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Post Office Group Litigation

Report for Post Office Limited Board as at 13 December 2018

1. Common Issues Trial – Closing Arguments

- 1.1 The Common Issues Trial was held before Mr Justice Peter Fraser in the High Court of Justice, Queen's Bench Division between 7 November 2018 and 6 December 2018. The Judge has now retired to draft his judgment, which he anticipates completing by mid-late January 2019.
- 1.2 During the trial the Court heard evidence from 20 witnesses (six for the Lead Claimants and 14 for Post Office). The parties then closed their cases with detailed and lengthy written closing submissions, supplemented by four days of oral arguments (two days for each party).
- 1.3 The closing arguments traversed the 23 Common Issues which the Court will determine through this trial, focussing on:
 - 1.3.1. The express terms of the postmaster contracts which deal with liability for branch losses:
 - the Claimants argued that the terms require Post Office to prove positively what caused the loss.
 - Post Office's position was that the express terms cannot make a postmaster liable for a loss caused by a bug in Horizon (as s/he will not have caused it), but otherwise it is for the postmaster to show s/he should not be liable given their control over branch activities.
 - 1.3.2. Whether the postmaster contracts are "relational contracts" such that they should have implied into them duties of good faith and fair dealing:
 - The Claimants argued that the postmaster contracts are heavily biased towards Post Office, despite the postmaster relationship being a "relational" one of mutual trust, confidence and inter-dependence.
 - They therefore argued that the relationship should be rebalanced just as imbalances of power have been addressed by the law in other similar relationships (eg employment contracts).
 - Post Office's position was that even if the postmaster contracts are "relational" (which was not accepted), that does not mean that obligations of good faith and fair dealing of the kind sought by the Claimants should automatically be implied into the contracts. Instead, the Claimants should still have to satisfy the law's established tests for implying terms, i.e.

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that any additional terms are necessary to make the postmaster contracts commercially coherent.

1.3.3. Whether the postmaster contracts should have further terms implied into them:

- The Claimants did not discuss the 21 individual terms they seek to imply into the postmaster contract, or the legal basis for their implication.
- They instead argued that they were generally to be expected in contracts that are as one-sided as they contend the postmaster contracts to be.
- Post Office's position was that the parties had agreed to imply into the postmaster contracts terms (i) to provide necessary cooperation to each other and (ii) not to prevent the other party's performance of their obligations.
- Given these "Agreed Implied Terms" had been accepted, there were no lacunae in the postmaster contracts which needed to be filled by the Claimants' terms, such that the proposed additional terms failed the legal test for implication into the contracts.

1.4 Despite acknowledging that the starting point for most of the Common Issues is the express terms of the postmaster contracts, the Claimants spent very little time on them, the further terms they want implied into the postmaster contracts, or the law on contract interpretation and implication of terms.

1.5 The Claimants instead seem to be relying on an overarching narrative of the postmaster relationship being unfair and biased towards Post Office such that it should be rebalanced, leaving it to the Judge to "fill the gaps" on how this could be done.

1.6 Post Office's counsel therefore continues to believe that Post Office has the better of the arguments, with the main risk to Post Office being the extent to which the Judge gives weight to individual Claimants' experiences over orthodox legal principles.

2. Common Issues Trial – Judgment

2.1 The judgment will be provided to the parties in draft and subject to embargo, a few days before it is formally "handed down" and made public. This enables the parties to:

- consider the consequential orders that may need to be made, e.g. for the "loser" to pay the "winner's" substantial trial costs; and
- correct any mistakes in the judgment, e.g. typo's, but not matters where a party disagrees with what the Judge has said (those can be addressed through the appeal process – see below).

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- 2.2 The judgment will be embargoed during this period and must be kept strictly confidential. This means that the draft judgment cannot be circulated or discussed outside of a small and restricted group within Post Office, and no external action may be taken in response to the judgment. Failing to respect the embargo may be a contempt of court, and the Judge indicated at the conclusion of the trial that the embargo would be "rigorously enforced".

3. Common Issues Trial – Appeal (Procedure)

- 3.1 Either party can ask the Court for permission to appeal if there is a real prospect that the judgment is wrong in law, in fact, in the exercise of the court's discretion, or is unjust due to a serious procedural irregularity. Both parties can seek to appeal a judgment simultaneously.
- 3.2 Permission is initially sought from the trial judge when the judgment is handed down. If this is given (e.g. where the trial judge recognises that the law in issue is developing and requires senior court guidance), the appealing party/"appellant" must make their formal application within 21 days of the judgment being handed down, or such longer period as the judge may specify.
- 3.3 If the trial judge refuses permission, the party/parties can apply directly to Court of Appeal. Again, this must be done within 21 days of judgment being handed down, or such longer period as a judge may specify.
- 3.4 The Court of Appeal typically decides applications for permission to appeal on the papers. There is no fixed time period in which this decision must be made. The Court of Appeal can however also ask for an oral hearing, which will be listed within 14 days of the Court of Appeal notifying the parties that an oral hearing is required. This hearing only considers whether permission for a full appeal should be granted. It will not therefore consider the full substance of the appeal.
- 3.5 If the Court of Appeal refuses permission, the appellant can within 7 days of permission being refused apply for the decision to be reconsidered at an oral hearing. If that is refused, consideration may need to be given to appealing the Court of Appeal's decisions directly to the Supreme Court.
- 3.6 If permission to appeal is granted, whether by the trial judge or Court of Appeal, the other party/"respondent" may file a respondents' notice within 14 days of receiving the notification. The appeal will then proceed on a set timetable to be heard on a date largely determined by the Court of Appeal's case load, but typically within 12 to 18 months of the judgment being handed down.

