APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 15
HCA/2022/000486/XC, HCA/2022/000487/XC, HCA/2022/000488/XC, HCA/2022/000489/XC, HCA/2022/000490/XC, HCA/2022/000485/XC

Lord Justice Clerk
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeals

by

(1) WILLIAM JOHN QUARM; (2) SUSAN SINCLAIR, (3) COLIN STEWART SMITH, (4) JUDITH ELIZABETH SMITH; (5) ROBERT THOMSON; (6) ALEID KLOOSTERHUIS

Appellants

against

HIS MAJESTY'S ADVOCATE

Respondent

For the Appellants: (1) Lenehan KC, C Miller; Faculty Services Limited for Houston Law; (2) CM Mitchell KC, Welsh; Livingstone Brown; (3) Martin, sol adv, Ogg, sol adv, Mulgrew, sol adv; Martin Johnston & Socha; (4) L Kennedy, Morgan, Whittaker; PDSO (Glasgow); (5) Mackintosh, KC, Culross, Brannigan, CM Mitchell KC, MacQueen; Faculty Services Limited for Edward Fail, Bradshaw & Waterson (London); (6) Mackintosh KC, G Reid; Collins & Co for E Thornton & Co (Oban)
For the Respondents: Bain KC, Lord Adv, Charteris KC, Sol Gen, Borthwick KC, Goddard KC, Gill KC, the Crown Agent;
Appearing to address the court on issues of disclosure for The Post Office: MacGregor KC; Moynihan KC; Brodies LLP
Womble Bond Dickinson (UK) LLPL Tosh; Womble Bond Dickinson (UK) LLP

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30 April 2024

Introduction

[1] These appeals all arise from the conviction of former sub-postmasters ("SPMs") in respect of various offences of dishonesty between 2004 and 2013.

[2] From 2000, Post Office Limited ("POL") operated a computerised accounting and electronic point of sale system provided by Fujitsu Limited. In 2010, a second version of the system was rolled out. The post-2010 system is known as "Horizon Online" and the 2000-2010 system as "Legacy Horizon"; together "Horizon". In each appellant's case, Horizon provided evidence of shortfalls in the branch account of the appellant. These were relied upon by POL in investigating, and the Crown in prosecuting, the appellants.

[3] POL maintained, until the judgment of the High Court of England and Wales in *Alan Bates & Ors* v *Post Office Limited (No. 6)* [2019] EWHC 3408 (QB), that Horizon was "robust" and extremely unlikely to be the cause of shortfalls in branch accounts. The court found that confidence to be misplaced. POL's continued refusal to acknowledge systemic problems with Horizon, notwithstanding evidence to the contrary, was described as "the 21st century equivalent of maintaining that the earth is flat" (*Bates No. 6* per Fraser J at paras 928-929).

[4] The findings in *Bates* raised concern over the safety of convictions based upon evidence furnished by the Horizon system. In *Josephine Hamilton & Ors* v *Post Office Limited* [2021] EWCA Crim 577 the Court of Appeal considered the convictions of 42 appellants, quashing all but 3. The court concluded not only that the successful appellants did not have a fair trial, but that it was an affront to the public conscience for them to be prosecuted at all. In *O'Donnell* v *Post Office Limited* [2023] EWCA Crim 979 the Court of Appeal set out the basic factual position, which the Crown accepts:

> "[T]hroughout the relevant period, there were significant problems with Horizon, which gave rise to a material risk that an apparent shortfall in branch Post Office accounts did not in fact reflect missing cash or stock, but was caused by one of the bugs, errors or defects which existed in Horizon. [...] [D]uring the relevant period, POL knew that there were serious issues about the reliability of Horizon, and [...] POL failed adequately to consider or to make relevant disclosure of problems with or concerns about Horizon, instead asserting that Horizon was robust and reliable. [...] POL had consistently failed to be open and honest about the issues affecting Horizon and had effectively steamrolled over any [sub-postmaster] who sought to challenge its accuracy." (para 5).

