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LITIGATION PRIVILEGE***Bond Dickinson***Post Office Limited****Horizon Risks****Horizon**

Horizon is the electronic point of sale IT system used in all Post Office branches. It includes hardware being the counter-terminals in each branch as well as the servers and data centres. The Horizon software is a bespoke program developed by Fujitsu for Post Office. Fujitsu continue to support, upgrade and develop Horizon.

In essence, Horizon is an electronic accounting system. It tracks every transaction made in a Post Office branch. It also logs the levels of cash and stock held in each branch.

Its core principle is that of double entry bookkeeping. For example, if a product is sold for cash this would in most cases result in a reduction in a branch's stock levels of that particular product line and an increase in the amount of cash recorded as held at the branch. It should however be noted that the range of products sold by Post Office is very diverse. These include financial products, insurances, banking facilities and a number of Government services and benefits. These all sit alongside core postal services. The transaction journey for a particular product is therefore unique to that product and can be complex. Horizon also connects to a number of other systems, both internal to Post Office and external. In particular, Horizon connects to a number of external banking systems for the purposes of offering banking facilities to customers.

Each branch is responsible for logging the transactions conducted within that branch onto the Horizon system. It is also the branch's responsibility to ensure that it collects the correct level and type of payment for each product and properly provides the correct product to a customer. On a regular basis, and at least one a month, branch staff are required to undertake a reconciliation of their Horizon records. This involves undertaking a manual hand count of all the cash and stock in the branch and comparing the actual levels of cash and stock against the recorded levels in the Horizon system. On occasions, there may be discrepancies between the actual cash and stock levels and the recorded cash and stock levels. These discrepancies can be either shortages or surpluses.

There are nearly 12,000 branches in the Post Office network. The majority of these are run by subpostmasters. Subpostmasters are individuals who are contracted to run Post Office branches. They are individual contractors and not employees. Under the standard subpostmaster's contract, a subpostmaster is liable for any shortages in cash or stock in their branches. If a shortage is discovered, the subpostmaster is required to either (1) physically place more cash into the branch from their own funds or (2) settle the shortage centrally with Post Office – which means that the shortage is added to the subpostmaster's account with the Post Office and becomes a debt which the subpostmaster owes to Post Office. Where there is a surplus, the subpostmaster is entitled to keep the surplus.

In some cases, errors in branches can lead to losses (potentially up to hundreds of thousands of pounds). This can result in a subpostmaster's contract being terminated and/or then sued through the civil courts to recover the outstanding loss. Where Post Office discovers evidence of criminal wrongdoing, the subpostmaster may be criminally prosecuted. Typical criminal prosecutions are for either theft or false accounting (where a subpostmaster has declared transactions or stock or cash levels within the branch which are not true). Post Office sometimes refers these prosecutions to the police/criminal prosecution service. However, in the vast majority of cases, Post Office undertakes a private prosecution of the subpostmaster.

Challenges to the Horizon system

Over the last few years, there have been a growing number of accusations from subpostmasters that the Horizon system is unreliable. They allege that errors in the Horizon system have falsely created losses that do not actually exist. Some subpostmasters have gone further to allege that Post Office has wrongfully recovered debts from subpostmasters or wrongly prosecuted subpostmasters based on flawed information from the Horizon system. It should be noted that the transaction records from the Horizon system form the fundamental foundation of any civil recovery or criminal prosecution.

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This growing discontent ultimately led to the formation of a pressure group called the Justice for Subpostmasters Alliance (**JFSA**). The JFSA managed to garner interest from a group of MPs lead by the Rt Hon James Arbuthnot MP. Post Office, as a company which is beneficially owned by the UK Government, came under increasing pressure to investigate and resolve JFSA's and other subpostmasters' allegations about the Horizon system. This ultimately lead to Post Office setting up an independent inquiry into the Horizon system.

The Inquiry is a private inquiry (it is not established under any law or action of Parliament) and was set up in June 2012. It is led by a company called Second Sight Support Services Limited (who are independent forensic accountants and fraud examiners). The Inquiry's scope was agreed with Second Sight, JFSA and James Arbuthnot MP. Second Sight was tasked with investigating whether there are any systemic issues and/or concerns with the Horizon system, including its training and support processes.

Second Sight rendered its Interim Report on 8 July 2013. Its preliminary conclusion was that it had so far found no evidence of system wide (systemic) problems with the Horizon software. However it did highlight a number of areas in relation to wider support and training around the Horizon system that required further investigation.

Although the Report indicates that the Horizon system is fundamentally sound, it has not given Post Office a clean bill of health. This has therefore led to increased pressure from MPs on Post Office and increased activity by JFSA.

