



Briefing Paper

Meeting on 17 October 2018

with

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Energy and Industrial Strategy (BEIS)

and

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1. Executive Summary

Context

- 1.1 Post Office Limited has been requested to provide a briefing to the Parliamentary Under-Secretary of the Department for Business, Energy and Industrial Strategy ('BEIS') and to the Permanent Secretary for BEIS on the upcoming "Common Issues" trial in the Post Office Group Litigation, Alan Bates & Others v. Post Office Limited, in the Queen's Bench Division of the High Court of Justice of England and Wales, before Mr Justice Fraser commencing on Monday 5 November 2018.

What is the case about?

- 1.2 The case represents the culmination of a series of campaigns by disaffected postmasters and others (including a number of MPs on both sides) who believe that Post Office wrongly attributed branch losses to those postmasters and that as a result, they suffered financial and reputational harm. A theme of these campaigns is that flaws in Horizon (the in-branch point-of-sale system) were the cause of these losses.
- 1.3 The Managing Judge has determined that the case will be heard in a series of trials. The first, which is to be heard in November, will address a series of 'Common Issues' - essentially, to determine as a matter of legal construction, the proper meaning of the contract between Post Office and its agents, and whether certain additional terms should be implied into the contract.
- 1.4 Post Office's external Counsel believe that Post Office has the stronger arguments on most of the Common Issues, nevertheless they caution that Post Office is unlikely to be successful on each and every one of the Common Issues, given the judicial tendency to provide a degree of balance between the parties. In their view the areas likely to be most problematic for Post Office are the clauses dealing with suspending and terminating postmaster contracts (including the length of notice to be provided), withholding remuneration during periods of suspension, and imposing liability for branch losses - which turns on the question of whether a shortfall of cash or stock in branch causes an actual 'loss' to Post Office.

What will be the impact of the decision?

- 1.5 The Common Issues trial will not address questions of breach, causation and loss, and there will be no award of damages as a result of this trial.
- 1.6 Post Office has a continual programme of operational improvement and the outcome of the case will not affect that approach. In conjunction with our external legal team, management has assessed the likelihood of adverse outcomes and the operational and financial impacts of such decisions. While there are a number of areas which Counsel consider to be more problematic,

Post Office management believe that the operational impact of an adverse outcome on these issues is manageable. Those arguments which would have the greatest adverse impact on Post Office, are assessed by Counsel as being less likely outcomes.

- 1.7 Nevertheless, Post Office has developed contingency plans against the possible outcomes and is currently aligning these with the operational improvement programmes, and developing other risk based mitigation plans.

How much attention will it attract?

- 1.8 While we do not expect there to be any material 'new news' to emanate from the trial, there are some reporters and media outlets who have been covering these issues over a long period, and significant interest from the group of 561 Claimants. We are therefore preparing for significant adverse media attention during and after the trial.
- 1.9 Nevertheless, and consistent with the management of media around the Panorama programme in 2016, and the BIS Parliamentary Select Committee enquiry in 2015, Post Office believes that with an effective communications strategy this media interest will be short lived; and that our planned response should materially defuse any adverse impact.
- 1.10 We are also taking steps to increase our proactive media campaign to highlight the wider story of the Post Office's commercial success and innovative future.
- 1.11 We are therefore launching brand campaigns in the Midlands and London/SE during October and November, and we will attempt to generate media interest in positive stories on the Banking Framework, the acquisition of Payzone which is expected to complete before the end of October and digital innovation, as well as the annual Christmas campaign.

Settlement

- 1.12 The Post Office Board has regularly considered whether settlement options should be explored. While the financial and operational impact of an adverse outcome would be material, settlement prior to the Common Issues and Horizon trials will not, of itself, resolve the wider issues underlying the trial, and Post Office would remain open to similar complaints from any current or former postmaster who we required to make good branch shortfalls; this number would be material. Further, settlement would not resolve the issues of confidence in the Horizon system which are now beginning to have an operational and financial impact on the branch network.

Engagement with Major Stakeholders

- 1.13 Post Office management has regularly apprised the Post Office Board of developments in the case since its commencement, and over the last 12 months has maintained a regular dialogue with UKGI to ensure that the Shareholder was aware of developments. At this stage Post Office believes that any remedial

actions will be within the authority of the Post Office Board as set out in the Articles of Association. However it is possible that certain outcomes could trigger a request for shareholder involvement. These could include settlement discussions (which Post Office believes are unlikely to be attractive to the Claimants unless they exceed c£30m), and consequential impacts such as a loss of confidence in the Post Office such that significant numbers of agents withdrew from the network, thus impacting the Network size criteria.

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2. Background to the Litigation

- 2.1 Transactions at Post Office counters are undertaken on the Horizon system. Post Office estimates that c50,000 people use the system each day across the network and that around half a million employees, agents or employees of agents have performed transactions on it since it was introduced in 1999.
- 2.2 In 2012 a small number of (mostly former) postmasters, under the banner of the "Justice for Subpostmasters Alliance" (JFSA) and with support from some MPs led by then MP (now Lord) James Arbuthnot, claimed Post Office's Horizon IT system had caused losses (shortfalls in physical cash against cash holdings recorded on Horizon) which they had had to make good. In some cases they had been prosecuted for these losses (usually for false accounting, theft or both) while, in other cases, they claim that it led to their contracts with Post Office being terminated causing them financial loss and other personal harm including bankruptcy, divorce and emotional distress including suicide.
- 2.3 In response to these assertions, Post Office appointed independent forensic accountants Second Sight to perform a 'top down' examination of Horizon. Second Sight issued a report in July 2013 which concluded there was no evidence of system-wide (systemic) problems with the Horizon software but identified some areas where Post Office could have done more to support individual postmasters.
- 2.4 As a result Post Office set up a Branch Support Programme which led to the introduction of important new measures in areas such as branch operation practices, processes and support. Further, in the autumn of 2013 Post Office established the 'Complaint Review and Mediation Scheme' as an avenue for postmasters and counter clerks (both former and serving) to raise individual concerns. The scheme was set up in consultation with MPs, the JFSA and Second Sight and was overseen by a working group, chaired by a former Court of Appeal Judge.
- 2.5 From 150 applicants, 136 were accepted into the scheme. Many cases were based on allegations which were vague and or not supported by the evidence and no evidence of systemic flaws in the system was found; rather the investigations (by both Second Sight and Post Office) found that the main reason for losses in the majority of cases was "errors made at the counter" by the postmaster and or their staff.
- 2.6 The process of resolving cases became challenging in an environment increasingly driven by JFSA campaigning for large financial settlements which were not justified by investigation findings, and or for the scheme to be used as a platform for overturning postmasters' criminal convictions, which is something only the criminal courts could deliver (37 cases in the scheme involved criminal convictions).

- 2.7 Post Office has never publicly discussed the detail of the individual cases that were put forward (we promised confidentiality) and were therefore constrained in its ability to fully counter some of the media and Parliamentary criticisms generated by the JFSA's campaigning, which centred on some undoubtedly sad, but highly selective, histories of a small number of cases.
- 2.8 In the spring of 2015, following completion of all of our investigations, Post Office took the decision to offer mediation for all cases which remained in the scheme except those that had been subject to a previous court ruling. This accelerated the scheme and also ensured that the commitments made to applicants at the outset were met.
- 2.9 The JFSA encouraged applicants not to take part in mediation but nevertheless 50% of cases where a mediation took place were resolved. Mediations were overseen by the Centre for Effective Dispute Resolution (CEDR).
- 2.10 Although a total of 41 applicants to the scheme were able to resolve their complaints, the JFSA was not satisfied with the outcome and continued its campaign against Post Office.
- 2.11 In recent years, the focus of the complaints by postmasters has expanded from issues with the Horizon IT system, to the alleged "unfairness" of the contract between Post Office and postmasters. Despite significant lobbying by the JFSA of Parliament and through the media, Post Office's position has not altered, and considers that these disputes are now best resolved through the Courts.
- 2.12 In February 2016 it was reported that a group of postmasters had secured funding for group legal action and in April 2016, a High Court claim was issued against Post Office.
- 2.13 In March 2017, following a preliminary public High Court hearing, a Group Litigation Order was made, following which statements of case were filed by the claimants and Post Office setting out their "generic" cases (i.e. as apply to the entire group of claimants). At a subsequent Case Management Conference ('CMC') in October 2017, the Managing Judge appointed to oversee the Group Litigation, Mr Justice Peter Fraser, determined that the litigation would proceed in at least three stages:
- (i) a 20 day 'Common Issues' trial starting on 5 November 2018, the purpose of which is to determine issues common to all the claimants, focussing on the legal relationship between Post Office and postmasters, the proper interpretation of certain terms in the standard contracts Post Office enters into with postmasters, and whether further terms proposed by the claimants should be implied into those contracts. These Common Issues are set out in Appendix A;

- (ii) a second 20 day trial starting on 11 March 2019 on 15 "Horizon Issues" concerning technical aspects of the Horizon accounting system used in Post Office branches, which will be determined primarily on expert evidence (as opposed to individual users' experiences). These Horizon Issues are set out in Appendix B; and
- (iii) one or more further trials which would address issues of causation, loss and damages. On 27 September 2018 Mr Justice Fraser suggested that hearing time would be made available in May 2019 for such a further trial, the scope of and timetable for is currently under consideration and has not yet been agreed.

