

## Post Office Limited

### Postmaster Litigation Subcommittee Agenda



<b>Date:</b>	<b>17 September 2019</b>	<b>Time:</b>	<b>10.00 – 11.00 hrs</b>	<b>Location:</b>	<b>1.19 Wakefield and by telephone</b>
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<b>Present:</b>		<b>Other Attendees:</b>		
<ul style="list-style-type: none"> <li>• Tim Parker (Chairman) (by phone)</li> <li>• Ken McCall (Senior Independent Director)</li> </ul>		<ul style="list-style-type: none"> <li>• Tom Cooper (Non-Executive Director)</li> <li>• Nick Read (Chief Executive Officer)</li> <li>• Ben Foat (General Counsel)</li> <li>• Andrew Parsons (Womble Bond Dickinson)</li> <li>• Catherine Emanuel (Herbert Smith Freehills)</li> <li>• Richard Watson (General Counsel – UKGI)</li> <li>• Alasdair Cameron (Chief Financial Officer)</li> <li>• Veronica Branton (Company Secretary)</li> <li>• Rodric Williams (Head of Legal – Dispute Resolution &amp; Brand)</li> <li>• Alan Watts (Herbert Smith Freehills)</li> </ul>		
<b>Agenda Item</b>		<b>Input needed/ Status</b>	<b>Lead</b>	<b>Timings</b>
1.	<b>Welcome and Conflicts of Interest</b>	Noting	Chairman	10.00 – 10.05 hrs
2.	<b>Minutes and Matters Arising</b> - 24 April 2019 - 12 June 2019 - 20 June 2019.	Approval	Chairman	
3.	<b>Updates on Court Activity (oral updates)</b> Common Issues Appeal a. Horizon Issues Judgment i. Protocol for distribution ii. Instructions on appeal b. Third/Further Issues Trial i. Counsel availability and selection	Noting and Discussion	Womble Bond Dickinson/ Herbert Smith Freehills	10.05 – 10.55 hrs
4.	<b>Settlement / Mediation (Draft Board Report)</b> a. Dates (inc. lawyers only pre-meeting with Freeths) b. Costs c. Settlement ranges, approvals and strategy	Noting and Discussion		
5.	<b>Claimant case reviews (oral update)</b>	Noting and Discussion	Herbert Smith Freehills	
6.	<b>Any other business</b>	Noting	Chairman	10.55 – 11.00 hrs
7.	<b>Date of next meeting:</b> 11.30 hrs, 22 October 2019	Noting	Chairman	

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**POSTMASTER LITIGATION SUBCOMMITTEE  
BOARD****2**

Minutes of a meeting of the Postmaster Litigation Subcommittee held on 24 April 2019

**Present:**

Tim Parker (by telephone)  
Tom Cooper  
Alisdair Cameron

**In attendance:**

Lord Neuberger  
David Cavender, QC  
Andrew Parsons (Womble Bond Dickinson)  
Kirsten Massey (Herbert Smith Freehills)  
Alan Watts (Herbert Smith Freehills)  
Ben Foat (Legal Director)  
Rodric Williams (Head of Legal)  
Veronica Branton (Head of Secretariat)

**Apologies** were received from Ken McCall, Senior Independent Director.

Alan Watts provided a summary of the key points from his paper.

**Questions and points raised:**

- it appeared to be that the appeal on the Common Issues judgment was stronger and more likely to succeed than the appeal on the recusal. Could co-joining the appeals taint our chances of success in seeking leave to appeal the judgment?
- a pause in litigation over the summer could be helpful as we considered settlement options
- there appeared to be significant advantages to not rushing work on the Common Issues appeal. We needed to focus on winning the key points that were important to the operation of the business.

David Cavender QC explained that we had minimal control over when the appeals would be heard but they were likely to be heard together if the appeal on the Common Issues judgment was filed swiftly. He saw the recusal of the Judge as the only way of protecting against adverse findings in the Horizon trial. The functioning of the computer system was at the centre of the dispute. If a finding from the Horizon trial was that the system was not robust it would undermine our position in all of the cases brought against us. The subsequent trials were linked to fact and it was very difficult to appeal on findings of fact. However, that did not take away from the importance of the appeal on the Common Issues judgment. If we were going to co-join the appeals at the permissions stage careful thought would be required on how to do this. DC thought there was a greater degree of overlap between the common issues and recusal appeals than Alan Watts' advice suggested. A separate ground of appeal was on the overriding procedural unfairness and the proposal that the case should not be returned to the Judge for trials 3 and 4 ("recusal light").

