

## IN THE POST OFFICE HORIZON IT INQUIRY

### NOTE TO THE INQUIRY IN RE THE POST OFFICE v CASTLETON

#### INTRODUCTION

1. Mr Richard Morgan's KC evidence on whether POL v Castleton was a miscarriage of justice is dryly legalistic but mistaken. He maintained that because Mr Castleton had signed the Branch Trading Statement, he had accepted that the figures therein were true, and so judgment was entered accordingly.
2. We submit, for posterity, the Inquiry should review the position, should those answers of Mr Morgan KC (thrice repeated) be subsequently referred to.
3. We draw again to the attention of the Inquiry (out of an abundance of caution) the decision of Mr Justice Fraser (as was) in the Common Issues judgment, *Bates v Post Office Ltd (No.3: Common Issues) [2019] EWHC 606 (QB)*.
4. It is important to note that the decision<sup>1</sup> of HHJ Havery QC, adverse to Mr Castleton was cited and considered by Fraser J and addressed at [843] – [851]. In relation to that, as is clear from the reasoning of Fraser J, the fact that a SPM contacted the helpline was a major feature in his conclusion that an SPM had rejected the accounts. An SPM's disavowal of the accounts was evidenced by such contact with the helpdesk to report an unexplained shortfall, discrepancy or dispute a TC.
5. It is therefore unfortunate that in the decision of HHJ Havery QC, the 90 odd calls that Mr Castleton made to the HSC/NSBC were merely referred to as follows:

I accept evidence of Mr. Castleton that he contacted the Helpdesk over problems with discrepancies in balancing accounts at Marine Drive on a number of occasions.

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<sup>1</sup> [2007] EWHC 5 (QB)

6. It follows that when commenting on Mr Castleton's case, Fraser J would not have been apprised of the weight of evidence showing that Mr Castleton questioned and did not accept the accounts were true.
7. Set against the judgment of Fraser J, and the reasoning he brought to bear on the issue, it would have been apparent that Mr Castleton was in a hopeless double bind, and that it would have been unconscionable to treat the Branch Trading statement as a settled account, nor foist the burden of proof on the agent, given the significant number of contemporaneous calls he made. Furthermore, it is reasonable to surmise that had Mr Castleton been represented, the arguments that were advanced before HHJ Havery QC, on behalf of the Post Office, would not have prevailed.

#### **THE REASONING OF FRASER J AND ITS RELEVANCE TO MR CASTLETON'S CASE**

8. In his judgment, Fraser J poses this question, which he answered in the negative<sup>2</sup>:

*"13. Did Subpostmasters bear the burden of proving that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect?"*

9. The Post Office had argued that it did not have the burden of showing there was a loss [649].
10. He summarised and encapsulated the dilemma of the SPMs at [652]:

*"Whether there are Horizon generated shortfalls, or apparent shortfalls attributable to bugs or errors, will be resolved at the Horizon Issues trial. Because this has the effect of shifting the burden back on to the SPM, the Post Office both argues for, and has in the past applied Section 12 Clause 12 as*

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<sup>2</sup> Appendix R at 13; other passages in the judgment, not expressly quoted are at 646, 653, 682-687, 1102.

*justifying, recovery under this clause for all losses, unless an SPM could show that the deficiencies and shortfalls were not due to their own negligence, carelessness or error.”*

11. Proceeding, Fraser J, when construing the onerous contract by which the Post Office ruthlessly exploited its agents, held that the burden of proving losses fell on the Post Office, and it was not for the SPMs to prove that the losses were illusory, and thus ‘the books’ inaccurate. What is of importance to Mr Castleton’s injustice are the common threads of unfairness that entwine all the SPMs’ cases, which are emphasised below:

*822. I turn then to the issue of whether SPMs bear the burden of proving (my emphasis) that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect. I simply do not see how it can sensibly be suggested that SPMs bear such a burden, for any branch trading period **when a SPM has called the Helpline and sought help for an unexplained shortfall, discrepancy or disputed TC. This is for the following reasons. . [Emphasis added]***

*823. Firstly, for an unexplained discrepancy or shortfall, the very point of dispute by a SPM is that they could not work out the cause of the discrepancy. That is why it was an unexplained shortfall or discrepancy. **It is no answer to this point for the Post Office to require a SPM to identify the time and/or product when it occurred, in order that it could be investigated. That is simply a more refined way of requiring the SPM to do the impossible.** Branch Trading Statements are done on a cycle of 5 weeks, 4 weeks, 4 weeks. These shortfalls and discrepancies would not be likely to become apparent until the end of the particular trading period. **[Emphasis added]***

*824. This point was, perhaps presciently, identified by Mr Bates himself as long ago as 2000. With his background knowledge in IT systems, and his high degree of attention to detail, he attempted to get to the root cause of the first unexplained shortfall in his case, and he realised that the information for him to do so was simply*

*not available to him, or any SPM in a branch. The Horizon system did not allow him to do this. [Emphasis added]*