Governance

- 2.14 Post Office has provided regular updates to the legal team within BEIS and UKGI on the procedural aspects of the litigation and therefore these are not further repeated here.
- 2.15 Governance of the litigation since it commenced in 2016 has included the following:
 - (i) An internal 'steering group' mandated by the Post Office Group Executive to oversee the litigation. This has included representatives from across the business including those responsible for management of the agency network, the Head of Agents' Development & Remuneration, IT (in relation to Horizon issues), Finance, Communications, as well as internal and external legal counsel.
 - (ii) Regular briefings being provided to the Post Office Group Executive.
 - (iii) Regular updates being provided to the Post Office Board, and in January 2018 the Board established a Board Litigation Subcommittee to oversee the progress of the litigation. That committee comprises the Chair, the shareholder appointed director, and the Senior Independent Director.
 - (iv) In addition, the CEO and CFOO have met with Post Office's external counsel¹ on several occasions, and external counsel briefed the Board Litigation Subcommittee in person following the issue of their Interim Merits Opinion in May 2018.

¹ Womble Bond Dickinson (led by partner Andrew Parsons) are Post Office's solicitors in this matter, and Anthony de Garr Robinson QC and David Cavendar QC – both of One Essex Court, together with their respective juniors, Owain Draper and Gideon Cohen are representing Post Office in Court.

3. Key Issues at the Common Issues Trial

- 3.1 The Common Issues trial will not address issues of breach, causation or loss. Instead, the trial will determine the correct legal relationship between Post Office and its agents:

*"It has been set down for the express purpose of determining a list of 23 Common Issues in the context of Group Litigation, involving 561 Claimants who contracted with Post Office over a period of many years. The trial is to be conducted by means of Lead Claims. Six have been selected. But the Common Issues are not directed to determining the specific cases of the Lead Claimants alone. Rather, the Common Issues were defined by the Court, with the agreement of the parties, as generic issues "relating to the legal relationship between the parties" being Post Office and wider group of 561 Claimants, whose engagements spanned around 20 years."*²

- 3.2 The claimants have sought to have implied into the contract a further 21 terms – details of which are set out in Appendix A, and which would imply a range of additional duties including – most importantly, a duty to investigate branch losses and determine their cause before requiring an agent to repay them.
- 3.3 The most important Common Issues concern the liability of agents for "losses". The claimants argue that Post Office needs to show that a postmaster's actions have caused Post Office to suffer a net economic detriment, not just that a branch's accounts ostensibly show a shortfall. Post Office's position is that if a shortfall is shown in the branch's accounts then, absent any cogent evidence to the contrary, the postmaster is liable for that shortfall given they are responsible for conducting the transactions recorded in those accounts, and for the Post Office cash and other assets used.
- 3.4 Post Office has accepted that two additional terms are implied into the postmaster contracts which are necessary for their operation, but which obviate the need to imply the 21 terms sought by the claimants. Post Office's additional terms are that each party would:
- (i) refrain from taking steps that would inhibit or prevent the other party from complying with its obligations under or by virtue of the contract; and

² Quoted from the Claimants' skeleton argument ahead of the Case Management Conference to be heard on 10 October 2018.

- (ii) provide the other party with such reasonable cooperation as was necessary to the performance of that other's obligations under or by virtue of the contract.

- 3.5 These terms in themselves present risk, given that the litigation covers events that happened over a significant period, during which a very large number of agents have worked with Post Office, such that it would be difficult for Post Office to assert with certainty that it never acted contrary to (i.e. breached) these terms.
- 3.6 Post Office's external Counsel believe that Post Office has the stronger arguments on most of the Common Issues. However they also caution that the areas likely to be most problematic for Post office are the clauses dealing with suspending and terminating postmaster contracts (including the length of notice to be provided), withholding remuneration during periods of suspension, and imposing liability for branch losses. Counsel also note that Post Office is unlikely to be successful on each and every one of the Common Issues, given the judicial tendency to provide a degree of balance between the parties.
- 3.7 Witness evidence at the Common Issues trial will refer to Post Office's standard practices for contracting with new postmasters, and the circumstances of 6 'Lead Claimants' (details of which are set out in Appendix G). This evidence should address what the parties understood about the contract and running a Post Office branch prior to entering into the contract.³ Witness statements' will not be read out in Court, and the Judge has stipulated a maximum of half a day for cross examination of each witness. There are 6 witnesses for the claimants, and 14 for Post Office.
- 3.8 To date, the claimants have only generically stated the remedies they are seeking from the Group Litigation, and in particular have not quantified the level of the financial damages they are seeking from Post Office.

³ The precise scope of the witness evidence that can be referred to during the Common Issues trial, and the issues to which that evidence can relate, was the subject of a hearing before Mr Justice Fraser on 10 October 2018. Mr Justice Fraser has indicated that he will provide his written ruling on this early in the week commencing 15 October 2018.

4. Operational improvements already underway

Background

4.1 Post Office is currently undertaking an operational review which includes:

- (i) Updating and streamlining the Agent Onboarding process to bring this in line with other Franchisors.
- (ii) Using the new data and insight from our Contact Centre to better understand branch issues, so as to better support agents to resolve issues.
- (iii) Bring Agent Loss data and activity together to enable early interventions to prevent an escalation of losses and to resolve disputed losses sooner.
- (iv) Introduce an online interactive help facility, Agent Portal, to link branches to "help" support when they need it.

Agent Onboarding

4.2 This review covers the entire support process from initial application to the point the agent is ready to run the branch independently. The improvements are focused on making each stage easier, quicker and using digital solutions wherever possible.

- (i) Agent application – this will become online process involving an initial pre-qualification test (to give more information about running a branch) and an account manager being assigned to support the applicant through the rest of the application process, which includes submission of a business plan.
- (ii) The account manager will discuss the business plan and arrange for a property project manager to assess the branch and advise on the operational aspects of installing a Post Office within their retail premises.
- (iii) Assuming the financial, personal vetting and location checks are satisfactory, the account manager will organise for the contract to be signed – this will be electronic and designed in a way which explains each step before the final signature is provided.
- (iv) Before the 'go-live' date, training will be provided to the Agent and any assistants. This will start with an online induction, covering the Post Office offer and certain regulatory training. Following this, there will be classroom based training and subsequent in branch training supported by a dedicated trainer. Recent enhancements

have been made to the training to simplify the language and make it more focussed on practical transaction practice. The training is followed up by 1, 3 and 6 month reviews at the branch to ensure all colleagues are operating effectively.

- (v) A Local Relationship Manager (LRM) is a recently introduced role, who will stay in touch with the Agent to ensure they are realising the full potential of the Post Office within their wider business and that they are closely achieving their business plan expectations.
- (vi) Once the Agent has been in place for 6 months, the LRM will hand over to business as usual support.

Contact Centre and Field Support

4.3 Branch support for all ad-hoc enquiries, including balancing issues, is provided by our contact centre who handle c.35,000 calls per period.

- (i) The contact centre moved to Microsoft Dynamics call recording earlier in 2018 and this has enabled us to track and measure the main causes for calls, thereby allowing projects to be identified to remove these issues for branches. Examples include cash order adjustments, which has led to a project to better forecast branch cash needs which is due to go live in the new year.
- (ii) The data also tracks individual branches and a range of issues reported might indicate a trainer or performance manager should be deployed. Only the largest 4,000 branches currently receive regular visits, but this tool will allow field resource to be directed to branches depending on their need. This is expected to remove the frustration felt by branches who would like to see someone from Post Office to discuss and resolve their issues.

Agent Losses

4.4 Branches often either declare losses because a mistake has been made, or we notify them of a transaction correction which leads to a loss. We also monitor branch activity to identify potential fraudulent activity in branches.

- (i) The fraud analysis, Horizon investigation, and transaction correction activities currently take place across 3 functional areas. These areas have a limited insight into other issues a branch may be experiencing.
- (ii) The plan is to bring these areas together so that each loss or mistake is not treated in isolation and contact centre or field visit information is also considered. Bringing these areas together will also allow us to identify the loss, identify the cause and engage with the branch to explain the loss.

- (iii) Through this process, losses where the branch is not at fault will be removed and properly accounted for, whilst at fault losses will be addressed either contractually and or through recovery.
- (iv) Repayment terms are sometimes available, however, the changes will bring consistency to this process, driving value for the Post Office, whilst being considerate of an Agent's business cashflow.
- (v) Finally, the Agent Loss levels will be tracked carefully at business level, so that any worrying trends are spotted quickly and acted on.

Agent Portal

4.5 The only help currently available to branches is via the contact centre. Branches often complain at being kept waiting, particularly when there is a customer in branch.

- (i) Agent Portal will give online help, video tutorials, IT live chat, provide sales MI, access to training materials, enable cash and stock order status to be seen or values to be changed.
- (ii) A pilot of 300 branches will go live pre-Christmas and will be quickly rolled out to all branches.
- (iii) Access is via a user's Smart ID log-on – the same as they use for Horizon – so no new passwords or registration needed.
- (iv) The key design principle is that the Portal is for all branch staff, not just for the Agent.

