An illustration of the opinion writing process

This chapter endeavours to set out the process of moving from a more realistic set of instructions than those found in Chapter 21 to the writing of an opinion, looking both at the mental process and the preparatory work required. As in much skills work, this guide is not intended to be mandatory, but to provide a suggested basis on which you can build good working practices. This chapter picks up and illustrates many of the points made in Chapters 19, 20, and 21.

25.1 Instructions to counsel

JACKIE RUSSELL

v

WATCHDOGS LIMITED

Counsel is instructed on behalf of Mrs Jackie Russell, who is the owner of Falstaff Farm, Gadshill, Kent where she breeds and trains racing greyhounds. At night the greyhounds are locked into the kennel compound, which consists of two kennels, each housing about ten dogs, in a courtyard enclosed by a high wall with a single iron gate. Outside the courtyard is an exercise area entirely surrounded by a wire-mesh fence. To keep watch, Mrs Russell hires a security company, Watchdogs Ltd (‘Watchdogs’). By a contract made in January 2010 Watchdogs agreed, for a fixed charge (at the material time £250.00 per week), to provide a night patrol service whereby a patrolman would visit and check the kennel enclosure four times a night between the hours of 9.00 pm and 7.00 am. The contract contained the following clause:
Under no circumstances shall the company be held responsible for any loss suffered by the customer through burglary, theft, fire, criminal damage or any other cause, except insofar as such loss is attributable to the negligence of the employees of the company acting within the course of their employment.

Throughout the period of the contract the regular patrolman has been Mr Harry Prince, whom Mrs Russell and her family have got to know quite well. However, on occasions (eg when prowlers have been seen, or the night before a major race meeting) Mrs Russell has felt that additional security is necessary and has telephoned Watchdogs which has provided an all-night watchman at a fixed fee of £300.00 per night. There is no mention of this service in the contract.

On 18 April 2014 Mr Prince reported to Mrs Russell that on two occasions the previous night he had seen prowlers near the perimeter fence who had run off when challenged. Mrs Russell asked him to be particularly vigilant the next night and immediately telephoned Watchdogs to ask for an all-night patrol that night, which was agreed. No payment in advance was requested and indeed nothing was said about money.

That night, Mrs Russell’s daughter, Elizabeth, was in the Boar’s Head Inn, which is 100 yards away from Falstaff Farm, and saw Harry Prince drinking with a companion. He was there at 9.00 pm when she arrived and was still there at 11.30 pm when she left. Believing an all-night patrol had been arranged, she thought nothing of it. In fact it seems no all-night patrolman arrived.

The next morning, 19 April, Mrs Russell found that raiders had broken into the kennels. Two greyhounds, Pistol and Poins, were missing and a third, Peto, was dead. A veterinary surgeon found that he had been strangled and put the time of
death at around midnight. The police found evidence that two men had cut a hole in
the wire fence, sawn through the padlock on the iron gate and picked the lock on the
kennel door. All had been left open. The police estimate that it would have taken the
raiders about one hour to get in.

Pistol has never been found and it appears that he was the raiders’ target. Poins ap-
parently escaped through the open fence and roamed the countryside for two days.
He was shot dead by a local farmer when he attacked the farmer’s sheep.
Pistol had just retired from racing and was now at stud. He was expected to earn
around £15,000 a year over the next five years in stud fees. Poins and Peto were
both successful dogs each of whom was expected to win races worth £7,500 in all in
2014 and again in 2015. They would then have retired. Poins would have gone to
stud. The estimated value of the three dogs is: Pistol £30,000; Poins £24,000; Peto
£10,000. Mrs Russell was deeply distressed at the loss of her three favourite dogs
and suffered from depression for several months.

Instructing Solicitors have received the following letter from Watchdogs:

Dear Sirs,

We must inform you that we have no record of any telephone conversation with
your client on 18 April 2014 and we deny that any agreement to provide an all-night
watchman service on that night was entered into. Mr Prince’s log for that night
shows that he made four visits, at 12.30, 2.30, 4.30 and 6.30 am. Your client’s loss
is plainly not attributable to any negligence on the part of our employees and we
must accordingly deny any liability.

Yours etc

Mrs Russell on 3 July 2014 received a bill from Watchdogs containing the following
items:

- Night patrol service 1 April to 30 June 2014 £
- 12 weeks at £250.00 3,000.00
- All-night watchman service
- 3 nights at £300.00 900.00
- Total 3,900.00

Mrs Russell says she arranged for an all-night watchman on three occasions in the period covered by the bill: on 2 and 18 April and 31 May.

