

NOTE ON HORIZON ISSUES JUDGMENT

1. This note is designed to record the essence of the advice I provided during the conference call on 2 December 2019, with a few additional points, having read in advance of the conference call the draft judgment (Parts A-L). I have now read Part M of the draft judgment and the revised Technical Appendix, which I received on 6 December.
2. Just as he did in the Common Issues Judgment, in the Horizon Issue Judgment, Fraser J notably emphasised that criminal prosecutions are not part of the proceedings albeit that evidence of software bugs, errors and defects “which led to consequences for SPMs” did form part of the Horizon Issues trial. So, criminal convictions, he said, were not part of the trial but part of the background (§62). He emphasised that the group litigation had no bearing on what, if anything the CCRC did in respect of the judgments arising from the litigation (§66(6)), and that the Commercial Court had no jurisdiction over the criminal convictions of those SPMs successfully prosecuted by POL.
3. Significantly, also, the judge added “Although the presence of criminal convictions does have evidential effect in respect of individual claims by individual claimants who have been convicted of false accounting, these have not arisen in either of the two substantive trials held to date ... nor will they arise in either of the next two (the principles governing Heads of Loss, and then some individual claims” (§66(7)). I am unsure what he meant by “some individual claims” but (subject to correction, as I do not know which individual claims are currently proposed to be litigated) I take it to exclude claims by anyone convicted. I assume by “evidential effect” he means that when an individual claimant has been convicted by a jury on the criminal standard of proof, that claimant will have a high bar to surmount, before the judge can say on the civil standard of proof that POL are liable to him for a Horizon issue.
4. In my view, these passages are a good reminder to any convicted claimant as well as the CCRC that this judgment has its limitations. The judge did not make any findings about individual convicted cases. He did refer to the Misra case at various points in the judgment. Passing references are to be found at §§77, 282 (misspelt as ‘Nisra’), 289, 291,

414, 508 and 512. But in none does he analyse the evidence against her or make any particular finding which could advance any appeal in her case.

5. Given that POL is in the throes of mediation, I expect it is not known whether any of the individual claims will be litigated at all? Given also that the convicted claimants fall outside any proposed settlement, I imagine their decision whether to pursue POL in individual claims is yet to be decided.
6. There are 61 convicted claimants participating in the group litigation, 32 of whom (I am told) have referred their cases to the CCRC.
7. In theory, there are three potential generic arguments that could be taken on appeal or on a CCRC reference. In basic terms, they appear to be:
 - a) At the time of the trial in question there was material non-disclosure, thereby rendering the conviction unsafe; and/or
 - b) A particular bug, error or defect impacted the branch account as to explain the loss or shortfall; and/or
 - c) The branch account was remotely accessed and interfered with in such a way as to explain the loss or shortfall, thereby rendering the conviction unsafe.
8. The judgment does not identify any evidence or make any findings that presently can lead to a ground argued in respect of point (b) or (c). That may have to await individual trials (if any) of the convicted claimants' cases.
9. The disclosure issue at point (a) is arguably different. The first question that arises from the information disclosed in the litigation and the effect of the judgment is whether POL complied with its disclosure obligations during each of the trials in which POL secured a conviction (the test for disclosure being whether the material might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused (s.3(1) CPIA 1996)).
10. In light of the fact that the evidence given in certain criminal trials eulogised the 'robustness' of Horizon, there are three factual issues that arise in considering the

question whether there was material non-disclosure. In simple terms they appear to be (1) the existence of bugs, errors or defects in Legacy Horizon or Horizon Online; (2) their potential or actual impact on branch accounts (and as a sub-issue, the related lack of systemic 'robustness'); and (3) remote access. (I have noted the judge's findings in the Technical Appendix about the 29 bugs, errors or defects in the table, and his views about their impact on branch accounts, as well as his views about permissions and remote access, but this note is not the place to consider them further.)

11. Because the convicted claimants are now fully sighted on these issues, POL has no duty as such of disclosing something which has previously been disclosed to them (see s.3(1) CPIA 1996, and the same must apply at common law to the post-trial duty). It may be recalled that, in the Common Issues Judgment advice (§42), I considered whether there needed to be a review of cases in light of the Branch Trading Statement aspect of that judgment, and advised against this, given the matter was now out in the open, although that part of the litigation and the focus of the judgment was on the contractual relationship between POL and SPMs.
12. However, the same will not apply to those convicted individuals who are not claimants in the group litigation. POL cannot safely assume they are aware of the generality, far less the detail, of the litigation and the judgments so far handed down. It is better therefore to treat both categories the same. So, subject to the outcome of the advice I have given that POL should engage first with the CCRC so as not to make any misstep, POL may have to consider if any disclosure/further disclosure/review must be made across the board not just to those convicted individuals who are not claimants in the group litigation, but also to the 32 convicted claimants in the litigation who have referred their cases to the CCRC, as well as the other convicted claimants in the litigation.
13. What is POL's duty? If material comes to light after the conclusion of proceedings which might cast doubt on the safety of a conviction, then there's a duty to consider disclosure. This is just another way of saying that if there was any material non-disclosure at trial, POL has a duty to consider the matter for disclosure. That said, I am far from sure in light of the limitations in the Horizon judgment that anyone can say presently that any material has come to light which might cast doubt on the safety of any of the convictions without there being a wholesale sale review of each and every one of them.

