

Privileged



## **Bates & others v Post Office**

**Board Sub-committee: 21 February 2019**

**Speaking note**

### **Headlines**

- The trial in March is focused on the Horizon system. There are 15 questions for the Judge to address, which fall under three core topics:
  1. Is Horizon robust or does it cause shortfalls in SPM branches?
  2. Are PO and FJ able to manipulate Horizon data in secret and without the knowledge of SPMs?
  3. And finally, a group of factual questions about certain aspects of the system that if determined now will be a useful foundation in other trials.
- In my assessment, the evidence weighs in favour of Horizon being a robust system. There is little risk of the Judge saying that Horizon is bad but he may find that it is only "ok" and/or that in some areas it could be improved (for example, he may find that it can sometimes encounter problems (e.g. in the recovery process following a system crash) or he may find that some of Post Office's or Fujitsu's support processes could be criticised (e.g. there is no system to monitor the transaction correction process with a view to identifying problems for which Horizon may be responsible and/or some problems in Horizon are not fixed as quickly as would be desirable).
- This trial will come down to whose expert is more credible. We believe the evidence of our expert, Dr Worden, has a better methodology and is more cogently evidenced than the Cs expert, Mr Coyne. His approach has been to pick as many holes as possible without considering them or their impact too carefully, which lacks balance.

- The secondary battle will be keeping the Judge focused on what is important. The Cs will attempt to draw attention away from the experts (where they are somewhat weaker) and towards eye-catching issues such as FJ's ability to remotely change Horizon data and side issues such as a perpetual complaint that PO has provided insufficient disclosure of documents. They will use this to paint Post Office and Fujitsu in a bad light but these points don't go to the core of whether Horizon works.
- We also have to factor in a good deal of judicial risk as this Judge as acted in ways that are truly extraordinary as you will have already heard from David Cavender on the Common Issues trial.

## Our case

- The core argument we will run in Court is as follows.:
  - Horizon like all IT systems is not perfect but it is a very good system.
    - This is not about proving that Horizon is perfect and that there are no bugs in Horizon.
    - In the context of this litigation, it is about showing that Horizon accurately records transactions the vast majority of the time so that PO, SPMs and the Court can safely start from an assumption that the branch accounting information held on Horizon is sound.
  - No-one has found a fundamental flaw in the system or its support processes. We are nowhere near a situation where this a bad or even average system. In practical terms, this is a decision between whether Horizon is good or very good.
  - One would expect imperfections and bugs to occur in any large system of this sort. But Horizon has been designed and supported carefully over many years, with many countermeasures in place to spot and

correct problems as they may arise. The service history of Horizon is comprehensive and shows these countermeasures in action time and time again. They were plainly effective in practice.

- The highest the Cs can put their case is that of the many thousands of issues which inevitably arise on a system of this scale, they have identified a couple of dozen bugs over 20 years which according to them, did or may have caused loss to a SPMR:
  - Several of the "bugs" they claim to have found are no such thing. They are not bugs at all. Indeed, they often support PO's case that there were effective countermeasures.
  - Of the actual bugs found, many have no bearing on the critical issue in this case, i.e. those bugs either did not affect branch accounts or they were picked up and fixed relatively quickly in the ordinary course of Horizon's operation
  - Many of those bugs are also triggered by relatively unusual events: SPMs doing unexpected things with the system and some cases doing things that are in breach of PO's operating rules.
- Cs argue that there could be thousands of undetected bugs lurking in the system, but this is based on little more than the (obvious) point that it is not possible to say that all bugs are always detected whenever they appear. Cs have no evidence to justify the supposition that there could be many lurking bugs having a significant impact on a significant number of branch accounts. PO's expert has a persuasive analysis suggesting that there is nothing like the number of undetected bugs in Horizon that there would need to be in order to explain even a material portion of the losses alleged by the Cs. The Cs' expert does not have a rival analysis and, although he tries to pick holes in PO's analysis, he does not really grapple with it.

