

Draft Linklaters LLP//19/03/2014

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POST OFFICE LIMITED

REPORT INTO INITIAL COMPLAINT REVIEW AND MEDIATION  
SCHEME

PART A – LEGAL ISSUES

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## 1 BACKGROUND

- 1.1 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").
- 1.2 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.
- 1.3 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.<sup>1</sup> 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 in-depth and objective Report which describes and addresses the use and reliability of Horizon. This is a major gap and one which we would recommend is remedied as soon as possible.

## 2 AIMS AND OBJECTIVES

- 2.1 This Report aims to address the following key issues:
  - 2.1.1 Whether and to what extent the Post Office has any legal liability with respect to complaints made by applicants to the Scheme ("Applicants").
  - 2.1.2 The nature and extent of the risks arising from and associated with the Scheme in its current form.
  - 2.1.3 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.
  - 2.1.4 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.
  - 2.1.5 In the event that a decision is made by the Board to discontinue the Scheme, what steps the Post Office could take to minimise any existing legal risks.
- 2.2 This Part A of our Report covers introductory matters and the legal issues identified in paragraph 2.1.1 above only. Part B of the Report which deals with the remainder of paragraph 2.1 will follow when the Board has had an opportunity to consider and reflect upon this Part A.

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<sup>1</sup> Hansard, 9 July 2013.

**2.3** We anticipate that in considering this Report and reaching any conclusions as to decisions the Board should take with respect to the future of the Scheme, the Board will wish have regard to the following matters:

- 2.3.1** 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?
- 2.3.2** Does the Post Office wish to establish a full baseline audit of the functioning of the Horizon system?
- 2.3.3** 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?
- 2.3.4** 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?
- 2.3.5** 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?

**2.4** Section 2 of the Draft Scheme Settlement Policy states that the objectives of the Scheme are to:

- 2.4.1** listen to SPMRs concerns;
- 2.4.2** explain the Post Office's position;
- 2.4.3** offer solutions where possible;
- 2.4.4** compensate if loss has been unfairly suffered
- 2.4.5** demonstrate that the Post Office is being transparent; and
- 2.4.6** ensure that the Post Office's decisions are defensible.

### **3 BASIS OF THIS REPORT**

**3.1** The issues in this Report are discussed primarily from the perspective of the legal rights and obligations of the parties involved. We appreciate that some of the matters covered have political and public relations implications for the Post Office or may have such implications in the future. As we have not been asked (nor are we qualified) formally to advise on such non-legal matters, we have sought to highlight in the Report where they may arise and have suggested possible solutions for dealing with them where appropriate but otherwise have not provided any definitive views on them. Some measure of political engagement will doubtless be called for. It is a decision for the Board 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 Board may decide that it is sensible to engage specialist public relations advice to guide the management of this issue.

**3.2** In preparing this Report we have assumed that:

- 3.2.1 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;
- 3.2.2 all legal issues are governed by English law; and
- 3.2.3 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 it is strictly binding (and some may be) it is likely to be persuasive.

3.3 Our observations and conclusions are limited by the following:

- 3.3.1 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;
- 3.3.2 we have had no contact with Fujitsu, the company which designed, provided and supports the Horizon system;
- 3.3.3 we are not in a position to test the facts of any of the claims; and
- 3.3.4 we have been asked not to consider certain matters, namely, PI and D&O insurance.

3.4 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.

## 4 EXECUTIVE SUMMARY

4.1 We set out in this executive summary our key conclusions on the legal analysis of the complaints made by SPMRs about Horizon.

### Post Office/SPMR relationship

4.2

[REDACTED] but in our view, there is no general duty of care owed by the Post Office to SPMRs relevant to their complaints about Horizon.

### SPMR complaints

4.3 The nature of the complaints made by SPMRs in respect of Horizon vary in their detail but can broadly be categorised as concerning 1) wrongful recovery of "losses" from SPMRs by Post Office, 2) wrongful termination of SPMRs' Contracts and 3) inadequate training and support. Complaints are also made that some SPMRs have suffered emotional distress as a result of their dealings with the Post Office.

