DENIALISM: THE LATEST ENTRANTS Lloyds Bank the Post Office, Clausewitz and the tinkling teacups of the English judiciary

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"This is an unacceptable denial of responsibility"

Professor Sir Ross Cranston on the Lloyds Banking Group's *Customer Review* compensation scheme, December 2019

The Post Office's position at trial *"... amounted, in reality, to bare assertions and denials that ignore what has actually occurred.... It amounts to the 21st century equivalent of maintaining that the earth is flat."*

The Honourable Mr Justice Fraser, December 2019

"In the psychology of human behaviour, denialism is a person's choice to deny reality as a way to avoid a psychologically uncomfortable truth. Denialism is an essentially irrational action that withholds the validation of a historical experience or event, when a person refuses to accept an empirically verifiable reality."

Wikipedia entry on "Denialism."

1. The Lloyds Bank no-compensation compensation scheme

On one view, events at the Lloyds Bank/HBOS Reading branch might be thought unsatisfactory.

On 14 October 2008 Mr Andrew Reade, a customer of Lloyds Bank, delivered a bulky document to Sir Victor Blank, Chairman of the bank. The document identified an alleged fraud by a company called Quayside Corporate Services and highlighted Quayside's arrangements with HBOS (Halifax Bank of Scotland) and a director of the Impaired Assets (IA) unit at HBOS's Reading branch (IAR). Lloyds was about to take over HBOS.

Mr Reade complained that the activities identified in his dossier had impacted some 50 companies and thousands of employees' jobs and lives.

Earlier, In 2007, a bank internal peer review of the IAR had been undertaken. That review identified "*unusual strategies employed in the management of cases, with cases exhibiting increasing rather than decreasing risk*". This was noted, in particular, in connection with Mr Lyndon Scourfield's portfolio. Scourfield was manager of the IAR. The bank's Corporate Financial Crime Prevention team undertook a review. It concluded that, though there was some possibly odd evidence of Caribbean holidays and US business trips, there was no evidence that Scourfield's actions were for personal gain or were of a fraudulent nature. No further investigation was considered necessary.

In 2007 HBOS had terminated loans to a Mr and Mrs Turner. They had sunk their life savings into their music publishing business and taken loans in 2003. Unfortunately for them, Scourfield managed their account. They were reduced to penury and living on state benefits. Mrs Turner later explained that the family scarce had enough to eat. Possession proceedings were issued against them to recover their home because they couldn't keep up mortgage payments. (Later, the Financial Conduct Authority (FCA), unusually, intervened with the result that the legal proceedings were stayed.) The Turners were responsible for some of the information provided by Mr Reade to Lloyds in 2008. They believed that after Lloyds acquired HBOS in 2009 it would be a new dawn. The Turners had amassed a trove of evidence of wrongdoing and dishonesty documenting arrangements between HBOS and Quayside. They were nonplussed when Lloyds inexplicably stonewalled, expressed no interest in their allegations or in further investigation, and loftily dismissed the Turners' concerns. The Turners, who over the whole period were subject to no less than 11 eviction applications seeking re-possession of their home, received a letter from a senior Lloyds' executive, Philip Grant, stating: "*[w]hilst I appreciate you disagree with our position, the bank firmly believes you have been treated fairly*". This was correspondence worthy of the pigs in *Animal Farm*. It depends on your frame of reference, and upon the conception of "fair". Grant was formerly employed by HBOS.

Track forward 8 years. Employees of Lloyds were tried for offences of dishonesty, fraud and money laundering in the IAR and its connection with Quayside. With others from Quayside, they were sentenced to a total of 47 years' in prison. Lynden Scourfield received a prison sentence of 11 years'. In his sentencing remarks the trial judge said:

> "*The harm for which you were individually and collectively responsible can of course be quantified in cash terms but cannot be so in human terms. Lives of investors, employers and employees have been prejudiced and, in some instances, ruined by your behaviour. People have not only lost money, but in some instances their homes, their families and their friends. Some who would have expected to be comfortable in their retirement were left cheated, defeated and penniless*."

Up to that point, Lloyds Bank had denied all knowledge of the fraud, *the total estimated value of which is now thought to have been around £1 billion*. What Lloyds Bank *actually* knew, and of what it was put *on notice*, are now the subject of a separate inquiry headed by Dame Linda Dobbs

DBE, a former High Court Judge. Its findings, though these will be provided to the FCA, are not expected to be made public. If I had been a customer of the IAR, I would be *very* interested.

When all else fails, say "sorry" and ask everyone to move-on

Let us track back to 2013. Lloyds had been in receipt of a 158-page report entitled "*Project Lord Turnbull, Operation Hornet*" (nothing to do with the former Cabinet Secretary). You can read it on the link here.[1] Operation Hornet was identified as "*a large-scale investigation into serious financial irregularities involving the former HBOS High Risk & Impaired Assets team, based in Reading*." On the front page of the report were a quotation and a statement. The quotation was:

> "*Anything we can do to widen the gap will help the Audit Committee not to disclose, and that is something we seriously don't want to do especially at this moment*".

