

IN THE CROWN COURT AT BIRMINGHAM

BETWEEN

REGINA

v

BALVINDER KAUR SAMRA

HEARING NOTE

Background

1. This case was listed for trial to commence on the 1st July at Birmingham Crown Court. The defendant is alleged to have removed sums of money from each of the complainants Post Office Card Accounts by performing duplicate or near duplicate withdrawal transactions when the account-holders attended and made their own withdrawals. She would do this by claiming that the account-holder's PIN had not "gone through" and ask that the account-holder again re-enter their PIN. In this way she was able to make her own withdrawal from the account. All but one of the victims of these thefts were elderly customers - the remaining victim was a disabled and severely epileptic customer.
2. All of the duplicate transactions were conducted over-the-counter through Horizon, this being the only portal (including Post Office ATMs) through which Post Office Card Accounts may be conducted. Accordingly the transactions are evidenced through entries appearing in Post Office Card Account statements. Those entries represent Horizon data.

3. In answer to the charges the defendant says that any transactions completed by her would have been appropriate and legitimate. She says that she only completed the transactions which the customers had asked her to carry out. She is unable to provide any explanation as to why complainants had said that they had not asked for the duplicate transactions and had not received the additional amounts of money. Further, whilst she has not directly suggested that the Horizon data is wrong, there is an implicit suggestion that, if the complainant's accounts of not having made duplicate transactions is correct, then the fault must lie with Horizon.

Recent information

4. The limited information available to me comes from a number of sources within Post Office Ltd.: Head of Litigation Hugh Flemington; Head of Criminal Law Jarnail Singh; and Gareth Jenkins of Fujitsu Services Ltd.
5. I first became aware of the issue of bugs within the Horizon system on Thursday the 27th June when I was instructed that a report commissioned from Second Sight by Post Office Ltd. and as yet unpublished, indicated that Horizon may not be 'bug' free. I am instructed that the report is to be provided to Parliament prior to publication, perhaps as early as Monday (1st July). I have not seen the report.
6. Prior to the 27th June I had seen no reference in any of the expert reports tendered for the prosecution in other cases, to the existence or possible existence of bugs. On the 27th June and through the following day I was instructed that in a number of post offices the Horizon system may have produced false balances.. I am however informed of the following:
 - i. Post Office Card Accounts are maintained by Hewlett Packard who provide the data processing facilities and send out the

bank statements. All of the information used by Hewlett Packard is derived directly from Horizon.

- ii. Horizon is not 'bug' free.
- iii. Fujitsu Services Ltd had reported the existence of two bugs to the Second Sight committee.
- iv. A number of bugs have been identified which have affected a number of post offices although it is not clear to me that those are the same as disclosed to the Second Sight committee by Fujitsu.
- v. The two bugs I am instructed of by POL are: Bug 14, so called because it affected 14 post offices, and Bug 68 (named for similar reasons?). Bug 68 was historic and a patch had been applied to Horizon which had remedied the problem. Bug 14 was more recent, only being diagnosed in early 2013. Some remedial work has been undertaken and a systems change is planned for the 8th October.
- vi. The effect of Bug 14 has been the appearance of incorrect financial balance information in the system, known to include the false indication of financial data.
- vii. Hurst Lane Post Office is not one of those post offices identified as having been affected.
- viii. The report's authors were instructed to investigate a number of cases of apparent Horizon error, including at least one where prosecution was contemplated. That prosecution

would have relied heavily upon data obtained from Horizon concerned transactions made at the local sub-Post Office on the Horizon system.

7. Once we became aware of the timetable for publication of the Second Sight report and it's preview to Parliament, Martin Smith and I and with Head of Criminal Law Jarnail Singh's agreement, contacted Gareth Jenkins in order to establish what was known about the status of Horizon's integrity. Mr. Jenkins made the following points:

- i. He had informed the Second Sight Committee of two bugs which had affected Horizon (see para. 6.iii above).
- ii. He is confident that the audit trail used for prosecuting criminal allegations based on Horizon data has not been compromised by the bugs.
- iii. Where the withdrawal of sums of cash from Post Office Card Accounts is involved, he is not aware of any reason to believe that Horizon can slip into error.
- iv. It can never be said that there are no more bugs in the system; however nothing has been found to show that there is a problem with the integrity of the audit trail used for prosecution evidence.
- v. It is his view that, were the defence to suggest a problem with Horizon, he cannot rule out that there may be other problems with Horizon.

- vi. As far as he and Fujitsu Services Ltd. are concerned, the integrity of the Horizon system is intact.
8. The information may be distilled thus: Fujitsu Services Ltd. and Post Office Ltd. are aware that Horizon has suffered bugs – Bug 68 and Bug 14 (it is highly likely that the two bugs reported to Second Sight by Fujitsu are Bugs 14 and 68). One bug has been neutralised, the other remains extant. The extant bug affects Horizon to a limited degree and at specific post office locations; it manifests itself by producing false balances; whilst Fujitsu Services Ltd. continue to have faith in the integrity of Horizon, and whilst there is no other indication of any more bugs, further possible bugs within Horizon cannot be ruled out.
9. I emphasise however that neither I nor Gareth Jenkins (nor indeed anyone at POL) has read the Second Sight report.

