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Board Meeting - Group Litigation, 12.30 pm, 20 March 2019

Present:	**Other attendees:**
Tim Parker (Chairman) (by telephone)	Jane MacLeod (Group Director Legal, Risk and Governance and Company Secretary)
Ken McCall (Chairman for the meeting)	Mark Davies (Group Director Communications)
Tom Cooper	Veronica Branton (Head of Secretariat)
Tim Franklin	Ruth Cowley (Norton Rose Fulbright)
Shirine Khoury-Haq	Glenn Hall (Norton Rose Fulbright)
Carla Stent	
Alisdair Cameron	

Apologies:

Tim Franklin, Paula Vennells.

1. Conflicts of Interest **Actions**

Potential conflicts of interest were noted in relation to Tim Parker in his role as Chairman of the HM Courts and Tribunal Service.

Potential conflicts of interest were noted in relation to Tom Cooper in his role as UKGI Director, which as an executive part of government, should not be involved in a decision which related to the judiciary.

Article 82 of PO Limited's Articles of Association permitted the Board to authorise a director in relation to any matter the subject of a conflict. The Board determined that Tim Parker and Tom Cooper should be involved in the Board discussions but they would not be party to the decision on whether or not to seek the Judge's recusal, when sought.

Ken McCall reported that had spoken to Tim Franklin the previous evening and that he and Jane MacLeod and had received his views in writing.

It was reported that Paula Vennells could not participate in the call but had been updated on the discussions.

2. Summary of discussion with Lord Grabiner

JM reported that Lord Grabiner had given an overview of his opinion on the Common Issues Judgement and how it impacted on the current and prospective trials on a telephone call earlier that day. Lord Grabiner had noted that the Judge had received several warnings about allowing inadmissible materials but had chosen to do so and as such had behaved improperly and was wrong as to the law. It was an unusual case and which was unusual procedurally.

The test for recusal on grounds of apparent bias was through the eyes of a reasonable observer. We would only need to argue apparent bias rather than actual bias, although grounds existed to argue the latter. There was no practical alternative

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to recusal and the risk of not seeking it was that the Court of Appeal (CoA) would ask why we had not sought for the Judge to recuse himself. Lord Grabiner agreed that there was a risk that the Judge would be emboldened if we lost the recusal application but his position was already clearly indicated by his Judgement and the damage from this had already been inflicted.

It was noted that we had not sought Lord Grabiner's view on what his reaction be if he were counsel for the other side.

Lord Grabiner's views would be provided in writing.

3. Introduction from Norton Rose Fulbright

Norton Rose Fulbright had been engaged to provide an independent legal view on the case and Ruth Cowley would also be giving a view on our contractual position in light of the Judgement.

Glenn Hall was a corporate lawyer with significant experience in mergers and acquisitions. He had worked for the firm for 20 years but had been special adviser to Greg Clark, Secretary of State BEIS, for the last couple of years, before re-joining Norton Rose Fulbright recently.

Ruth Cowley specialised in commercial litigation and had been at the firm for nearly 20 years.

4. Discussions on appeal, recusal and case management

The paper setting out the background to recusal and other issues which had been circulated on 19 March 2019 was used as the reference point for the discussions on recusal and appeal. Each director's view was sought and a number of issues were highlighted:

- if the trials continued to be heard by a judge who had such a strong views on the conduct of Post Office Limited and the reliability of its systems the potential costs surrounding the case would begin to grow. The pool of individuals seeking compensation would increase as PO Limited was found to be in breach of contract in relation to Post Masters and the action we had taken against them where losses had been discovered. Existing and new agents' perception of PO Limited would be damaged
- there was a significant potential liability which was very hard to quantify because of the terms which the Judge had found could be implied into contract and the unfairness shown by the Judge in accepting inadmissible evidence to which PO Limited had not been able to respond
- irrespective of whether the Judgement was in our favour we wanted to make sure that any individuals who were found to have been treated unfairly had restitution
- the consequences of losing on the reliability of the Horizon System were very serious. The Board needed to see the potential range of penalties at different trial stages to provide a roadmap
- there would be an upper limit on the claims that would be payable to the current pool of claimants even if we lost on every point. However, a Judgement from

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- second trial which undermined the reliability of the Horizon System could destabilise the business as it runs today. We would lose our ability to manage our cash supplies if the ruling was that our systems could not be relied upon
- a follow on question to whether the Horizon System was reliable was how we treated discrepancies in the System and if we were treating Post Masters fairly where this happened today. It was noted that the system had changed substantially in last 10 years. It was reported that most discrepancies were due to human error, such as incorrect cash counting or putting a decimal point in the wrong place. There was a team in Chesterfield which helped to identify these errors and liaised with Post Masters and the banks. It was recognised that we could improve our processes and be more transparent but if we were getting banking transactions wrong routinely, we would know this because the banks and their customers would be complaining. This was accepted to be the case but it was **AGREED** that the Board should have the facts and figures to be able to verify that position **Exec**
- we now had the opportunity to think more strategically about this case and the final outcomes sought.

