

Group Litigation Update

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Executive Summary

Context

Post Office is awaiting decisions from the courts on the Horizon Issues trial and on Post Office's application for permission to appeal the March 2019 Common Issues judgment.

On 3 October 2019 Post Office notified the Claimants and the Court that we had become aware of the existence of potentially relevant documents (previous versions of Fujitsu's Horizon Known Error Log / KEL entries) which had not been disclosed before the Horizon Issues trial.

Mediation to explore settlement with the Claimant Group is scheduled for 27-28 November 2019. This could be postponed if the Horizon judgment is delayed. Preparations otherwise continue for the third, "Further Issues" trial scheduled for March 2020.

An update on Post Office's operational responses to the Common Issues Judgment handed down on 15 March 2019, and on the Contingency Planning for the Horizon Judgment will be addressed in a separate Board paper.

Questions addressed in this report

1. What is the update on the Group Litigation (Horizon judgment; Common Issues trial; third/Further Issues trial)?
2. What is the update on the KEL Disclosure development?
3. What is being done to prepare for mediation and settlement?
 - a. What is being done to analyse each individual Claimants' claim?
 - b. What might be driving the Claimants' perspective on quantum?
 - c. Would it be more cost effective to settle the claim or litigate and lose?
 - d. What is being done to map out the route for shareholder approval of any settlement?
 - e. Who will attend the mediation for Post Office?
4. What are the next steps?

Conclusion

1. The Horizon judgment will not be handed down until the end of October at the earliest. It is possible that the KEL Disclosure development delays this. We are also preparing for the Court of Appeal hearing on 12 November 2019, and to receive on

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25 October 2019 the Claimant's formal claims for the third, "Further Issues" trial scheduled for March 2020.

2. Post Office has received the additional KELs from Fujitsu and is reviewing the additional KELs those requested by the Claimants not previously disclosed to assess the impact they may have on the litigation. It is also addressing its legal options and audit rights against Fujitsu. Neither the Court nor the Claimants have as yet responded substantively to us following our notifications of this development.
3. Mediation to explore settlement with the Claimants has been scheduled for 27-28 November 2019. This could be postponed if the Horizon judgment is delayed (which is possible given the KEL the Disclosure development). Nevertheless, further work is being done to refine the analysis of the Claimants' claims and quantum, and to put in place arrangements to share information with, and obtain approvals from, our shareholder concerning settlement.
4. The next key steps between now and the end of November 2019 are attending to the Horizon judgment once received and the KEL Disclosure development, preparing for the Court of Appeal hearing on 12 November 2019 and mediation on 27-28 November 2019, and responding to the Claimants' case for the Further Issues trial by 25 November 2019.

Input Sought

1. The Board is asked to note the updates in this paper.
2. The Board is also asked to note the approach being taken to mediation, and to authorise the Board Subcommittee to delegate to the General Counsel authority to make settlement offers at mediation on terms determined by the Subcommittee.

Input Received

3. This paper has been prepared with the assistance of external legal counsel.

The Board is reminded to exercise caution when communicating about potential levels of settlement. Communications about settlement should therefore only be held orally, but if that is not possible, advice should be sought from Post Office's lawyers.

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Litigation Update

Horizon Judgment

On 7 October 2019 the Managing Judge informed the parties that his judgment on the Horizon Issues Trial was “unlikely to be distributed before the end of the month”. A further update from the court on when we can expect to receive the judgment will be provided during the week commencing 21 October 2019.

The Horizon contingency plans have been developed to respond to an adverse judgment, the details of which are set out in the separate GLO Operations paper.

Common Issues Appeal

The Court of Appeal will hear Post Office’s application for permission to appeal the Common Issues Judgment on 12 November 2019, with judgment on the application to follow shortly after.

The hearing will be based on the Grounds of Appeal and Skeleton Argument we filed on 28 June 2019, and largely influenced by questions from the judge (Lord Justice Coulson). As part of her preparations for the hearing, Helen Davies QC has outlined the key points she aims to land during the hearing. In short, these focus on the wide ranging legal term of good faith Mr Justice Fraser implied into the postmaster contracts (to which most of the other issues are connected) and challenge both the breadth of the term and whether it should be implied at all. Helpfully, there has been a recent judgment in another High Court case which supports our approach to this issue¹.

