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DRAFT: 20/09/18



POST OFFICE GROUP LITIGATION: MITIGATIONS

Three parts:

1. Effect of a Court Judgment
2. Draft wording for contract change
3. Potential mechanisms of contract change

1. Effect of a Court Judgment

The Common Issues trial judgment will make a series of decisions on the true meaning and effect of the contracts and legal relationship between postmasters and Post Office. The Judgment will only directly bind the 561 Claimants. It will also set a very strong precedent that any other similar dispute between Post Office and a postmaster who is not a Claimant should be decided the same way.

A Judgment can include Court Orders compelling Post Office to do something or change some aspect of its business. Failing to comply with an Order would be contempt of Court and a criminal offence. We believe it extremely unlikely that the Judgement on the Common Issues will include any Court Orders implementing the Judgment (and indeed none have been sought by the Claimants).

The Judgment will determine the legal rights (mainly under the contracts) between Post Office and postmasters. Post Office remains free to act in a way that is contrary to the Judgment, but in doing so it faces the risk of further claims from postmasters for being in breach of contract (that contract having been defined by the Judgment).

In terms of process, the Judgment will not be given directly at the end of the trial in November. It will be reserved, whilst the Judge considers the arguments and writes up the Judgment. It will likely be handed down, days, weeks or even months later. Our best estimate is around Christmas 2018, but this is little more than an educated guess.

The Judgment will be sent to Post Office in draft before it is formally delivered. Typically, Post Office will have a couple of days (if lucky, maybe a couple of weeks) to consider the Judgment before it goes public. This draft copy of the Judgment is embargoed and cannot be publicly shared until formally delivered.

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2. Draft wording for contract change

We have set out below some possible draft wording that could be used to harden the Subpostmaster Contracts against an adverse Judgment on the topic of recovering shortfalls.

This wording comes with the following caveats:

- It is impossible to know in advance of the Judgment exactly what formulation of words may be effective to counteract the effects of the Judgment. This will depend on the legal reasoning applied by the Judge. The wording below should therefore be seen as a "straw man" for further discussion.
- It is possible that the Judge could adopt decisions that apply to the very nature of the relationship between Post Office and postmasters (rather than just points of contractual interpretation) such that there is no formulation of words that would be effective, unless accompanied by real-world changes to the relationship.
- The wording below will need to be tailored to each version of the Subpostmaster Contracts in existence.
- This wording has not yet been approved by Counsel, but they can be invited to comment once mitigation plans are further advanced.