That was attributed to the Group Risk Director of HBOS in February 2008, shortly before the acquisition by Lloyds of HBOS. Looking at the matter from the other end of the telescope from the penury to which the Turners had been reduced, the 2013 report included under the title "*Non-Disclosure of the Reading Incident*" the statement:

> "*At a basic level, if the Reading Incident had been properly disclosed in the 2007 Annual Report and Accounts then it is unlikely that the Rights Issue would have been capable of proceeding and irrespective of whether the Government stepped in or not at that time to prevent the collapse of HBOS, it is unlikely that a solvent acquisition by Lloyds TSB would have occurred.*"

The report included the author of the report's view that: "*Disclosure of the Reading incident at that point in time [the February 2008 Annual Report and Accounts for 2007] would in all likelihood have precipitated the collapse of HBoS*."

In May 2014, the Lloyds Banking Group wrote a letter to the Financial Conduct Authority stating: "*We and our external legal advisers, have reviewed the [Project Lord Turnbull] Report and are considering whether any aspect of it requires further investigation by LBG. We think this unlikely for the reasons stated previously*".

The Financial Services Authority had undertaken a review, which it provided to Lloyds in 2010. That review identified payments to Quayside and other related entities worth about £8 million – more than could be accounted by a conventional business relationship – and other suspicious transactions and irregularities. No further regulatory investigation was undertaken. The Serious

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1 http://www.appgbanking.org.uk/wp-content/uploads/2018/06/draft-Project-Lord-Turnbull-Report-part-1.pdf
http://www.appgbanking.org.uk/wp-content/uploads/2018/06/draft-Project-Lord-Turnbull-Report-part-2.pdf

Fraud Office was uninterested, presumably on the basis that it thought it only frivolous. It was left to Thames Valley Police to investigate. The investigation is estimated by the Police and Crime Commissioner for Thames Valley, Mr Anthony Stansfeld, to have cost the force about £7 million, only £2 million of which has been recouped.

There is a significant financial *disincentive* to the investigation by the police of serious fraud. That is contrary to the public interest. More concerningly, Stansfeld is on record as having said that the Lloyds Banking Group was less than co-operative in the investigation ("merry dance" has been used). Ms Sally Masterton, author of the Project Lord Turnbull report, a senior risk officer in the Lloyds Banking Group, was suspended from her job, prevented from working with the police, discredited to the Financial Conduct Authority, and sacked by Lloyds. Much later, in 2018, Lloyds belatedly confirmed that Ms Masterton, the formerly shot messenger, had "acted with integrity and in good faith at all times". With this sleight, Lloyds has warned others who might be tempted to follow her lead, whilst sanctifying itself with cost-free contrition.

The criminal trial in 2017, so far as the prosecution of the defendants was concerned, proceeded along lines identified in the *Project Lord Turnbull* report. Following the convictions, Lloyds Bank apologised to its customers for the IAR fraud. Lloyds agreed to set up a review and compensation and redress scheme for those who had suffered as a consequence of the fraud (the *Customer Review*). One policy always available to large institutions where all else fails is to apologise – the dogs bark and the caravan moves on. The Customer Review was to be devised and operated by Lloyds, but under the oversight of Professor Russel Griggs as putatively independent reviewer.

In 2017 the Financial Reporting Council discontinued its inquiry into KPMG's audit function for HBOS.

Vaunting contrition to escape from perdition

Let us track forward again, now to December 2019. The Customer Review by Lloyds had generated such widespread dissatisfaction and public concern that it gave rise to a debate in parliament on 18 December 2018, moved by Mr Kevin Hollinrake MP.[2] Hollinrake is Chair of the *Cross-Party Parliamentary Group on Fair Banking,* arguably the most influential cross-party parliamentary group. He told his parliamentary colleagues that the victims of the IAR fraud "*have described the review to us as corrupt, disgraceful, one-sided and evincing an absence of due diligence, with manipulated documents and lies about evidence. Agreed payments are not met, and the process makes life as difficult and unpleasant as possible. These are victims of fraud*".

The result (in reply to the debate), was that the Economic Secretary to the Treasury announced that the Lloyds Banking Group had agreed with the Financial Conduct Authority that there should be a "*post-completion review to quality assure the methodology and process*" of the Customer

[2] For a transcript: https://www.theyworkforyou.com/whall/?id=2018-12-18b.270.2

Review. The remit was to determine whether the Customer Review conducted by Lloyds Bank produced "*fair and reasonable outcomes*" for customers.

Sir Ross Cranston, professor of law at the London School of Economics and former High Court judge, was appointed to head the assurance review. This was perhaps unfortunate for Lloyds, because Cranston, in addition to being formerly a judge, is a banking specialist. Obnubilation became unlikely. Cranston delivered his review report on 10 December 2019, an event unfortunately overshadowed by the general election result. Cranston regretfully concluded that Professor Griggs had been conflicted and that he "*was placed [by Lloyds Bank] in an impossible position"* and that "*his appearance of independence was undermined by the way that the process was structured*". Griggs, in short, had been captured.