Counsel is requested to advise Mrs Russell as to liability and quantum.

25.2 Preparing to write an opinion

We will go through the seven stages of preparation explained in Chapter 19.

25.2.1 Read and digest your instructions (see 19.4.1)

Your first step is to read the instructions in Jackie Russell v Watchdogs Ltd slowly and carefully.

Be careful of forming strong views about the case on first reading, or you may prejudice the depth and width of your analysis in the following stages. In reading these instructions the point is to avoid labelling the case ‘breach of contract’ or ‘negligence’ too early, but on initial reading only to absorb as much of the factual background as possible. At this stage your mind should be asking questions about what has happened and what caused the dogs to be lost, which is clearly the client’s central problem, rather than starting to take decisions.

26.2.2 Clarify your client’s objectives (see 19.4.2)

What do your instructions ask you to do? The instructions will never ask you to write
all you know that is vaguely legally relevant, but will set you specific tasks, which are normally set out at the start or the end of the instructions. Here you are asked to advise on liability and quantum—whether the client can sue and if so how much she will get.

Having read the brief once and clarified your objectives, it is useful to read it again and annotate it. Annotating on first reading can be dangerous as what you are being asked to do may not be clear in your mind, especially in this case where your tasks are only set out at the end of the instructions. In annotating you should underline or highlight those points which are most relevant to whether there is a cause of action and to what has been lost, perhaps using a separate coloured pen for different aspects of the case, such as liability and damages.

25.2.3 Analyse the facts (see 19.4.3)

Before you form views on the appropriate legal solution you will need to carry out a thorough fact management exercise. The legal argument must be based on the facts, not twisted to fit your preconceived legal theory.

Methods of fact management are dealt with in the fact management chapters of this Manual. Written notes of facts will be part of preparing to write any opinion. The following is a very basic analysis of the Russell case.

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<tbody>
<tr>
<td></td>
<td>Watchdogs Ltd. Employed to keep watch on premises. Potential Defendant?</td>
</tr>
<tr>
<td></td>
<td>Mr Prince. Employee of Watchdogs Ltd. Regular patrolman. Witness?</td>
</tr>
<tr>
<td></td>
<td>Potential Defendant?</td>
</tr>
</tbody>
</table>
Elizabeth Russell. Daughter of client. Witness?


Those who broke in. Seems they cannot be traced.

**Places**
- Mrs Russell’s kennels. A plan would be useful.

**Dates**
- Mrs Russell calls to book all-night service.
- 9.00–11.30 pm. Mr Prince in the pub.
- 1.00 pm–12.00 am. Estimated time of break-in.
- 12.30, 2.30, 4.30, 6.30 am. Mr Prince visits.
- 19 April 2014. Loss discovered.

**Figures**
- Cost of patrol service. £250.00 per week.
- Cost of all-night watchman. £300.00 per night.
- Estimated value of dogs: Pistol £30,000, Poins £24,000, Peto £10,000.
- Loss of stud fees for Pistol £15,000 per year for 5 years.
- Loss of winnings for Poins and Peto £7,500 per year for 2 years each.
- Loss of stud fees for Poins, commencing after 2015: unknown.

Having analysed the basic facts, three further stages of factual analysis are important in preparing to write an opinion, because they are all closely related to exercising your judgment on the chances of the case succeeding.

(a) **Identify any gaps in the facts.** Almost certainly your instructions will not give you all the facts, as it would be very expensive and time consuming for
instructing solicitors to collect everything before sending a case to a barrister. Your opinion will have to be based on the facts that are available. Gaps in the facts are important first because they may prove a weakness in developing a legal case, and secondly because in your opinion you will need to indicate to instructing solicitors what extra information should be sought. The main gaps in the facts in this case are:

(i) limited information about the agreement for an all-night watchman on 18 April;
(ii) limited information about the actions of Mr Prince that night;
(iii) limited information about the break-in;
(iv) limited information about the ability of the dogs to win races.

(b) **Identify which facts are probably agreed, and which are probably in dispute.**

The point is that a case can be most firmly founded on facts that are agreed. Where facts are in dispute, your case is open to challenge and is less strong. Again this will be directly relevant to exercising your judgment on the case. In this case the facts which are probably agreed are:

(i) the existence of the original contract;
(ii) that the dogs were lost.

