

Postmaster Litigation

Meeting date: 24 April 2019

Executive Summary

CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

Context

1. As the Committee is aware, the judgment in the Common Issues Trial was handed down on 15 March 2019 and found against Post Office in a number of material respects. An application was made to the Judge – Sir Peter Fraser, to recuse himself on the grounds of apparent bias which was heard on 3 April 2019 and rejected on 9 April 2019. The Application to the Court of Appeal to allow an appeal from that decision was filed on Thursday 10 April 2019 (the "Recusal Appeal").
2. The Committee is now requested to consider: whether an appeal should be made against the decision in the Common Issues judgment itself (the "Common Issues Appeal"); if so, the scope of the Common Issues Appeal; and whether Post Office should seek to have the Common Issues and Recusal Appeals heard together.

Questions

- What was the strategy behind the litigation and is that still appropriate?
- Are there grounds on which the Common issues judgment could be appealed?
- What is the timing and process for making the Common Issues Appeal?
- Are there any aspects of the Common Issues judgment that Post Office should accept?
- What are the risks and benefits of hearing the appeals together or separately?

Conclusion

3. The Post Office legal team (which for the purposes of this note means collectively Post Office legal, Womble Bond Dickinson and Counsel) recommend:
 - appealing the Common Issues judgment;
 - that the scope of the Common Issues Appeal focus on rejecting a legal duty of good faith and therefore also the consequential terms implied into the postmaster contracts by the Common Issues judgment. In addition, the Common Issues Appeal should also appeal certain findings of fact extraneous to the Common Issues. The rationale for this recommendation is set out in paragraphs 21 to 26; and
 - that Post Office seek to have the Common Issues Appeal heard together with the already filed Recusal Appeal. The rationale for this is set out in paragraphs 41 to 44.

4. There are significant risks attached to any litigation, and the risks in relation to these recommendations are also discussed in the relevant sections. Decisions made by the Managing Judge to date have been very critical of Post Office and as a result, there is considerable concern around the tone of Post Office's defence. These concerns are understood by the external Counsel team. The tone of the legal strategy is however more relevant to the interaction with the Managing Judge, as the Court of Appeal will look objectively and dispassionately at the matters before it – these are about the application of the law, not how Post Office conducts its business. Decisions about the scope of an appeal should be made accordingly.
5. Along with the work being done to conduct the litigation and appeals, work has begun to assess the range within which a settlement could be negotiated, and details of this should be discussed with the Board sub-Committee at a future meeting. However a range of £40-£80 million is not unrealistic in light of the decisions in the Common Issues judgment. As set out in paragraph 42 mediation and settlement discussions could progress pending the hearing of the Appeal(s).
6. The Committee should note however that while a settlement may bring the current litigation to an end, it does not :
 - address the claims of anyone other than the Claimant group;
 - necessarily provide a repeatable framework for resolution of similar complaints from postmasters outside the Claimant group; or
 - address the findings in the Common Issues judgment as to the correct interpretation of the Contract, and the operational impacts of those findings will remain.

Input Sought

7. The Committee is requested to consider:
 - appealing the Common Issues judgment and, if thought fit, approve the scope of the Common Issues Appeal; and
 - whether Post Office should seek to have the Common Issues Appeal heard together with the already filed Recusal Appeal.

The Report

What was the strategy behind the litigation and is that still appropriate?

8. The dispute between Post Office and a number of mainly former postmasters has been ongoing for a number of years. Despite attempts to resolve these previously without recourse to litigation, a claim was issued against Post Office in early 2016.
9. Post Office considered that absent litigation, the matters under dispute would continue without resolution and that it was therefore in the interests of both Post Office and the affected postmasters to bring matters to a conclusion which would provide a fair and repeatable basis for resolving issues arising from in-branch losses. This basis would apply to both those claimants in the Group Litigation, and to claims (current, legacy or future) arising outside the current litigation.
10. Post Office expected that the litigation would address the following issues (among others):
 - whether Horizon is 'robust', and whether it is likely to be the cause of in branch losses;
 - who bears the responsibility for demonstrating the cause of in-branch losses;
 - if Post Office is determined to be responsible for in branch losses (from whatever cause), but has previously held a postmaster accountable, what liability does Post Office have to the postmaster and how is compensation fairly calculated?
 - does Post Office have a legal liability to recompense all postmasters, or only those who have raised/ notified their claims in accordance with the Limitation Act (which would therefore exclude most claims arising before 2010)?
11. Additionally, there was concern that the lack of certainty around the contractual framework, and the challenges to the robustness of the Horizon point of sale system, operated as a disincentive to potential agents to contract with Post Office and disrupted business-as-usual activity, as well as causing concern to key (government) stakeholders.
12. Other desired outcomes from the Group Litigation therefore also included establishing with a reasonable degree of certainty the terms of contracts and ways of working that are effective in supporting agents and defending Post Office's interests
13. It was also Post Office's view that Horizon, although not perfect or error-free, was generally reliable. This was based on, amongst other matters, assurances from Fujitsu and the findings of Second Sight that there was no systemic problem in the system. Further, Post Office was of the view that the legal position it had adopted with its postmasters (including in civil and criminal court proceedings) for over 20 years was broadly sound; this was reinforced by legal advice from a number of sources including WBD and Linklaters during the mediation scheme and latterly from Leading Counsel.