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Third / Further Issues Trial

The next step ahead of the “Further Issues” trial scheduled for March 2020 is for the Claimants to file “Particulars of Claim” (PoC) formally setting out the legal basis for their claims for financial compensation. We know from correspondence with the Claimants that these could include they are considering (a) asking the Court to also determine whether their claims for harassment would succeed on assumed facts (i.e. a liability question); and (b) making a new claim and for their litigation funding costs.

The Court has ordered the PoC to be filed by 25 October 2019. The Claimants may however seek an extension of time so that they can reflect in the PoC the Horizon judgment’s findings. There is also a Case Management Conference before the Court scheduled for 7 November 2019 at which any issues with the PoC could be raised. As matters stand however, Post Office has been ordered to file Defences formally replying to the PoC by 25 November 2019.

Future Trials

As part of its ongoing review of all 555 individual cases, Post Office is identifying criteria for selecting “Test Claimants”. These Claimants would then be used as cases representative of the wider claimant group in an as yet unscheduled trial on breach (i.e.

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¹ UTB v Sheffield United Ltd [2019] EWHC 2322

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whether Post Office acted wrongly), causation (i.e. did that breach cause the Claimant's harm), and limitation (i.e. is a Claimant's claim time-barred).

The parties will each propose [selection](#) criteria [for choosing test cases](#) on 25 November 2019, which will then be discussed with the Managing Judge at a Case Management Conference scheduled for 4 December 2019. The approach taken to this exercise will be set out at the next Board Subcommittee meeting. [No date has yet been set for the selection of test claimants yet; this is unlikely to be for some time.](#)

Horizon Issues Trial - KEL Disclosure

As reported to the Board on 3 October 2019, Post Office failed to disclose all potentially relevant Known Error Log entries (KELs) prior to the Horizon Issues Trial. Post Office disclosed only final versions of the KELs, and not any previous versions, acting on incorrect information from Fujitsu that previous versions were no longer available.

The Court and the Claimants were notified of this on 3 October 2019, and urgent steps (on which the Board has received separate updates) have been taken to correct the position. We will understand better the impact this may have on the litigation once we have completed the reviews now underway of the [additional newly disclosed versions of the KELs referred to at trial](#) (e.g. as to whether the versions are materially different), received [substantive](#) responses to our notification from the Claimants and/or Court, and assessed its influence on the Horizon judgment itself.

[The Claimants are, however, likely to contend that the inadequacy of Post Office's KEL disclosure warrants the Court drawing an adverse inference about the extent of the bugs in Horizon-issues. They may also press to re-open the trial.](#)

These developments could delay receipt of the draft judgment, ~~which could in turn delay mediation scheduled for 27-28 November 2019~~. They could also influence the Judge while drafting his Horizon judgment and ahead of future trials which will consider for limitation/time-bar purposes whether Post Office concealed known issues with Horizon.

Legal advice is being provided about our prospects of making a claim against Fujitsu arising from this incident and in respect of the proceedings more generally [\(any recommendation will however have to wait until the impact of this on the litigation is better known\)](#). We are also [proposing to audit Fujitsu's work on the extraction of the historic KELs, scoping an audit to examine the court support Fujitsu has provided together with the broader controls around the Fujitsu relationship](#). A verbal update can be given at the time of the meeting.

Mediation / Settlement Update

At its September 2019 meeting, the Board approved the broad approach to settlement outlined in the paper prepared for that meeting. The Board also raised a number of further matters, which are addressed below.

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Individual Claimant Analysis

The Board noted that further work needed to be done to investigate each individual Claimant's case.

HSF has already assessed the claims on a claimant-by-claimant basis for quantum analysis purposes, based on data collated from Post Office's records (principally remuneration, notice period, suspension period and settlement data). Nevertheless, assumptions may still be required for some cases, e.g. if data is not available or cannot be verified from Post Office's records.

The cases are now being analysed so that Post Office can make informed decisions about liability (both individually and collectively), and make strategically useful settlement offers as part of the settlement strategy.