The main facts which are likely to be in dispute are:

(i) whether there was an agreement for an all-night watchman to come on 18 April;
(ii) what Mr Prince did on the night of 18 April;
(iii) precisely when the break-in occurred;
(iv) loss and damage.
(c) **Identify which facts you have evidence of.** This is especially important in relation to facts in issue—if you have a fact in issue on which you have little or no evidence your case is very weak. Again this will be important when you come to exercise your judgment. Also, your opinion should indicate to instructing solicitors where evidence is required.

In this case, the evidence which we have is:

(i) the original contract;
(ii) Mrs Russell’s evidence;
(iii) Elizabeth’s evidence;
(iv) Mr Prince’s evidence (but query if he would appear as a witness for our client or for Watchdogs, and how useful his evidence would be if he is still employed by Watchdogs);
(v) the police report about the break-in;
(vi) the quarterly bill;
(vii) veterinary evidence on the death of Peto;
(viii) the farmer’s evidence on the death of Poins.

(d) **Identify which facts you need evidence for.** The further evidence we will need is:

(i) all possible evidence about the making of the contract for an all-night watchman on 18 April;
(ii) evidence about what Mr Prince did on the night of 18 April;
(iii) evidence of the capital value of the dogs (you cannot simply assume the figures in the instructions are correct);
(iv) evidence of the income the dogs would have earned, which may be pure
conjecture.

25.2.4 Construct a legal framework (see 19.4.4)

Once the facts are fully analysed it is safe to start analysing the legal issues. This is where the professional ability of the barrister begins to come into play, deciding what legal possibilities there are, and which is strongest. The first step is to identify the possible causes of action. Here there are two: breach of contract and negligence. It is important to consider them separately.

25.2.4.1 Breach of contract

As explained in Chapters 19 and 20, you must think in terms of:

- Contract
- Terms
- Breach
- Causation
- Damage

(a) Contract. You are immediately faced with the fact that there appear to be two contracts here: the night patrol contract, made in 2010, and the contract for the all-night watchman made on 18 April 2014. You need to consider them in turn.

(i) There do not seem to be any issues with regard to the night patrol contract, though you should ask to see a copy of it, particularly in the light of the exclusion clause that it contains.

(ii) There is clearly a dispute as to existence of the all-night watchman contract. Mrs Russell says she arranged it by phone, but Watchdogs say they have no record of this. So you will need to consider whether and how it can be proved and the strength of any evidence on this.
(b) Terms. The relevant terms of a contract will be those that you will allege have been breached, and those that could prevent or limit liability.

(i) With regard to the night patrol contract, there do not appear to be any express terms that have been breached, unless it can be shown that Mr Prince failed to patrol at all. So liability would have to be based on an implied term. You need to find an implied term breach of which you can prove, and which, if breached, can be shown to have caused the loss of the dogs. Two possibilities come to mind. Firstly an implied term with regard to the spacing of his four visits over a night: could it be said that Mr Prince should have made at least one visit before midnight? Secondly, a term that can most certainly be implied (see s 13 Supply of Goods and Services Act 1982): that the patrolman would carry out his obligations with reasonable care and skill.

But relevant also is the exclusion clause: could this operate to prevent any liability on the part of Watchdogs?

(ii) With regard to the all-night watchman contract, the relevant term is the fundamental obligation to provide the service. But more issues arise with regard to the exclusion clause. Firstly, could it be incorporated into the contract? Secondly, if it was, could Watchdogs rely on it to avoid liability?

(c) Breach. As explained above, it is difficult not to consider breach at the same time as the relevant terms, because you will be looking for terms that you can prove to have been breached.

(i) If you could imply a term that brings with it an obligation to make at least one visit before midnight, then it appears that this has been breached on Watch-
dogs’ own admission. You would need more evidence before you could show a breach of the implied term with regard to reasonable care and skill. It seems Elizabeth Russell saw Mr Prince drinking in the Boar’s Head earlier in the evening, but that is of no significance unless he was drinking alcohol in such a quantity as to render him unable to patrol in a competent manner. And even so, can you identify any negligent act or omission which has caused the loss of the dogs?

(ii) There will however be no problem in establishing a breach of the all-night watchman contract, if it can be proved: Watchdogs clearly admit that no all-night watchman was provided.

(d) Causation. You may well have started to think about causation at the same time as you thought about terms and breach. There is no point in relying on a term which, even if breached, did not cause any loss.

