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TX/RX NO. 1461

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## SLAUGHTER AND MAY

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## FAX TRANSMISSION

Date 22nd November, 1999

Total pages (inc. this) 4

Our reference JRT

Writer's telephone

GRO

From Jeff Triggs

To Keith Baines, Post Office Counters  
Limited, London

Receiving fax number

GRO

Copy to RAC

Al 376

Thank you for arranging for Tony Oppenheim's letter of 18th November to be forwarded.

I attach, for your ease of reference, a copy of my e-mail to you of 2nd November. This suggested that, although the question of who caused the discrepancy is irrelevant under the terms of the Second Supplemental Agreement, Pathway might nevertheless seek to argue that if a discrepancy arises as a result of a breach of contract by POCL then Pathway could argue that the damages suffered by it as a result of POCL's breach were equivalent to the £229 charge for detecting the error and therefore that the two should cancel each other out.

Pathway seem to be adopting that approach and are seeking an obligation on POCL that it may have breached.

CAR 891 appears to be a classic "agreement to agree" and therefore not to impose on POCL a relevant binding obligation.

Whether the document "Reference Data - POCL/ICL Pathway Operational Level Agreement" is a CCD incorporated into the Codified Agreement which imposes relevant obligations is something we can consider if you would like us to. Please feel free to forward a copy of the document to Robert Chaplin.

Likewise the CCD entitled "Application Interface Specification Reference Data to Pathway". The sentence quoted from it does not immediately strike me as particularly relevant and in any case paragraph 5.3.2.2 of Schedule G1 incorporates from that document into Schedule G1 only the definition of the "Contractor domain", and then only for the purpose of imposing an obligation on the Contractor, not POCL.

A list of the partners and their professional qualifications is available for inspection at the above address.  
The partners are either solicitors or registered foreign lawyers.

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE TELEPHONE

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Even if these CCD's did incorporate into the Codified Agreement an obligation on POCL not to cause cash account discrepancies, and POCL could be demonstrated to be in breach of that obligation, it would still be incumbent on Pathway to demonstrate that the relevant loss suffered by Pathway as a result of the breach (i.e. the £229 charge) was a loss which was a foreseeable consequence of the breach at the time the contractual obligation was accepted.

In short then, Pathway (or Masons) are somewhat scraping the barrel to find a relevant cause of action against POCL. If you wish us to respond in detail on whether they have succeeded could you please forward to Robert copies of the relevant CCD's.

Regards,

**GRO**

Jeff Triggs

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**TRIGGS, Jeff**

**From:** TRIGGS, Jeff  
**Sent:** 02 November 1999 14:24  
**To:** 'keith.k.baines' GRO  
**Cc:** Chaplin, Robert  
**Subject:** RE: CCNs 560 and 562

Keith,

Thank you for your e-mail of 1st November.

**A. Suspension of Rollout**

The purpose of the provisions allowing Rollout to be suspended is not to punish Pathway for its defaults but to ensure that the system is not universally rolled out while serious problems persist. Hence the right to suspend Rollout on failure of any of the criteria in Part B of Schedule 4 applies irrespective of whose fault, if anyone's, the discrepancy might be.

The exceptions from the definition of Data Errors in Emergency CCN 562 are irrelevant to the question of whether Rollout may be suspended under paragraph 6.1 of the Second Supplemental Agreement.

**B. TIP Integrity Checking Process**

The charge payable to POCL under paragraph 7.2(ii) of the Second Supplemental Agreement is an agreed charge for performing a service. Again the question of who caused the discrepancy is irrelevant. The exceptions to the definition of Data Errors in Emergency CCN 562 are also, again, irrelevant.

**C. But ...**

There is a gloss on this.

If POCL is in breach of contract then Pathway may have a right to claim compensation for the losses it suffers as a foreseeable result of POCL's breach.

If a discrepancy arises which would not have arisen but for POCL's breach, and Pathway thereby incurs a £229 charge which it would not have incurred but for such breach, then POCL would prima facie be liable to compensate Pathway for that charge (and in practice Pathway would seek to set off the damages against the charge).

Likewise if, as a result of discrepancies caused by POCL's breach, Rollout is suspended and Pathway thereby suffers a financial loss (as a result of delay to receipt of Rollout Payments) then Pathway may have a claim in damages against POCL for POCL's breach.

In this latter case, Pathway would need to demonstrate that Rollout would not have been suspended but for Pathway's breach. In other words, if the number of discrepancies would have entitled POCL to suspend Rollout even after disregarding all discrepancies caused by POCL's default, then Pathway would be unlikely to succeed in claiming damages arising from the suspension.

In both cases, of course, Pathway would need to demonstrate not only that the relevant discrepancies were as a matter of fact caused by POCL but that the causing of the discrepancies amounted to a breach of contract. In other words Pathway would need to point to a clause in the Codified Agreement (as amended and supplemented to date) of which POCL was in breach as a result of causing the discrepancy. It is not sufficient simply to demonstrate that the discrepancy arose other than as a result of a breach by Pathway.

On a brief perusal of Schedule G I have not discovered any contractual obligation on POCL not to make errors in reference data. We could make a more thorough trawl of the Codified Agreement if you wish, although it would be up to Pathway to identify any breach on which it might wish to rely.

Regards

Jeff

-----Original Message-----

**From:** GRO  
**[mailto: ]** GRO



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Sent: 01 November 1999 13:14

To: Jeff Triggs 

Subject: CCNs 560 and 562

Jeff,

Can you advise on the following issues regarding interpretation of CCNs 560 (the 2nd supplementary agreement) and 562 (The emergency CCN regarding Data Errors in relation to A1376, and signed at the same time as the 2nd sup. ag.)

At present there is a disagreement between POCL and ICL Pathway staff involved at working level in operation of the provision and implementation of reference data. This is in the context of a large number of discrepancies having been discovered in the TIP Integrity Checking which POCL is carrying out in accordance with paragraph 7 of CCN 560.

Over the past 3 weeks, the number of errors discovered in the checking has been 272, 367, and 424. This compares to previous error levels generally below 10 per week. There are two issues at stake. One is in relation to the 0.6% error level to be achieved as one of the criteria to be met by 24 November as a condition for resuming roll-out in January 2000, POCL having the right to delay such resumption if the criteria are not met. If all the errors identified in recent weeks were to be counted, then it is clear that even perfect performance by Pathway from now onwards would be insufficient to meet the target. The second issue is the cost of £229 per discrepancy to be paid by Pathway to POCL, where some £266k is at stake.

The main area of disagreement is in relation to a change to POCL reference data, which Pathway assert is of the type excluded by para. 3.6.1.2.2 of CCN 562. POCL's view is that the reference data provided by POCL was valid, but that there is a flaw in Pathway's procedures and/or software that resulted in Pathway not applying the data correctly.

On re-reading the CCNs, I am unclear whether or not the provisions in CCN 562 are relevant to this case at all. It seems to me that they only apply to the later circumstances when Pathway have implemented the data integrity control they are due to provide in accordance with the rectification plan for A1376; and not the checking performed by POCL in the meantime. If that is the case, how would we determine the number of discrepancies chargeable to Pathway under 7.2(ii) of CCN 560? Would this include discrepancies which, on investigation, proved to have been caused by POCL failures?

A response by close on play on Wednesday, 3/11/99 would be very helpful.

Keith Baines  
Head of Horizon Commercial  
Post Office Network

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22/11/99