

Strictly Confidential – Subject to Legal Privilege – DO NOT FORWARD

POST OFFICE LTD BOARD

Initial Complaint Review and Mediation Scheme ("the Scheme")

1. Purpose

The purpose of this paper is to provide the Board with:

- 1.1. A copy of the advice received from Linklaters about Post Office's legal and financial exposure in relation to the claims made by applicants to the Scheme; and
- 1.2. An update on planned next steps in relation to the Scheme and other related issues.

2. Background

- 2.1. At its February meeting the Board asked the Executive to take external advice to assess our legal and financial exposure in relation to the matters raised by applicants in their complaints made to the Scheme. This was, in part, in response to concerns flagged to the Board about:
 - the rising costs associated with administering the Scheme;
 - the quantum of some of the claims being submitted to the Scheme, especially when compared with our assessment of what we might reasonably consider paying by way of settlement (the so called expectations gap); and
 - the extent to which managing the Scheme, and associated issues, is diverting management attention.
- 2.2. Following that Board meeting Linklaters were engaged to provide us with the relevant advice. The scope of their engagement was agreed by the subcommittee of ExCo established to oversee this work, chaired by the Chief Executive, a draft of which was circulated to the Board for comment. As the Board will be aware, the questions Linklaters were asked to consider are relatively technical in nature and, for that reason, we asked them to include in their advice (see Annex 1) a brief executive summary, which tries to draw out the main legal points. In addition, we have arranged for Christa Band, the Linklaters partner engaged to undertake this work, to attend the Board meeting to present the advice and answer any questions the Board may have. That said, at a high level and by way of an indication of the direction of their advice, it may be helpful to note that one of Linklaters many conclusions, is that: *"There can be no question of a claim for consequential losses [by an SPMR] based simply on the recovery by the Post Office of losses [i.e. the amounts that POL believes were owing to it] if the losses were properly payable and the Post Office was entitled to the money".*
- 2.3. It perhaps should also be noted that, following feedback from a number of Board members, the advice set at Annex 1 focuses mainly on the question of our legal and financial exposure, and not on the possible changes that could be made to the Scheme, or alternatives to it. It is currently proposed that a further paper will be delivered to the Board at its April meeting setting out the range of realistic options to take matters forward, with recommendations. This

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paper is being worked up by the Project Team, overseen by the ExCo subcommittee with input from Linklaters.

3. Next Steps

- 3.1. In preparing their advice Linklaters have, in effect, made the working assumption (which we believe to be correct) that there is nothing 'wrong' with the Horizon system. On that basis, the advice from Linklaters is that, in strict legal terms, many, if not all, of the claims submitted under the Scheme would be unsuccessful if they were considered by a Court. Linklaters do, however, acknowledge that there may well be policy considerations, above and beyond pure legal principles, that might sensibly guide any decisions relating to the payment of compensation and/or the future of the Scheme and/or any modifications that might be made to it.
- 3.2. Linklaters have further acknowledged that any decisions made with respect to the future of the Scheme will carry potential risks – these risks, which include reputational, public relations and political risks, will be reflected in the further report to be delivered to the Board in April. That report will also reflect the dialogue which has been commenced with the Financial Ombudsman Service, which has already provided useful insights into complaints handling.

4. Second Sight

- 4.1. In addition we were asked by the Board to consider the extent to which Second Sight's engagement could be regularised. Following a period of intense discussions with Second Sight we have reached broad agreement on the engagement letter (on a time and material basis) and, despite initial (and very heavy) resistance from Second Sight, they have now agreed to the inclusion of a 12 month (post completion) non-compete clause. In current circumstances, it is unlikely that Post Office will be able to agree materially better terms with Second Sight without imposing considerably more strain on the relationship with them. The Board's view on whether to push for a more aggressive agreement would be welcome.

5. Insurance

- 5.1. A paper on insurance cover maintained by Post Office Ltd. has been prepared by the Chief Financial Officer and has been submitted under separate cover.

6. Recommendation

The Board is invited to:

- 6.1. Note the advice from Linklaters and the steps being taken to develop options for the future of the Scheme and or alternatives to it.
- 6.2. Should the Board so agree, authorise the signing of the draft engagement letter with Second Sight which includes the 12 month non-compete clause.

SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE

Dated 20 March 2014

POST OFFICE LIMITED

**REPORT INTO INITIAL COMPLAINT REVIEW AND MEDIATION
SCHEME**

LEGAL ISSUES

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1 EXECUTIVE SUMMARY

- 1.1 We set out in this executive summary our key conclusions on the legal analysis of the complaints made by SPMRs about Horizon.
- 1.2 The relationship between SPMRs and the Post Office is governed by the standard form contract which, according to its terms, allows the Post Office to recover losses and is terminable on three months' notice without the need to specify a reason. The relationship between the SPMRs and the Post Office is one of principal and agent and the SPMRs are not employees. There is no broader duty of care which would extend the contractual duties owed by the Post Office in any respect relevant to the issues in this Report.
- 1.3 The key factual issue is whether and to what extent Horizon might be said to be reliable, what defects there may be in it and how any such defects might manifest themselves and translate into errors in the state of the account between an individual SPMR and the Post Office. Such relevant legal risks as exist arise only in the event that there are provable malfunctions in the Horizon system which are causative of losses on the part of the SPMR.
- 1.4 Absent such proof that Horizon is not working as it should, the Post Office should be able to recover losses which the Horizon records indicate are owing on an individual SPMR's account. If the Post Office is entitled to recover losses, then there can be no question of a consequential loss claim on the part of the SPMR relating to their recovery (for example for damage to the SPMR's business or for stress).
- 1.5 If, in an individual case, a SPMR is able to show that the account between him and the Post Office, as evidenced by Horizon, is inaccurate, he has a claim to the recovery of any losses he has mistakenly paid. This would not carry with it a right to claim consequential losses.
- 1.6 There may be cases in which the Post Office has given inadequate notice of termination of the contract with a SPMR (for example, terminating him summarily without justification). In those cases, the SPMR is entitled to payment of what he has lost in net income over the period – up to three months. He may also, on the facts, have a consequential loss claim if he argues and establishes that he has lost a chance to sell his business as a going concern in the period for which he should have been entitled to notice.
- 1.7 Some SPMRs allege that the Post Office has offered them inadequate training and support. We do not think that these claims, even if established, affect the Post Office's ability to recover losses evidenced by the accounts shown on Horizon.
- 1.8 In summary, we think that, absent proof that Horizon is malfunctioning (either generally or in the specific case) the Post Office has a right to recover losses from SPMRs, the SPMRs have no right to compensation for such losses and the circumstances in which there will be a consequential loss claim are limited to those in which inadequate notice of termination was given, will depend on their facts and should be limited. While we are not in a position to assess the facts of the claims in the Scheme and the specific amounts sought in each of them, it appears to us on the basis of the conclusions above that many of the claims are likely to be over-ambitious and difficult to prove. Accordingly, the total amount that could be successfully claimed in Court by Applicants may well be only a fraction of the aggregate amount (approximately £100 million) which they have claimed through the Scheme.
- 1.9 We set out below the legal analysis which supports these conclusions.

2 BACKGROUND

2.1 This Report has been commissioned by the Board of the Post Office Limited ("the Post Office") following concerns over the level of claims and costs and other potential legal and financial exposure for the Post Office in connection with the Initial Complaint Review and Mediation Scheme (the "Scheme").

