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POST OFFICE

Thoughts on draft letter of response

A. SOME GENERAL COMMENTS

1. My two overriding reactions to the draft letter are (1) there is too much information and too little argument (or rather, explanation and persuasion) and (2) the structure is hard to understand. As I read the letter, I found myself wading through lots of detail without knowing why I was doing so. In a letter of this sort, it is important to have a clear argument reinforced by a clear structure, so the reader knows what the argument is and why the information being given supports that argument. This is particularly important in a very long letter which gives a great deal of information, like this one. Without clear signposts and explanations as to the significance of the points being made, information overload sets in and the reader's mind glazes over.

2. The draft letter does not have enough signposts or explanations. At times, I felt that I was wading through a mass of detail without understanding why and without understanding how it helped our case. This problem was exacerbated by the fact that the structure of the draft letters was unexplained.

3. My impression was that some of the detail did not need to be in the letter at all, that some of it could usefully by moved to a number of appendices and that, in relation to the detail that was retained, the drafting should be tightened up so as to make it clear what point/argument the relevant information supported.

4. My specific comments on the structure of the draft letter are set out below, but the key points are that:

   (1) The letter should explain its structure as part of a new introductory section encompassing an introduction, an executive summary and an explanation of how the letter is organised.

   (2) The letter should address the critical issues earlier than they do at present (the most critical issue being the relationship between POL and Sub-Postmasters).

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(3) The letter should follow the general structure of the letter of claim unless there is a good reason for deviating from it – there may well be good reasons for the deviations in this case, but in the absence of any indications in the letter as to what those reasons are I do not understand them.

(4) Our analysis of the claims made and their merits (which should include a subsection explaining why some claims are obviously unsustainable) should come after we have addressed the facts of which they complain. This should include the existing section 7, which should be rewritten in the light of what is in the factual section and in the light of further legal research that would be useful to do.

B. COMMENTS ON THE STRUCTURE AND SOME ADDITOIONAL POINTS

5. **Sections 1 to 3**:

(1) I would rewrite these once we are close to finalising our contract/factual/merits of claims and loss and damage sections. There is a big positive case for us to make here – that their letter is confused and confusing, that it proceeds on the basis of a characterisation of the commercial and legal relationship between POL and Sub-postmasters, that it ignores important facts, that is divorced from reality and inconsistent with the governing contract, that on critical questions it is devoid of the particulars that would be necessary to demonstrate any claim at all and that it includes very serious claims for which there is clearly no proper basis and which ought never to have been suggested etc. But the best time to organise and formulate these points is when we are close to finishing the rest of the letter.

(2) We may want to flag up the remote data alteration point in this introductory section – it is a big point on which they have devoted a great deal of fire but we do not want to give the appearance that we are trying to shy away from it or downplay its significance. It is vitally important to our case that we have a positive story to tell here – e.g. that there has been no remote data alteration to speak of, that it the very rare cases where it has happened there has been a specific reason for this and the relevant Sub-postmasters have known about it, and that there has been no alteration of data in any of the claimants' branches.

(3) I am not sure that the points made section 3 (need for specific details) deserve their own section. What I am sure about is that, in these early sections, we should explain the structure of the rest of the letter do that the reader knows what is the purpose of

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each section/the sort of points each section is intended to make. That does not mean a list of headings as per Freeths' para 14, but a proper explanation of how the letter is organised and why.

6. I do not understand the point of **section 4** (challenges against PO and Horizon) –

(1) Why it is a separate section, what the basic objective of the section is or why it comes so early in the letter, forcing the reader to swim 20 lengths before starting the cross country run that he came for. Is it intended as a rebuttal of the points made in Freeths' section A (PO knowledge of dispute)? If so, this is far from clear (the very different heading does not help).

(2) I should mention that I don't really understand the point of Freeths' section A, either. The point of Freeths' letter is to set up a series of claims based on alleged duties under the Sub-Postmaster contract and breaches of those duties. Why waste 6 or 7 pages going into the mediation etc? If they want to mention the SS report and the Panorama programme early on as good evidence of wrongdoing, fine, and if they want to sling mud at us for being obstructive and/or secretive, also fine. But in that case, should we not have a much shorter response, concisely rebutting the particular points that concern us (e.g. explaining why SS and Panorama are not the great evidence they pretend)?