[5] Against this backdrop the Scottish Criminal Cases Review Commission commenced an investigation of Scottish prosecutions of sub-postmasters in September 2020, ultimately obtaining the names of over 80 individuals who may have been prosecuted on the basis of Horizon evidence. The SCCRC referred 6 convictions to this court on 8 November 2022.

[6] Ultimately, the Crown conceded each appeal after lengthy investigations by them and the appellants' respective agents. The court allowed each of the appeals over a number of diets between 29 September 2023 and 1 February 2024. In view of the court's expectation that the SCCRC will continue to refer such cases to this court, it will be helpful to narrate the circumstances of each appeal and the relevant factors taken into account by the Crown in conceding them, and by the court in giving effect to those concessions and allowing the appeals.

The basis of the SCCRC's reference

[7] The SCCRC produced a *General Statement of Reasons* in which it outlines reasons for referral which have a bearing on all of the POL-related cases. It highlights a number of issues which it considered likely to arise:

(i) The absence of any statutory framework regulating the relationship between the POL and the Crown, which raised questions as to the extent to which the Crown could direct POL's investigation.

(ii) The SCCRC considered that the Crown had institutional awareness of problems with the Horizon system by July 2013, with some prior degree of knowledge on the part of individual procurators fiscal. From October 2015 the Crown undertook to review all live cases; prosecutions would only continue where there was a sufficiency of evidence without reliance on Horizon data.

(iii) There is no dispute that POL had knowledge of the deficiency of Horizon from an early stage. The SCCRC considered that the failure to pass its knowledge of the deficiencies in Horizon at that early stage to the Crown could have prevented the Crown from exercising its disclosure duties in these cases.

[8] The SCCRC also raised various potential grounds of review which it considered might arise depending on the circumstances of the case:

(i) For those who pled not guilty, a ground based on fresh evidence coming to light about the serious flaws in the Horizon computer system of which the appellants could not, with reasonable diligence, have become aware.

(ii) For those who pled guilty, that the circumstances under which the plea was tendered were prejudicial, being made in the absence of disclosure of evidence casting doubt on the reliability of the Horizon system. See *Healy* v *HM Advocate* 1990 SCCR 110 and *Kalyanjee* v *HM Advocate* 2014 JC 233.

(iii) In all cases, a ground based on oppression, namely that the Horizon system was so inherently unreliable that any conviction reliant upon evidence deriving from it must be viewed as tainted by unfairness.

Statements of reasons specific to each of the appeals were produced setting out the basis on which some or all of these grounds arose in the particular circumstances of that case. All the

grounds of appeal advanced in the referred cases were within the terms identified by the SCCRC.

The circumstances of the individual appeals

William John Quarm

Background

[9] Mr Quarm died in 2012. The court granted leave to his widow to bring the appeal. Mr Quarm pled guilty in 2010 to a charge of embezzlement of £27,000 between October 2007 and July 2008. He was sentenced to 150 hours' community service. He was considered to have confessed to using POL funds to prop up his business in 2008, both in correspondence to POL and in his interview under caution with POL investigators. He was charged at summary level. Having initially pled not guilty, he instructed a forensic accounting report in preparation for his defence. The author opined that the Horizon system was considered "watertight". In February 2010, Mr Quarm changed his plea to guilty. He appears to have told his solicitor that this was "simply to get the matter resolved". He also made certain admissions in the pre-sentence social enquiry report.

Appeal

[10] It was submitted that the plea was tendered under prejudicial circumstances and that his prosecution was oppressive. The SCCRC observed in its individual statement of reasons for the appellant that there had been a "consistent ambiguity" in Mr Quarm's position and his brother-in-law, William McDonald, stated that he had never accepted responsibility. It was submitted that he had never freely and consistently acknowledged his guilt. The appellant prayed in aid the forensic accounting report, the findings of which could no longer stand in light of information now available. Failures in disclosure meant that evidence

undermining Horizon had been suppressed and this rendered the prosecution oppressive, as well as raising a compatibility issue in terms of Article 6 ECHR.

