

CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION
Steering Group Meeting: 6 December 2017



DECISION: Should Post Office put forward the settlement proposals set out below?

Tom W: As my attendance has been curtailed by events recently, I have also reviewed the papers and agree with Tom's comments and annotations. Settling any of these claims does not sit easily with me (and I would be especially concerned if there were large outstanding debts we were writing off as a result – particularly amongst active claimants). However, I recognise the sense in pursuing the recommended approach.

Mark D: My points would be similar to those of Tom and Tom.

I welcome the approach but would want to be assured that all internal stakeholders are aware of the strategy and supportive.

I would also want to be sure that it is clear that we would always seek to resolve issues via non-legal avenues, and there is substantial evidence of this from the deployment of the mediation scheme.

This is particularly true of "active" cases. I would be very anxious about settling cases where there is no cause to do so: it is public money and while I can see the benefits of splitting the claimants, I do not believe we should do so when it would not be right to do so: as well as a reputational risk as set or above there is also a risk around signals being sent to the network.

I wholly agree re those cases where there are criminal records.

I think it is a really clear and helpful paper. I do think it requires a full discussion.

Patrick B: I agree with what's already been said.

I just wondered whether something had cropped up for this proposal to emerge now? I was away last week, and may have missed something so forgive me if I have, but I hadn't been expecting a suggestion settlement of any kind at this stage, although I can quite see the appeal of the proposal.

The other thing which occurs is what the likely position of the litigation funders is likely to be in respect of this approach, if the consensus is that we ought to make it. While these 2 subgroups were never going to be the ones to generate the sort of pay day which gives them a reason to be in business, it would be just be interesting to know what WBD think their likely stance will be.

Rodric W: Generally, while we should always be looking at settlement options, I don't think we need to rush this and would want to see some pretty strong advice to support sending something to Freeths this side of Christmas before we took any action.

I like the idea of trying to hive off the settled cases:

- They are a significant number of claimants;
- Their claims can be dealt with on a discrete point, namely they should pay back the NT payment if they no longer want to be bound to their settlement (i.e. they can't have their cake and eat it);
- The claimants should see the sense in abandoning their claim, given that it should be worth less than the NT payment they are putting at risk (i.e. the bird in the hand is worth more than two in the bush).
- The suggested approach doesn't involve us paying anything, just foregoing legal costs (which we should not lead with but could negotiate to), limiting how much confidence Freeths/the claimants could take from any settlement proposal.

I do not like the suggested approach for "Active Claimants":

- I think it will be very difficult to limit this to the 45 current claimants, or even their existing claims (e.g. they could raise the same challenges next time they get a loss).
- In this regard, I do not consider the closing of the Group Litigation to be an effective mitigation - it has already been extended twice.

- At the moment, the impact of the litigation on BAU is fairly confined, albeit disproportionately frustrating. That could change if it became known that the litigation provided a way to circumvent BAU branch accounting process.
- Settlement is likely to involve some form of payment. This would give confidence to the claimants (and their funders), flag our vulnerability to claims from active postmasters, and increase the risk of contagion.
- My experience with the mediation scheme is that significant resource would be required to put the proposal into practice, which resource gets quickly strained by even small increases in the number of cases.
- I doubt whether Freeths' will go for it:
 - What we consider to be realistic settlements are unlikely to be attractive at this stage of proceedings, bearing in mind Freeths apparently need >£20m before the claimants get anything.
 - The approach they have taken to date to dealing with active postmasters is to slow our processes without dealing with the substance.
 - Based on that, I would expect them to require wide ranging and costly disclosure for each case, and that the claimants only speak to us with legal representation, before agreeing to engage with us. That would put further strain on our resources.

In short, I am concerned that the suggested approach runs the risks of increasing the number of claims we need to deal with, consuming resources and weakening our overall position for questionable return.

- I do however agree that we should try to hive off the Active Claimants, but think it could be done through different means which should be properly considered, e.g. by using BAU means to circumvent the litigation rather than the other way around as proposed, and/or by highlighting to the Active Claimants that they are engaged in a dispute which is going to take a long time to resolve but which is unlikely to give them a big payout given they are still in post.
- Finally, I don't think we need to run the two proposals simultaneously. We could just focus on one, lower risk option (i.e. the settled cases) and see where that takes us.

1. BACKGROUND

- 1.1 The CMC Order requires Post Office and the Claimants to consider and explore the possibility of settling the dispute (or aspects of it) outside of the litigation process. Costs penalties may follow if a party cannot justify its refusal to enter into settlement discussions proposed by the other party.

Tom M: This is a crucial bit of context which is very helpful.

- 1.2 We have identified two groups of Claimants with whom an early settlement might be possible:

- 1.2.1 **Active Claimants.** There is a group of 45 Claimants who are currently in-post and have valued their claims at less than £5,000 each, with their claims often relating to recent issues or single isolated events. Given that the claims are relatively low-value, the parties would incur disproportionate costs to continue them through to trial.

