

From: David Cavender <[GRO]>
To: Andrew Parsons <[GRO]>
Cc: Owain Draper <[GRO]>, Gideon Cohen <[GRO]>, Amy Prime <[GRO]>
Subject: RE: Implied terms to be conceded [WBDUK-AC.FID26896945]
Date: Tue, 16 Apr 2019 18:55:15 +0000
Importance: Normal
Inline-Images: image319cab.PNG; image432e91.PNG; imageb5bf44.PNG

Andy,

Many thanks for this.

I think it depends on how far "...transactions using Horizon..." goes. My assumption was that Horizon was effectively a point of sale system and so the transactions using Horizon covered by this term would be those carried out by SPM'S in branch and would not necessarily extend to all the onward transactions PO does with its clients. From your question - it seems as though my assumption is incorrect and the two species are in practice one- in which case we would need to narrow down the wording to make that point clear.

Standing back from the wording of what is their implied term - on the face of it - it is difficult to argue against duty to do that work "accurately" - in the real world.

That said, the approach urged by DN and AG is not to actually concede any of these implied terms - whether as narrowed by me or at all. And to seek to hold the line at Necessary Co-Operation and Stirling v. Maitland and then make warm noises about the possibility of some of these "necessary" implied terms (if sufficiently defined /narrowed as i have suggested) coming in under the umbrella of those Agreed Implied terms- in the skeleton argument. As such, points such as the one you raise should become less stark ?

Best,

D.

From: Andrew Parsons <[GRO]>
Sent: 16 April 2019 16:07
To: David Cavender
Cc: Owain Draper; Gideon Cohen; Amy Prime
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David

I've been thinking about the implied terms to concede, in particular:

"properly and accurately to effect all transactions using Horizon and to maintain and keep records of such transactions for a reasonable time"

The second bit (to keep records) is fine.

The first bit is more difficult, because it really makes no difference in branch whether PO effects the

transactions with the end client or customer. But doing that work accurately is very hard. Also, this would fetter PO's ability to conduct business with its clients. What if it has a big dispute with a bank and wants to do some deal with it that results in some transactions being written off? PO would be in breach of the SPM contracts.

I also think this implied term waters down our argument on liability for losses. Our case is that an SPMs liability for losses is limited to the losses shown in their accounts. PO does not need to show that the loss in the accounts reflects a real financial loss to PO. Otherwise it would need to reconcile every loss in every branch with a corresponding loss with a client or customer. That task would be very burdensome, probably impossible.

I think we need to drop this bit of this implied term.

Thoughts?

A

Andrew Parsons
Partner
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