DC's view was that if we did not proceed swiftly we would lose the recusal appeal; he did not think that a compromise approach would work and we should be asking for the applications to appeal to be considered by three Leading Judges. The Horizon trial was critical. A draft Skeleton Argument setting out many of the grounds for appeal had already been produced. DC saw advantage in both appeals being heard together because it would show the overlap between the two appeals. Kirsten Massey noted that a counter argument to this was that if the appeals were heard together the CoA might refuse the recusal appeal because the appeal on the Common Issues judgment would allow a number of the same issues to be considered.

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**POSTMASTER LITIGATION SUBCOMMITTEE  
BOARD****2**

## Questions and points raised:

- what were the risks of co-joining the appeals and did we have the resources to submit the documentation required in time? DC reported that the resources required to deliver the documentation were available
- what risks would we face if we lost both appeal applications?

The Subcommittee requested Lord Neuberger's view of the situation and the options available.

Lord Neuberger reported that judges had been recused previously; he largely agreed with the position set out by DC. Both cases were likely to be heard together unless the court decided that the recusal should be dealt with quickly. It was more likely that the Horizon trial would continue if the two appeals were not considered together.

The matter was not black and white, but Lord Neuberger thought that when hearing the two appeals together the judges were more likely to give leave to appeal on all points raised in relation to the Common Issues judgment in order not to constrain the Court of Appeal (CoA). The recusal application was very different in some respects to the Common Issues appeal but there was still a fair degree of overlap.

If Lord Justice Coulson rejected the leave to appeal for recusal and the appeal on the Common Issues judgment found a number of points in our favour the CoA might then have a different view on recusing the Judge. Lord Fraser would have informed the CoA that an appeal was due to be lodged.

Lord Neuberger thought we were likely to obtain permission to appeal the recusal on grounds of apparent bias as the threshold for appeal was not very high. It would be very unusual not to give leave to appeal on the Common Issues judgment. Lord Neuberger thought that Lord Justice Coulson was likely to view matters in this light; on balance he thought it better for both appeals to be submitted together.

## Questions and points raised:

- that we needed to take a decision but the case was not clear cut
- that we had little control on when and how the appeal cases would be heard. Further work was needed to determine the grounds for appeal sufficiently well. In addition, Ministers needed to be briefed properly on the issues. Seeking a settlement could be time consuming so a long appeal could be advantageous. It might, therefore, be better to have the hearings separated and we should not co-join the appeals if that gave us no scope to separate the hearings.

Following detailed discussion, the Subcommittee **AGREED**:

- that the appeals for recusal and on the Common Issues judgment should not be co-joined
- we should write to Lord Justice Coulson to advise that we would be submitting the grounds to seek leave to appeal the Common Issues judgment on 16 May 2019
- a meeting would be arranged in the week beginning 29 April to consider the grounds for appeal.

**POSTMASTER LITIGATION SUBCOMMITTEE  
BOARD**

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Minutes of a meeting of the Postmaster Litigation Subcommittee held on 12 June 2019

**Present:**

Tim Parker (Chairman) (by telephone)  
Ken McCall (by telephone)  
Tom Cooper  
Alisdair Cameron

**In attendance:**

Kirsten Massey (Herbert Smith Freehills)  
Ben Foat (General Counsel)  
Rodric Williams (Head of Legal)  
Veronica Branton (Head of Secretariat)  
Andrew Griffin (Deloitte) (Item 5.)  
James Drummond (Deloitte) (Item 5.)

**1. Horizon Trial Update****Action**

Ben Foat provided an update on the Horizon Trial which had resumed on 4 June 2019 and was hearing expert evidence. There were important areas of agreement between the experts, including that the Horizon system was relatively robust and that the range of bugs identified in the system was between 12 and 29.

