

Post Office Limited

Postmaster Litigation Subcommittee Agenda



Date:	13 November 2019	Time:	16.00 – 17.00 hrs	Location:	BEIS Offices (1 Victoria Street London, SW1H 0ET)
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Present:		Other Attendees:		
<ul style="list-style-type: none"> • Tim Parker (Chairman) • Ken McCall (Senior Independent Director) 		<ul style="list-style-type: none"> • Tom Cooper (Non-Executive Director) • Nick Read (Group Chief Executive Officer) • Ben Foat (General Counsel) • Andrew Parsons (Womble Bond Dickinson) • Catherine Emanuel (Herbert Smith Freehills) • Richard Watson (General Counsel – UKGI) • Alasdair Cameron (Group Chief Financial Officer) • Veronica Branton (Company Secretary) • Rodric Williams (Head of Legal – Dispute Resolution & Brand) • Alan Watts (by phone) (Herbert Smith Freehills) 		
Agenda Item		Input needed/ Status	Lead	Timings
1.	Welcome and Conflicts of Interest	Noting	Chairman	16.00 – 16.05 hrs
2.	Minutes and Matters Arising	Approval	Chairman	
3.	Settlement Authority for Mediation 3.1 Financial range 3.2 Settlement approach for Convicted Claimants	Approval	Catherine Emanuel, Alan Watts	16.05 – 16.40 hrs
4.	Further Issues Trial 4.1 Approach to Defences	Noting	Catherine Emanuel, Alan Watts	16.40 – 16.50 hrs
5.	Common Issues Judgment/Permission to Appeal Hearing (time permitting) - Verbal Update	Discussion	Ben Foat/ Rodric Williams	16.50 – 16.55 hrs
6.	Any Other Business	Noting	Chairman	16.55 – 17.00 hrs
7.	Date of Next Meeting: 10 December 2019.	Noting	Chairman	

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MINUTES OF A MEETING OF THE POSTMASTER LITIGATION SUBCOMMITTEE OF POST OFFICE LIMITED HELD ON TUESDAY 22 OCTOBER 2019 AT 20 FINSBURY STREET, LONDON EC2Y 9AQ AT 11.30 HRS

Present:

Tim Parker	Chairman (TP)
Ken McCall	Senior Independent Director (KM) (Items 1. – 3.)
Tom Cooper	Non-Executive Director (TC)

In attendance:

Nick Read	Group Chief Executive (NR)
Ben Foat	General Counsel (BF)
Veronica Branton	Company Secretary (VB)
Rodric Williams	Head of Legal – Dispute Resolution & Brand (RW)
Catherine Emanuel	Herbert Smith Freehills (CE)
Andrew Parsons	Womble Bond Dickinson (AP)
Alan Watts	Herbert Smith Freehills (AW)
Julie Thomas	Operations Director (JP) (Item 5.)
Amanda Jones	Network Director (AJ) (Item 5.)
Angela Van Den Bogerd	Business Improvement Director (AVdB) (Item 5.)

Action

1. Welcome and Conflicts of Interest

The Directors declared that they had no conflicts of interest in the matters to be considered at the meeting in accordance with the requirements of section 177 of the Companies Act 2006 and the Company's Articles of Association.

2. Minutes and Matters Arising

The minutes of the Postmaster Litigation Subcommittee held on 17 September 2019 were **APPROVED** and **AUTHORISED** for signature by the Chairman.

3. Updates on Court Activity

Alan Watts provided an update on the litigation. We were still awaiting the Horizon Issues Trial judgment and were anticipating further news on when it would be issued this week. The permission application to appeal the Common Issues Trial judgment was taking place on 12 November 2019. Mr Justice Fancourt had recently ruled on the Sheffield United case and had disagreed with Mr Justice Fraser's views on relational contracts in the Common Issues Trial judgment; this could be helpful for our application on leave to appeal.

A pleading on the Further Issues trial was due from Freeths on 25 October 2019. They had raised the issue of their funding and were seeking to bring a damages case for their funding costs. It was probable that they had fixed their funding for the case at the outset but had exceeded their budget. If POL was successful in its application for leave to appeal this would extend the timeline for the trials and the associated costs which will probably be a matter of concern for the Claimants. Freeths wanted to argue that liability for harassment claims should be part of the Further Issues Trial however, any harassment claim would have to be fact specific and considered case-by-case. Counsel's view and our view was that we should resist liability issues arising from harassment claims being part of this trial. As there are not many issues of legal principle between the parties on the correct measure of loss the Further Issues Trial should be limited in scope.

It was reported that we had undertaken a review of the non-disclosed Known Error Logs (KELS) and those that had been relied upon at trial. 94 had been identified as having significant

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changes. Counsel was reviewing all of these and of the 78 KELs reviewed so far 75% were felt not to have had a significant impact on what happened at trial. The other 25% were being reviewed in more depth.

We had offered the claimants access to all 14,000 non-disclosed KELs. The claimants' solicitors had argued that POL should pay for them to review the non-disclosed KELs. We were likely to resist this proposal but the Judge could take a different view. We had already provided the claimants' solicitors with red lined copies of the KELs which had been important at trial.

We wanted to be certain that Fujitsu had provided all versions of the KELs to us. We were considering whether there should be an audit to test how the KELs worked and the complexity of working with a live system from which the information had to be extracted. The approach to the audit and the scope of the audit was discussed and it was thought that we should seek the help of a third party for an audit. The scope of the audit should be limited to a review of the KE extraction process and contain the timescales for completion.

4. Operational and GLO contingency planning

Julie Thomas introduced the paper.

A number of points were raised, including:

- how were we tracking progress with implementing operational changes? It would be helpful to understand this and see statistics in the Board pack. It was reported that we were trying to build a high level scorecard, including measures such as completion rates on disputes, weekly reconciliations, branch closures
- how were we changing our interactions with postmasters? Amanda Jones reported that there were good turnout rates from postmasters at engagement events. Feedback suggested that postmasters thought the relationship was improving. There was a clear expectation of improvements in remuneration. We would be running an advocacy survey in Q4
- did we allow postmasters to feed back on the call centre service? It was reported that we would be introducing a quick feedback survey at the end of calls next month. We were also considering whether to run a base lining survey with postmasters. It was noted that some of the changes we were making were about tone. We had reviewed all the documentation, letters etc. All calls into NBSC were recorded. A telephone number was included on the end of letters so that postmasters could call us. We had checking processes to monitor the quality of calls
- what plans were there to improve management information to postmasters? It was reported that we were progressing some "quick wins" with Horizon to change the way the screen looked and how reports were run. Tim Perkins was leading a piece of work on the end-to-end process for stock to help us understand what we should manage within the Horizon system. This was not a simple piece of work.

5. Any other business

5.1 Convicted Cases

Tom Cooper reported that he had met with Alan Watts and the team to go through the settlement numbers, including those for convicted cases. The treatment of these cases was discussed and it was felt that we needed to understand more about the status of the cases and analyse the figures. It was noted that Counsel's advice was that a monetary settlement should not be offered to convicted claimants at mediation because this risked undermining their

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convictions. Counsel would read through the 61 convicted claimants' cases after the Horizon Issues Trial judgment had been issued to see if this ought to affect our approach. A number of the convicted claimants had reported that they had been unable to resolve their problems with the Horizon system and had only been able to continue trading by entering a false account into the system to balance the books.

6. Date of next meeting:

November date to be confirmed¹. [*Post-meeting note: the meeting has been scheduled for 16.00 – 17.00 hrs, 13 November 2019.*]

¹ The date originally scheduled now clashes with the Court of Appeal hearing for permission to appeal the Common Issues Judgment.



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**BATES AND ANR -v- POST OFFICE
GROUP LITIGATION**

draft / ADVICE ON SETTLEMENT

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Executive summary

1. The purpose of this note is to provide an overview of the Post Office Group Litigation and to summarise our recommended settlement strategy for an upcoming mediation scheduled for 27-28 November 2019.
2. This is a complex dispute where there are a number of material unknowns. Settlement at this stage of the proceedings therefore will necessarily involve a risk-based judgment in light of provisional assessments of liability and quantum. In our view, the position can be summarised as follows:
 - a. Post Office is likely to be unsuccessful in its defence of most of the claims. Although Coulson LJ's judgment is awaited, we consider it unlikely that Post Office will be given permission to appeal on most of the implied good faith terms. The true battleground in the case is likely to be quantum.
 - b. We consider that settlement at a level between £40m and £65m would be a good result for Post Office. Those numbers are based on a robust analysis of the most significant heads of loss across the 555 claims and take into account a premium for risk, reputational considerations and the anticipated high burn-rate on costs going forward.
 - c. Achieving a settlement will not be a straightforward matter:
 - i. The claims are funded by litigation funders, Therium. Given the level costs invested to date, the funding return - which the Claimants will want covered as part of any settlement - is likely to be disproportionate (we estimate of the order of £75m - £90m and growing). There is therefore likely to be a significant gap between the parties.