2.2 We understand that the Scheme was established in August 2013 with the aim of resolving various allegations that had by then been made by certain interested parties about the Horizon financial transaction and accounting system ("Horizon") used by the Post Office and the Post Office's Subpostmasters ("SPMRs"). It was claimed by a small, but very vocal, minority of SPMRs that there were problems with Horizon and that if Horizon recorded that there were losses at a particular Subpostoffice this was not necessarily because the SPMR had stolen or otherwise lost money or stock but because Horizon was malfunctioning. This issue attracted political comment and there was debate in Parliament about it.

2.3 Importantly, Jo Swinson, the Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs, noted that there was no evidence of a systemic problem with Horizon.¹ This has also been the Post Office's conclusion on the information so far available to it. We note that there is, so far as we understand it, no objective report which describes and addresses the use and reliability of Horizon. We do think that such a report would be helpful, though there is a decision to be made about how broad and/or thorough it needs to be.

3 AIMS AND OBJECTIVES

3.1 We were initially instructed to prepare a report with the aim of addressing the following key issues:

- 3.1.1 Whether and to what extent the Post Office has any legal liability with respect to complaints made by applicants to the Scheme ("Applicants").
- 3.1.2 The nature and extent of the risks arising from and associated with the Scheme in its current form.
- 3.1.3 Whether and to what extent the Scheme, as currently structured, can be sensibly modified in order to improve the efficiency and effectiveness of its operation, and mitigate any of the risks identified above.
- 3.1.4 The nature of any dispute resolution (or similar) mechanisms that could be established either in order to replace the Scheme or augment its operation. In particular, whether adjudication, arbitration and the use of ombudsman services might be more appropriate than the Scheme.
- 3.1.5 In the event that a decision is made by the Post Office to discontinue the Scheme, what steps the Post Office could take to minimise any existing legal risks.

3.2 This Report covers introductory matters and the legal issues identified in paragraph 2.1.1 above only. Once the Board has been able to consider the legal issues outlined in this Report we should be happy to assess, in conjunction with the Post Office Executive, how best we can assist the Post Office in addressing the issues in paragraphs 2.1.2 to 2.1.5.

¹ Hansard, 9 July 2013.

3.3

We anticipate that the Post Office will wish to have regard to, and come to a view on, the following matters, in light of the conclusions reached in this Report in order to guide the Post Office's consideration of the issues in paragraphs 2.1.2 to 2.1.5 above:

- 3.3.1 Does the Post Office wish to consider paying compensation by reference to principles other than legal entitlement? If so, how will it articulate and apply those principles? How will it justify its position to all SPMRs (Applicants and those who have not complained) and to stakeholders?
- 3.3.2 Does the Post Office wish to establish a full baseline audit of the functioning of the Horizon system?
- 3.3.3 How important is it to the Post Office to determine the facts of each individual claim? In any claim is the Post Office's stance to be more conciliatory than adversarial? What are the limits of this approach?
- 3.3.4 How and to what extent will the Post Office wish to strike a balance between resolving past issues and putting the future operation of Horizon and the relationships with SPMRs on a sound footing?
- 3.3.5 How and to what extent will the Post Office wish to strike a balance between the matters above and achieving a satisfactory political outcome, including with regard to what has been said in Parliament about the Scheme and Horizon?

3.4 In accordance with our instructions, this Report addresses the issues as a matter of law, only. We fully appreciate that many of the issues will have political and public relations implications for the Post Office or may have such implications in the future. We can certainly, in due course, offer our views as to where such issues may arise in the context of the matters outlined in paragraphs 2.1.2 to 2.1.5 above. Some measure of political engagement will doubtless be called for. It is a decision for the Post Office what measure of criticism or public relations damage it could and should tolerate – this is a factor which applies whether the Post Office decides to compensate SPMRs otherwise than in accordance with their legal entitlements or declines to pay such compensation and thereby doubtless frustrates their expectations. The Post Office may decide that it is sensible to engage specialist public relations advice to guide the management of this issue.

4 BASIS OF THIS REPORT

4.1 The issues in this Report are discussed primarily from the perspective of the legal rights and obligations of the parties involved. In preparing this Report we have assumed that:

- 4.1.1 the 10 spot reviews and 4 cases with which we have been provided are indicative of all the types of complaint that have been accepted into the Scheme – we have not seen any other cases;
- 4.1.2 all legal issues are governed by English law; and
- 4.1.3 we have been provided with all relevant reported decisions. There has been prior litigation on issues directly relevant to those raised in this Report. Whether or not such decisions are strictly binding (and some may be) they are likely to be persuasive.

4.2 Our observations and conclusions are limited by the following:

- 4.2.1 we have only reviewed certain documents prepared by or on behalf of Second Sight, the Working Group or SPMRs or the JFSA and have otherwise had no contact with any of those parties;
- 4.2.2 we have had no contact with Fujitsu, the company which designed, provided and supports the Horizon system;
- 4.2.3 we are not in a position to test the facts of any of the claims; and
- 4.2.4 we have been asked not to consider certain matters, including PI and D&O insurance.

4.3 We reference throughout this Report where appropriate the documents from which we have derived facts forming the basis of our views. All other facts referred to herein are based on discussions we have had with the Post Office Scheme project team. We would welcome any comments on facts or background we have stated in this Report which appear to be inaccurate or incomplete. They could affect the views and conclusions we have reached.

5 WHETHER AND TO WHAT EXTENT THE POST OFFICE HAS ANY LEGAL LIABILITY WITH RESPECT TO COMPLAINTS MADE BY APPLICANTS

Duties owed by the Post Office to SPMRs and duties owed by SPMRs to the Post Office

5.1 It is helpful to start this section with an overview of the legal relationship between the Post Office and the SPMRs. That, self evidently, provides the foundation for the issues identified in the various complaints made by SPMRs.

Contract

5.2 There is a contract which we are told is in standard form and which all SPMRs are required to sign. We have a copy described as the 1994 issue of the standard contract with SPMRs, amended to include all contract variations issued since 1994, although the document was never issued in this form to SPMRs ("**the Contract**").

5.3 We understand that certain SPMRs dispute whether they signed a contract at all and there may, in individual cases, be debate about which variations were received and/or are effective. This would be an issue which would need to be resolved in any particular claim. We have assumed in this Report that the contractual terms which apply are those in the version of the document which we have received.

5.4 Under the Contract, the Post Office owes duties to the SPMRs and in principle breach of any of those duties could found a claim. That claim would only be valuable, in the sense of entitling the SPMR to damages, if the breach could be shown to be causative of loss on the part of the SPMR. We highlight relevant terms of the Contract as appropriate below.

Agency

5.5 Clause 1 of the Contract provides that:

"The contract is a contract for services and consequently the SPMR is an agent and not an employee of Post Office Ltd."

This is important as the agency relationship gives rise to specific duties on the part of the SPMR which are detailed further below (see paragraphs 5.25 and 5.45 below).

Non-employment

5.6 The SPMRs are not employees of the Post Office. This is critical as it means that there are certain legal protections, both statutory and at common law, to which SPMRs are not entitled. Not only is this clear from Clause 1 of the Contract it was also established in *Commissioners of Inland Revenue v Post Office Limited*² and we note that in later cases, for example *Moeze Lalji v Post Office Limited*,³ the position seems to have been accepted and the contrary not argued.

No relevant duty of care

5.7 Where the parties are in a contractual relationship, that is the starting point for determining their duties where the conduct in question is covered by terms of the Contract. So if the conduct relied on for the claim is conduct covered by the Contract, the contract should determine the extent of the parties' rights and liabilities. That is not to say that there may not be an implied (or even an express) term to the effect that the party rendering the performance should do so with reasonable skill, care and diligence. Where the party in breach can be said to have performed his contractual duty negligently then the party suffering the loss can claim in either tort (negligence) or contract. But this does not mean that he can rely on a duty of care in negligence to extend the duties owed under the contract.

