code and how they arguably misalign with the overriding objectives of civil litigation.[34]

Separate from forming a view on those judgments, it would also be sensible to raise questions about weak guidance dealing with litigants in person,[35] the inadequacy of disclosure regimes which allow for such slack thinking, and the obvious difficulties in courts allowing an artful legal argument to shift the burden onto those least able to prove their case.

In Lee Castleton's case, he was subject to multiple disadvantages: he was required to prove Horizon was faulty without having the evidence available to him to do so, having had some evidence available to him excluded to make the trial more manageable for the judge, and whilst unrepresented. If all these burdens had not been tilted against him, it may or may not have led to different decisions on the irrelevance of evidence and disclosure of Horizon problems, for instance. However, it seems reasonable to assume that, at the very least, a flat earth strategy would have been executed with more restraint, and it would have been more likely to fail.

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[33] Max H Bazerman and Ann E Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do about It* (Princeton University Press 2011) <https://books.google.co.uk/books?hl=en&lr=&id=A-crywke5jEC&oi=fnd&pg=PP2&dq=bazerman+blind+sports&ots=n3a7sjaBeK&sig=kcZCnyvISqdbGdw1WqTMHXie9tQ> accessed 11 July 2016.

[34] See text associated with footnote 27

[35] See the text associated with footnote 23