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- ii. The Claimants include 61 individuals who were prosecuted by Post Office in the criminal courts. Compromising these claims before the criminal courts have adjudicated on any appeals creates difficulties: it would be unprincipled and also has potentially significant knock-on effects. However, if Post Office were to exclude this highly activist cohort from the settlement process, that is likely to jeopardise the entire mediation.
- d. In view of these issues, there is a strong chance that the upcoming mediation will be unsuccessful. Post Office therefore needs to adopt a negotiating strategy which preserves its prospects of achieving a reasonable settlement later down the line if the November mediation fails. Key elements of the strategy will include:
 - i. Negotiating around Post Office's top numbers at the November mediation only if doing so would close a deal;
 - ii. If the mediation fails, making Part 36 offers to each individual Claimant. This would enable Post Office to (a) shift at least a part of the costs risk going forward and (b) reach out to individual Claimants who may not share the views of the activist members of the class who will likely be in the driving seat in the negotiations; and
 - iii. Maximising pressure by re-focussing the litigation on points where the Claimants are more vulnerable, including a trial of test cases where the weaker individual claims can be brought to the fore.
- e. Resolving this litigation would be of significant benefit to Post Office. Not only would it bring an end to the ongoing cost, diversion of management time and reputational damage, it would allow Post Office to move forward, with the benefit of lessons learned, and focus on its commercial objectives for the future.

Background

- 3. In around 1999/2000, Post Office introduced a computerised electronic point of sale and accounting system called Horizon (the "**Horizon System**"), which sub-postmasters



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("SPMs") were required to use in their branches. The Horizon System requires SPMs to account for stock, sales and takings and, as part of the balancing process, identifies shortfalls or discrepancies. Under the terms of their contracts, SPMs are required to make good any shortfalls out of their own funds.

4. Some Claimants repaid their shortfalls; others hid them by through false accounting so as not to be held accountable for funds they could not, or wished not to, repay.
5. Post Office implemented robust audit and collections procedures to minimise losses from the SPM network. Many offenders had their SPM contracts terminated, some summarily for breach and others on notice. Up until 2013, Post Office in appropriate cases also exercised its powers as prosecutor to convict SPMs of criminal offences - principally theft, fraud and false accounting. Many convicted SPMs pleaded guilty, although it is now said those pleas were motivated by ignorance or pragmatism (i.e. to avoid more serious charges of fraud or theft), rather than true guilt.

The Claims

6. The Claimants are a group of 555 individuals who allege that Post Office's policy of seeking recovery of shortfalls was wrongful because shortfalls were generated by "bugs" in the Horizon System. They also allege that Post Office failed in its "good faith" duties to provide proper training on the use of the Horizon System, to assist with queries or complaints, to disclose the existence of known bugs in the system, to conduct adequate investigations into the cause of disputed shortfalls and to allow suspended SPMs access to records to enable them to challenge Post Office's assumption that unexplained shortfalls were the result of theft or error.
7. As a result of these breaches, they claim damages for the wrongful recovery of shortfalls, the wrongful suspension and termination of their contracts and associated wrongs including harassment, stress related illness and stigma. A breakdown of the claims is attached as Appendix 1.



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The current position in the litigation

8. The litigation is structured as a GLO. Fraser J, the managing judge, has ordered that it be heard as a series of trials on issues of relevance to the claims brought by the Claimant class as a whole.
9. The first trial (the "**Common Issues Trial**") concerned the meaning and effect of the contracts between Post Office and the SPMs. The judgment, handed down in March 2019, was resoundingly favourable to the Claimants. In his judgment, Fraser J found that the SPM contracts were "relational" contracts and as a consequence implied a series of onerous "good faith" terms which undermine, in material respects, the contractual framework which Post Office believed it had in place. Fraser J was critical of Post Office, finding that some of its key witnesses had deliberately misled the Court and described it as having "*a culture of secrecy*". Post Office has sought permission to appeal the judgment (the "**Common Issues Appeal**"). Following the oral permission hearing which took place on 12 November 2019, it seems likely that the majority of the good faith terms will remain in place.
10. The second trial focussed on whether Post Office's Horizon System was, in principle, robust (the "**Horizon Trial**"). The trial concluded in July 2019 and judgment is awaited, although we expect it to be handed down imminently. The trial was dogged with complaints around the adequacy of Post Office's disclosure¹ and allegations that the true extent of problems with Horizon was being concealed in the litigation.² Although the expert evidence on the robustness of the system was relatively compelling, the Claimants will be able to establish that there was a risk (even if small) of bugs causing accounting discrepancies. Leading Counsel for Post Office (Tony de Garr Robinson QC) considers it highly unlikely that Fraser J will give the Horizon system a clean bill of health.
11. A third trial has been scheduled for March 2020. It will deal with the correct measure of damages if the Claimants are able to establish liability in principle³ and will be conducted

¹ Many of the "suspicious" non-disclosures are in all probability red herrings but have been deployed effectively by the Claimants to create a "concealment" narrative.

² The decision not to call Fujitsu's Dr Jenkins (who stated, incorrectly, in some of the criminal trials that Horizon had no bugs) is likely to result in adverse inferences being drawn.

³ This is a peculiar issue to have tried at this stage, before matters of breach. The original order made provision for a trial about both limitation and measure of loss. The limitation issues would have been centred on the Claimants' deliberate concealment defence under section 32 of the Limitation Act 1980.



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on assumed facts, without any evidence. Its scope has yet to be decided. Key points of legal principle that are likely to arise are (a) Post Office's liability for lost earnings claims for extended periods of time (i.e. remuneration until retirement); and (b) a novel claim for the recovery of the Claimants' litigation funding costs as damages.

12. Neither the first nor second trials were concerned with Post Office's liability in respect of the individual Claimants' claims. The impact of bugs and the alleged breaches of good faith duties in individual cases will be left over for future trials, probably involving test Claimants.
13. In parallel with the court timetable, Post Office has agreed with the Claimants to engage in mediation on 27-28 November 2019 with Charles Flint QC officiating as mediator.

Liability Issues

14. Post Office's exposure on liability will likely turn on a consideration of:
 - a. Whether Post Office was entitled to hold the Claimants accountable for shortfalls;
 - b. Whether Post Office was entitled to suspend SPMs 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.
15. There are distinct issues raised by fact patterns both in the individual claims and by certain categories of Claimants, in particular (a) Claimants convicted of criminal charges; (b) Claimants who have previously settled with Post Office, either under the Mediation Scheme or Network Transformation; and (c) Claimants who were not SPMs (e.g. assistants to SPMs) who had no contractual relationship with Post Office.

Issues raised on the facts of Individual Cases

In view of Fraser J's approach on Common Issues (that Post Office operated a "culture of secrecy") and the obvious sympathy he showed to the lead Claimants whose cases would have formed the foundation of the limitation trial, we took the view that confining the trial to measure of loss issues was the least-worst solution.



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16. The fact patterns of the individual claims raise a variety of issues:

- a. In some cases there is compelling evidence, unrelated to the Horizon system, which explains why shortfalls arose (e.g. confessions from Claimants that cash was misappropriated or lost). Outside of the cohort of the convicted Claimants, these are relatively few.⁴
- b. There are other cases where it might be inferred that shortfalls were the result of lax business management or poor accounting practices.⁵
- c. In the majority of cases, however, the cause of the shortfalls remains unknown. It is inherently difficult for Post Office to prove that shortfalls were caused by SPM error because, apart from the Horizon accounting system, Post Office has no visibility over the operations of the branches. Further, there is a paucity of solid documentary evidence, particularly on older cases.⁶
- d. Many Claimants' contracts were terminated because they were submitting false trading balances so that shortfalls did not come to light.⁷
- e. There some cases where the Claimants have found themselves in unfortunate personal circumstances, which is likely to attract the sympathy of the Court.⁸

17. It is clear from the Common Issues judgment that Fraser J is sympathetic to the Claimants' core complaints. In implying the extensive good faith duties he did, he has given the Claimants a legal mechanism for challenging Post Office's approach to the

⁴ For example, Mr Kutianawala (Claimant 106) admitted during an audit that he inadvertently left numerous cash pouches (containing £100,000) out of the safe which were erroneously taken from the branch in a mail bag. He has since denied this and suggested he fabricated the story under pressure.

⁵ For instance, Ms Connolly (Claimant 45) admitted that she never physically counted the money in one office cash supply for a four year period, passwords were not confidential and branch trading statements were not signed when completed. Ms Connolly was summarily terminated due to evidence of cash inflations and false declarations in accounts submitted.

⁶ For example, on the case of David Gilbert (Claimant 63) there are no documents available to confirm or deny the Claimant's claims concerning shortfalls.

⁷ For instance, Darren King (Claimant 99) admitted that both he and one of his employees inflated cash reserves in order to conceal discrepancies and issues with balancing. Mr King also admitted he did not account for prize money from the lottery correctly on the Horizon System.