5. Contingency Planning

Potential Impacts on the Business of Common Issues/Terms being implied

- 5.1 To ensure Post Office understands the risks associated with any adverse finding(s) at the Common Issues trial in November, Counsel's Merits Opinion assesses the likelihood of additional terms being implied into the postmaster contract and Post Office has assessed the business impact should any or all of the proposed terms be decided in favour of the claimants.
- 5.2 From this risk assessment we have determined that an adverse ruling could, in certain circumstances, have a material impact on Post Office's current operating practices. As such, we have developed contingency plans to ensure Post Office is best placed operationally to respond to any adverse Judgement.
- 5.3 The Common Issues fall into 8 groups, the most significant of which concern the "construction" (i.e. interpretation) of the postmaster contract terms and whether some 21 terms should be implied into those contracts.
- 5.4 Those terms considered more likely to be implied by the Court ('likelihood' assessment) are in fact those which have a lower business impact ('impact' assessment). Conversely those that are less likely to be implied by the Court have a higher business impact.

Likelihood Assessment

- 5.5 There are four terms assessed by Counsel as being very likely or more than likely to being implied: Co-operation; Exercise of Powers (both of which are services proposed by Post Office); Suspension and Training (set out in Appendix C). Post Office's assessment is that whilst these would involve a change to working practices and increase costs, the business impact would be manageable.

Impact Assessment

- 5.6 From our high level business assessment of 'impact' against each of the proposed terms, there are 3 that are of the greatest concern: Shortfalls; Liability for Losses and Post Office as Agent (set out in Appendix D)
- 5.7 Whilst the legal assessment is that these terms are less likely to be implied, the business impact would be material. In particular, the burden of proof would shift onto Post Office to show the root cause of branch losses. As a result, Post Office would be unable to recover shortfalls in branches unless it positively proved a postmaster was at fault for those losses. The length of time for a postmaster to make good the loss would be significantly longer than it is today, increasing annual operating costs and resulting in additional business exposure to agent losses and a significant cash flow risk.

- 5.8 In the event of an adverse judgement, a retrospective risk will always exist. Accordingly, the contingency planning explores how Post Office could mitigate the risk of claims being made in respect of the current/future situation.
- 5.9 We have identified the following key mitigating actions to address the consequences of adverse rulings (set out in full at Appendix E):
- (i) Contract Variation – addresses any findings regarding the clarity of contractual terms. **Note:** Changes to the contract(s) would only be made if the Judgement were to go against Post Office.
 - (iii) Losses Investigation Approach – proposed as best practice as well as litigation mitigation. Should the Judgement go against Post Office the size of the team would need to be increased significantly to investigate all losses declared by postmasters
 - (iv) CCTV – in conjunction with the investigation approach, CCTV could provide further mitigation for the implied term. **Note:** due to the cost and operational complexity, CCTV would only be installed in all post offices if the Judgement were to go against Post Office

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6. Communications Strategy

Media and Communications Management Pre and During Trial

- 6.1 The Postmaster Litigation presents some significant communications challenges. We expect the claimants to seek to maximise publicity around the opening of the trial and for its duration. A freelance journalist, Nick Wallis, who has followed the story for many years and is close to campaigners, has crowd funded to enable his attendance at every day of the Common Issues trial, set up a website for his reporting and has publicised via social media that he has, so far, two national news organisations interested in his reporting. He has been successful in the past in securing coverage on various BBC TV and radio programmes, in the Daily Mail and elsewhere. The issue has also been closely followed by Computer Weekly magazine and Private Eye. Nick Wallis has also recently been in touch with Post Office to let us know that he is planning some pre-trial coverage, most likely featuring 'case studies' of some of the claimants.
- 6.2 We expect significant activity on social media, broadcast outlets and daily national and regional newspapers when the trial begins. The amount of media coverage will depend, in part at least, on how successful Nick Wallis' continued attempts to secure commissions are, as well as the attempts of the claimants and their representatives to generate interest in the issue. The news agenda at the time of the trial will also be a factor but we expect coverage in any event. The unions are likely to provide public comment and may connect it to other issues such as the future of the DMB network and ongoing pay talks. MPs and peers who have previously supported the claimants, and those with constituency cases, are also likely to comment. The principal risks in the pre-Christmas period are that substantial media coverage is triggered, with wider issues drawn in to occasion Post Office significant reputational challenge. Our communications approach is designed with this eventuality in mind.

Strategy

- 6.3 Our media and communication strategy objectives are centred on (1) underlining how seriously the Post Office, as a responsible business, takes the issues in the trial and the opportunity to resolve them through the legal process (2) making clear our robust defence of our position and (3) ensuring colleagues across the business are able to address questions during the trial.
- 6.4 Our tactics, tone, behaviours and messaging throughout the trial will reflect these areas as we seek to contain negative publicity from the trial

and minimise reputational damage for Post Office. We are deploying external expertise through an agency with substantial experience of handling disputes such as this.

- 6.5 Whilst we will not provide a 'running commentary' for media outside of the hearing, we will proactively ensure that our position is reflected in external coverage and be prepared for rapid rebuttal where necessary. A statement and set of clear lines to take will be in place and kept under continual, daily review. We will keep our focus on the 'bigger picture' to counter balance negative accusations from the claimants and to provide perspective about the case. It will not be appropriate for us to proactively directly comment on issues being heard by the court: this could both cause irritation to the Judge which would be unhelpful but also 'fan the flames' of coverage, as well as potentially compromising our legal position/ strategy.
- 6.6 We will engage with our stakeholders and partners in advance of the trial to raise awareness and set out our position and approach and there will be comprehensive, proportionate internal communications which ensure colleagues are informed and equipped with information, including background facts and 'Q&As'.
- 6.7 Throughout, we will monitor and assess coverage across all media channels and assess customer sentiment through social media and insight channels.
- 6.8 In addition to managing media and communications directly related to the trial we will implement a proactive communications plan featuring positive Post Office developments which give proper context. This will include a brand campaign which, through newspaper advertising, radio, video on demand and social media, will reach c12 million people across the Midlands, London and the South East and drive awareness of the scale of the Post Office offer to customers - providing some balance to any negative perceptions that may be caused by media reporting on the Trial. There will also be a social media campaign highlighting the work of our best branches and a Christmas trading marketing campaign. A series of positive news announcements and 121 interviews with selected senior journalists are being planned, linked to business developments - for example the Payzone acquisition; a new bank joining the Banking Framework; further franchising and new branches in the network. We will also work with credible 'third parties' such as the NFSP and individual agents to amplify particular messages.

Media and Communications Management Post Decision

- 6.9 An embargoed Judgement will be provided to the legal team 2-7 days in advance of it being handed down by the Court. There might be provisions made by the Judge which limit the embargoed Judgment being shared beyond the legal team. In preparing communications in advance we will have to work within the legal parameters that are set which could of course be very limiting. In addition the Judgement could be complex and will need careful legal consideration which will take some time. Our communications stance must reflect this.
- 6.10 For the purposes of communications planning we are assuming scenarios where all or parts of the Judgment (which would not be 'stayed' by Appeal) could mean potential changes to the relationship/contracts with agents.
- 6.11 Our communications will align with this work and comprehensive plans are being produced for all scenarios, including any potential settlement scenarios.

Strategy

- 6.12 There are essentially two broad phases to post-trial communications: the immediate aftermath of the Judgment and, later, in support of any contractual or operational changes that need to be made.
- 6.13 Post Office is unlikely to be in a position to provide a detailed statement either externally or internally when the Judgment is handed down because of the complexity of this legal area and to ensure we preserve our legal position as the litigation continues.
- 6.14 We will therefore provide measured, factual information and responses for our stakeholders, agents and employees, with strong rebuttals of any misleading / inaccurate media coverage. Our proactive positive news agenda will continue providing context.
- 6.15 As we move forward, detailed communications plans and messaging will be produced for all the business's mitigations of impacts following the Judgment.

7. Settlement options

- 7.1 Settlement has been considered at each meeting of the Board Litigation Subcommittee. However, to date management and the Board have been of the view that settlement will not satisfactorily address the issues at stake.
- 7.2 There are a series of issues which make settlement problematic at present:
- (i) The Claimants' costs are funded by Therium Capital Management Limited, an off-shore hedge fund which specialises in litigation funding. Our expectation is that based on the known level of costs incurred by the Claimants (in excess of £10 million), Therium would expect to recover a multiple of at least 3 times the costs under any settlement or award, and that their 'fee' would be paid before any amounts are paid to the Claimants themselves. As the Claimants have not yet been required to articulate their claim for damages, Post Office has no clear view of the scale of the amount that might be acceptable through a settlement. Note that the Court has advised both parties that it expects the parties to attempt mediation subsequent to the Horizon trial in March 2019.
 - (ii) A settlement is only binding on the parties to the action. While it is usual that the terms of a settlement are confidential, the fact of a settlement is unlikely to remain confidential. This is likely to be construed by media and followers as a capitulation by Post Office, and is therefore likely to give rise to further claims by other former or current agents who believe they have been wrongly treated.
 - (iii) Settlement will not resolve the questions posed by the claimants as to the correct interpretation of Post Office's obligations under the contract or the robustness of Horizon. This would mean that agents will continue to challenge the veracity of data from Horizon which is relied on by Post Office in recovering losses, and will at least perpetuate the current issues Post Office faces whereby branch losses are increasing significantly. It is unlikely that, absent litigation funding, any single agent would be able to afford the necessary legal costs to have the Horizon issues fully determined; whereas the current group litigation structure and funding allows those issues to be addressed.
 - (iv) Post Office currently enjoys the confidence of both customers and 'clients' to whom it provides services. An outcome which does not address the robust operation and resilience of Horizon risks undermining that public and commercial confidence in Post Office.