5.8 If the SPMRs wished to allege that the Post Office owed them a broader duty, not covered by the Contract, then they would need to allege and establish that the Post Office owed them a duty of care. On the usual principles, this would depend on an assumption of responsibility by the Post Office in the relevant respects. The existence of the Contract does not preclude there being a duty of care, but for matters covered by the Contract, the Court should not find that one party assumed a responsibility which would extend the duties he owed beyond the Contract.

5.9 What the SPMR cannot do is to extend the duties of the Post Office by claiming some ill-defined and over-arching duty of care covering all aspects of the relationship between the Post Office and the SPMR, as this would interfere with the allocation of risks under the Contract.

5.10 In the respects which are relevant for the purposes of this Report we do not consider that the SPMR will be able to establish a duty of care and we think that the relevant obligations will be defined by, and limited to, the Contract.

Nature of the complaints made

5.11 We have reviewed the 10 spot reviews and the 4 case Reports conducted by Second Sight that have been provided to us. While they represent only a small sample of the 150 Applications which we understand were accepted into the Scheme, we assume that for the purposes of this Report, they are representative of all the complaints accepted into the Scheme.⁴

5.12 The spot reviews and case Reports generally show that SPMRs' complaints range from substantial monetary claims to a general dissatisfaction with their relationship with the Post

² [2003] ICR 546.

³ [2007] EWHC 5 (QB).

⁴ We understand that while the spot reviews themselves were conducted prior to the establishment of the Scheme, all of the complaints the subject of the spot reviews were subsequently accepted into the Scheme.

Office as a result of their experiences with Horizon and several other or related complaints somewhere in between (some SPMRs have several of these issues). In particular, we have seen complaints made about:

- 5.12.1 wrongful "loss recoveries" in respect of amounts reported by Horizon as due to the Post Office, including in some cases, various categories of alleged consequential losses, in one case, following the determination of the relevant loss recovery action against the Applicant in Court and in another, after a SPMR had been suspended and lost access to Horizon;
- 5.12.2 Horizon-related customer payment malfunctions or lost cheques and transaction corrections resulting in the loss of limited sums (in some cases, under £100);
- 5.12.3 unauthorised foreign exchange transactions being entered into the Horizon system without a SPMR's knowledge, but without any specific allegation of loss incurred by the SPMR as a result;
- 5.12.4 printing of excess receipts in respect of a 67p postage transaction;
- 5.12.5 an inability of Horizon properly to account for GIRO payments and SPMRs having to trust the Post Office about transaction corrections;
- 5.12.6 criminal charges: in circumstances where the SPMR has been subject to criminal allegations of false accounting but where they say the false accounting arises from cheques being lost in the mail or where they have retracted an admission made under caution to the criminal conduct;
- 5.12.7 wrongful termination of SPMRs' contracts;
- 5.12.8 inadequate training given to SPMRs by the Post office in respect of Horizon; and
- 5.12.9 inadequate telephone or other day-to-day support services provided by the Post Office to SPMRs.

5.13 We have not, nor are we in a position to, investigate the facts of these complaints. They would have to be seen on a case by case basis. Our comments below are based on principles of general application, but the result they produce in any one case will depend on the particular facts. Horizon is a particular issue in this respect and deserves comment of its own (see paragraphs 5.20ff below).

5.14 Some of the complaints made are no more than observations on, and frustrations with, the operation of Horizon. They have not been translated from facts into allegations that a contractual duty has been breached and are not articulated as legal claims.

5.15 Generally, the complaints fall into a number of categories:

- 5.15.1 wrongful recoveries of "loss" from SPMRs by the Post Office and consequential losses arising therefrom;
- 5.15.2 wrongful terminations of the Contract and consequential losses arising therefrom;
- 5.15.3 inadequate training and support leading to losses, both direct and consequential.

The reference to consequential losses covers variously lost earnings (beyond a three month period), damage to other business interests, damage to reputation, stress and ill health.

5.16 We turn to considering each group of claims.

Wrongful loss recovery

5.17 The Post Office regularly recovers "losses" from SPMRs. This happens by one of four methods:

- 5.17.1 The SPMR notices that there is a loss shown in his statement of account and makes good that loss without a formal request from the Post Office;
- 5.17.2 The Post Office requests that the SPMR makes good a loss and the SPMR pays in response to that demand;
- 5.17.3 The Post Office, after an investigation process which envisages the participation of the SPMR, holds back money from the next payment due to the SPMR to cover a loss which has arisen; or
- 5.17.4 The Post Office takes civil proceedings for the recovery of a loss and is successful.

5.18 We note that the Post Office recovers losses through any and all of the above methods on a regular basis. The vast majority of SPMRs accept not only the Post Office's legal right to recover such losses, but also the way in which they are calculated through Horizon. The decisions made by the Board now as to the circumstances in which such losses will be "repaid" or reversed will potentially affect not only those SPMRs who have brought complaints to date but also all those SPMRs who have paid losses without complaint.

5.19 There are two main issues in the recovery of losses:

- 5.19.1 the way in which losses are calculated; and
- 5.19.2 the Post Office's legal entitlement to seek those losses from a SPMR.

The way in which losses are calculated

5.20 It is this question which has given rise to the dispute between aggrieved SPMRs and the Post Office. It focuses on the operation of Horizon.

5.21 We do not know what was said to SPMRs at the time of Horizon's introduction in 2000 as to its purpose and status. Nevertheless, it seems to be accepted by all involved that Horizon produces and maintains the accounts on which all parties rely.

5.22 The SPMR is, day to day, responsible for inputting transactions to the Horizon system. It provides a record not only of what the SPMR has received from the Post Office by way of stock but also what he has sold, and the cash he has received. Horizon is the only system used to record transactions; the Post Office holds no other relevant records. We understand that during the period covered by the complaints to the Scheme, at least once a month and potentially as often as at the end of every week, a SPMR was obliged to prepare and sign a document entitled "Cash Account (Final)" and send it to the Post Office or complete an equivalent process by declaring via an electronic system the amount of cash that he holds. The SPMR also conducted a manual hand count of cash and stock in the branch and compare them to the levels recorded in Horizon.

5.23 Our understanding of the operation of the Horizon system is far from complete. It would be helpful to understand more about the way in which the statement of account shows the losses. Is it, for example, clear which relate to transactions with or for the benefit of other companies and organisations, for example the DVLA or the DHSS? This may be important when it comes to considering what "caused" the losses in an individual case.

5.24 Section 12, paragraph 4 of the Contract provides:

"The Subpostmaster must ensure that accounts of all stock and cash entrusted to him by Post Office Ltd are kept in the form prescribed by Post Office Ltd. He must immediately produce these accounts, and the whole of his Post Office branch cash and stock for inspection whenever so requested by a person duly authorised by Post Office Ltd."

5.25 This duty to keep an account also arises under the general law by virtue of the principal/agent relationship. An agent is required to keep an accurate account of all transactions entered into within the scope of his agency and he has to be ready to produce that account at any time to his principal. If he fails to keep and produce accounts then the principal is entitled to assume everything against him.⁵

5.26 SPMRs are asked to agree accounts regularly. We understand that they signify their agreement by an appropriate entry on Horizon. If a SPMR disputes the state of his account, he is free not to agree that account on Horizon.

