

From: Swil, Jonathan
Sent: 21 March 2014 19:32
To: Band, Christa
Subject: RE: Post Office

Christa

I think I must have missed you this afternoon. To keep this moving, my further comments below underlined. I will contact Richard on the JR point on Monday, if having read my comments, you would still like me to.

I'm assuming all of this is for your benefit in view of the Board presentation, as it is too late to be making amends to the report, to the extent any need to be made.

Jonathan

From: Band, Christa
Sent: 21 March 2014 08:40
To: Swil, Jonathan
Subject: RE: Post Office

My comments marked below.

Happy to discuss

Christa

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

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? I agree with you. **This is exactly the point made in Lailji (which I may not have spelled correctly). It is all about loss of a chance and you can discount for as many variables as the Court thinks appropriate. Yes, I have checked Lailji and that is precisely what it says at [11].** 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. **You are right. Also someone might be prepared to buy the lot taking the risk that he will get the SPMR contract. I don't know how hard it is to get them but if you were of good character and had the right skills and there was an existing subpostoffice – ie an established need – then you might well be pretty confident. What if, for example, you were already a SPMR somewhere else but wanted to move. You might well think that you would be bound to get the contract. Yes, agreed, there's quite a few scenarios one can think of.** 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. Perhaps we can now ignore my last comment; I don't think Richard's point still stands.

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. **I would have thought that this was effectively covered by the contract – if necessary by reference to an implied term. I'm not sure it is, at least expressly.** I wasn't able to find any reference to an obligation to provide helpdesk support (perhaps not surprisingly because the contract pre-dates Horizon by 6 years) in the contract (although that could just be my review of it, given how difficult it is to navigate). Presumably if it is an implied term, then it will be more difficult to know how the contract covers it – even if the court finds an implied obligation to provide support, surely it's not going to imply a term of such detail or breadth as to make clear how if at all the term excludes or interacts with any tortious duty to provide support with reasonable care and skill? 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. **I agree with you but also agree that it seems unfair. It is this general "we can terminate you when we like for no reason" point which nags away in the context of the JR issue – which I know that you think is a non starter. If we are only advising on claims currently in the Scheme then my email from yesterday about the 3 month limitation period I think means JR is a non-starter. If we are also interested in future claims (I didn't think we are, but for the sake of argument will assume we are) is it really that unfair a) to have a power to terminate on 3 months' notice? Isn't that common in many contracts and this is not an employment contract, it is a contract for services? and b) because the SPMR can choose to dispute the Horizon entry and not pay and if he has good grounds i.e. "your helpdesk person told me to do it", we would be well advised not to terminate summarily and he can threaten an injunction etc. if we attempt to (granted, the SPMRs have limited means so that may not be a practical solution, even if it is a legal one).**

But turning to the JR point for any future loss recovery, I guess the question is this: is the recoupment of funds belonging to the Post Office a commercial/corporate activity because it is for the benefit of Post Office Limited the company or is it ultimately a public function because it is for the benefit of the public through HMG's shareholding? The problem with the latter is by that reasoning, any and all activities of the Post Office would be considered a public function because everything it does is ultimately aimed at making profit for the government shareholder, not to mention provide a service of universal public importance. But that can't be right because it is after all a privatised, arms length company. I can see a distinction being drawn between say a decision to recover losses and a decision by the Post Office (if it has the power) to decide not to collect mail on Tuesdays. Perhaps, therefore, we are on the non-public function side and therefore not amenable to JR in this context. **I wouldn't mind Richard Morgan thinking about that expressly.** Would you like me to ask him on Monday? He did say specifically that he hadn't considered this before and that this is not his area, but I guess it isn't really mine either and we can't ask anyone else at this stage.

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. **I agree. There may be real issues of proof here. Also could it be said that these losses were due to anything – at all – that the SPMR did? May depend on the facts again. For example, if you leave your terminal switched on and someone comes in over lunch and accesses it that may be different to someone hacking in centrally. I think that the hacking point plays directly into the provisions in the contract covering theft of stock. Can you take a look? I'm not sure it does.** The theft provisions deal specifically with cash, stock and property of the Post Office which is located, I think by implication, at his Subpostoffice or in his custody. I don't see how that links in with the tampering with data in a centrally held system out of the SPMR's control, especially if the hacking doesn't involve any "theft" at all but simply fiddles with numbers which make it appear that a SPMR has stolen or lost stock/cash. I do agree though that leaving the terminal unwatched over lunch falls within the negligent or careless test in the loss recovery provision and so is different at least for that reason to central hacking. **I think that the contract basically tells SPMRs to take all proper precautions to guard against theft but does not make them responsible per se for stolen goods. Can you think about this a bit more? Yes, I think that is what the contract does, but again, hacking could occur without the hacker stealing anything – in fact unless the hacker can somehow by his hacking electronically divert funds from either the SPMR or the PO to himself, I don't see how he could "steal from" Horizon (but that might just be my limited understanding of how it all works).**

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 disparage them. **Noted. But so what? This case is all about whether Horizon works properly and no one has anything clear to which they can point which gives an answer which could be relied on.**

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. **This must be nonsense surely. The SPMR takes vicarious responsibility and has vicarious liability for his assistants. What am I missing? Does vicarious liability arise in respect of all forms of liability or only negligence/non-strict tortious liability? I thought it was only the latter. And what if there is no general law liability of any sort in any event? E.g. what if what the assistant does is not negligence or otherwise tortious and is simply a mistake? The SPMR would say the assistant did it. The assistant wasn't negligent so the Post Office has no recourse directly against the assistant because there is no contract with him, nor against the SPMR vicariously, without the strict liability provision in the Contract.**

Perhaps though, it is an odd distinction because why not match the SPMR's contractual "vicarious" liability for the assistant's conduct to his own i.e. negligence, carelessness and error? The PO has recourse for mistakes by the assistant just as it does for those made by the SPMR but not, some would say unfairly, also for say, theft by the assistant where adequate precautions were taken or a genuine error in Horizon etc. where the assistant was on the terminal (although in the latter case, presumably neither the assistant nor the SPMR has caused the loss). So on reflection, maybe there is something to be said in the comment, although I don't know if it is simply because the SPMR would be vicariously liable under general law principles for his assistants, to the extent that he is.

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. **Let's discuss later.**

Jonathan

From: Swil, Jonathan
Sent: 20 March 2014 14:47
To: [rmorgan](#); 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:Jonathan.Swil@gro.com] **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)
Linklaters LLP, London

Tel: **GRO**
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GRO
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