Appendix A: Common Issues (including terms to be implied in to the contract by the Claimants)

Agreed pursuant to §2 of the First CMC Order

*References to Subpostmasters in this Schedule are to Subpostmasters who were subject to either (1) the Subpostmaster Contract ("**the SPMC**"), or (2) the Network Transformation Contract (local branch or main branch types) ("**the NTC**").*

Relational Contract

- (1) Was the contractual relationship between Post Office and Subpostmasters a relational contract such that Post Office was subject to duties of good faith, fair dealing, transparency, co-operation, and trust and confidence (in this regard, the Claimants rely on the judgment of Leggatt J in Yam Seng Pte v International Trade Corp [2013] EWHC 111)?

[GPOC 63, Defence 103]

Implied terms

- (2) Which, if any, of the terms in the paragraphs listed below were implied terms (or incidents of such implied terms) of the contracts between Post Office and Subpostmasters?

Post Office is required:

- (1) to provide adequate training and support (particularly if and when the Defendant imposed new working practices or systems or required the provision of new services);

- (2) properly and accurately to effect, record, maintain and keep records of all transactions effected using Horizon;

- (3) properly and accurately to produce all relevant records and/or to explain all relevant transactions and/or any alleged or apparent shortfalls attributed to Claimants;

- (4) to co-operate in seeking to identify the possible or likely causes of any apparent or alleged shortfalls and/or whether or not there was indeed any shortfall at all;

- (5) to seek to identify such causes itself, in any event;

(6) to disclose possible causes of apparent or alleged shortfalls (and the cause thereof) to Claimants candidly, fully and frankly;

(7) to make reasonable enquiry, undertake reasonable analysis and even-handed investigation, and give fair consideration to the facts and information available as to the possible causes of the appearance of alleged or apparent shortfalls (and the cause thereof);

(8) to communicate, alternatively, not to conceal known problems, bugs or errors in or generated by Horizon that might have financial (and other resulting) implications for Claimants;

(9) to communicate, alternatively, not to conceal the extent to which other Subpostmasters were experiencing relating to Horizon and the generation of discrepancies and alleged shortfalls;

(10) not to conceal from Claimants the Defendant's ability to alter remotely data or transactions upon which the calculation of the branch accounts (and any discrepancy, or alleged shortfalls) depended;

(11) properly, fully and fairly to investigate any alleged or apparent shortfalls;

(12) not to seek recovery from Claimants unless and until:

- a. the Defendant had complied with its duties above (or some of them);
- b. the Defendant has established that the alleged shortfall represented a genuine loss to the Defendant; and
- c. the Defendant had carried out a reasonable and fair investigation as to the cause and reason for the alleged shortfall and whether it was properly attributed to the Claimant under the terms of the Subpostmaster contract (construed as aforesaid);

(13) not to suspend Claimants:

- a. arbitrarily, irrationally or capriciously;
- b. without reasonable and proper cause; and/or
- c. in circumstances where the Defendant was itself in material breach of duty;

(14) not to terminate Claimants' contracts:

- a. arbitrarily, irrationally or capriciously;
- b. without reasonable and proper cause; and/or

c. in circumstances where the Defendant was itself in material breach of duty;

(15) not to take steps which would undermine the relationship of trust and confidence between Claimants and the Defendant;

(16) to exercise any contractual, or other power, honestly and in good faith for the purpose for which it was conferred;

(17) not to exercise any discretion arbitrarily, capriciously or unreasonably;

(18) to exercise any such discretion in accordance with the obligations of good faith, fair dealing, transparency, co-operation, and trust and confidence;

(19) to take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls), business, health and reputation of Claimants;

[GPOC, para 64; Denied at Defence, paras 104-106]

(20) to recover and/or seek to recover any alleged shortfalls within a reasonable time of discovery or the date by which, with reasonable diligence, Post Office could have made such a discovery.

[Reply, para. 96.1]

(The implied terms admitted at Defence para 105 are agreed)

- (3) If the terms alleged at GPOC, paras 64.16, 64.17, 64.18 and/or 64.19 (i.e. (16), (17), (18) and/or (19) above) are to be implied, to what contractual powers, discretions and/or functions in the SPMC and NTC do such terms apply?

Supply of Goods and Services Act 1982

- (4) Did Post Office supply Horizon, the Helpline and/or training/materials to Subpostmasters (i) as services under "relevant contracts for the supply of services" and (ii) in the course of its business, such that there was an implied term requiring Post Office to carry out any such services with reasonable care and skill, pursuant to section 13 of the Supply of Goods and Services Act 1982?

[GPOC para 63A, Defence, para. 104]

Onerous or unusual terms

- (5) Were any or all of the express terms in the GPOC paragraphs listed below onerous and unusual, so as to be unenforceable unless Post Office brought them fairly and reasonably to the Subpostmasters' attention?
- (i) para 51.1 and 51.3 (rules, instructions and standards);
 - (ii) para 52.1 and 52.3 (classes of business);
 - (iii) para 54.1 and 54.3 (accounts and liability for loss);
 - (iv) para 56.1.a. and 56.2.a (assistants);
 - (v) para 60.1 and 60.3 (suspension);
 - (vi) para 61.1 and 61.3 (termination).
 - (vii) Para 62.1 and 62.3 (no compensation for loss of office)

[GPOC, para 66; Defence, para. 108]

- (6) If so, what, if any, steps was Post Office required to take to draw such terms to the attention of the Subpostmaster?

[GPOC, para. 66; Defence, para. 108(2)]

Unfair Contract Terms

- (7) Were any or all of the terms at paragraph (5) above unenforceable pursuant to the Unfair Contract Terms Act 1977?

[GPOC, paras. 67-68; Defence, para. 109; Reply, para. 49]

Liability for Alleged Losses

- (8) What is the proper construction of section 12, clause 12 of the SPMC?
- (9) What is the proper construction of Part 2, paragraph 4.1 of the NTC?

[GPOC paragraph 49 and 55; Defence, paras 93-94]

Agency and Accounts

Post Office as agent

- (10) Was Post Office the agent of Subpostmasters for the limited purposes at GPOC paragraphs 82 and 83?

[Defence, paras 124-125]

- (11) If so, was the Defendant thereby required to comply any or all of the obligations at GPOC paragraph 84?

[Defence, para 126]

Subpostmasters as agents

- (12) Was the extent and effect of the agency of Subpostmasters to Post Office such that the principles of agency alleged at Defence 91 and 93(2) and (3) applied as Post Office contends?

[Defence paras 90-91; Reply, paras 59-60]

- (13) Did Subpostmasters bear the burden of proving that any Branch Trading Statement account they signed and/or returned to Post Office was incorrect?

[Defence, paras 69(3) 183; Reply, paras 64 and 92]

Suspension and Termination

Suspension

- (14) On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled to suspend pursuant to SPMC Section 19, clause 4 and Part 2, paragraph 15.1 NTC?

[GPOC, paras 32-3, 49, 60, 64.13 and 99; Defence, paras 66-72, 99 and 142]

Summary Termination

- (15) On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled summarily to terminate?

[GPOC, paras 34-37, 61, 64 and 99; Defence, paras 66-72, 100, 104-106 and 142]

Termination on Notice

- (16) On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled to terminate on notice, without cause?

[GPoC, paras 49, 61 and 64, Defence para. 100]

True Agreement

- (17) Do the express written terms of the SPMC and NTC between Post Office and Subpostmasters represent the true agreement between the parties, as to termination (in this regard, the Claimants rely on *Autoclenz v Belcher* [2011] UKSC 41)?

[GPOC, paras 50, 69-71; Defence, paras 86, 110-112]

- (18) If not, was the "true agreement" between the parties as alleged at GPOC, para. 71?

[GPOC, para. 71; Defence, para. 112]

Compensation for Loss of Office

- (19) On a proper construction of the SPMC and NTC, where Post Office lawfully and validly terminated a Subpostmaster's engagement, on notice or without notice for cause, was the Subpostmaster entitled to any compensation for loss of office or wrongful termination?

[See GPOC, para. 62; Defence, para. 101]

- (20) On a proper construction of the SPMC and NTC, in what, if any, circumstances are Subpostmaster's breach of contract claims for loss of business, loss of profit and consequential losses (including reduced profit from linked retail premises) limited to such losses as would not have been suffered if Post Office had given the notice of termination provided for in those contracts?

[GPOC, para. 131; Defence, para. 171; Reply, paras 81-82]

Subsequent appointments

- (21) On a proper construction of the SPMC and NTC, what if any restrictions were there on Post Office's discretion as to whether or not to appoint as a Subpostmaster the prospective purchaser of a Subpostmasters' business?