More remarkably still, Cranston concluded that, so far as direct and consequential (D&C) losses to business affected by the Reading fraud were concerned, "*this part of the Customer Review, both in structure and implementation, was neither fair not reasonable*."

There appear to be two possible explanations, either the Lloyds Banking Group, with a battalion of competent and reassuringly expensive lawyers, was simply *unable* to devise a compensation scheme structure so as to satisfy basic requirements of fairness and reasonableness, or else the scheme was *intentionally* unfair (and not expected to be subject to further high level scrutiny or review). As to the latter possibility, the consequence, as Cranston was at pains to emphasise, was that:

> "*as a matter of analysis, therefore, on the Bank's approach, the Bank appears to have been the only victim of the fraud to have been caused financial loss*."

This was the result of the Customer Review structure that itself had the result that Lloyds Bank customers' D&C loss claims "*from the outset .. could not meet the standards that the bank had set for such claims, in part because the standards themselves had not been communicated to those claiming"*. Pure Kafka. Cranston noted that in some cases, where Professor Griggs was dissatisfied with Lloyds' approach to D&C claims, Lloyds responded by simply increasing allowed distress and inconvenience (D&I) payments. These, Cranston concluded, "*could not be logically justified*".[3] *Not a single award was made by Lloyds for D&C losses*. That failure, in Cranston's assessment, communicated that the failure of every single company affected by the fraud was inevitable and not caused by the fraud, and that none of the customers' financial suffering had anything to do with the actions of the criminals. Accordingly, Lloyds Bank and its Customer Review "damagingly communicated" that *all the business failures and all of the suffering were of the customers' own making*.[4] This was clever, the methodology adopted could be said to nicely fit with the position that Lloyds had adopted when in receipt of complaints from Reade, the Turners and many others. Further Cranston found that "*because the Bank never properly explained its methodology or its findings,*

[3] Cranston 15.58.
[4] Cranston 15.20.

customers were not given information to understand why they were (and were not) being compensated".

Cranston's evaluation was that: ***"[t]his is an unacceptable denial of responsibility. It undermined the sincerity of the Bank's apologies for the IAR fraud"***.[5] He concluded that Lloyds' assessment of compensation was "flawed".

Questions remain why and how this happened? It would be disappointing to conclude that Lloyds was simply helpless to devise a fair compensation scheme; but if it was not, what then? What inferences are to be drawn?

The only lesson to be learnt is that lessons aren't learnt

The outcome is eloquent of the absence of any real accountability for banks. This is both an actual absence, reflected by the FCA's seemingly light-touch response, and, crucially, *an expected* absence of accountability, as perceived by Lloyds itself. On one view, Lloyds was unlucky on three counts, the first was that, despite the lack of interest of the FCA as regulator (still less the Serious Fraud Office that has more important matters to attend to), Thames Valley Police, as the local constabulary, were willing to pursue the criminal investigation - despite it draining the police authority of its scarce funds; second, the Hollinrake CPPG parliamentary debate on the Griggs' Customer Review that had prompted such a noisy public outcry; third, that Sir Ross Cranston was appointed to undertake the assurance review – the wrong reviewer for Lloyds at just the wrong time.

It is scarcely likely that Lloyds would have structured the Customer Review as it did, had it known that the scheme would be subject to rigorous scrutiny by someone as expert and independent (compared with Professor Griggs) as Sir Ross Cranston whose independence Lloyds was powerless to compromise. That, of course, is unless one subscribes to the view that Lloyds and its legal team simply couldn't help devising a scheme that was neither fair nor reasonable – as Cranston concluded it was.

2. Size matters, judicial distaste for allegations of fraud

TS Eliot reflected, where is the wisdom that we have lost in knowledge and the knowledge that we have lost in information? Less elegantly, it might be enquired whether in the current animated 'woke' public discussion of the treatment of the disadvantaged, as though a strange contemporary problem hitherto unknown, sight is not lost of the ancient biblical imperative to "uphold the cause of the poor and the weak". These things are contextual and relative. But if you are a modest-sized enterprise and suffer an actionable wrong at the hands of a very large institution, where the cause of the harm is *systemic* in nature (rather than one-off or self-contained[6]), the chances of obtaining a remedy in English law - or for that matter any remedy at all, regardless of merit, are slight and the odds are heavily stacked against you (see above – and below).

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5 Cranston 15.19, 15.20.

6 I would use the expression 'transactional' – but that is inexact, and generalities and absence of nice qualification, in an article of this kind, are unavoidable.

