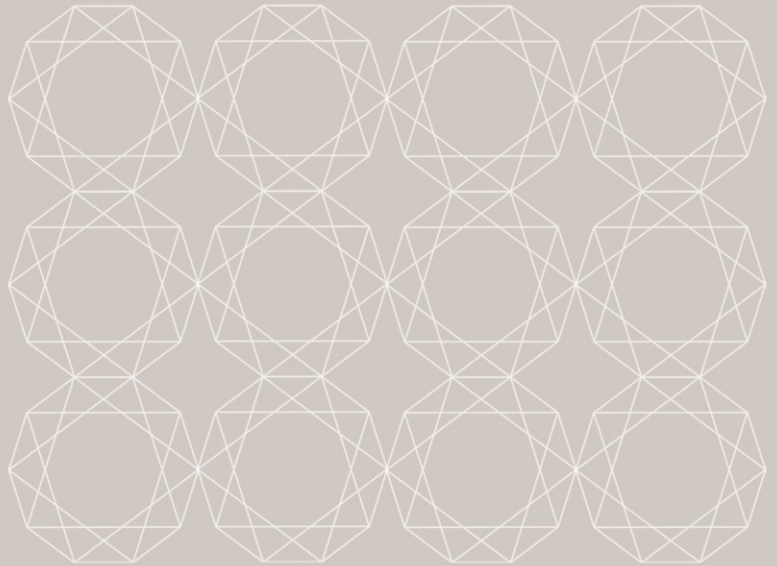




**DEKA**  
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**CRIME & FRAUD**



**Welcome to the latest edition of the Crime Briefing which focuses on private prosecutions with articles written by Louise McCullough and Amelia Katz. We hope that you find these articles informative and interesting.**

There remains ongoing disbelief, outrage, and concern over the private prosecutions that the Post Office undertook against hundreds of sub-postmasters. As the inquiry led by Sir Wyn Williams moves into phases 5 and 6, we await the final report, due in the Autumn of 2024, with its recommendations for the future. Lessons must be learned from this appalling miscarriage of justice.

We are one of the largest common law sets in the country. We have a strong and experienced team of barristers practising criminal law and fraud who prosecute and defend in some of today's most high profile and leading cases.

We are incredibly proud and delighted of the following appointments:

James Thacker is to be appointed King's Counsel and will formally take silk on 18<sup>th</sup> March 2024 at a ceremony presided over by the Lord Chancellor.

Tom Little KC has been appointed as First Senior Treasury Counsel from 1<sup>st</sup> April 2024.



# PRIVATE PROSECUTIONS — AN OVERVIEW

By Amelia Katz



## Introduction and History

A private prosecution is a prosecution started by a private individual or entity who/which is not acting on behalf of the police or other prosecuting authority. Historically, victims and their families had a right to hire a private prosecutor to pursue charges against an individual they alleged to have harmed them. In the 18<sup>th</sup> Century, private prosecutions were the norm for most criminal cases, the main exception being offences where the Crown was the victim, and those cases would be prosecuted by the Attorney-General and the Solicitor General.

Following the Metropolitan Police Act in 1829, police forces began to move towards the role and form they are in today. They began taking over the bringing of prosecutions against suspected criminals. The Prosecution of Offences Act 1985 ('the 1985 Act') established the Crown Prosecution Service ('CPS') who now bring the vast majority of prosecutions, however it also preserved the right to bring a private prosecution.

## Present Day

While the right to bring a private prosecution is preserved by s.6(1) of the 1985 Act, there are some limitations. The Director of Public Prosecutions ('DPP') has the power under s.6 (2) of that Act to take over private prosecutions. This can include taking over a private prosecution, and then discontinuing it, thus ending the proceedings. The CPS will take this course of action when, upon reviewing a case, either the evidential sufficiency stage or the public interest stage of the Full Code Test is not met.