*825. The Post Office's answer to that was, eventually, to write off the amount in question. In my judgment, that was no "answer" at all, in logical terms. All that approach did, for that unexplained shortfall on that occasion, was entirely to avoid addressing the issue. [Emphasis added]*

*826. The Post Office seeks, in this Common Issues trial, to treat the Branch Trading Statement as though it were an account stated, and/or a settled account, both of which are concepts in the law of agency as has been seen from the extracts from Bowstead above. However, I do not consider that such an approach is correct, in either law or fact, for a Branch Trading Statement for any period in respect of which a SPM notified or called the Helpline concerning a dispute. This could be by way of seeking assistance on a disputed item, unexplained shortfall or discrepancy, or otherwise drawing to the Post Office's attention that the trading statement was not agreed, but this had to be done through the Helpline. Further, and for completeness (and to provide maximum utility to the Group Litigation) there can be no requirement for any magic phrase that had to be uttered by an SPM when doing so. This is to deal with a situation which Mrs Stubbs experienced, after she had phoned the Helpline multiple times, disputing the shortfall shown. Eventually she was asked by the Helpline whether she wanted to report this particular issue as "a dispute". This surprised her, as she was fairly certain that was what she had been doing all along, in her many phone calls on the same subject. If there were such a magic phrase, the SPMs should have been told what it was, and the evidence is that they were not told any such thing. It may transpire, in later trials, that internally at the Helpline an item was only treated as being disputed if certain words or phrases were used. Alternatively, it may transpire that different Helpline operators behaved differently. [Emphasis added]*

12. The relevance of the above passages speak for themselves in relation to Mr Castleton's case, and address Mr Morgan's KC complaint (which is not accepted) that Mr Castleton ought to have

identified the specific flaws in the system. Fraser J described this at [823] as another instance of the Post Office requiring the SPMs to do the impossible. Paragraph [825] of the judgment is emphasised, however, because it is clear that the Post Office put off Mr Castleton by twice allowing him to 'suspense' the dispute, or discrepancies, in question.

13. As HHJ Havery QC observed at [9]

*Mr. Castleton, being alarmed by the growing discrepancies, was allowed by the claimant to put two accumulated discrepancies (deficits) into a suspense account. That was done by entering the relevant accumulated discrepancy as a fictitious expense in the Payments column of the Final Balance document. On each occasion the accumulated discrepancy was reset at zero.*

#### **THE CONSIDERATION OF POL v CASTLETON**

14. This brings us to how Fraser J dealt, in passing, with Mr Castleton's case, and distinguishing it:

*843. I should also deal with one authority upon which the Post Office seeks to rely in this respect, which is Post Office Ltd v Castleton [2007] EWHC 5 (QB). In that case the Post Office brought proceedings to recover the sum of £25,800 approximately from Mr Castleton. Mr Castleton represented himself. He had been the SPM at a branch in Bridlington in Yorkshire, which was called Marine Drive, until following an audit he was suspended and then terminated. His explanation for the shortfalls is encapsulated at [4] in the judgment of HHJ Havery QC, who gave judgment for the Post Office:*

*"Mr. Castleton admits that on 23rd March 2004 there was an apparent shortfall in the account of Marine Drive in the sum of £25,758.75. He admits that he produced weekly Balance Lists (the documents in question are headed "Final Balance") and personally produced, signed off and submitted to the claimant Cash Accounts (Final) up to week 51. His case was that the losses apparently shown by the Balance Lists and Cash Accounts (Final) were illusory not real. It was entirely the product of problems with the Horizon computer and accounting system used by the claimant. The apparent*

shortfalls were nothing more than accounting errors arising from the operation of the Horizon system ."  
(emphasis added)

844. The Post Office seeks to rely upon this case as authority for the proposition that the burden is upon a SPM to demonstrate an account is wrong. However, in my judgment they are unable to do so for the following reasons:

1. The statement of the account in that case was admitted by Mr Castleton as made clear at [1] in the judgment.
2. The judge also stated at [2] "the burden of proof on Mr. Castleton can relate only to the figure of £22,963.34. In the event, as will appear, the identity of the party on whom lies the burden of proof is not important in this case."
3. It was neither argued before the judge, nor explained, so far as one can tell from the judgment, that the method of accounting using Horizon meant that there was no separate mechanism or process for disputing items, or that the "account" (which it must be remembered was admitted) included disputed items.

845. Who had the burden of proof was not therefore even in issue, and was certainly not fully argued before the judge.

846. I ought for completeness to identify three further passages in Post Office Ltd v Castleton . At [22] the judge stated:

"During the hearing, Mr. Castleton sought to adduce evidence of other complaints from subpostmasters of other post offices about the Horizon system. I admitted in evidence the fact that there were a few such complaints, but I refused to admit evidence of the facts underlying such complaints, since that would have involved a trial within a trial."