Susan Sinclair

Background

[11] Ms Sinclair was convicted after trial of embezzlement of £10,749.58 between August 2002 and February 2003. She was sentenced to 180 hours' community service. At all times she denied embezzling the funds. She could not explain the losses. She had contacted the Horizon Helpdesk for assistance, but this did not resolve the issue. She confessed to overstating the cash in hand to make the accounts balance. She maintained her innocence throughout the trial. The Crown led evidence from a POL auditor who said he had not attempted to trace the missing money as this was not his remit. Part of the Sheriff's reasoning in convicting Ms Sinclair was that she had adopted a position of bare denial and failed to provide a coherent explanation either for the repeated errors or her failure to report them.

Appeal

[12] Ms Sinclair advanced grounds based on fresh evidence and oppression. The fresh evidence was that which disclosed issues with the Horizon system. It had come to the notice of POL at least as early as the first serious investigation in 2013, if not earlier, but was not the subject of conclusive determination until 2019 in *Bates*. Ms Sinclair maintained that the case against her had relied on Horizon evidence and, being ignorant of the flaws therein, she had been deprived of an opportunity to present objectively exculpatory evidence. The submissions based on oppression and Article 6 ECHR were broadly the same as those advanced for Mr Quarm. In support of her appeal Ms Sinclair relied *inter alia* on an affidavit

of her trial defence solicitor who stated that she had believed ever since Ms Sinclair's conviction that her case was a "real travesty of justice", but the evidence against her appeared, at the time, to be overwhelming.

Colin Stewart Smith

Background

[13] Mr Smith pled guilty in 2013 to embezzlement of £12,680.88 between March 2009 and July 2012. He was sentenced to a Community Payback Order with a 180 hours' unpaid work requirement. He had been SPM there since 2003. POL audits carried out in 2007 detected no significant problems. The issues started in mid-2008. Mr Smith reported discrepancies to the Helpdesk in 2010 and 2011 but his concerns were dismissed. To resolve discrepancies, he adjusted the snapshot to show that the shortfall was made up by cheque. On the morning of the POL audit in 2012 he had input figures in this respect in excess of £12,000. He provided no comment at the POL investigative interview. The evidence against him included the statements of two POL auditors as to an apparent admission on the morning of the audit, to the effect that he had been paying shop suppliers with POL funds and putting a cheque in once per week to cover it. He initially pled not guilty and maintained that plea at a further two diets. The defence file noted that he wanted to "put matters behind him" and records admissions that he was taking money from the branch to keep the business afloat. He referred to financial difficulties the branch encountered in the criminal justice social work report.

Appeal

[14] The grounds advanced were that his plea was tendered under real error/misconception, that the prosecution was oppressive, and that it violated his Article 6

ECHR right to a fair trial. Mr Smith was interviewed by the SCCRC as part of its investigation. He said he never considered Horizon might have been at fault, he could not explain how the shortfall occurred, and the account he provided was the only one that appeared consistent with the evidence before him. In its individual statement of reasons for Mr Smith the SCCRC said that it did not consider his apparent admissions could be regarded as being given freely and consistently, but arose from the seemingly indisputable evidence with which he was faced. An affidavit from Mr Smith's defence solicitor at the time was lodged, indicating that he was unable to recall the details of his case. He did however set out his usual practice in relation to embezzlement cases and stated that the circumstances indicated that Mr Smith had admitted guilt, provided an explanation and that he had thereafter taken steps to mitigate the consequences.

Judith Elizabeth Smith

Background

[15] Ms Smith pled guilty in 2009 to a summary charge of uttering false accounts for sums in excess of £3,000 or thereby. She was admonished. POL auditors identified a shortfall of £95,607.19 in August 2007. She had previously settled another amount in the region of £4,000. In her interview Ms Smith accepted that she had inflated the cash on hand figures when completing branch statements in order to make the accounts balance. She blamed Horizon and said the Helpdesk made matters worse. Ms Smith paid to POL the money in her bank account at the time, that being £3,000. POL reported the matter to the Crown as theft or embezzlement of £96,368 and the case was commenced on petition. During the course of 2009, negotiations took place regarding a plea. Meantime, the Crown sought further information from POL. These inquiries appear either not to have been carried out or

to have proved fruitless, because by September 2009 the Crown reduced the case to the summary complaint of uttering referred to above. Ms Smith maintained throughout the criminal proceedings that she had not stolen the money. She had falsified the accounts to conceal an inexplicable shortfall.

