

Message

From: Jane MacLeod [GRO]
Sent: 16/09/2018 21:25:58
To: Andrew Parsons [/o=Exchange-Org/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ad9ed344815e47e4aaa3c0e7e1740919-Andrew Pars]; Rodric Williams [GRO]
Subject: RE: Postmaster Litigation - Security for Costs - Advice re: Undertaking from Post Office CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD [WBDUK-AC.FID26896945]

Have just had a call with Paula & Al. They agree that we should press ahead with the application & give the undertaking on the standard terms as set out in Rod's email from late Friday night.

We will need to explain this to the Board sub-committee next week, but at least by then the terms will be clear!

Many thanks,

Jane

**Jane MacLeod**

Group Director of Legal, Risk & Governance
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Mobile number: [GRO]

From: Andrew Parsons [GRO]
Sent: 16 September 2018 21:50
To: Jane MacLeod [GRO]; Rodric Williams [GRO]
Subject: RE: Postmaster Litigation - Security for Costs - Advice re: Undertaking from Post Office CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD [WBDUK-AC.FID26896945]

According to Cs witness evidence they want the standard commercial court wording (as set out in your email below) that does not mention a multiplier. However, they have not yet provided a draft Order (we have asked for it) and so they could try to squeeze in an amended version.

A

Andrew Parsons

Partner
Womble Bond Dickinson (UK) LLP

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From: Jane MacLeod [GRO]
Sent: 16 September 2018 21:46
To: Andrew Parsons; Rodric Williams
Subject: Re: Postmaster Litigation - Security for Costs - Advice re: Undertaking from Post Office CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD

Apologies, my question wasn't clear - does the scope of the undertaking sought by the claimants refer to the multiplier?

Jane MacLeod
Group Director Legal, Risk & Governance
Post Office
[GRO]

From: Andrew Parsons [GRO]
Sent: Sunday, September 16, 2018 9:42:19 PM
To: Jane MacLeod; Rodric Williams
Subject: RE: Postmaster Litigation - Security for Costs - Advice re: Undertaking from Post Office CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD

The undertaking won't mention the multiplier. The undertaking is broadly worded to give the Court a wide discretion to order Post Office to pay for the costs of the security if Post Office "loses" the litigation taking into account all the circumstances.

When that cost is assessed by the Court (which is at least months away), the Cs have indicated that they intend to try to claim the multiplier's effect on the cost of the funding. We will argue that the multiplier should not be taken into account at all because it is unfair that Post Office should bear the cost of the Cs funding when it had no control, or even visibility, of it.

Even if the multiplier is taken into account, it doesn't mean that it will apply 100%. For example, if half the claims are struck out for limitation, we will say that only half the security cost is recoverable (or something along these lines). There are many more arguments like this that could be deployed but cannot be predicted in advance.

I think we need to be careful here not to overstate the risk of the multiplier on the undertaking because it is both contingent and discretionary.

A

Andrew Parsons
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From: Jane MacLeod [GRO]
Sent: 16 September 2018 21:25
To: Andrew Parsons; Rodric Williams

Subject: Fwd: Postmaster Litigation - Security for Costs - Advice re: Undertaking from Post Office CONFIDENTIAL AND
SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD

See below. I assume that the undertaking doesn't call out the multiplier specifically, but this is an interpretation that the legal team has seen as a possibility???

Jane?

Jane MacLeod
Group Director Legal, Risk & Governance
Post Office

GRO

From: Alisdair Cameron
Sent: Sunday, September 16, 2018 8:53:45 PM
To: Paula Vennells; Jane MacLeod
Subject: RE: Postmaster Litigation - Security for Costs - Advice re: Undertaking from Post Office CONFIDENTIAL AND
SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD

I could do a call at 10-10.30 if that would work?

Echo Paula's questions and clearly we can't make decisions without numbers. We also need a best guess of what losing means.

I find the logic of the multiplier increasing cost to us (rather than the split between claimant and funder) baffles me completely and I find it extraordinary that we couldn't challenge it. Could we not address this in our response?

I wasn't 100% sure I understand the recommendation but I think its is to press on and take the risk? I don't quite see how the team have reached this without numbers either. But is that right?

Emotionally I am in favour of taking the risk: if we back down at the first of trouble we look weak?

But it does feel like they have better advisors than us – more nimble, more prepared to push the envelope. And that is a real worry.

Thanks Al



Alisdair Cameron
Chief Finance & Operating Officer

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GRO

From: Paula Vennells
Sent: 16 September 2018 18:30

To: Jane MacLeod <[redacted] GRO>; Alisdair Cameron <[redacted] GRO>
Subject: Re: Postmaster Litigation - Security for Costs - Advice re: Undertaking from Post Office CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD

Jane, it might be easier if you and Al can manage it, to have a call tonight.
I really don't want to eat into the McK workshop. But I can see that this is serious.

Thank you first of all for a very comprehensive note. And please take my comment in point 5 as an 'assume positive intent' tone of voice.