However, while this seems a sensible safeguard against wrongly founded private prosecutions, there is no duty on a private

prosecutor to notify the CPS that a prosecution has commenced. The CPS will usually only intervene in a private prosecution where they have received a specific request to do so. The CPS do not generally take action in private prosecutions that it learns about (for example, through a press report) but have not otherwise been requested to be involved in, unless there are exceptional circumstances.

Whilst the vast majority of prosecutions are still brought by the CPS, private prosecutions are now regularly used by numerous organisations, including the RSPCA. In many cases they are an attractive alternative to civil proceedings as the individual or organisation has greater control over the proceedings. They are also often quicker than civil proceedings and can be viewed as a better way of holding individuals to account.

## Duties of a Private Prosecutor

A private prosecutor is under the same obligations as a public prosecutor and is required to act as a 'Minister of Justice'. The duty remains to act in the public interest, rather than in the interests of their instructing client. Of course, an individual or body undertaking a private prosecution is also likely to be the complainant and may also have to act as a witness, investigator and disclosure officer. There is an inherent conflict in some of these roles, and indeed the Post Office were heavily criticised by the Court of Appeal for its commitment to its own interest over and above its role as a Minister of Justice in cases relating to the Horizon scandal (see Louise McCullough's comprehensive article for more information).

It is important that the conflicts are identified and managed early on. The conflicts inherent in bringing a private prosecution present a

particular problem for those instructed on behalf of the prosecuting body to act on their behalf. Unlike the CPS, the lawyers in these cases will have a financial interest in the prosecution continuing and it is crucial that whatever pressures the client puts on them, that they remember their ultimate duty is to the public and the Court. It is good practice to apply the Full Code test set out in the CPS Code for Crown Prosecutors, primarily because there is the risk of the DPP taking over the prosecution and discontinuing it if they are not satisfied the Full Code test is met.

## **The Future of Private Prosecutions**

Lord Thomas of Cwmgiedd CJ commented in *R v Zinga* [2014] 1 WLR 2228 that it seemed inevitable private prosecutions would increase to fill the gaps in publicly funded criminal investigation and prosecutions (para 57). While it may on the surface seem sensible to allow individuals and other bodies to bring prosecutions whilst there are so many deficiencies in the criminal justice system, the pitfalls have been laid bare by the Horizon scandal. In particular, those who find themselves the Defendant in a private prosecution will almost never have the same resources as those prosecuting them to fight the case against them and uncover any failure to comply with their duties.

The Justice Committee undertook an inquiry into the safeguards to regulate private prosecutions following the Post Office cases. They recommended there be a review of funding arrangements for private prosecutions in order to create a fair balance and manage the use of public funds. As it stands, a private prosecutor can recover their costs irrespective of whether there is a conviction and at a far more advantageous rate than a legally aided party. It remains to be seen whether the government will accept the recommendations and create further safeguards to prevent such abuses in the future.



# THE HORIZON SCANDAL

By Louise McCullough



## Introduction

Doubtless there is no-one in the country unaware of the Horizon/Post Office Scandal whereby hundreds of otherwise upstanding citizens who had contracted with Post Office Limited to become sub-postmasters were prosecuted for Theft and False Accounting when the Fujitsu developed Horizon IT system showed shortfalls on cash balances which the sub-postmasters were contractually obliged to make good. It has been described as the worst miscarriage of justice in British history.

The saga was dramatized in the gripping Mr Bates –v- The Post Office which was shown on ITV in early January 2024. The attendant outrage has led to the Government bringing forward emergency legislation, the Post Office (Quashing of Convictions) Bill, to quash the convictions and exonerate those convicted after investigations by the Post Office and the CPS. It is expected to be on the Statute books by the end of July and will only apply to convictions obtained in England and Wales.

It is acknowledged by the Government that the legislation was “likely to exonerate a number of people who were, in fact, guilty of a crime” said Post Office Minister Kevin Hollinrake but he went on to say, “The government accepts that this is a price worth paying in order to ensure that many innocent people are exonerated”.

