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Department for
Business, Energy
& Industrial Strategy

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Director General: Justin Manson

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Kelly Tolhurst		X
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APPROVAL FOR SETTLEMENT OFFER IN POST OFFICE LTD. (POL) LITIGATION

Summary

1. POL is preparing for a mediation meeting with the Claimants in the Group Litigation Order ('Project Sparrow'), which is due to begin on 27 November. In order to enter mediation POL must have agreed how much it is prepared to offer to settle the case, and this figure must have prior approval from BEIS Ministers and CST. This note seeks your approval to a proposal from the POL Board to authorise settlement at a figure up to £65m. CST approval is being sought in parallel by HMT. Kelly Tolhurst has a phone call with officials on Monday 18 November to discuss.
2. The settlement working group of BEIS/UKGI/HMT officials met on 14 November and agreed to support the POL board's proposal for settlement at a figure up to £65m.
3. In line with the decision of the POL Board, any offer above £48m could be made only if it ensures a settlement takes place and would require POL [CEO and Chair] approval, as well as the approval of officials from BEIS and HMT.

Timing

4. Urgent - A decision is required by 22 November. It is also worth noting that the next judgment in the Horizon case is expected imminently.
5. The Permanent Secretary's office has confirmed that this issue is classed as 'essential business' which should be allowed to continue during the pre-election period. The scheduled mediation cannot reasonably be delayed until after the General Election without posing significant risks to POL's business. There is also a risk that, should POL ask to re-schedule the mediation to a later date, this would be looked upon unfavourably, including by the Court, and could ultimately lead to increased costs to the taxpayer.

Recommendation

6. We recommend that you:
 - **Approve** the POL Board's proposal for a settlement of up to £65m.
 - **Note** POL's mediation strategy, in particular noting the difficulties in settling claims of claimants who have been convicted of criminal offences

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7. Our submission of 8 November (attached **Annex A**) provided the background to this litigation and POL's mediation strategy. Mediation is scheduled to take place on 27-28 November. It is important to note that this is not the final opportunity for mediation, but the start of a potentially long process. It is common for settlement not to be reached at the first attempt. However, in order to enter mediation POL must have agreed how much it is prepared to offer to settle the case, and this figure must have prior approval from BEIS Ministers and CST.
8. We advised that a decision seeking approval for a settlement range would be required by 22 November. Since then POL's application for permission to appeal the first Common Issues judgment was heard by a Court of Appeal Judge on 12 November. The Judge is aware his decision is likely to have a bearing on the parties' mediation strategies and has indicated that his decision will be sent to the parties by the end of next week. The outcome of the permission to appeal does not change this advice. If permission is granted, POL will be in a slightly stronger position to achieve a positive outcome at the mediation, however even if the appeal was subsequently successful POL would still be liable for damages. The recovery expected by the Claimants would fall but would still be expected to be higher than the proposed settlement amount, particularly after taking account of the cost of additional trials. Conversely, if POL is refused permission to appeal, this lowers the likelihood of success at the mediation.
9. POL's articles require them to have shareholder approval for any spend over £50m but as advised in our 8 November submission given the novel and contentious nature and Managing Public Money principles, any settlement amount will require approval by CST as well as by BEIS Ministers.
10. The POL Board sub-committee with oversight of the litigation and delegated authority to propose to Ministers a settlement range met on 13 November and considered the attached advice (**Annex B and C**) from their lawyers Herbert Smith Freehills (HSF) on possible settlement ranges and criminal cases. That sub-committee agreed that HSF should be given authority to settle at up to £48m but that if a full and final settlement with all the claimants could be achieved for up to £65m then HSF could seek swift approval for a figure up to that limit from POL's CEO and Chair. Note that this figure would be inclusive of interest and costs.
11. The BEIS/HMT/UKGI settlement working group also meet on 14 November to consider that advice and the settlement range agreed by the POL Board sub-committee. HSF also attended the initial part of that meeting to answer queries about their advice. The working group agreed that POL should have authority to settle up to £48m but that if a full and final settlement with all the claimants could be achieved for up to £65m then POL could seek further BEIS/HMT agreement to that. It is proposed that Carl Creswell (BEIS) will be the official authorised to consider, and if satisfied agree, a request from POL to settle at a figure beyond £48m and up to £65m. A designated HMT official will be authorised to agree on behalf of the CST.
12. POL have provided written confirmation to BEIS that on the basis of current forecasts it will be able to fund the proposed settlement range up to £65m (**Annex D**). POL would fund the settlement through expected annual profits. The opportunity cost of which is the ability for POL to fund investments elsewhere in the business. However, it will not affect their ability to fund the current investment programme that was agreed as part of the existing Funding Agreement. In addition, any decision on future subsidies will be



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considered entirely separately as part of the Spending Review, and we will make this clear to POL if you approve the settlement proposal.

13. HSF have confirmed that their likely strategy at the mediation will be to make a first offer significantly below £48m and they will only look to increase it if there is a realistic prospect of achieving a final settlement with all the claimants at the mediation.

Settlement advice

14. In broad summary the advice from HSF (**Annex B**) confirms their view that POL is likely to be unsuccessful in its defence of most of the 555 claims brought as part of this litigation and that a settlement level of between £40 and £65 million would be a good result for POL.

