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To: Jane MacLeod [GRO]; "Mark Underwood1" [GRO]
Cc: Rodric Williams [GRO]; Amy Prime [GRO]
Victoria Brooks [GRO]; Elisa Lukas [GRO]

Subject: Draft Defence - Suspense Account

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Importance: Normal

Attachments: 113_Bates_Defence_suspense_account_rider.docx

Inline-Images: image52d46f.JPG; image9b7bb0.PNG; imagee9006e.PNG; image80c16e.PNG

Mark, Jane (I'm sending this direct to you as Rod is away)

I've been speaking with Tony re the Suspense Account sections. Given that Deloitte's work is ongoing, we've decided to go very light on the drafting of this section. We're really concerned about getting the position wrong and then having to back-track. This does expose POL to potential criticism that we have ducked an issue, but we believe this is better than saying something that we later regret.

The proposed drafting is attached.

In preparing this, it is has highlighted a risk that has led us to slightly shift the emphasis in one of our implied terms by adding the word "reasonable".

"Each party would provide the other with such reasonable cooperation as was necessary to the performance of that other's obligations under or by virtue of the contract."

Although small, this change means POL needs to provide "reasonable cooperation" rather than just "necessary cooperation", which in effect means that POL has to cooperate a little bit more. Given our conversations with the business over the last few days I don't believe this will be controversial.

The reason for the change is a little complicated:

1. One of the Claimant's arguments is that POL must suffer a real loss before it can recover money from an SPMR. This means actual financial harm, rather than just a loss showing in a branch accounts.
2. The suspense account investigations have shown that it is theoretically possible that an error in a transaction could cause a loss in a branch (which is paid by the SPMR) and also an overpayment by a client. In effect, POL double recovers on the loss. The overpayment from the client means that Post Office has not suffered actual financial harm and that, in the Claimant's words, the loss in the branch is not real.
3. To combat this, we are running an argument that when clause 12.12 in the old SPMR contract refers to POL recovering "losses" from SPMRs, it means "losses as shown in a branch's accounts" and not "losses that are actual financial harm to POL".
4. This interpretation effectively legitimises the ability of POL to recover branch losses without needing to prove actual financial harm and regardless of any double recovery.

5. It is however manifestly at risk of being unfair to a postmaster, who may end up paying Post Office even though Post Office has not suffered financial harm. This unfairness may dissuade a judge from agreeing with our interpretation of the word "loss" in clause 12.12.
6. We therefore hope to balance out this unfairness by saying that POL has a duty to reasonably reconcile client payments against branch losses to avoid this possibility. To give this a legal foundation, we need to base it our implied terms and hence we need to offer slightly more generous formulation of the cooperation term set out above by adding the word "reasonable".

My apologies for troubling you with this highly technical legal point, but it's the cornerstone of the case and therefore I'd be grateful for your input / approval.

If you're happy with the above, I plan to send the "suspense account" wording to Deloitte and AI Cameron (if you agree?).

Kind regards
Andy

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