Clausewitz, who wrote virtually all that there is worth saying on the subject, observed that conflict tends to the extreme. The only impediment to the will to overcome resulting in ultimate destructiveness (*absolute* war) are what he identified as 'frictional' constraints. These he suggested, on the one hand were economic (think the Habsburg monarchy in 1811) and, on the other moral (though cognate, not quite the same as morale), the latter always especially acute in democracies – see Vietnam). If you want to keep a domestic economy going while fighting, there is a balance to be struck. So it is, of course, with litigation. A long time ago, at the height of the swaps mis-selling scandal, a litigation partner with a specialist financial services practice told me that the risk analysis of swaps litigation almost always indicated against claiming in favour of the wronged innocent party bearing the loss (if sustainable), however egregious or dishonest the mis-selling and regardless of how complex and plainly unsuitable a derivative. The reasons were the downside risk to his clients' businesses in terms of the diversion of resources, and that the banks, as typical sellers, for practical purposes had unlimited resources with which to contest and, as importantly, delay a claim.

That reluctance was distinct from legal obstacles presented by a judicial enthusiasm, now a bit abated, for the Alice in Wonderland world of misrepresentation created by the Court of Appeal judgments in *Peekay* and *Springwell*, that have facilitated and encouraged bank reliance upon 'basis clauses'. For some 15 years, until the Court of Appeal's welcome and sensible decision in *First Tower Trustees*, the judiciary had failed to notice - or had else positively dismissed[7] - that these, bank-devised standard-form clauses, in circumstances of disparity in bargaining-power, operate as exclusion or limitation clauses. Such clauses are subject to statutory control, effecting the *will of parliament,* rather than the common law, however generously this be interpreted by judges in favour of the banks.

Additionally, there is a slightly quaint and otherworldly judicial reluctance to believe that banks give advice to their customers (bad or otherwise) unless contractually provided and paid for. The German courts, from the *Bundesgerichtshof* (Federal Court) downwards, have adopted a view that may well accord rather better with reality, recognising that banks, in fact, frequently do so.[8]

There is a further constraint against modest enterprises engaging in litigation against large institutions where serious impropriety or dishonesty are in issue; the courts at an interlocutory (*ie* pre-trial) stage are highly resistant to entertaining the possibility of serious institutional misconduct in the absence of very clear evidence. The problem in some respects is circular. Often, to start with fraud and dishonesty are only inferences drawn from meticulous analysis of circumstances that require documents to be obtained and delicate threads to be followed. Getting documents at an early stage is a bit tricky because the courts don't like what are routinely disparaged as objectionable "fishing expeditions" - an objection that fails to recognise that the point of fishing is to catch fish. Other reasons for this difficulty are quite complex, but the major obstacle is a curious reluctance on the part of the judiciary to entertain the possibility that large institutions behave badly. Lytton Strachey's image of the tiny tinkling teacups of the Victorian clergy springs to mind, don't mention the 'f' word – especially with banks. One would have thought that by this stage, experience would have taught judges that a

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7 Notably in *Crestsign*, a case often cited for a doubtful proposition.

8 The '*Bond*' decision: Federal Court judgment of 6 July 1993 XI ZR 12/93 BGHZ 123, 126.

strong presumption of propriety, only rebuttable by clear evidence, is quite often unwarranted and unsafe.

In English law there are, additionally, very significant procedural impediments to a party pursuing a claim for fraud, many of which are historic in origin. The idea that making an allegation of fraud against a bank is a very serious thing to do, because it carries reputational implications, is a bit anachronistic, and belongs to an age when bankers provided *lending services* to family firms and looked after *their* interests and famously - for the Accepting Houses (then the commercial banks) at least - "my word is my bond" had content and was a self-policed, culturally-embedded code. But the courts continue to treat banks with what I have called a 'special tenderness'. The Chancellor of the High Court, Sir Geoffrey Vos, has, for example, extolled the "symbiotic" relationship that subsists between the courts and the financial services industry. There was a time when wise judges steered clear of making extra-judicial statements that might be thought to suggest favouritism.

Further, the judiciary are surprisingly *unsympathetic to victims of fraud*. It was less than a year ago, in only March 2019, that the Supreme Court considered it necessary to explain to the lower courts that a victim of a *judgment* obtained by fraud *did not have to act with diligence* to apply to set such a judgment aside, absent which the judgment would be enforced: *Takhar v Gracefield Developments Ltd.*[9] Put another way, the Court of Appeal's erroneous view was that judgments obtained by fraud *should be enforced* by the courts, *unless* the victim could demonstrate that they had acted expeditiously to set the judgment aside. Thus, in the judgment of the Court of Appeal, a fraudster doing time in prison could enforce a fraudulently obtained charge over property. Pretty peculiar, you might very well think? Oddly, there was no judicial decision that directly supported the Court of Appeal's judgment. Though overruled by the Supreme Court, the Court of Appeal's judgment in *Takhar* exhibits the contemporary vogue, at all levels of the English courts, for emphasis upon process over substance. There are a number of reasons for this systemic problem, lack of resources, including an increasing shortage of judges and suitable applications for judicial appointment, is one. It results in an unfortunate 'exclusionary' mindset that results in the conduct of English litigation being a bit like the Grand National, with stages of litigation providing lots of opportunity for expensive leaps over, and falls at, procedural fences. (These issues are tempered if there is a very great deal of money at stake, circumstances that noticeably impact the exclusionary mindset.)