Appeal

[16] Ms Smith relied in the main on the grounds advanced for both Mr Quarm and Mr Smith. She submitted that her plea was tendered under duress. She made admissions at a time when the trauma of her arrest and court appearance had led to a deterioration of her mental health. The admissions she made were in any event equivocal. There was no independent evidence of theft and loss. Her oppression and Article 6 ECHR grounds similarly referred to the Crown's failures in their duty of disclosure. In her affidavit Ms Smith's former solicitor had little memory of the case, but did recall that Ms Smith never accepted theft and that she said she had put in everything she had to make up the shortfall.

Robert Thomson

Background

[17] Mr Thomson pled guilty in 2006 to embezzlement of £5,000 from between October 2003 and March 2004. He was sentenced to 180 hours' community service and ordered to pay compensation of £5,000. Shortfalls were identified at audit in March 2004. Mr Thomson said in his POL investigative interview that he had problems with the computer. He accepted altering figures since taking over the branch in order to get the books to balance and blamed the computer system for the need to do so. Later in the interview he appeared to admit, on a number of occasions, to paying his wife's debts out of POL funds from October or November 2003. The POL Investigation Manager gave a statement which stated

that Mr Thomson tried to "…cloud the issue by saying his Horizon computer was malfunctioning. We know that apart from one unrelated incident the computer appeared to be operating correctly". Mr Thomson initially pled not guilty but ultimately pled guilty to a reduced sum. In the pre-sentence social enquiry report he said that he had mixed money from POL's business with his retail business, for example, by using POL funds at the cash and carry.

[18] The SCCRC identified consistent and continuous allegations from Mr Thomson that the Horizon system was at fault. He was put in a position where his original account of innocence was deemed impossible by investigators, based on the alleged reliability of Horizon. There were significant doubts as to whether the admissions could be considered freely made.

Appeal

[19] Mr Thomson advanced the same grounds already noted relating to the circumstances of his guilty plea, oppression and Article 6 ECHR. In its individual statement of reasons the SCCRC noted that it was clear he had given accounts consistent with guilt, and accepted that he had made these admissions. However, he said that they were untrue and made under pressure. That continued throughout the criminal proceedings. The investigators told him that his true position was not possible. The SCCRC thus formed the view that there were significant doubts to whether the confession was freely obtained. In support of his appeal Mr Thomson prayed in aid the circumstances of his interview with POL investigators, including the lack of legal advice, and the pressurised environment which they created, and the POL's conduct in suppressing evidence.

Aleid Kloosterhuis

Background

[20] Ms Kloosterhuis pled guilty in 2012 to embezzlement of £20,000 between April 2010 and September 2011. She is the only one of the present appellants who received a custodial sentence, having been sentenced to 12 months' imprisonment. A shortfall of £22,889.82 was identified at an audit in 2011. At interview she admitted using POL funds to pay bills for the shop and petrol side of her business, accepting that she had misused POL money on numerous occasions but intended to pay it back. The funds of both sides of the business became intertwined, which could lead to confusion, but was generally rectified. She had contacted the Horizon helpline but says that she was told that she was the one at fault. She pled not guilty initially and then intimated her change of plea in a section 76 letter, thereafter pleading guilty at a section 76 diet. Ms Kloosterhuis, it appears, did not raise with her defence solicitor at the time that she had been experiencing issues with Horizon. Despite this, her solicitor queried the accuracy of Horizon with the Crown, and included the following in the section 76 letter: "Our client is aware from the National Newspapers that the accounting system used by Post Office Counters is currently being questioned on its accuracy". At the sentencing diet her solicitor advised the court that she had first used the funds inadvertently and had hoped she would be able to trade her way out of the issues. A similar account was contained in the criminal justice social work report.