5.27 An agent is usually held bound by his own accounts save if he can show that he made a mistake. Once an account is agreed, the principal can sue on it. We think that there is a good argument that at law, once the SPMR signifies his agreement to an account on Horizon which shows a balance due to the Post Office, the Post Office can sue on this as an account stated. This appears to be the basis of the decision in the *Castleton* case. The principle of an account stated also applies where debts are owed in both directions. So, once Horizon has set amounts owed by the Post Office to the SPMR (if any) against amounts owed by the SPMR to Post Office in Horizon and the SPMR signifies his agreement to them, the accounts are settled. Generally, settled accounts will not be re-opened, unless drawn up under a mistake or the agent is guilty of fraud.⁶

5.28 Horizon is an electronic point of sale IT system used in Post Office branches. It tracks transactions and also records levels of cash and stock. We are told, and can readily appreciate, that Horizon is a complex double entry accounting system, made the more complicated because of the range of products and services which the Post Office sells. It also connects to other systems for particular services, for example, banking.

5.29 Suffice it to say for present purposes that it is possible that Horizon will, at the end of every day and therefore week, show either a shortfall or a surplus. There are two ways in which Horizon could present an inaccurate picture of the "true" state of account between SPMRs and the Post Office. Either the SPMR could have keyed in transactions incorrectly, or there could be some malfunction with Horizon itself. User error is a risk with any system. The Contract would entitle the Post Office to recover in any case where there was user error on the part of the SPMR and this would be the result even if it could be said – as some SPMRs have – that Horizon is confusing or that its user-friendliness could generally be improved.

5.30 It is the reliability of the Horizon system as a matter of principle which is important. If there are doubts about the reliability of the system then this could obviously impact on the Post Office's ability to claim losses since it calls into question whether such losses exist at all. This is the fundamental question and one which has not yet been satisfactorily addressed.

5.31 Second Sight have not done what we would have expected them to do in terms of an investigation into Horizon. The logical and obvious start for their work would have been a

⁵ See Bowstead & Reynolds on Agency, 19th Edition, Article 50, paragraph 6-092.

⁶ Ibid, paragraph 6-097 and 6-098

thorough review and description of how Horizon is supposed to work, its day to day use by the SPMRs and an in principle identification of any weaknesses and likely points of malfunction. This should be done without reference to the facts of any particular case and must be done in conjunction both with the Post Office and Fujitsu. Second Sight should have produced a report which clearly and objectively sets out what is known about Horizon at a level of detail which can then be used as a baseline in any individual case where the complaint is that Horizon was not working properly.

5.32 We understand that Second Sight are due to produce a generic report which will set out and describe themes and the types of loss that they have identified from the Applications that have been submitted to the Scheme. Such a report would not fulfil the objectives we here describe. Nor does the work Second Sight seem to have done so far fulfil those objectives either. They have descended into the detail of individual cases and commented on the particular issues of which complaint is made. They have done so without reference to any robust evidence as to how and why there may have been malfunctions with Horizon or how any such malfunctions could have caused the losses in the particular case. The views which Second Sight have expressed in individual cases are not supported by the sort of detail or evidence which would enable any conclusions to be safely drawn from them. There may be a question as to whether Second Sight have the expertise which would allow them to do the work required to a satisfactory standard.

5.33 We would, further, have expected Second Sight to have discussed its work in progress with the Working Group. Drafts should be available and the parties should have an opportunity to comment. Second Sight seem to have relied on concerns raised by the JFSA⁷ to prepare their report which they have used to challenge the Post Office, but they do not address any fundamental questions about the problems with Horizon. These factors further illustrate the idiosyncratic nature of Second Sight's approach.

5.34 Even without the baseline report which Second Sight should have produced, it seems to be accepted generally that there are no systemic weaknesses in the Horizon system. This much has been made plain by:

5.34.1 the Post Office. Anne Chambers, a Fujitsu system specialist, gave evidence in the *Castleton* case to the effect that there was no evidence whatsoever of any problems with the system. We understand that a Dr Gareth Jenkins of Fujitsu provided expert reports for the Post Office in several criminal cases. These reports dealt with the Horizon system. He gave oral evidence in only one case (that of Seema Misra). That case resulted in a conviction. In all other cases the fact that he was not required to give oral evidence strongly suggests to us that there was no substantive challenge to his evidence.

5.34.2 Parliament;⁸ and

5.34.3 Second Sight. Its Interim Report of July 2013 concluded: "We have so far found no evidence of system wide (systemic) problems with the Horizon software".⁹

5.35 We find it surprising that, against such a conclusion as to Horizon's general reliability, Second Sight find it possible to make comments in individual cases that it is likely that it is a difficulty with Horizon which has led to the losses. The reasons for such a view are not

⁷ See, for example, paragraph 4.1 of the Second Sight Interim Report of July 2013.

⁸ See n1.

⁹ See paragraph 8.2(a).

explained nor is there any general evidence on which to draw which could provide further illumination.

- 5.36 Audits are carried out by the Post Office on a regular basis and we assume that these are considered in determining whether Horizon shows an accurate state of account. Given the lack of any sensible information about the operation of Horizon we are unable to comment as to the likelihood that in a particular case the conclusion could or should be reached that it was problems with Horizon which caused the account of a particular SPMR to show a loss.
- 5.37 There is an important question in this regard: who bears the burden of showing that in a particular case, Horizon did not accurately reflect the state of the account between the SPMR and the Post Office? The SPMR will have regularly signified his agreement to an account – e.g. by signing the “Cash Account (Final)” at the end of each week - which confirms the existence and extent of losses and the Post Office is able to rely on this as a settled account.
- 5.38 In *Castleton* the Post Office relied on authority to the effect that an agent (the SPMR) who produces accounts for his principal which contain statements that money has been received is bound by those accounts unless he can show that the statements in the accounts were made unintentionally and by mistake.¹⁰
- 5.39 The question, therefore, is how would a SPMR show that there had been a mistake and what sort of evidence would be required before he would be allowed to reopen a settled account? The SPMR would need to adduce evidence which when tested and compared against the account in Horizon, showed that he had unintentionally made an error inputting information into Horizon (although even in that case, the terms of the Contract would not absolve the SPMR, as we explain below) or that as a matter of arithmetic or logic, the account stated by Horizon could not possibly be correct. In other words, he would need to do what the SPMR tried but failed to do in *Castleton*.

The Post Office's legal entitlement to seek losses from a SPMR

- 5.40 In everything we have seen, no point appears to have been taken as to the Post Office's right, as a matter of principle, to recover losses from the SPMR. All the debate seems to focus on the way in which the losses are calculated. Nonetheless, it is important to determine the legal foundation for the Post Office's claim to losses.
- 5.41 Section 12, paragraph 12 of the Contract is headed Losses. It provides:

“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.”

Paragraph 13 makes it clear that this obligation does not cease on the SPMR relinquishing his appointment and extends to losses which come to light after he leaves.
- 5.42 Section 12, paragraph 17 is also relevant here. It provides under the heading “Relief”:

“Counter losses: A Subpostmaster may exceptionally not be required to make good the full amount of certain losses at his office. If he feels entitled to relief in making good a loss he should apply to Post Office Ltd.”

¹⁰ *Shaw v Picton* (1825) 4 B&C 715; *Camillo Tank Steamship Co Limited v Alexandria Engineering Works* (1921) Times LR 134

This paragraph contemplates that the circumstances in which a SPMR will not be required to make good a loss will be "exceptional" although clearly this issue only arises if the SPMR is liable for the loss in the first place.