14. Post Office has always recognised that there are likely to be individual cases where its treatment of postmasters has not met appropriate standards and/or it has acted wrongly. In such cases, Post Office should acknowledge failures and the postmaster should be compensated. However, although some evidence has been put forward, the court process mandated by the Judge should not have allowed for those individual issues to be properly scrutinized until at least Trial 3 in late 2019.
15. Permeating all decisions was a strong belief that any acknowledgment of past failures should be balanced against the risk of significant numbers of unrealistic demands for compensation from undeserving Claimants and encouraging more historic claims from postmasters who were not yet Claimants.
16. Against the above objectives, it was recognised that litigation will always come with risks and that an adverse finding against either the postmaster contracts or Horizon could be seriously damaging to the business. Of particular concern was the risk that Post Office may be left in the position of not being able to recover shortfalls in branch from postmasters, putting its cash and stock at risk.
17. Finally, there was a commercial objective to bring the litigation to a close as quickly and cost effectively as possible.
18. Having considered the above factors, Post Office decided to contest the first two phases of the litigation, namely the legal framework of the postmaster contracts and Horizon.¹ Post Office would try to secure some positive Court decisions with a view to building a platform for settlement, recognising that the Claimants' funding was finite. Positive decisions could provide a narrative to explain a modest settlement payment without that looking like a concession of liability that would cause business disruption and a risk of more claims.
19. In light of the adverse findings in the Common Issues judgment, and Mr Justice Fraser's very dim view of Post Office in general, consideration should be given to whether the above objectives are still best served by continuing to contest the litigation beyond the first two phases of the litigation (recognising that the second, "Horizon Issues Trial" phase is currently part-heard before the Managing Judge in the High Court).
20. Against this background, the first point addressed below is whether the Common Issues judgment could, as a matter of law, be successfully appealed, and then consideration is given to whether this is an appropriate course of action and what alternative options there are.

Are there grounds on which the Common issues judgment could be appealed?

21. As previously advised, the Common Issues judgment was formally handed down on 15 March 2019. Since then, Post Office has engaged Lord Grabiner, one of the most senior practising barristers in the country, and Lord Neuberger, the former President of the Supreme Court, to advise on appealing the Common Issues judgment. They have considered this alongside David Cavender QC who represented Post Office at the Common Issues trial.

¹ WBD and the Counsel team advised against a trial solely focused on Horizon taking place without putting it in the context of individual test cases. Post Office explained this to the Court which ultimately decided to proceed with a discrete Horizon trial.