(i) With regard to the night patrol contract, you need to consider whether any difference in the timing and spacing of Mr Prince’s visits would have prevented the break-in. There are various scenarios you might consider, depending on what you think is the most helpful term to allege. You also need to consider whether, assuming Mr Prince can be shown to have been negligent, this by itself has caused the loss of the dogs, bearing in mind that the break-in had apparently occurred before his first visit.

(ii) The issue is however entirely different if there has been a breach of the all-night watchman contract. Had there been an all-night watchman, would that probably have prevented the break-in? It is unlikely that this can be resolved by evidence—only by reasoned judgment and common sense.
(e) **Damage.** Assuming you have managed to establish a contract, a relevant term, breach and causation that has led to loss and/or damage, you then need to address your mind to several things:

- What items of loss and damage?
- Are they too remote?
- Is there any failure to mitigate on the part of Mrs Russell?
- How will each item of loss be quantified?

(i) **Items of loss.** Do not treat the loss of the dogs as one item. The losses of Pistol, Poins, and Peto need to be considered separately. But there are other items of loss you can identify: the cost of repairing the damage to the fence, replacing the padlock and veterinary bills in connection with Poins’s and Peto’s deaths; and the possibility of damages for the distress and depression suffered by Mrs Russell.

(ii) **Remoteness.** Was what happened to each of the dogs too remote? Apply the correct test to form a view. Similarly the incidental expenses and the distress and depression.

(iii) **Mitigation.** Is there anything that Mrs Russell could reasonably have done to minimise her loss after the damage had been done? You might well decide that there is no real issue here and take this no further.

(iv) **Quantum.** How would damages for the loss of the dogs be quantified? They clearly had a value, but they were also profit-earning chattels. Can Mrs Russell recover both their value and the income they would have earned over the rest of their natural lives? What evidence will be required? How would the calculation be made? If Mrs Russell has a claim for distress
or depression, how will that be quantified? What evidence will be required?

25.2.4.2 Negligence

As well as breach of contract another possible cause of action is negligence. But this would only be applicable as an alternative to breach of the implied term in the night patrol contract that the watchman would carry out his watch with reasonable care and skill.

If he failed to do so, Watchdogs might be concurrently liable in negligence. That is as far as it goes. This is something to bear in mind, but it is unlikely to play a large part in your analysis.

25.2.5 Carry out any necessary research (see 19.5.4)

From the analysis you have done so far you have identified several matters that require research. Now is the time to carry out that research, in the focused way explained in Chapter 19: you are looking for answers to questions that you have identified, not researching the law for its own sake.

It is not possible in this chapter to go through the whole research process. When you read the opinion that concludes this chapter (see 25.4) you will see what the fruits of the research have been. But you would probably be looking for law that will help you answer the following questions:

- How might a relevant term be implied into the night patrol contract?
- How might the exclusion clause which appears in the written night patrol contract be incorporated into the oral all-night watchman contract?
- Could the exclusion clause operate to protect Watchdogs for any breach of the night patrol contract?
- Could the exclusion clause operate to protect Watchdogs in the event of a fundamental breach of the all-night watchman contract?
• Do Watchdogs owe Mrs Russell a concurrent duty of care to perform their services under the night patrol contract with reasonable care and skill?
• What is the correct test for remoteness to apply in deciding whether Mrs Russell can recover all or any of her loss and damage?
• What is the correct measure of damage for the loss of the dogs? Their value, their lost earnings or a bit of both?
• Can Mrs Russell recover damages for distress for breach of a contract of this kind?
• Can Mrs Russell recover damages for depression for breach of a contract of this kind?

25.2.6 Look at the case as a whole (see 19.4.5)

You are now in a position to pull everything together and allow the case to take shape. You will start to create a skeleton plan for your opinion. You will inevitably start forming a view on the case as a whole, and on each issue. You probably have a fairly clear idea by now what your opinion is going to be, both overall and on the major issues. You therefore know what matters are most important and which matters will be subsidiary.

If you have carried out your analysis and research soundly you have probably come to the conclusion that the best chance of establishing liability is for breach of the all-night watchman contract, and that there is little chance of establishing liability under the night patrol contract. You will probably also have concluded that with regard to the loss of the dogs the most likely measure of damages is their market value, and that although there might be a question of remoteness with regard to the death of Poins, it is certainly arguable that this loss was not too remote. Finally you
will have decided that there is no claim for distress, but that there is a small possibility of a claim for damages for depression, though this harm may well be too remote.

