

POST OFFICE
"BLACK HAT REIVEW"

NOTE

Introduction

1. I have been asked to review the claim made by the Claimants and identify ways in which they could formulate their case which are likely to cause Post Office the most difficulty. I am asked this because the structure of the claim is confused and contains irrelevant and hopeless elements. I also identify some obstacles which would be faced by the Claimants if they presented their case in the way I suggest. In writing this Note I have assumed that the reader has a good working understanding of the claims made in the action- and so do not seek to summarise them.
2. Put broadly, the claim is that the deficits upon which Post Office relied to terminate the contracts of the claimants (and which deficits (in many cases) were repaid to the Post Office), were not real deficits at all. That they were paper deficits which arose due to a wide range of different problems with the Post Office system of operating – the responsibility for which the Claimants put at the door of the Post Office.
3. Although multifarious – and covering a broad sweep of time, the single string running through them- and in some cases linking them, is the Post Office computer system called "Horizon"- at least from its introduction in 2000. The Claimants allegation in relation to Horizon is nuanced. It is not that there is a systemic problem or failure in Horizon – they could not say this given that it worked at the material time (and still does) for many thousands of other Postmasters. Their claim in relation to Horizon is that there were "bugs" in the system that caused the deficits to occur.
4. It seems to me that based on the work done so far, that this case is unlikely to get very far once disclosure is given their expert develops a good understanding of Horizon. This is because the "bugs" that have been identified are very limited in scope and application and cannot reasonably have caused the very wide range of deficits which are the subject of the claims. At the moment paragraph 22 of the APOC simply says that, "...prior to disclosure and expert evidence, the Claimants are unable to provide detailed particulars of bugs, errors or defects which were or may have been the cause of any discrepancies or alleged attributed to them.....". Quite.
5. Similarly the broad claim – epitomised by paragraph 94A of APOC that, "...the Defendant failed to provide a system which was reasonably fit for purpose" – runs into immediate difficulties given that it was fit and clearly worked for the overwhelming bulk of Postmasters.

6. But I have identified two broad elements that were I presenting their case for the Claimants I would concentrate upon. The first of these seeks to side step the ability of Post Office to demonstrate that its computer system operates satisfactorily (by and large)– by focusing on the human elements of the system which are (by definition) easier to attack and more difficult (particularly at a distance of time) to defend comprehensively. And to allege a particular obligation directed to tailoring training and supervision to the (differing) abilities of the whole range of postmasters that existed– good, bad and indifferent.
7. The second seeks to shine a bright light upon the difficulties caused by there being suspense accounts into which miscellaneous sums of money generated by the operation of Horizon are placed.
8. The first mentioned area is the non-computer aspects of the “Horizon System” . This is subject to human intervention and the difficulties of proof one way or the other. The Claimants are able to do this as, in effect, they contend that the “Horizon system” – includes everything to do with it – including (a) the initial training, (b) ongoing training and (c) the helpline. These areas, it seems, to me are more susceptible to challenge and perhaps harbour more risk for Post Office in this litigation than the actual Horizon computer system itself – if early indications on the Horizon system prove to be correct. I explain my reasoning and the way I would present the case on this basis below.
9. The second mentioned area is the suspense account(s) – into which, as I understand it sums inexplicably produced by the Horizon system are put when there is no other place for them. As I understand it, it is very often difficult to determine from where such (surplus) sums are derived- or why. This then opens up, forensically, the operation of the Horizon system – and whether a system that can inexplicably produce surpluses can also (equally inexplicably) produce deficits. And then there will be a desperate attempt by the Claimants to draw a line between the two – to ask the question whether the “deficits” relied upon are “real” deficits if the entire workings of the system are not assured. Again, I expand on this below.

The Horizon System

10. The initial selection of candidates for Postmaster appointments, their initial training, ongoing training, and helpline are all matters which were in the direct control of Post Office. This became more important when Horizon was introduced in 2000 – when it is said that a more complicated computer based system was introduced (in place of the mainly paper one) and was imposed upon Postmasters.
11. My sense, in reading through the materials is that the work of a Postmaster involved a significant number of interactions with the Horizon computer system and the delivery of an increasing number of (it will be said –complex) products alongside the normal post office business of post and paying benefits etc. And all of this through the Horizon system. The interaction of the main Horizon system with other products was not always seamless and there was a need for thoroughness and attention to detail to operate them accurately. Examples are the lottery, foreign currency exchange and cash point facilities. It is the case that the operation of these various facilities through the Horizon system required a

competent operator if mistakes were not to be made- and one who was computer savvy – at least from 2000.

