Group Litigation Update

Author: Ben Foat/Rodric Williams Sponsor: Ben Foat Meeting date: 29 October 2019

Executive Summary

Context

Post Office is awaiting the Horizon Issue judgment and the permission to appeal the Common Issues judgment.

Rod - this is what the next section is to do

~~This report provides updates on: (i) the contingency planning being undertaken ahead of the High Court's judgment on the Horizon Issues Trial; (ii) the status of the High Court Group Litigation; and (iii) preparations for mediation scheduled for 27 and 28 November 2019.~~ An update on Post Office's operational responses to the Common Issues Judgment and the Horizon contingency planning handed down on 15 March 2019 will be addressed in a separate Board paper.

In respect of the Group Litigation.

~~We are currently awaiting the High Court's judgment on the Horizon Issues Trial.~~ This is ~~unlikely to be distributed before the end of October 2019, but could be delayed~~ by the ~~"KEL Disclosure" development (discussed further below).~~

this is not context (that's an update)

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

this is not context (that's an update)

Management has continued to prepare for mediation + settlement as well as the

This is an update

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

have

Questions addressed in this report

Rod - this is the scope of the report.

This should be dealt with in Julie's paper.

1. ~~What is the update on contingency planning for the Horizon judgment?~~
2. What is the update on the High Court Group Litigation?
3. What is being done to prepare for mediation and settlement?
   a. What is being done to analyse each individual Claimants' claim?
   b. What might be driving the Claimants' perspective on quantum?
   c. Would it be more cost effective to settle the claim or litigate and lose?
   d. What is being done to map out the route for shareholder approval of any settlement?
   e. Who will attend the mediation for Post Office?
4. What are the next steps?

those numbers should align to the numbers below

Conclusion

What question above are you answering as this does not refer to contingency planning.

As matters currently stand:

1. The Horizon judgment will not be handed down until the end of October at the earliest. It is possible that the KEL Disclosure ~~development~~ incident delays this.

(is the question - What is the impact of the FJ disclosure incident to the handing down of the HJ?

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11 - 17
18 - 24
25 - 31
1 - 7
8 - 14
15 - 22.

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Jules's paper

2. ~~[[NEW CONCLUSORY REMARK ON CONTINGENCY PLANNING A detailed Contingency Plan is now in place with a Rapid Response Team stood up to manage the execution of this plan. The 'detection' and 'response' processes which the plan is reliant upon are now being finalised, baselined and stress tested to understand what level of uplift against baseline levels these processes and the business can withstand.]]~~

what a above does this refer to? (8)

3. Mediation to explore settlement with the Claimants has been scheduled for 27-28 November 2019. This could be postponed if the Horizon judgment is delayed, which is increasingly likely given the ~~Horg~~ FJ disclosure incident. Nevertheless, further work is being done to refine the analysis of the Claimants' claims and quantum, and to put in place arrangements to share information with, and obtain approvals from, our shareholder concerning settlement.
4. We are also preparing for the Court of Appeal hearing on 12 November 2019, and to receive on 25 October 2019 the Claimant's formal claims for the third, "Further Issues" trial scheduled for March 2020.

(Rod - rewrite the questions + conclusions

Input Sought

1. The Board is asked to note the updates provided in this paper. ~~The Board will be asked to approve (if appropriate) final settlement authorities by way of an updated paper closer to the mediation date.~~

Input Received

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

? (2) The Board is asked to delegate authority to The Board Sub-Com, ~~the~~ to ~~approval~~ provide settlement range for the mediation.

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

new page (Report starts on a new page

Contingency Planning

[[MARK/ANGELA - PLEASE UPDATE THE TEXT BELOW, WHICH WAS USED IN THE SEPTEMBER 2019 REPORT]]

Not underestimating the potential operational, reputation and commercial implications a negative outcome of the Horizon Issues Trial could have for the Post Office, we engaged Deloitte (the risk advisory team which has relevant experience in crisis preparedness and response work) to work with key business area owners to prepare an effective immediate and short-term response to stakeholder reaction to the Judgment. The work to date has included:

- defining worst-case, medium-case and best-case scenarios
- identifying the key stakeholders (Postmasters, Government & Regulators, Commercial & Retail Partners and Customers)
- identifying potential stakeholder reaction to the trial outcome and assessing the operational, reputational and commercial impact of those reactions
- preparing the business response to those likely impacts by identifying and impact assessing business as usual processes; introducing new impact detection

move to Julie's paper

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processes (eg branch closure monitoring); designing new processes where BAU processes were not adequate for the worst-case scenarios; and putting mitigation plans in place where possible to minimise the impact.

Ultimately, the response from Day One (the day the judgment is handed down) will be determined by what the Horizon Issues Trial Judgment (the Judgment) actually says and how our stakeholders react to it. The output of our work ahead of the Judgment is the Operational Response Plan (available in the 'reading room') which details the business response to stakeholder reaction to the Judgment with the ultimate aim of continuing to maintain business operations and provide service to our customers as normally as possible. This is underpinned by a Communication Strategy and extensive Comms collateral designed to address worst, medium and best case scenarios[1]. This material has been prepared with business area owners, undergone legal review by WBD and HSF and is currently undergoing a further 'tone' review by Lexington.

