

## **RE: THE POST OFFICE GROUP LITIGATION**

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### **ADVICE ON THE COMMON ISSUES TRIAL JUDGMENT**

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#### **Introduction**

1. I am instructed by the Post Office Ltd (**'POL'**) to review the Common Issues Trial judgment, including the Appendices, handed down by Mr Justice Fraser on 15 March 2019 in order to advise on to what extent the judgment could undermine the basis of historic criminal convictions of subpostmasters (**'SPMs'**) by POL.
2. I am informed that a particular area of interest for POL is that as a result of the judgment POL is no longer able to rely on disputed Branch Trading Statements as a settled statement of account. However, POL would welcome wider comments or concerns on the impact of this judgment on historic convictions.
3. The second trial – the Horizon Issues Trial – has commenced before the same judge as part of the group litigation. I have been sent material from Days 7 and 8 of the Horizon Issues Trial (20 and 21 March 2019) consisting of extracts from the transcripts of the evidence of Andy Dunks and Torstein Godeseth (both Fujitsu witnesses), as well as Mr Godeseth's witness statements dated 27 September 2018 and 16 November 2018, the witness statement of Gareth Jenkins dated 8 July 2010, the witness statement of Penelope Thomas dated 4 February 2010 and a PEAK log from August 2011 relating to a Missing Reversal Indicator in ARQ Returns (PEAK PC0211833).

4. An application that was made for Mr Justice Fraser to recuse himself during the Horizon Issues Trial based on comments he made in the Common Issues Trial judgment was refused on 9 April 2019. As I understand it, the Horizon Issues Trial is continuing pending an appeal to the Court of Appeal. A third trial will examine the issues of limitation and breach of contract but not causation and loss.
5. For the purposes of this Advice, I have reviewed in full all of my past Reviews and Advices as well as other miscellaneous material in order to refresh my memory.
6. I am taking the term ‘historic convictions’ simply to mean past convictions. The issue I believe I am being asked to consider is, in essence, the safety of past convictions in light of the Common Issues Trial judgment.
7. I have been told that 61 of the claimants to the group action are SPMs who have either been convicted of, or have pleaded guilty to, offences prosecuted by POL. I have checked through my past Reviews and Advices to see which of those claimants’ case files or case reviews I have seen before. In the course of my Review of 15 October 2013,<sup>1</sup> I was provided the cases files of Khayyam Ishaq and Lynette Hutchings (albeit I do not have any detailed note of my review of their cases). Lynette Hutchings is one of the 61 claimants; Mr Ishaq is not. During that Review, I also read 31 Cartwright King reviews of other cases (not all past prosecutions), whose names I did not list in my Review; some of them may be among the 61 claimants. Della Robinson, who is one of the 61 claimants, was one of the Cartwright King reviews I saw and read in 2013.
8. The names of Stanley Fell and Tracy Felstead are familiar to me. I am familiar also with the name Grant Allen because, in my Review of 15 October 2013, I referred to Gareth Jenkins’ witness statement in the case of Grant Allen where Mr Jenkins conceded there had been an unusual ‘non-polling event’ at Winsford Post Office over a 12-day period.<sup>2</sup>

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<sup>1</sup> Paras 52, 108, 168-169.

<sup>2</sup> Para 156.



9. I am also familiar with the Timothy Burgess case because I had access to a Second Sight Case Review report about it, dated 8 February 2015, to which I referred in my Advice on Theft & False Accounting of 8 March 2015.<sup>3</sup>
10. Finally, in this regard, Jonathan Swift QC and Christopher Knight were asked by Tim Parker (POL Chairman) to conduct a Review to consider whether there was any further action that might reasonably be taken by POL to address a series of complaints raised by SPMs about their alleged treatment by POL.
11. As a result of one part of their written Review of February 2016, in July that same year I was asked to consider the case files of Alison Hall, Josephine Hamilton, Alison Henderson, Peter Holmes, Jacqueline McDonald, Seema Misra, Margery Williams and Julian Wilson, all of whom are among the claimants to the group litigation. I shall return to them below.

### **Disputed Branch Trading Statements**

#### *The judge's findings*

12. In the course of his Common Issues Trial judgment, Mr Justice Fraser dealt with the issue of disputed Branch Trading Statements, their content and effect, and how disputes about Branch Trading Statements were dealt with.
13. He observed that the parties had been unable to agree how Branch Trading Statements were produced.<sup>4</sup> The parties had drawn up a list of facts for agreement known as the Factual Matrix which was subdivided into categories. POL had challenged Category 2 of it ('Claimants' facts in issue and/or relevance disputed'), in particular as relevant to this Advice, Category 2 paragraphs 32 and 36.<sup>5</sup>

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<sup>3</sup> Para 3.

<sup>4</sup> Para 35.

<sup>5</sup> Para 51.

“32. Claimants seeking to dispute apparent shortfalls did not have an option within Horizon to do so, and were required to contact the Helpline to seek assistance.

36. A branch cannot enter (or “roll over” into) a new trading period without the Subpostmaster declaring to Post Office the completion of the Branch Trading Statement.”

14. These issues were relevant to Common Issues 12(c) and 13. These were two of a number of widely drawn contractual issues. Under the heading ‘Subpostmasters as agents’, they were:<sup>6</sup>

“12. Was the extent and effect of the agency of Subpostmasters to Post Office such that:

*(c) Where an agent deliberately renders a false account to his or her principal, in relation to the matters covered by the account the Court should make all presumptions of fact against that Subpostmaster as are consistent with the other facts as proven or admitted.*

13. Did Subpostmasters bear the burden of proving that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect?”

15. In dealing with the evidence of one POL witness, Andrew Carpenter, the judge said that POL’s approach was to regard a Branch Trading Statement as though it were an agreed and settled account between agent and principal. But he said it was not an agreed and settled account because by design the Branch Trading Statement did not identify within them disputed entries, it overlooked how they were treated by POL as evidencing undisputed debts and how discrepancies were pursued by POL, and a SPM who believed there was a shortfall or a discrepancy caused by Horizon could not show the mistake in the account because they could not identify the mistake.<sup>7</sup>

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<sup>6</sup> Paras 44 and 51.

<sup>7</sup> Para 525.

16. Later, the judge came to deal with the Helpline. He said that calling the Helpline was presented by POL in the evidence at the trial as a means by which a dispute could be registered by a SPM at, before, or no later than the end of the branch trading period. He referred to a POL document of 14 November 2008 'TC/Debt Recovery Review' which stated that when a SPM 'settled centrally' that signified acceptance of debt liability (which unlike paying by cash or cheque gave a SPM time to pay). The judge found as a fact that SPMs were forced 'to accept debts' with which they did not agree at the end of the branch trading period within the Branch Trading Statement for that period. 'Settled centrally', he said, simply initiated debt recovery procedures.<sup>8</sup>
17. The judge said that the Helpline was the only route for a SPM to challenge items with which they did not agree such as shortfalls, discrepancies or transaction corrections in the figures generated by Horizon. However, on the evidence he had heard, the Helpline did not operate that way, in that, even if the SPM got through, the dispute would not be resolved; workarounds might be suggested but no investigation (at least in the case of the six lead claimants) appeared to have been initiated; the sum would be settled centrally and after a few weeks chased as a debt.<sup>9</sup>
18. The dispute around how a Branch Trading Statement worked was in fact resolved at the end of the trial by the production of Appendix 3 and 4 but the judge found significant facts about them.
19. The judge found as facts, among others, facts 32 and 36 (which had been disputed by POL) against POL but with slight tweaks. He held:<sup>10</sup>

"32. Claimants seeking to dispute apparent shortfalls, or shortfalls, discrepancies or TCs with which they did not agree, did not have an option within Horizon to do so, and were required to contact the Helpline to seek assistance. Given the reliance placed by the Post Office on the Branch Trading Statement, this is plainly of the utmost relevance.

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<sup>8</sup> Paras 438, 550-553.

<sup>9</sup> Paras 555-558.

<sup>10</sup> Para 569.

36. A branch cannot enter (or "roll over" into) a new trading period without the Subpostmaster declaring to Post Office the completion of the Branch Trading Statement. That would include disputed amounts."