Last week our QC had been cross examining the claimants' expert witness. This had established that remote access of the system had happened rarely and that the actual number of bugs the expert could identify in the system was not clear.

Our expert had begun to be examined the previous day. The claimants' QC was seeking to challenge his credibility and had criticised his statistical analysis for lacking precision.

The claimants' QC continued to criticise Post Office Limited for inadequate disclosure and insufficient access to documents. New documents were being put in front of witnesses which allowed them to be entered into evidence.

The Trial would end on 2<sup>nd</sup> July 2019 and the Judge would determine which expert witness he preferred on the basis of fact. While it was unlikely that the Judgment would be published until the Autumn we were planning for the possibility of it being published in July 2019.

**2. Common Issues Appeal**

Kirsten Massey provided an update on the Common Issues Appeal, the papers on which had been circulated to the Subcommittee on 7 June 2019.

The grounds to be submitted on appeal had reduced from 55 pages to 8 pages. Helen Davies' QC (HD) had made a number of recommendations, including that we did not appeal any of the Judge's factual findings or raise points of procedural unfairness which could retrace the grounds of the recusal application. Relational contract and procedural fairness points would be the focus of our appeal. HD had also suggested that we remove the ground relating to the training of assistants and the ground on reasonableness terms as well as the procedural unfairness ground relating to onerous and unusual clauses because POL would not be able to prove that all NCT Sub postmasters had signed their contracts.

A number of points were raised, including:

- that we should be clear that we were not seeking to defend any clauses within the contract that we did not think defensible, even if we agreed that they were not onerous or unusual provisions. It was noted that the main issue would be whether or not the clauses had been enforced. TC requested an analysis of the enforcement, in practice, of contract clauses that it had been argued could be viewed as "onerous or unusual" and where Sub postmasters might not have seen their contracts
- whether there were any case precedents we could look to in relation to onerous clauses. It was reported that there were other relevant cases but that our focus would be on enforcement of contract clauses in practice.

**Executive**

The Subcommittee **APPROVED** the submission of the grounds of appeal on the more limited basis discussed at the meeting.

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**POSTMASTER LITIGATION SUBCOMMITTEE  
BOARD****2****3. Kelly Tolhurst meeting and Litigation Strategy**

Al Cameron provided an overview of the primary objectives for the discussion with the Minister on 24 June 2019:

- we would acknowledge that our approach to the litigation had been flawed, that we had changed our approach and that this was evidenced by our revised approach to the appeal on the Common Issues Judgment and our new legal Counsel. We were looking at settlement options
- Government would like to see information on costings for settlement. This would be discussed at the meeting including thoughts on the potential range for settlement, while noting the inherent uncertainty in the absence of a figure in relation to quantum from the claimants' solicitors.

The information received to date on potential costs was discussed. It was reported that individual claimants had provided a schedule of information in which they had set out their estimated losses, which Womble Bond Dickinson (WBD) held. Previously, the Subcommittee had only been aware that we held information for the 140 cases which had already gone through mediation. Previous discussions at ARC around disclosure of figures in the Annual Report and Accounts (ARA) for 2017/18 and in prior years were raised and it was **AGREED** that WBD should be asked to explain the position to the Subcommittee. It was noted we had not held information on the probable economic output from the litigation because there had been no crystallisation of the liability or quantum of figures received from the claimants' solicitors. The position would be different for 2018/19 because of the Common Issues Judgment and points on which we had lost which meant that the claims were not without merit.

RW to  
advise WBD

The disclosures on the litigation and inclusion of a provision in the ARA for 2018/19 were discussed, including whether we should include a provision figure if we were planning to go into settlement negotiations. Inclusion of a modest figure could signal our willingness to seek to settle where we had been at fault but also indicate that we would be testing the legitimacy of each of the cases. It was felt that we needed to be very careful about including a provision and the basis for this given that we were in an appeal process and that the claimants' QC would refer to the provision as an acknowledgement of liability. It was noted that the figure of £90m in relation to a potential settlement was in the public domain. It was **AGREED** that AC would come back to the Subcommittee with more detail on the range of potential settlement figures and the criteria for including cases for consideration for settlement. RW noted that it was important that we segregate the criminal justice system and civil litigation case streams.