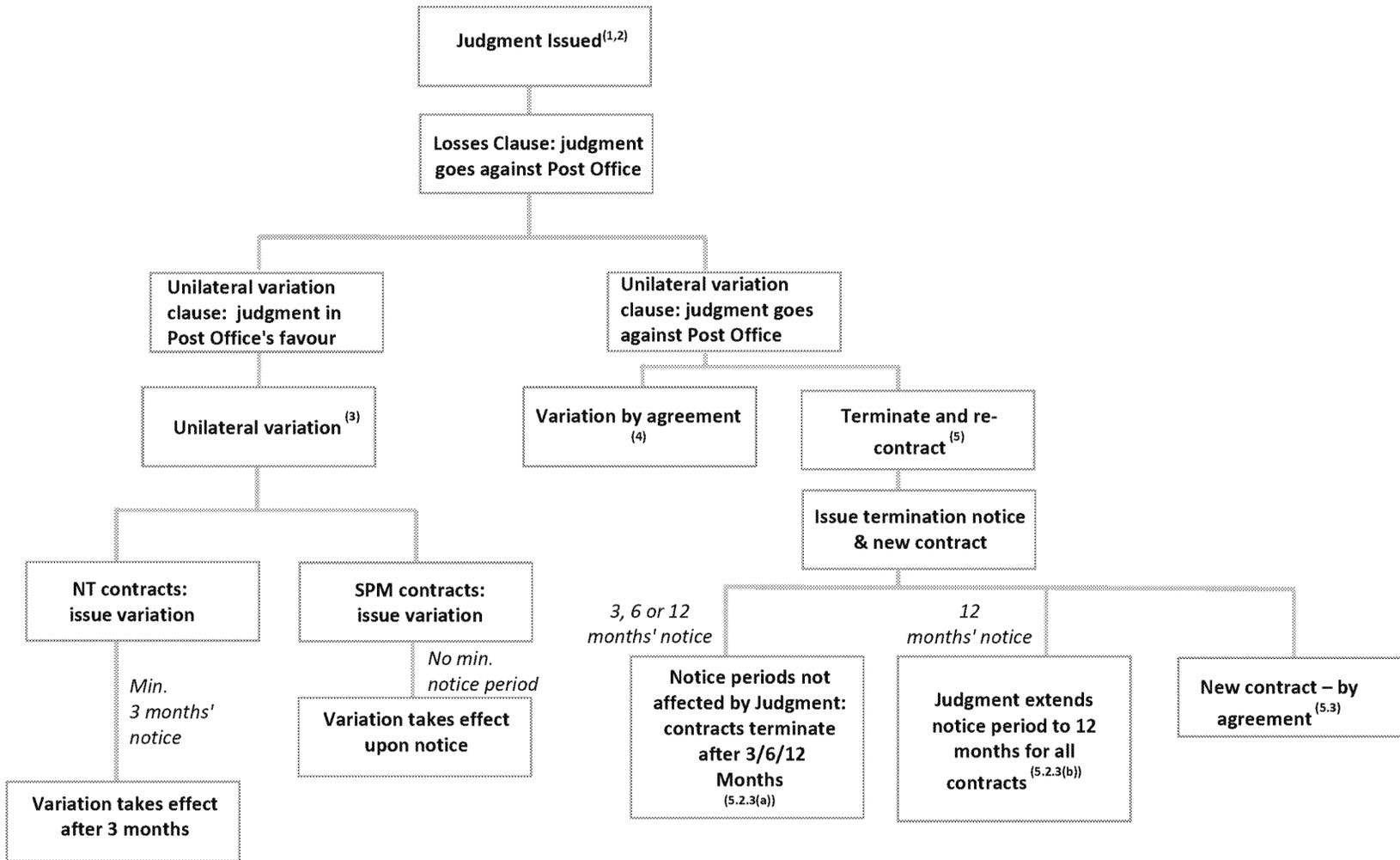
The following wording would replace Clause 12, Section 12 in the SPMC and clause 4.1 in the NT Contracts.

1. *The Subpostmaster shall indemnify, and hold harmless, Post Office against any Shortfall, unless the Subpostmaster can prove to Post Office's [reasonable] satisfaction that the Shortfall was not caused (for whatever reason) by him or his assistants.*
2. *A **Shortfall** shall mean the difference between the amount of cash and / or stock shown in the branch accounts and the physical amount of cash and / or stock in the branch at any given point in time.*
3. *Where a Subpostmaster declares a Shortfall in his branch accounts or a Post Office identifies a Shortfall:*
 - a. *The Subpostmaster shall have [30 days] to give notice that he challenges his liability under clause [1], absent which he shall be irrevocably deemed to have caused the Shortfall.*
 - b. *Regardless of whether the Shortfall is challenged or not by the Subpostmaster, the Subpostmaster shall pay to Post Office a sum equivalent to the Shortfall within 30 days of it being declared or identified (or within such other period of time or on such other terms as Post Office may agree in its absolute discretion).*
 - c. *If Post Office is satisfied that the Shortfall was not caused by the Subpostmaster or his assistants, it shall pay back any money paid under 3(b) within [30] days.*

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3. Potential contract change mechanisms – Subpostmaster contract and Network Transformation contracts

The flowchart below sets out the possible routes to implementing a change to the contract wording. This should be read in conjunction with the notes that follow.



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Notes to flowchart

1. GENERAL

- 1.1 The legal issues relating to Recovery of Losses which will be examined in the Common Issues Trial are complex and there are a variety of different possible outcomes (which we have not summarised here). The flowchart is based on certain assumptions, which are outlined below.
- 1.2 The flowchart assumes that Post Office wishes to implement changes to the wording of the losses clauses in its existing contracts as quickly as possible following the judgment in order to mitigate the impact of this outcome.
- 1.3 The flowchart is based on the following forms of standard contracts:
 - 1.3.1 Subpostmaster contract (**SPM contract**)
 - 1.3.2 NT contract (**NT contract**) (Main and Local versions).

