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From: Parsons, Andrew[GRO
Sent: Wed 01/06/2016 3:20:59 PM (UTC)
To: Anthony de Garr Robinson[GRO
Cc: Loraine, Paul[GRO]; Porter, Tom[GRO]; Rob Smith[GRO
Subject: RE: Bates v POL - Commentary on Counsel's Bundles [BD-4A.FID26859284]
Attachment: _DOC_32205054(1)_Chronology_ Advice on Balancing Transactions (2).docx

Tony

Comments in red below.

A

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From: Anthony de Garr Robinson [GRO
Sent: 01 June 2016 13:24
To: Parsons, Andrew
Cc: Loraine, Paul; Porter, Tom; Rob Smith
Subject: RE: Bates v POL - Commentary on Counsel's Bundles [BD-4A.FID26859284]

Thanks, Andy. The second box of files you sent to my chambers has just arrived here in Oxfordshire (it's half term this week). However, I'm still hard at work reading the two files you sent last week – it is much slower going than I expected.

I already have lots of questions and will have more by the time my reading is all done. A pre-conference meeting or call is a necessity, I think. I will revert with suggestions as to timing when I've reviewed had a look at the amount of further reading I have to do. My current thinking is that we have a (possibly quite ling) telecon or meeting on Monday or Tuesday of next week, with a con following towards the end of the week. Would that work for you and the client?

Works for me. I'll speak to people about fixing dates.

One issue I think the clerks have raised with you is whether to bring in a junior at this stage. I would certainly benefit from someone who can do some targeted research into the implied term issues and maybe some GLO issues too. I would particularly like someone with the time to look for cases considering (1) whether and to what extent, in cases relating to contracts involving the design, supply and/or sale of complex products and/or training, there are implied terms requiring the products and/or training to be idiot proof or designed for idiots, (2) whether and to what extent the "fitness for purpose" standard implied term in sale of goods/supply of goods and services cases requires the relevant products or services to be idiot proof or designed for idiots and (3) whether and to what extent such requirements have been implied in long term agency or franchising or other similar agreements (e.g. through the standard implied term requiring cooperation or requiring the state of affairs necessary for performance to be maintained to enable the contract to be

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performed). If a junior is to be brought in, now is the best time to do it. Sooner or later, a lot of foot-slogging research will be required into these and other questions. It would save me time and effort to have someone super-clever here in chambers who can work under my close direction, and it could well improve the quality of the judgments the client ultimately makes on important issues.

I'll speak to Rob about a junior.

Best wishes,

Tony

PS. In the meantime, I have a few questions:

1. Is it possible that there are cases where human errors at branches cause Horizon to record losses which do not really exist but for which postmasters are then held to be liable (e.g. because – perhaps as a result of the postmaster's failure to do all the reconciliations he or she was required to do when required to do them, or perhaps because the helpline told the postmaster to accept an incorrect balance – it is not now possible to tell whether the loss is real? If so, does that raise a question as to the propriety of our basic approach to recovering losses from postmasters and summarily terminating their contracts? If not, why not?

   The "real" loss question gets raised a lot by postmasters.

   Save for the handful of small bugs found in the system (see the example at tab 121 of your bundle), I've not come across a case where an accounting loss in a branch has not reflected a real genuine loss to Post Office. Sometimes however the "real" loss to Post Office is not that obvious.

   The key point to note is that it is not possible to make a one sided change to the accounts. For example, if a branch was to manually, but accidentally, increase the amount of stamps recorded in the branch accounts (which would create a shortage of stamps vs the amount of stamps actually on hand), Horizon automatically assumes that the stamps have not been sold and decreases the cash holdings to reflect this (thereby creating a surplus of cash). In this way, errors are balanced out.

   The other point to note is that the double entry to a transaction may be against a third party. For example, a customer wishes to deposit £200 into their bank account. They physically pass £200 in cash to the branch, but through a typo the branch records a deposit of £300. This would show as a loss of £100 in the branch (as the accounts would record the receipt of £300 but the branch would only hold £200 in cash). On first blush one could say that there was no real loss to Post Office as the £100 difference is just an accounting error. However, that accounting error will be passed through to the customer's bank and the bank will expect a credit of £300 from Post Office. Unless the branch or the customer spots the error, Post Office (who has no way of knowing that there has been a typo) will pay £300 to the bank and will expect the branch to hold £300 in cash. The £100 loss is therefore "real" (unless the error is spotted and corrected).

   I'm conscious that this question raises the much bigger issue as to how Horizon and/or our helpline and/or our training caused postmasters or their staff to do things that ultimately resulted in losses being recorded for which they were held to be liable. As is often the case with practical issues of this sort, the armchair reports and other documents I have read so far have not enabled me to get on top of that issue at all, and it's hard to formulate questions which would enable me to do so.

   Understood. This rabbit hole goes pretty deep!

   What you'll probably find is that general answers about what Horizon does or does not do are not often possible. One has to look at the detail of how a specific transaction is processed on Horizon in order to validate / challenge a particular point

2. When did we become aware of the possibility of remotely altering branch data on Horizon, and why did we not become aware of it long ago? Is the fact that we consistently claimed the opposite our fault, or Fujitsu's? Does it mean that the expert evidence that we have previously relied on from Fujitsu was wrong/misleading? And have we already embarked on an exercise to determine whether this makes any or all of the previous convictions

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unsafe, as we did with the previous exercise with the previous revelation about the Fujitsu bugs"? If not, why not?