Appeal

[21] Ms Kloosterhuis advanced the same grounds already noted regarding oppression and the prejudicial circumstances in which the plea was tendered. In particular, she submitted that her interview was inadmissible having not complied with the requirements of Article 6 ECHR. The admissions she made were qualified and in many respects confusing

or ambiguous. The SCCRC in its individual statement of reasons for Ms Kloosterhuis doubted whether her various admissions were freely given. The evidence against her came primarily from the Horizon system. The failure to disclose meant that she did not have ammunition to challenge that system. It was suggested that there would have been an insufficiency of evidence without the Horizon data.

Joint Minute of Agreement

[22] Prior to conceding Ms Kloosterhuis' appeal the Crown and her agents entered into a joint minute of agreement. Although only binding in that case so far as the present appellants are concerned, the facts agreed are of a general nature and thus of wider interest to appeals referred by the SCCRC. It is not necessary to set out at length the facts agreed in the joint minute. Particularly significant facts outlined in the Joint Minute are:-

i) It was not possible for sub postmasters to "opt out" of Horizon once it had been installed in a branch (para. 10);

ii) Where a sub postmaster left office (for example, by being suspended as a result of an investigation into apparent cash shortfalls reported by Horizon), they were not permitted to retain any equipment or documents, including any electronic documents or back-up discs acquired or made owing to their position (para. 11);

iii) POL did not retain comprehensive records of sub postmaster contact with the helpline (para. 12);

iv) POL provided no facility within Horizon to dispute the figures it reported. If a discrepancy was recorded at the end of a trading period, the sub postmaster either had to immediately put in their own cash (known as "settling in branch") or consent for the sum to be deducted from their future income (known as "settling centrally") (para. 13);

v) Regardless of the sub postmaster's actions regarding the helpline, any item "settled centrally" was automatically subject to POL's debt recovery procedure (para. 14);

vi) The way in which a SPM was required to compile Branch Trading Statements each trading period meant that they would have no choice but to accept into that statement disputed amounts that they expressly disagreed with, and Transaction Corrections that they either did not understand, or disputed. There was no practical or effective dispute resolution mechanism. Between 2006 and 2019, this resulted in over 100,000 such disputes – of which POL has not retained comprehensive records (paras. 14 – 15);

vii) POL and its contractor, Fujitsu, had considerable technical capabilities in relation to the Horizon system, including the ability to edit, fix, and rebuild branch transaction data. If Fujitsu injected a transaction into a branch account, it would look as though the SPM had done it. Fujitsu maintained inadequate controls over, or records of the use of these capabilities (para 18);

viii) POL's Security Team operated a bonus/incentivisation scheme which included objectives relating to the recovery of POL losses through criminal confiscation or compensation proceedings or direct repayment during the course of a prosecution. The Crown became aware of this scheme only on 11th January 2024 (para. 21);

ix) During the relevant period, POL adopted a "default position" that Horizon was not the cause of shortfalls in branches and therefore any such shortfalls could only be the responsibility of sub postmasters, with the result that debt recovery and fraud prevention procedures were initiated against sub postmasters unless they could demonstrate that the shortfall or discrepancy was not their fault (para. 25);

x) Between paras. 27 and 65 of the Joint Minute there is outlined POL's growing awareness of serious problems with Horizon and its corresponding failures in relation to

disclosure. It is not necessary to relate the entirety of this lamentable history, but it does not cast POL in a favourable light;

xi) The effect of all of this is set out in paras. 67 – 77 of the Joint Minute, the gravamen being that during the period covered by these referrals, the Crown accepts that Horizon was unreliable. Some key points are:

(a) During the relevant period, there was a significant and material risk of branch accounts being affected by bugs, errors and defects in both Legacy Horizon and Horizon Online.

(b) During the relevant period, Legacy Horizon was not remotely robust.