[GPOC, para. 62; Defence, para 102]

Assistants

- (22) Did SPMC section 15, clause 7.1; NTC, Part 2, clauses 2.3 and 2.5 and/or any of the implied terms contended for by the parties and found by the Court

purport to confer a benefit on Assistants for the purposes of section 1 of the Contracts (Rights of Third Parties) Act, and if so which of these terms did so?

[See GPOC, para. 74; Defence, para. 116; Reply, para. 92]

- (23) What was the responsibility of Subpostmasters under the SPMC and the NTC for the training of their Assistants?

[See GPOC, para. 56; Defence, para. 95(4); Reply, para. 92]

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Appendix B: Questions to be addressed at the Horizon Trial in March 2019

Agreed pursuant to §4 of the Third CMC Order

The following proposed issues are confined to issues that concern the Horizon system (as defined here) and which (a) arise on the parties' generic statements of case, (b) can be resolved by IT expert evidence, and (c) require limited, if any, evidence of fact.⁴

DEFINITIONS FOR THE PURPOSE OF THIS LIST OF ISSUES

"the Horizon System" shall for the purposes of this list of issues mean the Horizon computer system hardware and software, communications equipment in branch and central data centres where records of transactions made in branch were processed, as defined in GPOC, at §16 and as admitted by Post Office in its Defence, at §37.

BUGS, ERRORS AND DEFECTS IN HORIZON

Accuracy and integrity of data

- (1) To what extent was it possible or likely for bugs, errors or defects of the nature alleged at §§23 and 24 of the GPOC and referred to in §§ 49 to 56 of the Generic Defence to have the potential to (a) cause apparent or alleged discrepancies or shortfalls relating to Subpostmasters' branch accounts or transactions, or (b) undermine the reliability of Horizon accurately to process and to record transactions as alleged at §24.1 GPOC?
- (2) Did the Horizon IT system itself alert Subpostmasters of such bugs, errors or defects as described in (1) above and if so how.
- (3) To what extent and in what respects is the Horizon System "robust" and extremely unlikely to be the cause of shortfalls in branches?

[GPOC §23 and 24; Defence §§49 to 56]

Controls and measures for preventing / fixing bugs and developing the system

- (4) To what extent has there been potential for errors in data recorded within Horizon to arise in (a) data entry, (b) transfer or (c) processing of data in Horizon?
- (5) How, if at all, does the Horizon system itself compare transaction data recorded by Horizon against transaction data from sources outside of Horizon?

⁴ In accordance with the indications given by the Court at the CMC on 22 February 2018

- (6) To what extent did measures and/or controls that existed in Horizon prevent, detect, identify, report or reduce to an extremely low level the risk of the following:
- a. data entry errors;
 - b. data packet or system level errors (including data processing, effecting, and recording the same);
 - c. a failure to detect, correct and remedy software coding errors or bugs;
 - d. errors in the transmission, replication and storage of transaction record data; and
 - e. the data stored in the central data centre not being an accurate record of transactions entered on branch terminals?

[GPOC §§5, 14-15, 24.1, 24.1A, 94A, 95; Defence §§35(2), 36, 38(1), 50(1), 52-54; Reply §41]

OPERATION OF HORIZON

Remote Access

- (7) Were Post Office and/or Fujitsu able to access transaction data recorded by Horizon remotely (i.e. not from within a branch)?

[Defence §7; Reply §9]

Availability of Information and Report Writing

- (8) What transaction data and reporting functions were available through Horizon to Post Office for identifying the occurrence of alleged shortfalls and the causes of alleged shortfalls in branches, including whether they were caused by bugs, errors and/or defects in the Horizon system?

[Defence §7; Reply §9]

- (9) At all material times, what transaction data and reporting functions (if any) were available through Horizon to Subpostmasters for:
- a. identifying apparent or alleged discrepancies and shortfalls and/or the causes of the same; and
 - b. accessing and identifying transactions recorded on Horizon?

[GPOC §§14.2-14.3, 17 and 19.3; Defence §§38(2)(b), 38(3), 46(2); Reply §15.2-15.3]

Access to and/or Editing of Transactions and Branch Accounts

- (10) Whether the Defendant and/or Fujitsu have had the ability/facility to: (i) insert, inject, edit or delete transaction data or data in branch accounts; (ii) implement fixes in Horizon that had the potential to affect transaction data or data in branch accounts; or (iii) rebuild branch transaction data:
- a. at all;
 - b. without the knowledge of the Subpostmaster in question; and
 - c. without the consent of the Subpostmaster in question.

- (11) If they did, did the Horizon system have any permission controls upon the use of the above facility, and did the system maintain a log of such actions and such permission controls?

[GPOC §§21.3, 23, 25; Defence §§48(3), 50, 57]

- (12) If the Defendant and/or Fujitsu did have such ability, how often was that used, if at all?
- (13) To what extent did use of any such facility have the potential to affect the reliability of Branches' accounting positions?

[GPOC §§21.3, 23, 25; Defence §§48(3)(c), 57]

Branch trading statements, making good and disputing shortfalls

- (14) How (if at all) does the Horizon system and its functionality:
- a. enable Subpostmasters to compare the stock and cash in a branch against the stock and cash indicated on Horizon?
 - b. enable or require Subpostmasters to decide how to deal with, dispute, accept or make good an alleged discrepancy by (i) providing his or her own personal funds or (ii) settling centrally?
 - c. record and reflect the consequence of raising a dispute on an alleged discrepancy, on Horizon Branch account data and, in particular:
 - i. does raising a dispute with the Helpline cause a block to be placed on the value of an alleged shortfall; and
 - ii. is that recorded on the Horizon system as a debt due to Post Office?
 - d. enable Subpostmasters to produce (i) Cash Account before 2005 and (ii) Branch Trading Statement after 2005?

- e. enable or require Subpostmasters to continue to trade if they did not complete a Branch Trading Statement; and, if so, on what basis and with what consequences on the Horizon system?

[Defence §§42-46; Reply §§17.1-17.2, 21]

Transaction Corrections

(15) How did Horizon process and/or record Transaction Corrections?

[Defence §§12, 39-40, 45-46; Reply §21]

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Appendix C: Contingency Planning - High Likelihood Areas

This table details the 4 Common Issues assessed as having a high likelihood of Post Office losing the issue/having the implied term found against them. It is an extract from the document (9th July 2018) that summarises in Counsel's Opinion on the Common Issues. By its very nature, it is simplistic and should not be relied upon in lieu of a careful reading of Counsel's Opinion.

The impact on Post Office is the initial view as set out in the 9th July 2018 document version. This document has been updated with mitigating options identified as part of Post Office contingency planning.

Likelihood of Post Office losing a Common Issue / an Implied term being found against Post Office		Impact on Post Office if a Common Issue is decided in favour of the Claimants	
5	Post Office is very likely to lose the issue / The proposed term is very likely to be implied	5	A significant adverse impact on the business that could threaten its existence.
4	Post Office is more likely to lose than win the issue / The proposed term is more likely than not to be implied.	4	A major adverse impact on the business that will have a considerable long-term commercial harm.
3	50/50	3	A material impact on the business that will cause some commercial detriment / increased costs
2	Post Office is more likely to win than lose the issue / The proposed term will likely not be implied.	2	There will be some impact on the business but the additional burdens / costs will be manageable.
1	Post Office is very likely to win the issue / It is very unlikely that the proposed term will be implied.	1	There will be negligible impact on the business

Issue	Likelihood	Impact	Comments	CONTINGENCY PLANNING STATUS
POST OFFICE IMPLIED TERMS				
Implied term (admitted): Cooperation Post Office and Subpostmasters would not take steps which would stop the other from complying with the contract Post Office and Subpostmasters would cooperate with the other as was necessary to enable the other to carry out their obligations as set out in the contract	5	2	Impact These terms apply a low threshold (eg. necessary cooperation) to all Post Office's activity in all areas that touch postmasters. The expectation is that Post Office meets these standards in most areas however a holistic view of Post Office's business is required to say this with certainty.	
CLAIMANTS IMPLIED TERMS				
Implied term: Exercise of powers 1 [In relation to (i) contract variations and (ii) withholding Subpostmaster remuneration during suspension.]	5	2	Note: This issue has been split into two parts because it depends on which express terms are being considered. Post Office has a high degree of freedom when deciding to (i) vary postmaster Contracts and (ii) withhold postmaster remuneration during suspension. Counsel has advised that the Court is likely to place some restrictions on these	Current contracts state that remuneration may be withheld during period of suspension. As best practice, the process should clearly document the decision rationale for withholding remuneration. This rationale should be shared with the suspended postmaster. Refreshed policy and

<p>Post Office would exercise any power (under the contracts or generally) honestly and only for the purpose the power was created to achieve.</p> <p>Post Office will not exercise a power arbitrarily capriciously or irrationally.</p>			<p>discretionary powers, namely that these powers should not be used arbitrarily, capriciously or irrationally.</p> <p>Impact</p> <p>Post Office will need to pro-actively consider and document in every case whether remuneration should be withheld during a period of suspension. This could lead to significant back-claims for withheld remuneration. Going forward this could be remedy with a process change to approve and document these decisions.</p> <p>It is considered unlikely that Post Office would vary postmaster Contracts without careful consideration. More effort may be required to document these decisions.</p>	<p>process documentation is to be introduced as best practice from Oct 2018 onwards.</p> <p>Whether to concede - that the suspension/repayment of remuneration during suspension terms of the postmaster contract should be subject to an implied term that our discretion will not be used dishonestly, or in an arbitrary, irrational or capricious manner – this is subject to SteerCo decision on 12th Oct</p>
<p>Implied term:</p> <p>Training</p> <p>Post Office would provide adequate training and support.</p> <p>Post Office would especially provide adequate training and support where:</p> <p>A) new working practices were introduced;</p> <p>B) new systems were introduced; or</p>	4	3	<p>Impact</p> <p>If Post Office already provides adequate training and support, these additional terms will have minimal impact. It should be noted that the admitted term of "necessary cooperation" will likely require Post Office to provide adequate training and support.</p> <p>If more is required from Post Office, this could require more trainers and training sessions, a greater amount of more detailed training material, consideration of the form of training and a way to track whether the training provided had been properly instilled into the audience aimed at.</p>	<p>A review of the Postmaster training was initiated in January the purpose of which is to ensure that:</p> <ul style="list-style-type: none"> - the initial training adequately equips postmasters to successfully run their post office; - they know how to access ongoing support and training as required; - that the training offer for new products and services is appropriate; - that all training is reviewed periodically to ensure that it continues to be fit for purpose.