We aim to complete the case reviews by 31 October 2019 and also refine the quantum analysis in light of the Claimants' Further Issues PoC so that a more informed view can be formed prior to mediation.² We aim to present the outcomes from this exercise at the Board Subcommittee meeting prior to the mediation.

Claimants' Perspective on Quantum

The Board wanted to understand what might be driving the Claimants' funders investment in the GLO given the substantial delta between HSF's estimates of Post Office's legal liability ([REDACTED])

[REDACTED] The fact that the Claimants are now proposing to bring a claim for their litigation funding costs tends to suggest that they recognise this delta ~~does, indeed, exist~~.

Litigation funding arrangements are highly confidential, so we do not as yet have any insight into how the funders assessed this particular case (we hope to learn more at mediation). The gap might however be explained by:

- The Claimants may have exceeded their budget: HSF's funding analysis is based on costs incurred, which are substantial. The funders' original assessment would, however, have been based on budgeted costs and it is likely they did not budget for Fraser J's approach of holding numerous, costly trials.
- Including recovery for convicted Claimants: A convicted Claimant whose conviction is overturned is likely to have stronger claims for stigma damages, personal injury, harassment and malicious prosecution. [REDACTED]

² As noted earlier in this Report, this exercise has also helped identify criteria for selecting "Test Claimants". [REDACTED]

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- Interest: HSF estimated interest at LIBOR plus 1% / [REDACTED]. Adding recovery for convicted Claimants as above could increase interest to [REDACTED] or more if higher rates of interest or compound interest awarded.
- Other possible factors: These might include the Claimants making less generous assumptions around the extent of recoverable losses than in HSF's analysis, in particular around post termination losses, capital/investment losses, and the unquantified claims, and/or expecting Post Office to pay a premium for reputational or operational concerns.

In summary, although we do not yet have any insight into the funders' approach, the above could explain how they put a greater valuation on the claims than HSF's estimates, thereby justifying their investment in the GLO.

Costs to Settle vs. Costs to Litigate to Conclusion

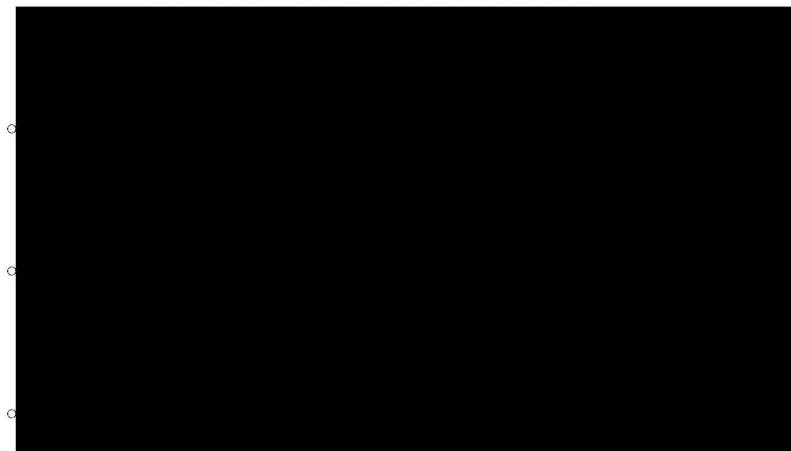
The Board wanted to understand whether it would be cheaper to settle or to fight and lose in Court.

HSF cannot express a concluded view on this question until we understand better the Claimants' settlement expectations (which should come through mediation), have clarity on the claims that will be made and as to their quantification (we will be better informed once we have the Further Issues trial PoC). Nevertheless, the following points can now be made:

- If the Claimants' expectations are driven by their funding commitments and a per Claimant recovery on top, we estimate the Claimants will be looking for a settlement between [REDACTED] and potentially more.
- The cost of fighting and losing in Court will be driven by the heads of recoverable loss and their values, plus legal costs and interest. Although this gives rise to a large number of permutations, the following benchmarks (which are based on certain assumptions⁴) may be helpful:
 - If the Claimants succeed on all their quantified claims and make a recovery for reasonably estimated unquantified claims (e.g. for personal injury, stigma damages, harassment), [REDACTED]
 - If the Claimants' claims for post-termination loss of earnings are capped at 5 years, with other damages awarded in line with HSF's current model, Post

assume a conviction could be overturned). The range could be further increased if the court is particularly sympathetic to the (at least) 7 Claimants who were imprisoned.