(3) My feeling is that we should think carefully about what points we want to make in section 4 and, having decided that, we should rename and redraft the section in as concise a way as possible, with a series of well explained points. The amount of information in the current section makes me a little nervous – does it include hostages to fortune (our apparent admission in para 4.3 that their approach to the facts is basically right certainly does)? Also, why even talk about things such as the role of the working group (para 4.36)? But having decided how much information we want to give, it occurs to me that the best place for this information would be in **a new Appendix 1**. To the extent that it is necessary to go into substantial detail to make good its various points, the redrafted section 4 can cross refer to the relevant paras in Appendix 1.

(4) If we are going to talk about the SS report, should we make more of the interim report and the express statement in that re- no systemic flaws? And should we make more of the fact that, although there is an attempt to suggest systemic flaws in the final report, on careful analysis they are saying something very different, apparently on the

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assumption that POL should be responsible for failures by Sub-postmasters and their assistants to follow POL instructions and rules?

7. I understand the purpose of **section 5** (role of postmasters), which is to set the appropriate context against which the Sub-postmaster contract needs to be understood and evaluated. However:

(1) It goes into much too much detail which is not needed for that purpose and some of which may conceivably end up being a hostage to fortune. And the reader gets bogged down in abstruse points without understanding their significance. So I would shorten this section radically so that it just makes the key points as per my suggestions for section 4 above.

(2) Regarding the details that are omitted, I wonder whether some of them can be omitted altogether and, as for the rest, I would either put them in a **new Appendix 2 (or perhaps more than one new Appendices)** or move them to another the section (e.g. the factual section). I favour the former option.

(3) What are the key points to be made here? To my mind, they include the following:

(a) Sub-postmasters are independent businesspeople with their own businesses to run (would I be right in thinking that **all** the claimants had their own retail shops of which the post office counters just formed part)?

(b) The contracts between Sub-postmasters and POL are contracts for services, as the Wolstenholme case makes abundantly clear (worth citing some of its reasoning). Nothing like an employment contract, much more like a franchise agreement. And nothing like a long term contract requiring substantial financial investment by Sub-postmasters. On the contrary, POL pays and/or provides the necessary advertising, facilities and equipment, and the contract is terminable by either side on only three months' notice.

(c) As the contract makes clear, Sub-postmasters are agents for POL, with fiduciary obligations to POL, not the other way around. And they are responsible for the actions of their assistants, not the other way around. And they are responsible when any cash or stock in their custody goes missing, not the other way around.

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(d) As one would expect given the scale and geographical spread of the PO network, Sub-postmasters are required to undertake transactions and to account for those transactions and for the POL cash and stock they hold using the Horizon system.

(e) Horizon has passed lots of impressive quality control tests and has been used by over X million users since it was established in the late 1990s, without substantial problems. No IT system of this sort is bug or error free, but the number of bugs encountered over the years is very small, and they have all been detected and remedied. The result is a remarkably high satisfaction rate.

(f) It would be unreal to suggest that POL was required to ensure that Horizon never made a mistake. No organisation would ever accept such an impossible obligation. But as explained in the next section, POL does accept that the Sub-postmaster contract contains an implied term prohibiting either party from taking steps to prevent performance of the Sub-postmaster's obligation to account and an implied term requiring the parties to co-operate to the extent necessary to enable performance of that obligation.

(g) In this case, POL took extensive steps to achieve these objectives. We need to think about what steps to identify and how best to characterise them, but examples include:

(i) The various quality standards Horizon has passed.

(ii) The operational instructions and rules POL required Sub-postmasters to comply with regarding the use of Horizon (including instruction and rules regarding what to do if things go wrong – e.g. power/communication shutdowns, when keying errors have been made etc? Query whether we should include some details the best examples).

(iii) The extensive training POL made provided for Sub-postmasters and their assistants regarding Horizon and those instructions and rules (it obviously being Sub-postmasters' responsibility to ensure their assistants took all necessary advantage of the training made available).

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(iv) The helplines, the training given to people manning the helplines, the database of information/instructions they used, the ability to escalate to more senior people etc).

(v) The procedures Sub-postmasters are required to follow to identify errors in branches, correct them and take action to ensure they do not reoccur – this includes the requirement to do daily cash balances and the monthly trading balance, about which substantial information should be given (e.g. what statement was a Sub-postmasters required to make to POL in each case?) but it may include other things too.