⁸ For example, Lawrence Bailey (Claimant 12) was [GRO] and he alleges that [GRO] [GRO] due to depression and suicidal thoughts resulting from Post Office action against him. At the time of the shortfalls, [GRO] [GRO] His wife (Joan Francis Bailey, Claimant 210) was also [GRO] including with a [GRO]

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recovery of shortfalls, suspensions and terminations. Seen in the round, apart from those few cases where Post Office can point to clear documentary evidence of theft or culpable error on the part of individual SPMs, Post Office's prospects of success on liability are not encouraging.

18. At the risk of some oversimplification:

- a. On bug issues, if the findings made in the Horizon Issues judgment are to the effect that Post Office cannot rely on Horizon data as compelling evidence that shortfalls were genuine⁹, there is limited further evidence that Post Office will be able to rely on in support of its case that it was entitled to demand repayment. Post Office did not typically conduct extensive investigations into the cause of shortfalls. Unexplained shortfalls were effectively assumed to be the result of SPM theft or error.
- b. The extensive good faith terms implied by Fraser J operate, at least arguably, as a fetter on Post Office's ability to exercise its express contractual entitlements. Post Office will be constrained to accept that it acted in breach of many of those terms because its working procedures were simply not designed with the good faith terms in mind. (For example, Post Office believed that it was entitled to rely on Horizon System data; it also believed it was entitled to terminate on notice as of right and did not typically turn its mind to the question of what period of notice might, in all the circumstances, be "fair".)
- c. One area of controversy we foresee emerging is whether Claimants who have falsely accounted for cash or stock in order to "cover up" shortfalls can be said to be in material breach simply because they falsely declared their trading balances. On its face, a failure to follow prescribed accounting procedures might qualify as a material breach justifying summary termination - particularly if it was deliberate. Here, however, the Claimants are likely to blame breaches of Post Office's good faith obligations - for example (a) that errors were made as a result of poor training and inadequate helpline support; or (b) that deliberate false

⁹ It would be unwise to speculate what the judgment will say; however if its effect is that Post Office bears the burden of proving that shortfalls were genuine and it cannot rely on Horizon data as compelling evidence of that fact, it will struggle for want of proof. There are few cases where Post Office can in fact demonstrate how or why cash or stock went missing.

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accounting was justified in light of Post Office's policies of demanding repayment and/or terminating summarily without proper investigation or process. There are legal questions around how the good faith duties interact with Post Office's contractual entitlements in these types of scenarios but we can see ample scope for Fraser J treating accounting failures as non-material, either because they were a consequence of breaches by Post Office of its good faith duties or, quite apart from the Common Issues Judgment, because they were not repudiatory in nature. That assessment is borne out by Fraser J's sympathy for Mr Abdulla in the Common Issues Trial notwithstanding an undisclosed shortfall of £4,398.32 discovered on audit, a practice of keeping an undated cheque in the amount of £2,500 in his till and the overstatement of mutilated notes.

- d. Finally, and of obvious practical significance, the findings made about the credibility of Post Office's witnesses mean that, in the absence of solid documentary evidence, factual disputes are likely to be resolved in favour of the Claimants.

Distinct Issues raised by Categories of Claimant

19. There are also distinct issues raised by certain categories of Claimant.

Convicted Claimants

20. There are 61 convicted Claimants. These Claimants face a threshold issue in that 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. As such, the convicted Claimants would have a civil remedy only if they succeed in having their convictions overturned in the criminal courts.¹⁰
21. Subject to the outcome of the Horizon Trial 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

¹⁰ Unless, potentially, they can identify causes of action unrelated to the matters in respect of which they were convicted.



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representation); and (b) they will then need to persuade the appeal court that they were wrongfully convicted. 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 ("CCRC"), which has been asked to review 34 of the criminal cases, is also awaiting the outcome of the Horizon Trial judgment.

22. It would be unwise to speculate how matters might unfold in the criminal courts. For present purposes, we observe simply that the criminal cases do not on their face appear to be of equal merit. In some cases, the Claimants made detailed confessions as to how and why they (or family members) misappropriated funds.¹¹ In other cases, Claimants allege that they pleaded guilty to false accounting only to avoid the more serious charges of fraud or theft and the associated risk of custodial sentences.¹² On its face, the former category of cases appears to pose less risk than the latter, but this is a specialist question of criminal law.
23. 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.
24. According to Brian Altman QC, the only proactive duty Post Office has is to ensure that the appropriate disclosures are made to each convicted individual. It may be that findings are made in the Horizon judgment which require Post Office to make fresh disclosures which convicted parties might then be able to rely upon to found criminal appeals. 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.
25. Against this background, settlement with the convicted Claimants raises particular challenges:

¹¹ See, for example, the case of Ms Rudkin (Claimant 444) who admitted in interview that she had inflated cash figures and falsified branch trading statements; that she had "borrowed" Post Office funds and was unable to repay the funds; and she had taken cash from Post Office to pay it into her business account - the money was used to pay for shop, wage and household bills.

¹² See, for example, Mr Clark's (Claimant 248) case where the charge of theft (1 count) was not pursued following a guilty plea to false accounting (7 offences). Similarly, the charge of theft against Ms Thomson (claimant 178) was not pursued following a guilty plea to false accounting (3 offences).

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- a. 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 public criticism, as happened at the time of the original mediation scheme in 2013.
- b. However, settling with the convicted Claimants is problematic:
 - i. 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 several convicted Claimants admitted to theft of Post Office funds). If, on the other hand, a Claimant has been wrongfully convicted, he is deserving of the maximum compensation. No obvious half-way house exists.
 - ii. Any settlement could be viewed as admission of failures on the part of Post Office in the exercise of its prosecutorial powers, which is a serious matter. If Post Office has got things wrong, it should of course address that. However, given that an admission of any such failing will have consequences,¹³ this is not a step that should be taken lightly.
 - iii. Brian Altman QC's advice is that offering the convicted Claimants anything at all would of itself enhance the prospects of the Claimants succeeding in their appeals (confidentiality over the settlements could not be maintained). It also risks unravelling the numerous other prosecutions where Post Office acted as prosecutor.

26. In light of these complications, Post Office must take a strategic decision as to whether to exclude convicted Claimants from the settlement discussions or take a non-legal approach and seek to settle with these Claimants notwithstanding the risks. There is no wholly satisfactory solution. Having given the matter careful consideration, we consider the best approach is not to make any settlement offers to convicted Claimants.

¹³ Not least the risk of a potential re-examination of all its past convictions – a difficult exercise in light of the passage of time - as well as the increased civil claims.



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That would not, however, preclude Post Office from making a global settlement offer to the cohort of non-convicted Claimants. If the wider Claimant group then agreed to apportion that lump sum amongst themselves, that would be a matter for them.

Assistants

27. There are 28 Claimants who are Assistants (rather than SPMs). Assistants fall into a distinct category because, under the Common Issues judgment, they have no third-party contractual rights and therefore no claims against Post Office for breach of contract (for example, for lost earnings). Such claims might be brought through SPMs but, in a number of cases, the Assistant's SPM is not a claimant in the GLO.

28. Assistants would not be precluded from claiming in restitution (for shortfalls repaid) or in tort (for harassment, personal injury and so forth). Several assistants were convicted and, if their convictions are overturned, they may have some prospects of succeeding. For those that were not, however, these claims appear speculative.

Settled Claimants

29. Approximately 150 Claimants settled with Post Office either under the Mediation Scheme or under one of the Network Transformation restructuring programs and entered into full and final settlement agreements. A sympathetic judge may be persuaded to unwind those settlements on misrepresentation grounds. However, even in that event, Post Office has a good argument that credit should be given for sums that it has already paid.¹⁴ Network Transformation Leavers were, for example, paid relatively substantial sums, roughly equivalent to 26 months' earnings.

Summary

30. In summary, therefore, while we can identify some weak claims or categories of claims within the Claimant cohort, this is not a case where we consider there are likely to be strong arguments on liability across the board. Post Office's position may improve¹⁵ if

¹⁴ There is a partial exception for Claimants who converted under the Network Transformation programme whose settlement releases do not cover claims in respect of Post Office activities going forward.

¹⁵ Even if the judgment is overturned, there is still a strong probability that claims will fail on the facts, particularly if the Horizon judgment is unfavourable.

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the Common Issues Judgment is overturned, but our present assessment is that Post Office is unlikely to get permission to appeal on many (if any) of the good faith terms which go to liability issues and the hearing of any appeal is unlikely to take place until mid or late next year. Further, although many of the claims are old, [REDACTED]

[REDACTED]

Quantum

31. In general terms, the claims made comprise:

- a. Claims in contract for the recovery of shortfalls, loss of earnings and capital losses. A novel claim is now also made for recovery of the Claimant's litigation funding costs.
- 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).

