

8 May 2019

**THE POST OFFICE GROUP LITIGATION**  
**BOARD LITIGATION SUB-COMMITTEE: 9 MAY 2019**

This paper is supplemental to the Common Issues appeal paper prepared by the Post Office legal team (Post Office legal, Womble Bond Dickinson and Counsel) for the meeting of the sub-committee on 24 April 2019. That note contained the Post Office legal team's recommendation on the scope of the Common Issues Appeal.

In this brief paper, we set out what we consider to be the key issues in the Common Issues appeal to be discussed at the sub-committee meeting on 9 May, with a view to reaching consensus before the hearing before Fraser J on 16 May 2019. We also set out the proposed approach in relation to the costs hearing on 23 May 2019, also for discussion tomorrow.

**RECOMMENDATIONS**

**1. On what grounds should the Common Issues judgment be appealed?**

1.1 As we explained in our paper of 23 April 2019, on the basis of the information available to us at that time, we **agreed** with the Post Office legal team's view on the aspects of the Common Issues judgment that should be appealed. We have since had more time to review the Common Issues Judgment, draft Grounds of Appeal and draft Skeleton and meet with the Post Office legal team to discuss the approach and confirm that we continue to **agree** with the approach being proposed.

1.2 We set out below what we consider are the key issues for tomorrow's discussion, being the position to be taken in the appeal on the implied duty of good faith (and implied terms more generally) and the Judge's factual findings. We note that, from a quantum of liability perspective, his findings in relation to the interpretation of clause 12.12 and the notice provisions are key and are challenged. However, we do not understand there to be any question that these findings need to be appealed and do not consider that the Post Office could properly be criticised for doing so. We therefore do not address them further in this note, but would be happy to discuss these points (and any others) with the sub-committee if you wish to do so.

**2. What are the key issues in the appeal to be discussed with the sub-committee?**

*Errors of law: implied terms*

2.1 The Judge implied 21 terms<sup>1</sup> into the contracts (the "**Implied Terms**"):

2.1.1 First, the Judge concluded that the SPMC and NTC were relational contracts and that, as an automatic result of this, they contained an implied duty of good faith. The Post Office's position is that the Judge's approach is inconsistent with leading case law and wrong in law. While not presented as alternatives in the appeal papers, Post Office's case is:

- (A) The Judge erred in concluding that the contracts were relational;
- (B) Even if the contracts can be properly classified as relational, the Judge still erred in law in implying a good faith term; and
- (C) Even if a good faith term is implied, the Judge's particular term is wrong in law. It is extremely broad and onerous and inconsistent with case law and leading academic text.

<sup>1</sup> The annexed paper prepared by WBD outlines the Judge's basis for implying each of the 21 terms.

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- 2.1.2 We are discussing the presentation of this argument with Counsel but, on balance, agree with the approach being taken – that is to present this as a singular argument rather than alternatives. To present Post Office's position as alternatives risks undermining Post Office's primary case that these are not relational contracts. Should it prove necessary to do so before the Court of Appeal, the Post Office can advance an alternative argument based on a limited duty of good faith in oral argument.
- 2.1.3 The Judge then implied a further 20 terms:
- (A) 10 terms were implied on the basis that they were "incidents" of the implied duty of good faith;
  - (B) 7 terms were implied on the basis that they were "incidents" of the implied duty of good faith and/or were necessary for the business efficacy of the contracts; and
  - (C) 3 terms were implied on the basis of necessity alone.
- 2.1.4 The Post Office legal team's position is that all 20 terms should be appealed on the basis that the test for necessity was not met for any of the terms and/or even if there is an implied term of "good faith" none of the above terms were "incidents" of the duty of good faith. We agree with the proposed approach for the following reasons:
- (A) It ensures that the appeal is legally coherent and consistent.
  - (B) While a number of the Implied Terms appear to be relatively anodyne, there is a risk that if the Post Office accepts some duties but not others it will undermine the Post Office's challenge to the Judge's approach to the tests for implying terms.
  - (C) If it looks like the Post Office is picking and choosing between the Implied Terms, there is a risk that the debate in the Court of Appeal will be centred around which of the implied terms should be permitted, rather than the Judge's errors in law to the implication of terms in general.
  - (D) We are applying for permission to appeal before Fraser J. It is difficult to add appeal points but not to withdraw appeal points. It therefore makes sense to cast the appeal in broad terms and then (should there be a desire or need to do so) to narrow the issues either in our application for permission to appeal to the Court of Appeal or before the Court of Appeal hearing.
- 2.2 However, we do think it is important that the Post Office's position as to its obligations under the contracts is clearly explained, in order that it not be seen to be contesting obvious obligations. It needs to be made clear to the Court of Appeal that the core of Post Office's position before the Judge was the (agreed) implication of the twin implied terms of "Necessary Cooperation" and "**Stirling v Maitland**", (the "**Agreed Implied Terms**"), which Post Office contended operated in the same area as the terms implied by the Judge. While the precise effects of both terms will depend on the factual circumstances in which they are relied upon, Post Office did provide the Judge with examples of circumstances in which these implied terms would be engaged – giving these terms real teeth.
- 2.3 We have discussed this point with Counsel and they agree with the need for the Court of Appeal skeleton to address the Post Office's position. The current draft of the skeleton goes some way towards this, but we will continue to work with Counsel to ensure that the Post Office's position as to its obligations is clearly articulated. In particular, we think that it