Whilst this is no doubt welcome news for those sub-postmasters and their families waiting for their appeals to be processed by the Court of Appeal (and Southwark Crown Court for appeals from Magistrates Courts) nevertheless it might equally be viewed as political interference in the judicial process and a blurring of the “separation of powers”.

A cynic might say that no legislation along these lines would have been brought forward but for the public outrage stirred up by the ITV drama. It is also difficult to ignore that we are in an election year.

The scandal was many years in the making and multi-factorial. A public inquiry chaired by former High Court Judge Sir Wyn Williams commenced in February 2022 and will likely report in September 2024, progress having been slowed (somewhat ironically) by disclosure issues.

## Historical Background

Despite a widely held belief to the contrary, the Post Office has no special authority to bring private prosecutions but instead pursued cases against its staff using its own investigation branch under the “general right in English law for any individuals and organisations to pursue private prosecutions”. The Post Office and Royal Mail (which were part of the same organisation until 2012) has a long history of bringing private prosecutions stretching over hundreds of years. The Post Office Investigation Branch had the power to investigate offences committed against the post, with the authority to prosecute the perpetrators of these crimes. One of their more high profile investigations was into the “Great Train Robbery” where the modern day equivalent of £58 million was stolen from an overnight Royal Mail train heading from Glasgow to London.

## Development of Horizon

In the mid-1990s the Post Office joined together with its biggest client the Benefits Agency to develop a benefits “payment card” which would assist with reduction in benefits identity fraud and would assist the Post

Office by increased footfall into a branch with attendant scope for “up selling” other services. This was to be a PFI (“private finance initiative”) project and put out for tender. The successful bidder was “ICL Pathway” a subsidiary of Fujitsu. This was not the *best* bid by any number of criteria (in fact it came bottom in 7 out of 11 categories – National Audit Office Report, August 2000) and the project was riddled with problems from the outset. These were still not resolved by the time the Government pulled the plug on the PFI in May 1999.

This led to the Post Office (“Post Office Counters Limited”) contracting directly with Fujitsu to develop the Horizon system with a national roll out envisaged for 2000. It was accepted that the system would not be perfect and there was a contractually accepted tolerance / margin of error. A number of political and commercial factors meant that a blind eye was turned towards a number of ongoing bugs and faults.

The Horizon accounting system began to show a number of shortfalls, sometimes in the course of a single transaction. Sub-postmasters were contractually obliged to make good any shortfall and many of them did out of their own pockets paving the way for the future accusations of theft and false accounting.

There was a helpline which was meant to provide assistance. It was a common theme of the sub-postmasters that when they rang for support they were always told that they were the only one experiencing these difficulties. This was demonstrably not the case. Further evidence of the lack of integrity of the system was gleaned by a visit from one of the postmaster’s federation reps to Fujitsu’s Head Office in Bracknell where he observed technicians accessing individual branch accounts in real time and altering the data, something which it was asserted could not be done. The inviolability of the system was the fundamental premise for prosecuting sub-postmasters on the basis that only they

had access to their branch figures.

## Horizon Prosecutions

There was an escalation in the number of prosecutions that the Post Office brought in the key years with between 700 to 900 overall with the Post Office relying on the evidential presumption that computers are presumed to be operating correctly, unless there is evidence to the contrary. This is the common law. It follows the repeal of Section 69 of PACE by section 60 of the Youth Justice and Criminal Evidence Act 1999 with effect from 14th April 2000.

There was also a pattern of charging both Theft and False Accounting notwithstanding no evidence of Theft. This would often lead to sub-postmasters pleading to false accounting in the hope of avoiding prison sometimes without success.

Disclosure of faults with the Horizon system were lacking and it would appear that Post Office and even their independent Counsel fell prey to “group think”.