(vi) POL's use of information about the various assets and liabilities recorded for each branch to detect errors and send through transaction corrections for Sub-postmasters to consider (more detail needed about this and about how the so-called (and wrongly called?) double entry system will invariably allow errors to be identified.

(vii) POL's use of information from third parties such as BOI for the same purpose.

(viii) Whatever POL did to identify and correct general problems with the system, to identify which branches were effected and to remedy their effects in those branches. POL's regular improvements of the system.

(ix) Query whether we have a section addressing data integrity here, and also remote data alteration.

(x) Anything else? Do we dare rely on the investigative work we do (with or without Sub-postmasters?) when discrepancies arise?

(h) The key point to make here is that, where errors are made, the combined effect of these rules, practices and procedures make it virtually impossible for errors to remain undetected and uncorrected. Of course, problems occur if they are not followed. Most obvious example – false accounting by Sub-postmasters, making it very difficult if not impossible after large shortfalls have been to identify the cause. But this is the result of the Sub-postmasters' own wrong in failing to comply with their contractual obligations. Absurd to seek to hold POL responsible for that situation, or to claim that POL is under a duty to

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establish cause of discrepancies that Sub-postmasters responsible for concealing.

(i) One point that makes me nervous is the possibility that errors made at branch can create apparent shortfalls that are not real, which Sub-postmasters are then forced to cover out of their own pockets. Nowhere do we say that this can't happen, or that it has not happened in any of the cases that have been reviewed so far. Can we make these points? Maybe this is really a point for the factual section, but it would do no harm to allude to the point here, since it is critical to our whole letter.

(j) Much of the information in the existing section 4 goes to these points, but I would reformulate it in the focused way suggested above so that it is clear why particular points are being made I did not understand the point of paras 5.36 to 5.39 at all, for example). and, as I have said, I would put much of the detail supporting these points in a separate Appendix 2. I would also leave some of the information out, or at least explain it better – for example, how does section 5G help us (possible causes of discrepancies), and should section 5H be in a different section?

8. **Section 6** (The relationship between POL and Sub-postmasters) is critical to our case. As to this section:

(1) Sections 6A to 6C are not critical to our case, they simply answer questions Freeths have asked. I would answer those questions in a **new Appendix 3** and just include a very short section 6A in the main body of the letter indicating the questions that are answered in that Appendix and making any points arising out of those answers which are helpful in the context of the rest of section 6.

(2) While on sections 6A to 6C:

(a) Is it really the case that there were no variations between 1994 and 2002 and there have been none since 2010 (para 6.4). And wasn't there also a variation in July 2004 (para 6.9)?

(b) Para 6.3 says that POL's operational manuals form part of the contract. Laying aside the fact that I do not think that this is the correct way of characterising the position, are the operational manuals potential hostages to fortune? Could they

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be used to imply some of the very detailed implied terms that Freeths allege in their section C?

(3) Section 6D – has anyone analysed the jurisdictional position under the Brussels Regulation? Does one of the more specific jurisdictional rules in the Regulation mean that Scottish and Northern Irish Sub-postmasters cannot rely on the general rule of the domicile of the defendant to sue POL in England because it is an English company?

(4) Section 6E –

(a) I would start by alluding back to the points made in the previous section.

(b) Then I would recite all the express terms we say are relevant, including those cited in the letter of claim, and the terms dealing with the requirement that Sub-postmasters comply with our operational requirements (see for example clauses 1.13-19 and 15.2.1). For each term I would include a sentence explaining why it is sensible or reasonable or properly reflects their duties as our agent etc.

(c) I would finish the recitation of the express terms by expressly pointing out that these terms reflect the commercial reality of the relationship. It would be absurd to suggest that they are some sort of sham, as Freeths seem to imply by their citation of **Autoclenz** (but seem to be unable to bring themselves actually to assert). It would be equally absurd to suggest that all or some of them were somehow excluded from the actual contract, as Freeths also seem to imply by their citation of **Interfoto** (which concerns the completely different problem of incorporation by notice).

(5) I would delete Section 6F.

(6) As for Section 6G (implied terms):

(a) See the points made in para 7(3)(a)-(d) and (f) above. Owain and I are in the process of hammering out some conclusions as to the nature of the implied terms we think we should admit (we currently think only the two mentioned above, but we are considering whether the express references to the training and the helpline we provide in clauses 15.2.2 and 15.7.1 and 17.1.4 make it appropriate to conclude that we have an express contractual obligation to provide these things and whether there are implied terms requiring us to do so to a specific standard of reasonableness or similar).