AC

It was noted that the ARA was likely to be signed towards the end of July 2019.

**4. Operational Work stream Update**

Ben Foat reported that in parallel with the litigation work operational transformation work was taking place. We were reviewing whether all of our processes were fair and reasonable, including those for losses and suspension. Processes were being mapped end to end and policies were being reviewed.

A table was being produced for the July Board meeting which set out the processes that had been in place, the processes that would be implemented (where changed), how changes had addressed the trial points and the communications surrounding this. Changes proposed may not have been implemented by July 2018 as a programme of training, implementation and monitoring would be required.

A number of points were raised, including:

- whether the table would include a commentary on losses, processes for dealing with losses and which elements Postmasters were responsible for and which elements PO Limited? It was reported that this information would be included
- a quarterly update for ARC and/ or Board was requested on how the transformation work was being implemented and how it was working in practice.

Executive

**POSTMASTER LITIGATION SUBCOMMITTEE  
BOARD****2****5. Horizon Contingency Update & Plan**

AC described the context for the Horizon Contingency planning work and the focus on providing reassurance to Postmasters. From late July 2019, a two to three month programme of work would be taking place to address the chief concerns of Postmasters, including remuneration. We would be reversing reductions in remuneration that were associated with the simplification programme and would be implementing improvements to Horizon, including enabling the same till to be used for Horizon transactions and retail transactions, and rolling out Branch Hub.

Committee Members raised the importance of real connections and conversations with people. It was agreed that this was vital and would be supported by the new field network and the Communications Team would be making sure that everyone had the 10 or so central messages we wished to communicate to assist those one-to-one conversations.

Andrew Griffin and James Drummond from Deloitte joined the meeting and provided an update on the Horizon contingency planning work. The Deloitte team was supporting POL's operational readiness to respond to the impact of an adverse Horizon trial. This included looking at what our response needed to be in the coming weeks; the impact of the worst case scenario and the strategic response to this; the "new normal" position and the day one readiness response. Potential business impacts and what could be done to mitigate these ahead of time was a particular focus. The range of impacts from a reputational, political, regulatory and business perspective were all being considered.

It was noted that how we handled complaints and the processes we had in place was critical. There was danger that the Managing Judge would find that our processes or our accounting system were not fit for purpose which was more likely than finding that the Horizon system was unfit for purpose given the views of the expert witnesses.

**6. Date of next meeting**

A date would be sought for the next Subcommittee meeting.

Chairman..... Date.....

## POSTMASTER LITIGATION BOARD SUBCOMMITTEE

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**Minutes of a meeting of the Postmaster Litigation Subcommittee held on Thursday, 20 June 2019  
at Finsbury Dials, 20 Finsbury Street, London, EC2Y 9AQ at 16.30**

**Present:**

Tim Parker (Chairman)  
Ken McCall (by telephone)  
Tom Cooper  
Alisdair Cameron

**In attendance:**

James Drummond (Deloitte)  
Ben Foat (General Counsel)  
Andrew Griffin (Deloitte)  
Andrew Harding (Womble Bond Dickinson)  
Elizabeth Hallissey (Senior Assistant Company Secretary)  
Andrew Parsons (Womble Bond Dickinson)  
Tony Robinson QC (*Minute 1*)  
Alan Watts (Herbert Smith Freehills)  
Rodric Williams (Head of Legal)

**1. Horizon Trial Update****ACTION**

Tony Robinson QC provided an update on the Horizon Issues Trial, which had restarted on 4 June 2019. He had been asked to provide a review of the trial and his opinion on the likely outcome.

Tony Robinson explained that the cross examination of the Claimants' expert witness had gone well and it had become clear that the documents did not say what the expert witness had claimed. However, there had also been issues with Post Office witnesses and one witness in particular, the Chief Architect of Horizon, could be perceived as not credible to the court after he gave evidence. This was an issue as he was a central witness from Fujitsu. Fujitsu had also provided information used by Post Office at a Parliamentary Select Committee a number of years ago to confirm that there was no remote access to Horizon, which was incorrect.

The Committee discussed the stance and behaviour of the Judge towards Post Office witnesses throughout the trial.