### Loss recovery

4.4 The Post Office regularly recovers "losses" from SPMRs. These are amounts indicated by the Horizon system as owing by a SPMR after his accounts showing the weekly inflow and outflow of money and stock are reconciled. The two key issues with such loss recovery

appear to be 1) the way in which losses are calculated and 2) the Post Office's entitlement to claim them.

- 4.5 SPMRs are obliged under the general law and the Contract to account to the Post Office for money and stock they receive and hold on behalf of the Post Office. We understand Horizon is the only system used by SPMRs to produce an account and that SPMRs agree the account by entries made into Horizon. The agreed account entitles the Post Office to sue on it as a conclusive record of amounts owed, unless the SPMR can re-open the account by showing that he was mistaken.
- 4.6 The account could only be re-opened if amounts are entered incorrectly by mistake or Horizon suffers from a particular malfunction which caused the inaccuracy. The latter is important because the terms of the Contract render the SPMR liable for unintentional errors in any event. In particular, if there are doubts about the reliability of Horizon, then this might call into question whether such losses exist in any particular case.
- 4.7 Second Sight have not done a comprehensive investigation into Horizon. The logical and obvious starting point for their work would have been, without reference to any particular case, a 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. Second Sight have, instead, descended into the detail of particular cases without reference to robust evidence or in such a way as to cast doubt on their ability to form safe conclusions from their investigations.
- 4.8 However, on the basis of the work that they have done, Second Sight have accepted that there are no systemic problems with Horizon. Comments made in Parliament and expert evidence given in civil and criminal proceedings by the Post Office's expert witnesses support this.
- 4.9 As the accounts in Horizon (once agreed) are a conclusive record, a SPMR would need to lead evidence that as a matter of arithmetic or logic, what Horizon shows could not possibly be correct i.e. that Horizon itself had malfunctioned (as the Contract renders the SPMR liable for unintentional error, evidence of such error would not suffice).

#### **Legal entitlement to seek loss recovery**

- 4.10 The focus of what we have seen seems to be on the manner in which losses are calculated, rather than whether the Post Office is entitled in principle to recover them. However, it is important to establish such entitlement.
- 4.11 The Contract permits loss recovery of amounts caused by (amongst other things) the SPMR's error, and any loss howsoever caused by his Assistants. This is a low threshold and allows recovery even where the SPMR unintentionally and with the greatest of care, makes a mistake. But it would not allow loss recovery where he does not make a mistake (assuming the loss is caused by him and not his Assistants).
- 4.12 Aside from the Contract, the SPMR is also liable to account in equity to the Post Office as its agent. This requires the SPMR to enable the Post Office to determine the financial position between them but it does not entitle the Post Office to recoup any shortfall – that entitlement comes from the Contract or elsewhere under the general law.
- 4.13 We understand that the Post Office exercises discretion whether to recover losses in some cases, such as where the Post Office becomes aware of a popular scam perpetrated against SPMRs. The Post Office may choose not to recover losses in those cases for

such time as may be reasonable to allow the SPMR to take steps to protect himself. Applying such discretion narrows or removes the scope for argument that a loss is not due to the SPMR's error.

**4.14** We think that there is a sound contractual and/or general law basis for the recovery of losses.

#### **Compensatory claims**

**4.15** The key question in assessing a complaint which seeks "compensation" is this: did the Post Office have the right to recover the loss? If it did, there can be no compensation. If it did not, any claim is for the repayment of any money paid by the SPMR to the Post Office to which it was not entitled. This is a restitutive, not compensatory, claim.

**4.16** While a criminal conviction against a SPMR does not entitle the Post Office to claim any related losses, its factual basis could do so as a matter of civil law. If the SPMR pleaded guilty to an offence or was found guilty after pleading not guilty, the Post Office should be entitled to rely on that outcome in other contexts to claim any losses. But if the Post Office, as prosecutor, has material which casts doubt on the safety of a conviction, it is under a duty to disclose the material to the convicted party. The approach set out in the Scheme Settlement Policy appears consistent with this.