Moreover, as these Claimants have a live relationship with Post Office, they may be more amenable to settling early. We suspect that many of these Claimants may have joined the Group Litigation as a way of escalating their concerns and / or see it as a way of frustrating Post Office's normal debt recovery processes. Nevertheless, it would appear to be in both sides' interests for a negotiated settlement to be concluded with these Claimants so that they can go back to running their branches as normal.

- 1.2.2 **Settled Cases.** Approximately 120 Claimants have settled with Post Office already, most under NT. It is a general (but not undisputed) principle of law that if a Claimant wishes to unwind their settlement so that they may bring a claim against Post Office, they would first need to return to Post Office any settlement monies they have already received. This is a point we made to Freeths in Post Office's Rejoinder.

Nick B: Who is the ultimate arbiter of this disputed principle?

Given the size of many NT leaver's payments, it is likely that the amount of money to be returned to Post Office may exceed the amount a Claimant would recover in the Group Action. Claimants facing this prospect may be prepared to settle early.

- 1.3 Post Office is asked to consider whether to commence settlement discussions with these categories of Claimants. A draft letter to Freeths is enclosed for consideration.

Nick B: Do we know how confidential this will be - both the overall principle and the individual cases - and how binding it will be? I am very supportive of the concept but my perception to date is that some claimants have been very public in how this is all playing out. Maybe there is nothing we can do about this but I would like to have a sense of this in order to inform the decision being made here.

2. ACTIVE CLAIMANTS

- 2.1 We propose the following process for dealing with Active Claimants:

- 2.1.1 The Claimant and a nominated person at Post Office meet to discuss the Claimant's concerns and seek to agree a resolution. No lawyers would necessarily need to attend these meetings. Settlement would be discussed on a 'without prejudice' basis. This means that neither party could draw the Court's attention to those discussions.

Tom M: Who would this be? It sounds fraught with potential risk. Also sounds a bit like mediation.

Nick B: Will this vary between cases? What will be the determinant?

Nick B: Please clarify what this means - "neither party could draw the court's attention to those discussion"

- 2.1.2 Post Office could offer to provide specific training or conduct branch visits to address any operational concerns the Claimants may have. The settlement may involve either party paying money to the other party depending on the nature of the issues involved.

Nick B: Have we not done this already?

- 2.1.3 An audit should be undertaken at each relevant branch prior to any settlement being concluded. This would ensure that any recent and undetected shortfalls could be identified and factored into any settlement. This ensures finality.

- 2.1.4 Each of the settling Claimants would be required to enter into a written settlement agreement, covering all claims they may have against Post Office. Settlement would not involve any admission of fault or liability on Post Office's part.

3. SETTLED CLAIMANTS

- 3.1 We propose the following process for dealing with Settled Claimants:

- 3.1.1 WBD to review all the "Settlement Agreements" to identify Claimants with claims worth less than their previous settlement payments.
- 3.1.2 WBD to disclose all relevant Settlement Agreements to Freeths.

- 3.1.3 WBD write to Freeths inviting Settled Claimants to discontinue their claims on the basis that each side bears its own costs. We believe that Post Office needs to be prepared to waive its costs in these cases in order to create an incentive for these Claimants to settle. Post Office's costs per case are currently around £3,500.

Tom M: I support this. Without it we would not be able to progress, I think.

4. CONSIDERATIONS

- 4.1 **Court duty to consider settlement:** As noted above.

Tom M: There is another set of considerations around corporate reputation, i.e. the risk of Post Office being seen by the ill-informed as 'guilty' i.e. willing to settle already.

- 4.2 **Dividing the Claimants:** We believe that it would be to Post Office's tactical advantage to seek to divide the Claimants into sub-groups through settlement. The more we are able to do this, the harder it will become for Freeths to manage the litigation, with each sub-group needing to be administered individually, rather than as part of one group.
- 4.3 **Reduce the economics of the Group:** Getting the Settled Claimants to discontinue will reduce the overall aggregate value of the claims, reducing the economic benefit to the funder of continuing the Group Action.
- 4.4 **Burden on Freeths:** Freeths will be obliged to communicate with each Claimant who is offered a settlement, thereby giving them further work to do and putting them under further pressure.
- 4.5 **Costs:** Entering into settlement discussions, even with only a limited group of Claimants, will necessarily involve incurring further legal costs. It will also require internal resource in order to hold the settlement discussions with the Active Claimants.
- 4.6 **Encourage the Claimants:** Offering any form of settlement may give the Claimants hope that a wider settlement is possible. This may encourage them to fight the litigation for longer.
- 4.7 **Further Claimants:** Offering a settlement to Active Claimants may encourage other postmasters to join the Group Action (though we note the Group is currently closed to new applicants).
- Nick B: Does this mean that no one can now join? If not, what are the rules?
- 4.8 **Criminal Cases:** Opening up a settlement dialogue allows Post Office to make clear that it will never settle with Claimants who have been convicted. This will drive a wedge into the Group, which we believe will make Freeths' job very difficult in holding the group together.

5. RECOMMENDATION

- 5.1 We would recommend the above proposals to Post Office. In our view, the benefits of starting to split up the Group and reducing the Group economics outweigh the disadvantage of signalling to the Claimants that Post Office may be prepared to settle.