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POSTMASTER GROUP LITIGATION – GENERAL COUNSEL BRIEFING NOTE – 27 January 2018

General

- We are now in a period of refining the cases which will be used for the November '18 Common Issues trial, the outcome of which we suspect will strongly influence the Claimants', or rather, their funder's appetite to continue with the claim.
- Most immediately, there is a Disclosure Hearing this coming Friday (2 Feb).
 - This is a procedural hearing primarily on document disclosure and the scope and timing of documents to be disclosed by Post Office.
 - Despite initial encouraging discussions with Freeths, they have since reverted to requesting that everything be disclosed immediately.
 - Post Office has been resisting this because:
 - it has offered to provide c.175,000 documents (in addition to key documents already provided through correspondence) which relate to Post Office policies and processes, technical and operational aspects of Horizon, the 12 Lead Claimants, and materials considered by Second Sight. These documents therefore go to the core issues in dispute in the Common Issues trial.
 - the task of identifying, extracting and reviewing the documents required to respond to Freeths' wide ranging requests (which could run into the tens of millions) will increase substantially the already significant costs and time required to complete disclosure.
 - Freeths' requests are likely to produce vast quantities of documents, very few of which would be used at trial.
 - Post Office's focussed approach to disclosure aims to follow a new court protocol for disclosure, which protocol was designed to avoid the problems presented by Freeths' wide ranging requests.
 - If time and the Judge permit, the Disclosure Hearing may also consider how the 4 week trial window in March '19, which was ordered by the Judge at the October CMC, will be used:
 - As every major issue is in some way reliant upon the outcome of the Common Issues trial, both parties are agreed that it would be impossible to prepare properly for any type of meaningful trial in the 4 months between the Common Issues Trial (November '18) and March '19.
 - Freeths have suggested the time be used for Mediation - the principle of which Post Office does not oppose.
 - Post Office has also proposed a detailed timetable for a 'Lead Cases Trial', which both sides agree is necessary to move substantively this litigation towards a conclusion - addressing questions of breach, causation and loss, and avoiding the need for 562 separate trials. Freeths are resisting agreeing to this (or any other) timetable.

Quantum

- Based upon a review of the SOIs, the total figure claimed is £224m (c£400k per claimant). £150m of this is claimed on the basis of loss of earnings post termination. It is the claims which span from termination until retirement age that generate the large quantum claims – although none have not set out the legal basis on which loss of earnings post termination is being claimed.
- Though the amount claimed is significant, the facts (e.g. that the claimed losses were in fact suffered) and legal basis (i.e. that they satisfy the legal tests of liability, causation, remoteness and mitigation) for such claims are yet to be tested.

Merits

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- An opinion on the merits of Post Office's case will be sought once pleadings (Particulars of Claim, Defences and Replies) for the Common Issues trial have closed in April 2018.
- It is proposed that this be reviewed again in September 2018 once Witness Statements have been exchanged and the full evidence to be used in the Common issues is known.

Security for Costs Application

- Typically in civil litigation, the losing party makes a substantial payment towards the costs of the successful party.
- Therium Litigation Funding are funding the Claimants and as such, could be liable for Post Office's costs should Post Office successfully defend this litigation. Therium has sought to cover this risk through an "ATE" (After the Event) insurance policy.
- However because a number of Claimants could be found to have acted dishonestly (indeed, some have convictions for fraud, false accounting and theft), there is a real risk that the insurers could avoid the policy, meaning Post Office would have to look to Therium directly for its legal costs if successful.
- Therium is however an off-shore company of uncertain financial standing, such that it is far from clear that Post Office would be able actually to recover its costs from Therium.
- To address this risk, the court's procedures allow a party to apply for "security for costs", i.e. for a specified sum to be ring-fenced to cover costs.
- WBD has been working with Freeths for the last 18 months to try to address its concerns about Post Office's costs exposure and thus avoid the need for a security for costs application, e.g. by having the ATE insurance re-drafted, and by requesting financial information about Therium.
- The concerns remain unresolved. Post Office will therefore need to apply to the court if it wants security for its costs. A successful application will require the claimants to provide security at a set level and form, with the possibility that the claim is struck out if it is not provided. The application could therefore generate adverse comment, e.g. claims that Post Office is using legal technicalities and/or economic pressure to stifle the claimants' claims.
- Applications for security for costs should be made promptly. Post Office has essentially exhausted its ability to resolve this issue directly with Freeths, and will therefore need to make the application within the next couple of weeks.

CCRC

- Post Office continues to liaise with the Criminal Cases Review commission as it investigates 30 former Post Office-led postmaster prosecutions.
- The CCRC has appointed forensic accountants Grant Thornton to assist its investigations. The CCR has made public the fact that it has instructed forensic accountants, but **has not** named the firm, whose identity should be kept **strictly confidential**.
- A 25 January 2018 article in *Computer Weekly* reported that the "current piece" of forensic accountancy work is nearing completion, which will be scrutinised to see if "it gives rise to any further lines of enquiry", and that the CCRC expects to provide an update to the postmaster applicants by the end of March 2018.
- Based on the timings reported by *Computer Weekly*, we do not anticipate the CCRC reporting on its investigations before June 2018.

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27 January 2018