32. To the extent the claims have been quantified, they total £205.6m. Interest at 8% p.a. is claimed in addition. Because the Claimants have not quantified all their losses and have expressly reserved the right to amend the values claimed, the total claim value is, if anything, understated.

Post-Termination Losses

33. The single most significant driver of value is the period for which the Claimants may be entitled to recover lost earnings resulting from the termination of their contracts. Post-Termination losses (i.e. lost earnings beyond the notice period) presently account for circa £148m of the £205.6m claimed and are sometimes claimed for very lengthy periods (up until retirement).

34. Conventionally, such awards of damages are capped at the amount of remuneration payable during the contractual notice period. Post-Termination losses are typically not recoverable because the "minimum obligation" rule assumes that a contract-breaker would have taken steps to terminate the contract on notice as soon as he or she properly could do so.



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c.

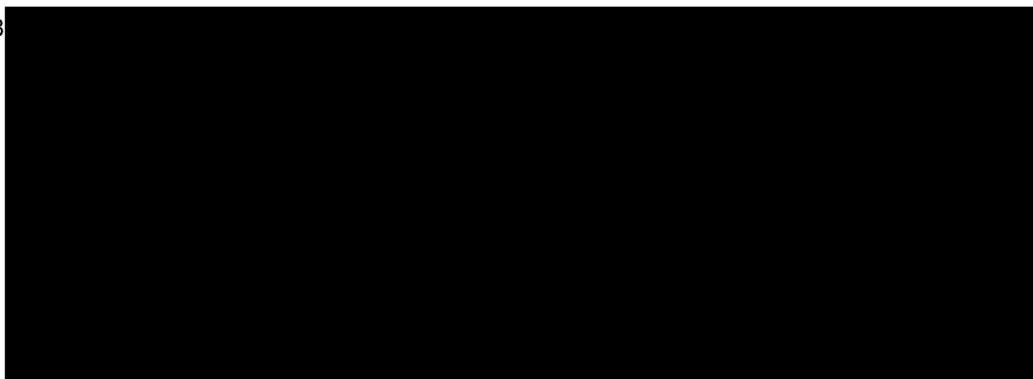
d.

¹⁷ Which obligation could survive a successful Common Issues Appeal.



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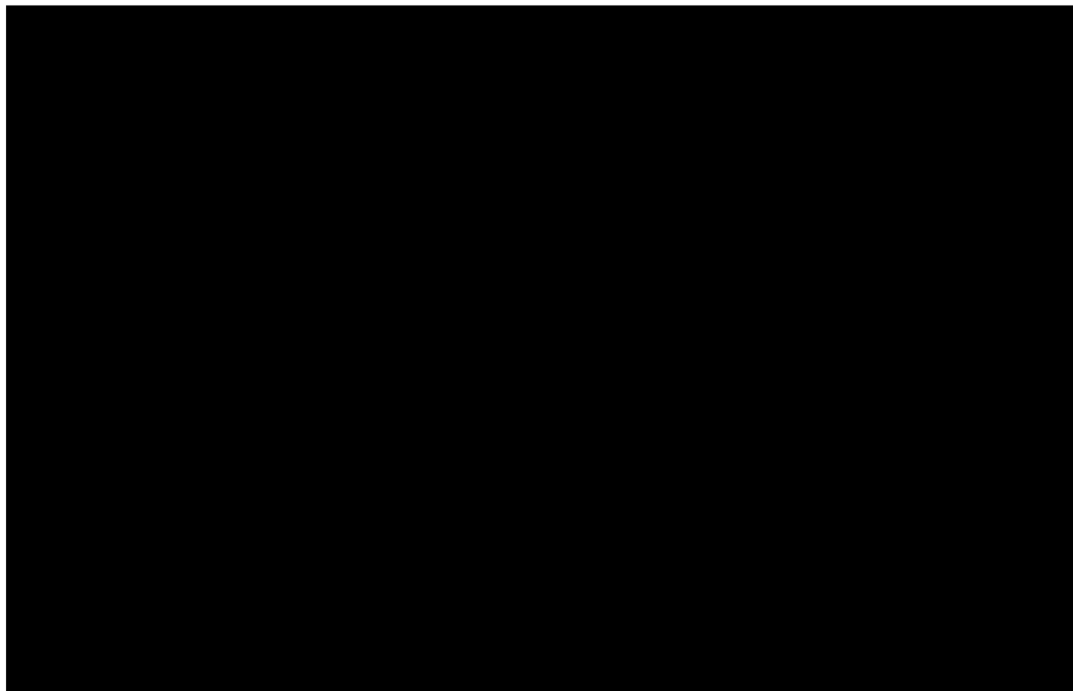


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Funding Cost Claim

39. The new claim advanced for the recovery of the premium payable by the Claimants to their litigation funder is also likely to be very substantial. We do not, however, consider that it is likely to succeed. The law is clear that funding costs are irrecoverable as costs and it would be extremely surprising if the Claimants were permitted to circumvent that rule by re-framing the claim as one for damages. It is also contrary to the public policy on litigation funding that was recently examined in the context of the Jackson reforms.

