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Draft: 22 April 2014

Post Office Limited

Initial Complaint Review and Mediation Scheme: note on settlement

Following our provision of previous papers to Post Office Limited (the “**Post Office**”) in connection with the Post Office’s and SPMRs’ use of the Horizon system and the Initial Complaint Review and Mediation Scheme (the “**Scheme**”), we outline in this note what appear to us to be guiding issues and principles that may be relevant to achieving settlements with applicants to the Scheme.

What is a settlement payment?

Ordinarily, “settlement payments” are described as such and made in the context of threatened or ongoing legal proceedings. They are made by one party to another (usually by the (or the expected) defendant to the claimant) as an inducement to the other to agree to compromise the claim. Payment is usually made in exchange for the giving up by the other party of the right, for a period or in perpetuity, to continue or re-commence the claim in the future and/or to bring other claims on the basis of the facts in issue. In more complex settlements, the relinquishment of other rights, and the incurring of obligations to take certain steps in addition to the payment of money, may also be involved.

Settlement payments are thus only meaningfully made once opposing positions are known with at least some degree of certainty i.e. once the “battle lines have been drawn” between the parties. They are usually made by reference to the known (or suspected) facts in issue in the claim and the merits of the respective parties’ positions. In that sense, they differ from ex gratia payments strictly so called which, by contrast, are usually paid to a class of recipients according to some generally applicable policy (if there is one), without much or any consideration of or reference to the circumstances of each particular case or its merits.

The key drivers of any settlement are 1) the merits of the case, 2) what is at stake in the case (financially and otherwise) and 3) the quantum of the settlement involved, both as to its sufficiency to extract the relinquishment of the claimant’s rights and the means and willingness of the defendant to pay it, balanced against the potential cost to the paying party of continuing the claim and the risk of that party ultimately being unsuccessful. There may well be others but these will invariably be the minimum relevant considerations.

The key point is that settlements need only be deployed if they are determined by the Post Office, given the issues involved in the particular case, to be necessary. If they are paid as part of some generally applicable policy and according to a pre-ordained calculation or payment structure without reference to the merits of cases, not only will they increasingly resemble ex gratia payments, they may also more likely be ineffective to achieve the Post Office’s desired outcomes.

On what basis might settlement payments be made in connection with the Scheme?

As we say, settlement payments are ordinarily paid by reference to the merits of the case in question. We appreciate that in the present context it may not be feasible simply to provide no further redress to any applicants and thereby seek to invite the drawing of “battle lines” by reference to which the merits of a settlement in each case can more rationally be assessed.

To the extent a more pre-emptive, general approach must be taken, the Post Office could assess the merits of each case on the basis of its preliminary investigations. Having done so, it could then categorise cases by reference to the risks (assessed with the assistance of legal advisers as necessary) of 1) each complaint continuing further, including potentially to threatened or actual litigation, and 2) the potential financial (and other) impacts on the Post Office, if no settlement or

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alternative dispute resolution process were offered at this stage. Decisions as to whether settlement payments should be offered and if so how much could then be taken according to how cases are categorised.

A third, broader approach could be taken by categorising cases by reference to more general substantive and/or procedural attributes which may be, but are not necessarily, linked to legal merit, such as cases in which a) the Post Office summarily dismissed an applicant or b) the Post Office considers that it knowingly withheld information from a SPMR which may have contributed to the issues of which he has complained to the Scheme i.e. where there may have been an "inequality of arms". There could be overlap with this approach and the second approach above. However, in our view, it suffices to say, the more settlements can be tailored to the facts and merits of particular cases, the more likely they are to be effective.

How much might such settlement payments be?

As the calculation of any settlement payment necessarily varies from case to case and depends very much on the scope of the "drivers" above (amongst other things), it is impossible to posit with any precision what quantum they could be in the context of the Scheme in any particular case. However, the following principles may provide some guidance:

- Because a settlement payment must satisfy the recipient of the payment sufficient to cause him to give up his rights and cease his complaint, it is often calculated in proportion to or by some rational relation to the amount claimed. Offering a very small amount to seek to settle a claim, such as might be the case if token, ex gratia payments (e.g. of a few hundred Sterling) are paid, is unlikely to be sufficient (unless, of course, the token amount is in fact more than a token because it is of the order of magnitude of the amount claimed).
- On the other hand, by its nature, a settlement payment will almost always be less than and if the claimant's merits are weak, substantially less than, the amount claimed in order to provide incentive to the other party to agree to pay it, rather than choose to bear the risk of continuing to defend the claim and end up better, or at worst no worse, off (subject to the likely irrecoverable costs incurred in doing so).
- Given our view previously advised that the legal merits of cases in the Scheme are likely to be, at best, limited, on one view, the quantum of any settlement payments may not need to be substantial to satisfy applicants and may be small proportions of the amounts claimed. That will in some part depend on the quality of legal and other advice to which the SPMR has access and the strength of the SPMR's conviction. It may be so even in cases where a very substantial amount has been claimed, because the quantum of a claim bears no relation to its legal merits (e.g. someone who claims £5 million may have much lower prospects of successfully claiming any of it than someone who claims £50,000, so a realistic settlement figure may be similar in both cases or even lower in the larger claim).
- However, we appreciate that the quantum of any settlement payments will also be constrained by the Post Office's budgetary imperatives, the strength of its desire to bring an end to the Scheme and the complaints the subject of it sooner rather than later and the strength of conviction of applicants to "stay the course" and maintain their complaints, perhaps by threatening or pursuing litigation if they remain unsatisfied. These are all matters for the Post Office's consideration and further reasons why we think a "one size fits all" approach to agreeing settlements would not be appropriate.

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Linklaters LLP