**4.17** Where the Post Office has a civil judgment for loss recovery from a SPMR, the SPMR is not entitled to re-open the judgment and the Post Office's right to the loss recovery is clear. There may be certain circumstances which entitle the SPMR to appeal a civil judgment after the time period for doing so has expired, but these are likely to be limited. Accordingly, any decision to repay to SPMRs losses recovered from them would be voluntary and needs careful consideration given the possible legal and public relations implications this may have.

**4.18** If no Court has yet given a decision on a loss recovery, the Post Office has a genuine decision to make whether to press claims for losses or repay those already recovered. From what we have seen, such claims appear to turn either on general allegations about the unreliability of Horizon or specific allegations about how it worked in a particular case. We think only specific allegations about Horizon provide a basis for casting doubt on the Post Office loss recovery in any particular case although even then, a SPMR will have the burden of establishing that the allegations caused the relevant "losses".

**4.19** It is not ordinarily a breach of contract to claim money to which you are not entitled, although it would be a breach of contract to withhold payment from other monies due. This matters because a SPMR could only claim consequential losses if there is a breach of contract on which he can rely. If there is no breach of contract, the SPMR's claims is merely restitutive; it "reverses" a financial benefit to which the Post Office was not entitled, but without the right to claim any associated other "losses".

**4.20** To the extent there is a breach of contract, normally, no damages can be awarded for hurt feelings or mental distress, even if such harm is reasonably foreseeable as flowing from the breach. The harm must be in the reasonable contemplation of the parties as not unlikely to result from the breach. While it is conceivable that stress leading to a breakdown in health of a SPMR which is compensable could have been in the reasonable contemplation of the Post Office and a SPMR, we do not think it is likely. Consequential loss may be available for loss of reputation which directly causes foreseeable financial loss, such as a loss of future earning capacity. We think this is also unlikely and that

consequential only has any real relevance in the context of terminated Contracts (mentioned below).

#### **Restitutionary claims**

**4.21** If the SPMR can show he made a payment to the Post Office under a genuine but mistaken belief that he was liable to do so, he has a restitutionary claim for the money (although again, without a claim to any associated consequential "loss"). Such a claim will only arise if the Post Office is not legally entitled to the payment i.e. if the settled Horizon account can be re-opened or the Post Office is not entitled to recover losses. The SPMR must not have appreciated that there was a risk he was not required to pay, if his claim is to succeed. This is a fact sensitive issue in each case. If the claim is compromised (whether before or during proceedings), he will lose the right to a restitutionary claim.

#### **Termination of contracts**

**4.22** The Post Office is entitled under the Contract to terminate it on three months' notice. Provided such notice is given, the SPMR will have no remedy for the termination, regardless of the reason or motivation for it. This means that the most a SPMR could recover for a termination without sufficient notice is the pay (and any other entitlements) he would have received during the notice period.

**4.23** In cases where the Post Office terminates summarily (i.e. with no notice) but the facts do not justify summary termination, the SPMR may have a right to claim the three months' pay and certain consequential losses, such as a loss of profits, if they are not too remote. The "remoteness" of the loss is tested by reference to the knowledge of the parties at the time of the contract and whether the loss is "of the kind" that they reasonably would have contemplated. As above, the loss must be caused by the defendant's breach. So, for example, where a SPMR runs an associated business, if his Contract is wrongly terminated summarily, he might be able to claim for losses in the associated business caused by his inability to act as a SPMR during the three month notice period or the loss of a chance to sell the whole business as a going concern during the three month period. This is a fact-sensitive question.