20. I have deliberately selected and set out below other factual findings made by the judge from the Factual Matrix which seem to me to be the most relevant significant findings he made for the purposes of this Advice (albeit, as revised by him):

"37. The Post Office operated the Helpline which it provided and recommended to Claimants as a primary source of advice and assistance in relation to Horizon, transactions, errors and issues relating to their trading statements and accounts.

38. The Post Office required Claimants to comply with contractual obligations in relation to the keeping and production of branch accounts.

39. The Defendant had the power to seek recovery from Claimants for losses relating to branch accounts.

40. The Defendant in fact sought recovery from the Claimants for apparent shortfalls. I would also add that on the evidence the Post Office did this regardless of whether disputes had been reported to the Helpline or not. This was accepted by all the Post Office witnesses, and occurred whether the SPM in question was appointed under the SPMC or the NTC, even though the terms of those contracts were different. It was also done regardless of any analysis of any causative fault on the part of SPMs. It was also done when the SPM in question had been told that no action would be taken in respect of a disputed shortfall.

41. It is a matter for the Horizon Issues trial whether it would be right to infer or presume that a shortfall and loss was caused instead by a bug or error in Horizon.

42. The Post Office required Claimants to accept changes to records of branch transactions, ("Transaction Corrections" or "TCs" issued by the Post Office), unless the Claimant was effectively able to prove that the Transaction Correction was not correct.

60. There is no evidence available to demonstrate that *any* SPM has, to date, ever been able to establish to the Post Office's satisfaction that an alleged



shortfall was the result of a Horizon bug or error. There is however evidence that the Post Office has, on occasion, “written off” sums which it had initially claimed were due to it. This happened in Mr Bates’ case. However, there is no explanation available for why that was done.

61. The Post Office has on occasion detected that Horizon generated errors caused the appearance of shortfalls and errors which the Claimants themselves had not been able to identify as the cause of those apparent shortfalls. Whether the individual Claimants had been forced to make these good from their own funds, or when recovery was sought from them had refused to pay, must depend on the resolution of individual cases in later trials.

70. On the evidence of the six Lead Claimants, even when further training was specifically requested it was not provided, and in some cases the SPM was told there was no entitlement to it, even though it was specifically requested.

75. The Post Office does rely on the accurate and regular reporting by Subpostmasters of accounts, transactions and the cash and stock held at a branch. The evidence makes clear that the Branch Trading Statement is not an accurate report if and in so far as disputes have been reported to the Helpline. It is only when those disputed items are taken into account, properly investigated, and resolved that those results, together with the Branch Trading Statement, would constitute an accurate picture of the cash and stock held at the branch. This is because the Branch Trading Statement includes disputed items.

78. The truth (as to the cause of shortfalls arising in a branch) does not lie peculiarly within the knowledge of Subpostmasters as the persons with responsibility for branch operations and the conduct of transactions in branches. Where there is a dispute, “the truth” and whether such a shortfall “arises in a branch” can only be determined after a proper investigation. Further findings must await the Horizon Issues trial.

79. Whether losses in branches arise in the ordinary course of things without fault or error on the part of Subpostmasters or their assistants can only be determined after the Horizon Issues trial. This is dependent upon the



answers to the Horizon Issues, as the Horizon system is used by SPMs in “the ordinary course of things”.

80. The final “fact” that the Post Office seeks in Category 3 is “If SPMs submit false accounts to the Post Office, that can lead to concealing losses from it, sometimes for many months or even years”. There is no doubt that the submission of false accounts is a serious matter, and the Theft Act 1968 specifically identifies false accounting as a separate criminal offence. However, this final entry in the Factual Matrix by the Post Office, the relevance of which to the Common Issues is disputed, is so general that it serves no purpose. I therefore propose to deal with this point as follows. False accounting is a criminal offence, and although concealment of losses is not an element of that offence, in many instances concealment will be involved. Concealment of losses by someone committing fraud might be discovered after many months, and on occasion even years, dependent upon the individual circumstances of a particular fraud or frauds.”

21. Thus, the judge underlined more than once that the Horizon Issues Trial was when any findings regarding the cause underlying shortfalls or losses would be made. The significant findings for my purposes are that there was no evidence to show that any SPM had to date been able to establish to POL’s satisfaction that any alleged shortfall was the result of a Horizon defect (which was as much a comment about the burden placed on SPMs as anything else); that POL had occasionally detected that Horizon-generated errors caused the appearance of shortfalls and errors which the claimants had not been able to identify as the cause of those apparent shortfalls; that the Branch Trading Statement was not an accurate report if and insofar as disputes had been reported to the Helpline, and it was only when those disputed items were taken into account, properly investigated and resolved that the results, together with the Branch Trading Statement, would constitute an accurate picture of the cash and stock held at the branch.
22. When dealing with the SPMC and the issue who bore the ‘contractual burden’ of proving the cause underlying any shortfall or discrepancy, the judge pointed to the fact that POL is responsible for compiling evidence for prosecutions for offences of false accounting and theft by SPMs, and, as such, bears the burden of proof of demonstrating

to the criminal standard that conduct by SPMs is dishonest and so it must have the ability to show how a loss was caused.<sup>11</sup> The point he was making is that POL had the burden in criminal cases of proving the case against a SPM, including dishonesty and loss, so it was not onerous for POL to bear the contractual burden of proving the correctness of the Branch Trading Statement.

23. As to the effect on a Branch Trading Statement of a SPM contacting the Helpline, he later said:<sup>12</sup>

“I consider that if and insofar as, during or at the end of any branch trading period, any SPM contacted the Helpline in relation to any shortfall, discrepancy or disputed TC, the Branch Trading Statement for that period cannot be treated as an account rendered by an agent to the principal which can only be opened up if the SPM can demonstrate a mistake. I also consider that this conclusion applies regardless of whether the matter is approached (correctly) through the contractual obligation upon a SPM in either the SPMC or the NTC, or whether the Post Office’s approach relying upon common law principles were applied (although I do not consider this to be the correct approach).”

24. The judge added:<sup>13</sup>

“... I do not consider the Branch Trading Statements for the periods I have identified – namely those in which, or at the end of which, the SPMs notified the Helpline of disputed items – have the status of settled accounts. The Post Office plainly does not treat them as such, given the evidence in the Common Issues trial of TCs being issued a lengthy period after the end of branch trading periods to which those TCs relate. This is made clear by fact 42 in [569] above. Further, I do not consider that it is necessary for the Claimants to rely upon the principle of re-opening settled accounts in any of these cases in order for the SPMs in this Group Litigation to be entitled to avoid the consequence sought by the Post Office, namely to keep the SPMs to the Branch Trading Statements for

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<sup>11</sup> Para 656.

<sup>12</sup> Para 820.

<sup>13</sup> Paras 841-842, 853.

the periods in question (which in almost all cases contained disputed items and unexplained shortfalls and discrepancies). For the avoidance of doubt, I do not consider that the Post Office can hold the SPMs to their Branch Trading Statements as though they were settled accounts in the way the Post Office contends.

Returning therefore to the issue of whether the SPMs bear the burden of proving that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect, if I am incorrect in my finding above, and they do bear such a burden, this can be satisfied as follows. That burden would be discharged by their showing (either by reference to Helpline call logs, or by the evidence of individual SPMs, or otherwise) that they contacted the Helpline in respect of shortfalls, discrepancies and/or TCs, in any particular branch trading period.”

25. In his conclusions and summary, the judge said:<sup>14</sup>

“Horizon was introduced in 2000, and from then onwards unexplained discrepancies and losses began to be reported by SPMs. Internal documents obtained in this litigation show that some personnel within the Post Office believed at the time that at least some of these were caused by Horizon. Some of these are identified at [542] above.<sup>15</sup> The first document in that paragraph of this judgment dates from November 2000. At [41] I deal with part of an internal Post Office report from as recently as June 2014 – other parts have been redacted – that make it clear that steps had to be taken within the Post Office to “ensure consistency of accounts and enable a higher chance of detecting errors in accounts due to problems with Horizon”. The Post Office’s position in this litigation remains that Horizon is what is called “robust” and that none of the Claimants experienced shortfalls or discrepancies in their branch accounts due to problems caused by Horizon. Further consideration of this will occur in subsequent judgments and after the Horizon Issues trial.

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<sup>14</sup> Paras 1115-1116.