You know that you must consider liability first, then damage. Under the head of liability, you decide to deal first with the all-night watchman contract, because it has the best chance of success, considering, in order:

(a) Whether you can prove the existence of the contract
(b) Whether there has been a breach of it
(c) Whether an all-night watchman would probably have prevented the break-in (i.e. whether the breach caused the loss)
(d) Whether the exclusion clause might be incorporated into the contract
(e) If so, whether Watchdogs can rely on it.

You will probably realise also that issue (a) is crucial, and needs to be dealt with fully, but it depends on evidence rather than any law; that issues (b) and (c) are questions of fact so straightforward that they can be dealt with in a few lines; that issue (d) is a matter of mixed law and fact and needs fairly full consideration; and that issue (e) can be answered quite quickly and easily by applying the relevant law.

You will then deal with the night patrol contract, considering in order:

(a) Whether any term can be implied into the contract with regard to the timing or spacing of the visits; and if so, how such a term might be formulated;
(b) Whether it would be possible to show breach of such a term, and whether breach would have caused the loss;
(c) The fact that there is an implied term with regard to reasonable care and skill and a concurrent duty at common law;
(d) Whether it would be possible to show breach of this term/duty (i.e. negligence
by Mr Prince);

(e) Whether such negligence could be shown to have caused the loss of the dogs;

(f) If there is liability under this head, whether Watchdogs would be able to rely on their exclusion clause.

Since you are going to conclude that liability under this head is unlikely, you will not allow yourself to spend too much time on it. But you will give due consideration to issues (a) and (b), probably taking them more or less together; you will simply state (c) and explain why you will not succeed on issues (d) or (e); and once again you should be able to give a short answer to issue (f) by applying the relevant law, though given your opinion on the previous issues the question does not really arise.

Under the heading of quantum, it obviously makes sense to deal first with the loss of the dogs, as the main head of damages. You might well decide to deal first with the question of remoteness in relation to Poins, to get that out of the way, and then go on to deal with the basis on which damages will be assessed. You need to cover:

(a) the problem of double recovery;

(b) the normal basis of assessment (the value of the dogs);

(c) how the value can be proved;

(d) whether it is arguable that you might recover loss of earnings instead;

(e) the problems of proof and quantification;

(f) what method is actually in Mrs Russell's best interests.

Issues (a) to (f) are not entirely separable, so must be taken to some extent together, but overall they are quite complex and need to be explained fully.

Then go on to deal with distress and depression (do not muddle these two together, they are separate heads of damage), explaining why each is unlikely to be recov-
ered. Finally indicate that some additional financial losses should be recoverable.

25.2.7 Answer all the questions (see 19.4.6)

You have now put the whole case together and it has shape. In all probability you know by now what your opinion on each issue is going to be, but it's worth going through and checking that you do have an answer to every issue you have raised and intend to discuss. Of course, it may be a conclusion of uncertainty, where you use your judgment to express an opinion, in which case you need to think how you will express that opinion to give a clear indication of how strong you think the case is on that point.

The answers which you have hopefully reached appear in the finished opinion below (see 25.4).

25.2.8 Consider your advice (see 19.4.7)

Obviously your advice is to a considerable extent wrapped up in the answers you have given to the questions. You were asked to advise on liability and quantum, and you will do so.

But do not forget evidence, further information required, procedural matters, and steps to take. Advice on these matters should also be incorporated into your opinion. It might be worth compiling a list of all the points of advice you intend to give under this heading, to ensure that nothing important gets left out.

25.3 Writing the opinion

You are now ready to start the writing of the opinion.

25.3.1 Draw up a skeleton plan

For the reasons explained in 19.6.1, before writing your opinion, you should draw up a skeleton plan. It is a false economy to start by going straight into writing an opinion
without drawing up a skeleton, as you will often find that you miss something out or get confused and have to start again. You should never have to waste time writing an opinion out twice. The properly planned opinion will be right first time.

The broad structure of your opinion, and therefore your skeleton, should by now be clear to you (see 25.2.6). But the value of a skeleton plan is that it tells you not just what you are going to write about, but what you are actually going to say. In other words, it contains your conclusions and opinions within the structure of issues. There is however no correct way to create a skeleton plan—after all, no one will ever see it but you!

Here is a skeleton that might be created in preparation for writing the opinion in 25.4.

**OPINION**

1. Brief intro. JR, the dogs. What happened to them.
2. Wdogs, Mr P. Night patrol agreement and terms. Alleged all-night watchman agreement. Failure of security.
3. Asked to advise on liability and quantum.