Four points to go through tonight; Al please add:

- 1) should we proceed at all? I'm not worried about any optics - only about minimising our exposure. I could be right or wrong and would like to talk it through.
- 2) before any decision, the numbers (I accept intelligent guesswork) must be set out clearly: this needs a finance overview in the sense of a risk-reward approach. If I've understood correctly, the multiplier introduces a risk of paying back more than we have applied for.
- 3) If the potential for a cross-undertaking, and the multiplier 'is not unusual', we should have set it out clearly like this for the Board Sub-Ctte. The downside risk is high and it would have been helpful if they were aware as I'm uncomfortable taking a further decision without their cover.
- 4) what happens if we miss tomorrow's deadline? I don't see that we can take a decision without 2) and 3).
- 5) I wonder if we are being advised well enough; and if we need to tighten our governance around ways of working. If 'not unusual', we could have anticipated it. There is always a danger when colleagues (advisers or our own teams) are working as hard as they are, and are as close to it as they are, that perspective slips. We are being asked to take a decision on risks to public money with little data and no notice. This short-notice request puts Al and me (but ultimately me) in a difficult situation personally. Let's sort it out then pick up later.

I can make a call anytime from now until late - Jane, can you set something up?
Al can you confirm you're ok? You may be travelling so I'm happy to fit in with your schedule.
Thanks both,
Paula

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From: Jane MacLeod <[redacted] GRO>
Sent: Saturday, September 15, 2018 19:11
To: Alisdair Cameron; Paula Vennells
Cc: Rodric Williams; Andrew Parsons
Subject: Postmaster Litigation - Security for Costs - Advice re: Undertaking from Post Office CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD

Paula, Al

Apologies for the weekend email.

As you will be aware from previous briefings, the application for security for costs in the Postmaster Litigation is to be heard on Wednesday, and we are seeking security for c£6.7 million. To date Freeths have offered us security of £2 million. There have been developments this week as set out below, and our legal team need instructions by midday on

Monday. Our recommendation is set out below, however there is financial risk to Post Office as a result of this, of which you should be aware.

Freeths served us on Wednesday with a request for a cross undertaking for damages, which means that if we lost the Common Issues trial (see below as to what this means), we would be required to indemnify the Claimants for the cost of providing the security. We are not being required to provide any security for this cross undertaking. The request for a cross undertaking is not unusual, although we would have expected this to have been raised earlier, and there are court rules around such cross-undertakings.

However in this case there are a number of potential issues, and we have spent Thursday and Friday considering the potential risks:

- in this case it is not clear what 'lost' would mean given that the application in the Common Issues trial is to determine the proper construction of the contract, rather than the usual case of determining liability. It will be for the Court to decide as part of that hearing, what would trigger a liability under the cross undertaking;
- the funders will incur costs for the provision of the security. The security will be in the form of a bond issued by an insurer and they have so far offered a bond of £2 million. The cost of the bond will be equivalent to a financing charge however we have no details of the cost. Therefore the cross undertaking will cover – at a minimum – that financing cost.
- There is a further complication that is possible, although at this stage not clear:
 - the Claimants' funders are paying the costs of pursuing this litigation, which will include the costs of providing any security;
 - typical funding arrangements enable the funder to recover those costs from any damages received in the claim, multiplied at a rate which reflects the risk they are taking (typically a 3x to 5x "multiplier");
 - if we do not get a costs order which could be satisfied by the security, the Claimants will say that the losses covered by the undertaking include the amount by which their damages were reduced as a result of having to pay for the unnecessary security; that is, the amount the funder takes from the damages for paying those costs (i.e. the finance costs at the "multiplier" rate).

The net effect of this will be to increase the total amount we would have to pay to the Claimants (i.e. damages plus Claimants' legal costs plus the "multiplier" costs of security).

The legal team's recommendation (including our Counsel) is to agree to a standard Commercial Court undertaking (with necessary amendments to cater for this litigation) which is as follows:

"Upon the Defendant undertaking to comply with any order that the Court may make if the Court later finds that the order for security for costs has caused loss to the Claimant and that the Claimant should be compensated for such loss".

The reasons for this are:

1. It is now the norm to provide an undertaking when security is given, such that there is a high prospect that security will either not be ordered at all (or not ordered for more than £2m) without a cross undertaking from Post Office.
2. This form of undertaking has been given in security applications in other group litigations, including the recent RBS Group Litigation.
3. The Judge is unlikely to want a prescriptive undertaking that decides upfront what is inside and outside of its scope. It is difficult to predict exactly how and when costs orders may be made in this litigation, so an undertaking that gives the Judge a wide discretion will be attractive.
4. That point however cuts both ways, and the above form of undertaking leaves room for Post Office to argue (when dealing with costs) as to the costs that should be caught by the undertaking, and to bring other factors

into consideration, e.g. if the Claimants win on some issues but not all, or some Claimants discontinue/lose but others win etc.

Therefore, this undertaking comes with the risk of covering the cost to the Claimants of providing the security, as multiplied under the Claimants' funding arrangements:

We are developing some modelling to demonstrate the potential costs in certain scenarios, and we will have this for Monday, however it is a model only and we are missing important information (e.g. a proper claim value, as well as the details of the agreement between the funders and the Claimants).

As the application is being heard on Wednesday and skeleton arguments need to be filed by 4pm on Monday, the legal team need instructions by lunchtime Monday as to whether Post Office will provide the cross undertaking in the above terms.

Can we discuss first thing on Monday?

Many thanks,

Jane



Jane MacLeod

Group Director of Legal, Risk & Governance
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