<sup>15</sup> This was a reference to internal POL documents the judge had read.

Under Horizon, the way in which a SPM was required to compile Branch Trading Statements each trading period (usually every four weeks) meant that they had no choice but to accept into that statement disputed amounts with which they expressly disagreed, and Transaction Corrections that they either did not understand, or disputed. The Post Office treated disputed amounts as debts which they were entitled to claim under debt recovery procedures from SPMs. There was no mechanism adopted by the Post Office to resolve such disputes. The Post Office accepted during the trial that amounts that were “settled centrally” were treated by it as being legally due and owing to the Post Office, even if they were disputed by SPMs. I find that the Post Office is not therefore entitled to rely upon the Branch Trading Statements, for any period in respect of which a SPM notified a dispute to the Helpline, as a settled account between agent and principal. Nor do SPMs bear the burden of demonstrating that the Branch Trading Statement is wrong for such a period.”

26. In his answers to the Common Issues, in particular, 12(c) and 13, he therefore held:<sup>16</sup>

“12. SPMs were under an express contractual duty to account to the Post Office in the manner required or prescribed by the Post Office. This was by using the Horizon system. This required a Branch Trading Statement, which is not subject to the same common law principles that would apply as though it were an agreed or settled account. The Branch Trading Statement required a SPM to “accept now” in respect of items that were disputed or not agreed. The common law principles at Common Issue 12(b) and (c) do not apply to the Branch Trading Statement.

13. No, SPMs bear no such burden.”

### Discussion

27. As the judge said at the beginning of the Common Issues Trial judgment, the contracts between SPMs and POL were what was relevant to the Common Issues Trial.<sup>17</sup> Thus,

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<sup>16</sup> Para 1122.

<sup>17</sup> Para 3.



the focus of the trial was towards resolving the contractual dispute between the parties, with six lead claimants chosen by the parties themselves whose experiences covered different time periods, and the SPMC (and modified SPMC) and NTC contracts.<sup>18</sup>

28. The judge acknowledged that for the group litigation to achieve and resolve anything, it had to resolve issues affecting all the many hundreds of claimants (of which there are around 550), as well as fully resolving some of the claimants' individual claims.<sup>19</sup>

29. Significantly, by way of introduction, the judge said:<sup>20</sup>

“I have said in each of my written judgments in this case before, and in a number of interlocutory hearings as well, that this is bitterly contested litigation. The parties are poles apart in their approach to the issues, and in their approach to the litigation generally. When shortfalls occurred, the Post Office demanded (and I use that word advisedly) that each individual sub-postmaster pay the sums in question. This stance was consistent with what remains the Post Office's general position, which is that if Horizon shows a shortfall of X pounds, that shortfall of X pounds must have been caused by the sub-postmaster, either through mistake or dishonesty. Some shortfalls started in the hundreds of pounds, and moved into the thousands, and then tens of thousands, of pounds over a few months. Some Claimants paid these amounts to the Post Office out of their own resources, even though they did not believe or accept that there was anything deficient in their accounting. Some of the shortfalls were only for modest sums. Some Claimants were lucky enough to find accounting irregularities in their favour. Others were convicted in the criminal courts of false accounting, fraud, theft or other offences, and some were imprisoned. The Post Office's position in this litigation is not quite that it is impossible for Horizon ever to generate any errors, but rather that the system is what is called “robust” and can be relied upon. Further consideration of that will occur in the Horizon Issues trial. It should be noted that the Post Office itself is the prosecuting authority for prosecutions of sub-postmasters. These Claimants

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<sup>18</sup> Para 46.

<sup>19</sup> Para 9.

<sup>20</sup> Para 10.



claim malicious prosecution against the Defendant, and also claim that there was a “cover up” at the Post Office over the shortcomings in Horizon. Some Claimants were made bankrupt. There are claims for damages for financial loss, personal injury, deceit, duress, unconscionable dealing, harassment and unjust enrichment brought against the Post Office. There is currently a Criminal Cases Review Commission (“CCRC”) review underway in respect of the convictions of a significant number of the Claimants. These are being dealt with together by the CCRC and are, effectively, awaiting the outcome of the technical aspects of this litigation. This is a High Court civil action and has no jurisdiction or involvement in such criminal matters.”

30. Thus, significantly, the judge acknowledged that the High Court civil action has no bearing on the criminal matters being reviewed by the CCRC which is awaiting “the outcome of the technical aspects of the litigation”. I have taken that to be a reference to the Horizon Issues Trial. I am told that the claimants (who can only be those claimants who were prosecuted) are bringing claims for malicious prosecution, but no directions have yet been set for the hearing of those claims.
31. At the time of my 2013 Review, I was unaware of any appeal proceedings relating to Horizon,<sup>21</sup> and I remain unaware of any existing appeals or applications for permission to appeal against conviction; I assume there has been none.
32. What is the relevant test the Court of Appeal applies? The Court of Appeal will allow an appeal if they think the conviction is unsafe.<sup>22</sup> The circumstances in which the Court of Appeal will find a conviction unsafe are many and varied. The list is not definitive, and it is impossible to draw up a list of circumstances in which the Court will find a conviction unsafe.
33. As I advised in the October 2013 Review,<sup>23</sup> material non-disclosure can render a conviction unsafe, and in this regard, the Court of Appeal will ask itself ‘whether there is a real possibility that the jury would have arrived at a different verdict had the

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<sup>21</sup> Para 126.

<sup>22</sup> Section 2(1) of the Criminal Appeal Act 1968.

<sup>23</sup> Para 154.

necessary disclosure been made.’<sup>24</sup> Non-disclosure can lead to the quashing of a conviction even where there has been a plea of guilty.<sup>25</sup>

34. Any individual appeal would almost certainly have to proceed on the basis of an application to adduce fresh evidence before the Court of Appeal.<sup>26</sup> In deciding whether to receive any fresh evidence the Court of Appeal will decide whether the new evidence is capable of belief, whether it appears that the evidence may afford any ground for allowing the appeal, whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal, and whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.
35. As for the CCRC, the criteria I mentioned in my October 2013 Review have to be met before the CCRC can make a reference to the Court of Appeal,<sup>27</sup> so the test the CCRC will apply before considering making a reference is whether they consider that there is a ‘real possibility’ that the conviction would not be upheld on account of some argument or evidence not raised in the proceedings which led to it. There must also have been an appeal, or an application for permission to appeal, which has been refused. But, failing these criteria, the CCRC may still make a reference if there appear to be ‘exceptional circumstances’ for so doing.<sup>28</sup>
36. In practical terms, although it remains open to an individual to appeal their conviction out of time with reasons,<sup>29</sup> my strong suspicion is that anyone (claimant in the group litigation or otherwise) who thinks their conviction might be affected by the case is likely to be advised to await the outcome of all the substantive trials in the litigation, as well as the CCRC’s review, rather than to proceed precipitately.
37. Here, the focus is on Mr Justice Fraser’s analysis of Branch Trading Statements and his finding that POL’s reliance on them as a settled statement of account at the end of a particular branch trading period cannot be supported where the SPM sought help from

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<sup>24</sup> *McInnes (Paul) v HM Advocate* [2010] HRLR 17 SC.

<sup>25</sup> *R v Smith* [2004] EWCA Crim 1626.

<sup>26</sup> Section 23(1)(c) and 23(2) of the Criminal Appeal Act 1968.

<sup>27</sup> Paras 158-159, 165.

<sup>28</sup> Section 13 of the Criminal Appeal Act 1995.

<sup>29</sup> Section 18(3) of the Criminal Appeal Act 1968 and CrimPR 36.4.

the Helpline (or NBSC). Despite the unlikelihood of POL being confronted by applications to appeal out of time at present, the theoretical impact of the judge's findings on any past convictions needs to be considered. If his analysis applies to past criminal convictions, then that could in theory raise an issue regarding the safety of any conviction based wholly or mainly on the correctness of a disputed Branch Trading Statement in any branch trading period.