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- Post Office would also need to bear its own costs of progressing matters to trial which, subject to the way the litigation develops, could be in the order of a further £10-15m.

Determining the amount at which settlement can be justified will be a risks-based exercise. Recognising the number of unknown factors that remain (e.g. the outcomes of the Horizon Issues trial and application to appeal the Common Issues judgment, and the potential for additional or more substantial claims to be brought), our approach has been to start with a reasonable and justifiable assessment of quantum based on the claims as they are currently pleaded.

However, taking into account the financial risk associated with these unknowns, the risk of the Claimants succeeding on some of their arguments (which is exacerbated by the wide discretion afforded to the court on matters of quantum and Fraser J's clear distaste for Post Office's case) and the broader impact to the business in managing this litigation, the Board could be justified in offering more than HSF's preliminary analyses, and ultimately offering around £100m to resolve this claim.

Settlement strategy and authority for mediation

Our recommended strategy for mediation is as follows:

- HSF will meet with the mediator prior to the mediation and explain that Post Office's key concern is that the claims are not worth what the Claimants claim.
- At the plenary session on the first morning, Post Office will emphasise its desire to bring this matter to a satisfactory conclusion for commercial reasons and reassure the Claimants that it is negotiating in good faith.
- Much of the first day will be devoted to getting the parties to understand the principles upon which the value of the claims will need to be assessed.

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- As defendant, Post Office is likely to be pressed to make the first offer. We intend to make a low first offer (probably between 10 and 20 million) which is credible and can be justified by reference to the HSF quantum analysis spreadsheet.
- Over the remainder of the mediation, if the Claimants engage substantively, Post Office will progressively improve its offer up to an approved maximum (below £50m) by conceding (for settlement purposes only) certain assumptions built into the quantum analysis.
- How far to go within the approved range, and in what increments, is a question that will need to be judged on the day. That is because if (as is likely) settlement at a palatable level is not available at the mediation, Post Office's final offer will set the floor for future negotiations. Post Office will not therefore want its best numbers on the table too soon.
- If (but only if) a deal at a palatable level above £50m can be done on the day, Post Office can seek further authority from the Special Shareholder to conclude that deal.

Addressing the Board's request to map out the route for Shareholder approval through BEIS and HMT in advance of mediation, arrangements are in hand with UKGI to finalise a protocol for Post Office's shareholder to authorise settlement if required. Specifically:

- UKGI/BEIS and HMT representatives have formed a committee to assess and respond to requests for authorisation.
- Arrangements are in place for Post Office to share information with that committee, so that it can ask questions and form provisional views before any formal request for approval is made.
- The committee will require confirmation of how Post Office plans to fund any settlement. Al Cameron has confirmed that Post Office could fund the sums presently under consideration from its own resources.

The precise form the authorisation protocol takes will depend on further feedback from the committee.

Managing messages coming out of Mediation

The Board enquired about the extent to which we could manage the messages coming out of a settlement, and noted that BEIS input should be sought if we were considering the use of confidentiality agreements.

Mediation is a confidential process where the parties should be free to explore settlement with the mediator and each other without fear of their discussions becoming more widely known. Mediation cannot work without confidentiality.

Mediation is also a consensual process where the parties agree the terms of settlement where one is reached. Settlement agreements routinely impose confidentiality obligations (with consequences for breach), which may also be accompanied by a statement the parties agree can be made public. These terms will be subject to negotiation along with all other settlement terms. BEIS's input on any such terms could therefore be sought through the information sharing and approvals process as

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appropriate. Post Office will also act consistently with Law Society guidance on the use of confidentiality clauses.

Post Office Mediation Representatives

Beyond ensuring that attendees are properly authorised, there are no rules as to who can attend mediation for a party. As matters stand, it is proposed that the key Post Office representatives at mediation will be General Counsel Ben Foat and Alan Watts of HSF.⁶ Consideration is being given to CEO Nick Read attending to make introductory commercial remarks. Others from Post Office's operations and legal teams will be available on the day to assist as required, either in person in breakout rooms or remotely.