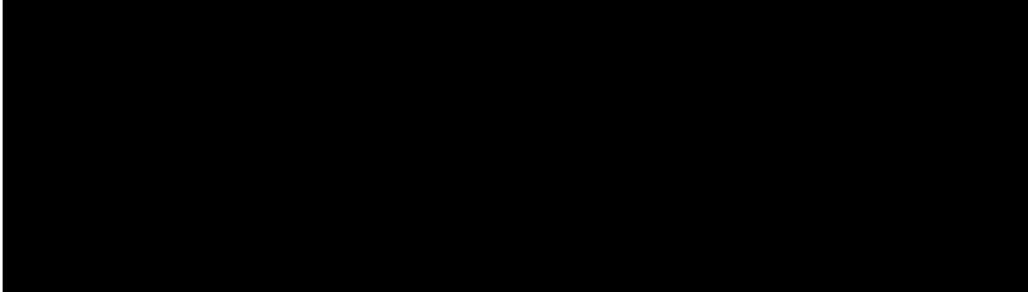
#### **Inadequate training and support**

**4.24** The Post Office is expressly obliged to provide up to date training under the Contract. What the training entails is not defined. But as the SPMR is still responsible for the day to day operation of the Subpostoffice, he accepts the consequences of any lack of training provided to his Assistants or their failure to put the training into effect. There may also be an implied term in the Contract entitling the SPMR to reasonable training and support which he could not be expected to know from his own general knowledge and past experience, such as in respect of bespoke systems like Horizon.

**4.25** We think it is possible that the Post Office could have provided adequate training and support to some SPMRs but not to others (unlike the operation of Horizon itself, which as a common system, could be expected to provide a similar experience to all or most SPMRs). However, the SPMR would need to be able to show that inadequate training or support was causative of losses in order to have a claim against the Post Office. This may be difficult to establish in any particular case.

**Limitation**

**4.26**



**4.27**

**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.

**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).

**5.6**





#### 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 137 Applications which we understand are still currently in the Scheme, we assume that for the purposes of this Report, they are representative of all the complaints accepted into the Scheme.<sup>4</sup>
- 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 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:

<sup>2</sup> [2003] ICR 546.

<sup>3</sup> [2007] EWHC 5 (QB).

<sup>4</sup> 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.

- 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; no other relevant records exist. We understand that at least once a month and potentially as often as at the end of every week a SPMR is obliged to prepare and sign a document entitled "Cash Account (Final)" and send it to the Post Office. **[Post Office, please confirm. Taken from skeleton in Castleton].** The SPMR will also conduct 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 but we note that it is likely that it is only certain transactions which the SPMR carries out which are capable of leading to "losses." 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.<sup>5</sup>

**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.<sup>6</sup>

**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.

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

<sup>6</sup> Ibid, paragraph 6-097 and 6-098

**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 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** Second Sight are due to produce a generic report about Horizon. We do not know, since it is not yet available, whether this report will fulfil the objectives we here describe, but in any event in our view this report should have been done first. Instead, what Second Sight seem to have done is to descend into the detail of individual cases and comment on the particular issues of which complaint is made. They do 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 a good working relationship with the JFSA<sup>7</sup> but this does not seem to be replicated so far as the Post Office is concerned. 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;<sup>8</sup> 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".<sup>9</sup>

**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

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

<sup>8</sup> See n1.

<sup>9</sup> 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 – i.e. by signing the “Cash Account (Final) at the end of each week **[Post Office to confirm]** – 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.<sup>10</sup>

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.”

<sup>10</sup> *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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

**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 will not recover losses due to the scam for such period as it is reasonable to expect the SPMRs to be familiarising themselves with the procedure. Only once it is reasonable to think that SPMRs should be able to protect themselves from the scam will the Post Office recover losses due to it. 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 argument as to whether a SPMR was negligent, careless or in error in relation to any losses shown to exist.

**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.

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

<sup>12</sup> Ibid paragraph 6-099.

<sup>13</sup> 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 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.

The Scheme is only apt to deal with cases in the third group.