- The simple fact is that, taking into account the size of the Horizon estate and the period of its operation, the volume of bugs Cs have found is tiny. About 20 bugs over an 18 year period, against a back drop of 30,000 active users and 50m transactions a week.
  - Even if one assumes that the Cs case is entirely correct, Horizon would still be a robust system.
  - This is PO's expert's clear and well-explained opinion.
  - Cs expert cannot even bring himself to give a clear opinion that Horizon is not robust, which is very telling as to the truth of the matter.
- This is the narrative that we are proposing be put to the Court and around which we will arrange our detailed submissions and the evidence.
- The strength and formulation of this narrative may need to be adjusted in light of the Cs supplemental expert report served on 1 Feb this year.
  - Up to Christmas, we were feeling confident about PO's position. The Cs first expert report was poor and we had answered it comprehensively in Dr W's report.
  - On 1 February, they served their supplemental report. It is anything but supplemental. It raises a whole new range of issues, including about 15 new alleged bugs in Horizon that have not been raised before.
  - Consideration was given to whether to seek an adjournment to the trial but this would have been impossible with our Judge who is obsessed with speed of resolution at all costs, even if that creates an unfairness. An adjournment would not have been supported by Cs.
  - The legal team and FJ are now working ferociously to investigate these new points. Progress so far has been good. Extracting relevant and reliable information from FJ in a timely fashion can be difficult, but we are hopeful, but not certain, that we will have credible counter-points to raise to most of Coyne's new attacks.



- My assessment of the case is therefore premised on FJ being able to supply good ammunition to counter-act Coyne's late arguments. This seems likely but until the investigations are complete we cannot be certain and we are about a week away from that point.

### **Risk 1: High bar.**

- PO has necessarily set its case very high: that Horizon is robust and extremely unlikely to cause shortfalls. It has done this for two reasons:
- First, this was the finding from Deloitte's investigation into Horizon at the outset of the litigation and on which PO premised its legal position.
- Second, PO's operating models are built on the assumption that Horizon works.
  - The heart of this litigation is whether SPMs should be liable for shortfalls. The Cs main line of attack is that the shortfalls were not caused by them but by bugs in Horizon.
  - In its interactions with SPMs, PO's starting assumption is that Horizon works. It habitually looks first for errors in branch before looking at Horizon. Its contracts with SPMs are structured to in line with this approach, and the experience of PO and FJ is that this starting approach is the right one to take.
  - This approach can only be sustained if Horizon is so reliable to justify a starting, but rebuttable, assumption that Horizon is accurate.
  - If Horizon does not meet this bar, then that may require PO to test the accuracy of Horizon in relation to every branch shortfall going forward before seeking to recover any monies.
  - It would also pose a risk to its decisions over the last 18 years in relation to the recovery of shortfalls and the

termination of SPMs: which heightens the possibility of successful claims within the litigation.

- Although this bar is high, Dr Worden has felt comfortable giving an opinion saying that Horizon is robust and extremely unlikely to cause shortfalls in branches, which aligns with Deloitte's earlier work.

## **Risk 2: Witnesses**

- Unlike the Common Issues trial, this trial turns heavily on the quality of witness evidence.
- In any litigation there is a risk that witnesses may break under cross examination. That applies to both our evidence and the Cs' evidence
- The Two key risk areas are:
  - Dr Worden relies on statistical models to show that incidence of bugs in Horizon is tiny when compared to the size of the system. Some Judges dislike data and maths-heavy analysis and so this approach may fall on deaf ears.
    - We have mitigated this risk by ensuring that Dr Worden also includes a qualitative opinion alongside his quantitative views.
  - The main evidence for Post Office is being given by technical personnel from FJ. We have encountered difficulties in the evidence from FJ.
    - In a relatively small number of places, the evidence has been incorrect and needed to be corrected through further statements.
    - We are therefore concerned that under cross-examination further cracks in FJ's evidence could be exposed.
    - We should make clear that FJ have been very cooperative – this is not due to a lack of engagement from them, particularly now.

- The problem is that they are being asked to give factual evidence on issues that arose years, sometimes, decades ago on highly technical and often obscure points. In some cases, the points they are addressing are hypothetical and so FJ are having to speculate rather than draw the answer from first-hand experience.
- This problem is exacerbated by the fact that several of the points now being emphasised by Cs' expert were either only raised or only given emphasis in the last month or so (in a supplemental witness statement by Richard Roll, who worked for FJ about 15 years ago, and in Mr Coyne's "supplemental" expert report). For reasons related to the way in which the Judge has managed these proceedings, Cs' case has been a moving feast. The result is that not all the factual issues are now in play that were addressed in the FJ and PO witness statements previously served.
- We have mitigated this through extensive discussions with FJ, probing their evidence as far as we can as lawyers with no technical knowledge and I have even met with FJ direct on a number of occasions. Nevertheless, it remains a real concern whether FJ's witness will withstand cross-examination.
- The sorts of areas where FJ might be attacked should not, in our view, necessarily lead to PO's overall case being undermined. For example, if the Judge finds that FJ used its powers of privileged access to edit or delete branch data more frequently and with less discipline than FJ previously said, that does not of itself mean that there were problems with the Horizon system. So the case does not stand or fall with the performance of FJs witnesses on every issue, but it needs to be recognised that if they perform

poorly it gives the Judge a route to finding against PO if he wants to.