The consequence of all this is that an allegation of fraud against a bank, that does not succeed, carries disastrous financial consequences that are *purposely penal in effect*, intended to operate as a deterrent against a party launching such claims. The institutional (judicial) fear is that otherwise distasteful allegations of dishonesty will be made willy nilly (from the Latin, '*willum nillum'*). But this constitutes a super-added constraint on access to justice that is little discussed and is merely assumed to be reasonable. But its logical basis is questionable, largely unexamined and merits proper critical evaluation. It is a policy that is ripe for adjustment. Twenty years' ago, a customer of a bank alleging that banks appeared to be colluding in dishonestly manipulating the LIBOR interbank

[9] [2019] UKSC 13, reversing the Court of Appeal [2017] EWCA Civ 147 about which I have elsewhere commented: '*Courts as the instrument of fraud*': https://www.litigationfutures.com/blog/courts-as-the-instrument-of-fraud

reference index rate would have been treated by the courts as seriously detached from reality, possibly unhinged, and slightly hysterical. It is noticeable that, further, while in truth so great a systemic problem in the banking industry that LIBOR is to be abolished next year and substituted by a central bank overnight index rate (i.e. SOFIA for sterling), the English courts have been helpless to hold *any* institution engaged in LIBOR-rigging liable in law for doing so, regardless of regulatory fines running into billions.

Wrongdoing, if done by a body of sufficient bulk, presents the courts and English civil law with particularly intractable problems, both procedural and substantive. Mrs Justice Asplin, in the only English decided civil case on the issue of LIBOR-rigging, *Property Alliance Group Ltd v Royal Bank of Scotland Plc*[10] baulked at drawing any inferences adverse to The Royal Bank of Scotland from the refusal of senior officials, alleged to have knowledge of the LIBOR arrangements and bank LIBOR policy, to give evidence to the court. Never mind that this defied the jurisprudence of Lord Diplock in *British Railways Board v Herrington* [1972] AC 877 at 930–931, Lord Lowry in *TC Coombs & Co (A Firm) v IRC* [1991] 2 AC 283 at 300 and the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, at 340. A long time ago, Lord Denning said that it was the public duty of a person to assist the court by giving evidence, where they had relevant knowledge of the circumstances in issue; Denning was not speaking, though, of banks.

I discussed some of these issues in *English Judges Prefer Bankers to Nuns: changing ethics and the Plover bird* published in Butterworths Journal of International Banking and Financial Law (2019) 8 **JIBFL** 505 (September 1, 2019). I showed that, while unsuccessful allegations of the worst kind of fraud and dishonesty, relentlessly pursued against a religious order of nuns over years, persisted-in at trial and formally put to elderly sisters (some of whom had rarely ventured from their convent) in cross-examination, when these were comprehensively dismissed by the trial judge for being without any factual basis the successful defence attracted an order of costs, in favour of the nuns' religious order, only upon the *standard basis* - just the ordinary 'rough-and-tumble' of litigation. In contrast, when an allegation of a fraudulent conspiracy was sought to be made against a bank on the basis that there was evidence that, while it was telling its customer that it was considering lending against security, there were internal emails, circulating at the accountants' firm, tasked with undertaking an independent review of the business, only reluctantly disclosed only in response to a court order, that expressed the accountants' clear understanding and belief that the bank would not lend, the claim was nevertheless dismissed at the interlocutory stage for having no prospect of succeeding at trial. Stuart-Smith J (co-author of a textbook on motor insurance claims) thought the fact of the draft allegations so serious as to merit an award in favour of the bank and the accountants, for *the period of the entire claim*, on the *penal indemnity* basis. At the time, neither the bank nor the firm of accountants had filed *any*, let alone given oral, evidence.

[10] [2016] EWHC 3342 Ch.

Whatever that is, it is not equal, or even similar, treatment; but there is no symbiosis between the courts and the Catholic Church similar to that that subsists with the financial services industry - at least none that has been semi-officially endorsed.

3. The Post Office's contention that the earth is flat

The recent very public debacle concerned the Post Office's 'Horizon' IT accounting system, introduced in 2000 for sub-post offices and those who staff and operate them, the sub-post masters and mistresses (SPMs). SPMs are self-employed small businesses who run retail premises in which branch Post Offices are located.

Were the facts not recorded in two long, meticulous and exhaustive judgments of the trial judge and that these remain a matter of public record, they could scarcely be credited for an institution of the public standing and importance of the Post Office.

It is a matter of regret that the judgments reveal that the English legal system is structurally organised to prefer large entities. When David meets Goliath in the legal system, the judicial inclination is towards Goliath. But not always. And when not, we are strongly struck by the difference.

The Post Office trades on its reputation as a trusted public brand. Of little that was common ground in the litigation, it was agreed that the Post Office is an important national institution that provides a crucial service to society. In some rural communities the Post Office is the only way that some individuals and businesses can access cash, banking services and financial services.

The Post Office alleged accounting failures and fraud against more than a thousand SPMs over a period of almost 20 years.