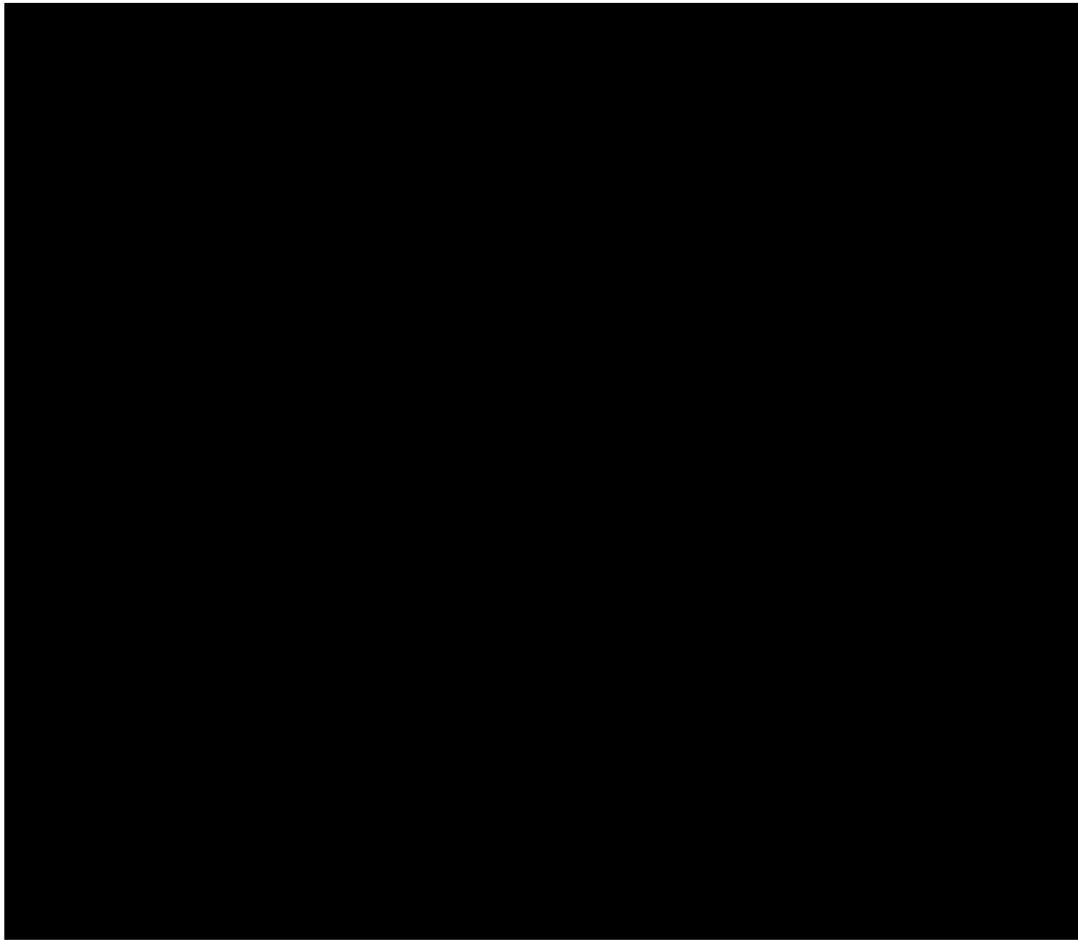
Quantification Models



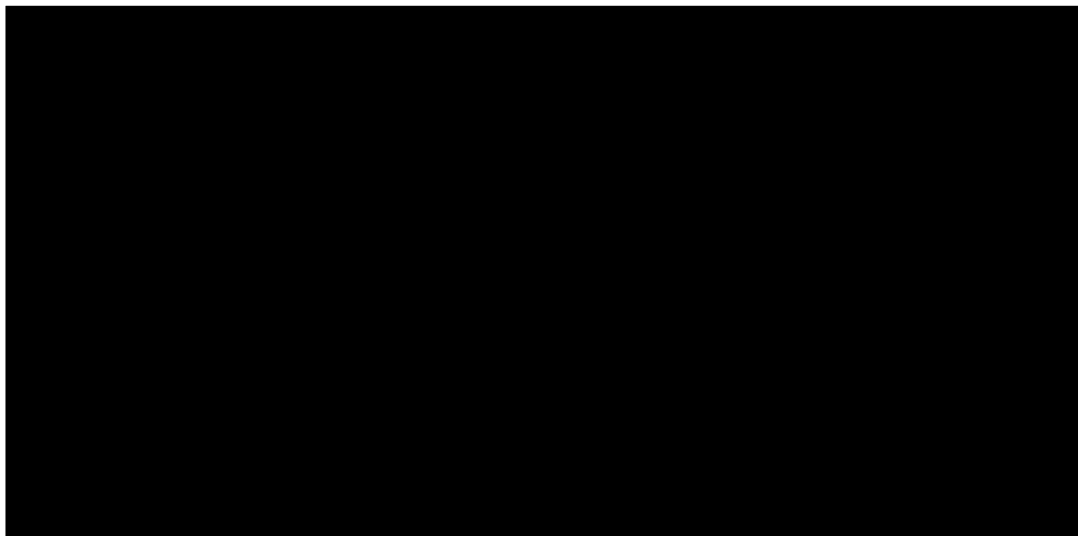


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Ground-up recoverability analysis





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Non-convicted Claimants (494 Claimants)

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45. [REDACTED]

46. [REDACTED]

47. [REDACTED]

Convicted Claimants (61 Claimants)

[REDACTED]



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[REDACTED]

50. [REDACTED]

51 [REDACTED]

Costs of "fighting and losing"

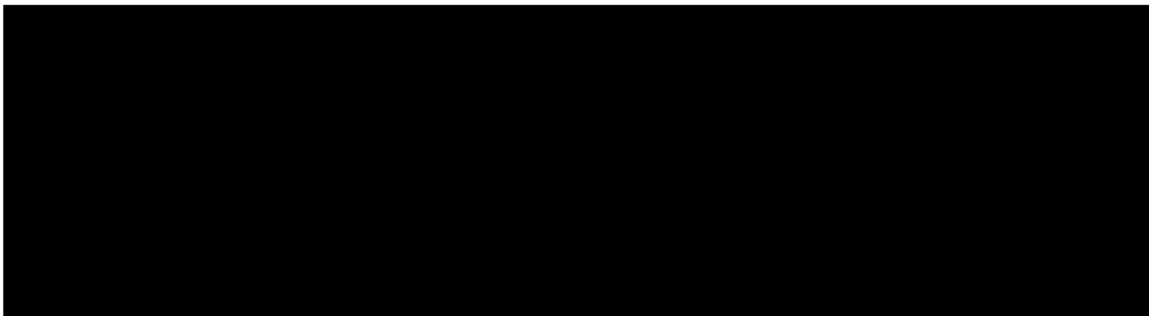
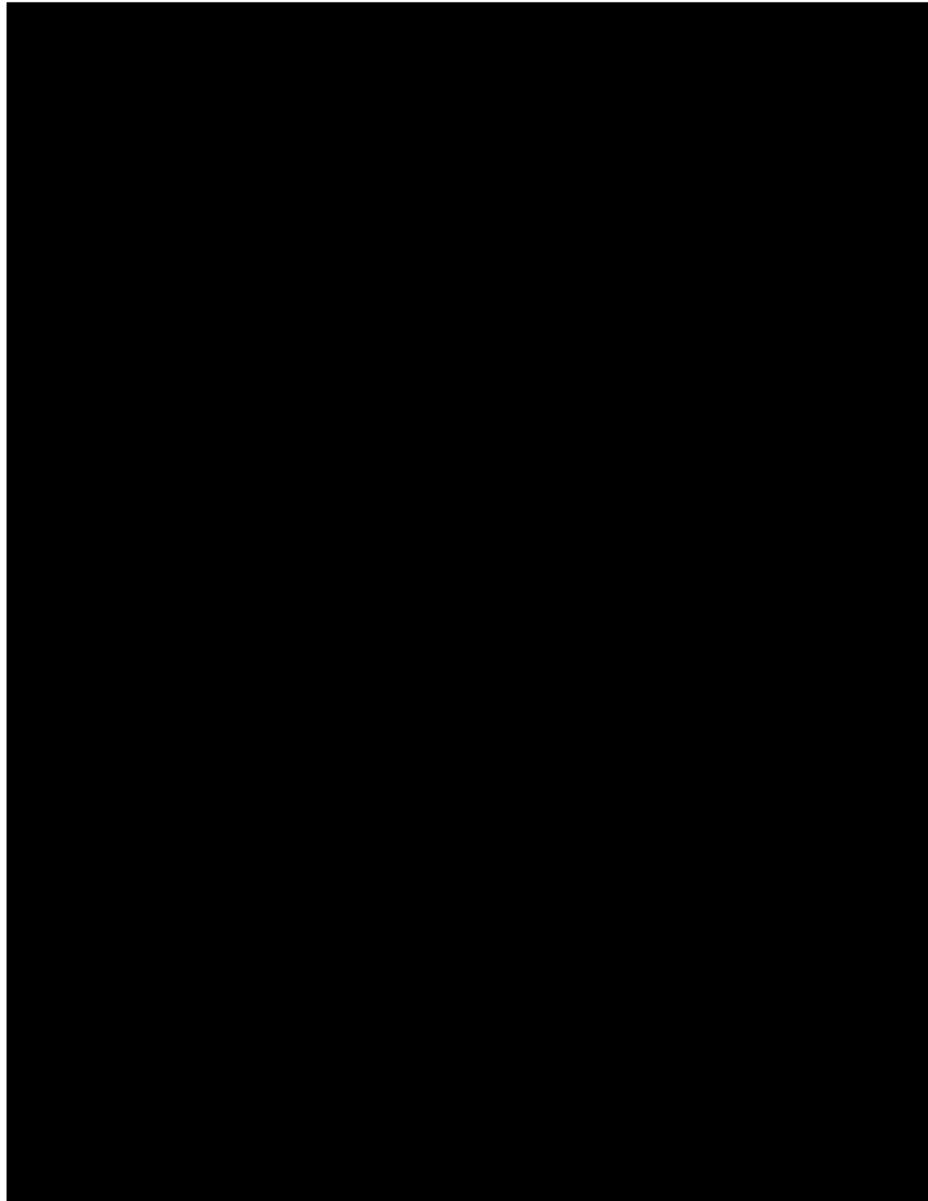
[REDACTED]



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Recommended Settlement Range

56. Seen in the round, we consider that a settlement of £40m - £65m would be a good price to pay for the settlement of this litigation with the non-convicted cohort. We say so for the following reasons:

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57. A helpful sense check as to whether these numbers are in the right ball-park could be to consider the average value of a Post Office business. The average SPM remuneration across the Post Office network (i.e. not limited to Claimants in the GLO) stands at circa £38,000 per annum. We note that leavers under Network Transformation were offered 26 months' earnings by way of an exit payment. If that is taken as a proxy for the value of a the loss of an average Post Office businesses, that would suggest the average value of a branch business would be of the order of £82,333, or a total of **£45.7m** across the 555 Claimants.

Settlement Strategy

58. The Claimants' settlement expectations are unlikely to be driven by strict legal analysis. As a practical matter, we anticipate that the Claimants will want to recover their full funding costs (typically a multiple of costs invested) and a top-up payment which allows each Claimant to receive a meaningful (albeit proportionately reduced) recovery on top.

59. We have no visibility as to the Claimant Group's funding arrangements but estimate that they may look to recover £75.9m - £90.9m for their legal costs and expenses at a settlement in November 2019.²⁰ Given the burn rate on costs, this would likely increase to £90.9m - £109.9m at a settlement in May 2020. If each Claimant were also to recover between £10,000 and £50,000 in addition, those numbers would increase to £81.4m - £118.7m as at November 2019 and £96.4m - £136.7m as at May 2020.²¹

60. If our estimates are accurate, there will be a gap between the parties with the result that settlement is unlikely to be achievable given the weak negotiating position Post Office is presently in. Post Office therefore needs a clear strategy which preserves its

²⁰ This is calculated as 3 – 4 x estimated costs incurred to date, assumes that Freeths is on a 100% CFA and assumes an ATE premium of circa £6m was paid.

²¹ Post Office's Board has quite properly observed that, given our assessment of the likely recoverable quantum, it is unclear why the funders agreed to invest in the claim. That is a pertinent question. It seems to us the most likely answer is that the Claimants have exceeded their original budget – possibly by some considerable margin – because they did not anticipate that Fraser J would order quite so many trials and that quite so many contentious issues would arise. It may also be that allowance was made for recovery by all 61 the convicted Claimants and/or for interest at higher rates.