2. CONTRACT CHANGE - LEGAL MECHANISMS

- 2.1 There are three potential mechanisms to change the wording of the losses clauses:
 - 2.1.1 Variation of existing contracts by Post Office (**unilateral variation**);
 - 2.1.2 Variation of existing contracts by agreement with the Postmasters (**variation by agreement**); or
 - 2.1.3 Terminate existing contracts and replace with a new contracts (**terminate and re-contract**).
- 2.2 **Post Office's rights to impose a unilateral variation or to terminate voluntarily (options 2.1.1 and 2.1.3) are themselves issues in the Common Issues Trial. Post Office's ability to rely on either of these mechanisms cannot be assessed with any certainty until the judgment has been issued. A period of time to review and analyse the judgment will need to be factored into any assumed timetable.**
- 2.3 Our comments below are made on the basis of Post Office's current interpretation of the contracts.

3. UNILATERAL VARIATION

- 3.1 The NT contracts contain a right for Post Office to make changes by issuing a Notice to Amend giving not less than 3 months' notice¹, in accordance with the notices provisions in the contract². This does not require the agreement of the counterparty.

¹ Part 2, clause 20.2 (Locals) / clause 21.2 (Mains) of the NT contract.

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- 3.2 A consequence of issuing a Notice to Amend is that it reduces the notice period if the Postmaster chooses to exercise their voluntary termination right within 1 month of receipt of the Notice to Amend (from 12 months to 6 (Main version) or from 6 months to 3 months (Local version)).
- 3.3 The SPM contract contains a clause relating to changes and amendments³ which is worded differently to the NT contracts but which has been interpreted by Post Office as providing a similar unilateral variation right. No notice period or notices provisions are stipulated in the SPM contract.
- 3.4 There is no requirement under the NT or SPM contracts for consultation with NFSP in these circumstances, although we understand Post Office has often opted to consult with NFSP on variations in the past (this may be a requirement of a separate agreement between Post Office and NFSP).
- 3.5 Post Office has relied on these provisions to make variations in the past, most recently in relation to the implementation of the General Data Protection Regulation (GDPR).
- 3.6 Post Office's ability to rely on unilateral variation rights will not be known until the judgment.

4. VARIATION BY AGREEMENT

- 4.1 If Post Office is unable to rely on unilateral variation rights, an alternative is to vary the contract by agreement.
- 4.2 This relies on the agreement of the counterparties; there is no legal mechanism to compel postmasters to agree to varied terms. Post Office may therefore wish to consider attaching an incentive to the variation to encourage postmasters to sign up.
- 4.3 Accordingly, no timescale can be prescribed for this.

5. TERMINATE AND RE-CONTRACT

- 5.1 As an alternative to variation of the existing contracts, Post Office could potentially terminate the existing contracts and re-contract on new terms.

5.2 Termination of existing contracts

5.2.1 Both the SPM and NT contracts contain a right for Post Office to terminate the agreement on notice without cause, as follows:

- (a) SPM contract: not less than 3 months' notice⁴.
- (b) NT contracts⁵

² Part 2, clause 21 (Locals) / clause 22 (Mains) of the NT contract.

³ Section 1, clause 18 of the SPM contract.

⁴ Section 1, clause 10 SPM contract.

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- (i) Main version: not less than 12 months' notice (not to expire before the first anniversary of the start date)
- (ii) Local version: not less than 6 months' notice (not to expire before the first anniversary of the start date).

5.2.2 Post Office's ability to terminate on notice without cause (whether at all, or on any particular notice period) is being challenged in the Group Litigation and the final position will not be known until the judgment has been issued.

5.2.3 The three foreseeable scenarios are:

- (a) The termination clauses remain as drafted.
- (b) The termination notice period is extended to 12 months for all postmasters.
- (c) Post Office loses its right to terminate on notice altogether and can only terminate for cause.

5.3 Re-contract on new terms

5.3.1 This relies on the agreement of the counterparties; there is no legal mechanism to compel postmasters to agree to new terms. There is therefore a risk that on termination of the contracts, postmasters may leave the network. Or, the NFSP may see this as leverage to try to negotiate better terms for its members.

5.3.2 There will also likely be more political and media response to wide scale termination programme, rather than a voluntary variation programme.

5.3.3 Accordingly, no timescale can be prescribed for this.

5.3.4 There is no contractual requirement to offer any financial compensation; however we understand that Post Office has in the past offered financial compensation to incentivise postmasters to sign-up to new forms of contract.

⁵ Part 2, clause 16.1.1.