5.43 The wording of paragraph 12 is curious. It makes a SPMR responsible for losses caused by his "negligence, carelessness or error" but makes him strictly responsible, with no such qualification, for all losses caused by his Assistants. We do not know what the thinking was behind this distinction.

5.44 In any event, the fact that the SPMR must be in "error" is a low threshold and implies no mental element: the SPMR can be mistaken without being careless and without there being any question of dishonesty on his part. Taken at face value, however, and where the loss is caused by the SPMR rather than his assistant, the SPMR would not, under paragraph 12 be automatically responsible for all losses if it could not be shown that he was at least in error.

5.45 There is another basis for the recovery of losses which requires attention. As noted, the SPMRs are agents of the Post Office. The characterisation of the relationship as that of principal and agent gives rise to a number of duties as a matter of law, though where, as here, there is also a Contract, they have to be seen in the context of what the parties have thereby expressly agreed.

5.46 The agent is required to account in equity to his principal.¹¹ This is effectively a procedure which enables the financial position as between the principal and agent to be determined. It does not of itself entitle the principal to claim any shortfall. In order to claim whatever losses are highlighted by the taking of the account, the principal has to establish his right to them. For example, this may be through breach of contract or the common law duty of an agent who holds money for his principal to pay over or account for that money at the request of his principal.¹² Moreover, where the agent cannot satisfactorily explain what has happened to the principal's property or money, presumptions may be made against him which will lead to substantive liabilities such as those mentioned above.¹³

5.47 We understand that the Post Office does exercise discretion as to the recovery of losses where circumstances make that a reasonable reaction. For example, we were told that if there is a "scam" which is recognised to be popular the Post Office will take steps to warn SPMRs, it will issue a procedure giving guidance as to how the scam can be combatted and may consider (depending on the circumstances of the particular case) not recovering losses due to the scam for such period as it is reasonable to expect the SPMRs to be familiarising themselves with the procedure. We include this point not because it impacts on the legal liability to repay losses *per se* but because such a practice would narrow very considerably, or remove completely, the scope for a SPMR to argue that a particular loss was caused by something other than his own negligence, carelessness or error, and therefore not recoverable from him.

5.48 In summary, we think that there is a sound contractual basis for the recovery of losses, which is supported or in any event, supplemented, by the general law governing an agent's duties to his principal.

¹¹ Bowstead & Reynolds on Agency, 19th Edition, Article 51, paragraph 6-094.

¹² Ibid paragraph 6-099.

¹³ Ibid paragraph 6-096.

Claims for “compensation” for the recovery of losses by the Post Office from SPMRs

5.49 Whilst the issue in the complaints is sometimes referred to in terms of “compensation”, this is not an accurate expression for the particular claim insofar as it relates to losses. The question is: in the particular case, did the Post Office have the right to recover losses? If the Post Office did, then there is no question of the SPMR being entitled to “compensation.” If the Post Office did not, then again no question of compensation arises: the Post Office is simply unable to claim the money and if it has been paid, the SPMR has a right to recover it. This is a restitutive, not a compensatory, claim.

5.50 In practical terms, the issue is cases in which the Post Office has, in fact, claimed and been paid the losses and the SPMR is now disputing its entitlement to do so and seeking to “reverse” that payment. It is important to distinguish three groups of cases:

- 5.50.1 those in which the Post Office has secured a conviction for theft or false accounting and the SPMR is now seeking to claim back the losses on which that conviction was based;
- 5.50.2 those in which the Post Office has secured a civil judgment for the recovery of the losses; and
- 5.50.3 those in which there has been payment of the losses (or potentially a claim on the part of the Post Office which has not yet been satisfied but from which the SPMR now seeks relief) but the Post Office’s entitlement has not been determined by the civil or criminal Courts.

5.51 The Scheme is only apt to deal with cases in the third group. It is worth noting at this point that Section 2 of the Draft Scheme Settlement Policy states that the objectives of the Scheme are to:

- 5.51.1 listen to SPMRs concerns;
- 5.51.2 explain the Post Office’s position;
- 5.51.3 offer solutions where possible;
- 5.51.4 compensate if loss has been unfairly suffered;
- 5.51.5 demonstrate that the Post Office is being transparent; and
- 5.51.6 ensure that the Post Office’s decisions are defensible.

Cases in which there is a criminal conviction

5.52 A criminal conviction does not of itself entitle the Post Office to claim the losses from the SPMR but where the SPMR has been so convicted it is clear that the Post Office would be entitled to recover the losses on which the conviction is based as a matter of the civil law, or through ancillary orders made in the criminal proceedings.

5.53 The two offences with which SPMRs are most often charged are theft and false accounting, both of which are offences of dishonesty. If the conviction followed a guilty plea, the SPMR can be properly taken to have made an unequivocal admission as to all the elements of the offence, since the criminal law of England and Wales does not recognise “pleas of convenience”. If the SPMR pleaded not guilty, the high standard of proof in criminal proceedings means that it is likely to be appropriate for the Post Office to rely on it in other contexts. In cases involving allegations of theft or false accounting, a

conviction necessarily involves a finding that the SPMR acted dishonestly, this being a critical element of those offences. In such cases, there could be no strict liability basis for either a guilty plea or a finding of guilt. Moreover, SPMRs facing such allegations would in general have been eligible for legal aid under representation orders (if they could not fund legal representation themselves). It may safely be assumed, therefore, that in general they were legally advised and represented, or had the opportunity to be so.

5.54 If the SPMR has been convicted of a relevant offence the only basis as a matter of law on which the Post Office should entertain a claim for the repayment of sums claimed from the SPMR is if it were to conclude that there were doubts about the evidence on which the conviction was based. However, if the Post Office did so conclude, the situation would be much more complex than simply dealing with certain individual claims for "compensation."

5.55 The Post Office in its capacity as a prosecutor has duties of disclosure which extend beyond the date of conviction in any particular case. In *R v Belmarsh Magistrates' Court (Ex p Watts)*,¹⁴ it was observed that private prosecutors are subject to the same obligations to act as ministers of justice as the public prosecuting authorities. Any material in the possession of the Post Office which might cast doubt on the safety of any particular conviction ought therefore to be disclosed to the convicted party. The "Settlement Principles" in the Draft Settlement Policy of December 2013 state:

"5.6 Settlements involving convicted Applicants should only be offered where there is clear evidence of a miscarriage of justice."

This is consistent with the above analysis.

Cases in which there is a civil judgment

5.56 If the Post Office has obtained a civil judgment against the SPMR, the Post Office's entitlement is clear and established. The SPMR will have had an opportunity to dispute the claim and an opportunity to appeal the decision should he have been unhappy with it at the time. Indeed, as a matter of law he is prevented from seeking to re-open any issue covered in the prior claim: it is now *res judicata*. This means that the SPMR could not bring a civil claim seeking to reopen the issues covered by the judgment. In certain circumstances, however, he could seek to reopen the issues by seeking permission to appeal the civil judgment after the period within which he is ordinarily only entitled to do so. The appeal Court has a discretion whether to allow such a late appeal and will weigh various factors including the interests of the administration of justice, whether the failure to appeal in time was intentional and whether there is a good explanation for it. A SPMR who has had a civil judgment awarded against him would probably need to show a substantial change of circumstances, such as leading new and material evidence about the workings of Horizon, to have any chance of being given permission to appeal out of time.

5.57 The considerations outlined above in relation to criminal convictions do not apply in relation to civil litigation: in principle the Post Office could repay to a SPMR the sums which it received under the judgment and/or relieve the SPMR of any liability for the judgment debt. But any decision to do so would be entirely voluntary and need careful thought and clear rationalisation. If it could be interpreted as a recognition that Horizon is in fact unreliable then there are obvious consequent complications both for further civil litigation but more importantly in the criminal context (both retrospective and prospective) as detailed above. It may also have political or public relations ramifications.

