

From: Anthony de Garr Robinson <GRO>
To: 'Jonathan Gribben' <GRO>, "Andrew Parsons
<GRO>, Sebastian Isaac
<GRO>, 'Lucy Bremner' <GRO>, "Katie
Simmonds" <GRO>

Subject: Horizon issues - the next steps

Date: Fri, 7 Dec 2018 18:26:02 +0000

Importance: Normal

Inline-Images: image001.gif; image002.jpg

Dear all,

We will be serving Rob's expert report very soon, if we have not done so already, and both he and the legal team will benefit from some rest before returning to the fray. However, there is a great deal to do not much time to do it in. I understand from Andy that Jonny is putting together a list of issues for us to consider and address. The purpose of this email is to offer some initial thoughts on the issues to be included on that list. Subject to everyone's diaries, I would suggest a con to discuss the final list early in the week commencing 17 December (or telecon if need be – face-to-face meetings can often be more productive but I know that may not be possible for everyone).

In no particular order, the principal issues that I have in mind are as follows:

1. Follow up work on Rob's report:
 - a. No one has had enough time to read and reflect on Rob's report properly, possibly not even Rob himself. Next week, we should all take time to read the final version slowly and to identify the possible areas of concern.
 - b. One possible area is that Rob rarely cites the documents that justify the many, many propositions regarding Horizon (descriptions, analyses, statements and conclusions etc) contained in his report. As a result, I expect Rob to suffer a great deal of aggressive cross examination in which Green repeatedly asks him which documents justify a large number of the propositions in his report. Green will play a memory game which a witness in Rob's position will never win. Moreover, if we don't know what documents Rob was relying on for his various propositions, we will be limited in our ability to put the propositions to Coyne in cross examination and to defend Rob in re-examination.

To mitigate this problem, I would suggest asking Rob – once he has recovered from his recent exertions – to prepare a list of the document references for each material proposition in his report that is liable to be challenged on – and also the page number in those documents and additional explanations, if and to the extent this is needed to understand why the relevant document supports the relevant propositions.

Query whether we should provide Rob with a list of the propositions which we want him to justify, or whether we leave it to Rob to decide. The former would involve quite a lot of work, but we could regret the latter.

- c. Another possible area is the methodology by which Rob (1) determined whether any KELs were or might be capable of having a financial impact on branch accounts and (2) estimated the maximum possible financial impact of each such KEL. Where Rob was uncertain about whether a particular KEL had a financial impact at all, I have no idea how he managed to come up with an estimate of its maximum possible financial impact, and nor do I know whether this is covered in his report (it is not in the main body of the report but I'm not sure whether it is in the appendices). In any event, I would expect Rob's estimates to be the focus of considerable attack and I would therefore suggest that Rob be asked to give us a further and better account of his methodology, and of the calculations he did for the relevant KELs.
- d. When we review it, I expect that there will be some sections in Rob's final report which we are still uncomfortable with. In my case, that would include financial impact of erroneous TCs analysis in section 9.6 and the claimant analysis in section E (assuming that they survive in the final report), but others will have other candidates. I would suggest that, between ourselves, we identify the potentially problematic sections and ask Rob (1) to explain to us in words we understand why he does not share our qualms about them and (2) in some cases to consider producing alternative analyses that he could fall back on if the judge is not persuaded by the original analyses.

2. Disclosure:

- a. It is clear from both Coyne's report and Rob's report that there are significant Horizon issues in relation to which few (or no) documents have been disclosed. I would suggest that we identify those issues and the relevant deficiencies. Two obvious candidates are (1) the permission controls that were in place in relation to the various forms of data alteration that were / are available to Fujitsu or Post Office (editing / deleting transaction data and also simply injecting transactions, whether remotely or while at the branch), and (2) the way in which those permission controls were applied in practice.
- b. Having identified the relevant "missing" issues, we should consider what, if anything, we can do to mitigate the criticisms that will be levelled at us for not having provided relevant disclosure. This would include considering (1) whether there are further categories of documents we can and should disclose and (2) whether there are further categories of documents which might seem obviously disclosable but which we cannot be expected to disclose, and why.
- c. Before too long, I expect Freeths to be demanding more disclosure, or at least to be telling us that they will be drawing adverse inferences from our failure to give such disclosure. In my experience, extended whinges about disclosure can be an enormous distraction, both in the run up to and in the course of a trial. There are firms who regard making exaggerated / unfair accusations about withheld disclosure as a standard litigation tool that pays regular dividends. If we do not get ahead of this issue now, after spending the next three months on the back foot, we may regret it.
- d. It would also be helpful if Amy could produce a detailed note (with a bundle of the relevant correspondence) (1) explaining when and why particular categories of disclosure were (i)