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(b) Other things being equal, I would redraft this section from scratch, explaining first what terms we say should be implied and then what is wrong with the terms Freeths say should be implied. but I'm not sure the budget will cover it. Could Owain's budget be extended so that he can draft it under my supervision, with me making fine tuning amendments at the end?

(c) We should also draft some paras dealing with some of the particular situations in relation to which Freeths allege specific terms are to be implied. In this context, one thing we need to address, either here or in the factual section or both is the situation where shortfalls apparently arise long after the relevant trading period (e.g. because of very late transaction corrections) and the relevant Sub-postmaster cannot identify what has happened. Is it possible that he is being prevented from doing so because Horizon no longer gives him access to line by line transaction data for the period in question? If so, the implied terms that we propose to admit would require POL to co-operate by providing this transaction data so that the Sub-postmaster can perform his duty to account. What do we say about this – do we say it can never happen that this data is really needed for this purpose? This is a big issue for us.

(d) We should make it clear that express powers under the contract – e.g. the power to terminate ion lawful notice – are unqualified and, even if there were a duty to act in good faith or similar, this would not affect the exercise of that unqualified right – there are cases on this.

(e) We should also make it clear that the grounds on which we can terminate summarily or suspend are specified in the contract and, if those grounds are made out, our right to terminate or suspend is similarly unqualified – again, there are cases on this.

(7) As for Section 6H (fiduciary/tort duties), again could Owain's budget be extended so he can draft it under my supervision?

(8) As for Section 6I, we need to think about this. Query whether the **Castleton** burden of proof point only applies to accounts that Sub-postmasters have rendered. And what about the possibility of an apparent shortfall that may be the result of human error and is not real – do we say it is not possible? Sub-postmasters would surely have to prove that such possibilities are possible, but if they do that and there is no longer

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data available to prove what happened, it is not clear to me that they would still have to prove what happened in order to avoid liability for the shortfall?

9. **Section 7** is in the wrong place and needs to be largely rewritten. All the claims (including breach of contract claims) should be dealt with in a section coming after the factual section. Also:

(1) Section 7A – is the best we can do on harassment? Surely there are cases illustrating the big dividing line between the sort of cases identified by Freeths (poor and probably inadequate consumers harassed by utility providers) and our case (a business to business agency relationship in which the principle simply seeks to enforce rights conferred by that contract and/or by the general law). Is it worth analysing the things they complain about and saying how absurd it is the characterise this as harassment for the purpose of the act – e.g. requiring our agents to account for shortfalls, terminating the agency summarily where we believe they are guilty of serious wrongdoing such as false accounting and even theft, terminating the agency on three months' notice which we are entitled to do without cause, bringing a private prosecution where we believe this to be justified etc? If it turns out that the factual basis on which we acted was incorrect, they may have a remedy for breach of contract or maybe even malicious prosecution, but is the Protection from Harassment Act intended to protect entirely different interests in different situations? Query whether more legal research on the Act is required.

(2) Section 7B needs to be rewritten. The big point is that for a claim in deceit, one needs a clear representation made and relied on, and one needs knowledge or recklessness as to falsity, and as a professional matter the lawyer making the claims needs to have material to justify the allegation. What representation was made in this case, by whom at POL, when and to whom? When and how was it relied on by any claimant? What material do Freeths have to justify the allegation that responsible people at POL made the representation with recklessness as to its falsity? If they want to run a case in deceit they must particularise it properly. Save in relation to remote alteration of data, which is awkward for us, they have not even begun to do that and we should tell them that they should put up or shut up, or words to that effect.

Building on these points, we can and should ridicule their suggestion that certain claimants can rescind the settlement agreements we have made with them.

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(3) Section 7C: Further research is needed to determine two questions – (a) whether POL and (b) whether a private prosecutor can be liable for misfeasance in public office. Surely there is more learning out there than is indicated in the early draft research note produced by Bond Dickinson last week.

(4) Section 7D: This section should set out the ingredients of malicious prosecution – including an acquittal either at the trial or on appeal! By all means say that they have not properly particularised their case, but we need a clear statement that POL has never prosecuted a former Sub-postmaster for a charge for which it does not believe there is evidence to support the charge.