38. Clearly, Mr Justice Fraser's findings were findings of fact based on his interpretation and application of the law of contract. He made clear from the outset that the focus of the Common Issues Trial was the contracts between POL and SPMs. The contractual relationship between POL and SPMs was defined by the express and implied terms of the contracts. For that reason, Mr Justice Fraser's findings are not binding on the Court of Appeal or even persuasive authority. This he acknowledged when he said, "This is a High Court civil action and has no jurisdiction or involvement in such criminal matters."<sup>30</sup>
39. Moreover, what the judge finds as facts does not constitute fresh evidence for the purposes of any appeal, but the facts underlying those findings could amount to fresh evidence. If, for instance, relevant and admissible evidence heard in the course of the group litigation suggested previously unknown Horizon defects caused or might have caused shortfalls explaining the losses in branch, that could in theory be relied upon as fresh evidence in an appeal.
40. However, the circumstances of any individual appeal (or even a CCRC reference based on the circumstances of individual cases) would be far from straightforward, and likely to be complicated if, for example, it were claimed that POL had known about certain Horizon defects but had failed to disclose them during the trial process. Such a scenario would be complicated further where a SPM had admitted inflating their figures and falsifying the Branch Trading Statement, and had gone on to plead guilty to offences such as false accounting on the basis of their admissions but now argued that alleged non-disclosure affected the advice they were given to plead guilty.

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<sup>30</sup> See para 29 above.

41. The point I am trying to make (which is borne out by my analysis of the case files I reviewed in 2016 (for which see below)) is there is unlikely to be any one-size-fits-all or any thematic approach the CCRC can adopt towards these cases as a whole; appeals on conviction tend not to operate in the same way as group litigation, not least because the Court of Appeal has to look at the safety of each conviction. Any appeal case has to be looked at on its own facts, and, unless there was reliable evidence to demonstrate that every case was affected in the same way (for example) by the same Horizon defect such as to lead to the conclusion that the conviction in each case was unsafe for the same reason, then the same conclusion could not be reached in each case.
42. I have considered whether POL should open a review of cases to examine any case potentially impacted by the judge's factual findings on the effect of Branch Trading Statements. It would only have any use if POL felt there was material it was aware of that might impact on the safety of convictions. However, unlike the reviews began by Cartwright King in 2013 which were targeted at disclosure of the Second Sight Interim Report and the Helen Rose Report in suitable cases, the group litigation has thrown wide open the many relevant issues between POL and SPMs, there has been full discovery in the litigation, the litigation has been highly publicised in the media, the Common Issues Trial judgment is open to the public, as are the trial hearings themselves, the CCRC is watching the proceedings, 61 of the claimants are former SPMs who were convicted of, or pleaded guilty to, criminal offences against POL, and Alan Bates, the lead claimant in the litigation, is or was involved in the JFSA which has a keen interest in the outcome of the proceedings.
43. Indeed, as the judge said in the judgment:<sup>31</sup>

“Because the subject matter of this litigation is so controversial, there has been a great amount of public interest in it. Over the years, and prior to the issue of proceedings by the Claimants there was an action group formed, called Justice For Sub Postmasters Alliance (“JFSA”). Mr Bates was centrally involved in this. Encouraged by some Members of Parliament, an independent inquiry was set up by the Defendant using a specialist company called Second Sight Services

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<sup>31</sup> Para 22.



Ltd (“Second Sight”) that ran from 2012 until 2015, when it was terminated by the Post Office for reasons that are currently unclear. Evidence was given to a Parliamentary Select Committee by the Chief Executive of the Post Office in February 2015. This was in relation to the Mediation Scheme funded by the Post Office that had run for a while jointly under the auspices of the Post Office, Second Sight and JFSA. That publicly funded scheme ended without resolving the issues between the Post Office and sub-postmasters involved, and was roundly criticised in an adjournment debate in the House of Commons. There have been various reports and documentaries in the media, including a BBC Panorama documentary entitled “Trouble at the Post Office” in August 2015.”

44. There is in my opinion therefore no point or utility in POL commencing any new review in light of the openness of the proceedings, the parties to it and the CCRC’s interest in it.
45. In February 2016, in their written Review Messrs Swift and Knight advised consideration of the question (1) whether the decision to charge a SPM with theft and false accounting could undermine the safety of any conviction for false accounting where (a) the conviction was on the basis of a guilty plea, following which and/or in return for which the theft charge was dropped, and (b) there had not been a sufficient evidential basis to bring the theft charge; and recommended (2) if such a conviction could be undermined in those circumstances, that counsel review the prosecution file in such cases to establish whether, applying the facts and law applicable at the relevant time, there was a sufficient evidential basis to conclude that a conviction was a realistic prospect such that the charge was properly brought.
46. I was therefore asked to review all such potentially affected cases for which I was sent the case files. As I have said before, those were the cases of Hall,<sup>32</sup> Hamilton, Henderson, Holmes, McDonald, Misra, Williams and Wilson, all of whom are among the 61 claimants in the group action, and who were convicted of, or pleaded guilty to, offences against POL.

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<sup>32</sup> In fact, I was unable to review Hall’s case, as there was little documentary material to enable me to do so.



47. Although that review was for an entirely different purpose, some of the cases serve to illustrate the prosecution of SPMs for false Branch Trading Statements, and the interplay with the repayment of shortfalls by SPMs according to what was understood to be the contractual obligation. They also demonstrate how the judge's findings about the contractual relationship (particularly the findings on disputed Branch Trading Statements) between POL and SPMs are immaterial to the safety of the convictions.
48. Indeed, the judge's findings of fact about disputed Branch Trading Statements can have no relevance to the case of a SPM charged with a criminal offence against POL who admits dishonestly falsifying the account as reflected by the Branch Trading Statement (or was proved to have done so) and/or stole the sums covered up by the falsification. It is important not to confuse the findings about disputed Branch Trading Statements in the context of the relational contracts between POL and the SPM (which was the focus of the judge's findings and which may or may not later lead to a finding of breach, causation and loss) and the admitted or proven deliberate and dishonest falsification of a Branch Trading Statement by an offender in the course of a criminal trial to conceal a shortfall and/or the theft of monies by a SPM.
49. Where POL successfully prosecutes a SPM based wholly or mainly on the correctness of the Branch Trading Statement, it will have done so according to the burden of proof and the criminal standard of proof cast on POL as a private prosecutor. What that means, is unlike the judge's findings on the contractual burden between POL and SPM as regards Branch Trading Statements, POL always has the legal burden of proving that the SPM is guilty of the offence or offences charged to the criminal standard of proof, and to the extent its case relies on the correctness of the Branch Trading Statement, it also has at least an evidential burden of proving the statement to be accurate. Likewise, to the extent that a SPM challenges the functionality and fallibility of Horizon, POL has at least an evidential burden of proving the data to be accurate and was not produced by reason of some bug or error. Where a SPM has admitted guilt, then in the absence of evidence the SPM did not plead guilty freely, or was ill-advised by his representatives, then the conviction based on that admission will be difficult if not impossible to overturn.

50. Naturally, each of the cases I reviewed in 2016 (to which I now come) is fact-specific; there are no paradigm cases. These summaries should be read in conjunction with my original Advice where I set out the facts far more fully. Footnote references are to paragraphs in my Review.
51. Josephine Hamilton was a Legacy Horizon case.<sup>33</sup> Analysis of Branch Trading Statements for two consecutive periods indicated a cash deficit of over £36,000 and/or the falsification of the cash figure in the Branch Trading Statement for the first period. Mrs Hamilton had called the Helpline, but none of the calls related to, or could account for, such a deficit. The prosecution case was that she had inflated the cash on hand figure over several months in order to disguise her thefts of the cash. In due course, Mrs Hamilton pleaded guilty to several counts of false accounting and the count of theft representing the loss was left on the file on condition Mrs Hamilton repay the shortfall, which she did.
52. Another case file I considered as part of this exercise was Seema Misra.<sup>34</sup> This too was a Legacy Horizon case, albeit the case was not finally tried until 2010. Mrs Misra explained to investigators that she had hidden shortages by falsifying the cash on hand figure, and also by falsely declaring cash in pouches or currencies awaiting despatch. She conceded this had been dishonest, but said she wanted to save her business. She added she had been repaying money into the account. She confirmed that she was the only person who had completed the Branch Trading Statements at the sub-post office since 2007.
53. Mrs Misra had first said she was guilty of false accounting but not guilty of theft, claiming that employees working at the post office had been guilty of stealing it. Initially, she made no allegations about Horizon defects, or (so far as I can find) about any lack of support. The first trial in 2009 had to be aborted because Mrs Misra belatedly alleged Horizon reliability issues. Following her changing her solicitors, Mrs Misra then changed her defence, resiling in part from the allegation that her employees had stolen from her, but now asserting that her training had been deficient, and Horizon

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<sup>33</sup> Paras 57-108.