(c) During the relevant period, where there was an unexplained shortfall in a branch there was a material risk that such a shortfall in a branch's accounts had been caused by Horizon. Unexplained shortfalls in branches were not "extremely unlikely" to be caused by Horizon.

(d) SPMs could not identify apparent or alleged discrepancies/shortfalls or their causes, nor could they access or properly identify transactions recorded on Horizon, themselves. They required the co-operation of POL to do so.

The Crown's reasons for conceding the appeals

[23] It is necessary to say something about the way in which the Crown approached its decision on each of the appeals. The starting point was whether the case was a "Horizon case". That is a term which was coined by the Court of Appeal in *Robert Ambrose & Others* v *Post Office Limited* [2021] EWCA Crim 1443:

> "3. We used the shorthand term "Horizon case" to refer to a case in which the reliability of Horizon data was essential to the prosecution, and in which there was

> no independent evidence of an actual loss from the account at the branch post office concerned, as opposed to a Horizon-generated shortage."

[24] In light of what was said in *O'Donnell (supra)* the Crown accepted that, where a case was identified as a "Horizon case", the conviction could not be supported. In such cases, no trial could have been fair, on the basis that:

a) the whole basis of the prosecution case was that money was missing from the POL branch account and that there was an actual shortfall which had been caused by theft on the part of the sub-postmaster; but

b) there was no basis for that case, because the only evidence of such a shortfall was Horizon evidence and that evidence was unreliable; and

c) the accused was prevented from effectively challenging the Horizon evidence by the failure to disclose its unreliability.

In light of the issues highlighted in the Crown concessions, including the disclosure issues and the matters highlighted in the Joint Minute and summarised at para [22] above, (especially para [22](xi)(a)-(d)), we agree with the Crown that the trial in any case in which the Horizon evidence was essential to conviction, whether as the primary evidence or as essential corroboration, cannot be considered to have been fair. Not all of the present appeals were accepted to be Horizon cases. Ultimately, the Crown conceded even those which it did not accept were Horizon cases, primarily for public interest reasons. We set out briefly the Crown's position in respect of each of the appeals which led to their concession.

Quarm

[25] The Crown accepted that this was a Horizon case. Mr. Quarm's admissions were not evidence of an actual shortfall in the branch account, which could only be provided by the Horizon data. The appellant's admissions were also ambiguous. The interview was

conducted when, on POL's investigators' own assessment, the appellant appeared to be in a daze and not understanding the questions put to him. Properly analysed, the only concession that he ultimately made was that he "must have been" using POL funds to pay invoices "or we wouldn't have this situation". The forensic accounting report he instructed incorrectly assumed that Horizon was "watertight". That being so, his plea was tendered in circumstances which were exceptional and clearly prejudicial to him. The Crown also accepted that the appellant had established that his prosecution was oppressive as a result of the Crown's, albeit unknowing, actings which prevented a fair trial (*HM Advocate* v *Withey* 2017 JC 249 at 39). All Horizon cases were "inherently unfair" such that the appellant had not received a fair trial in terms of Article 6 ECHR.

Sinclair

[26] This was also a Horizon case. Ms Sinclair had consistently denied taking the money. The Sheriff recorded in his reasons convicting the appellant that there was no direct evidence against her. The case against her relied on inference, which would have been much less strong had evidence been available to challenge the reliability of Horizon. The fresh evidence met the test under section 175(5) of the 1995 Act. It was not heard at trial, there was a reasonable explanation for that and it would have had a material bearing on determination of the critical issue at trial. The grounds based on oppression and Article 6 ECHR were made out for the same reasons as in the case of Quarm.