4. Common Issues Trial – Appeal (Governance)

- 4.1 We are currently developing a matrix (following the model developed earlier in the year for contingency planning) to identify those areas which would have a material impact, such that we can prioritise those aspects of the judgement which, depending on the decision, we are more likely to appeal.

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- 4.2 In light of the procedure described above, Post Office may need to make an urgent decision as to whether to seek permission to appeal, between receipt of the embargoed draft judgment and the formal date of handing down, which may be a gap of only 2 or 3 days.
- 4.3 The key determinant will be the judgment itself. Any appeal will be made against the findings the Judge makes, and his rationale for doing so, as set out in his judgment. It is not a rehearing of the Claimants' case on the Common Issues.
- 4.4 Given the number of Common Issues (23), their breadth (e.g. one of the Common Issues seeks the implication of 21 separate implied terms), and the discretion the Judge has to make his findings (which should not be exercised outside of recognised legal principles), there are almost limitless permutations on what the judgment may contain.
- 4.5 For example, the Judge may find that the postmaster contract is a "relational" one. This may not be objectionable if it is just a label, but could be problematic for Post Office if used as a back door through which further detrimental terms are implied into the contract (whether as sought by the Claimants or as modified by the judge), or if it could be used by some future claimant to try to rewrite the contract with yet further different terms.
- 4.6 Further complicating the position is that we will shortly be back before the judge whose judgment we are appealing, asking him to agree with our case on the Horizon Issues at trial in March 2019, while at the same time (potentially) criticising him implicitly in the Court of Appeal for the decisions he made in the Common Issues trial.
- 4.7 Putting to one side the question of whether Post Office has to pay the Claimants' legal costs on an issue it "loses", there may well be scenarios where Post Office could decide to "live with" an adverse finding on one or more issues, especially if reflects what we are or should be doing anyway.
- 4.8 To this end we propose that the Chairman, CEO, and CFOO ("Post Office Executives") be authorised to make the decision as to whether Post Office should appeal the judgment when it is handed down, and if so decided, instruct Post Office's external legal team to seek permission to appeal. We are also in discussion with UKGI as to whether the Civil Procedure Rules allow us to inform them of the decision during the embargo.
- 4.9 The legal team (both internal and external) will be on standby to review and consider the judgment immediately upon receipt from the court, with a view to being able to provide an early initial view, as well as a more considered view to the Post Office Executives. If necessary, the external legal team including David Cavender QC will be available to discuss the judgment and provide advice

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5. Horizon Issues Trial – March 2019

- 5.1 Preparation for the March 2019 Horizon Issues trial continued throughout the Common Issues trial, the most significant development being the filing on 7 December 2018 of the report into Horizon by Post Office's expert Dr Robert Worden from Charteris Consulting.
- 5.2 Dr Worden's report is lengthy and technically detailed, but essentially finds that Horizon is a robust system which was unlikely to have been the cause of the significant branch losses for which most of the Claimants complain.
- 5.3 The Post Office IT team and Fujitsu contributed to the development of the report, and reviewed key sections before it was filed in Court. Both final reports have now been made to available to Fujitsu and Post Office with a view to ensuring that communications lines and potential press statements are aligned.
- 5.4 The Horizon Issues Trial remains on course to start on 11 March 2019; the key next step is meetings between both parties' experts with a view to preparing a joint statement to the Court on their opinions. The Horizon Issues trial should proceed regardless of any appeal on the Common Issues.

6. The "Third Trial"

- 6.1 The Judge has confirmed that the "Third/Breach Trial" has been fixed in the Court's diary for October 2019. This Third Trial will consider the full cases of some or all of the six Lead Claimants used in the Common Issues trial. It will therefore determine whether Post Office breached any legal obligations to the Lead Claimants, and if so with what financial consequence.
- 6.2 The Judge has ordered a Case Management Conference for 31 January 2019 to set out the timetable to prepare the cases for the Third Trial, suggesting that this would also be the backstop date for delivering his judgment.

7. Mediation & Settlement

- 7.1 In February 2018 the Court ordered the parties to "use their reasonable endeavours to attend a mediation as soon as practicable after receipt and consideration of the Judgment on the Common Issues to attempt to resolve or at least narrow the dispute by way of mediation."
- 7.2 Post Office's solicitors wrote to the Claimants' solicitors in early December 2018, opening up the dialogue between the parties on mediation by seeking to agree candidates to act as mediator and timings for when mediation could be held. The Claimants have not yet replied, and there have been no other developments in connection with mediation or settlement since the last Board meeting on 27 November 2018.

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