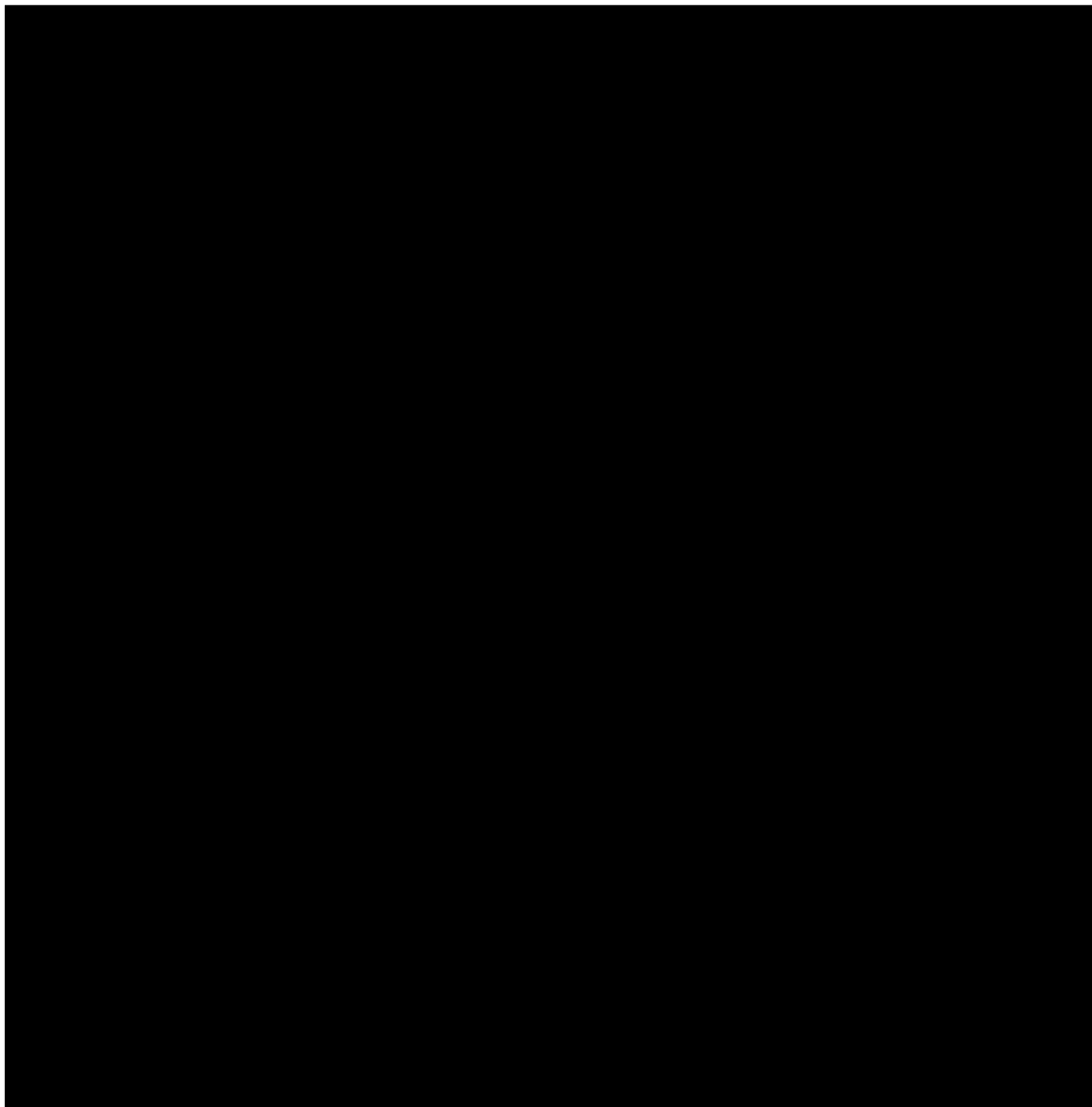


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prospects of achieving a reasonable settlement later down the line if the November mediation fails. Our recommendations are that:

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- c. Going forward, Post Office will also need to maximise pressure on the Claimants by re-focussing the litigation on points where the Claimants are more vulnerable, including careful selection of test cases which would enable Post Office's best points to be brought to the fore.



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Potential Claimants outside the GLO

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61. [REDACTED]

62. [REDACTED]

Herbert Smith Freehills LLP
12 November 2019

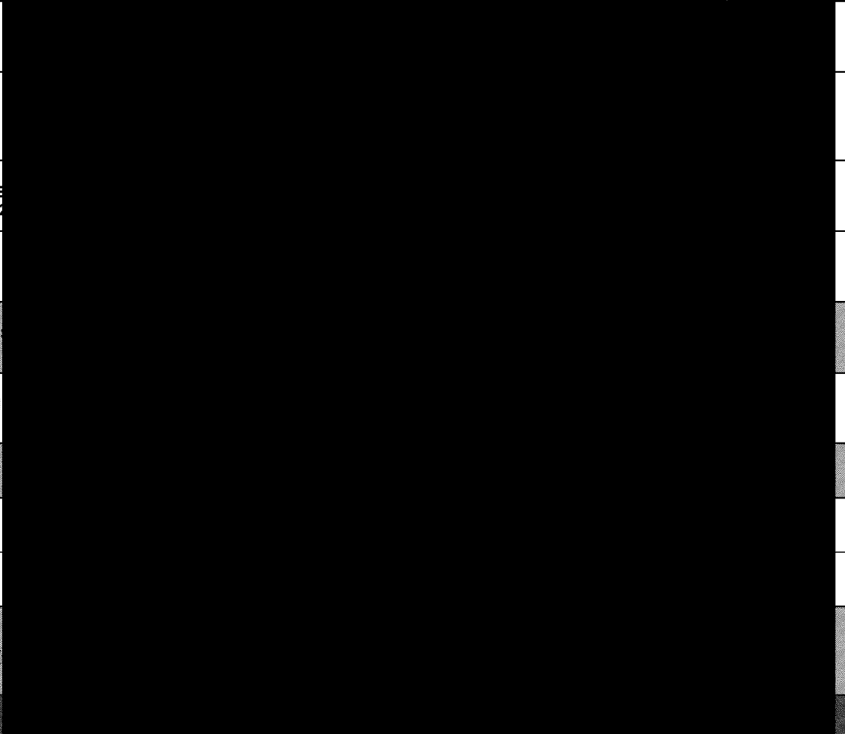
²² Under section 32 of the Limitation Act (1980), time will start to run again once the Claimant "has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have done so".

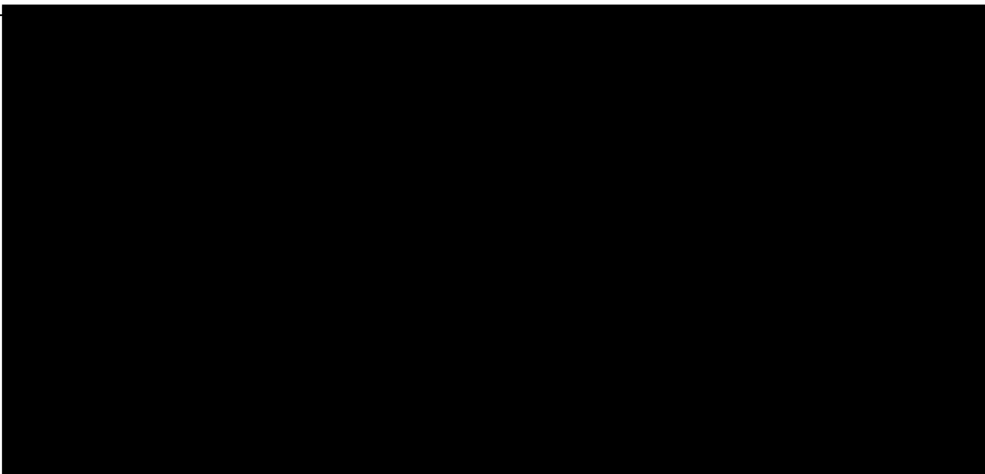


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Appendix 2: Ground-up Recoverability Analysis

Ground-up Recoverability Analysis [23]						
		(a)	Assessed Value [25]			
		All Quantified Claims [24]	(b) Notice period earnings	(c) 12 months' earnings	(d) 24 months' earnings	(e) 5 years' earnings
A.						
B.						
C.						
D.						
E.						
F.						
G.						
H.						
I.						
J.						
K.						