The Law of Disclosure

10. The Criminal Procedure and Investigations Act 1996 places a positive duty on the prosecutor to provide the defence with any information which “...might reasonably be considered capable of undermining the case for the prosecution ...or of assisting the case for the accused....” This duty extends to examining any information of which the prosecutor becomes aware (and for these purposes this includes information which Post Office Ltd becomes aware of) so as to determine whether or not that test is met.
11. The Act goes on to require that the prosecutor must, at all times before the conclusion of the case, keep under review the question whether there is any information which must be provided to the defence. The ultimate holder of these duties is prosecuting counsel, who must answer to the court in compliance, or otherwise.

12. The fact that Horizon may not be infallible is at the very least information which I as prosecuting counsel am duty-bound to consider under the terms of the test set out in paragraph 5 above. This is because, whilst the defendant has not directly suggested that Horizon has erred in this case, the implication is clear. And if Horizon may not be infallible in one respect, the defence *may* be entitled to know of that fact so that they can at the very least suggest that a system prone to error in one respect may be prone to error in another.
13. Whilst it may be that on consideration of the report it is clear that there is no information which meets the test, that assessment cannot be made until I have seen and digested the conclusions and implications the report. And until I have considered the report, I cannot say to the court that I have fully discharged my disclosure duties.
14. In some instances it is possible to apply to a judge for a certificate not to disclose material to the defence where that material was subject to a Public Interest Immunity ("PII"). Such applications most often occur in cases involving National Security, or where police have used informants and undercover officers. The list of such cases however is not closed: in a case where the Public Interest may be the prevention of a widespread loss of confidence in a public institution, or the loss of trust in a system operated by such an institution, or the prevention of journalistic speculation as to the efficacy of systems almost universally relied upon by the public, there may be an argument that the protection of a PII certificate is appropriate.
15. PII Hearings are always held *in Chambers*, that is, in the absence of any defendant or defence representative, and usually in the judge's chambers (retiring room). No other person may be present other than a court clerk, any relevant police officer and the prosecuting solicitor.

16. In this case I took the view that such an approach to the problem might be appropriate. Accordingly Martin Smith and I, in conjunction with Jarnail Singh, decided that the best way forward was to: 1). seek a ruling (*i.e.* the grant of a PII certificate) from the trial Judge that we need not disclose to the defence the fact that the Second Sight report was to be presented to Parliament today; and that the report contained references to the existence of bugs in Horizon both past and present; and 2). to adjourn the trial until such time as we were able to fully comply with our disclosure duties.

Today's Hearing

17. The effect of the late developments in this case is that we could not commence this trial as scheduled. To do so would be to mislead the court into believing that we had complied with our duties as prosecutor and that, we cannot contemplate.
18. The Judge, HHJ Chambers, was ultimately persuaded of the arguments advanced in support of the grant of a PII certificate (see para.14 above). The following orders were handed down:
 - i. Defence to be told that a report had been commissioned:
 - ii. The prosecution to be permitted to withhold information concerning the existence of the draft report and that it is to be shown in confidence to MP's in Parliament today;
 - iii. Non-disclosure Order to be temporary and to be reviewed at the 'mention' hearing;
 - iv. Case to be adjourned 8-weeks, dates to be fixed with List Office.

v. Trial adjourned to commence on the 21st October 2013: for 'mention' on the 13th September 2013.

19. The Judge also commented that this situation should never have arisen and that the Post Office were to provide a written explanation as to why this information had been withheld from solicitors and counsel until as late as last Thursday.

Comment and conclusion

20. I am not particularly concerned at the Judge's requirement for a written explanation from POL - to a large degree the Heads of Litigation and Criminal Law were in much the same position as were Martin Smith and I and accordingly I have no difficulty in assisting with the preparation of an explanation.
21. Of greater concern is the absence of any reference to Bug 68 or Bug 14 in any of Fujitsu Services Limited's statements served in support of other criminal prosecutions. This is a matter to be returned to at the appropriate time.
22. Given that the trial of R. v. Samra has gone off to October, to be listed for a trial readiness hearing in September, it is (I hope) likely that the Second Sight report will by then be in the hands of POL. It is imperative that counsel and solicitors have sight of the report before the September listing so that we may satisfy our disclosure duties as set out in paragraphs 12 to 16 above. It may well be that the report is of no assistance to the defence: in those circumstances we need not disclose it. If it is of assistance to the defence then we shall have to consider in conference the way ahead. In any event I require a face-to-face conference with Gareth Jenkins upon publication of the Second Sight report.

23. It is also the case that we shall have to review any other prosecution which relies upon Horizon data, for the same reasons.
24. Finally, it is worth commenting on the reasoning behind my advice that we seek a PII certificate in this case. POL were, rightly in my opinion, very concerned at the potential adverse publicity which would inevitable have been generated by the revelation of the existence of a (draft) Second Sight report into Horizon. To permit this information to enter the public domain at such an early stage would have been to encourage extremely unhealthy and likely virulent speculation as to the content of any report, most probably in the national press. Such speculation would have seriously damaged the reputation of POL and would have greatly undermined public confidence in both POL and POL systems. Our objective was to avoid such consequences: that objective we achieved.

Simon Clarke
2013
Senior Counsel
Cartwright King Solicitors

1st July