

From: Tom Beezer <[redacted] GRO>
To: Rodric Williams <[redacted] GRO>, Jane MacLeod
<[redacted] GRO>, Andrew Parsons <[redacted] GRO>
Cc: Mark Underwood <[redacted] GRO>, Amy Prime
<[redacted] GRO>, "Ben.Foat" <[redacted] GRO> <[redacted] GRO>
Subject: RE: Update from the Board call - [WBDUK-AC.FID26896945]
Date: Tue, 19 Mar 2019 12:52:31 +0000

Importance: Normal

Inline-Images: image02597a.PNG; image7f4d0c.PNG; image01ff2a.PNG; image001.png

Jane

I have added some comments on top of Rod's comments.

I'll keep thinking.

When you have visibility of timings for Board call tomorrow and what is possible and whether AGQC timings can be accommodated, please let me know and I'll seek to finalise that appointment.

T

Tom Beezer
Partner
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From: Rodric Williams [mailto:[redacted] GRO]
Sent: 19 March 2019 08:41
To: Jane MacLeod; Tom Beezer; Andrew Parsons
Cc: Mark Underwood <[redacted] GRO> Amy Prime
Subject: RE: Update from the Board call -

Thanks Jane – I've embedded a couple of extra thoughts in **red** below.

Rod

From: Jane MacLeod
Sent: 18 March 2019 19:40
To: Tom Beezer <[GRO]>; andrew.parsons <[GRO]>; Rodric Williams <[GRO]>
Cc: Mark Underwood <[GRO]>; Amy Prime <[GRO]>
Subject: Update from the Board call -

All

Many thanks for your help in sorting out DNQC attendance at the call. He was very balanced in his approach, but confirmed that he thinks we have a good case on recusal. The Board asked a number of questions and my sense was that they were 'calmed' by his discussion. However they haven't yet made a decision. There is a further board call on Wednesday at 12.30 and they have requested whether Lord Grabiner would be available in person at the time – ideally at FD if that's possible? Having said that they recognise that he will almost certainly say the same things as DNQC.

So please pass on our thanks to DNQC.

There is significant pressure to be able to say how we are going to treat those claimants who establish they have a case, and all those outside the scheme who may have a similar fact pattern. So what they have asked for is a pro forma model of what the various outcomes could be – that is, what is the financial impact such that taking a step like recusal is 'worth it'.

It would be helpful to receive your thoughts on this but I think the following factors should be taken into account:

Original Expectations (and, assuming appeal on law was successful too, what a recusal would help us get back to)

- contract would stand in all material respects, **and ideally improved in some areas applying lessons learned (e.g. simplifying and delineating obligations from operational instructions).**
- Horizon would be found to be robust (no systemic issues; bugs may cause losses but these can be identified and we would have a process to ensure that we didn't attribute losses where the cause was Horizon or a PO controlled factor)
- Limitation would apply (reduces group by 50%)

- Normal basis of assessment of damages (contractual notice period 3/6 months, no compensation for loss of office, other?)
- Would then look on a case by case basis – potentially repayment of amounts required to be made good, maybe interest? other ‘reasonably foreseeable’ loss?

These principles would inform a settlement, and would also apply to all others (outside the GLO) who sought relief

Post Common Issues (assuming no recusal or appeal):

More likely that:

- Horizon trial – high risk of adverse findings re Horizon increases risk of breach findings in Trial 3 (and later Trial 4), which must similarly be seen as very high risk.
- we will be in breach of a contract due to implied terms: failure to investigate, proving actual loss, and ‘burden of proof’ will be most material.
- The finding that the contracts are “relational”, and the implication of additional terms (whether as “incidents” of a relational contract or for “necessity”) invites the implication of yet further terms, e.g. to cure with hindsight perceived breaches not covered by the already expanded contract.
- can’t rely on branch trading statement in the event of disputed losses – so must wear impact of in branch losses both historically and going forward if any form of challenge is raised. Currently c£5m pa and growing. CIT findings place burden of proof for disputed shortfalls on Post Office and it is hard to see how Post Office can prove shortfalls were the responsibility of the Sub-Postmaster as it has no minute by minute visibility or control at an “in-branch” level.
- greater damages due to longer notice period implied, and greater exposure to requirement to repay those losses that we recovered (wrongly) from claimants (and others). Issues around historic wrongful prosecutions may come to be prominent both in terms of damages and as a hindrance to settlement. See comment below.
- Wider scope of recoverable damages, e.g. breaching obligations of good faith may make more foreseeable/less remote some losses, e.g. those connected to the postmasters’ branch premises. [[Query whether this Judge would go even further and consider punitive and/or exemplary damages typically not awarded in this jurisdiction]]
- Bias and ‘conspiracy theory re withholding evidence’ – will impact Limitation arguments; may also impact the Judge’s assessment of our expert’s opinions in the Horizon Issues trial (e.g. if he finds - wrongly – that the experts did not have equal access to information).
- Therefore greater numbers of postmasters within group and externally who could bring claim and greater quantum of damages – whether through litigation or settlement

Additional factors – other than Recusal and appeal, costs of trials should not vary. If recusal is sort, the Horizon trial may be (and we say should be) stayed in the interim. This will have a costs impact but on the assumption the Court of Appeal quickly deals with any refusal to recuse by the Judge himself (a likely outcome) then the period of any stay (if agreed to or imposed) should be limited.

On a settlement (say over the summer) the fact (or not) of recusal and the Horizon outcomes will be key to our negotiating strength. Note there is a set of scheduled mediations in June. As it stands today, we would be in a worse position. In the absence of a recusal application and successful appeal the negotiating position of Post Office seems weak. It is necessary to appreciate that the Claimants are backed by litigation funders who will sense victory from the CIT Judgment. In the absence of risk to the Claimants case (or important elements of it) the funders are likely to insist on recovering the maximum fee they are contractually able to extract from the Claimants and this will erode the "pot" available to the Claimants and thereby drive any settlement number required from Post Office up.

Also on the topic of settlement it is necessary to remember that 30 out of the 557 Claimants have been convicted for shortfalls. Those 30 are relevant to the process currently underway at the CCRC. Post Office cannot therefore currently simply settle with the entire Claimant group as that would throw serious doubt on safety of those 30 convictions

As ever, thoughts on the back of a postcard

Thanks

Jane



Jane MacLeod

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