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Appendix 3: Breakdown of Ground-up Recoverability Analysis

Case	Age	Sex	Occupation	Duration of symptoms (years)	Onset	Course	Family history	Social history	Physical examination	Laboratory studies	Imaging studies	Pathology	Treatment	Outcome	Comments
1	45	M	Teacher	10	1985	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
2	52	F	Homemaker	5	1990	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
3	68	M	Retired	15	1975	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
4	35	F	Nurse	8	1988	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
5	42	M	Engineer	12	1980	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
6	58	F	Homemaker	7	1992	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
7	65	M	Retired	18	1970	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
8	38	F	Teacher	6	1995	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
9	55	M	Engineer	9	1985	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
10	48	F	Homemaker	11	1982	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
11	62	M	Retired	14	1978	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
12	32	F	Nurse	4	1998	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
13	50	M	Engineer	10	1988	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
14	58	F	Homemaker	7	1992	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
15	65	M	Retired	18	1970	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
16	38	F	Teacher	6	1995	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
17	55	M	Engineer	9	1985	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
18	48	F	Homemaker	11	1982	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
19	62	M	Retired	14	1978	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
20	32	F	Nurse	4	1998	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
21	50	M	Engineer	10	1988	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
22	58	F	Homemaker	7	1992	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
23	65	M	Retired	18	1970	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
24	38	F	Teacher	6	1995	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
25	55	M	Engineer	9	1985	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
26	48	F	Homemaker	11	1982	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
27	62	M	Retired	14	1978	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
28	32	F	Nurse	4	1998	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
29	50	M	Engineer	10	1988	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
30	58	F	Homemaker	7	1992	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
31	65	M	Retired	18	1970	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
32	38	F	Teacher	6	1995	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
33	55	M	Engineer	9	1985	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None
34	48	F	Homemaker	11	1982	Chronic	None	None	Normal	Normal	Normal	Normal	None	Stable	None



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3.2

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:

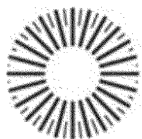
2.2.1 It is not a principled way of proceeding. If a Claimant has been properly convicted, it is in the interests of justice that the conviction stands. From our review, it appears that a number of the Convicted Claimants admitted that they (or family members) stole (or "borrowed") money from Post Office.

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:



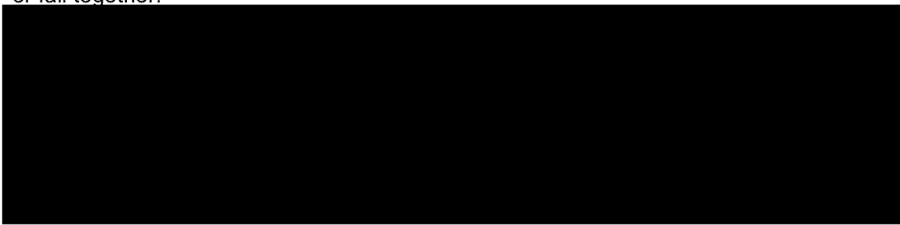
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- 2.3.1 A global quantum view that incorporates the Convicted Claimants; and
- 2.3.2 Further advice on strategy, including an assessment of the advantages and disadvantages of commissioning an internal "non-legal" review of the convictions to identify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

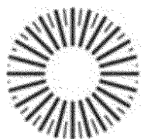
¹ This figure is based on information as verified by Post Office and excludes any damages for post-termination losses (save for notice pay losses), personal injury, harassment, malicious prosecution and stigma damages.

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.

Tab 3.2 Settlement approach for Convicted Claimants

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	1% + LIBOR	3%	5%	8%

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:

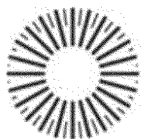
- (A) Legally sound approach;
- (B) Risks derailing the mediation process from the outset and making settlement impossible to achieve;
- (C) Will generate adverse publicity.

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



Convicted Claimants – potential exposure

[illegible]

⁴¹ 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.



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3.3

Alex Chisholm
Permanent Under-Secretary of State
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London SW1H 0ET

[13 November 2019]

Dear [Alex],

Re: Alan Bates & Ors v Post Office Limited – Group Litigation

The purpose of this letter is to confirm that:

1. On the basis of its current forecasts, Post Office Limited believes it will be able to fund the value recommended by HSF in their note dated [13 November 2019] (a copy of which is appended to this letter). It is important to put that into context as we do not yet have plans beyond March 2021 agreed with the Board or with BEIS as shareholder. In addition, forecasting outcomes is complex and volatile for a number of reasons:
 - Product flows are changing rapidly and decisions we will make may create further, material change.
 - Branches are moving from net withdrawal to deposit which changes operational cash flows.
 - We have no funding agreed after March 2021. We are assuming in making this statement that the RC Facility will continue.
 - The Bank of England is reviewing the operation of the NCS scheme, our second source of funding and we expect changes next year.
 - The timing of the outflow is not known.
 - We have not yet completed the prioritisation work and do not therefore have an approvable Five Year Plan or clarity over the nature and timing of investments including next year.
2. The current forecasts suggest that we can fund such a payment through our annual cash profit. That may result in Post Office Limited needing to utilise its existing facilities to fund future investment. Our forecasts assume a continued network subsidy after March 2021, so that unprofitable branches do not also have to be supported by the annual cash profit.

Please feel free to contact me if any further details are required.

Yours sincerely,

Alisdair Cameron,
Chief Financial Officer, Post Office Limited

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PostOffice.co.uk

Group Litigation Update

Author: Ben Foat/Rodric Williams

Sponsor: Ben Foat

Meeting date: 13 November 2019

Executive Summary

4.1

Context

Post Office is awaiting decisions from the courts on the Horizon Issues trial (which is now imminent), and on Post Office's application for permission to appeal the March 2019 Common Issues judgment (which should be delivered on or shortly after the oral hearing on the application on 12 November 2019).

The issue raised on 3 October 2019 concerning the disclosure of potentially relevant documents for the Horizon Issues trial (previous versions of Fujitsu's Horizon "Known Error Log"/"KEL" entries) has been resolved with the Court and the Claimants. It should not impact the trial or delivery of the trial judgment.

On 25 October 2019 we received the Claimants' individual Particulars of Claim ("IPOCs") for the third, Further Issues trial scheduled for March 2020. That trial will determine whether the types of loss claimed are recoverable in principle and, if so, how they should be quantified. Post Office's Defences replying to the IPOCs must be filed by 25 November 2019.

Mediation to explore settlement with the Claimant Group remains scheduled for 27-28 November 2019. On 29 October 2019 the Post Office Board authorised the Group Litigation Subcommittee to delegate to the General Counsel authority to make settlement offers at mediation, on terms determined by the Subcommittee. Advice on the financial range within which the General Counsel should be so authorised, and on the approach that could be taken to Claimants with criminal convictions, is being provided by Herbert Smith Freehills in separate briefing notes for the Subcommittee's consideration on 13 November 2019.

Questions addressed in this report

1. What is the update on the Group Litigation (Horizon judgment; Common Issues trial; Further Issues trial)?
2. What approach is Post Office taking in its Defences to the Claimants' "Particulars of Claim" filed for the third, "Further Issues" trial?
3. What are the next steps in the Group Litigation?

Conclusion

1. The Horizon judgment is now imminent, and should not be delayed by the "KEL Disclosure" issue. The Court's decision on whether to grant Post Office permission

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to appeal the Common Issues judgment should be delivered on or very shortly after the Court of Appeal hearing on 12 November 2019. The Claimants filed “Particulars of Claim” for the March 2020 “Further Issues” trial on 25 October 2019, which Post Office must reply to by 25 November 2019.

2. The Further Issues Defences are being drafted so as to accept in principle the Claimants’ uncontroversial claims for compensation, but to oppose the unorthodox or potentially significant claims for loss of earnings to retirement and litigation funding. The Defences will also minimise the scope for factual disputes which could lead the Judge to make adverse factual findings on incomplete, assumed facts.
3. The next key steps are attending to the Horizon judgment once received, attending the Court of Appeal hearing on 12 November 2019 and mediation on 27-28 November 2019, and filing by 25 November 2019 Post Office’s Defences to the Claimants’ claims in the Further Issues trial.

4.1

Input Sought

The Subcommittee is asked to NOTE:

1. the updates in this paper;
2. the approach being taken in the Defences being drafted for the Further Issues Trial; and
3. the next steps to be taken in the litigation.

Input Received

This paper has been prepared with the assistance of external legal counsel.

The Board is reminded to exercise caution when communicating about potential levels of settlement. Communications about settlement should therefore only be held orally, but if that is not possible, advice should be sought from Post Office’s lawyers.

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Litigation Update

Horizon Judgment

We have still not received the draft Judgment on the Horizon Issues trial, which is now imminent. On 6 November 2019 the Managing Judge emailed the parties advising that “intended dates for distribution of the draft will be circulated in due course”.

The Claimants may seek to postpone the mediation scheduled for 27-28 November 2019 if they do not feel they have sufficient time to consider the judgment ahead of the mediation. However they have not yet asked for this.

4.1

KEL Disclosure Issue

In October 2019 we reported that an issue had come to light which suggested we may not have given proper disclosure of the Horizon “Known Error Logs” (KELs) for the Horizon trial.