## The Group Litigation

It is beyond the scope of this piece to set out the impact of the Group Litigation Action brought in the High Court by the Justice for Sub-postmasters Alliance (*Bates and Others v The Post Office Limited* [2019] EWHC 3408 (QBD)) but suffice to say in a series of excoriating judgments Mr Justice Fraser (as he then was) found in favour of the sub-postmasters and against the Post Office leading to a settlement of the litigation.

## Court of Appeal Criminal Division

The CCRC referred a number of cases to the Court of Appeal (Criminal Division) with judgment handed down on 23<sup>rd</sup> April 2021 (unusually without an embargoed version being handed to the lawyers involved beforehand). In *Hamilton & Others v Post Office Limited* [2021] EWCA Crim 577 Lord Justice Holroyde gave the lead judgment and

said that the Post Office, which brought the prosecutions itself “knew that there were serious issues about the reliability of Horizon. The failures of investigation and disclosure were in our judgment so egregious as to make the prosecution of any of the “Horizon case” an affront to the conscience of the Court”.

To date only 93 convictions have been overturned. The remainder will benefit from the upcoming legislation.

## **Lessons Learned**

We await the conclusions of the public inquiry to provide comprehensive analysis but do pose the question Could a Post Office Horizon type scandal happen again? This case, decades in the making, was a perfect storm of complacency and cover up with business and political interests trumping the rights of the individual. It is a cautionary tale to us all not to be lulled into “group think” but to question assumptions and push for disclosure of material which might undermine those assumptions. Unless and until lessons are learned similar miscarriages of justice are bound to happen.



# Crime & Fraud Team



**Tom Little KC**

Call: 1997 Silk: 2018  
Senior Treasury Counsel



**Jonathan Loades**

Call: 1986  
Level 4, RASSO List



**Louise McCullough**

Call: 1991  
Level 4, RASSO List  
Fraud Panel Level 3  
Serious Crime Panel Level 3 Serious Crime Panel Level 4



**Claire Harden-Frost**

Call: 2000  
Level 4, RASSO List,  
Fraud Panel Level 4



**Gareth Munday**

Call: 2000  
Level 4, RASSO List,  
Fraud Panel Level 4



**Eleanor Mawrey**

Call: 2001  
Level 4,  
Fraud Panel Level 4



**James Thacker**

Call: 2001  
Level 4, RASSO List  
Fraud Panel Level 4  
Serious Crime Panel Level 4



**Giles Bedloe**

Call: 2001  
Level 4,  
Fraud Panel Level 4



**Jennifer Osborne**

Call: 2007  
Level 4, RASSO List,  
Fraud Panel Level 3  
Serious Crime Panel Level 3



**Thom Dyke**

Call: 2007  
Level 4, RASSO List  
Serious Crime Panel Level 3



**Patricia Londono**

Call: 2008  
Fraud Panel Level 2  
Serious Crime Panel Level 2



**Stephanie Hayward**

Call: 2011  
Level 3, RASSO List  
Fraud Panel Level 2



**William Dean**

Call: 2011  
Level 2



**Helen Pooley**

Call: 2012



**Laura Hibberd**

Call: 2013  
Level 3



**Thomas Jones**

Call: 2015  
Level 2



**Kyah Mufti**

Call: 2016  
Level 2



**Theodore Bunce**

Call: 2017  
Level 2



**Francesca Kolar**

Call: 2018  
Level 3



**Lucy Lodewyke**

Call: 2018  
Level 2



**Amelia Katz**

Call: 2018  
Level 3



**Madeleine Miller**

Call: 2019  
Level 2



**Louise Thomson**

Call: 2019  
Level 2



**Thomas Clarke**

Call: 2022  
Level 1

## DEKA CHAMBERS

5 Norwich Street, London, EC4A 1DR

T: 020 7832 0500

E: [clerks@dekachambers.com](mailto:clerks@dekachambers.com) W: [www.dekachambers.com](http://www.dekachambers.com)