847. Also at [23]:

"I heard evidence from Anne Chambers, a system specialist employed by Fujitsu, the company that provides the Horizon service. She has a working knowledge of the Horizon computer system used by the claimant. She said that calls from postmasters relating to potential system problems are initially taken and logged by the Horizon system Helpdesk. I

*accept evidence of Mr. Castleton that he contacted the Helpdesk over problems with discrepancies in balancing accounts at Marine Drive on a number of occasions. If the helpdesks are unable to resolve the problem, calls may be passed to the System Support Centre, where Mrs. Chambers works. In this case, her first involvement with Marine Drive was on 26th February 2004. Mrs. Chambers examined the questions raised and concluded that there was no evidence whatsoever of any problem with the system. She was unable to identify any basis upon which the Horizon system could have caused the losses .*"

848. This led to the conclusion which the judge included earlier in the judgment at [11]:

*"Since Mr. Castleton accepts the accuracy of his entries in the accounts and the correctness of the arithmetic, and since the logic of the system is correct, the conclusion is inescapable that the Horizon system was working properly in all material respects, and that the shortfall of £22,963.34 is real, not illusory."*

849. These passages above identify that the Castleton case was argued on a completely different basis to this Group Litigation, and the legal issue upon which the Post Office seek to rely upon it as support, namely burden of proof in reopening accounts, together with the correct status of the trading statement (then called Final Balance and Cash Account (Final)) was not even in issue or argued. In any event, this judgment would be only persuasive and not binding upon me, and I consider I am in a better position than HHJ Havery QC in terms of deciding a point that was not even argued before him.

850. I therefore do not take into account the judgment in Castleton as being supportive of the Post Office's arguments on the status of a Branch Trading Account, as I consider it distinguishable. Even if it were not distinguishable, and the point had been argued, I would not follow it.

851. However, if I am wrong, and the Branch Trading Statement is a settled account, and it is necessary for the Claimants to rely upon these older cases in the way that they

seek, then I would identify the principle in those cases as being no more specific than this. The law will permit an account between an agent and a principal to be re-opened where it is unconscionable for it to remain otherwise. In that alternative scenario, I would hold that it is unconscionable here for account represented by the Branch Trading Statement not to be reopened for any trading period when the SPM had contacted the Helpline to report an unexplained shortfall, discrepancy or dispute a TC.

852. I have also considered, as a separate exercise, uninfluenced by my findings above, whether (if there were such a burden upon the SPMs as alleged by the Post Office) SPMs could ever satisfy it. **I find, on the evidence before me in this trial, that imposing such a burden upon an SPM would be requiring them to perform the impossible.** As was clear from all the evidence of both the SPMs and the Post Office witnesses who actually knew about how Horizon worked, unexplained shortfalls or discrepancies became apparent at the end of a branch trading period. It was simply not possible, on the information available to a SPM on the Horizon system, for them to identify the day, product, and still less the time of day, that was responsible for this. This was exactly what was identified by Mr Bates as a problem in the very earliest days of Horizon. The prolonged and extraordinary efforts of Mrs Stubbs and Mrs Stockdale showed that this burden simply could never be discharged by a reasonable and diligent SPM. This is not an answer to a question of construction, as it deals with post-contractual events, but it is telling that the Post Office argue for a construction that would impose an impossible burden upon SPMs. **[Emphasis added]**

853. Returning therefore to the issue of whether the SPMs bear the burden of proving that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect, if I am incorrect in my finding above, and they do bear such a burden, this can be satisfied as follows. That burden would be discharged by their showing (either by reference to Helpline call logs, or by the evidence of individual SPMs, or otherwise) that they contacted the

*Helpline in respect of shortfalls, discrepancies and/or TCs, in any particular branch trading period.*

15. Fraser J offered further justification at [1116] which directly applies to Mr Castleton's case:

*1116. Under Horizon, the way in which a SPM was required to compile Branch Trading Statements each trading period (usually every four weeks) meant that they had no choice but to accept into that statement disputed amounts with which they expressly disagreed, and Transaction Corrections that they either did not understand, or disputed. The Post Office treated disputed amounts as debts which they were entitled to claim under debt recovery procedures from SPMs. There was no mechanism adopted by the Post Office to resolve such disputes. The Post Office accepted during the trial that amounts that were "settled centrally" were treated by it as being legally due and owing to the Post Office, even if they were disputed by SPMs. I find that the Post Office is not therefore entitled to rely upon the Branch Trading Statements, for any period in respect of which a SPM notified a dispute to the Helpline, as a settled account between agent and principal. Nor do SPMs bear the burden of demonstrating that the Branch Trading Statement is wrong for such a period.*

## **CONCLUSION**

16. Very much troubled by Mr Morgan's KC answers, which he no doubt gave based on his genuine understanding of the Law and recollection of the case, those representing Mr Castleton believe that unless they are contextualised against the decision of Mr Justice Fraser in the Common Issues judgment, Mr Castleton will suffer a further injustice.
17. Leading counsel apologises to the Chair for making this unsolicited submission, but 'black letter Law' is hardly an appropriate subject for cross-examination on a Friday afternoon, and this is submitted after careful reflection upon his duty to Mr Castleton.

Edward Henry KC

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