This issue has now been resolved:

- the Claimants have informed us and the Court that they do not want to review any further KELs or make further submissions to the Court on this issue; and
- the audit we commissioned on the completeness of Fujitsu's KEL disclosure has not identified any further KELs which need to be disclosed to the Claimants or require Post Office to change the submissions we made about Horizon during the trial.¹

The KEL issue should not therefore have any direct impact on the Horizon trial or delay delivery of the judgment.

Common Issues Appeal

The oral hearing of Post Office's application for permission to appeal the Common Issues Judgment handed down in March 2019 will take place on Tuesday 12 November 2019. Helen Davies QC will be representing Post Office at that hearing.

We should receive the Court of Appeal's decision at the end of that hearing or very shortly after.

Third / Further Issues Trial

On 25 October 2019 we received from the Claimants individual particulars of claim (IPOCs) for four test cases (Abdulla, Bates, Stubbs and Stockdale, each a “Lead Claimant” in the Common Issues trial).

The IPOCs set out the types of loss each Claimant is claiming for the purposes of the March 2020 Further Issues trial, which will determine whether those losses are recoverable in principle and, if so, how they should be quantified. The IPOCs have not put any values on these claims.

Post Office has until 25 November 2019 to file Defences to the IPOCs, with Helen Davies QC and Tony Robinson QC retained to lead this work. The approach which Leading Counsel is recommending is discussed in “Further Issues Trial – Defences” below.

¹ The written report on the audit is due to be delivered during the week commencing 11 November 2019.

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Future Trials

As part of the ongoing review of all 555 individual cases, we are continuing to identify criteria for selecting “Test Claimants”, whose cases could be used as representative of the wider claimant group in a (unscheduled) future trial on breach (i.e. whether Post Office acted wrongly), causation (i.e. did that breach cause the Claimant’s harm), and limitation (i.e. is a Claimant’s claim time-barred).

4.1

No date has yet been set for the selection of test claimants. The parties have agreed to write to the Court proposing to exchange proposed selection criteria on 12 December 2019, which would enable the outcome of Post Office’s application for permission to appeal the Common Issues judgment to be factored into the selection criteria, and for a Case Management Conference to be set for January 2020 to finalise the criteria.

Further Issues Trial - Defences*Approach to Facts*

The Further Issues trial is proceeding on the basis of assumed facts with no witness evidence being called. The Court will therefore assume that the claims made in the IPOCs are factually correct (e.g. that Post Office was in breach of contract), and that it will not need to make findings to resolve disputed issues of fact (e.g. as to whether a specific event happened or not).

The trial has been structured this way so that the Court can make findings now on the types and scale of losses that are recoverable in principle by the Claimants, without first needing to hear evidence on whether Post Office has acted unlawfully (which would significantly increase the trial’s preparation time, hearing time and cost). The question of whether Post Office has, in fact, acted in breach of contract will be addressed at a later trial.

Consistent with the approach being taken to assumed facts, the IPOCs acknowledge that nothing Post Office says in its Defences will be taken as an admission of any of the assumed facts or allegations of breach and causation contained in the IPOCs.

Content of the IPOC

The assumed facts underpinning the Claimants’ IPOCs build on those advanced in the Common Issues trial:

- Post Office made them pay for shortfalls for which they were not liable;
- their retail businesses were disrupted by having to deal with shortfalls;
- their postmaster contracts were unlawfully suspended and terminated;
- their reputations were damaged as a result; and
- a new allegation that they could not afford to fund legal action against Post Office because of the financial harm they had suffered.

These assumed facts provide the foundation for the very wide range of loss and damage the Claimants are claiming, which include:

- recovery of wrongly repaid shortfalls;
- lost remuneration and profit (from the Post Office and independent retail business), during suspension and after termination;

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- loss of capital investment / diminution in branch value;
- the costs of the Claimants' litigation funding;
- reputational/stigma damage leading to disadvantage in the labour market;
- compensation for distress, anxiety and inconvenience;
- "aggravated damages" to punish conduct which is not just unlawful but reprehensible; and
- consequential losses, such as wasted staff time, staff redundancy costs, overdraft fees etc.

4.1

Post Office's Defences

The legal principles behind many of the claims are not contentious, although the way which the Claimants seek to apply them can be. The two claims we see as being most contentious are:

- post-termination losses, which on the Claimant's claim are worth c. £148m if payable up to the date of retirement (the Claimants' best case); and
- litigation funding costs, which on Herbert Smith Freehills' analysis could be worth c. £72m (as at May 2020, assuming a 4x multiplier is applied to their incurred legal costs).

Given that the Further Issues trial will proceed on the assumption that Post Office is in breach, Post Office does not need to dispute any of the factual claims put forward by the Claimants. Leading Counsel is therefore recommending that we only challenge the Claimants' case and put forward Post Office's own case where absolutely necessary to determine whether a loss is recoverable in principle.²

This approach will mean that for the most part, only the Claimants' view of events will be before the Court, not Post Office's. Post Office will however still be able to challenge this later in the litigation (when it can put its full evidence before the Court), and the approach will minimise the potential for factual disputes (which the Further Issues trial has been designed to avoid), thereby limiting the opportunity for the Judge to make findings to resolve any factual dispute (which could be adverse and binding on Post Office at later stages of the litigation).

This approach will also help keep the Court focused on determining the legal principles surrounding recoverability of losses rather than the history of the four lead cases. Findings about the scope of those losses (particularly loss of earnings and litigation funding) are important to clarifying Post Office's potential exposure and for creating common ground on settlement.

The Defences are currently being drafted in line with this approach, which the Subcommittee is asked to note, ahead of the 25 November 2019 filing deadline.

Next Steps

² For example, although we will not challenge whether Post Office unlawfully terminated a Claimant's postmaster contract (which will be assumed without any admission as to its actual truth), we will assert as additional assumed facts that the contract would have come to an end anyway, so the Claimant has suffered less loss of earnings than s/he is claiming. The Court will then be asked to determine whether a claim on these assumed is recoverable in principle.

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An overview of the main court and settlement-related activity in the Group Litigation through to October 2020 is set out in the “Group Litigation Timetable” at **Appendix 1**.

Between now and early December 2019 we are preparing to:

- receive the Horizon judgment (now imminent);
- attend the Court of Appeal on 12 November 2019 for the hearing on permission to appeal the Common Issues Judgment;
- file Defences to the Further Issues trial IPOC by 25 November 2019; and
- attend mediation on 27-28 November 2019;
- complete the individual claimant case reviews and draw up a criteria for selecting test cases for later trials.

4.1

A timeline of the key milestones to early December 2019 is set out at **Appendix 2**.

Operational responses to the Common Issues Judgment and Contingency Planning for the Horizon Judgment are being reported separately.

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Appendices

1. Group Litigation Timetable

	Oct 2019	Nov 2019	Dec 2019	Jan 2020	Feb 2020	March 2020	April 2020	May 2020	June 2020	July 2020	Aug 2020	Sept 2020	Oct 2020
Common Issues Appeal		Oral permission hearing (12 Nov)	File additional documents with Court as required for appeal if permission is granted.							Likely window for Court to hear appeal if permission is granted. Note: Court vacation August & September so unlikely appeal will be heard in these months.			
Horizon Issues Trial		Likely window for Horizon Issues Judgment		Hearing on costs of Horizon Issues trial									
Further Issues Trial	Costs Budgets (2 Oct) Discussion Reports (16 Oct) Costs Management Conference (23 Oct) Particulars of Claim (25 Oct)	CMC (7 Nov) Defences (25 Nov)	Statement of Assumed Facts (2 Dec) CMC (4 Dec) Replies (9 Dec)	PreTrial Review (23 Jan)		Further Issues Trial (2-20 Mar)		Likely window for Further Issues Judgment		Hearing on costs of Further Issues Trial			
Trial 4		Agree test case selection criteria (27 Nov)								Likely window for Trial 4			
Settlement	Without Prejudice Lawyers meeting (10 Oct)	Mediation (27-28 Nov)		Window for possible second mediation									

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<u>No.</u>	<u>Date</u>	<u>Milestone</u>
1.	Imminent	Horizon: judgment expected to be handed down on or after this date
2.	12 November	Common Issues: Oral hearing of Permission to Appeal application
3.	13 November	Post Office Board GLO Sub-Committee on or after this date
4.	18 November	Further Issues Trial: Internal deadline for legal team to draft Defences and provide to Post Office for sign off.
5.	25 November	Further Issues Trial: Deadline for Post Office to serve individual Defences
6.	26 November	Post Office Board Meeting
7.	27 November	Parties to serve and file their proposed Selection Criteria for Test Claimants
8.	27 – 28 November	Mediation. UKGI/BEIS authority to be obtained if required.
9.	3 December	Parties to set out assumed facts and issues to be decided at Further Issues Trial
10.	4 December	Case Management: Case Management Conference to resolve any disputes about issues to be dealt with at FIT