Colin Smith

[27] This was a Horizon case. It was accepted that the appellant's plea was tendered under prejudicial circumstances. The only source of corroboration came from the

admissions reported in the statements of the POL auditors. The Crown noted there was objective evidence that the explanations proffered in these admissions – relied on as corroboration- were untrue, and moreover that the investigators understood that to be the case. The evidence about the writing of a cheque thus became neutral and could not corroborate the shortfall (*Meredith* v *Lees* 1992 JC 127 at 131). On one view it supported Mr Smith's position that he wrote the cheque to conceal an inexplicable Horizon-generated shortfall. The Crown also referred to logs from the Horizon helpline between 2008 and 2012. They showed that Mr Smith had contacted the Helpdesk on 29 separate dates. A log entry noted a "KEL" ("Known Error Log"). Despite this, Mr Smith was informed that others were not experiencing problems. In terms of the oppression/Article 6 ECHR ground, the Crown noted that POL's disclosure failures were "particularly egregious" in Mr Smith's case. Between the audit and Mr Smith being sentenced, POL instructed Second Sight to report on suspected defects in Horizon, and contacted the Crown via its Scottish agents to discuss concerns about the relevance of known Horizon issues to Scottish SPM prosecutions.

Judith Smith

[28] Ms Smith's case was unique. The Crown ultimately accepted that her case was a Horizon case and that each of the three grounds was made out for the reasons already set out in relation to the other appellants. However, the first issue noted by the Crown, which had been identified by the SCCRC in its individual statement of reasons, was that the facts libelled in the complaint could not have amounted to the offence of uttering as genuine, because there was no underlying forgery (Macdonald, *The Criminal Law of Scotland*, 5th edition, p 59). They therefore invited the court to treat Ms Smith's conviction in substance as a conviction for fraud, applying the approach in *Sneddon* v *HM Advocate* 2006 JC 41 at 11.

Ms Smith's case had started on petition in relation to a charge of theft and embezzlement amounting to almost £100,000. The Crown had very limited papers but from those it did have it could reliably be inferred that the Crown took the view that there was insufficient evidence that Ms Smith had stolen the sum of £99,887.05. Instead, the Crown relied on (i) her own admission that she had made false returns to cover up discrepancies between the cash levels shown on Horizon for the branch and the actual levels held in the branch, together with (ii) the fact that she had repaid the sum of £3,000 to POL. The latter was deemed to amount to an admission that she had taken that amount from POL funds, an untenable position standing her contractual obligation to settle such shortfalls.

[29] Analysed as a case of fraud, there was no independent evidence of the shortfall other than Horizon. Ms Smith had been consistent in her position that she had regularly encountered difficulties with the weekly and monthly account balances. She was aware of shortfalls but could not explain them. She had sometimes reported the difficulties to the helpline but the advice she received made the position worse and not better. She admitted that for a number of months she inflated the figures in the branch trading statements that she submitted to POL to cover up Horizon-generated shortfalls.

Thomson

[30] The Crown did not accept that Mr Thomson's case was a Horizon case. His case could be distinguished on the basis that he made unqualified admissions. Nonetheless it was conceded that there had been a miscarriage of justice. The Horizon evidence was very significant in the case. Mr Thomson's admission had weak evidential value. The only source of corroboration of the admission came from the unreliable Horizon evidence. As for the circumstances of the admission, it was noted that: it arose in a process initiated solely on

the basis of unreliable Horizon evidence; followed an exculpatory account of the Horizon system "going haywire"; and followed repeated, and untrue, assertions by POL investigators that Horizon was robust. This had to be viewed against the background that POL's failures in disclosure meant Mr Thomson was precluded from challenging the Horizon evidence. While the Crown did not necessarily accept that the plea was tendered in circumstances which met the *Healy* and *Kalyanjee* tests, in all the circumstances, it would not be in the public interest to oppose the appeal.

Kloosterhuis

[31] The Crown did not accept that this was a Horizon case. The Crown adopted their "own independent analysis" quite apart from the grounds of appeal advanced by Ms Kloosterhuis. It would not be in the public interest to oppose the appeal. Absent the Horizon-reported shortfall of £22,889.82, the evidence against Ms Kloosterhuis consisted of her own admissions, a document she had prepared called "the manual cash sheet" which purported to record the cash position of the Gigha Post Office for the week beginning 9 September 2011, and certain personal bank statements. None was compelling evidence of guilt. When she made the admissions she was experiencing mental health difficulties. In the course of the interview she often appeared confused, not understanding questions or answering in an incoherent way which is at some points difficult to understand at all. The admissions in any event were made only in relation to a restricted sum. Despite this, the POL investigator submitted an "incorrect and misleading" standard prosecution report to the Crown which suggested that Ms Kloosterhuis made admissions in relation to the entire shortfall. In all these circumstances the evidential strength of her admissions was substantially weakened. The manual cash record had limited evidential strength and was

capable of innocent explanation. The plea tendered reflected a sum considerably greater than that noted in the admissions.

