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POST OFFICE LIMITED
THE POST OFFICE GROUP LITIGATION
CRIMINAL CASES

1. EXECUTIVE SUMMARY

The 61 GLO claimants with criminal convictions for fraud, theft and/or false accounting ("**Convicted Claimants**") present significant challenges in the litigation, in particular for the settlement efforts.

Whether the Convicted Claimants' claims have any value depends on whether the Claimants in question are successful in their criminal appeals. If they are unsuccessful, the claims will likely be worth nothing. If, however, all the criminal convictions are overturned, the Convicted Claimants' claims will be substantial – our estimate the total realistic exposure to be between £10.4m and £44.6m. These numbers could be understated as the Court is bound to have sympathy with a claimant who is found to have been wrongfully convicted, particularly in cases involving custodial sentences.

There is no clear solution to the problem of how to approach settlement with the Convicted Claimants; all the options carry risk. This paper aims to articulate the options and advantages and disadvantages of each. The right approach is not simply a legal matter but our recommendation would be to approach settlement at the mediation by making global offers to the Claimant Group which make no allowance for Convicted Claimants' claims. There would then be nothing to stop the Claimants from apportioning the global sum between the members of the wider Claimant Group as they consider fit.

The Board Subcommittee is asked to note the contents of this paper and approve the strategy for the Convicted Claimants ahead of the forthcoming mediation.

2. BACKGROUND/CONTEXT

2.1 Settlement with the Convicted Claimants raises particular challenges. The Convicted Claimants, who are Post Office's most vocal critics, are likely to form a core component of the Claimant committee at the mediation. If Post Office were to take an inflexible position that their claims cannot be considered as part of the mediation process, there is a high risk that the mediation will not get off the ground. Post Office is also likely to be subject to trenchant external criticism, as happened at the time of the original mediation scheme in 2013.

2.2 However, settling with the Convicted Claimants is problematic:

2.2.1 It is not a principled way of proceeding. If a Claimant has been properly convicted, it is in the interests of justice that the conviction stands. From our review, it appears that a number of the Convicted Claimants admitted that they (or family members) stole (or "borrowed") money from Post Office.

2.2.2 Any settlement could be portrayed as admission of failures on the part of Post Office in the exercise of its prosecutorial powers, which is a serious matter, with potentially very significant consequences.

2.2.3 Brian Altman QC's advice is that offering the Convicted Claimants anything at all would enhance the prospects of the claimants succeeding in their appeals (confidentiality over the settlements could not be maintained).

2.2.4 It also risks unravelling the numerous other prosecutions where Post Office acted as prosecutor.

2.3 The Board has previously received advice from HSF dated 13 September 2019 on the proposed strategy for the upcoming mediation on 27 and 28 November 2019. Given the particular sensitivities around the Convicted Claimants and Brian Altman QC's recent advice, we have been asked to provide the Board further advice specifically covering:



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- 2.3.1 A global quantum view that incorporates the Convicted Claimants; and
- 2.3.2 Further advice on strategy, including an assessment of the advantages and disadvantages of commissioning an internal "non-legal" review of the convictions to identify cases which Post Office may not have prosecuted ~~only~~ and offering such claimants appropriate compensation.