**CONCLUSION**

4. Good chance liability all-night watchman agreement. Not night patrol agreement. Quantum value of dogs £64,000 plus incidentals. Possible but not likely dogs’ earnings.

**LIABILITY**

*All-night watchman*


Any witness to phone call? Overall good chance to prove contract.

7. Exclusion clause incorporated? Unlikely. JR must by law be aware of it. No mention of all-night service in written contract. Implied by previous dealings? Ask for more info. Separate standard t’s & c’s? Ask to see all documents.

8. Anyway Wdogs can’t rely on it. Cannot be intended to protect Wdogs against total failure to perform (*Photo Production v Securicor*).

9. Overall good chance on all-night watchman contract.

**Night patrol**

10. No evidence Mr P did not make 4 visits. Failure to notice hole in fence insufficient. So no breach of express terms. Implied term reasonable space between patrol visits? But Wdogs timings do not suggest breach.

11. Implied term s.13 SGSA 1982/common law duty. Possible negligence of Mr P for drinking, failing to notice hole. But no causation: raid before first visit, so most unlikely loss could have been prevented.

12. Anyway Wdogs probably could rely on exclusion clause (unless Mr P negligent): reasonable in circumstances. So little chance on night patrol contract.

**QUANTUM**

**Dogs**

13. Recoverable loss. No remoteness problem Pistol, Peto, Poins—foreseeable stolen or escaping dog would come to harm. Type of damage close enough (*Parsons v Uttley Ingham*).


15. Lost earnings possible, and potentially larger sum, but deduct expenses and
difficulty of proof. Without clear evidence of future earnings expert evidence on value is best.

Distress & depression

16. Distress no. Not a contract for peace of mind or personal enjoyment, even partly. Commercial contract and no damages for distress (Hayes v Dodd).

17. Depression possibly yes if medical condition. Medical report needed. But most probably too remote.

Incidental

18. Fence repairs, padlock, vet fees recoverable. Anything else?

EVIDENCE

19. Sum up requests for information and evidence.

CONCLUSION

20. Advise pursue claim v Wdogs.

25.4 Opinion

JACKIE RUSSELL

v

WATCHDOGS LIMITED

OPINION

FACTS

1 On the night of 18/19 April 2014, thieves broke in to the kennel compound at Falstaff Farm, Gadshill, Kent, where Mrs Jackie Russell breeds and trains racing greyhounds. Three of Mrs Russell’s favourite dogs were lost: Pistol was stolen, Poins was allowed to escape, and was later shot by a farmer, and Peto was strangled. Mrs Russell was distressed and suffered from depression for several
months.

2 Security was supposed to be provided at the compound by Watchdogs Limited (‘Watchdogs’) at two levels and under two separate agreements. There was a written agreement to provide a regular night patrol service, under which a patrolman (Mr Harry Prince) was to make four visits a night between the hours of 9.00 pm and 7.00 am. Mrs Russell says that there was also an oral agreement, made by telephone on 18 April, to provide an all-night watchman for just that one night. But Mr Prince seems not to have made any of his four visits until after the thieves had departed; and the all-night watchman never turned up.

3 I am asked to advise Mrs Russell as to liability and quantum in any claim that might be made against Watchdogs for the loss of the dogs.

CONCLUSION

4 In my opinion there is a good chance that liability can be established against Watchdogs for breach of the all-night watchman agreement (though not the night patrol agreement) and that Mrs Russell will recover damages representing the value of the three dogs, about £64,000, plus incidental expenses. It may be possible to recover a larger sum representing the lost earnings of the dogs, but this is not likely and will be hard to prove. My reasons are set out below.

LIABILITY

The all-night watchman agreement

5 Watchdogs are denying that they agreed to provide an all-night watchman on the night of 18/19 April 2014. They claim they have no written record of the telephone call made by Mrs Russell on 18 April. However, they sent a bill charging Mrs Russell for an all-night watchman on three occasions between 1 April and 30 June, and Mrs
Russell says that those three occasions include the night of 18 April. Unless Mrs Russell has forgotten some other occasion when she used the service in this period, this bill should provide good evidence of the existence of the agreement. I advise that a copy should be sent to Watchdogs, or their solicitors, inviting them to say on what dates they allege the all-night service was provided, and to admit that one of the dates referred to is 18 April. It would also be useful to find out if any member of Mrs Russell’s family (Elizabeth perhaps?) overheard her asking for an all-night watchman on the telephone. Unless any evidence to the contrary appears, I think it likely that the existence of the all-night watchman agreement can be established.