5. Information and discussions requested

1. To provide a phased plan (e.g. over 30/60/90 days) covering the operational, financial and reputational issues we would be addressing. It was reported that this work was underway and that a paper covering these issues should be circulated by the end of the week. The executive would need to make proposals on any operational changes, such as the liability clause in NCT contract
2. We needed a clear view on whether the Horizon System worked properly today. We had be able to defend against others' doubts of the reliability of the System. This meant that we needed to be able to validate the system error rate and what was acceptable in other industries with transaction volumes of similar scale e.g. banks. It was reported that we could provide sensible information about today's system but it was much more challenging to go back in time **Exec**
3. The outcome of the Deloitte work on the Horizon System that Tim Parker had commissioned when he became Chairman would be circulated **Exec**
4. TC would like to discuss the figures included in the paper with the executive. **TC/ Exec**
5. We needed to demonstrate a cultural shift in how we managed the case in future. It was vital that we avoided any potential to be criticised further for our behaviour
6. We needed to carry out a critical analysis of ourselves. For example, what did we need to do to be the right partner for Post Masters? **Exec**
7. We needed to make sure that the written legal advice aligned with the verbal advice received. **JM**

6. Decisions

Ken McCall asked whether the Board thought that it had received sufficient information to take a decision on recusal and appeal. Directors confirmed that while

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there was further information they would wish to see, as discussed and requested for subsequent discussion, the information already received was sufficient to allow a decision to be reached on recusal and appeal.

Norton Rose Fulbright's input was also sought, accepting that RC and GH had been given limited time to review the case. RC noted that from a legal perspective, recusal was seeking to stem the flood of taint on future trials. There were no other options to achieve this end and it would be difficult, if not impossible, to seek recusal at a later stage. GH noted that from a broader director perspective there were risks of action and risks of inaction against the background of where we were today. There would be consequences financially, operationally and from a reputational perspective; however, there was a greater upside in making the application for the recusal versus the risks of that application failing. There were risks of incremental damage if we were to lose the recusal application but damage had already occurred because of the initial Judgement. The final outcome with a different judge ought to be better from a reputational, financial and operational perspective. This did not underplay the fact that an application for recusal was unusual and could attract attention. It was also difficult to take a decision seeking the judiciary to rule against one of their own. However, the position was unusual because the Judge was hearing a series of trials.

Mark Davies' view was sought from a communications and stakeholder perspective. He thought that there was a high degree of probability of an adverse outcome on the Horizon trial with the current judge. We needed to take the right steps to protect the business long term, notwithstanding that this was likely to generate some adverse publicity in the short or medium term.

The following points were made in considering whether to make a recusal application and seek leave to appeal:

- it was a balanced decision, notwithstanding the legal advice, because we could not be sure of succeeding with the recusal application or of securing a judge that recognised the merits of our case. However, we could still manage the narrative on what we wanted to do with the business even if we lost the recusal application. The strength of the legal advice and possible upsides of success tipped the balance in favour of recusal and we should pursue leave to appeal
- we had received three legal views each of which supported making an application for recusal and seeking leave to appeal. The Judge's views and the reputational damage caused by these pushed us towards seeking recusal and to appeal
- the Horizon trial could be enormously damaging and pose an existential risk to the business
- the only argument of force against recusal was the near term reputational impact if we lost and the risk of further alienating the Judge; however, the Judge's views were already pronounced and losing the recusal application could either embolden him further or make him more alert to charges of bias
- the case had not garnered significant attention thus far, possibly because it was focussed on technical systems issues
- we needed to take action in the long term best interests of the business. This was not confined to the current group of claimants and their case.

JM

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AC and JM confirmed that they recommended applying for leave to appeal and the Judge's recusal from a legal perspective.

After careful consideration of all the arguments, each Director present and participating in the decision, supported a **RESOLUTION** of the Board that an application should be sought for the Judge to recuse himself from the case, and, should he not elect to do so, to submit this application to the Court of Appeal. It was further agreed that leave to appeal should be sought. Ken McCall reported that Tim Franklin shared the view that an application for recusal should be made as well as seeking leave to appeal.

The Board **RESOLVED** that Lord Grabiner should be briefed to prepare the recusal application.

JM reported that we had sought clarification on the timescales for appeal and it seemed likely that we would have until 16 May 2019 to lodge an appeal. A significant amount of work would be entailed in preparing the appeal and a decision would need to be taken on who should carry out the appeal work for us.

We did not have to notify that we would be seeking leave to appeal at the same time as making the recusal application. Court was not sitting next week and it was not clear therefore when the Judge would take the decision as to whether to recuse himself. We thought it likely that he would decline to recuse himself and that the case would go to the CoA. At this point a decision was likely to be taken quickly because the Horizon trial was underway. We would seek for the Horizon trial to be adjourned at the same time as the lodging the recusal application.

The options for appeal we discussed. David Cavendar could conduct the appeal for us or we could appoint a new QC. There were advantages and disadvantages associated both with retaining counsel or appointing new counsel. The executive's recommendation was to use David Cavendar but to draw on Lord Neuberger's expertise in the background. That was an option acceptable to both counsel. **JM**
TC suggested that we ask Norton Rose Fulbright to consider the options and discuss these further at the Board Meeting on 25 March 2019.

The need to avoid language that could be perceived as strident or arrogant was raised. It was reported that recusal was largely a written process and was couched in legal language. Lord Grabiner would stand up in Court to make to case to recuse. The arguments would be forceful but would be legally grounded.