C) where Subpostmasters were required to provide new services.			<p>The impact would be further increased if this training was also required for postmaster assistants.</p> <p>Additional in-house training may be needed to ensure face to face contacts are giving Subpostmasters consistent advice.</p>	<p>- New training offer introduced June/July 2018 (includes revised 2 day classroom training and on-line training for Locals). Rolling 6 month review of effectiveness of training now in place.</p> <p>Training is currently offered to assistants on transfer of the post office to a new postmaster. The number of assistants to be trained is agreed with the postmaster at interview.</p>
END OF IMPLIED TERMS				
<p>Suspension</p> <p>On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled to suspend pursuant to SPMC Section 19, clause 4 and Part 2, paragraph 15.1 NTC?</p> <p>Note: the Claimants also seek an implied term in relation to Suspension.</p> <p>Post Office would not to suspend Claimants:</p> <p>A) without reasonable and proper cause; and/or</p> <p>B) when Post Office had breached its duties to the Subpostmasters.</p>	4	2	<p>Summary: There is a real risk that the court will find that there is an implied term that Post Office would only suspend postmasters where there was a <u>reasonable basis</u> for suspension on one of more of the grounds listed in the express clauses.</p> <p>Detail: The claimants say these clauses act in a more limited way than the way Post Office has historically applied them. They seek to limit the circumstances in which Post Office can suspend postmasters.</p> <p>For the most part, Counsel thinks the claimants arguments are weak. However, there is a risk that the court could instead decide that although it will not imply a "reasonable basis" for the suspension, it may instead treat the right to suspend as a <u>discretion</u> which cannot be exercised arbitrarily, irrationally or capriciously by Post Office.</p> <p>Impact</p>	<p>Pre-audit investigation approach has been designed as best practice though the implementation date is tbc.</p> <p>This ensures that there is sufficient evidence to support reasonable grounds for suspension. The detailed findings of the investigation will be shared with the postmaster as part of the suspension process.</p>

			<p>Post Office could still suspend but may need to take more care before exercising the right to suspend.</p> <p>Ability to make quick decisions could be hindered</p> <p>Concern for Post Office's reputation if it is required to keep a questionable postmasters in their position whilst investigations are carried out.</p> <p>Risk to assets whilst decisions made.</p>	
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Appendix D: Contingency Planning - High Impact Areas

The following table details the 3 Common Issues assessed as having a significant adverse impact on the business if the issue / implied term were to go against Post Office. It is an extract from the document of 9 July 2018 which summarises Counsel's Opinion on the Common Issues. By its very nature, it is simplistic and should not be relied upon in lieu of a careful reading of Counsel's Opinion.

The impact on Post Office is the initial view as set out in the 9th July 2018 document version. This document has been updated with mitigating options identified as part of Post Office contingency planning

Issue	Likelihood	Imp	Comments	CONTINGENCY PLANNING STATUS
CLAIMANTS IMPLIED TERMS				
Implied term: Shortfalls Post Office would: A) produce, keep and maintain accurate records of all transactions carried out using Horizon; B) be able to explain all relevant transactions; and	2	5	Impact This would reverse the current responsibilities between Post Office and postmasters in relation to losses. Post Office would need to put processes in place to enable it to explain all transactions and shortfalls. This would make recovery of losses in branches very difficult if not impossible in many cases.	A 'formal investigation' approach has been designed ie end to end from issue/discrepancy being flagged/identified to findings of investigation being produced and shared with postmaster a. Approach is based on the existing Support Services Resolution Team (SSRT) investigation approach ((heavily HORIce based) and is to be

<p>C) use the records to explain any shortfalls.</p> <p>Post Office would co-operate in trying to:</p> <p>A) identify the possible or likely causes of any shortfalls without any input from the Subpostmasters and/or</p> <p>B) work out whether or not there was any shortfall by carrying out a formal investigation</p> <p>C) prove as a result of the investigation that the shortfall was properly attributed to the Subpostmaster under the contract.</p> <p>Post Office would not seek recovery of any shortfalls from the Subpostmasters unless and until:</p> <p>A) it had complied with its duties (which include the duties in the implied terms);</p> <p>B) it had shown that the shortfall was a genuine loss to Post Office</p>			<p>used as basis for best practice for formal losses investigation approach.</p> <p>b. Best practice involves the branch flagging an issue with a discrepancy they couldn't resolve. Step check to understand what investigation the spmr/branch had done before flagging to Post Office for further investigation.</p> <p>c. Root cause analysis to be routinely taken as part of the investigation to not only identify the cause of the shortfall but also to identify any improvements to product, transaction, process or system that would prevent or mitigate a repeat scenario.</p> <p>d. Approach is defined as a Signature Process ie transparent approach hardwired into ways of working</p> <p>The above approach is implementation ready.</p>
END OF IMPLIED TERMS			
Liability for Losses	2	5	<p>Summary: Post Office is likely to succeed on the major issues arising out of the construction of these clauses.</p> <p>The losses investigation approach detailed above will piece together what has or rather what has not happened in</p>

<p>What is the proper construction of section 12, clause 12 of the SPMC?</p> <p>Clause 12 states "<i>The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay.</i>"</p> <p>What is the proper construction of Part 2, paragraph 4.1 of the NTC?</p> <p>Para 4.1 states: "<i>The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (howsoever this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise, or as a result of any breach of the Agreement by the Operator) except for losses arising from the criminal act of a third party (other than Personnel) which the Operator could not have prevented or mitigated by following [Post Office's] security procedures or by taking reasonable care. Any deficiencies in stocks of products and/or resulting shortfall in the money payable to [Post Office] must be made good by the Operator without delay so that, in the case of any shortfall, [Post Office] is paid</i></p>	<p>See also the comments above in relation to implied terms regarding shortfalls.</p> <p>The major challenge on these clauses whether for a "loss" to be recoverable it needs to be a real financial loss to Post Office or whether it can be an accounting loss in a postmaster's accounts. The difficulty with the former is that Post Office would need to track the loss in a branch accounts and show how that loss caused it real financial detriment. This would require a significant forensic accounting exercise, tracing a loss through all Post Office's back-office accounting systems.</p> <p>Impact</p> <p>Losing this point would make it very difficult for Post Office to recover losses without significant effort and details investigation into every loss in every branch.</p> <p>It also has the effect of shifting the burden of proof onto Post Office to show the root cause of the loss. In many cases, this will be impossible to discharge.</p>	<p>branch in a timely manner with a high degree of accuracy so Post Office can establish whether there has been a shortfall and in many cases it's likely root cause.</p> <p>By default the length of time for postmaster to make good the loss will be significantly longer than it is today which could have a significant impact on Post Office cash flow.</p>
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the full amount when due in accordance with the Manual."			It may give rise to substantial claims for repayment of losses to postmaster's dating back many years.	
<p>Post Office as Agent</p> <p><u>Post Office as agent</u></p> <p>Was Post Office the agent of Subpostmasters for the limited purposes at GPOC paragraphs 82 and 83?</p> <p>If so, was Post Office required to comply any or all of the obligations at GPOC paragraph 84, which include that Post Office would:</p> <p>a) properly and accurately to effect, execute, record, and/or maintain and keep records of all transactions which the Claimants initiated using Horizon or for which the Claimants were potentially responsible;</p> <p>b) to render and make available to the Claimant accounts (in accordance with paragraph 84 (a)); and/or</p> <p>c) a where the Defendant alleged shortfalls to be attributed to the Claimants, to comply with the duties the Claimants have said they are owed in relation to Horizon.</p>	1	5	<p>Summary: The contracts make it clear that postmasters are agents of Post Office, not the other way around.</p> <p>Counsel considers that it will be a steep challenge for the Claimants to succeed on this Agency issue, as it will be difficult for them to reserve the relationship so that the Post Office subordinates its interests to the postmasters' interests.</p> <p>Impact</p> <p>This would reverse the current responsibilities between Post Office and postmasters, making recovery of losses from a postmaster very difficult if not impossible.</p>	<p>Implementing the losses investigation approach detailed above will determine whether there has been a loss and in many cases its likely root cause.</p> <p>If CCTV installed to cover the complete movement of cash in and out of the post office then in conjunction with the investigation approach the cause of the loss should be able to be determined.</p>

Appendix E: Contingency Planning - Key Mitigating Actions

Changes to the Postmaster Contract

Amend the wording of the postmaster contracts (Community/Spso; Local; Main) to make it explicitly clear that postmasters are responsible for shortfalls in their branch accounts and are required to make good those shortfalls. The postmaster is also responsible for investigating the cause of any discrepancies in the first instance and advising Post Office of any large (to be quantified) unresolved discrepancy. This could be achieved through:

1. **Unilateral variation** – from a process point this would have the shortest timescale. Assuming no consultation⁵ with NFSP and notification to postmasters by way of a letter:

- Community branches - 2-4 weeks
- Mains & Locals - 3 months owing to a 3 month notice clause for variations

Trial Dependency: This is one of the terms that the claimants are arguing should be implied into the contract and therefore is part of the Common Issues trial. If the judgement goes against Post Office on this point then unilateral variation would not be option.