3. **GLOBAL QUANTUM VIEW**

- 3.1 Subject to the outcome of the Horizon Issues judgment, Brian Altman QC's view is that the Convicted Claimants are unlikely to succeed in their criminal appeals because they face two substantial hurdles: (a) those who pleaded guilty will need to establish a basis for withdrawing their guilty pleas (for example by alleging incompetent legal representation); and (b) they will then need to persuade the appeal court that they were wrongfully convicted.
- 3.2 Brian Altman QC acknowledges, however, that his assessment might change in light of findings made in the Horizon Issues judgment. The Criminal Case Review Commission (the "CCRC"), which has been asked to review 34 of the 61 criminal cases, has also suggested that the Horizon Issues judgment is likely to be material to how it proceeds.
- 3.3 In light of that background, there are a wide variety of potential quantum outcomes to the Convicted Claimants' claims:
 - 3.3.1 If, ultimately, the convictions stand, the Convicted Claimants' claims are likely to be worth little or nothing. That is because the claims made will, for the most part, involve a collateral attack on the judgments of the criminal courts and such claims are liable to fail as an abuse of process.
 - 3.3.2 If, however, particular convictions are overturned, the affected claimants will likely have significant claims. Such claimants would likely have enhanced prospects of recovering stigma damages (assessed as a multiple of earnings for the duration of the period that the Claimant's earning capacity was diminished as a result of having a criminal conviction) and be entitled to enhanced damages for distress-related personal injuries and harassment. Claims for malicious prosecution may also lie if the Claimants are able to establish malice.
 - 3.3.3 The cumulative value of such claims will depend on the number of claimants who successfully overturn their convictions. The fact-patterns across the criminal cases are different so it may not be the case that all the Convicted Claimants will stand or fall together.

3.3.4

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¹ This figure is based on information as verified by Post Office and excludes any damages for post-termination losses (save for notice pay losses), personal injury, harassment, malicious prosecution and stigma damages.

² This figure excludes any damages for personal injury, harassment, malicious prosecution and/or stigma damages but includes post-termination losses as stated by the Convicted Claimants in their Statements of Information schedules.

³ This figure includes recoverable costs to date (£15m less £5m costs order paid).

⁴ The interest calculations are merely indicative. They are calculated based on the average number of days from the mid-point between the Claimant's First Date of Service and Last Date of Service (where this information is available) to 30 November 2019.



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	1% + LIBOR	3%	5%	8%
Legal Privilege				

3.3.5 These figures could be understated as a claimant who can establish that their life has been ruined as a result of a wrongful criminal conviction is bound to attract the sympathy of the Court.

4. POST OFFICE'S LEGAL OBLIGATIONS

- 4.1 From a technical legal perspective the correct course for the Convicted Claimants is to pursue their grievances through the CCRC and/or the criminal appeals courts, not the GLO, until such time as their criminal convictions have been overturned.
- 4.2 The only proactive duty Post Office has is to ensure that the appropriate disclosures are made to each convicted individual. In that regard, it may well be that, as a result of the Horizon Issues judgment, findings are made that require Post Office to make fresh disclosures which convicted parties might then be able to rely upon to found a criminal appeal. Brian Altman QC has advised that, if fresh disclosures are required, an individual case-by-case review will need to be conducted to determine the appropriate approach in each case. Steps are being taken now to prepare for such a review.

5. STRATEGIC APPROACH

- 5.1 In light of the complications which the Convicted Claimants raise for mediation, Post Office will need to take a strategic decision as to whether to take a strict legal approach to these cases or offer something more. None of the options offer a wholly satisfactory solution. The advantages and disadvantages are summarised below:

5.1.1 Exclude Convicted Claimants from the mediation/settlement discussions altogether:

- (A) Legally sound approach;
- (B) Risks derailing the mediation process from the outset and making settlement impossible to achieve;
- (C) Will generate adverse publicity.

5.1.2 Offer to fund criminal appeals:

- (A) Brian Altman QC advises that any gesture of this type will jeopardise the safety of the conviction and also, potentially, that of Post Office's other historic convictions.

5.1.3 Make a global settlement offer to the entire Claimant group – Although it would need to be specified that no amount in the lump sum settlement amount has been attributed to the Convicted Claimants, it would be a matter for the Claimant group to apportion that sum between themselves:

- (A) Would give the Convicted Claimants a prospect of recovering something from their co-claimants as a result of the mediation process;
- (B) If settlement can be achieved, those Convicted Claimants who are satisfied with their financial outcomes may be less inclined to pursue matters through the CCRC or criminal appeals process;
- (C) Risks splintering the Claimant group by putting the onus on them to resolve the issue themselves, which may make obtaining a full and final settlement overall harder to achieve;