(5) Section 7E: More research needed here. Points to be made in this section include – the suggestion that POL conspired with its board of directors or with the people through whom it acted (who acted in the course of their employment by POL) is absurd as matter of law. The suggestion that it conspired with Fujitsu is absurd as a matter of fact.

10. **Section 8**:

(1) This section seems out of place to me. Would it be better to include this information (hopefully expressed more concisely) in a **new Appendix, possibly in around the Appendix 2 suggested above**?

(2) Section 8E seems to me not to belong in the same section as sections 8A to 8D. Where in the letter of claim does Freeths claim that the POL/Fujitsu contract gives the parties an incentive to behave badly? Should this point not be addressed – **maybe in a separate new Appendix but probably not** – in the corresponding part of the letter of response? Incidentally, the points made in this section seem quite unhelpful to me – have I misunderstood the position?

(3) Section 8F also seems to me to be in the wrong section (Richard Roll allegation). Why not just address it in the factual section?

11. **Section 9** –

(1) I do not understand why this section is at this point in in the letter. As with Panorama/Richard Roll, should we not address the quality of their evidence where we address their factual allegations (currently section 10)? If so, given the length and diversity of the section, I am in two minds whether it be a good idea to address the

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points we want to make relatively briefly in the body of the letter and allude to a **new Appendix** where they are dealt with more fully?

(2) Some non-structural comments: Para 9.4 – the formulation "risky to rely" is not helpful, we need to be more measured and emphatic. Paras 9.10 and 9.13 – do these paras go too far? Para 9.16 – need to emphasise we are only talking about 3 categories of documents. Para 9.17 is confusing - does SS have privileged material or not? Para 9.23 – are we really saying SS were lying?

12. **Section 10** – this is the second critical section, after section 6. It is still a work in progress but my immediate comments are:

(1) I would rewrite paras 10.1 to 10.4, once the rest of the section is finalised. And I would go large on the complete absence of any particularity in their case.

(2) How does the table in para 10.4 help us?

(3) We need an early section emphatically pointing out that no actual system flaw in Horizon software or hardware has ever been identified, let alone substantiated. We are now in litigation; generic statements will not do.

(4) Somewhere in section 10, we also need to deal with remote data alteration and how it has no relevance to any claimant.

(5) Para 10.5 et seq (training section): Some random thoughts:

(a) Make it clear that the standard of our duty was that which was necessary to enable Sub-postmasters to operate Horizon. There is always room for improvement, and the training has been improved over the years. But no breach of contract.

(b) Early on, is it not worth mentioning the following? We've trained tens of thousands (?) of Sub-postmasters and assistants, the overwhelming majority without any significant problems. That would not be possible if the training we offered was wholly inadequate, as they now claim.

(c) Is it also worth making it clear that generic complaints are easy to make, but the very few specific claims about training they make (duration of training sessions etc) are wrong?

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(d) Is it worth relying on sections 15.2 and 15.7 – Sub-postmasters' responsibility to ensure assistants get sufficient training? And more generally on the Sub-postmasters' duty to ensure only suitable staff are employed? And to the extent that Freeths are claiming that their clients were not up to the task of doing what they agreed to do in their contracts, is it worth mentioning that POL cannot be held liable for this. They did not owe any Sub-postmasters a duty to protect them from themselves by not appointing them in the first place?

(6) Para 10.21 et seq (support) –

(a) As per para 12(2)(a) above).

(b) The allegations of false The "only one experiencing problems" allegation – can we say more about this? Isn't context critical? Aren't there all sorts of contexts in which this would be an entirely appropriate thing to say? Because these complaints are devoid of all context, it is impossible even to assess them?

(c) As per (b) above in relation to the "it will sort itself out" allegation?

(d) Has the point been made sufficiently clearly that, if one takes a step back and tries to understand what Freeths are really saying, it seems to be that POL had a policy of telling all its call handlers to tell Sub-postmasters things that were not true, in circumstances where POL had no belief that those things were true. On the facts, such a case beggars belief. What possible incentive would POL have for doing this? And why on earth would call handlers be willing to say it, if it was not true?

(e) As per (d) above re- the allegation that call handlers instructed Sub-postmasters to falsely account in their daily and monthly returns etc. They would never have done such a thing. All sub-postmasters know that it is fundamentally wrong to do such a thing (refer to the relevant provisions in the contract and maybe also the provisions in training materials making it clear). It is never excusable.