<sup>34</sup> Paras 109-137.

was responsible for the losses. Mrs Misra's new solicitors had also written to POL to say that the possible theft by Mrs Misra's other employees remained a live issue.

54. At or before her new trial in 2010, Mrs Misra pleaded guilty to false accounting but not guilty to theft. POL chose nonetheless to try her on the theft allegation, and she was convicted. It is clear that Mrs Misra had first admitted the offences of false accounting to investigators, and subsequently formally pleaded guilty to counts of false accounting. At the time of the first trial, her case was there had been a theft of the monies, which she had tried covering up, and, by the time of her second trial, her case had remained so, albeit running in parallel with claims about Horizon fallibility and her training. Indeed, the transcript of the judge's summing-up at trial shows the trial judge summarised her defence in this way: <sup>35</sup> "There was a shortfall apparent on (sic) the tills at the time of the audit ... but the cause of that was not her taking the money. She thinks it was staff theft, problems with the computer system and general (sic) just problems of coping with the demands of running the post office leading to disorganisation and incompetence. That is what the defence case is." Mrs Misra had also rung the police to allege her employees had stolen relatively small sums.
55. Julian Wilson faced several fraud counts alleging that he had "dishonestly and intending thereby to make a gain for himself or another abused his position as sub-postmaster of Astwood Bank Post Office in which he was expected to safeguard the financial interests of Post Office Limited by enabling a substantial deficiency to rise, by failing to make good that deficiency whilst pretending that he had done so and by falsifying entries in Final Branch Trading statements in breach of section 4 of the Fraud Act 2006."
56. Mr Wilson pleaded guilty to two counts of fraud on the basis that he had failed to make good losses, which accumulated in 2007 and 2008. Thus, this too is a Legacy case. Of note, Mr Wilson said he had falsified entries in the final Branch Trading Statements, and in so doing had avoided repayment, as had been his contractual obligation. He said the losses had occurred as a result of staff or systemic errors, he did not believe any of the money was stolen, he had not stolen the money, and he had made no financial gain.

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<sup>35</sup> Page 59D-E.

57. Margery Williams was another case I reviewed.<sup>36</sup> An audit revealed a shortage of over £14,000, representing the difference in cash, stock, postage and foreign currency.
58. Mrs Williams was interviewed under caution in June 2011. She explained that she had been having trouble with balancing from the end of February to the beginning of March 2011. She was unable to explain the shortfall in the cash on hand figures but implied the losses might have been linked to Horizon. She said she had first noticed a discrepancy in the accounts around February/March 2011. She admitted producing a false Branch Trading Statement by inflating the cash on hand figures; she had done this by inflating the cash figures of one denomination rather than across all denominations. She confirmed knowing it was wrong to do this. She admitted inflating the cash for a period of about three months but she denied theft. She admitted inflating the number of stamp books on hand which were out by bundles of 50, explaining that in April 2011 the stamp books had changed and in the following balances they were out. She had concluded that she must have ‘remmed’ them wrongly into the Horizon system.
59. Mrs Williams was charged on indictment with four counts of fraud by false representation covering the three-month period between 2 March 2011 and 2 June 2011. She later pleaded guilty to the four counts on the indictment.
60. The pre-sentence report said “Mrs Williams ... stated that she had deliberately ‘cooked the books’ from February onwards ...” and “Mrs Williams was unable to fully give an account of her reasons for taking the money, only stating that she had used some of it to support her shop which was underperforming ...” The author of the report noted “... she was not open with regard to what had happened to (all of) the money”.
61. Thus, this was a clear case where on her own admission Mrs Williams had defrauded POL and had in fact taken the money for her own use.

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<sup>36</sup> Paras 170-182.



62. Finally, Alison Henderson.<sup>37</sup> An audit at branch had revealed a cash on hand deficit of £11,957.78. During interview, she denied stealing the money herself and denied falsifying Branch Trading Statements but offered to repay the money.
63. Subsequently, Mrs Henderson accepted that £11,957.78 appeared to be missing; she had no explanation for the discrepancy but said she believed that Horizon may have malfunctioned. She categorically denied theft, but accepted she was contractually bound to repay the money and would do so. In due course, she repaid the money and pleaded guilty to false accounting on the basis she had dishonestly covered up the discrepancy by entering false figures in the branch accounts but continued to maintain her denial of theft.
64. Whether or not the judge's findings lead to the conclusion that the SPMs in these examples were not contractually bound to repay POL the shortfall has nothing to do with the criminal acts they either accepted committing or were proved to have committed. On the judge's findings which included the qualification of calling the Helpline to dispute the Branch Trading Statement, except in the case of Mrs Hamilton (where she had called the Helpline, but none of the calls related to, or accounted for, the deficit) none of the other cases I summarised in my 2016 Review appear to involve any of the other SPMs logging disputes about Branch Trading Statements with the Helpline.
65. If my summary of these sample cases is accurate and complete,<sup>38</sup> then Mr Justice Fraser's finding that POL is not entitled to rely upon Branch Trading Statements for any period in respect of which a SPM notified a dispute to the Helpline as a settled account between agent and principal has no relevance anyhow. Even if (contrary to my view) the judge's findings could be argued to apply to past convictions, given the qualification that the SPM had to have called the Helpline to log a dispute about the relevant Branch Trading Statement to render it unreliable, where a given SPM had never called the Helpline, POL would by the terms of his finding be fully entitled to rely upon it, which appears to be the case in all the sample case files I reviewed in 2016.

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<sup>37</sup> Paras 183-202.

<sup>38</sup> I am being deliberately cautious because my review of these select cases was for a different purpose, so there is a possibility that in the cases other than Hamilton's I omitted any references to calls to the Helpline if they did not appear to be germane to the issue I was asked to consider.



66. Thus, I see no issues regarding the safety of individual convictions based on Mr Justice Fraser's analysis of the contracts between POL and SPMs. Each case has to be looked at on its own facts, and where POL has placed reliance on the Branch Trading Statement to prosecute a case to the criminal standard, or where its falsity was admitted, findings on contractual law and where the contractual burden lies cannot operate to displace criminal convictions simpliciter.
67. As regards the CCRC, I cannot see that anything the judge has said on the topic of Branch Trading Statements in the Common Issues Judgment is likely to lead it to determine the test it must apply is satisfied or, if it did, to render any SPM's conviction unsafe on that ground for the reasons outlined above.

### **Wider implications for past convictions**

#### *Judicial criticisms*

68. In the course of his judgment, the judge made a number of comments criticising POL and Horizon, albeit he repeatedly stated that he was not making findings about the functionality of Horizon which would have to await the Horizon Issues Trial.<sup>39</sup> There were also a number of general comments the judge made as a result of which POL sought his recusal in April 2019. I note in particular his observations about "a culture of secrecy and excessive confidentiality generally within the Post Office, but particularly focused on Horizon".<sup>40</sup>
69. The judge returned to this theme elsewhere.<sup>41</sup> Under the heading "The Post Office approach to documents",<sup>42</sup> among other observations, the judge commented, "Disclosure of plainly relevant documents has been resisted by the Post Office in this litigation, which led to interlocutory hearings and eventually orders by me in relation to disclosure. Again, I have also dealt above with the situation concerning Mrs

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<sup>39</sup> See e.g. para 21.

<sup>40</sup> Para 36.

<sup>41</sup> Paras 42 and 120.

<sup>42</sup> Paras 559-560.

Stockdale, whose credit was directly attacked as a result of an audit, yet the documents sought by her advisers relating to the initiation of that audit were not disclosed.”