¹⁴ [1999] 2 Cr App R 188.

5.58 The Scheme information memorandum states that Applicants "may put [their] case through the Scheme even if the Courts have already given judgment against [them]." Rejecting claims simply because there is a civil judgment covering the matter would seem to run counter to this. We do not know the thinking behind including this wording in the Scheme memorandum.

Cases in which the Post Office's entitlement is not yet established by a Court

5.59 If no Court has yet given a decision in relation to a SPMR, the Post Office has a genuine decision to make as to whether or not to press claims for losses or to repay those already recouped.

5.60 Each case would have to be considered on its own facts and depend on what the SPMR alleged about the reasons why the Post Office is not entitled to claim the losses. So far as we can see from the cases considered to date, there are:

- 5.60.1 general allegations as to the unreliability of Horizon; and
- 5.60.2 specific allegations as to factors which may have affected Horizon in the particular case.

5.61 General allegations about Horizon do not, we think, help. It would be far more satisfactory were there to be a reasoned Report as to why Horizon is thought to be working properly (if that is the case) but even without that, a general claim that there are "problems with Horizon" is not, we think, enough to cast doubt on the Post Office's claim for losses. The Horizon system works satisfactorily for the vast majority of those who use it and accounts will have been agreed, as noted above.

5.62 Specific allegations as to Horizon's malfunctions have also been made and to some extent "investigated" by Second Sight. These have included or been said to be caused by:

- 5.62.1 power cuts;
- 5.62.2 incompatible use of telephone lines with Horizon;
- 5.62.3 intermittent internet connectivity; and
- 5.62.4 the ability to "centrally input" transactions and thus directly, and without a SPMR's knowledge, adjust Horizon data sent by a SPMR.

5.63 Second Sight have certainly expressed concern – and more – in relation to certain of these supposed deficiencies in or effects of Horizon. But since they have singularly failed to support their views with any reasoned explanations, still less any clear evidence, it is not possible to conclude that any of these allegations have merit. If brought before a civil Court in this form the Court would have little difficulty in concluding that the case that Horizon was at fault and resulted in losses being inaccurately recorded was not made out.

5.64 There is a further point: not only would the SPMR have to establish that there was a fault with Horizon or some external factor which would have affected its operation, it would also have to be shown that those facts *caused* the "losses" which the SPMR is now seeking relief from. Second Sight's work, so far as we have access to it, is entirely silent as to their reasoning on this point.

5.65 If the Post Office concludes, in a particular case, that there are reasons for doubting the record which Horizon has provided and on which the claim for losses is based – in other words, where the Post Office concludes that there may be a mistake in the account and

there may therefore be a basis for re-opening it - the question arises of how the SPMR's claim for recovery would work. As a matter of common sense, if the Post Office decides that in a particular case it has no entitlement to claim the losses, we anticipate that the Post Office would simply refund the money/relieve the SPMR from the liability without the need for any formal claim or proceeding. But the SPMR would have a claim at law to recover the money and this is important since if the Post Office were repaying/relieving in such a case it may well wish to be sure that it was doing so in satisfaction of a legal obligation.

5.66 The Post Office's right to seek payment of the losses arises both under the Contract and the general law because of the agency relationship. If the losses do not exist – because the records produced by Horizon are not accurate, then there is no right on the part of the Post Office to claim them. Absent express provision to the contrary, it is not a breach of contract to claim money to which you are not entitled. Though it would be a breach of contract to withhold payment from other monies due. So, the question whether a loss recovery is also a breach of contract may turn on how the Post Office recouped the loss. This matters since there may be a claim for consequential losses if there is a breach of contract claim.

5.67 The SPMR would have the burden of showing not only that there were losses but also that there was a causal link between the losses and the actions of the Post Office on which he relies for his claim. Several cases we have seen suggest that there is at best a tenuous link between the alleged failings of Horizon and the loss incurred (if any such link is even alleged). For example, case M014 alleges that long running problems operating Horizon which gave rise to over £8,000 in loss recoveries to Post Office were largely fixed when a phone line was unplugged in a back office. This suggests a) there was nothing wrong with Horizon *per se* b) that the incorrect use of the phone line was an unfortunate error that might have been caused by inadequate training or support or could have been due to incompetence on the part of the SPMR or is an unusual set of circumstances which is not reasonably foreseeable. However, this could still give rise to liability on the part of the Post Office (albeit not in respect of Horizon failures specifically) if the Post Office is found not to be entitled to recover loss in those circumstances because the relevant SPMR's conduct was not negligent or in error, within the meaning of Section 12, paragraph 12 of the Contract.

Consequential losses

5.68 There can be no question of a claim for consequential losses based simply on the recovery by the Post Office of losses if the losses were properly payable and the Post Office was entitled to the money.

5.69 Even if the Post Office was not entitled to, but did, claim losses in a particular case, the SPMR has no claim for consequential losses since the SPMR does not have a claim for damages for breach of contract to which the other losses could be "consequential". We think that the better analogy is that the claim is a resitutory one and the aim of such a claim is to reverse a financial benefit which has otherwise been received. It carries with it no notion of attendant "losses."

5.70 As we mention above, if the Post Office has, in order to recover losses, withheld money to which the SPMR claims to be entitled then there is in principle a breach of contract claim. However, normally damages for breach of a commercial contract relate to financial losses only, as damages are only awarded for losses reasonably in the contemplation of the

parties as not unlikely to result from the breach. Normally, no damages would be awarded for injury to feelings, mental distress, anguish or annoyance. This is so even though such reactions might have been perfectly foreseeable at the time of the contract.¹⁵ Whilst stress which is so severe that it causes an actual breakdown in health may be compensable if it was in the contemplation of the parties as a not unlikely consequence of the breach, it seems highly unlikely that that test would be met here. The SPMR would also have to show, by clear and cogent evidence, that the damage to his health had been caused by the Post Office's conduct in recovering losses to which it was not entitled.

5.71 Damages are also not normally awarded for loss of reputation flowing from a breach of contract, unless the loss of reputation in turn directly causes foreseeable financial loss. So, for example, an employee of a business run corruptly might be able to claim damages for consequential financial loss suffered as a result of reduced future employment prospects by reason of the loss to his reputation as a result of being associated with the business. It seems unlikely such consequential loss would be recoverable here for any loss recovery by the Post Office that is in breach of contract - the fact of the loss recovery would need to be made known widely and the SPMR would need to be able to show that this somehow harmed his future earning capacity.¹⁶

5.72 We think that the better analysis is that the question of consequential losses only arises if the Contract has been terminated on less than three months' notice, as to which, see paragraph 5.77 to 5.83 below.

Restitutionary claim

5.73 If an SPMR can show that he made a payment on the basis that he was liable to make that payment to the Post Office when in fact he was mistaken as to the existence of the liability, he has a restitutionary claim for the repayment of the money.¹⁷ That claim focuses on the "unjust enrichment" which the Post Office will have received. It is not a damages claim but a restitutionary action for money had and received. For practical purposes this means that there is no question of a claim to consequential loss on the part of the SPMR. All that the SPMR would have to show is that there was no liability to make the payment but he believed that there was and this caused him to make the payment. There is no requirement for fault on the part of the Post Office and it does not matter if the SPMR has himself been careless.¹⁸

5.74 Such a claim can only work on behalf of the SPMR if the Post Office is not contractually (or otherwise legally) entitled to the payment.¹⁹ On the basis of that analysis, it would mean, therefore, that a settled account would have to be re-opened or that the SPMR would need to show that the Post Office is not entitled to recover loss.