Cases in which there is a criminal conviction

**5.51** 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.

**5.52** 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.

**5.53** 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.”

**5.54** 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)*,<sup>14</sup> 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

**5.55** 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.

**5.56** 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.

**5.57** 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

**5.58** 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.

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<sup>14</sup> [1999] 2 Cr App R 188.

**5.59** 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:

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

**5.60** 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.

**5.61** 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:

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

**5.62** 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.

**5.63** 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.

**5.64** 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.

**5.65** 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.

**5.66** 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

**5.67** 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.

**5.68** 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 resitory 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."

**5.69** 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.<sup>15</sup> 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.

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<sup>15</sup> Chitty on Contracts, 31<sup>st</sup> edition, paragraph 26-137, 138

**5.70** 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.<sup>16</sup>

**5.71** 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**

**5.72** 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.<sup>17</sup> 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.<sup>18</sup>

**5.73** 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.<sup>19</sup> 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.

**5.74** 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.<sup>20</sup> This is a fact 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.

**5.75** It is also clear that if the SPMR was once entitled to a restitutionary 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.

<sup>16</sup> Chitty on Contracts, 31<sup>st</sup> edition, paragraph 26-141 - 142

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

<sup>18</sup> *Barclays Bank v Simms* [1980] QB 677

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

<sup>20</sup> See *Kelly v Solari*, *Barclays Bank v Simms*.

The law will not allow such bargains to be reopened, not least because of the concern to achieve and respect finality in litigation.<sup>21</sup> If litigation has not been started then there needs to be a contract of compromise before a restitutary remedy will be ruled out.

**5.76** 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**

**5.77** 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) the Post Office is entitled to terminate the Contract on three months' notice for any or no reason.

**5.78** 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).

**5.79** 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.

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

**5.81** 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".<sup>22</sup> 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.

<sup>21</sup> *Marriot v Hampton* (1797) Term Rep 269

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

**5.82** 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.

**5.83** 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.<sup>23</sup> 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**

**5.84** 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 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."

**5.85** 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.

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

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

"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."

**5.87** 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.

**5.88** 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.

**5.89** 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.

**5.90** 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**

**5.91** 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**

**5.92**

**5.93**

**5.94**

**6 The nature and extent of the risks arising from and associated with the Scheme in its current form**

**6.1** The Scheme is a mediation scheme. Mediation is a technique for facilitating negotiations with the hope of arriving at an agreed settlement. The only pre-requisites are a dispute and a willingness on the part of the parties to explore the possibility of resolving it through agreement rather than some form of adjudication. The question which will be addressed in this section of the Report is whether there are risks in the Scheme.

**6.2** We think there are effectively four "risks" inherent in the Scheme, namely:

- 6.2.1** the financial costs associated with individual claims;
- 6.2.2** the costs of the Applicants and Second Sight;
- 6.2.3** the public relations and reputational issues associated with not settling claims; and
- 6.2.4** the public relations, legal and reputational issues associated with settling claims.

The financial cost associated with claims

**6.3** This first "risk" and the extent of it is entirely within the control of the Post Office. It does not have to agree to settle any claim, nor will it be forced to pay more in settlement than it is advised to, and is comfortable, paying. Mediation will not impose a solution on the Post Office.

The costs of the Applicants and Second Sight

**6.4** The costs of the applicants and of Second Sight will need to be borne in accordance with the Scheme Rules.

The public relations and reputational issues associated with not settling claims

**6.5** Even if the Post Office concludes that there is no, or no established, legal liability to a particular SPMR there is a risk associated with not settling a claim. This is difficult both to gauge and to manage. It may also vary from case to case.

**6.6** This is not a question of legal liability on the part of the Post Office but will call for some careful management.

**6.7** There is always the possibility that Applicants who think that they have a strong case may sue if they are not offered a satisfactory settlement. We think that this risk is low. If an Applicant does proceed to litigation, the Post Office should give such claims very careful thought and steps can be taken to resolve them at an early stage if appropriate.