Ms Deidre Connolly was a sub-postmistress of a Post Office branch. After an unannounced audit she was alleged to owe the Post Office a shortfall of some £15,600. Ms Connolly made up the shortfall with help from relatives. She was summarily dismissed from her position by the Post Office and her contract terminated. Her son attempted suicide. She attributed this to his witnessing the stress she was under. Mr Phil Cowan was a successful businessman whose ventures included a post office in Edinburgh that was run by his wife and a friend. He attributed the death of his wife, 47, to a shortfall of £30,000 shown in the branch Horizon electronic ledger. She died of an accidental overdose of anti-depressants, alcohol and cold medicine.

Businesses were wrecked and individuals pursued through the courts, in both civil claims and in criminal prosecutions, on charges of false accounting and fraud. SPMs had their contracts with the Post Office summarily terminated, and in some instances were made bankrupt and had their homes repossessed. Some received custodial sentences (prison). Many SPMs went to extreme lengths to repay to the Post Office-alleged shortfalls while vigorously protesting their innocence and honesty. That counted for nothing when set against the computerised records of the Post Office. SPMs contended that that Post Office documents must be wrong. A '*likely story/she would say that*', when an institution as reputable and respectable as the Post Office provided the courts with the evidence of primary documents and computer records. The courts readily acceded to the Post Office's claims,

bringing to ruin those subject of the claims and their businesses – not to mention the associated shame of being subject to a judgment or conviction for fraud or false accounting. The fundamental weakness was that individual SPMs did not know, until much later, that there was (i) a pattern in problems with the Horizon system; and (ii) the Post Office was aware of it while they were not. To use an analogy, until very late in the day, in 2017 when a group litigation order (GLO) was made, the Post Office was able to 'pick-off' individual SPMs, one by one. The rules on disclosure under English civil procedure provide both an advantage to large institutions and also protect them.

The judgments of the Honourable Mr Justice Fraser reported (25 March 2019) ***Bates and ors. v Post Office Limited*** [2019] EWHC 606[11] and (16 December 2019) ***Bates and ors. v Post Office Limited*** [2019] EWHC 3408,[12] concerned the way in which it ran its "Horizon" IT accounting system from 2000 and issues with its reliability and functional integrity. Some 19 years' after its introduction, the system was found by the trial judge to be seriously defective and liable to generate significant errors. The litigation and its outcome is a model, both of how a business ought not to be conducted and how litigation in connection with that business ought not to be conducted; that is to say, conducted without proper - or seemingly any - regard to the facts and without regard to the harm and damage, in financial and human terms, that institutional disregard for facts may have.

A flavour of the approach of the Post Office is caught by the fact that the trial judge was invited by its counsel, Mr David Cavender QC, instructed by the solicitors firm Womble Bond Dickinson, "*to be careful*" and to be aware of "*the sensitivity*" of comments or findings by the judge that the Post Office considered to be "not necessary". The judge drily observed that, *"a party (here the Post Office) threatening dire consequences should its case not be preferred is not helpful, and this seemed to me to be an attempt to put the court in terrorem."*[13] One approach, but nevertheless a bit surprising. Similarly, the judge in his March 2019 judgment observed examples "*… of a culture of excessive secrecy at the Post Office about the whole subject matter of this litigation. They are directly contrary to how the Post Office should be conducting itself. I do not consider that there can be a sensible or rational explanation for any of them*."[14] The Post Office, by its counsel, asserted litigation privilege in *the name of an animal* adopted for the title of a report into an investigation.

The litigation against the Post Office, and the approach that the Post Office adopted to the SPMs, cannot be better summarised than by two paragraphs of the judgment of Mr Justice Fraser that refers to a Mrs Stockdale. On 16 September 2016 Mrs Stockdale had her appointment as an SPM summarily terminated on grounds of falsification of accounts, a criminal offence punishable by imprisonment (paras [323],[326]). At that time Mrs Stockdale was a claimant in High Court litigation and a named party to a claim form that included the following summary claim. The claim form (before (the later) Group Litigation Order/GLO) alleged that the claimant SPMs:

> *".....have been subjected to unlawful treatment by [the Post Office] causing them significant financial losses (including loss of their business and property), bankruptcy,*

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11 https://www.bailii.org/ew/cases/EWHC/QB/2019/606.html

12 https://www.bailii.org/ew/cases/EWHC/QB/2019/3408.html

13 March judgment para [35], [30].

14 *Ibid* para [561].

prosecutions, serving community or custodial sentences, distress and related ill-health, stigma and/or reputational damage.

The [SPM] contracts were replete with power and discretion in the hands of [the Post Office]. […] There were … implied terms, including obligations on [the Post Office]:… properly to execute all transactions which [the SPMs] effected; properly to account for, record and explain all transactions and any alleged shortfalls which were attributed to the [SPMs]; and properly and fairly to investigate any such alleged shortfalls. ….