5.75 The restitutionary claim for money had and received will not be available to the SPMR where he appreciated that there was a risk that the Post Office was not entitled to the money but decided to pay on the basis that he accepted that risk. In those cases, the SPMR will effectively have settled the Post Office's claim and this is treated as a compromise which the Courts will not allow the SPMR later to reopen.²⁰ This is a fact

¹⁵ Chitty on Contracts, 31st edition, paragraph 26-137, 138

¹⁶ Chitty on Contracts, 31st edition, paragraph 26-141 - 142

¹⁷ *Kelly v Solari* (1841) 9 M&W 54; *Aiken v Short* (1856) 1 H&N 210

¹⁸ *Barclays Bank v Simms* [1980] QB 677

¹⁹ *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202

²⁰ See *Kelly v Solari*, *Barclays Bank v Simms*.

sensitive issue and would need to be explored in each case. The real question is whether in paying the money the SPMR was prepared to take the risk that it might not be legally due but it was in his interests to pay the money anyway.

5.76 It is also clear that if the SPMR was once entitled to a restitutory remedy based on his mistake in making the payment, he will lose that right if the dispute with the Post Office is resolved and cannot be reopened. That would be the case if the civil Court had given judgment in favour of the Post Office. Then the SPMR could not recover without also setting aside the judgment. Even if there is no judgment, if proceedings have been started and the SPMR then pays to settle the claim he will be treated as having compromised. The law will not allow such bargains to be reopened, not least because of the concern to achieve and respect finality in litigation.²¹ If litigation has not been started then there needs to be a contract of compromise before a restitutory remedy will be ruled out.

5.77 The Post Office's Draft Settlement Policy of 2013 sets out, in section 5, certain "Principles for Settlement." Those principles indicate the Post Office's approach to settling claims with SPMRs. These include that the SPMR needs to establish that the matters raised have caused them loss, that the alleged harm arises directly out of or was an obviously foreseeable consequence of a breakdown in the business relationship between the SPMR and the Post Office and that settlements will generally be driven by commercial fairness rather than legal principles.

Termination of contracts

5.78 The Post Office is entitled to give three months' notice to terminate the Contract with the SPMR. If in a particular case the SPMR's Contract has been terminated on three months notice, he can have no remedy arising out of that termination. It does not matter that the Post Office based its decision to terminate on facts which turned out to be disputed, flawed or mistaken (such as the reliability of Horizon) as the Post Office is entitled to terminate the Contract on three months' notice for any or no reason.

5.79 The effect of this is that the most that a SPMR may be entitled to is the pay (or whatever entitlements) were due during the notice period, reduced for any costs of doing business if they were not incurred. Moreover, the SPMR is under a duty to mitigate his or her losses and so should look for alternative employment during that three month period. Any unreasonable failure to find an alternative source of income would reduce the claim (though with a three month notice period this is not of huge practical relevance).

5.80 There may well be cases in which the Post Office has terminated the contract summarily – in other words on no notice. Here different considerations may arise. The facts of a particular case may justify summary termination – for example theft by a SPMR may well justify the conclusion that the SPMR is in breach of his obligations and the Post Office can accept that breach as terminating the contract. However, if the facts do not entitle the Post Office to accept the breach as terminating the contract summarily, not only would the SPMR be entitled to claim the three months' remuneration which he would have received had notice been given, he may also have a right to consequential losses within the principles which govern consequential loss claims for breach of contract.

5.81 The normal rule for assessment of contractual damages is to compensate the claimant such that they are put in the position they would have been in had the contract been

²¹ *Marriot v Hampton* (1797) Term Rep 269

properly performed. Consequential losses (such as loss of use or lost profits) are also recoverable where they are not considered to be too remote.

5.82 The traditional test for remoteness is whether the loss "may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract".²² The Courts have decided that the meaning of "reasonable contemplation" will depend on the knowledge of the parties at the time of the contract, and that the loss must be "of that kind" contemplated by the parties.

5.83 In any damages claim, there must be a clear link between the defendant's breach and the claimant's loss, or in any event the breach must be the "dominant cause" of the loss. An intervening act of a third party or the claimant itself may break the chain of causation, depending on the court's appraisal of the circumstances of the case, as may intervening events which were reasonably foreseeable by the parties.

5.84 In the case of a SPMR who runs an associated business, such as a convenience store or a newsagent, it may be said by the SPMR that terminating his Contract as a SPMR would be likely to have a knock on effect on the viability of his associated business. Moreover, it might be said that depriving an SPMR of the three month notice period also deprives him of a three month window in which to seek a purchaser of his business as a going concern. If the business does in fact close because of the termination of the SPMR's Contract and there is evidence that it might have been capable of being sold had the SPMR had three months in which to do so, there is the possibility of a claim for such losses. Whether such an argument could be made depends on the facts, not least whether there was an associated business and a candidate to take over the SPMR's role acceptable to the Post Office.²³ In practice in this sort of claim, because the Court is asked to consider a counterfactual which has not arisen, the Court makes an assessment of the prospects of a sale "the loss of a chance" and applies a discount to the claim to reflect this.

Inadequate training and support

5.85 Under the Contract the Post Office is obliged to provide training. Section 15 paragraph 7 provides:

"7.1 Post Office Ltd will:

7.1.1 provide the Subpostmaster with relevant training materials and processes to carry out the required training of his Assistants on the Post Office Products and Services;

7.1.2 inform the Subpostmaster as soon as possible where new or revised training will be necessary as a result of changes in either the law or Post Office Services; and

7.1.3 where appropriate (for example where clause 7.1.2 of this section 16 applies) update the training materials (or processes) to provide new training materials (or processes) to the Subpostmaster.

However, it is the Subpostmaster's responsibility to ensure the proper deployment within his Post Office branch of any material and processes

²² *Hadley v Baxendale* (1854) 9 Ex. 341, 354-355.

²³ See *Lalji v Post Office Limited* [2003] EWCA Civ 1873, CA

provided by Post Office Ltd and to ensure that his Assistants receive all the training which is necessary in order to be able to properly provide the Post Office Products and Services."

5.86 This seems clear: the Post Office must provide training and keep it up to date. This is not defined but could well extend to a help-line or other day to day advice on the operation of Horizon. But the SPMR is still responsible for the day to day operation of the Subpostoffice. In other words, the SPMR accepts the consequences of any lack of training provided to his Assistants or their failure to put the training into effect.

5.87 Section 15, paragraphs 1 and 2 of the Contract are also relevant here. They provide that:

"A Subpostmaster must provide, at his own expense, any suitable assistants with the relevant skills which he may need to carry out the Post Office work in his sub Post Office branch ("Assistants").

Assistants are employees of the Subpostmaster and the Subpostmaster will consequently be held wholly responsible for any failure on the part of his Assistants to:

- 2.1 apply Post Office rules or instructions as required by Post Office Ltd;
- 2.2 complete any training necessary in order to properly provide Post Office Services ...

The Subpostmaster will also be required to make good any deficiency of cash or stock which may result from his Assistants' actions or inactions."

5.88 It is also likely that there would be a term implied into the Contract to the effect that the SPMR should be entitled to reasonable training and support, particularly in relation to bespoke systems or practices, such as Horizon, which he could not be expected to know from his own general knowledge and past experience.