We (being POL and BD) were not at the outset aware of the ability of FJ to remotely alter branch data (by use of balancing transactions) until relatively late in the day. The BT process is used so infrequently that POL IT and FJ just overlooked it in their discussions.

It was only when Deloitte was commissioned to undertake their review of Horizon that the BT issue came to light (tab 119). This was in May 2014. Even then the full significance of this issue was not understood.

During late 2014, Second Sight began to focus more and more on the question of remote access. This was largely triggered by them discovering the Winn-Lusher email (tab 122) – they'd actually had this email for some time but had overlooked it.

In 2015, the pressure came to a head and POL began seeking advice from its criminal lawyers on the consequences of the BT process. I've attached a chronology of this advice. At the end, you'll see the advice from Brian Altman which essentially says that POL does not need to disclose the "remote access" issues in relation to any prosecution.

Our current understanding is that a BT has only been used once since 2010 (in a branch that has not raised a complaint nor subject to a prosecution). Before 2010, the situation is more opaque as before 2010 Horizon did not automatically log the use of BTs. We therefore don't know whether a BT was used before this point.

There is an open question about whether Deloitte should conduct more work in relation to this point – see para 130 of JSQC's report at tab 116. This is something we'll need to discuss in more detail.

3. I understand that, for 42/60 days, postmasters had the ability on Horizon to check each and every transaction done from his or her branch in order to explain discrepancies. But what about discrepancies appearing after that period, eg. as a result of late transaction corrections? On what basis do we claim that postmasters had the data they needed to explain those discrepancies, even though they could no longer do line by line transaction checks?

As postmasters are required to close their accounts every month, the only situation that I am aware of where a postmaster may need to look back further than 42/60 days is the late Transaction Correction (**TC**) situation.

I have been told repeatedly that the evidence needed to dispute a TC is the paper based record that should be kept in the branch, not data held on Horizon. It is the data held on Horizon that has generated the TC - put another way, the Horizon data will only validate the TC and not help challenge it. For example, if there was a TC saying that there had been more ATM cash withdrawals than stated in the accounts, the evidence for this is not the accounts (which will only show the discrepancy that generated the TC). The evidence needed is the paper receipt generated by the ATM showing the cash withdrawals. If the postmaster provides the paper receipt to challenge the accounting position, then POL will withdraw the TC.

The devil is in the detail on this one as you need to pick apart the operational steps for each transaction type in order to show that the Horizon data is not needed.

I've not yet found a TC that actually needs the Horizon data to be available for the TC to be challenged – that said the 42/60 days limit on data has always been an unattractive feature of Horizon in my view.

4. Why did we refuse to mediate some cases the working group recommended for mediation? Would I be right in inferring that, in the working group we were in a minority of one and everyone else tended to take the Second Sight view of things?

JFSA and SS voted in favour of mediation on most cases so we were in a minority and were out voted a lot.

The difficult cases were those where there was criminal activity as the advice from the criminal lawyers was that unless there was evidence that a conviction was unsafe (which we never found in any case) then simply mediating those cases could unsettle the conviction for no good reason. There was also a practical issue that if POL was standing by the conviction then POL took the view that it was justified in terminating the postmaster and any claim for losses was hopeless, so mediation was pointless.

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JFSA and SS did not accept this point and pushed POL to mediate criminal cases.

5. I'm biased, but it does seem to me that Second Sight's final report is one-sided. How high can we/should we/do we dare go in our criticisms of Second Sight? This may depend on the extent to which the conclusions in its final report dependent on fundamental errors that are demonstrably wrong – what is your view about that? And what are those errors, exactly?

   The factual errors in SS's work are outlined in POL's response to SS' report (tab 49). I agree that SS lost all sense of perspective and at times they were clearly biased against POL. The root cause of this however was, in my view, not bad faith but incompetence – I don't think they even realised how bad / biased their work was.

   Thus far, POL has resisted attacking SS's credibility and impartiality. They have stuck with a purely factual response to allegations put by SS. The reason for this is that they have paid SS over £1m and there's something unattractive about criticising the expert that POL picked and paid £1m to!

   Whether we now need to attack SS head on is a tactical call for POL (my view is that we will need to do this in order to undermine their reports).

6. In their final report, Second Sight claim that we stopped them completing their investigation, partly by not providing documents and info they wanted and partly because we cut their work short by requiring their report by 10/04/15. Did we know we were doing that but carried on regardless? If so, why?

   POL did stop SS accessing the three categories of documents set out in section 2 of the POL Reply to SS' final report. However, these documents were a drop in the ocean. In fact, POL actively encouraged SS to come and meet with key people at POL but SS consistently refused / failed to turn up. We would have loved (genuinely) to have spent more time with them explaining issues but we could just not get SS to engage – they were swamped with work and under-resourced.

Questions 5 and 6 may be answered in our response to Second Sight's final report, which I have yet to read. If so, my apologies.

From: Parsons, Andrew GRO
Sent: 01 June 2016 12:14
To: Anthony de Garr Robinson
Cc: Loraine, Paul; Porter, Tom; Rob Smith
Subject: Bates v POL - Commentary on Counsel's Bundles [BD-4A.FID26859284]

Tony

Please find attached a short commentary on the documents in your bundles which you should have hopefully received this morning. This is just to place some of the documents in context.

Once you've had a chance to quickly review the bundles, please could you let me know approximately when you might be available for a con with the client (as per my email attached)? I can then speak to POL about fixing a date.

Kind regards
Andy

Andrew Parsons
Partner

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