From the introduction of Horizon […] [the Post Office] in purported exercise of its contractual and/or prosecutorial powers: did not investigate the existence and/or causes of the alleged shortfalls fairly, properly or at all; required [the SPMs] to make good the alleged shortfalls; encouraged to sign-off [SPMs'] cash balances without being able to satisfy themselves that they were accurate and/or exercised undue or unreasonable pressure or influence on to do so; [the Post Office] excluded [SPMs] from their own branches; suspended and/or terminated their appointments and/or engagements and/or imposed undue and/or unreasonable pressure or influence upon [SPMs] […] unfairly investigated [the SPMs] (including by preventing or impeding any or any reasonable access by [the SPMs] to relevant data, information and documents and/or excluding from consideration the known risk, if not likelihood, of errors in or related to the Horizon system and/or related matters set out herein); mispresented to the [SPMs] the approach to and purpose of such investigations; prosecuted them for theft, false accounting and/or other criminal charges and took other measures against them including pursuing restraint orders against them (under 8.41 of the Proceeds of Crime Act 2002); unreasonably acted so as to prevent or inhibit Claimants from preserving, realising or recovering the value of their businesses […].

Throughout, [the Post Office] concealed material facts from the [SPMs] and thereby misled them about: the reliability of Horizon and the errors in, and generated by, Horizon; the problems encountered by other Sub-Postmasters in using Horizon ([SPMs] being informed that they were the only one); the ability of [the Post Office] […] remotely to access and make changes to transactions, data and/or branch accounts, without the knowledge of the [SPMs] ; the approach to investigations and audits following identification of alleged shortfalls and the purpose for which [the Post Office] carried out the same; the basis upon which [the Post Office] chose to prosecute or refer [SPMs] for prosecution [,,,]. Further…, [the Post Office] deliberately committed breach(es) of duty in circumstances in which the same was unlikely to be discovered for some time by [the SPMs] and thereby deliberately concealed the facts involved in that breach of duty.

[The Post Office] …..procured repayments and/or the settlement of claims by means of negligent misstatement and/or misrepresentation or deceit: unreasonably acted so as to prevent or inhibit Claimants from preserving, realising or recovering the value of their businesses including their capital investments and/or capital payment entitlements payable by [the Post Office] upon branch closures ; and/or otherwise acted wholly unreasonably, oppressively and/or arbitrarily….".

The trial judge's own emphasis.

Mr Justice Fraser observed that these were extremely serious allegations to make against the Post Office - that the Post Office had treated its SPMs unlawfully, including prosecuting them, leading to bankruptcy and community and custodial sentences (ie imprisonment).

The fact that Mrs Stockdale was a party to that litigation when the Post Office terminated her contract is very revealing. One does not have to be unduly cynical to take the view that a bankrupt SPM, or an SPM serving a term of imprisonment, from the Post Office's perspective, would represent just one less problem.

Eventually, on 22 March 2017 a Group Litigation Order (GLO) was made. Under the GLO some 550 SPMs (only about a-half of those subject to claims of accounting failures made by the Post Office) claimed that the Horizon system must have contained a large number of software coding errors bugs and defects as a result of which apparent shortfalls and discrepancies appeared in SPMs' branch accounts. The subject matter of the litigation was highly controversial and none of the claims were admitted by the Post Office. The SPMs alleged that when financial, accounting and other shortfalls occurred in branch accounts, the Post Office did not investigate these fairly or properly, that they required claimants to make good the alleged shortfalls, that they excluded claimants from their own branches, that they terminated their appointments, that the Post Office imposed undue and unreasonable pressure upon them to resign and otherwise end their contract with the Post Office. It was also claimed that the Post Office unfairly investigated the SPMs, prosecuted some of them for theft, false accounting and other criminal charges, and acted unreasonably so as to prevent them from recovering the value of their businesses. It was also the SPM's case that throughout the relevant period from 2000 onwards the Post Office has concealed material facts from them and misled them about the reliability of the Horizon system and the errors in and generated by it. This concealment was said to have included the ability of the Post Office and its IT provider, Fujitsu, remotely to access and make changes to transactions, data and branch accounts on Horizon without the knowledge of the particular SPMs in question.

The Post Office stated that it welcomed the GLO. It is possible to doubt whether this was the case. GLOs confer power upon the group that is wholly lacking in individual litigation.

The Post Office not only denied the claims, *it contended that the SPMs were lying*, it counterclaimed damages for false accounting and attempted to strike-out the SPMs' claims.

The Post Office's position was that its Horizon IT system was "robust" and could be relied upon. On the trial of 'common issues' Mr Justice Fraser in a judgment of April 2019 that runs to 288 pages and 1,121 paragraphs in the BAILII report, said this: "*The Post Office describes itself on its own website as "the nation's most trusted brand". So far as these Claimants, and the subject matter of this Group Litigation are concerned, this might be thought to be wholly wishful thinking*." Not finding the judge's March 2019 judgment to their liking, the Post Office, once the trial of other issues had started and witnesses were in the course of being cross-examined, made an unsuccessful application to the judge to recuse himself for alleged apparent bias. The Post Office engaged one of the best-known barristers at the English civil Bar. Tactically, this was probably an error; but the Post Office will have undertaken a cost-benefit analysis. The failure of the application will no doubt have fortified the SPMs and will have revealed the Post Office's thinking.