12. Put broadly, the reason for deficits is likely to arise from two main causes –and there may be some overlap:

- (1) Theft of monies – deliberate unadulterated fraud. I suspect that this will represent a minority of claims.
- (2) Incompetence by Postmasters: where it will be said that they did not fully understand the operation of the system- particularly the Horizon system when introduced and the various products that were added. They started producing deficits – and then did not know how to reconcile/deal with the problem. And then (crucially) they produced false accounting returns to cover up / put off the difficulty.

13. The first of these eventualities needs little discussion- if the court determines that (any of) the Claimants have stolen monies then such Claimants will not succeed.

14. The second eventuality, sets the context for where I would expect the Claimants to concentrate their attack. Given that there are (only) 562 Claimants who allege problems with Horizon, compared to some 60,000 users over some 11,500 branches (processing some 6m transactions a day) – the attack cannot sensibly be a wholesale broadly based one upon the computer system or the training and helpline as a whole, given that so many users operate the system without any perceptible problems. To get any traction, they will, it seems to me, need to focus, more particularly, on the attributes and experiences of the 562 and identity obligations owed to persons *such as* them, and how those obligations have been breached.

15. The basic narrative could be as follows:

- (1) The Post Office had an obligation only to appoint as Postmasters persons who had the ability, knowledge and skills to operate a complicated computer based system such as Horizon and to ensure *existing* Postmasters were properly trained on it. That system is said to have a low level of “error repelency” and it will be said is complicated and provides plentiful opportunities for the making of manual errors when operating it - and the various added products referred to above exacerbated matters. Furthermore, it will be said that in the event of operator error Horizon was not user friendly, and, in particular, the cause of errors/deficits was difficult to determine - unless caught immediately. These features, it will be said were exacerbated by the alleged requirement of the system that Postmasters “accept” deficits within short order – and the advice allegedly given by the help line to that effect.
- (2) In fact the Post Office appointed persons who were not suitably qualified (whether before or after initial training) and yet such persons were allowed to operate as Postmasters largely unsupervised.

- (3) Taken together, neither the Horizon system, the initial training, the ongoing training nor the helpline – were such so as to deal with this deficiency which was the responsibility of Post Office- as were (therefore) the deficits.
- (4) This was exacerbated by the failure of Post Office to neutrally investigate the cause of deficits or communicate with the Postmasters sufficiently- when they did arise and were notified to Post Office.

16. This narrative will be underpinned:

- (1) By the express terms in Part 2 of the NTC pursuant to which Post Office offers training to the Manager and Assistants both initially and can require both the manager and assistants to undergo further training if it, “....reasonably considers such training to be essential.....”. Both generally and in relation to new products/processes. To similar effect is paragraph 5 of Section 24 of the SPMC – which talks in terms of training and “sufficient levels of operational and administrative support....”.
- (2) By the express term at paragraph 1.6.1 of the NTC to provide a helpline to enable the Operator to consult with the Post Office about the running of the Branch.
- (3) By implied terms (not yet advanced):
 - (a) Which provide that Post Office have an obligation to provide such (initial) training, ongoing training, supervision and operational support *to match the understanding and skill levels of the appointee*. The last part is important – as clearly the training and support provided by Post Office worked for the overwhelming majority of people- and so it is very difficult to see how a Court could find that it was inadequate at a general level- or not “fit for purpose”. Their present case, as pleaded, does not begin to meet this difficulty.
 - (b) Such a term – as I suggest, seeks to place a duty on Post Office to assess the different initial skill levels and attitudes of potential Postmasters and to provide a tailored training and supervision system in response– and not simply to accept anyone who puts themselves forward put them through basic training and then let them lose on a system which will be presented as in effect, a dangerous one/ a trap (financially), for the uninitiated. And, thus, to place a greater duty of training, supervision and support upon the Post Office in respect of those that need it. It will be said that Post Office have a choice who to appoint and to place into the position of being responsible for what will be said to be a complicated intricate operating system- with harsh financial results (and it will be said loss of liberty) - if they get it wrong.
 - (c) The existing pleaded implied terms do enter into this area but are more generic than this – e.g. at paragraph 64 APOC “...adequate training and support” – particularly when new services are introduced. The “adequate” does not seem to me to begin to get into the specified duty the Claimants would need to advance if there were to

run this point. The new implied term at 63A gets nearer to this target – but then seeks to base itself erroneously on a “supply” under the Supply of Goods and Services Act 1982. So thus far, this is not ground they have got into.

- (d) Thus if they followed this more targeted approach, the Claimants would thereby have – through a combination of express terms, and more focussed implied terms, a framework to attack the experiences of individual Postmasters with respect to the non-computer aspects of the Horizon system – i.e. training, supervision, and support. This is Postmasters who on this basis are (basically) honest but incompetent.