(7) Paras 10.36 et seq (investigative support) –

(a) I'm not sure I like the title of this section.

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(b) Para 10.40 requires reconsideration – are we saying that we could have obtained more information which might have exonerated a Sub-postmaster but we were allowed not to do so because it was too much of a bother, and that we were therefore entitled to insist that Sub-postmasters repay amounts that they may well not have owed? This cannot be right.

(8) Para 10.55 et seq –

(a) Should this section not come before the previous section?

(b) This section needs squarely address the issues identified in para 8(6)(c) above, this is a bog point. If they needed further information to account to us, they can legitimately say that we should either have provided it or we should have written off the relevant discrepancy because it was not worth investigating further. So the question is whether we accept that they needed further information from us that we did not provide. If we do not accept this, we need to say so and explain why.

(c) Para 10.59 – this needs to be expanded. I thought the point was that Sub-postmasters have access to line by line data for all transactions, including card transactions, either on Horizon or at least on paper. Maybe I don't understand the complaint they are making – I certainly don't understand our answer to it.?

(9) Paras 10.61 et seq (sections 10G and 10H) –

(a) I do not understand the structure here. From dealing with certain general themes (training, support, what happens when discrepancies arise, investigations, access to information) we suddenly start talking about particular aspects of the business. Why then and there? There may well be a good reason – for example, it may well be a good idea to go into the ATM issues because we are on strong ground here and SS is on weak ground (Andy suggested on the phone to me last week that more detail on the ATM example might be merited). But a proper explanation for doing so should be given, so the reader understands why attention is suddenly jumping to this sub-issue and why here. Query whether **a new Appendix or new Appendices** would be the proper place for these sections.

(b) Para 10.43 – only the majority of Scheme cases? What about the rest?

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(10) Paras 10.72 et seq (Conduct of Prosecutions) –

(a) Para 10.73. How is it not clear? It is fairly clear to me what they are saying – malicious prosecution and misfeasance in public office. Para 10.72.2 almost seems designed to make their case look less clear than it is.

(b) Para 10.75 – "are held"? by whom?

(c) Para 10.76 – are we talking about the wrong time period here (something POL has been accused of before)? When was POL's policy adopted? If only recently, are we shooting ourselves in the foot by saying this is good practice?

(d) 10.78 – "principally the deterrent effect" – big hostage to fortune. Why say it? There are lots of good reasons.

(e) 10.81 – surely they are aware – haven't they referred to it themselves?

(f) 10.87 – needs rewriting. We have a good case here, but the points made in these paras seem quite tenuous. And never ask rhetorical questions as in 10.87.1 – they give Freeths an opportunity to answer them is a way we won't like.

(g) Paras 10.88-96 on Hamilton. This is one of the few specific examples they give so it is important we deal with it strongly. I think we can do better. Also:

(i) I do not understand the emphasis in para 10.93, please explain its significance.

(ii) Para 10.94 is a hostage to fortune – we appear to be placing our case squarely on the proposition that we obtained new evidence after May 2008, but I'm not sure that is true. It is not what we say in these paras (indeed, para 10.966 suggests we obtained nothing new).

(iii) What about the plea bargain? And what about the allegation that we induced them to agree not to mention problems with Horizon?

13. Note that, immediately after the factual section (section 10), we should have a new claims section drawing together the threads on what we say in relation to each cause of action alleged (see para 9 above). Query whether this section could usefully incorporate what is currently a separate "excluded cases" section (section 12) (I do not have a decided view).

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14. **Section 11** (loss and damage):

(1) The early paras need to go larger on how unfocused Freeths' case is and how they have not attempted to explain their case on causation (some examples could usefully be given to illustrate the point). Nor have they factored into their analysis important points such as that we were entitled to terminate any contract without case on three months' cause and that it was explicitly agreed that we were under no obligation to help Sub-postmasters to extract more value from any sale of their businesses by offering a Sub-postmaster appointment to their prospective purchasers.

(2) Paras 11.3 and 11.4 may go too far – are all the causes of action necessarily limited by the 3-month point (e.g. malicious prosecution)? More generally, when discussing what forms/heads of damage are recoverable, we need to be clearer about what causes of action we are talking about (e.g. in para 11.12).