A Rapid Response Team (RRT) has been established to manage the stakeholder, and execute the Post Office, response to the Judgment. The RRT will be invoked on Day One (preparatory sessions already completed) and will run daily (until deemed no longer required) to coordinate and manage the organisation-wide response to the Judgment, escalating key decisions to the Group Executive as appropriate, collating and distributing business impact information and providing daily update briefings.

Litigation Update

Horizon Judgment

~~On 7 October 2019 the Managing Judge~~ informed the parties that his judgment on the Horizon Issues Trial was "unlikely to be distributed before the end of the month". A further update from the court will be provided during the week commencing 21 October 2019. (So?) The Horizon Contingency plans have been developed to respond to an adverse judgment, the details of which are set out in the separate GCO-Operations paper.

Horizon Issues Trial - KEL Disclosure

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

The Court and the Claimants were notified of this on 3 October 2019, and urgent steps (on which the Board has received separate updates) have been taken to correct the position. [[~~UPDATE AS MATTERS DEVELOP~~ We will understand better the impact this may have on the litigation once we have completed the reviews now underway of the additional KELs (e.g. as to whether the versions are materially different), received responses to our notification from the Claimants and/or Court, and considered any impact to the Horizon judgment itself.

[1] *E.g. wide-spread, coordinated branch closures across the network; increased non-compliance with branch cash declarations; adverse impact on trading relationships with commercial partners; loss of stakeholder trust in Post Office.*

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1. Focus on Thm and at hand

R. Byrd

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legal advice is being ~~sought~~ provided about our prospects of making a claim against FJ arising from this incident, and in respect of the proceedings more generally. A verbal update can be given at the time of the meeting

This development could however delay receipt of the draft judgment (which could in turn delay mediation scheduled for 27-28 November2019). It could also influence the Judge while drafting his Horizon judgment and ahead of future trials which will consider for limitation/~~time-bar purposes~~ whether Post Office concealed known issues with Horizon. The next obvious point is what action are we doing about FJ.

Common Issues ~~Appeal~~

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

by who? the Court? us?

The hearing will be based on the Grounds of Appeal and Skeleton Argument we filed on 28 June 2019, and largely influenced by questions from the judge (Lord Justice Coulson). As part of her preparations for the hearing, Helen Davies QC has been asked to outline the key points she aims to land during the hearing. We should receive this by 18 October 2019. ~~Do you want to mention that~~ The details of this will be shared ~~by~~ to the Board sub-committee prior to the hearing.

This flags this to Steve Hill + Ken that I need the advice in 3 paragraphs by 6c)

Third / Further Issues Trial

The next step ahead of the "Further Issues" trial scheduled for March 2020 is for the Claimants to file "Particulars of Claim" (PoC) formally setting out the legal basis for their claims for financial compensation.

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

such as?

As part of its ongoing review of all 551 individual cases, Post Office is identifying criteria for selecting "Test Claimants". These Claimants would then be used as cases representative of the wider claimant group in an as yet unscheduled trial on breach (i.e. whether Post Office acted wrongly), causation (i.e. did that breach cause the Claimant's harm), and limitation (i.e. is a Claimant's claim time-barred). The parties will each propose criteria on 25 November 2019, which will then be discussed with the Managing Judge at a Case Management Conference scheduled for 4 December 2019.

Mediation / Settlement Update

broad

→ You need to either set out the current thinking on the approach/methodology or say it will be sent

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

[redacted]

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forwhat

this is too late

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[redacted]

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[redacted]

Managing messages coming out of Mediation

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

[6] *This advice will necessarily be provisional given that the Horizon judgment and the outcome of the appeal application are not yet known.*

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

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

Post Office Mediation Representatives

Beyond ensuring that attendees are properly authorised, there are no rules as to who can attend mediation for a party. As matters stand, it is proposed that the key Post Office representatives at mediation will be CEO Nick Read (who will make introductory commercial remarks), General Counsel Ben Foat, and Alan Watts of HSF.[7] Others from Post Office's operations and legal teams will be available on the day to assist as required, either in person in breakout rooms or remotely. ~~[[UPDATE AFTER LAWYER'S ONLY MEETING WITH FREETHS ON 10.10.19]]~~ Don't we need a QC there to set out our case?

Consistent with the mediation strategy outlined at the September 2019 Board meeting, we do not recommend there be any shareholder representation at the mediation. However, as noted above arrangements will be finalised to keep shareholder representatives informed of progress in the mediation. The Board would be concerned without.

Next Steps

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

Between now and the end of November 2020 we are preparing to:

- resolve the KEL Disclosure issue; including audit of FJ & consideration of whether FJ should be joined to the proceedings.
- receive the Horizon judgment;
- attend mediation on 27-28 November 2019, which includes finalising in advance the protocol for shareholder settlement authorisation if required;
- attend the Court of Appeal on 12 November 2019 for the hearing on permission to appeal the Common Issues Judgment;
- respond to the Claimants' Further Issues trial PoC due on 25 October 2019; and
- identify "Test Claimant" criteria by 25 November 2019.

The operational response to the CIJ and HIJ is set out in a separate paper.

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

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Appendices

1. Group Litigation Timetable

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

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Purpose - what is it that you want from Board

- note
- approval in principal
- approve
- delegate

Board resolution template

Questions

1. update litigation under CIT P. to A + HIJ?
2. FS Disclosure update?
2. Mediation preparation?

Conclusion

1. —
2. —
3 —

Context

Background. COLO.