22. WBD and Counsel believe that Post Office has good prospects of successfully appealing large parts of the Common Issues judgment. The Counsel team will be able to address this with the Committee at the meeting on 24 April 2019.
23. There are also strong business reasons for seeking the appeal. These include:
- While operational improvements and contractual changes may be implemented to address the impact of the judgment going forward, the retrospective impact of the judgment can only be addressed through a successful appeal.
 - The implication of a legal duty of 'good faith' creates significant uncertainty around Post Office's ability to make operational changes going forwards – including changes to contracts and termination of agents, as Post Office must now take into account the impact of such changes on specific agents as well as agents generally, in reaching decisions. A more detailed summary of these issues is set out in the attached advice from Womble Bond Dickinson and David Cavender QC.
 - The implication of a general legal duty of good faith creates uncertainty as to the scope of duties owed to postmasters historically such that in any particular case, it will be unclear whether Post Office has discharged that duty.
 - The adverse findings in the Common Issues judgment make it significantly more likely that Post Office will be found to be liable to a larger number of the Claimants and significantly increase the extent of its liability.
 - Post Office's position in any discussions to try to settle the litigation will be improved by appealing the Common Issues judgment.
24. The main areas where Post Office should consider appealing include:
- The implied legal duty of good faith, whilst superficially sounding uncontentious, poses significant difficulties to Post Office due to the uncertainty of its meaning and application. In a business sense, good faith is commonly understood to mean being honest; and that as a principle is obviously not objectionable. However the Common Issues judgment has gone much further than that, imposing a legal good faith duty that is defined to require Post Office to subjugate its legal rights to the interests of postmasters and take steps that are commercially onerous.
 - As part of this legal duty of good faith, the Judge has then imposed a further 20 specific duties which he states were necessary for "reasons of business efficacy or as incidents of the contracts being relational contracts". While a number of these duties appear anodyne, legally it is difficult to accept certain duties while rejecting others, or without undermining the challenge to the general legal duty of good faith.
 - Post Office's rights to terminate agency contracts (and indeed the rights of agents to terminate) on 'not less than x months' notice' are subject to the legal good faith obligation such that the period of notice to be given in any particular case must be considered taking into account all relevant factors. Not only is this interpretation contrary to normal commercial practice, but imposes burdensome operational considerations on both Post Office and the agent to take into account a range of other factors when deciding what notice is reasonable in the circumstances. Similar considerations will apply to suspensions.

- The Managing Judge has determined that the Unfair Contract Terms Act applies to the provisions of postmaster contracts which means that many of them could be considered to be unreasonable and therefore unenforceable. This applies irrespective of the type of agent – individual, multiple or corporate.
 - There are a number of findings that address losses and the agents' liability for losses which make recovering losses much more difficult, if not impossible. These different findings need to be considered together so as to ensure that the outcome is consistent.
 - The Managing Judge held that a disputed Branch Trading Statement is not an 'account' for the purposes of the agent's fiduciary duty to account to Post Office as its principal. We believe that the judge has based this decision on an incorrect understanding of how agents dispute transactions. He then found on the basis of this that there is no obligation on agents to demonstrate that Branch Trading Statements are wrong in respect of a disputed period.
25. The Counsel team have also reviewed whether there are any findings of fact in the Judgment that should be appealed on the grounds that those findings are perverse. Appeals of this nature are less common and more difficult, and should therefore be used sparingly, both as a legal tactic and because it comes with a higher risk of Post Office looking like an aggressive litigant. The recommendation is that the following findings of fact should be challenged:
- Mr Bates' receipt of his SPMC contract. This is a single issue. On its face this may seem to be unnecessary, however it is a clear example where the Judge has wholly ignored the documents to get to his desired conclusion and so it should strike the appeal court as very odd.
 - Findings adverse to Post Office's behaviour and witnesses. These findings are unfair and are directly relevant to the Claimants' claim for indemnity costs. There are 6 of these. These overlap with some of the recusal grounds.
 - Litigation conduct of Post Office. There are two of these. They are relevant to indemnity costs arguments made by the Claimants.
26. Set out in the Diligent Reading Room is a detailed table setting out the specific findings from the judgment and the appeal recommendation in relation to each.

Are there any aspects of the Common Issues judgment that we should accept?

27. There are a number of legal grounds on which an appeal could be sought but given the way the Common Issues Judgment has been constructed, it is difficult to disentangle the various issues so as to be able to accept some points and not others. In addition, the Managing Judge has expressed a number of findings 'in the alternative' which mean that even if he was found to be wrong on one ground, then there is at least another on which he also relies to achieve the same outcome. In those cases, it is therefore necessary to appeal against both findings.
28. Our Counsel team are of the view that 'concessions' should only be made in limited circumstances, as even accepting a few clauses could suggest to the Court of Appeal that the agency contracts are incomplete and open to further

implied terms. There is a need to mount any appeal in a legally coherent manner otherwise the merits of the whole appeal could be undermined.