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- (D) Notwithstanding careful positioning, the Claimants may present the position as Post Office having made offers to the Convicted Claimants.
- 5.1.4 Commission an internal, non-legal review of the Convicted Claimant prosecution files in light of Post Office's current approach to prosecutions and compensating in appropriate cases: This could enable the reviewer to identify particularly problematic cases, instances where Post Office could have acted unreasonably when viewed through the lens of its current approach to prosecutions, where there were significant extraneous circumstances involved, or where Post Office took a decision it would not take now when faced with the same circumstances. This approach:
- (A) Would show Post Office taking a "human" approach to resolving the issues which have arisen, painting Post Office in a positive light;
 - (B) Would demonstrate to the wider SPM population that Post Office cares;
 - (C) It would, however, be very extremely difficult to draw the line between deserving and undeserving cases, or to do so consistently, especially after the passage of time.
 - (D) Those Convicted Claimants who fall on the wrong side of the line would be aggrieved, exposing Post Office to criticism and potential legal challenge around its neutrality and decision-making; confidentiality could not be maintained;
 - (E) Other convicted SPMs (both in the GLO and outside it) are likely to rely on the actions taken as an implicit admission that Post Office has exercised its prosecutorial powers wrongly or oppressively in the past, with the associated risks of further adverse publicity, additional challenges to past prosecutions and increased claims for compensation.
- 5.2 The appropriate way forward is a matter for the Board but our view is that the approach outlined at 5.1.3 offers the least-worst option. The position should, however, be kept under review in light of the findings.

Herbert Smith Freehills LLP



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Convicted Claimants – potential exposure

	Total Claim Value	Total Claim plus Assessed Post-Termination Losses	Assessed Claim Value (excluding stigma)	Assessed Claim Value (allowing for stigma and notice period post-termination losses only)
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¹ Capital losses are only included where the Claimants do not claim post-termination losses.

² The quantified (unassessed) prosecution losses are included in the malicious prosecution calculation.

³ The lower figure provides for £10k/Claimant for all Claimants and the higher figure provides for £50k/Claimant for all Claimants.

⁴ The stigma/reputational damages are unquantified in the Claimants' Schedules of Information. As such any such attempts to quantify the claims are necessarily speculative. The lower figure is based on the date of sentence to 1/1/2021 (this being the earliest date we assume a sentence would be overturned) based on Post Office verified remuneration data (without any deductions) or based on remuneration calculation with the usual assumptions (where PO verified data is unavailable). Where the date of sentence is unknown we have used the Claimants' last date of service as verified by PO (where available) or as stated by the Claimant (where verified data is unavailable). The higher figure is based on the date of the sentence to 1/1/2024 (this being the latest date we assume a sentence would be overturned/the Claimant would be affected by the stigma).

⁵ This figure is based on £44k/Claimant. This being the upper band of the Vento guidelines (i.e. for the most serious cases). The figure awarded may be higher in the most exceptional cases. We note 10 of the Claimants do not claim harassment damages in the Schedules of Information. This figure gives credit to these Claimants on the assumption they will amend their Schedules of Information if their convictions are overturned on appeal. If these Claimants are excluded, the number reduces to £2.2m.

⁶ This figure is based on quantified (unassessed) prosecution losses (£0.8m) and £54k/Claimant. If the convictions are overturned on 1/1/2021 this will mean the convictions subsisted for an average of 12.4 years. Case law guidance suggests that £17,500 would be awarded for convictions for a prosecution continuing for as long as two years but that a larger award of damages may be appropriate if the malicious prosecution results in a conviction which is only set aside on an appeal. This is necessarily speculative. We note that 25 of the Claimants do not claim damages for malicious prosecution in their Schedules of Information. This figure gives credit to these Claimants on the assumption they will amend their Schedules of Information if their convictions are overturned on appeal. If these Claimants are excluded, the number reduces to £2.7m.