Risks to Post Office*Prosecutions & Convictions*

As noted above, where circumstances warrant, Post Office prosecutes subpostmasters who have acted criminally. The basis of these prosecutions is often found in the transaction records recorded in Horizon. As a result of Second Sight's investigation/Interim Report, Post Office is reviewing all its criminal prosecutions over the last three years to identify any cases where a conviction may be unsafe.

In particular, the expert evidence of one Post Office witness, Dr Gareth Jenkins of Fujitsu, may have failed to disclose certain historic problems in the Horizon system. Under the criminal prosecution guidelines, Post Office has an obligation to disclose (even retrospectively) this previously undisclosed information to subpostmasters' defence counsel. Post Office is required to make these retrospective disclosures where the additional information (ie Dr Jenkins' knowledge of historic, but now resolved, problems with Horizon) may have undermined a prosecution case or assisted with an accused's defence.

Civil Risks

In the event that a material problem was found in the Horizon system, this may undermine Post Office's ability to recover debts from subpostmasters. It could also give rise to some allegations that Post Office has unfairly terminated subpostmasters' contracts.

Although, the law firm Shoosmiths threatened to bring a group action against Post Office for problems in the Horizon system, this did not materialise. The claims threatened by Shoosmiths were for breach of the subpostmasters' contract. In practice Shoosmiths wrote four letters of claim on behalf of four different subpostmasters and issued proceedings in one case. Those proceedings were subsequently struck out as being time barred. Nothing has been heard from Shoosmiths in the last 12 months. However, it is understood that Shoosmiths has around 120 subpostmasters on a register of possible claimants, though as yet no further attempts at litigation have been threatened.

Criminal/Civil Crossover Claims

In the event that a conviction was unsafe and was later overturned by the Criminal Appeal Courts, this could theoretically give rise to a wide range of possible civil claims against Post Office. For example:

- 1 False imprisonment – unlikely, as these types of claims are usually made against the State rather than the prosecutor.

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- 2 Malicious prosecution – this civil remedy could be brought against Post Office where Post Office is privately prosecuting a subpostmaster and terminates that prosecution midway through a case (before a Court gives its verdict). The subpostmaster would need to show that Post Office acted maliciously.
- 3 Breach of the Data Protection Act – it is arguable that the data held in the Horizon system is classed as personal data and therefore subject to duties under the Data Protection Act (DPA). Under the DPA there is the possibility of individuals seeking personal remedies for a breach of the DPA.
- 4 Defamation/malicious falsehood – a subpostmaster may seek to argue that Post Office has defamed that subpostmaster in alleging that they have acted criminally.
- 5 Protection from harassment – a subpostmaster may try to say that Post Office's pursuit of a prosecution against a subpostmaster was a form of harassment.

The range of possible claims is wide and the remedies for each cause of action are very different (with some allowing damages for distress, inconvenience or harm to reputation, as well as the more usual financial losses). The above examples are not exhaustive. It is therefore impossible to predict at this stage what types of claim may be advanced by subpostmasters should they be subject to unsafe convictions or prosecutions.

D&O Risks

At a meeting with a senior representative of JFSA, it was indicated (in a passing comment) that the JFSA was aware of some subpostmasters investigating the possibility of bringing claims against directors and officers of Post Office. No further detail was provided to support this allegation.

We have considered whether a claim could lie against a director or officer of Post Office. We think this is unlikely, as it will be difficult for a subpostmaster to pierce the corporate veil. Most of the above claims, if brought and if viable, would be against Post Office Limited as a company. Nevertheless we can envisage the following possible scenarios involving directors and officers:

- 1 A claim against a director or officer for defamation if a director or officer has made comments specifically about a particular subpostmaster.
- 2 A subpostmaster brings a claim against Post Office Limited and, without good reason or cause, includes a director or officer as a named defendant in those proceedings.
- 3 Post Office's ultimate shareholder is the UK Government and the UK Government could, theoretically, bring a derivative action against a director for breach of his/her director's duties. As yet we have not seen any evidence to suggest that there has been such a breach of duty.
- 4 Being a company beneficially owned by the UK Government, and given the involvement of an interested group of MPs, there is the possibility that a director or officer could be called before a Parliamentary committee.

There may be more possible scenarios – these examples are not exhaustive.

Summary

Post Office is in a highly contentious situation and therefore finds itself open to litigation from a number of different sources. It is also quite possible that Post Office's directors and officers may find themselves caught up in this litigation, even though at present a claim against an officer or director would not appear to have any merit.

**Bond Dickinson LLP
15 August 2013**