

From: Swil, Jonathan
Sent: 20 March 2014 19:34
To: Band, Christa
Subject: RE: Post Office

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Christa

Richard Morgan called to discuss his comments. He said none were big picture and that to the extent we need to make any changes arising from his comments, he suggested we gloss them in the presentation to the Board rather than amend the document (particularly given it has now gone to the Board). His comments were

1.6/5.84 – he queried how there could be damages for loss of a chance for a wrongful summary termination of the contract given the SPMR is not entitled to assign his agency; if he is terminated it is entirely up to the Post Office to pick his replacement. In other words, while he might be able to sell an associated business, it is not in his gift to replace himself as SPMR (that fact is something which Rodric Williams commented on and I added wording in respect of in 5.84 just before the report went out). I said what about the loss of a chance to find someone who will buy the business and who the Post Office is happy to appoint as SPMR - does it matter that the decision about a replacement SPMR is ultimately up to the Post Office? He and I didn't seem to be able to take the point much further and I said we'd go away and think about it. While perhaps a little implausible or unlikely ever to occur in practice, I still think there is a chance to sell the business to someone who the Post Office will or has indicated it will appoint which a wrongful summary termination causes the SPMR to lose. Perhaps you may want to stress to the extent it comes up in the meeting that this is probably more theoretical than real but it is at least that.

5.7-5.10 – Richard questioned our broad statement that there is unlikely to be a tortious duty of care, aside from any duties defined by the contract. He surmised a duty and its breach e.g. where someone on the support helpdesk gives negligent advice about what to do with an entry in Horizon which subsequently causes a loss. If we claim the loss and the SPMR refuses to pay, we then terminate him summarily, and because of the negligence, wrongly. I said even if this is not abrogated or circumscribed by the contract, it seems the SPMR's decision whether to pay the loss breaks the chain of causation and that his remedy is for breach of contract for the wrongful termination. I said I couldn't see any loss flowing from the negligent advice. He said that the result seems unfair but I said the SPMR can then seek restitution of the mistakenly paid loss, so query if it is unfair anyway. He seemed to concede the point (without acknowledging it as such) so if you agree, I'm not sure this point calls for any change of approach. Although strictly, Richard may be right that there is a duty owed by the support desk person (vicariously on behalf of Post Office) but there is no liability because of a lack of causation.

5.29 – he suggested that aside from erroneous key entries or a malfunction with Horizon there may be a third way in which Horizon could show an inaccurate state of affairs – third party intervention. I think he is right about that e.g. one of the complaints made is that someone could directly access Horizon and override a SPMR's entries without reference to him. A more obvious example is someone hacking into the system. Assuming you don't think the ability for a third party to intervene can be categorised as a malfunction (I don't think I do), I think this could be glossed over if it needs to be during the presentation.

5.31 – more of an observation than a point for clarification, he said that Horizon is extremely complicated and has been built up over many years so it would be very difficult to produce the baseline report that we are expecting Second Sight to have done i.e. he has a bit of sympathy for them in that regard at least. I acknowledged that but said presumably someone who has had the knowledge over the years i.e. Fujitsu or someone else with relevant technical expertise, not SS, could do it. I also said Post Office are in any event not unhappy for us to disparege them.

5.43 – he said the reason why there is a distinction between a SPMR's liability for negligence, carelessness and error and strict liability for his assistants is because the contractual relationship is with the SPMR and the Post Office wants recourse against the SPMR, not his assistants i.e. the SPMR would try to shift blame or liability to his assistants if it were otherwise. He suggested ideally we'd delete the last sentence of this paragraph where we say we don't know what the thinking was behind the distinction. I agree with this but again, it's probably not something that requires anything more than an oral acknowledgement in the meeting, if necessary.

I assume we do not need to volunteer these to the Post Office, although they will no doubt ask what his comments were. Perhaps we could briefly explain his comments but say they are not material points and you will bring them out in the presentation if necessary.

Jonathan

From: Swil, Jonathan
Sent: 20 March 2014 14:47
To: rmorgan [mailto:] GRO
Cc: Band, Christa
Subject: RE: Post Office

Richard

I attach our report to the Post Office Board in respect of legal issues raised by the complaints/claims made in the Post Office mediation scheme we discussed briefly on the phone. We were pressed for time to get this to the Post Office today in final form before sending it to you so that it could go to the Board ahead of the Board meeting next week at which Christa will be presenting the advice. Accordingly, please limit your comments to high level points of which you think we or the Post Office should be aware before the Board meeting.

We should be grateful if you could get any comments back to us by Monday. Do let me know if, as you suggested, you would prefer to set up a call to discuss your views or if you have any questions about anything which is unclear to you in the document.

Kind regards

Jonathan

From: Richard Morgan QC [mailto:] GRO
Sent: 19 March 2014 11:04
To: Swil, Jonathan
Cc: Band, Christa
Subject: RE: Post Office

Jonathan,

Receipt acknowledged!

Nice to speak to you, and I look forward to receiving the draft when you are ready.

All the best,

Richard

From: Swil, Jonathan [mailto:] GRO
Sent: 19 March 2014 10:58
To: Richard Morgan QC
Cc: Band, Christa
Subject: Post Office

Dear Richard

You now have my details. As I mentioned, we will send you a draft of our report later today and would be most grateful for any high level comments you have which if you prefer, we are happy to discuss over the phone.

Kind regards

Jonathan Swil
Managing Associate (Solicitor, New South Wales)
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