70. He added, “These are examples, in my judgment, 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 they (sic) can be a sensible or rational explanation for any of them.”<sup>43</sup>
71. Even though the judge was directing his remarks at his perception of POL’s alleged conduct in the civil litigation, they might be thought by some to imply that POL’s alleged culture of secrecy extends to its prosecutorial function. These judicial criticisms could lead to a further diminution in trust as to POL’s approach to its prosecution function, in general, and to its disclosure duties, in particular. The CCRC will doubtless also have noted these comments.
72. The judge also made reference to extracts from 14 internal POL documents in which he said there had been an awareness of Horizon problems within POL over the years. I reproduce them in full because of their significance.<sup>44</sup>

“1. On 1 November 2000 in internal e mails from Frank Manning to Sue Locke, at 14:39: *“We talked about this case when I was in St. Albans last month & it is still on-going. I visited there today & was too scared to accept a cup of tea in case the Horizon system crashed cos the electricity supply is still a live (excuse the pun) issue. The balances are a mess (in pre Horizon times - the Postmistress virtually achieved a clean balance every week) & I've got the RNM going in there next Wednesday to see what actually happens on the ground but I worry that something like 25 re-boots in one day is having an effect overall. Need your best offices to get this case to a proper solution - she keeps getting promises of attention - but nothing is actually being done now to clear up the problem. **It is Horizon related** - the problems have only arisen since install & the postmistress is now barking & rightly so in my view. Help please.”*

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<sup>43</sup> Para 561.

<sup>44</sup> Paras 541-542.

(the bold emphasis “**It is Horizon related**” is present in the original, the underlining has been added in this judgment)

2. Sue Locke sent an answer back to Frank Manning on 2 November 2000 at 09:24 which was copied to Sanjay Patel. This asked “Frank - As discussed when you visited, can you confirm that the office have had an independent electrician visit it and that the problems are due to the electric's input by Horizon?”

The answer to this was very clear from Mr Manning, in an e mail of 12:58 on the same day, again copied to Sanjay Patel.

“Answer is YES to both points.”

(again, the use of block capitals was present in the original)

3. In the next email in this sequence, from Sue Locke to Kevin Cox, on 2 November 2000 at 14:05 she said: “*Frank came to see me about this office and we discussed it with Sanjay and said that she [ie Mrs Stubbs] needed to prove that it was Horizon that was causing all these power failures in the office (I think Remedy records this). Can you tell us please how we can now get this resolved as it appears now it is a direct consequence of the installation and not anything that has happened in steady state.*”

(emphasis added by me)

4. On 8 February 2007, in an e mail in relation to recovery of a disputed amount, Jacqueline Whitham stated:

*“I in the debt recovery section of P & BA and so could only report to you TCs that have already been issued. However part of my duty includes the deduction from remuneration process and so I do have a little knowledge of the office. I can confirm that a TC relating to Lottery has been issued and settled centrally for a credit of £22,778.40. Unfortunately, this credit was eaten into by a Lottery debit TC for £34,028.00.”*

5. On 14 November 2008 in a document called a “TC/Debt Recovery Review” the following was noted about SPMs generally:

*“Key Feedback Issues  
NFSP.*

They are forced to accept debts they do not agree with at Branch Trading.

7 days is a reasonable period of time to investigate a transaction correction before being forced to accept. Evidence provided is not meaningful in some cases e.g. Lottery Transaction Correction instructions are not clear.”

Network

.... Processes are not understood.

Communications to branches and network needs to be improved. What does settle centrally mean?

Costs of non-conformance – can this be passed on?

Legal

“Settle Centrally” signifies acceptance of debt liability.

Forcing TC acceptance on the same day as receipt through branch trading requirements would probably be regarded as unreasonable by a court of law and cause a related claim to fail.

NBSC.

The vast majority of calls to NBSC are either appropriate generic queries around processing TCs or complaining about being able to contact the Lottery team. There is nothing on the Knowledgebase to deal with a branch who needs more time to assess a TC.

1) Reinforcement of existing processes

> Defined product ID on TCs....

> Define Settle Centrally...

4) Rejected Proposals

Dispute button on transaction corrections – TCs are issued with evidence. The use of a dispute button simply provides a delaying mechanism and requires P&BA to resupply the evidence.

5) Further Investigation

Maintained error analysis – are any branches repeatedly getting amounts written off. Link to worst branch analysis.

Can we consolidate and issue – debits and credits? Do we keep it a secret?”

(emphasis added)



The phrase which jumps out particularly in this latter passage is the question posed “do we keep it a secret?”

6. On 10 February 2010 in a Post Office policy document entitled “Review of the Creation and Management of Transaction Corrections in POLFS to correct accounting errors in Horizon”:

***“2.2.6 High Value Transaction Correction Authorisation Signature Requirement***

*As part of the Transaction Correction creation process a high value authorisation series of signatures has been introduced. This is a form that goes with the evidence and is signed by the level of manager dictated by the value. Between £10k and £29.99K the team leaders' signature, £30K to £49.99K Senior managers signature and over £50K requires the head of P&BA to sign. These forms are then filed with the paperwork. The reason for creating this extra check step was two fold; firstly to prevent large credit Transaction Corrections being issued, then a long period for the debit to be issued, which then might get disputed and blocked. The second reason being to ensure that branches are not hit by a large value Transaction Correction which is subsequently found to not be proper to that branch."*

*"Camelot uses a process of rolling up or amalgamating all errors incurred by a branch over a period and issues one transaction correction to the branch. They send a spreadsheet with details of the errors to the branches to help them reconcile with their paperwork. This is not a popular method and there is a feeling that branches find it difficult to understand that evidence.*

*The reason for using this method is because there are too many errors to handle on an individual basis without doubling the resource requirement or getting into a backlog situation."*

*“Fujitsu send a file containing all the Transaction Corrections sent to Horizon, the data shows all the information the branch received, this includes the text. Analysis of the Fujitsu file found c2000 Transaction Correction were found to have no contact number within the text out of 40K issued between August and October 09 which is circa 5%. In some cases this is because the branches are instructed to address any disputes in writing.*

*During the analysis of the long text of the Transaction Corrections there were many other issues which made the task very difficult. E.g. the text I field was very inconsistent in teams approach, some use a reference number some use the name of the product.”*

(emphasis added)

7. On 26 May 2010 in an internal e mail about Mrs Stubbs from Rajinder Gihir to Nigel Allen:

*“However when I put the audit figures in the Horizon it would not match the figures on my audit spreadsheet. I tried that for two hours without any success, so finally accepted the Horizon figures which came to overall shortage of the office £3218.36 a difference of £374.48 from my above figure. (2843.88). Pam was quite happy to accept the new figure maintaining that when she puts her figures for everyday work they also do not match with the Horizon.”*

8. On 28 July 2010 in an email from N Allen to POL duty manger, M Dinsdale and J Owen dated 28/07/2010 re what are called ARQ Requests, which is something raised with Fujitsu but which SPMs could not action, they had to be raised by the Post Office:

*“Nigel. No probs with requesting data from Fujitsu but it will take around three weeks. Has Jason agreed to take this case on, because we don’t hand over Horizon logs to an spmr. It needs an expert to understand what it says and usually this requires one of the investigators”*

*I will give Jason a call in the morning then I will raise an ARQ from Fujitsu. Is this for our benefit, as there is a cost attached to ARQ requests, we do get a supply free of charge as part of the contract but we usually don’t enough, therefore we usually charge the defence lawyers.”*

(emphasis added)

The reference to “defence lawyers” could mean either those instructed to defend civil claims for outstanding amounts, or lawyers acting for those SPMs who were being or had been prosecuted by the Post Office.

9. On 7 September 2012 in a Post Office Branch Audit Trend Analysis YTD Q1 2012/2013:

*“A couple of existing agents have claimed that their discrepancies are as a result of the Horizon system. Action taken – the process we follow to investigate claims from agents that the Horizon system is generating discrepancies has been reviewed.*

*The refreshed process is detailed at appendix 2.”*

This document is at {G/7/6} of the electronic trial bundle, and is Appendix 5 to this judgment. It is a complex flowchart, but whatever is done, eventually the central question is reached “Can agent provide specific day and timeframe for alleged fault?” If the answer to this is No, then the SPM will be told that the Post Office response is to “Advise unable to progress further until can do so”.