29. They therefore advise that the following 4 terms could be accepted (subject to some drafting modifications) as incidents of the "necessary cooperation" term rather than freestanding implied terms in their own right. This is still a concession, although delivered in a way that runs less risk of undermining the wider legal arguments on when terms should and should not be implied.
- "to provide reasonable training and support if Post Office imposed new working practices or systems or required the provision of new services"
 - "to ensure that the Horizon computer system was reasonably fit for purpose"
 - "properly and accurately to effect all transactions using Horizon and to maintain and keep records of such transactions for a reasonable time"
 - "that Post Office take reasonable care in performing its functions under the SPMC and NTC contracts which could affect the accounts of Subpostmasters".
30. There are other points in the Common Issues Judgment that Post Office could decide to concede, although it should be noted that the Counsel team advise against any such concessions:
- **The finding that Post Office faces the burden of proving every loss in every branch.** Post Office will always face some difficulty in trying to prove the root cause of a loss in a branch because it has no first-hand knowledge of what has happened. That difficulty is manageable if addressed at the time the shortfall arises when information is freshly available and the cooperation of the postmaster can be sought (and which the postmaster is required to provide under the mutual duty of cooperation). The difficulty comes when a dispute is raised long after the events in question or where a postmaster has been false accounting (which by its nature means that the postmaster has been rendering undisputed, albeit false, accounts). The Common Issues Judgment would require Post Office to retrospectively determine what happened long after the events in question. That is exactly what most of the Claimants are seeking to do in this litigation. The Post Office legal team consider this to be unfair on Post Office and wrong in law. The case advanced by Post Office seeks to strike a fairer balance between the parties. It allows postmasters to raise timely disputes about shortfalls and put the onus on Post Office to investigate those shortfalls at that time, whilst also holding postmasters to any undisputed accounts, unless they can later prove there was no loss or it was not their fault. These points are explained more fully in the Appeal Table in the Reading Room.
 - **The various implied terms that require Post Office to pro-actively communicate information about shortfalls and Horizon to the whole network.** Although these sound innocuous, in practice they would be difficult to comply with. Conceding them would also contradict the core legal argument that there should be no duty of good faith and terms should only be implied where necessary.
 - **The implied terms and findings to the effect that Post Office's right to suspend and terminate must be exercised in good faith and only when Post Office is not in breach of contract.** Conceding these would

contradict the core legal argument that there should be no legal duty of good faith and terms should only be implied where necessary. From a business perspective, the judgment erodes the certainty and scope as to when Post Office can suspend and terminate postmasters, which is needed in order to protect cash and stock in the network.

- **The finding that Post Office must pay postmasters when suspended.** This is not recommended because it would expose Post Office to significant historic claims for withheld remuneration. If Post Office wishes to change this practice going forward, it could do so through an operational change / contractual variation.

31. It should be noted that it is not legally possible for Post Office to appeal generally but concede a duty of good faith. The legal duty of good faith pervades the entire judgment. A decision not to appeal the finding of a legal duty of good faith would undermine nearly all other grounds of appeal. If Post Office wished to accept the legal duty of good faith, this would require it not to appeal at all.

What are the risks of bringing the Appeal?

32. While the Counsel team believe that "Post Office has reasonable to strong prospects of success on nearly all of the above recommended legal grounds of appeal" (albeit some stronger than others), appealing against the Common Issues Judgment is not risk free.
33. First, although appealing a decision on the interpretation of contracts is common place, and the Common Issues Judgment states several times "in the event that I have got it wrong" which language is not unusual where a judge anticipates that a point may be subject to appeal, nevertheless an appeal is implicitly a criticism of the decisions of the trial judge and could be seen by the Managing Judge as a further aggressive step. Having made a recusal application and appealed that application, an appeal on the Common Issues Judgment is however a lesser and more ordinary step by comparison and one that this Managing Judge is very much expecting to happen by his comments in Court.
34. Second, Post Office may lose the Common Issues Appeal with the following consequences:
 - Mr Justice Fraser's comments about Post Office may be vindicated, leading to further negative publicity.
 - Mr Justice Fraser will feel emboldened to treat Post Office even more harshly in further hearings and trials.
 - The Claimants will be in an even stronger negotiating position.
 - Post Office will have incurred further legal costs and be liable for the Claimants' legal costs.
 - Post Office will still have to implement the Common Issues Judgment but after a 6-12 month delay (see further below on timing).
35. Third, even if the appeal is successful, there is a further right of appeal open to the Claimants to the Supreme Court. Getting permission to appeal to the Supreme Court is more difficult, but the legal duty of good faith arguments are new law and something that the Supreme Court may be prepared to hear.

What is the timing and process for making the appeal?