We do not intend bringing our Leading Counsel to the mediation, given that the purpose of mediation is to explore commercial possibilities for settlement rather than debate each side's legal case. The Claimants' solicitors have confirmed that that is also their understanding, and that although their Leading Counsel (Patrick Green QC) will attend the mediation, he is doing so to satisfy their funders' requirements.

Consistent with the mediation strategy outlined at the September 2019 Board meeting, we do not recommend there be any shareholder representation at the mediation. However, as noted above arrangements will be finalised to keep shareholder representatives informed of progress in the mediation.

Next Steps

An overview of the main court and settlement-related activity in the Group Litigation through to October 2020 is set out in the "Group Litigation Timetable" at **Appendix 1**.

Between now and the end of November 2019 we are preparing to:

- resolve the KEL Disclosure issue, including assessing the legal claims that could be pursued against Fujitsu and pursuing audit rights;
- receive the Horizon judgment;
- attend mediation on 27-28 November 2019, which includes finalising in advance the protocol for shareholder settlement authorisation if required;
- attend the Court of Appeal on 12 November 2019 for the hearing on permission to appeal the Common Issues Judgment;
- respond to the Claimants' Further Issues trial PoC due on 25 October 2019; and
- identify "Test Claimant" criteria by 25 November 2019.

A timeline of the key milestones to the end of November 2019 is set out at **Appendix 2**.

The operational responses to the Common Issues Judgment and Contingency Planning for the Horizon Judgment are addressed in a separate Board paper.

⁶ As noted in the September 2019 Board Report, both Ben and Alan have extensive experience of commercial mediation.

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Appendices

1. Group Litigation Timetable

	Oct 2019	Nov 2019	Dec 2019	Jan 2020	Feb 2020	March 2020	April 2020	May 2020	June 2020	July 2020	Aug 2020	Sept 2020	Oct 2020
Common Issues Appeal		Oral permission hearing (12 Nov)	File additional documents with Court as required for appeal if permission is granted.							Likely window for Court to hear appeal if permission is granted. Note: Court vacation August & September so unlikely appeal will be heard in these months.			
Horizon Issues Trial		Likely window for Horizon Issues Judgment		Hearing on costs of Horizon Issues trial									
Further Issues Trial	Costs Budgets (2 Oct) Discussion Reports (16 Oct) Costs Management Conference (23 Oct) Particulars of Claim (25 Oct)	CMC (7 Nov) Defences (25 Nov)	Statement of Assumed Facts (2 Dec) CMC (4 Dec) Replies (9 Dec)	PreTrial Review (23 Jan)		Further Issues Trial (2-20 Mar)		Likely window for Further Issues Judgment		Hearing on costs of Further Issues Trial			
Trial 4		Agree test case selection criteria (27 Nov)								Likely window for Trial 4			
Settlement	Without Prejudice Lawyers meeting (10 Oct)	Mediation (27-28 Nov)		Window for possible second mediation									

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2. Timeline of Key Litigation and Settlement Milestones to end of November 2019

No.	Date	Milestone
1.	w/c 21 October	Horizon: Court to provide an update regarding judgment
2.	22 October	Post Office Board Sub-Committee
3.	25 October	Further Issues Trial: Deadline for Lead Claimants to file/serve Individual Particulars of Claim
4.	29 October	Post Office Board Meeting
5.	1 November	Horizon: judgment expected to be handed down on or after this date
6.	4 November	Case Management: Deadline for Post Office to file any applications before the 7 November case management conference
7.	7 November	Case Management Conference
8.	12 November	Common Issues: Oral hearing of Permission to Appeal application
9.	13 November	Post Office Board GLO Sub-Committee on or after this date
10.	18 November	Further Issues Trial: Internal deadline for legal team to draft Defences and provide to Post Office for sign off.
11.	25 November	Further Issues Trial: Deadline for Post Office to serve individual Defences
12.	26 November	Post Office Board Meeting
13.	27 November	Parties to serve and file their proposed Selection Criteria for Test Claimants
14.	27 – 28 November	Mediation. UKGI/BEIS authority to be obtained if required.
15.	3 December	Parties to set out assumed facts and issues to be decided at Further Issues Trial
16.	4 December	Case Management: Case Management Conference to resolve any disputes about issues to be dealt with at FIT

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