The public relations, legal and reputational issues associated with settling claims

**6.8** There are risks – reputational rather than legal – associated with not settling large numbers of claims. There is a counterbalancing factor: settling large numbers of claims where there is no clear legal liability to do so also entails risk. There are two issues to consider:

**6.8.1** The reaction of stakeholders to the payment of compensation to SPMRs where there is no legal liability to do so;

**6.8.2** The effects of such payments on the criminal convictions secured to date and sought in the future.

**6.9** We have already outlined the situations in which the Post Office is likely to be under a legal liability to SPMRs. Payment of appropriate compensation in cases of legal liability should not be problematic. But payment where there is no liability to do so may well attract criticism from stakeholders.

**6.10** It is also important to bear in mind the likely impact of payments of compensation on the criminal convictions secured to date. If the Post Office pays compensation to those whom it has already prosecuted and convicted of relevant offences (in other words the conviction is closely linked to the matters of which the SPMR now complains) it could be seen to illustrate doubt in the Post Office's eyes as to whether there was further information casting doubt on the conviction. Why, it might be asked, would the Post Office otherwise be paying compensation? We have commented above that there is a risk from settling claims and an opposing risk which would arise if no or very few claims were settled. There is also an over-arching point in this respect: consistency of approach is likely to be important to all concerned.

**7 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**

**7.1** The Scheme has closed to new entrants. We make no suggestions at this stage as to the need for, or shape of, any further Scheme.

**7.2** It is worth noting what entry into the Scheme means and does not mean.

**7.3** The options which we will consider for the modification of the current Scheme include the following:

- 7.3.1 closing the Scheme altogether – declining to mediate any cases;
- 7.3.2 clarifying that no case in which there is a criminal conviction or civil judgment is suitable for the Scheme/clarifying the Post Office's position in relation to such claims;
- 7.3.3 formalising and revising the terms on which Second Sight are appointed;
- 7.3.4 terminating Second Sight's engagement;
- 7.3.5 clarifying the position of the Post Office independently of the facts of any individual claim including the production of a full and objective report on Horizon;
- 7.3.6 formulating criteria by reference to which "standard" compensation would be paid to Applicants irrespective of the legal merit of their claims; and
- 7.3.7 reviewing the basis on which the Working Group operates and putting the Post Office in greater control of the Working Group.

**8 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**

**8.1** The outcome of any one dispute resolution mechanism can never be known with any certainty nor is it likely to be a "silver bullet" in any particular case, but especially when implemented on a broader scale. Each mechanism will have its own advantages and disadvantages, particularly in circumstances, such as the present, where the nature of complaints vary (amongst other things) as to:

- 8.1.1 their subject matter;
- 8.1.2 the nature of legal liability (if any) involved;
- 8.1.3 the time at which the conduct the subject of the complaints occurred;
- 8.1.4 their monetary value; and
- 8.1.5 the quality of evidence available and ability or likelihood of cases being made out to any reasonable standard.

**8.2** Further, choosing an alternative mechanism and abandoning the Scheme in its entirety at would likely present difficult issues for the Post office.

**8.3** Therefore, we will consider the respective merits of negotiation/direct engagement, adjudication, arbitration and the Financial Ombudsman Service (if applicable) as an adjunct to the Scheme.

**9 In the event that a decision is made by the Board to discontinue the Scheme, what steps Post Office could take to minimise any existing legal risks**

We will identify and discuss the following issues relevant to the minimisation of risks associated with the discontinuance of the Scheme:

- 9.1.1 the underlying liability of Post Office to Applicants either exists or does not; discontinuing the Scheme will make no difference to that;
- 9.1.2 indirect risk of claims being litigated or otherwise some unsuitable dispute resolution process imposed on Post Office for political reasons if no clear viable, and agreed alternative is in place at time of termination;
- 9.1.3 the need for clear, consistent, messaging from the Post Office about the next steps it proposes to take; and
- 9.1.4 terminating Second Sight's engagement and paying them a fair amount for what they are owed to seek to avoid any protracted dispute or the longer term impact of them maintaining an adverse position to the Post Office.