### **Risk 3: Remote access**

- Weaved into the heart of the Cs case is a theory that PO and FJ are frequently meddling with branch transaction data in secret and that this is either deliberately or casually causing false shortfalls to appear in branches. This has become known as the "remote access" problem.
- The difficulty is that PO's and FJ's case on remote access has changed over the years.
  - During the mediation scheme, FJ advised PO that remote access was not possible and PO passed that message on to Second Sight.
  - At the end of the mediation scheme, the FJ position changed to there being a limited capability to add new transactions to a branch's accounts, but with no capability to edit or delete existing data.
  - Deloitte's work then revealed that the editing or deleting existing data was possible in certain circumstances.
  - Fujitsu's witness statements indicate that various forms of remote access have been and are possible, more than previously admitted.
  - The Cs' expert is now saying that there are even more ways that data can be edited and deleted – and we are still investigating these allegations with FJ.
- Viewed in its proper context, the Remote Access problem adds little substance to the basic question whether Horizon is robust. But it gives the Cs lots of damaging forensic points.
  - There is no evidence of widespread data manipulation but there are circumstances where FJ do need to change data to correct problems in the system. This is normal, but the history of this issue and FJ's apparently inability to give even POL a full and account of the



- remote access facility and its use feeds oxygen to a conspiracy theory of widespread secret meddling.
- It is difficult to imagine any rational reason why FJ would use this capability to maliciously manipulate branch data, or that it would do that so carelessly to cause widespread problems.
- But the changing position on FJ's capability to edit and delete transaction data exposes PO to criticism of covering up some untoward activity. The Cs will say that they have had fight to draw out the truth from PO.
- The remote access point can also be used to tarnish the credibility of FJ's witnesses.
- At trial, this will attract disproportionate attention. Human nature will attract the Judge and the media to this topic.
- Our approach is that sunlight is the best antiseptic. We won't be denying the existence of remote access capabilities but we will be saying that it's a red herring when it comes to deciding whether Horizon is robust. But for this purpose, we are seeking to produce a clear and comprehensive account of the remote access facilities that have been available to FJ over the last 18 years. This is not as easy as it we could like it to be.

## **Risk mitigation**

- Because of the above risks, we are building risk mitigations into the legal strategy.
- First, we will draw a clear distinction between the old version of Horizon that existed before 2010, and new Horizon that is currently in place. The Cs' attacks are mostly on old Horizon. If the Judge were to find that old Horizon was not robust, this would be far from ideal in the context of the litigation but it should cause less operational disruption to PO as that system is no longer used.
- Second, where possible, we are laying down markers that the steps taken to reach this trial were unfair. The Cs have

(again) served evidence that is not consistent with what the Judge said he wanted. Mr Coyne's supplemental report effectively makes a new case. With a more engaged and even-handed Judge, such things would not have happened. But they have happened and the possibility of appealing the Horizon Issues judgment is limited. The only likely ground is procedural unfairness and that is a very difficult ground to make out, particularly in the context of group litigation, in which Managing Judge's are expected to fashion unusual procedures to ensure the swiftest and most efficient means of resolving the points in dispute.

- Third, we are taking urgent steps to investigate whether we can produce some short witness evidence addressing some of the issues which the Cs are now placing emphasis. FJJ are being cooperative, but this is not an easy or quick process, we are not yet in a position to determine how useful it will be and there is no guarantee that the Judge will allow any further evidence to be adduced.
- Fourth, due to the level of reliance on the quality of witness testimony, we are planning to only submit short opening submissions. This then allows us flexibility to adapt our closing submissions to the quality of evidence given during trial. But this does also come with the risk of criticism by the Judge that we are not being clear about our case on awkward issues and/or that when we address them have, we will be raising new points late in the day.

## **Conclusion:**

- In conclusion, as matters stand, I believe that the Judge will likely find that Horizon is a robust system, but that we will get some criticism about FJ's ability to remotely change data and about the processes they apply in identifying and fixing bugs in Horizon. This assessment assumes that FJ can provide answers to most of Coyne's late attacks.
- The outcome will however turn heavily on what actually happens at trial with the witnesses perform well or not.

- I will therefore be keeping my assessment of the position under continuous review over the next few weeks and during the trial and will flag if I believe the position has changed.

## **Note for possible Q&A after above**

**Tony – I need to draft answers to this.**

- What's the problem with disclosure?
- Why did we not object to Coyne 2 / the Cs evidence?
- How come FJ's evidence was wrong?
- [I WOULD ADD – WHY ARE THERE SAID TO BE GAPS IN OUR EVIDENCE?]
- Can you not give me a more definitive view on the merits?