
From: Cooper, Tom - UKGI[O=HMT/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8D968D43E33749AE9E59F9C9350E69D5-COOPER, THOMAS (TCOO)]
Sent: Mon 01/04/2019 8:24:45 AM (UTC)
To: Watson, Richard - UKGI[] GRO
Subject: RE: POL Litigation

Thanks Richard. 1 and 2 are real problems for POL. Clearly the judge has said that SPM's shouldn't be responsible for losses that aren't due to their own acts and omissions and it's obvious that good faith dealing requires differences to be investigated where the SPM asks. POL's problem is that they will always find it extremely hard to prove theft if it has taken place so the burden of proof issue is very difficult in practice.

So how would these requirements be squared in the contract?

Tom

Tom Cooper
Director

UK Government Investments

1 Victoria Street | London | SW1H 0ET

The logo for GRO (Government Revenue Office) is displayed in a large, bold, black font within a dashed rectangular border.

From: Watson, Richard - UKGI
Sent: 29 March 2019 14:28
To: Cooper, Tom - UKGI[] GRO
Subject: POL Litigation

Tom

I agree with you that the key issues arising from the judgment that are relevant not only to resolution of the claims in the group litigation but also POL's relationship with existing and future SPM's are as follows:

1. Burden of proving loss

This issue is linked to the Branch Trading Statement account and the Helpline. POL's position is that absent the account being inaccurate because of a Horizon fault then it is an accurate record and can be relied on by them. The burden of proving the account is not an accurate record is on the SPM. The Judge decided that in circumstances where the SPM had contacted the helpline in relation to any shortfall, discrepancy or disputed Transaction Correction the burden lies on POL. At para 822 and 823 he said:

"I simply do not see how it can sensibly be suggested that SPMs bear such a burden, for any branch trading period when a SPM has called the Helpline and sought help for an unexplained shortfall, discrepancy or disputed TC. This is for the following reasons.

Firstly, for an unexplained discrepancy or shortfall, the very point of dispute by a SPM is that they could not work out the cause of the discrepancy. That is why it was an unexplained shortfall or discrepancy. It is no answer to this point for the Post Office to require a SPM to identify the time and/or product when it occurred,

in order that it could be investigated. That is simply a more refined way of requiring the SPM to do the impossible. Branch Trading Statements are done on a cycle of 5 weeks, 4 weeks, 4 weeks. These shortfalls and discrepancies would not be likely to become apparent until the end of the particular trading period"

The evidence appears to be that the information available to the SPM through the Horizon accounting system was simply insufficient to allow them to identify the cause of any discrepancy. If that is right then one has very considerable sympathy with the SPM. I don't think it is an answer to say that POL would also have the same difficulty. It is POL's system created by them and which they require SPM's to use. As regards what amounts to a "loss" it seems to me right that POL can only recover from the SPM if they have actually suffered a real loss rather than a computer generated one. I am not sure I fully followed the arguments on this "loss" issue but it is a generally accepted principle of law that a party can only recover for actual loss they have suffered.

2. POL's obligation to investigate

This seems to me to flow from the Judge's findings at 1 above and his findings that the loss must have been caused by the fault of the SPM or assistant. Clearly some sort of investigation would be required by POL to establish they have suffered a loss and that it was due to the fault of the SPM or assistant(s).

3. Termination provisions

POL appear to have conceded that the discretion they have to suspend or terminate must be exercised in good faith. Termination without notice is only available where the SPM is in repudiatory breach. For termination with notice the period must be at least 3 or 6 months depending on which contract is being used and POL must consider what is the appropriate period in each individual case.

Commenting generally, and as we have discussed, while I think the Judge was unwise to make the many criticisms he did of POL (principally because I don't see why he needed to make them to come to the decision he has) I am very concerned that even if another Judge considered the case he would take the same view of the evidence. I accept that the POL Legal team consider there are findings the judge made which were not relevant to the common issues but it does seem to me that many of his findings of fact were properly open to him to make given the nature of the common issues that he was being asked to decide. In particular he clearly had to come to a view on contract formation and so evidence relating to that in relation to each claimant was clearly admissible. Also, the issue of burden of proof in relation to Branch Trading Statements was a common issue that he was asked to decide so I struggle to see how evidence relating to how Branch Trading Statements were created was not relevant.

As regards POL's approach to the further conduct of this litigation I am also very concerned by the Judge's comments which I have set out below. Regardless of the outcome of the recusal application in my view these observations need to be taken very seriously as POL considers its future litigation strategy. They resonate with Jane's comment about "maintaining the edifice".

At para 545-547 the judge says:

"The problem with the Post Office witnesses generally is they have become so entrenched over the years, that they appear absolutely convinced that there is simply nothing wrong with the Horizon system at all, and the explanation for all of the many problems experienced by the different Claimants is either the dishonesty or wholesale incompetence of the SPMs. This entrenchment is particularly telling in the Post Office witnesses who occupy the more senior posts. When even a Post Office auditor, Mr Longbottom, attempts to go beneath this veneer, properly to investigate an unexplained shortfall, and finds that he is not provided with the documents he considers necessary, very considerable doubts arise about the approach adopted at the Post Office to its overall control of information.

Mrs Van den Bogerd is, in my judgment, a particularly stark example of how a witness had to force their evidence of fact to fit with a pre-ordained thesis. She remains, apparently genuinely, of the view that none of the different claims by the 589 Claimants have common issues or themes between them, and every single case is simply factually different, with no connection between them. This is despite the approval of a Group Litigation Order by the President of the Queen's Bench Division.

These Post Office factual witnesses appear to maintain this view, notwithstanding the weight of material put to them, and in the face of internal Post Office documents – obtained in disclosure for this litigation - that suggest the view may not be correct. Whether that view is in law and fact justified can only finally be resolved after subsequent trials. But they remain steadfastly committed, in their collective psyche, to the Post Office party view, despite such steps having been taken as amendments to the Camelot software using the Ping fix, and the contents of some of their own internal documents that suggest to the contrary. They give me the impression that they simply cannot allow themselves to consider the possibility that the Post Office may be wrong, as the consequences of doing so are too significant to contemplate.”

Happy to discuss

Kind regards

Richard

Richard Watson | General Counsel
UK Government Investments

1 Victoria Street | London | SW1H 0ET

GRO

W: <https://www.ukgi.org.uk/>