

Board call 12 March 2019

Ken McCall, Tom Cooper, Al Cameron, Jane MacLeod, Mark Davies, Carla Stent, Shirine Khoury-Haq, Tim Parker

Tim Franklin.

David Cavendar

Al – opening comments

V critical of PO and landing contractual obligations that will be v difficult to manage.

How we are starting to think about this.

Shouldn't be defensive. Strategies being played out in the legal team. Third time will have laid out this position to a third party and have lost. Settling agents and accelerating change will be critical. Criticism of lack of independence of NSEP makes this harder.

Will want to do a post mortem in due course but not the focus of our attention currently. Treating this as critical and to be managed.

David joined.

Deeply surprised and shocked by the judgement and v disappointed. Indicated some time ago that the main risk was the judge but had not anticipated such a vehement reaction. Have strong grounds for appeal. Don't think the judgement will survive the court of appeal. Accepted evidence that was not admissible. Unprecedented.

Contract has to be construed at the date at which it is entered.

Will consider with independent counsel the grounds for the judge to recuse himself. Not just a judge in a single case and his voice isn't independent.

Tim P – main errors? David – termination provisions and construct of “good faith”. Says the good faith doctrine applies to everything. This would not allow commercial contracts to operate.

Tim P – adduced from a relational contract that most of the implied terms applied and it is from this that most of the errors are deemed to have occurred. Seems to be of the view that the witnesses are telling the truth, Horizon system not reliable, unfair to have to show accounts as required (branch trading statement) and that this was not reliable.

David – unclear whether he accepts contractually that the branch trading statement is the real statement. If it can't be relied upon for any purpose...

Implied term M. Duty on PO to do investigations before it enforces a debt on a a PM v difficult operationally.

Tom C – elements of the judgement seem logical. Saying the contract as constructed can only work sensibly if PMs can challenge discrepancies. It's about the reconciliation process and whether PM provides enough info for PMs to be able to understand and challenge discrepancies. Puts PMs in an impossible position. David – capacity of Horizon as a system in branch to provide info in branch is an issue for the Horizon trial not for the common issues trial. At the PO trial PO accepted two implied terms (for the necessary cooperation of the contract). It is a powerful term when taken with the express terms. If you engage an agent you have to be able to protect the money you give to them.

Judge hasn't dealt with the fundamental implied terms in his judgement.

Tom C – if the fundamental principal agent relationship breaks down as he is suggesting because we don't provide the info we need we have to think of ourselves differently and have different procedures in place (eg employing people) to protect our interests

If Horizon were found not to be reliable that our position is difficult.

Jane – have six lead claimants. The case was constructed against this background. Judge has extrapolated from those claimants' experiences without our response to this and has applied their evidence as applying to the system widely. Huge amount of info that is available to branches, not all of which is available to us. Balance to be struck between who is accountable for what has happened in a particular branch. TC – haven't been able to show that PMs receive sufficient info to do basic cash reconciliations. David – judge doesn't seem to be reflecting that PMs do cash reconciliations every day and don't wait to do this until the end of each month.

There are imperfections in the system but that should not lead to there being not agency relationship.

Tim P – central adjustment file (where monies are being contended). Money held in this account and PMs then had to go to the Helpline. Judge criticises this process. Judge implies that our witnesses are seeking to hold up the PO position.

Horizon system is not just the buttons on the machine, there is also a helpline. Judge exercised as the contested sum still being treated as a debt and processed as a debt. PO may have been in breach of contract for treating the contract in that way. The helpline was not one of the common issues. It is an important issue. But had contractual right to register an objection and PO had not contractual right to register that against you. (Distinction between contractual provision and contractual breach).

Tim P – two axis graphs. Things in ascending order of items likely to be successful on appeal and things which have a significant operational impact of the PO and where the two overlap. Won't help us over the next year as the appeal could take a year and the revisions needed to the contract will apply from the date the judgement is released.

Duty to cooperate. No legal duty of good faith. Deal with 12.12. On termination, mirror provisions of the NSCC. 12 months' notice. Variation had to satisfy reasonableness under termination of contracts Act. Would secure the position as far as we could for the future.

Tom C – consequential losses. Bit confusing. Potential claims for loss of earnings? Loss of office – normally limited to the period in which a lawful termination could have operated. Period of notice should cap the loss of office. Judge says a year is the most that could be considered reasonable.

Tim F – can respond around typos etc. Can we push back on inflammatory language esp where this is prejudicial to other trials? Can seek clarifications. May or may not be a good idea. Danger of making it worse. Judgement call. No right to seek to tone down the language. Looking to get an independent silk to look at the judgement with an eye to seeking the judge to recuse himself. Preconceived ideas based on small amount of evidence and without evidence from PO. Appearance of bias. How would an independent observer view this. Worries about the trial that has just started.

If we succeeded that trial would be halted. If not successful in recusal then can seek to appeal.

Ken left the call.

Carla – do you seek recusal and appeal at the same time? Would brief silk v quickly and can a view on seeking recusal. Pretty quick if we decide to pursue. In parallel appeal against the law and how the judge conducted himself.

Shareholder will also want a view on this.

Al – most urgent focus is media and stakeholder plan, esp agents and operational plan. Need to deploy resource.

Suggest another Board call next Tues/ Weds. When in a position for the Board to review more decisions.

Tim F – try and have the meetings in the evenings. Evenings won't work for Shirine. Will contact people.

Will circ media lines by close of play Thurs. Working through our operational response. Inform prev Chair and Non-Execs as soon as we are able to brief them.

Carla – support to our witnesses? Have spoken to Nick and Angela separately. Angela also one of our key witnesses on the Horizon trial. WBD fully engaged. Trying to make sure there is appropriate support.

Tom C – how are we going to position ourselves publically? Ie suggesting that the judge is wrong? Uncomfortable. Legal response. Media/ comms line with flag that we will appeal some aspects of the judgement but more surprise and concern and will be looking at our processes. Will accept criticism of our manner and will address this in our relationship with our agents. Appeal on legal territory. Be willing to listen.

Need to clear on cost implications. Focus in on those and how we can limit some of the damage.

Shirine. judge led mediation and independent review. Would be good to understand why we think it would be different this time. Jane – will do a background summary for the Board. Need to be confident that any action will create a different outcome.

Tim P – a lot of this dates back a long time. Need to be as supportive of our staff as possible but need to understand the criticisms. Need to be clear in our own minds about which of these criticisms are fair whether previously or now.