In his later judgment of December 2019, that runs to 1130 paragraphs and 168 pages of the BAILII report, the judge described the Post Office's evidence in support of its contention that its Horizon IT system was 'robust and reliable' in these terms:

> ***"This approach by the Post Office has amounted, in reality, to bare assertions and denials that ignore what has actually occurred, at least so far as the witnesses called before me in the Horizon Issues trial are concerned. It amounts to the 21st century equivalent of maintaining that the earth is flat."***

There is much more, in particular about the unsatisfactory quality of the evidence given by witnesses on behalf of the Post Office, most of whom had no direct personal knowledge of the circumstances, but the reader will get the gist.

Mr Justice Fraser's description of the Post Office's position as analogous to maintaining the earth is flat can be read against Mr Cavender QC's invitation to the judge, on behalf of the Post Office, to be particularly careful in comments he might make in his judgment.

What is remarkable is what the Post Office's defence, and more particularly, its conduct of the litigation more generally, reveals about the Post Office's underlying corporate culture that, on the judge's findings, reveals an institutional inability, at the highest levels, to critically evaluate evidence of systemic failure.

The judge's stigmatising the Post Office's conduct as the 21st century equivalent of maintaining that the earth is flat is no throw-away line. It suggests that the management of the Post Office at its highest levels is curiously obdurate. If the evidence that the Post Office put before the court was properly evaluated by its legal team, that is to be assumed – that is to say the evidence held a real prospect of one big train crash, one wonders why an institution of the size of the Post Office would prefer to persist in maintaining that the earth was flat, a contention that even the most optimistic might think unlikely to be accepted by the average reasonably competent judge, than to cut a commercial deal with confidentiality as part of the price; a prize, surely sensible, of avoiding the Post Office's reputation being publicly trashed would surely have been worth the cost? Of course, obduracy and irrationality, if that is what they were, are good for lawyers.

Kafka, or if you prefer, Zola, could scarcely have conceived a plot so ghastly. For its deconstruction, the necessarily long, measured and exhaustive judgments of Mr Justice Fraser should be read – hyperlinks at notes 11 and 12 above (though half-a-day is required). Like Sir Ross Cranston's review, the latter judgment, and what it reveals, was a bit overshadowed by the general election. Having read them, the reader may reflect upon how improbable it is that an individual in the position of a SPM would *ever* have been able effectively to defend legal proceedings and prosecutions of the kind brought by the Post Office. She could protest until the crack of doom that "there must be something wrong", but where large institutions are concerned, in response to the invitation from the court 'where is your evidence?' what reply could be made? But for the eventual GLO, how could an individual, with necessarily limited financial resources, ever effectively challenge the reliability and functional integrity of the Horizon system?

For the better part of 15 years, until the GLO was eventually made by Master Fontaine in 2017, the Post Office was able to rely upon that disparity in power and resources. Further, the Post Office, even when the untenable nature of its position and its blind and unfounded (and therefore irrational) faith in the Horizon system was laid bare, persisted in contending for its reliability, alleging that those victims who had experienced and described in detail its malfunctions and functional unreliability were simply being untruthful, a contention that Mr Justice Fraser rejected. Litigating against an opponent that exhibits irrationality and mendacity in high degree presents its own special and additional burdens and difficulties (not least financial). The judge, for example, noted that the Post Office cross-examined SPMs on facts that were the subject of express agreement between the parties under statements of agreed facts; remarkable.

The fact that the SPMs were ultimately vindicated and, more importantly, *exonerated*, almost 20 years' after the Post Office introduced its flawed Horizon IT system and began its vicious campaign against them for sums falsely alleged to be owed, will be cold comfort to many, and comes tragically too late for some.

In 2015 there was an inquest into the death of Mr Martin Griffiths, 59, an SPM from Chester. He had stepped out in front of a bus one morning in September 2013. The inquest heard that at the time Mr Griffiths was being pursued by the Post Office for an alleged shortfall of tens of thousands of pounds.

The Post Office, following Mr Justice Fraser's judgments, has announced that it is committed to learning lessons.

While legal formalists will say that ultimately justice has prevailed and the English legal system has delivered the 'right' result, a similarly sanguine sentiment may be expressed of the outcomes for the 'Guildford Four' and the 'Birmingham Six' and, more recently, for the dead victims of the Hillsborough disaster (it took almost 30 years). All that can be said, if so, is that it's a strangely unattractive *conception* of justice, unlikely to be shared by those falsely prosecuted by the Post Office or cheated and left destitute by the Lloyds/HBOS IAR. English common law has perhaps lost sight of the biblical imperative to uphold the cause of the poor and the weak; to that extent, it is enfeebled.

While the pigs haven't yet quite taken over the farm, as so often, it will very likely to fall to parliament to redress the balance.

Falsehood flies, and truth comes limping after it,
so that when men come to be undeceived, it is too late;
the jest is over, and the tale hath had its effect.

Jonathan Swift

§§§