2. **Variation by agreement** – not as expedient as unilateral variation however more favourable from postmaster engagement perspective:

- NFSP negotiation – 4 weeks.

A financial incentive to agree the variation could help keep the timescale tight. At best, it is estimated that it would take 8 weeks.

3. **Terminate contract and re-contract** – if we were unable make the necessary amendment to the contract by unilateral variation or with Postmaster agreement then we would need to serve notice to terminate in line with the specified term in the contracts: 3 months for Spso; 6 months for Local; 12 months for Main.

Trial Dependency: Termination notice is one of the terms that claimants are arguing should be implied into the contract and therefore is part of the Common Issues trial.

⁵ whilst legally possible, is a contradiction with precedent and comes with other risks

Post Office's Approach to Investigations

Develop an end to end investigation process from the point of an issue / discrepancy being flagged / identified, to the findings of a subsequent investigation being produced and shared with the postmaster. This would include a full 'root cause analysis' being performed by Post Office, rolling out the approach already adopted by Post Office's current Support Services Resolution Team (SSRT) as 'best practice' for losses investigation across Post Office.

Mobilising a specialised team, which is able to piece together all of the necessary information to be able to understand what has or has not happened in a branch and thus, the cause of any shortfall, quickly and efficiently will:

- Enable the recovery of losses quicker; and
- Educate Postmasters in terms of what has caused their losses, so that the same mistakes are not repeated and the appropriate preventative controls can be put in place in particular branches and, in some circumstances, across the network - reducing future branch losses, calls to NBSC and the volume of TCs issued.

CCTV

Install CCTV into all Post Offices to effectively follow the cash in and out of branches (i.e. from Post Office Supply Chain cash deliveries and cash from customers to Post Office Supply Chain collections and cash to customers including transactions in and out of Horizon). This would act as deterrent in terms of theft and fraud, reducing losses but also enabling their recovery as transaction, keystroke and cash over the counter errors could be viewed on camera retrospectively.

A risk based approach could be adopted based upon crime data, overnight cash holding, ATM data, number of positions and branch type to arrive at the risk output e.g.

- 1,200 High Risk branches: 4 camera system, remotely monitored, cloud recording.
- 9,098 Medium Risk branches: 4 camera system, local recording.
- 1,904 Low Risk branches: 2 camera system, local recording, £800 Capex.

Appendix F: Key Communications Messages

- Post Office is vigorously defending the claim – we have confidence in our network of 11,500 Post Offices throughout the UK and the systems underpinning it. Millions of transactions are successfully processed for our customers every day, including on behalf of the high street banks.
- Post Office values the people working hard at its branches every day for our millions of customers. We depend on our agents and employees for the services we bring to the UK's communities – if they raise concerns we take these very seriously, it's in our interests to do so.
- We have gone to great lengths in the past to respond to the allegations and grievances made by a group of (mainly former) postmasters involved in the litigation, including extensive investigations and a mediation scheme which resolved a number of cases at the time.
- We've welcomed the Group Litigation Order (which enables the Court to efficiently manage litigation affecting multiple parties). We believe it provides the best opportunity to have the matters in dispute heard and resolved.
- The litigation is phased. *Neither of the two trials the Court has ordered for 2018/19 are to address or decide liability* – the Court has not yet determined a process for this. The November trial is about contractual matters between Post Office and its agents. The second trial, scheduled for March 2019, concerns the Post Office's computer system, Horizon.
- The number of claimants is a very small percentage of the many thousands of postmasters we have worked with over the past two decades.
- The vast majority of Post Office branches, large and small, are run on an agency or franchise basis, alongside local shops and always have been. It's a successful way of helping to keep thriving businesses and Post Offices on high streets and at the heart of communities. Post Office is a successful partner with both large UK-wide retailers as well as small, independent traders.
- Post Office has continued to successfully adapt and transform its business, working with our postmasters and employees. We've responded to dramatic changes in consumer trends and today's Post Office network provides – for example - for the collection or return of online shopping, a 'click and collect' service for Travel Money foreign currency and everyday banking for the majority of customers of UK banks.

Appendix G: Background to the 6 lead claimants

Alan Bates

Branch: Craig-y-don Post Office® Branch, 21 Queens Road, Craig-y- don, Llandudno, LL30 1AZ

Dates of service: 7 May 1998 to 5 November 2003

Loss claimed: At least £1,140,000 for loss of investment and earnings until retirement

Contract model: Standard Subpostmasters Contract 1994

Background:

Alan Bates took over the Craig-y-don branch on 7 May 1998. The Horizon system was introduced to the branch in October 2000 as part of its roll out across the Post Office network. Mr Bates claims that he experienced discrepancies fairly regularly following the introduction of Horizon, and that he was unable to find the cause. Some small amounts were written off by Post Office. Mr Bates did not make good any shortfalls. He began rolling over discrepancies at the end of each week instead of making good the shortfalls and resetting the branch to zero as instructed. In April 2003 a Post Office network manager became aware of this. He told Mr Bates to cease this practice and to make good the outstanding loss but Mr Bates did not do so. Post Office warned Mr Bates that failure to keep the accounts as required and not making good losses put his contract at risk. By August 2003 the position had not changed. On 5 August 2003 Post Office terminated Mr Bates' contract by giving him 3 months' notice in accordance with its terms. Mr Bates' final day of service was 5 November 2003. Mr Bates never repaid the loss (£1,000).

Key allegations made:

Mr Bates claims, in addition to the generic complaints made by all Claimants, that:

- When Horizon was introduced it limited his ability to investigate and remedy shortfalls. He claims transaction corrections directly affected his branch accounts.
- He alleges that Post Office knew Horizon was causing errors not just in his branch but elsewhere across the network.
- Post Office refused his requests to provide additional Post Office and non-Post Office services in his branch.

Reason for termination:

- Mr Bates was liable for the discrepancies in his accounts and instead of settling his liabilities and resetting the balance in his branch to zero every week he rolled the discrepancies into the following week's accounts in breach of operating procedures. He also failed to make good any losses.
- Post Office became aware of this around April 2003 and instructed the Claimant to desist but he refused to do so. Post Office warned Mr Bates that his practice put his contract at risk.

Naushad Abdulla

Branch: Charlton Post Office Branch®, 10-12 Charlton Church Lane, SE7 7AF

Dates of service: 24 January 2007 to 8 May 2009

Loss claimed: At least £285,000 for (wrongly) repaid shortfalls, loss of investment and earnings during suspension and post termination and consequential losses (such as sale of his house due to unemployment)

Contract model: Modified Subpostmasters' Contract

Background:

Mr Abdulla's parents ran a Post Office branch during the early to mid-1990s. The Branch opened on 25 January 2007. On 6 April 2009 an audit, conducted in Mr Abdulla's absence on holiday, identified a shortfall of £4,905.19. The audit revealed that he had an undated personal cheque for £2,500 and mutilated notes which were overstated by the same amount. Mr Abdulla was immediately suspended as the auditors suspected false accounting.

Mr Abdulla has admitted in his claim that he adopted a practice of keeping an undated cheque in the till to cover any shortfalls. However, he had indicated in his accounts that the relevant amount was held within the branch in the form of cash. This meant that until the false accounting was discovered, Mr Abdulla had free use of this money that ought to have been paid to Post Office.

Key allegations made:

Mr Abdulla claims, in addition to the generic complaints made by all Claimants, that:

- Due to shortfalls occurring regularly, he adopted a practice of keeping an undated cheque in the till to cover the amount of shortfalls. He claims that this was a common practice adopted by the previous Branch postmaster and staff.

- In his post suspension interview, he was told that if he made good the shortfall, which had reduced to £3,926.31, then he would be reinstated as postmaster. This did not happen.

Reason for termination:

- Post Office wrote to Mr Abdulla on 14 April 2009 identifying the breaches of his contract and stating that he had misused funds and falsely accounted.
- A post suspension meeting was held on 30 April 2009. Mr Abdulla admitted to falsifying accounts and failing to make good shortfalls that had occurred previously.
- On 8 May 2009 Mr Abdulla was summarily terminated due to misuse of funds and false accounting.