10. On 17 October 2012, at a meeting which 4 Fujitsu personnel attended as well as numerous Post Office personnel, entitled “Receipts-Payments Mismatch issue notes”:

*“What is the issue?”*

*Discrepancies showing at the Horizon counter disappear when the branch follows certain process steps, but will still show within the back end branch account. This is currently impacting circa 40 Branches since migration onto Horizon Online, with an overall cash value of circa £20k loss. This issue will only occur if a branch cancels the completion of the trading period, but within the same session continued to roll into a new balance period.*

*At this time we have not communicated with branches affected and we do not believe they are exploiting this bug intentionally. The problem occurs as part of the process when moving discrepancies on the Horizon System into Local Suspense.*

***Note the Branch will not get a prompt from the system to say there is Receipts and Payment mismatch, therefore the branch will believe they have balanced correctly. Impact***

- The branch has appeared to have balanced, whereas in fact they could have a loss or a gain.*
- Our accounting systems will be out of sync with what is recorded at the branch*
- If widely known could cause a loss of confidence in the Horizon System by branches*

- Potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data

- It could provide branches ammunition to blame Horizon for future discrepancies.

The Receipts and Payment mismatch will result in an error code being generated which will allow Fujitsu to isolate branches affected this by this problem, although this is not seen by the branches. We have asked Fujitsu why it has taken so long to react to and escalate an issue which began in May. They will provide feedback in due course.

Fujitsu are writing a code fix which stop the discrepancy disappearing from Horizon in the future. They are aiming to deliver this into test week commencing 4th October. With live proving at the model office week commencing 11th October. With full roll out to the network completed by the 21st of October. We have explored moving this forward and this is the earliest it can be released into live.

The code fix will on stop the issue occurring in the future, but it will not fix any current mismatch at branch.

Proposal for affected Branches

There are three potential solutions to apply to the impacted branches, the groups recommendation is that solution two should be progressed.

**SOLUTION ONE** - Alter the Horizon Branch figure at the counter to show the discrepancy. Fujitsu would have to manually write an entry value to the local branch account.

**IMPACT** - When the branch comes to complete next Trading Period they would have a discrepancy, which they would have to bring to account.

**RISK**- This has significant data integrity concerns and could lead to questions of "tampering" with the branch system and could generate questions around how the discrepancy was caused. This solution could have moral implications of Post Office' changing branch data without informing the branch.

**SOLUTION TWO** - P&BA will journal values from the discrepancy account into the Customer Account and recover/refund via normal processes. This will need to be supported by an approved POL communication. Unlike the branch



*"POLSAP" remains in balance albeit with an account (discrepancies) that should be cleared.*

*IMPACT - Post Office will be required to explain the reason for a debt recovery/refund even though there is no discrepancy at the branch.*

*RISK - Could potentially highlight to branches that Horizon can lose data.*

*SOLUTION THREE - It is decided not to correct the data in the branches (ie Post Office would prefer to write off the "lost"*

*IMPACT - Post office must absorb circa £20K loss*

*RISK - Huge moral implications to the integrity of the business, as there are agents that were potentially due a cash gain on their system"*

*(emphasis in bold present in original; emphasis by underlining added)*

11. On 14 May 2013 in a document entitled "Local Suspense Problem":

*"The purpose of this note is to provide a management level summary of the "Local Suspense" problem that was identified earlier this year and was seen to impact 14 of the current Horizon Branches. This issue occurred on Horizon Online and due to the different architecture of the old Horizon system, such an issue could not have occurred on the old Horizon system.*

*...This problem was not reported to Fujitsu in 2011/12 and only affected a small number of branches and only for a single Trading Period. However, it was reported to Post Office Ltd who could see the impact of the problem in their back end system and wrote off the loss for the branch but did not ask Fujitsu to investigate further."*

*"At the same trading period 2012/13 the problem reoccurred and this time one of the affected branches reported the problem to Fujitsu on 25<sup>th</sup> February 2013 (Peak 223870) resulting in a detailed analysis of this issue and finding the orphaned BTS records. The root cause was determined by 28<sup>th</sup> February 2013 and a preliminary report was sent to Post Office Ltd. A further update was sent on 14<sup>th</sup> March 2013 with a full analysis of the issue and all affected branches."*

*(emphasis added)*

12. On 26 June 2013 in an internal document “Benefits of extending the life of business transaction data”:

**“Business benefits**

*The business, in particular the Security and P&BA departments suffer from the inability to interrogate its data due to the short periods of retention. If we were to keep data for longer and for that data to be interrogatable the following areas should benefit:*

*POCA Claims and Disputes*

*Banking*

*Other product Claims and Disputes*

*Flag cases*

*Fraud and Conformance investigations*

*Proactive fraud identification (obviates the complexity costs of the Detica project which if goes ahead will need to take inputs from multiple sources instead of just one single database)*

*Security investigations*

*Criminal investigations*

*SPMR Contract advisors – re non-conformance suspension hearings”*

**Financial benefits**

*Paying Detica for proactive fraud project probably way too much due to complexity of taking from multiple sources ARQ (Audit retrieval process) costs at least £384k recurring annually. This is subsumed without breakdown in the Fujitsu Security Management costs. 720 requests @ £450 unit cost”*

13. On 24 October 2016 in what is called in the trial bundle Index “Business Case Paper”, but the actual title on the document is “Network Development Enhanced User Help & Support”:

*“1. Horizon Help (the in-branch operational support tool) has since its introduction over a decade ago fallen short of delivering the in-branch self-help functionality that was promised as part of Horizon roll-out and that postmasters and their assistants desperately need. This has resulted in a sub-optimum level of service to customers when branches are unclear on a*

*product detail and need to seek help from the Branch Helpline (NBSC). NBSC currently handles 30,000 calls per month and costs c£1.5m pa."*

The proposal in the document, which was to provide "Enhanced user help and support" on Horizon was described as a "Key change". It involved *"an intuitive search engine that enables the in-branch user to quickly get to the information they need, therefore building the trust of branches in the content and encouraging self-service."* Under consideration of the question *"what would the impact be of delaying or rejecting the decision to progress"* (which was obviously going to incur a cost) the following was stated:

*"Delay or rejection would result in:*

*a. Continued acceptance of a poor Horizon user experience and consequently an equally poor customer experience."*

14. Finally, on 17 October 2017 in the Operations Board the following is stated. "Client" is another name for a company with whom the Post Office does business, such as Camelot for the National Lottery:

*"Camelot:*

*Data integrity from client has led to a hold on TC issued in P6. The increase in P6 following clearing back logs which is expected to take until P7 to clear.*

*Ops simplification for the fix on Lottery is coming back at £0.2m and is unjustified. The solution is not to prioritise this on HNGT (next autumn) to redesign the product."*

*(emphasis added)"*

73. The judge said that these documents showed that behind the scenes a number of people at POL realised that there were difficulties with the Horizon system which ran counter to POL's case in the litigation that Horizon was a robust system and that none of the claimants experienced shortfalls or discrepancies in their branch accounts due to problems caused by Horizon.

74. While the judge made clear that the correct position was to be resolved in the Horizon Issues Trial,<sup>45</sup> the implicit suggestion is that Horizon was a defective system POL knew about. This coupled with the charge that POL operated a culture of excessive secrecy invites the risk of further scrutiny of POL and its prosecution function.
75. I know about the two defects that Gareth Jenkins revealed to Second Sight as revealed in their July 2013 Interim Report, and I referred to them in my 2013 Review. Second Sight reported them in the Interim Report in the following terms:<sup>46</sup>

“6.4. In the course of our extensive discussions with POL over the last 12 months, POL has disclosed to Second Sight that, in 2011 and 2012, it had discovered "defects" in Horizon online that had impacted 76 branches.

6.5. The first defect, referred to as the **"Receipts and Payments Mismatch Problem"**, impacted 62 branches. It was discovered in September 2010 as a result of Fujitsu's monitoring of system events (although there were subsequent calls from branches). The aggregate of the discrepancies arising from this system defect was £9,029, the largest shortfall being £777 and the largest surplus £7,044. POL has informed us that all shortages were addressed at no loss to any SPMR.

6.6. The second defect, referred to as the **"Local Suspense Account Problem"**, affected 14 branches, and generated discrepancies totalling £4,486, including a temporary shortfall of £9,800 at one branch and a surplus of £3,200 at another (the remaining 12 branches were all impacted by amounts of less than £161).

6.7. POL was unaware of this second defect until, a year after its first occurrence in 2011, it re-occurred and an unexplained shortfall was reported by an SPMR.