The Claimants' expert witness had agreed that the Horizon system was robust. However, he had displayed bias against Post Office in his evidence. The Committee discussed the evidence given by Post Office's Expert Witness and Tony Robinson explained elements of his evidence could have given the impression that he had not thoroughly investigated the Horizon issues and that the data in his report was unreliable, with imprecise calculations.

Further to questions from the Chairman, Tony Robinson explained that an objective judge would see that the Horizon system was robust and reliable almost all of the time. Both expert witnesses were unsatisfactory but the documents demonstrated the reliability of the system. However, he cautioned that preparations should be made for a similar judgment to the Common Issues Trial. It remained difficult to predict the judgment due to the abstract nature of the case. He expected the Judge to criticise Post Office but find that each individual Claimant's case should be assessed on its own merit, because, although there is insufficient evidence to suggest that the system was not robust, the Judge could not say it worked perfectly at all times in all cases.

*Tony Robinson left the meeting.*

## POSTMASTER LITIGATION BOARD SUBCOMMITTEE

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2. Deloitte – Day 1 Readiness Update

ACTION

The report, which was tabled at the meeting, was noted and James Drummond and Andrew Griffin provided an overview of the progress of the project to date, including the identification of business impacts of likely and worse-case legal scenarios. Next steps included validating the response and mitigation suggestions with operational units, supporting individual units through a focused planning process, defining the 'new normal' for the business and developing rehearsals before the judgment.

An update on the emerging themes was provided. There were four impact areas identified including postmaster relations, Horizon compliance, political and regulatory and commercial partners. Each of these impact areas had sub-sections and there were 32 different impacts. A mitigation and response plan had been drafted and there were 39 activities across the business which included back office resourcing, stakeholder engagement and additional training. It was planned that all mitigation work would be on track for completion at the end of July 2019. In 2 weeks a planning process would commence to understand the commercial and regulatory potential breaches, and how to mitigate these risks and remain as compliant with third party contracts as possible, following receipt of the final judgment.

In response to questions from the Chairman, James Drummond explained that there would be an initial communication to current Postmasters to explain a new collaborative communication channel to discuss Horizon questions. There would then be a longer term 3 month communication plan. The Chairman said it was important to ensure that a bigger issue was not inadvertently caused with Postmasters that did not exist. Postmasters generally thought that Horizon was reliable and there had been little coverage to date of the trial. Ken McCall agreed and suggested that the communications should focus on increased support to Postmasters with an easier communication process. The Committee agreed that it was important to keep the communications positive on how the vital system operated.

Alisdair Cameron added that it would be more useful to provide examples and answers of frequently asked questions in order to further help Postmasters use the Horizon system effectively.

In response to a question from Tom Cooper, Andrew Griffin said that the essential mitigation work included ongoing Postmaster relationships and proactive communication. Tom Cooper highlighted that if additional resources and capacity were required to change processes, this would be more difficult than the communication activities. Alisdair Cameron explained that work had already commenced to update processes.

Ben Foat explained that a report was due to be submitted to the Post Office Limited Board in July 2019 that provided details of an old process against the updated process. It would enable clarity on improvements made to processes that may be directly referenced in the judgment. The Chairman highlighted the importance of a defensible, sustainable reconciliation process that would meet the directions of the judgment.



## POSTMASTER LITIGATION BOARD SUBCOMMITTEE

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**3. Common Issues Judgment Appeal**

ACTION

The Skeleton Argument outlining the basis of appeal would be amended and re-submitted by 27 June 2019 in accordance with the Court of Appeal's order of 18 June 2019. There was no further update.

**4. Claimants' Schedule of Information**

The Committee discussed the Claimants' schedules of information. The Chairman asked for an explanation as to why the Post Office Limited Board had not been made aware of the schedules in 2017. Andrew Parsons said that the schedules had been submitted to court in mid-2017 for the first 198 Claimants. Further claimants were added and the schedules re-done with the final schedules received at the end of 2017. The schedules included financial claims totalling £224 million. This figure had not been communicated to the Post Office Limited Board.