15. The key considerations around liability are:

- a. Whether Post Office was entitled to hold the Claimants accountable for shortfalls;
- b. Whether Post Office was entitled to suspend Postmasters without pay;
- c. Whether Post Office was entitled to terminate the Claimants' contracts with or without notice;
- d. Whether Post Office was in breach of its "good faith" duties and, if so, whether that has a bearing on (a), (b) and (c) or otherwise caused the Claimants any loss.

16. Against the background of the judgment in the Common Issues trial which was heavily critical of POL, as well as the expectation of another adverse and critical judgment in the Horizon trial due imminently, HSF advise that while they can identify some weak claims, if the litigation runs its full course POL will be held liable and will have to pay damages to a large number of claimants.

17. On quantum HSF advise that in general terms the claims comprise:

- a) Claims in contract for the recovery of shortfalls, loss of earnings and capital losses.
- b) Claims in tort or for breach of statutory duty (e.g. for harassment, stress-related personal injury, stigma damages and malicious prosecution); and
- c) Claims in restitution (e.g. for the recovery of shortfalls repaid by Claimants without a contractual relationship with Post Office).

18. HSF have done both a "ground-up" recoverability analysis (considering the heads of loss claimed and likely recoverability) and a "cost of fighting and losing analysis" (looking to put numbers around worst-case scenarios).

19. So far, the claimants have quantified their claims to total £205.6m. This figure is likely to be understated because the claimants have not quantified all their losses and have expressly reserved their right to amend the values claimed. On a "ground-up" recoverability analysis the most significant driver of value is the period for which the claimants may be able to recover lost earnings resulting from the termination of their contracts. On the Claimants calculations this accounts for circa £148m of their claim. HSF consider that for the purposes of their settlement advice 1 to 2 years is the most appropriate time period. Applying that to the 494 non-convicted claimants indicates a figure of between £30 - £38m, including recoverable costs to date. Interest would also be recoverable which, depending on the rate awarded by the court, could bring the total value to £37m - £48m.

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20. For the 61 convicted claimants, and assuming all succeed in having their convictions overturned, HSF estimate their total claim value could range from £10.4m to £51m. This range could increase significantly if generous awards were made in favour of the 7 claimants who received custodial sentences – bringing the value recoverable across the convicted claimants to £40.7m - £133.7m.
21. On a “cost of fighting and losing” analysis HSF consider there is a clear risk that POL would be worse off financially fighting the litigation all the way and losing than they would by settling at the levels they propose. If the claimants succeeded on all their quantified claims two years down the line POL’s liability would be in the order of between £253.8m and £309.4m. If POL succeeded in confining post-termination losses to 2 years its liability might be in the order of between £104.7m and £124.5m.
22. HSF have also advised around the difficulties with settling with the convicted claimants. They have produced a separate note (**Annex C**) specifically covering this cohort. Broadly their advice is to offer a global figure and leave it to the claimants to decide how to divide it between them. Assuming the mediation is unsuccessful HSF advise that individual offers are made to each non-convicted claimant. If the claimant rejects the offer and is subsequently awarded the same or less than this figure at trial, they are likely to be required to pay both their costs and those incurred by POL after the offer was made.
23. HSF advise there are significant risks in offering settlement sums to convicted claimants as that will undermine the convictions and potentially open up POL to further claims. They are currently proposing not to make settlement offers to convicted claimants who, apart from a conviction, are factually in exactly the same position as non-convicted claimants i.e. they got into difficulty because of problems with Horizon and/or other breaches of duty owed by POL and when faced with a prosecution by POL felt they had to plead guilty to a charge of false accounting to avoid a more serious charge of theft. HSF has advised that this approach is unlikely to be acceptable for the convicted Claimants who are thought to be driving the GLO and therefore reduces the chances that the settlement strategy will succeed. UKGI has challenged HSF to re-consider whether settling with the convicted Claimants is a viable option and to advise POL as to what the consequences would be.

Next Steps

24. Mediation is scheduled for 27-28 November. At this stage it is considered unlikely that the settlement amount proposed will be acceptable to the claimants. However, this first mediation is a required to kick-off the process and POL require an agreed and approved settlement starting position and a ceiling beyond which it will not be willing to go in the initial mediation.
25. Although no precise figure has been put forward, the indications are that the Claimants will be starting at a level very substantially higher than the level that POL’s advisers believe could be achieved if the litigation runs its full course. POL’s primary objective in the mediation is to obtain a better understanding of the Claimants’ negotiating position, better understand the full extent of the claims and to make arguments to the Claimants to support its offer in order to reduce the Claimants’ expectations to a more realistic level. This will inform the approach to likely subsequent mediation that is likely to take place prior to the next trial in March 2020.

Comms Handling

26. As noted in our 8 November submission, this litigation has attracted significant media attention in the past. Given that we are now in Purdah, the BEIS Press Office will be



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restricted in its ability to comment if approached by media. As far as possible, we will point any enquiries to existing PQ responses setting out the government's position and direct media to published Purdah guidance for an explanation as to why government can approve spend of this nature during the election. Outside of Purdah, we will prepare full reactive media handling working closely with POL, though are likely to be somewhat constrained by ongoing legal proceedings and mediation.

Contributors

27. BEIS POL policy and finance colleagues have been consulted on this advice and are content with its contents. BEIS and UKGI Legal have also been consulted on the content of this submission. Note, BEIS Legal have not advised on or given a view on the litigation strategy proposed by HSF.