36. The Recusal Appeal was lodged with the Court of Appeal on 11 April 2019. Unless we file the Common Issues Appeal rapidly and seek to have the two appeals heard together (see below), the Court of Appeal will shortly consider the Recusal Appeal as standalone question.
37. The Managing Judge has set aside time on 16 May 2019 to allow either party to seek permission to appeal the Common Issues Judgment. Assuming the Managing Judge allows an appeal, then Post Office has a further 21 days within which to file its appeal. If permission to appeal is refused, then as with the recusal judgment, we could apply to the Court of Appeal directly (again within 21 days). In either case, Post Office will lose its right to appeal unless the Appeal Notice is filed with the Court of Appeal by 6 June 2019.
38. The Counsel team believe that it is unlikely that the Managing Judge will give permission to appeal based on his approach to date and therefore recommend making an application directly to the Court of Appeal as soon as possible (which is a permitted way of proceeding under the Court rules).
39. Assuming that permission is given for the Common Issues Appeal, in the absence of the Recusal Appeal, there are limited grounds to argue for an expedited hearing which means that it could be 6-12 months before the Common Issues Appeal is heard.
40. Once both appeals are lodged (and assuming that permission to appeal is granted in both cases), the Court of Appeal will then decide whether to hear them together or separately. If separately, the Recusal Appeal will likely move faster, perhaps being heard within 1-3 months. The Common Issues Appeal, being more complex, will likely take 6-12 months. If the two appeals are heard together, they will likely move on the slower timetable but with more chance of being towards the shorter end of that timetable.

Should Post Office seek to have the two appeals heard together?

41. The Counsel team believe that the two appeals should be heard together as they believe that there is a better prospect of winning both appeals by having them heard together rather than separately:
 - The Recusal Appeal will require the Court of Appeal to form a view on whether the Managing Judge has pre-judged issues outside the scope of the Common Issues trial. It will therefore need to consider certain of the issues which would be raised in the Common Issues Appeal in forming that view. It is also the case that the findings of fact that Counsel recommend appealing in the Common Issues Appeal are the same findings that are the subject of the Recusal Appeal. If the appeals are not heard together the Court of Appeal would need to consider the same points twice. This is inefficient and there is doubt as to whether the Lord Justice managing the appeal will allow this to happen.
 - The two appeals give complementary impressions. The extent of the errors of law in the Common Issues Appeal reinforce that the Recusal Appeal is one of substance not just form. The Common Issues Appeal makes clear that the Managing Judge has not made a trifling error for which he should not be recused and lays out the full extent of the flaws in his reasoning and helps justify (publicly and to the Court) why Post Office has sought the

sanction of recusal. The Common Issues Appeal therefore makes a recusal more likely.

- This will be the most efficient use of resources. One hearing will always take less work and cost less than two separate ones, which will benefit both parties and be attractive to the Court of Appeal.
 - Even if the Recusal Appeal receives the Court of Appeal's permission and goes forward separately and quickly, the litigation could not be fully re-started (if re-started at all) before the Common Issues Appeal was determined.
 - We anticipate that the Claimants may want the two appeals heard together. Their principal argument against recusal is that the Common Issues Judgment, and the Managing Judge's approach in it, was correct. They will therefore want to argue that the Common Issues Judgment should properly be the subject matter of the any appeal.
42. A further benefit of joining the appeals is that they are not likely to be heard before the Autumn which creates a window for mediation and settlement discussions over the Summer. Although settlement can be discussed at any time, the present litigation timetable is densely packed with the Horizon trial due to continue in June and July and Trial 3 still currently scheduled to start in November 2019. This will strain the Claimants' resources and may restrict their lawyers' ability to engage in settlement discussions. A combined appeal should (but this is not guaranteed) lead to all other activity in this litigation being paused, freeing the Claimants up to focus on settlement over the Summer. The Claimants appear to be open to this, having sought to push further court activity (including completion of the Horizon Issues trial) back until the Autumn (they have also previously refused to mediate where that overlapped with their preparations for the Horizon Issues trial).
43. The alternative view is that Post Office does not proactively seek to have the appeals heard together (which is in any event a case management issue for the Court of Appeal to determine). Reasons why Post Office may want to hold the appeals separately include:
- the Recusal Appeal concerns a very sensitive subject, which may influence how the Court of Appeal approaches the otherwise more objective legal issues in the Common Issues Appeal (the outcome of which is of greater operational significance for Post Office);
 - Post Office may be able to test how the Court of Appeal assesses its case and conduct of the litigation in the Recusal Appeal, applying any "lessons learned" to a subsequent Common Issues Appeal;
 - it avoids any suggestion that Post Office is looking to delay the Recusal Appeal by joining it with the Common Issues Appeal so that it can delay the Horizon trial; and
 - it avoids a possible criticism that by joining the two appeals together the immediate next step in this litigation (a joint appeal) is more expensive and that Post Office are promoting this as a tactical step to put the Claimants under financial pressure (although the overall cost should be cheaper than two separate appeals in the long run).
44. The potential consequences of the Appeals being heard separately include:

- if the Recusal Appeal is successful and the Managing Judge is recused, a new Managing Judge will be appointed, but will be unlikely to make any further directions for the subsequent conduct of the litigation until the Common Issues Appeal is resolved, given its relevance to issues in dispute overall; or
- if the Recusal Appeal is rejected, the Managing Judge can be expected to continue with the existing timetable for Trials 3 and 4 on the assumption that his findings in the Common Issues judgment are correct, even though many of the issues in those trials will be affected by the outcome of a Common Issues Appeal. The work done for those trials would therefore be wasted if the Common Issues Appeal alters the Managing Judge's findings in the Common Issues judgment.

Options

45. Against the above background, Post Office has the following options for the future conduct of this litigation.
- (a) Appeal the Common Issues judgment so as to try to obtain a more favourable judgment and then use that as a platform to settle – whether or not through mediation (or potentially cause the Claimants to give up).
 - (b) Appeal the Common Issues judgment and then look to settle **before** the appeal is heard. The Common Issues judgment has put the Claimants in a stronger negotiating position and appealing the judgment will put this negotiating position at risk such that they may want to settle now.
 - (c) Do not appeal and offer the Claimants a very considerable settlement payment to stop the litigation now, before the Horizon Issues trial continues in June 2019, and then manage the impact of the Common Issues judgment through operational and contractual change. However to close out the litigation in that time frame would give Post Office no room to position or negotiate the settlement. We estimate that a payment in excess of £75m² would be required to settle the claims of the Claimants, however this will not address the claims of disgruntled postmasters outside the Claimant group, the size of which is unknown, but which could result in a similar if not greater liability, and there would be no cover to dissuade future claims. There is also no guarantee that a settlement could be achieved in this time period
 - (d) Do not appeal, wait for the judgment on the Horizon Issues and then seek to settle. The merits of this approach will turn on the outcome of the Horizon Issues trial. That trial should turn on the expert evidence which has not yet been heard but, if the Managing Judge is not recused, Post Office has a serious risk of another adverse judgment.
 - (e) Contest the litigation through further trials, until Post Office resolves all 557 individual cases or the Claimants' funding collapses. This would take

² £100k per Claimant plus at least £25m towards their legal and funding costs. This is significantly in excess of what we believe each Claimant is actually entitled to. The recovery to the Litigation Funders (Therium) would be included in this overall amount.

years of further litigation, risk further adverse judgments and reinforce the impression that Post Office is an overtly aggressive organisation. This is an unattractive option but it is included for completeness.

Recommendations

46. The Post Office legal team recommends Option A. In parallel, Option B should be explored with the Claimants so to better understand the settlement range and to keep open the possibility of an earlier settlement.
47. If Post Office does appeal the Common Issues judgment, it will also need to consider the scope of the appeal and how it is progressed alongside the Recusal Appeal. For the reasons stated above, it is recommended that the Common Issues Appeal is conducted in a legally coherent manner, which would mean minimising concessions and seeking for it to be joined with the Recusal Appeal.
48. The Common Issues judgment made astringent criticisms of Post Office and left a bad impression of the business. A successful recusal of the Managing Judge and/or a successful Common Issues Appeal will mitigate some of that harm by showing that Post Office was the recipient of poor judicial decision making. However, if the appeals go against Post Office, it may reinforce the message that it is a litigious/aggressive organisation. The legal team will therefore be instructed to avoid polemic language wherever possible but ultimately an appeal is, by its very nature, a criticism of a Judge's work.
49. Post Office must therefore determine whether it is more important to achieve the right legal outcomes in the interests of the business, as against the tonal risks of being seen to be aggressive in the way it conducts the litigation or engages with the Managing Judge going forward should he not be recused. Arguably these risks have already crystallised in the Common Issues judgment and Post Office has already taken the more emphatic step of seeking the Managing Judge's recusal. In comparison, appealing the Common Issues judgment, if done with care and sensitivity, is a reasonable course of action.
50. The Board sub-committee is requested to:
 - a) Approve the making of the application to appeal to the Court of Appeal in respect of the Common Issues judgment;
 - b) Approve the scope of the Common Issues Appeal as set out in the Appeal Table in the Reading Room;
 - c) Approve the proposal that we request the Court of Appeal to hear both appeal applications together.
 - d) Note the proposals to explore a settlement with the Claimants, subject to the Post Office legal team reverting to a separate meeting with a more detailed outline of the options.