17. However, there are a number of problems with this suggested approach:

- (1) The implied term suggested, would, in substance be a term requiring Post Office to save the potential postmaster from themselves- and for Post Office to be in a position to identify with certainty, the differing talents and susceptibilities of potential postmasters. And to do so both during formal training and on the job training in branch – when (in the latter case) Post Office would not be present. In particular, it seems to me that such a term could only place a duty on Post Office to behave “reasonably” in this regard. I do not know the details of the training and whether there is a “pass” or “fail” and/or a marks system- but I suggest that this is looked at. At all events, I very much doubt Post Office would appoint a post master to that (permanent) position if, having completed training, they did not think that he/she was up to the job. But, what such an implied term would require would be a nuanced response by Post Office to training- further training and supervision/helpline, depending upon the sophistication of the Postmaster – as demonstrated during the training period. So, not a one size fits all approach – where, by definition, some get left behind and are subjected to the vicissitudes of the system.
- (2) Such an implied term – would more naturally fit in the employer/employee context (e.g. not over-promoting an employee to a position of stress or difficulty for which he/she was not capable) – rather than an arm’s length/commercial franchisee type relationship (such as the present) – where the business of Postmaster is very often run alongside other businesses such as the sale of stationary etc. However, it could (at a stretch) come within the widely stated “relational contract” rubric advanced by the Claimants, and is an area where I think we need to be diligent when reviewing the materials. Further, an attempt might be made to fit such a term within the *Stirling v. Maitland* /necessary co-operation implied terms- that we accept. Indeed, I note that at paragraph 3(a) of our current draft Response to the Claimants recent RFI we accept that the *generic* implied term about “adequate training” (paragraph 64.1 APOC) is within the *Stirling v. Maitland* implied term. We need to be diligent to ensure that we only ever accept an obligation to provide a “reasonable” training regime – and nothing more individualised or tailored.
- (3) Finally, the obligation to train and supervise sub postmasters is expressly placed upon the Postmaster – see e.g. Section 15 SPMC. But, I suppose it could be said that if the

training of the Postmaster was not appropriate – in breach of contract – then it is inevitable that the training of sub-postmasters would necessarily also be sub-standard. Therefore, when it comes to causation – it will be said – that it does not matter whether it was the Postmaster or the sub-master that was responsible for the relevant deficit caused by any alleged failure in training.

18. A further significant problem with this type of analysis results from the *deliberate* misstating of accounts by Postmasters- which I understand happened in many cases. The problem they have is this. If they were to run a case that Post Office should have identified that these particular individuals (Claimants) needed more training and supervision and a more helpful (user friendly) helpline – than the majority (who had no problems) – then they run into a serious difficulty when they start to misstate accounts. It might be thought to be one thing – to suffer from difficulties from failure to comprehend / understand training provided – it is quite another to react to that by misstating accounts. Not only is this dishonest – but it has the dual effect of:
 - (a) Masking the lack of understanding of the system by the Postmaster – on an ongoing basis. This prevents Post Office from being made aware of the difficulties being suffered by the Postmaster – and from being able to provide such support/re-training that might be appropriate.
 - (b) Deprives – through the effluxion of time – and numerous subsequent transactions – of the evidence from which the original error/problem could have been discerned- again on an ongoing basis.
19. These points have a direct impact on:
 - (1) Causation for the deficits – on an ongoing basis – and on one view, the true cause of the loss.
 - (2) At the very least – provides the grounds for contributory fault/loss to be argued.
20. I would expect a court to be underwhelmed with the point the Claimants make that they were obliged or pressurised into submitting false accounts/ false declarations of cash/stock- in the absence of compelling evidence to that effect. However, if the Claimants come across as clueless and untrained – then they might start to get the Court to, at least listen seriously, to these points.

The suspense account

14. The Claimants case on the suspense account is presently contained in two paragraphs – paragraph 38 and 39 AGPOC. And as yet is undeveloped. They simply say that there were suspense account containing unattributed surplus's – which they say included surplus's generated from branch accounts. That these surpluses represented (at least in part) the shortfalls suffered by Claimants (on their branch accounts) with the result that the "shortfalls" in their branch accounts did not represent "real" losses to Post Office.
15. As I understand it there are a number of different suspense accounts, into which, unallocated sums produced by the Horizon system are put. And, that it is very often difficult to determine from where such surpluses have come.
16. I would expect the Claimants to seek to open this up – once they have a better idea of the scope/size of this problem and its likely cause(s) – with the assistance of their expert. This then opens up, forensically, the operation of the Horizon system more generally – and the Claimants will be asking whether a system that can inexplicably produce surpluses can also (equally inexplicably) produce deficits.
17. Whatever the niceties of burden of proof/pleadings – this is an area where we can expect a good deal of probing once their existing attack on the Horizon system per se, fails to generate results. In a sense, they will try and put us in a position where we have to demonstrate that no part of the amounts in the suspense account(s) correlate to the shortfalls suffered by the Claimants in their branch accounts. This is, as I understand it, likely to be difficult.

David Cavender Q.C.

18 January 2018