6.8. POL's initial investigations in 2012 failed to reveal the system defect and, because the cause could not be identified, the amount was written off. Fujitsu

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<sup>45</sup> Para 543.

<sup>46</sup> Paras 38-39.



looked into the matter early in 2013 and discovered, and then corrected, the defect.

6.9. It seems however, that the shortfalls (and surpluses) that occurred at the first occurrence (in 2011) resulted in branches being asked to make good incorrect amounts.”

76. Number 10 referred to by the judge in the judgment equates to the receipts and payments mismatch issue reported by Second Sight (at §6.5), although Second Sight reported it impacting 62 rather than about 40 branches, and number 11 referred to by the judge equates to the local suspense issue impacting 14 branches, which was reported by Second Sight (at §6.6). The sum of 62 and 14 branches amounts to the 76 branches they reported the two defects impacted (at §6.4).
77. Therefore, even though the judge sought to highlight POL’s awareness of issues around Horizon, the two particular defects he chose to highlight have been known about for a very long time.
78. Beyond those, Helen Rose reported the Lepton sub-post office reversal issue in June 2013, as I mentioned in my 2013 Review,<sup>47</sup> and the Callendar Square, Falkirk, issue from 2005 (also mentioned in my 2013 Review)<sup>48</sup> was raised in the Misra trial, whereby information recorded on one terminal was not correctly passed to another terminal within the branch, creating a receipts and payments mismatch.<sup>49</sup> Neither of these issues appears to have been mentioned in the Common Issues Judgment but they have raised their heads in the material I have been sent from the Horizon Issues Trial to which I now turn.

### Horizon Issues Trial

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<sup>47</sup> Paras 48-50.

<sup>48</sup> Para 130.

<sup>49</sup> Misra Transcript of 14 October 2010 at pages 46G-53A.

79. The second witness statement of Torstein Godeseth (Fujitsu) deals with the claims made by Prof McLachlan in the Misra trial,<sup>50</sup> including the Callendar Square issue which apparently affected 30 branches.<sup>51</sup> Mr Godeseth also dealt with three other bugs and their resolution:<sup>52</sup> (1) the receipts and payments mismatch in September 2010 (which equates to the judge's item 10 and §6.5 of Second Sight's Interim Report); (2) the local suspense issue (which equates to the judge's item 11 and §6.6 of Second Sight's Interim Report); and (3) an issue that occurred at Dalmellington branch in October 2015, which is new to me as it post-dates by some margin my 2013 Review.
80. The 21 March 2019 cross-examination of Mr Godeseth in the current trial, in which he was asked about the fact that Prof McLachlan had asked for information that was not obtainable because, according to Mr Godeseth, it had not been viable to keep a Legacy Horizon system running simply to attempt to replicate errors, might be designed to suggest that anyone seeking to challenge a Legacy Horizon issue is unfairly hampered by the fact the issue can no longer be back-engineered.
81. On 20 March 2019, Mr Godeseth was asked whether he was aware that there had been instances of duplicate JSNs being committed to the database, and that in the Misra case a duplication of data had been identified in the ARQ figures. He said he had been unaware of it.
82. In his evidence on 20 March 2019, Andy Dunks (Fujitsu) was also asked about the duplications and what Gareth Jenkins had said about it in his witness statement of 8 July 2010. It related to ARQ 447 which recorded transactions between 1 November 2007 and 30 November 2007 and contained some duplication of audited records. In his witness statement, Gareth Jenkins had emphasised that it did not affect actual physical transactions on any counter of any outlet.
83. Andy Dunks was also asked about Penelope Thomas's witness statement of 4 February 2010. Mr Dunks was questioned about the fact her statement did not refer to ARQ 447 containing duplicates. Mr Dunks made clear that Fujitsu's function was to extract the

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<sup>50</sup> Paras 7-11.

<sup>51</sup> Paras 11-16.

<sup>52</sup> Paras 34-61.

data and it was not their concern what was in it. I do not know if the point being made was that there was something underhand in Ms Thomas not mentioning the duplicates in her witness statement, but if it is, clearly Mr Jenkins had mentioned it in his statement and assuming both statements were served or disclosed in the Misra case the issue was clearly disclosed to the defence.

84. Mr Dunks was also cross-examined about PEAK PC0211833. The summary given for this event is 'Audit Retrieval for ARQ Returns Missing Reversal Indicator'. The log for the event shows the incident occurred between 5 August 2011 and 24 August 2011 when the issue was resolved. A Technical Summary of 5 August 2011 bears the following notes: "Spreadsheets supplied by the prosecution team miss out an indication as to whether a transaction is a reversal"; "The prosecution team are well aware of the problems: we hope to have a release out in a few days; a KEL is therefore not required"; and "Risks (of releasing and not releasing proposed fix): there are a few risks with this fix. It must be got out or prosecution evidence is incomplete."
85. My observations about this are: first of all, there is nothing in the cross-examination to indicate that this issue was related to any particular claimant's case, let alone any of the 61 group action claimants who have been convicted, or pleaded guilty to, criminal offences committed against POL. Secondly, the issue was chalked up as an issue for the prosecution team to be aware of, and, according to the log, were "well aware" of it. Thirdly, the fix had to be got out because without it "the evidence was incomplete", rather than inaccurate or misleading which are words that might have been used had that been the case. There is nothing to suggest that the issue might or did cause a shortfall or discrepancy in branch as to mean the inaccuracy or substantial inaccuracy of any Branch Trading Statement.
86. My sense from the cross-examination, although it is difficult to judge as I was not there, is counsel for the claimants was seeking to undermine through the Fujitsu witnesses POL's case that Horizon is robust and that none of the claimants experienced shortfalls or discrepancies in their branch accounts due to problems caused by Horizon.
87. I should record the fact that this is the first time I have become aware of this particular issue and its potential connection with POL's prosecution of cases. The PEAK log itself

does not itself appear to make mention of any specific case and the parameters for the event appear to be a three-week period in August 2011 affecting Horizon Online which was fixed.

88. I would hope and assume that POL's prosecution team inhouse were made aware of the issue as the log suggests, and would also hope and assume that if there were live or past prosecutions the issue affected, and Cartwright King were prosecuting them, or had done so, they too were made aware of it (as the log indicates) in order to review it and to make disclosure about it if necessary. In light of the explicit reference to the events and POL prosecutions, I advise that POL investigates the issue with Cartwright King in order to establish if PEAK PC0211833 was notified to the prosecution in August 2011, what, if any, cases were affected; if they were, how they were managed, and what the outcomes were.
89. As these extracts from the evidence heard at the Horizon Issues Trial suggest, the outcome of the second trial will be likely to have more relevance to the view to be taken of the safety of past convictions where Horizon functionality and fallibility was at issue, and possibly where they were not. In saying this, I should emphasise I am not saying that adverse findings about Horizon will of themselves spell disaster for past convictions; but examination of the underlying evidence which led to any such adverse findings will be crucial.

### **Conclusions**

90. The judge's factual findings about disputed Branch Trading Statements do not in my view impact on the safety of past convictions, because (1) they are based on his application and interpretation of the law of contract to the contracts that exist between POL and SPMs; (2) the judgment and his factual findings are not binding on the Court of Appeal Criminal Division or even persuasive authority, and so they do not impact on criminal matters, as the judge observed himself; (3) each past conviction was founded on facts specific to that case, and in any future appeal or reference made by the CCRC the safety test will have to be applied according to issues, and the evidence heard in, each case and any fresh evidence the Court of Appeal permits to be adduced before it.



91. The critical observations the judge made in the course of the Common Issues judgment suggesting that POL has a culture of secrecy and regarding its approach to documents do risk provoking SPMs, the CCRC and the public to believe that POL will have adopted such a culture towards its duties of disclosure during the prosecution process and possibly to the review process begun in 2013. However, those criticisms are not grounds on which any individual can launch an appeal and they are not very likely to move the CCRC to make a reference on that basis alone, but they risk moulding, if not changing, attitudes towards POL.
92. I do advise that POL investigates the issue set out in paragraphs 84-88 above with Cartwright King to see if PEAK PC0211833 was notified to the prosecution in August 2011, what, if any, cases were affected; if they were, how they were managed, and what the outcomes were.

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