6 Once it has been shown that Watchdogs agreed to provide an all-night watchman, liability should be established without difficulty. Watchdogs admit that no such service was provided on that night. I think a court would have little difficulty in concluding that if it had been, the break-in would probably not have occurred. Both breach and causation can therefore be made out.

7 Watchdogs’ only possible defence would be to rely on the exclusion clause referred to by Instructing Solicitors. They would have to show that the clause was incorporated into the oral agreement. On the face of it, this is unlikely. The night patrol contract makes no reference to the all-night watchman service, and it is difficult to see how it could be argued that this service was provided under the written contract. It would have to be argued that the exclusion clause was incorporated into the oral agreement by implication. There are two ways in which this could be the case:

(a) If the implication is based on the previous dealings between the parties; for example if they had on other occasions expressly agreed to incorporate it.
Please would Instructing Solicitors find out from Mrs Russell if anything along these lines has ever been discussed.

(b) If the exclusion clause is contained in a separate document comprising standard terms and conditions which is merely referred to in the night patrol agreement. If so, it might be argued that the standard terms affect all agreements made between the parties. I would like to see a copy of the relevant documents, in order to see if this might be the case.

Neither of these possibilities seems likely. If, as I am instructed, arrangements for an all-night watchman have always been made by telephone, and Mrs Russell has no memory of the exclusion clause or standard terms being mentioned, then it probably was not.

8 But even if the clause is incorporated into the oral agreement, I do not think Watchdogs will be able to rely on it. Applying the principle of Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, it cannot have been the parties’ intention, on a true construction of the contract, that the exclusion clause should protect Watchdogs in the event of their failing to perform the contract altogether.

9 In my opinion, therefore, the chances of establishing liability for breach of the all-night watchman agreement are good.

The night patrol agreement

10 I think it is unlikely that liability could be established for any breach of the night patrol agreement. There is no evidence to suggest that Mr Prince did not make the four visits he was supposed to make, except perhaps the surprising fact that he apparently never noticed the hole in the fence. But I do not think this alone would prove his failure to patrol, and there is no more. The times of his visits did not
apparently coincide with the probable time of the raid. Therefore there is no breach of the express terms of the agreement. It could be argued that there must be an implied term in the agreement that there would be a reasonable space between the patrol visits—all four visits in the space of an hour between 6.00 am and 7.00 am, for example, would surely defeat the purpose of the agreement. But I do not think Mr Prince’s pattern of attendance that night (as alleged by Watchdogs) could be said to be unreasonable, given the need not to be too consistent, and the very low cost (about £36 per night) of the service.

11 There is of course also an implied term in the agreement to the effect that Mr Prince would patrol with reasonable care and skill (Supply of Goods and Services Act 1982, s 13) and Watchdogs would owe the same duty at common law. It might be shown that Mr Prince was negligent either in having consumed too much alcohol or in failing to notice the hole in the fence, or both (the two might be connected). But no causation would flow from such a breach. If the raid occurred before midnight, no amount of vigilance on Mr Prince’s part could have prevented it. The only faint possibility of establishing liability on this basis rests on being able to show that if Mr Prince had noticed the break-in at 12.30 am and raised the alarm, Pistol and Poins would have been saved. But it is hard to see where evidence to support this could come from, and I do not think a court would find it inherently probable.

12 I do not therefore think there is much chance of establishing any liability for breach of the night patrol contract. Even if the problems I have mentioned could be surmounted, I think Watchdogs probably would in this instance be able to rely on their exclusion clause (unless liability was based on Mr Prince’s negligence). It is not in my opinion an unreasonable exclusion given the very limited amount of security.
Watchdogs were supposed to provide and the low cost of the service.

**QUANTUM**

**The loss of the dogs**

13 Mrs Russell would in my opinion be able to recover damages for the loss of all three dogs. I do not think there is any problem of remoteness in respect of Pistol or Peto, but it might be argued that the death of Poins was too remote. However, I think this argument would not succeed. It was plainly within the contemplation of the parties that if there was no security provided at the compound, a dog could be stolen or harmed or escape. It was foreseeable that a dog that escaped might come to harm. It does not matter if the precise manner in which Poins met his death was not within the parties’ contemplation providing the type of harm was contemplated (*Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791).