Mr Abdulla appealed the decision at a hearing on 23 June 2009 but the decision was upheld.

Louise Dar

Branch: Lenzie Post Office Branch®, 118 Kirklintilloch Road, Lenzie, Glasgow

Dates of service: 19 November 2014 to 27 March 2017

Loss claimed: Roughly £3,709,000 for repayment of shortfalls, loss of investment, loss of earnings during suspension and post termination impact on business revenue

Contract model: Network Transformation Contract

Background:

Ms Dar opened the Branch in her existing business premises on 19 November 2014.

On 15 July 2015 an audit was conducted and found shortfalls of £10,423.96 relating to amounts of cash, cheques and foreign currency. Ms Dar was suspended. Post Office informed Ms Dar that during investigation they had found deliberate falsification of the accounts by the user of the Horizon ID of Ms Sohi. Ms Dar dismissed Ms Sohi, her assistant. She later confirmed that the discrepancy with the foreign currency was unexplained and she was responsible for it. She alleged that she must have misplaced the money. Post Office reinstated Ms Dar and the branch reopened on 28 August 2015, on the basis that Ms Dar repaid the shortfalls and adhered to some specified Post Office procedures. Monthly deductions were taken from Ms Dar's remuneration for the shortfall sum of £7,302.52.

On 17 May 2016 another shortfall of £2,252.84 was identified. Post Office's auditor thought the cause was irregular accounting procedures. Ms Dar repaid the shortfall.

On 3 February 2017 a shortfall of £6,870.85 was identified at audit. Ms Dar had not carried out a cash and stock check for around 2 weeks, and was suspended with immediate effect.

Key allegations made:

Ms Dar claims, in addition to the generic complaints made by all Claimants, that:

- She relied on Post Office's investigation which suggested the discrepancies found in July 2015 were due to deliberate falsification and inflation of accounts by her assistant, Ms Sohi, for which she was held responsible for.
- She had no access to Horizon during her periods of suspension in July 2015 and May 2016 so could not look into what happened and why there was a shortfall.
- From her experience with systems similar to Horizon, the programme was basic and based on older technology than she expected.

Reason for termination:

- A meeting with Ms Dar took place on 3 March 2017 in which she could not explain (or pay for) the shortfall of £6,870.85. This fact, combined with the fact that there had been two other substantial shortfalls within 18 months, led Post Office to believe that Ms Dar was not operating her branch properly.
- Post Office terminated her appointment on 27 March 2017 in view of her repeated failures to properly account for Post Office cash and stock, and her failure to be able to explain or make good the last shortfall.

Elizabeth Stockdale

Branch: Sandsacre Post Office® Branch, Wheatley Drive, Bridlington, East Yorkshire, YO16 6TN

Dates of service: 8 May 2014 to 16 September 2016

Loss claimed: At least £65,000 for (wrongly) repaid shortfalls and loss of investment / earnings

Contract model: Network Transformation Contract (Local Post Office® Branch, On Site Variant, Post Office Limited Cash)

Background:

Ms Stockdale operated the Sandsacre Post Office Branch from 8 May 2014. She alleges that the first shortfall she suffered took place shortly after opening while a Post Office trainer was providing support in branch. Post Office's position is that this is incorrect. Mrs Stockdale subsequently declared (and partly repaid) further shortfalls during the period October 2014 to August 2015. She then continued to experience shortfalls after this date but did not declare them to Post Office.

Eight months later, on 27 April 2016, Ms Stockdale declared the further shortfalls, totalling at that point £18,891.47. The growing shortfalls in the Branch prompted Post Office to audit the Branch. An audit was carried out on 13 May 2016 and identified an undeclared shortfall of cash and stock in the sum of £7,917.09, in addition to the sums that were already outstanding before the audit. In total, including sums declared on 27 April 2016, the further shortfall found at audit, and sums outstanding before these events, there was a total shortfall of £28,693.84.

Ms Stockdale was suspended by Post Office on the day of the audit. After an investigation, her contract was terminated by Post Office for breach of contract on 16 September 2016.

Key allegations made:

Ms Stockdale claims, in addition to the generic complaints made by all Claimants, that:

- She had no confidence that Post Office would assist her to discover the reason for apparent shortfalls so she stopped declaring them and kept paper records instead.
- She was never able to identify the cause of the shortfalls. Although she requested help from Post Office numerous times, this was never forthcoming.
- Post Office staff visited her branch numerous times following shortfall declarations however they could never identify the cause of the shortfall.

Reason for termination:

- The undeclared loss found at the audit indicated that Ms Stockdale had been falsifying her accounts to conceal the loss. Ms Stockdale admitted false accounting in meetings and calls with Post Office, and at a formal interview on 19 August 2016.
- Ms Stockdale's contract was terminated on 16 September 2016 due to falsification of her accounts, failing to act honestly, and failing to pay sums due to Post Office by the due date, in breach of her contract.

Pamela Stubbs

Branch: Barkham Post Office Branch®, 50 Bearwood Road, Wokingham, RG41 4SY

Dates of service: 23 September 1999 to 12 August 2010

Loss claimed: Roughly £67,000 for payments of shortfalls, loss of earnings post termination, and loss of investment

Contract model: Standard Subpostmasters Contract 1994

Background:

Mrs Stubbs took over as postmaster in September 1999 when her husband, the previous postmaster, passed away. Mrs Stubbs has been an assistant at the Branch since 1987.

In 2000 to 2001, Mrs Stubbs had problems with power outages at the Branch which caused the Horizon system to crash and reboot. There were discrepancies in the Branch accounts which Mrs Stubbs believed were due to the power outages over this period of time equating to around £1,000. These shortfalls were made good by her.

Following the power supply issue there were no major issues with shortfalls until late 2009 when the Horizon equipment was relocated to a portacabin due to redevelopment works at the branch premises. A significant number of shortfalls occurred and payment of these was requested. In the spring of 2010, Mrs Stubbs wanted to advertise the Branch for sale and had a prospective purchaser. On 12 May 2010 Mrs Stubbs sent in her letter of resignation. One final audit was conducted on 8 June 2010 following Mrs Stubbs resignation which found a shortfall of £4,837.87. Mrs Stubbs was suspended the same day and remained suspended until her resignation took effect.

Key allegations made:

Mrs Stubbs claims, in addition to the generic complaints made by all Claimants, that:

- There was no appointment process and that she never received a copy of the Standard Subpostmasters Contract.
- She was unable to identify the cause of apparent shortfalls from the information she had access to using Horizon.
- The discrepancies in the branch accounts in 2000/2001 were due to power outages which caused the Horizon terminal to crash and reboot.
- The Horizon terminal was relocated to a porta cabin during Branch refurbishment in 2009. Following this move she experienced shortfalls in her Branch accounts so there must be some correlation between the two.

Reason for resignation:

- On 12 May 2010 Mrs Stubbs sent a letter of resignation to Post Office noting she had two individuals whom were interested in purchasing the Branch.
- Post Office believed that Mrs Stubbs or her assistants were the cause of the losses in her branch; those losses being exacerbated by the move to the porta cabin whose unfamiliar surroundings created an increased risk of manual error when conducting transactions.

Mohammad Sabir

Branches: Cottingley Post Office® Branch, 4 The Parade, Cottingley, BD16 1RP;
Crossflatts Post Office® Branch, 33A Keighley Road, Bingley

Dates of service: 9 September 2006 to 2 October 2009 (Cottingley)
11 October 2006 to 2 October 2009 (Crossflatts)

Loss claimed: At least £95,000 for (wrongly) repaid shortfalls and loss of investment/earnings

Contract model: Standard Subpostmasters Contract 1994

Background:

Mr Sabir became postmaster of Cottingley on 9 September 2006 and Crossflatts on 11 October 2006. Mr Sabir claims that from 2008 he experienced discrepancies in the accounts for Cottingley which created an apparent surplus when a Lottery scratchcard was sold. An audit of Cottingley conducted by Post Office branch on 10 August 2009 revealed a shortfall of £4,878.36 which primarily related to scratchcards. The number of lottery scratch cards recorded as being in stock was greater than the number of actual stock. Due to the shortfall at Cottingley, an audit of Crossflatts was carried out the following day, revealing a small (immaterial) surplus. Mr Sabir was suspended from both branches and, after an investigation, both his contracts were terminated.

Key allegations made:

Mr Sabir claims, in addition to the generic complaints made by all Claimants, that:

- He requested further training on the Horizon system but Post Office told him they could not spare the resources. He alleges that the training he was provided with was inadequate.
- From 2008 he claims that a surplus of cash was created when scratch cards were sold and that he removed this surplus and placed it in the branch safe. When the audit uncovered a shortfall he presented the cash immediately and wrote a

cheque for the remaining outstanding amount. He therefore tries to claim that there was no real shortfall.

Reason for termination:

- The shortfall of £4,878.36 discovered at audit on 10 August 2009 had been disguised by inflating the figure for declared Lottery scratchcards in the branch accounts.
- At interview on 1 October 2009, Mr Sabir admitted that he had knowingly been overstating figures in his accounts to conceal losses.
- Post Office summarily terminated Mr Sabir's contracts of both branches on 2 October 2009 due to 'falsification of the branch trading account by inflating the declared lottery scratch cards on hand figure and failure to make good of losses without delay'.

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