sought, (ii) offered, (iii) agreed, (iv) provided or (v) refused, and (2) if this is possible, also explaining why we did not volunteer further categories of documents which would obviously be needed if the court was to decide the “missing” issues.

- e. While this is being done, we should keep on top of the contents of any further disclosure that we are giving – e.g. the MSC documents that Coyne complains he has not seen. Can someone look at those documents or a sample of those with a view to telling us whether they contain anything we need to know about, or is this not feasible?

3. Witness evidence:

- a. Just as there are Horizon issues on which relevant disclosure appears not have been given, there are Horizon issues on which either (1) no witness evidence has been given or (2) inadequate evidence has been given. A good example of (2) is the evidence in which witnesses simply repeats what Gareth Jenkins has told the relevant witnesses. The fact that we have obviously decided not to call Jenkins is going to a problem for us at trial.

- b. Again, I would suggest that we identify these issues and consider whether there is anything we can do to mitigate them, either by adducing further evidence or by disclosing further documents or whatever.

- c. We need to decide what is to be done with all the witnesses that the claimants might call at the Horizon issues trial. We’ve already decided not to strike out any of the evidence they have adduced for the Horizon issues trial proper, but what about the evidence of the common issues claimants? Do we know whether they are planning to call them? Is now the time to ask, or to tell them not to? Or is the effect of the orders made to date that they cannot call them without permission, in which case it might be better to let sleeping dogs lie (I doubt it but mention it for completeness)?

4. Trial bundles:

- a. What categories of documents should be included in the trial bundles and how should they be organised?

- b. Does anyone have ideas about how to organise and present the technical documents that will be deployed in this case (including Peaks and KELs)?

- c. Have Freeths agreed that we can take control of the trial bundles? If so, what steps should we be taking to ensure that these are prepared as quickly and efficiently as possible?

d. For reasons which will be obvious, it is critical that we get on top of this. Given that the real issues in the case will probably not emerge until supplemental reports are exchanged, and given that we may ending up wanting to serve a third report in response to the new issues raised in Coyne’s report, I am even more concerned than usual about the impact of producing trial bundles – or of adding vastly to the bundles – close to the trial.

5. Regarding the timetable for the trial, Andy has suggested that we should take care to ensure that the judge has as much reading time as possible. I agree. Andy’s suggestion was based on how long it took the judge to get up to speed in the common issues trial, but given the nature of the issues arising in the Horizon issues trial and the nature of the evidence on these issues, I think a longer than usual reading in period is needed anyway.

This list of issues is by no means exhaustive and I would encourage all of you over the course of the next week to suggest further issues for inclusion in the final list.

Finally, could someone send me an email setting out all the steps for which we dates / deadlines in the period from now to the commencement of the Horizon issues trial?

Best wishes,

Tony

Anthony de Garr Robinson QC
www.oeclaw.co.uk

Switchboard:
Fax:

GRO



One Essex Court, London
Temple
London EC4Y 9AR
United Kingdom

One Essex Court, Singapore
Maxwell Chambers #02-15
32 Maxwell Road
Singapore 069115

Tel +44 (0)20 7556 8000
clerks@oeclaw.co.uk

Tel +65 6339 1000
singapore@oeclaw.co.uk

**Chambers UK Commercial Litigation
Set of the Year 2015**



LEADING SET



The contents of this email are CONFIDENTIAL and may be PRIVILEGED. If you are not the intended recipient, please telephone (020) 7583 2000 and delete this email.

This email has been scanned by the Symantec Email Security.cloud service.
For more information please visit <http://www.symanteccloud.com>
