

## Message

**From:** Rodric Williams [GRO]  
**Sent:** 04/10/2018 19:44:00  
**To:** Jane MacLeod [GRO]  
**CC:** Andrew Parsons [GRO]; Angela Van-Den-Bogerd [GRO]  
**Subject:** RE: Contingency Planning - Friday  
**Attachments:** 2018.09.26 Enclosure to Second Letter to Freeths\_ Voluntary Further Info....pdf

Jane, Angela,

I spoke to David earlier today and ran through the bullet points in your email below.

On the all-important “burden of proof” issue, he summarised the position along the following lines, which he will run through tomorrow to help inform our response to the risk this issue presents:

1. The issue arises on Common Issues 8 and 9, namely *what is the proper construction of section 12, clause 12 of the SPMC and Part 2, paragraph 4.1 of the NTC*, i.e. to whom do the contracts assign the burden of proof.
2. For reference, those terms are set out in full at the bottom of this email.
3. Both SPMC and NTC terms require a “loss” before they are engaged.
4. We say a “loss” is established when the agent submits an account containing a shortfall.
5. That is a reasonable position to take given:
  - the control the agent has over branch activity; and
  - Horizon’s general reliability.(Counsel has articulated this formally in the attached “Voluntary Further Information” dated 26 September 2018 – see para.1(1)(a) to (e) on pp2-3.)
6. This can be challenged by the agent, by reference to cogent evidence.
7. This is consistent with the established principle of agency law that an agent is bound by their account unless they can show mistake.
8. For the SPMC term, the agent must then demonstrate that the loss was not caused by their assistant. If they cannot do that, the term effectively creates strict liability on the agent for the loss.
9. If they can, the next question for the SPMC term is whether the agent has been negligent, careless or acted in error, which will be down to:
  - us to prove, where we would rely on the same factors identified in 5. above; or alternatively
  - the agent, which would require cogent evidence, i.e. as per 6. above.
10. For the NTC term, the position is more straightforward as it does not require postmaster or assistant fault (the main challenge on this term is that its language arguably focusses on loss and damage to physical cash and stock).
11. David’s view is that construing the terms in a way where the agent could “sit on their hands” on a loss would be “absurd” given:
  - the factual matrix against which the contract is to be construed (i.e. agent control over branch activity and handling of Post Office assets);
  - agents are typically bound by their accounts (see 7. above); and
  - the potentially limitless scenarios which we would have to discount before an agent was liable (i.e. we’d have to prove the negative).
12. David thinks it unlikely that the Managing Judge would apply an alternative construction to that set out above. David would look to appeal if he did, and thinks the chances of the Court of Appeal making a similar finding would be “very low”.

I hope that's helpful. Please let me know if you need anything further.  
Rod

### **Terms for Common Issues 8 and 9**

SPMC Section 12, clause 12: The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay.

NTC Part 2, paragraph 4.1: The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (howsoever this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise, or as a result of any breach of the Agreement by the Operator) except for losses arising from the criminal act of a third party (other than Personnel) which the Operator could not have prevented or mitigated by following [Post Office's] security procedures or by taking reasonable care. Any deficiencies in stocks of products and/or resulting shortfall in the money payable to [Post Office] must be made good by the Operator without delay so that, in the case of any shortfall, [Post Office] is paid the full amount when due in accordance with the Manual.

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**From:** Jane MacLeod

**Sent:** 02 October 2018 19:11

**To:** Rodric Williams [GRO] >

**Cc:** Andrew Parsons [GRO]; Angela Van-Den-Bogerd [GRO]

[GRO]

**Subject:** Re: Contingency Planning - Friday

Many thanks for arranging this.

It would be helpful if David could address the following (recognising that we probably only have 30 mins):

- overall view of PO's prospects of success in the Common Issues Trial and high level view of strengths / weaknesses
- more detailed view on 'shortfalls/ burden of proof' issues given this is the area which would have the highest operational impact in the event of an adverse outcome, and where we would have to spend the most prospectively, if we wanted to mitigate (either in whole or in part) any potential risk.
- any areas where we might think about appealing (speculative I know ....)
- any other material risk areas in the conduct of the case?

I suspect Al might raise prosecutions, so it would be helpful to get to him in advance, the answers to the queries raised over the weekend.

At this stage, and given timing, I think we should try and steer clear of Horizon and 3rd trial issues. However once we have the expert opinions in, then we might wish to revisit David & Tony's views on prospects in the Horizon trial.

Thanks,

Jane

Jane MacLeod  
Group Director Legal, Risk & Governance  
Post Office

**GRO**

**From:** Rodric Williams  
**Sent:** Tuesday, October 2, 2018 5:52:10 PM  
**To:** Jane MacLeod  
**Cc:** Andrew Parsons; Angela Van-Den-Bogerd  
**Subject:** RE: Contingency Planning - Friday

Jane – David has confirmed he will come to Finsbury Dials on Friday morning for 8am.

I will link up with Angela (cc'ed) tomorrow so that we can line David up with the business to be addressed on Friday, then come back to you so you have sight of what is proposed.

I hope that's ok. Please let me know if you need anything further or different.

Rod

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**From:** Jane MacLeod  
**Sent:** 01 October 2018 13:54  
**To:** Paula Vennells <[REDACTED] GRO >;  
**Cc:** Andrew Parsons <[REDACTED] GRO >; Rodric Williams <[REDACTED] GRO >; Avene Regan  
**Subject:** Contingency Planning - Friday

Paula

As part of the contingency planning meeting on Friday, it may be helpful if we asked David Cavender QC to attend for 30 mins to provide his updated view on merits, which would then provide helpful context to the subsequent contingency planning discussion.

On that basis and unless I hear from you to the contrary, I will ask Andy/Rod (copied) see if David can attend – sequentially this would fit best at the beginning (8.00am), however depending on his availability, we may have to fit him in later.

Jane



**Jane MacLeod**  
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