14 The question arises whether Mrs Russell can recover damages based on the value of the dogs, their likely earnings, or both. On the assumption that their market value reflects their profit-earning potential, it will not be possible to recover the lost earnings in addition to their value, as that would amount to double recovery. There is no doubt that Mrs Russell will be entitled to the market value of the dogs; that is the normal basis of assessment for the loss of goods (even such treasured goods as Pistol, Poins and Peto). But where the goods are profit earning, it is sometimes possible to recover instead the loss of profit.

15 On the face of it, that seems to be a significantly larger sum—up to £180,000 or more as against £64,000. But the figures I have for likely earnings are presumably gross, and must be reduced to take account of the costs of keeping, training, guarding and insuring the dogs. Doubtless this would bring the loss of
earnings down substantially. There would also be the difficulty of proof. Mrs Russell would have to produce evidence as to the likely earnings of the dogs over the rest of their lives, which may not be easy, and would require some speculation. I think it likely that the court would prefer expert evidence of value, taking account of earning potential, in any event. I therefore advise Mrs Russell to claim on the basis of value, unless she is able to put forward strong evidence to show a probable level of net profit significantly greater than these sums.

Distress and depression

16 I do not think Mrs Russell can recover damages to compensate her for her grief or distress. Such damages may be recoverable in contract where the contract is one to provide peace of mind, or personal enjoyment, as in the spoilt holiday cases. They may be recoverable where that is only part of the purpose of the contract: *Farley v Skinner* [2001] 4 All ER 345. But however much she loved her dogs, Mrs Russell is essentially running a business, and I think the court would treat this as a commercial contract, in which case damages for distress are almost certainly irrecoverable: see for example *Hayes v James Charles Dodd* [1990] 2 All ER 815.

17 On the other hand if Mrs Russell’s depression was a depressive illness requiring medical treatment, then she has a potential claim for personal injury. If Instructing Solicitors could arrange for a medical report to be obtained substantiating this, then I advise that such a claim can be made. However, I do not have great confidence in its success. The difficulty would be remoteness. I think Watchdogs might well argue successfully that personal injury of this kind was not a foreseeable consequence of their failure to provide an all-night patrolman.

Damage to property
In addition, Mrs Russell should be able to recover damages for the cost of repairing the fence and replacing the padlock, any veterinary bills in connection with Poins’ and Peto’s deaths and any other incidental expenses resulting from the break-in.

EVIDENCE

It may help Instructing Solicitors if I recap on the further steps to be taken and evidence that might be sought. I advise the following:

(a) Send a copy of the bill received on 3 July 2014 to Watchdogs or their solicitors, inviting them to admit that one of the nights referred to is 18/19 April 2014.

(b) Ask Mrs Russell whether anyone (Elizabeth possibly) overheard her telephone conversation with Watchdogs on 18 April 2014. If so, seek evidence from that person as to what they heard Mrs Russell say, in particular whether they heard her ask for an all-night patrolman that night, and whether it sounded as though Watchdogs were agreeing to that request.

(c) Obtain all documents relating to agreements between Mrs Russell and Watchdogs, especially any documents containing standard terms and conditions and documents referring to the all-night watchman service.

(d) Ask Mrs Russell whether all previous requests for an all-night watchman have been made by telephone, and, whether in any of those phone calls, reference has been made to standard terms and conditions or exclusion clauses.

(e) Obtain expert evidence on the value of Pistol, Poins and Peto immediately prior to their deaths, taking account of their earning potential.

(f) Consider whether it is reasonably practicable to obtain evidence of the likely earnings of Pistol, Poins and Peto over the remainder of their natural lives,
both in winnings and stud fees, together with an estimate of the costs of keeping, training, guarding and insuring those dogs over the same period. Only go ahead with obtaining such evidence if it is reasonably practicable to do so, and likely to result in a larger claim than £64,000.

(g) Enquire whether Mrs Russell has been diagnosed as suffering from a recognised depressive illness, and if so obtain a medical report relating to this illness, its consequences, treatment and prognosis.

(h) Collate bills and receipts relating to the cost of repairing the fence and the padlock, veterinary expenses in relation to Poins’s and Peto’s deaths, and any other incidental expenses caused by the break-in.

CONCLUSION

20 I advise therefore that a claim should be pursued against Watchdogs for their breach of contract in failing to provide an all-night watchman and that it has good prospects of success. The claim should provisionally be for the market value of the three dogs, plus incidental expenses and possibly also for Mrs Russell’s depression, but this last may not be recovered. I would be happy to advise further and draft Particulars of Claim if so requested.

JOSEPH BLOGGS

4 Gray’s Inn Place

8th September 2014