The Court's decision

[32] In each of these appeals the court considered that the concessions made by the Crown were well made, and agreed that the appeals should be allowed. The four pure Horizon cases largely speak for themselves. They are all cases in which the Horizon evidence was central to conviction, and come within the third specific ground identified by the SCCRC, that the Horizon system was so inherently unreliable that any conviction reliant upon evidence deriving from it must be viewed as tainted by unfairness.

[33] William Quarm made clear attempts to obtain evidence to support his innocence by obtaining a forensic accounting report, which erroneously concluded that the Horizon system was infallible. The Crown noted that there are records of 104 phone calls made to the Horizon helpline from the appellant's branch between 2000 and July 2008, consistent with his finding records of transactions on Horizon for which he had no explanation. There is evidence to suggest that he changed his plea "simply to get the matter resolved". While a plea of guilty is a full admission of the libel in all its particulars (*Healy* v *HM Advocate*), the circumstances leading to the plea were truly exceptional, indicating that the plea was tendered in circumstances coming within the second specific ground identified by the SCCRC, namely that the circumstances under which the plea was tendered were prejudicial, being made in absence of disclosure of evidence casting doubt on the reliability of the Horizon system, thus depriving him of the possibility of challenging the evidence and resulting in a miscarriage of justice.

[34] Susan Sinclair maintained her innocence throughout. Indeed, in convicting her the sheriff relied on the fact that she had continued to deny any wrongdoing without providing a coherent explanation. There could hardly have been a clearer case of a miscarriage of justice having regard to the disclosure issues.

[35] In the case of Colin Smith there was very little in the way of an admission until the plea of guilty. Such admissions as had been made were shown to be factually inaccurate, and the Crown was entirely right to conclude that no reliance could be placed upon an admission which was demonstrably untrue. Mr Smith had repeatedly contacted the helpline to no avail. The case is again a clear one of miscarriage of justice. Mr Smith did write a cheque on the day of the audit but the Crown noted that the objective evidence now available supports his revised account, that he wrote that cheque because he was aware of the inexplicable shortfall which had been identified as mounting over a period of time. We agree with the Crown that POL's failure to disclose the Horizon problems in Mr Smith's case either to him or the Crown is particularly egregious given what POL knew at the time when the prosecution was live.

[36] Judith Smith is another Horizon case, where there was no independent evidence of a shortfall and where the fulfilment of a contractual obligation to settle such shortfalls was wrongly considered to be an admission. This was against a background of insistence that there had been repeated problems with the system, made worse by attempting to gain assistance from the helpline.

[37] In the case of both Robert Thomson and Aleid Kloosterhuis the Crown considered these not to be pure Horizon cases. One may quibble with that assessment, particularly in the Thomson case, but the matter is of no moment, since it is equally clear that the Crown concessions were well made. Issues with Horizon were raised in both of these cases. The

position adopted by Mr Thomson seems to have been quite inconsistent. For almost the entire interview, his position had been that he was repeatedly finding unexplained shortfalls in the Horizon system. The investigators' response was consistently that this simply could not have happened. Such admissions as were made were made in a context of problems with the Horizon system and difficulties in getting the books to balance. In short the prosecution, and any admissions made arose in a process initiated solely on the basis of unreliable Horizon evidence. Issues were raised on behalf of Kloosterhuis by her solicitor and nothing appears to have been done thereafter. In both these cases the weakness of the non-Horizon evidence meant that the problems with the Horizon evidence were of real significance. For the reasons stated by the Crown we consider the concession that these two appeals should succeed was also well made.