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may be helpful to include some of the content from the Closing Submissions for the Common Issues trial (rather than simply cross referring to it as currently), in particular that:

- 2.3.1 Training and support: The Post Office accepts that the Necessary Cooperation term requires it to provide reasonable initial training and any further training or support requested by SPMs that is required by them to properly discharge their obligations under the contracts. The example is given of the introduction of Horizon as being one in which further reasonable training was required.
- 2.3.2 SPMs accounting to the Post Office: The Post Office accepts that the Agreed Implied Terms require that (i) any accounting system used by the Post Office not inhibit or prevent SPMs from complying with their obligations; and (ii) Post Office operates the system so as to cooperate reasonably with SPMs where such cooperation is necessary to the performance of the SPMs' obligations. For example, the Post Office could not require SPMs to account through a system that Post Office knew to be flawed such that it prevented SPMs from performing their accounting obligations – and Post Office would be required to take steps to facilitate that performance by other means.
- 2.3.3 Investigation of shortfalls: The Post Office accepts that the Agreed Implied Terms require that it provide reasonable cooperation to SPMs where such co-operation is necessary to the performance of their obligations. For example, where the Post Office is aware of a fact about a branch's account that it not known to the SPM (eg that a transaction is incorrect), it must inform the SPM of this.
- 2.4 Our view, subject to further discussion with the Post Office legal team, is that this sort of content provides useful further detail as to the operation of the Agreed Implied Terms and the extent to which they cover the same ground as the additional terms implied by the Judge, rendering those terms unnecessary.
  - 2.4.1 We will also discuss with the Post Office legal team whether there are any further examples as to the operation of these terms that the Post Office advance at this stage. Counsel's current view, with which we agree, is that it is preferable to limit the examples to those set out previously in the Closing Submissions but to be prepared to go further in the Court of Appeal hearing if necessary.

#### *Factual findings*

- 2.5 The starting point is that the threshold for interfering with a finding of fact on appeal is high. It is therefore only in very limited circumstances that factual findings should be appealed. However, we agree with the Post Office legal team's view that there is a need to appeal certain factual findings in this case.
- 2.6 Attached to this paper is a summary prepared by WBD of the factual findings that are being appealed. In essence they fall into the following two categories:
  - 2.6.1 Factual findings appealed on the basis of Procedural Unfairness: the Judge made findings, or gave clear indications of his concluded views, on a large number of matters which were outside the scope of the Common Issues trial. Post Office did not lead evidence on these matters, and there was not proper disclosure on them. We agree with the need to appeal these findings to avoid the risk of prejudicing future trials.
  - 2.6.2 Errors of fact: these fall into the following sub-categories:
    - (A) Findings as to Mr Bates' receipt of his contract at the time of appointment. We agree with Post Office legal team's view that this is a clear example where the Judge has wholly ignored the documents to get to his desired



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conclusion and so it should strike the Court of Appeal as strange, and support our appeal in general.

- (B) Findings on Post Office's behaviour (and that of its witnesses) which were unjustified and unwarranted. We agree with the sense of appealing these findings as they are relevant to the claimants' claim for indemnity costs.

2.7 Highlighting the Judge's errors of fact is also supportive of our request that, even if Fraser J is not formally recused, that the Court of Appeal order that a different judge be appointed Managing Judge of the litigation.

2.8 With respect to factual findings which are not being appealed, these are summarised in WBD's attached paper. Given the need to ensure appeals of factual matters are used sparingly we are content to agree with the legal team's decision not to appeal these findings.

### **3. How should Post Office approach costs in the Common Issues Trial?**

3.1 There is a hearing before Fraser J on 23 May 2019 to settle the outstanding costs issues arising from the Common Issues Trial. WBD will present to the sub-committee their advice on how Post Office should approach this hearing. The proposed strategy is as follows:

3.1.1 On the merits there is a reasonable chance that the costs of the Common Issues Trial should be reserved. This is because the Common Issues Trial is not completely independent of the outcome of the overall proceedings. As it is the case that the individual claimants could fail to recover any or any significant damages then costs orders should be deferred not least because, once costs are assessed and paid, it may make any later adjustment more difficult. If costs are reserved, the Claimants will not receive any interim payment.

3.1.2 However, factoring in Fraser J's disposition, it is more likely than not that he will order Post Office to pay the Claimants' costs, and there is a risk that he will do so in astringent terms. Any costs order will come with a substantial interim payment to the Claimants, likely to be at or around the sum they are currently seeking of £6.1m.

3.1.3 WBD's recommendation is therefore that Post Office send:

(A) An open letter that reserves Post Office's position on whether costs should be ordered or reserved but offering a fair interim payment (£4.9m - 80% of what the Cs want) but subject to it being held by Cs solicitors in their client account pending the outcome of the proceedings.

(B) A without prejudice letter that offers a smaller "no-strings attached" interim payment (£3.3m) which the Claimants are able to access now. In exchange for Post Office giving up its claim for costs being reserved the Claimants will receive payment now.

3.1.4 [We are in the process of discussing the above proposal with WBD, but our current view is that we do not see the benefit of including the restricted offer in the open letter. There is no practical benefit to the Claimants in a ring-fenced payment of this type, given that the Post Office will be good for money in due course – and it may give impression that the Post Office is proposing this purely for tactical reasons.]

**Herbert Smith Freehills LLP**