(3) Para 11.8 should be reorganised and expanded and its emphasis changed.

(4) Para 11.112 –

(a) More research needed on stigma damages in contract (the old **Addis** case, the change effected by **BCCI** etc).

(b) Note that these points do not apply to tort claims such as malicious prosecution and possibly also conspiracy and misfeasance in public office, for which research is also needed.

(5) Do not ask the question in para 11.13.

(6) Para 11.16 seems to be to be wrong. If our prosecution destroys their reputation, causes their business to be lost and causes them to become ill, would they not have substantial claims against us (although possibly not loss calculated on the footing that we would have allowed their appointments as subpostmasters to have continued indefinitely - Is more research needed, including into the principle of minimum legal obligation?

(7) Para 11.18 – is Freeths even claiming false imprisonment?

15. **Section 12** – excluded cases:

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(1) Should we not include claims made by Sub-postmasters whose appointment we terminated on lawful notice, such as Bates? Or should this go in the claims section suggested above? Should this section 12 go in that section too?

(2) Para 12.1 – claims barred by limitation. Need to factor in the things POL said about suspending limitation during the mediation scheme.

(3) Para 12.5.2 – … the statement was ever made or made in a context which was misleading or which caused any Sub-postmasters to act in a way which caused them loss?

(4) Paras 12.10-11 – this should be approached differently. There is no cause of action for malicious prosecution unless and until any conviction is overturned. Could issue estoppel affect a claim for misfeasance? Para 12.11 adds nothing and should be deleted.

(5) Para 12.13 – surely better to put these claims to one side until the CCRC has decided whether to take the convictions to the Court of Appeal?

(6) Para 12.16 – I would change the wording here. Why wouldn't the false statements we have made about remote data alteration give them the misrepresentation they might need to support a claim for rescission?

16. **Section 14** (GLO). Here, we will have to address some of the issues raised in our GLO letter, including what issues are common or related etc. Also, I think we should emphasise the **Prudential** case and the particular importance in this context of proper Particulars of Claim which pleads the very serious allegations made about POL's conduct with full particularity.

17. **Section 15** (Official Secrets Act). This section is too mealy mouthed. The contract plainly goes further than justified by the Act – the wording quoted in para 15.2 is awful and I would rather not cite it. Can't we say something like POL has no intention of seeking to claim that the relevant contractual provisions do anything other than give effect to the Act and that, in this case, POL is not aware of any information at issue in this case that would be caught by the Act?

18. **Section 16** (non-victimisation). I do not think that we have made POL's position clear. Although I understand the client's natural unwillingness to say anything which could tie their hands, I see no reason not to make a few points here, namely (1) as we have made

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clear time and time again, we never have victimised anyone and no evidence has ever suggested indicating that we have, hence no provisions about this in the scheme: (2) we cannot give anything like the assurance they are seeking, since it would prevent us from applying our ordinary practices and policies as and when shortfalls arise, and would also stop us from taking any action or even seeking to recover debts in the event that any statements of case, documents or evidence from any claimants disclose any wrongdoing on their part or debts that they owe; but (3) we have no intention of subjecting any Sub-postmaster to extraordinary treatment merely as a result of his making a claim in this case?

19. **Section 17** (disclosure): We can probably be more emphatic about the remarkable scale of the disclosure they are seeking and how it is obviously a fishing expedition. Before giving any disclosure, should we not ask them to confirm that CPR 31.22 applies to the documents we give them, or that they will undertake in terms of CPR 31.22?

20. **Section 18** (ADR):

    (1) Is the point in para 18.3 inconsistent with what we previously said, in the early stages of the mediation?

    (2) Para 18.5.2 – I don't like the "primarily aimed" language. We are either making the offer to former Sub-postmasters only, or we are making it to all claimants. If the former, would it be better to say we are prepared to discuss similar terms with existing Sub-postmasters, but would need to investigate their individual positions first.

    (3) Para 18.8 – this can and should be watered down. I can see why we see no point in a further mediation with claimants which have already gone through the scheme. But with existing and future claimants who haven't, should we not reserve our position, perhaps expressing doubt that there is any point in engaging in mediation until we have seen a properly particularised articulation of their case, addressing all the deficiencies and other problems identified in this letter?

21. **Section 19**: Are there any specific questions that this letter clearly does not deal with?

Anthony de Garr Robinson QC

One Essex Court

5 July 2016