14. Naturally, there is some risk of the convicted claimants seeking to appeal their convictions to the Court of Appeal Criminal Division (CACD) out of time now, arguing that there was material non-disclosure at the time of their trial, arguably rendering their conviction/s unsafe, even though they are not yet the beneficiaries of individual, fact-specific judgments in their favour.
15. In my view, however, that would be precipitate, not least because they cannot argue such a ground of appeal unless they can show that any non-disclosure was in fact material. And that would involve a complete review of each case on its facts in light of the alleged material non-disclosure, including the impact any bug, error or defect or alleged remote access actually had on the facts underlying their conviction.
16. The CACD, if asked to determine the issue, would decide whether the material that was not disclosed caused it to doubt the safety of the conviction, and for those purposes the CACD might have regard to the question of the impact the withheld material would have had on the mind of the jury, which is a mechanism it will use to test its view in a difficult case. Even if the non-disclosure was material, ultimately the issue is whether, notwithstanding the material non-disclosure, the trial was fair; the test is whether there is a real possibility that, if defence counsel had been in a position to use the undisclosed material at trial, the jury would have arrived at a different decision.
17. So, by way of trite example, because the alleged non-disclosure has to be material, the non-disclosure of a bug that affected Legacy Horizon only could not be of any materiality in a Horizon Online case. A bug that affected one aspect of Horizon Online will not be material if the case against the SPM was based on a wholly different type of transaction that the bug could not possibly have impacted. A straightforward theft of £500 and falsely accounting for it, together with a fulsome confession, followed by a plea of guilty, will not be explained by any bug, error or defect that arguably affected this branch at the time, so not only would this not be material non-disclosure, but also it would not impact the safety of the conviction.
18. It is of note that (so far as I am aware – subject to one possibly irrelevant appeal) no one has sought to appeal any conviction following the Cartwright King review and disclosure

exercise in 2013 and after. Despite the absence of any individual application to appeal, the CCRC are nonetheless clearly considering the case to see if they can or should make a reference under their 'exceptional circumstances' jurisdiction. References by the judge to "a stay of proceedings" (§§60, 64(4)) seems to me wide of the mark of what the CCRC are actually doing.

19. As I said during the recent conference call, material non-disclosure would be the first issue the CCRC would logically look at, hence my advice of engaging them first about what, if anything, POL does on disclosure at this stage. I await sight of a draft letter to the CCRC. I would, however, suggest that the CCRC would also have a hurdle to overcome which is the one identified before: to show that any non-disclosure was material to the case under review. As I have said before there is no one-size-fits-all (see §41 of the Common Issues Judgment advice); each case has to be looked at on its own facts.
20. Finally, there are also particular issues arising from the Horizon Issues Judgment which require explanation:
 - The reference to "legal cases" (§429-430, 457) has puzzled me. There was comment about it in the judgment but nothing more. What were those legal cases and were they criminal ones?
 - The reference in POL's opening submissions to the occasions on which privileged Fujitsu users "have exercised their ability to remotely inject, edit or delete branch transactions or accounting entries will represent a tiny percentage of the relevant transactions/accounting entries. And the occasions on which they have done so negligently or dishonestly will ... represent a tiny percentage of those occasions" (§534). This apparent concession made on behalf of POL appears to be that entries may have been entered/edited/deleted negligently or dishonestly. On what factual basis was this concession made? The judgment makes equally clear that this could have been done without the SPM's knowledge or consent. This startling concession does not appear to have been fleshed out further in the judgment. If this is what the concession means, then the suggestion is that Fujitsu could have interfered with a branch account without POL's knowledge also. How confident is POL that it has not prosecuted to conviction a SPM purely on the basis of such an act?

21. May I be told if POL has done as I advised in the Common Issues Judgment advice (see §84-88, 92), as regards PEAK PC0211833 (which I note was not mentioned anywhere in the Horizon Issues Judgment or the Technical Appendix).

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GRO

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