5.89 Many SPMRs do not seem to have a complaint as to the level of training and support which the Post Office has given them. We do not think that this is conclusive. Whilst Horizon operates as a common system and one person's experience of it should be similar to another's, the same could not be said for training and support. It would be quite possible for the Post Office to have failed to meet its obligations in relation to one SPMR whilst easily fulfilling them in relation to many others.

5.90 Moreover, in order for this to translate into a claim against the Post Office, it would have to be shown that it was causative of losses. It is clearly not enough to say: "I was given bad support and any deficiencies in my account must be due to that." There would have to be an investigation of how and why the deficiencies had arisen. Were they in any sense attributable to a failure of training? This may be difficult to establish in any particular case.

5.91 The Settlement Principles contemplate that compensation might be paid where training is inadequate or poor. The principles make clear that compensation will not be paid for general complaints about the standard of training and that the Applicant needs to demonstrate facts peculiar to his circumstances which justify compensation.

Regulation

5.92 It does not appear to us that SPMRs would have a basis for complaint in respect of Horizon by reason of any regulation governing the Post Office's conduct. Although OFCOM has since October 2011 had responsibility for regulating the provision of postal

services, OFCOM's own website makes it clear that it does not regulate the Post Office. The Post Office does not appear on the FCA register as an FCA-authorised entity. It does appear as an "appointed representative" (in connection with its provision of financial products on behalf of principals such as the Bank of Ireland) and a "payment services agent" (in connection with its provision of money transfer services on behalf of, for example, MoneyGram International). Neither of these functions requires the Post Office to have separate FCA authorisation.

Limitation

5.93 Limitation is a factor which may well be relevant in certain claims. The standard limitation period for claims in contract is six years from the date of breach. For tort claims it is six years from the date on which the loss was suffered. Restitutionary claims are time barred six years from the date of the enrichment on which the claim is based. Any claim brought outside the limitation period can be met with the defence that it is out of time and no further consideration of the merits is required.

5.94 Where the claim is based on a mistaken payment or a fact deliberately concealed from the claimant by the defendant, time does not start to run until the claimant has discovered the mistake or concealment, or could with reasonable diligence have done so.²⁴ Some of the cases we have seen suggest that SPMRs have been aware well before the Scheme was instituted of the matters about which they have complained to the Scheme. At least in those cases, the deferral of the commencement of any limitation period may not make any difference to the barring of the SPMR's claim.

5.95 The Settlement Principles state:

"5.11 Settlements should reflect the fact that for the purposes of the Scheme, Post Office will not be relying on any legal limitation or time-bar defence and will consider all Complaints regardless of age."

We do not know what publicity has been given to this statement and whether the Post Office is free to, or indeed wishes to, reconsider its position.

²⁴ See Limitation Act 1980, s 32(1) and *Kleinwort Benson Limited v Lincoln City Council* [1999] 2 AC 349 .

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CRIB SHEET

HORIZON CONTROLS

Horizon is:

- **Tested**
- **Audited**
- **Encrypted**
- **Non rewriteable**

In particular:

ISAE3402 – conducted by FJ assesses high level controls both physical and technical and reviews the change process and access management, external threats. Conducted annually and made available to Post Office and External auditors

Royal Mail exit audit – largely green with small number of amber issues non related to data integrity.

Penetration Testing (ethical hacking) run every 6 months

PCI – credit card payment accreditation

System is ISO27001/2 – International Security Standard

System is ISO9000 accredited – system is properly documented

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DRAFT

From: David Oliver

CC: Chris Aujard
ExCo Subcommittee on the
Scheme

25/03/2014

To: Paula Vennells
Chief Executive,
Post Office Limited

BOARD DISCUSSION OF THE INITIAL COMPLAINT REVIEW AND MEDIATION SCHEME

Summary

1. You are presenting on the Scheme to the Board tomorrow on the Linklaters work and developments more broadly.
2. We have briefed Christa ahead of the discussion with the Board to reflect the
3. Following our discussion on Monday we felt that the best approach to the meeting was to try and manage the running order as follows:
 - a. Linklaters work – where you would introduce the work and set the parameters for discussion before Christa presents.
 - b. Second Sight – where you can build on the references in the Linklaters work to their quality and cross refer to the issue of releasing the thematic report they raised with MPs.
 - c. Financial Ombudsman – to update the Board on your positive discussion with the Ombudsman.
 - d. Arbuthnot meeting – which is an opportunity set the expectation in terms of parliamentary interest ie there is a small problematic hard core but not widespread engagement.
 - e. Options for discussion at the April Board/Board Sub committee – a chance to show direction of travel with the options and draw some of the sting ahead of April's discussion.
4. We suggest keeping discussion of the insurance paper separate.

David Oliver

25/03/14

DRAFT

SPEAKING NOTE FOR PAULA VENNELLS

POST OFFICE BOARD MEETING

26 MARCH 2014

1. Linklaters Report

- *Recap the Board position – rising admin cost, Large expectation gap, large management overhead*
- *Secondary Concerns – SS quality poor, capacity limited, timeliness limited*
- *Process gone through to deliver report – Counsel General worked closely with Linklaters, ExCo executive committee reviewed,*
- *Considerations while the Board hear from Linklaters –*
 - *no simple solution – all need a lot of handling*
 - *Cases at number of different stages in scheme*
 - *Stakeholders in different places but need to have particular regard to MPs including the hardcore of engaged MPs, the Minister, Tony Hooper, NFSP, current Subpostmasters not in the Scheme*
- *Introduce Christa Band, Partner, Litigation Department Linklaters*

2. Second Sight Work

- *Quality of work a problem – All three reports submitted so far sent back for substantial rework by the Working Group*
- *Possibility that their work will never satisfy applicants or JFSA*
- *Tony Hooper engaged in actively managing quality – gone so far as to provide Second Sight with a template for their reports*
- *Thematic report due cop today expect the quality and content to be an issue*
- *Second Sight indicated an intention to share the thematic report with MPs*

3. Financial Ombudsman Service

- *Positive meeting with CEO and Legal Director*
- *Some good ideas – Characterising the claims, framework for mediators to work inside, withdraw the criminal cases from the Scheme.*
- *Will be continuing engagement but limited in their ability to assist*

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4. James Arbuthnot Meeting

- Five MPs attended including James Arbuthnot
- Seven researchers attended
- Difficult meeting with a small hard core (Arbuthnot, Wood and Bridgen) of engaged MPs who will be very difficult to satisfy
- Possibility of a further meeting with MPs in July although no firm commitment
- Second Sight trailed their Thematic report as a possible report to MPs
- JFSA flagged that they would go along with the process for now.

5. Options Flowing from Linklaters

- Executive and project team will be working with Linklaters to draw up proposed solutions. Options that follow are broad and undeveloped – legal input will be required to assess preferred option from perspective of JR, comms and other administrative challenges
- Modify and continue
 - Revised ToRs for SS – address the need to more effectively control Second Sight
 - Revised ToRs for WG – rebalance the Governance and the power balance of the Working Group
 - Terminating Second Sight's engagement – and potentially replacing eg with Grant Thornton or BDO
 - Develop Criteria for Decision (similar to Financial Ombudsman Service suggestion)
 - Clarify Post Office position (eg commission a review of Horizon)
- Close down
 - Full Closure
 - Partial Closure – eg remove Criminal cases and civil cases

6. Next Steps

- ExCo committee to oversee development of options with Linklaters input

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- *Sensitise key stakeholders (BIS ministers, Tony Hooper, James Arbuthnot, NFSP,*
- *Bring an options paper to the April Board or Board Sub committee*