Andrew Parsons said that he had not been aware that the Board had not received the information contained in the schedules, including the total value of the financial claims. He had not provided this information when asked about a claim estimate when discussing the requirement for a provision in the statutory accounts as this estimate was widely understood to be inaccurate and unreliable, and he thought this information was known within Post Office. The Committee discussed that last year's statutory accounts would not have required a provision, but the position had now significantly changed due to the trials held in November 2018 and March 2019. The chairman expressed dissatisfaction at the assumption that the Post Office Limited Board had all the required information, and noted that approaches may have been changed with the additional information.

Andrew Harding said that a rolling brief would be sent regularly to the Sub-Committee in the future to ensure that no information was assumed. Tom Cooper requested information on the breakdown of the claimants including those that had been previously prosecuted. Appropriate remediation actions could not be agreed without all the facts.

WBD/HSF

**5. Report and Accounts**

Alisdair Cameron reported that a meeting with the Company's external auditors, PricewaterhouseCoopers (PwC) had been scheduled for the following week to discuss the requirement for a provision in the FY 2018-19 report and accounts related to the ongoing Postmaster Litigation.

Following further discussion, it was agreed that a separate meeting was required to determine the requirement for a provision whilst the trials continued and to discuss the impact of a provision on any future mediation. The meeting with PwC would be delayed, up to 10 days, until these elements had been discussed by members of the Sub-Committee.

AC

**6. Next Meeting**

The arrangements for the next meeting would be agreed and circulated to all attendees.

**POSTMASTER LITIGATION BOARD SUBCOMMITTEE**

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There being no further business, the meeting ended at 17.35.

Chairman..... Date.....

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POST OFFICE BOARD  
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# Group Litigation Update

Author: Ben Foat/Rodric Williams

Sponsor: Ben Foat

Meeting date: 24 September 2019

## Executive Summary

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### Context

We are currently awaiting the High Court's judgment on the Horizon Issues Trial. We expect to receive this any time between mid-September and late October 2019.

There will be a hearing in the Court of Appeal on 9 October 2019 to determine Post Office's application for permission to appeal the Common Issues Judgment. The Court of Appeal's judgment on this will follow shortly after the hearing.

Assuming these judgments are received within this timeframe, mediation to explore settlement with the Claimant Group is likely to take place in mid-November 2019.

In accordance with the legal strategy set out in the July Board paper, this report sets out the potential financial ranges of a settlement and the approvals which may be required, so that Post Office's representatives have delegated authority to settle in accordance with the Board's instructions.

### Questions addressed in this report

1. What is the update on the contingency planning?
2. What are the preparations for settlement and mediation?
  - a. What are the potential financial ranges of settlement?
  - b. What level of authority should Post Office have for mediation?
  - c. What formal approvals will be required?
  - d. What is the proposed strategy for mediation and do we have the right resource to manage the mediation?
  - e. If the litigation is settled, how could Post Office treat claims from postmasters who are not claimants?
3. What are the next steps?

**NOTE:** This paper and the privileged and confidential legal advice it contains is based on advice prepared for Post Office by Herbert Smith Freehills LLP (HSF) (attached in full at **Appendix 6**). The advice will be updated following receipt of the Horizon Issues and appeal decisions given the material impact they could have on Post Office's position.

### Conclusion

As matters currently stand:

1. A detailed Contingency Plan is now in place with a Rapid Response Team stood up to manage the execution of this plan. The 'detection' and 'response' processes which

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the plan is reliant upon are now being finalised, baselined and stress tested to understand what level of uplift against baseline levels these processes and the business can withstand.

2. A reasonable outcome would be to settle with the Claimant Group (excluding those who have been criminally convicted) within a range of **£45m - £65m**.
3. For strategic reasons, Post Office should enter mediation with settlement authority of **£40m - £45m**, with a process for obtaining authority above that range during mediation if that would facilitate settlement at an acceptable level.
4. There is a real prospect that settlement will not be available at an acceptable level at the first mediation. Unrealistic expectations from the Claimant Group can however be managed strategically to help achieve a deal further down the line.
5. There is merit in developing an alternative approach for dealing with the 61 convicted Claimants. They have therefore been removed from the settlement calculations.
6. A reactive rather than proactive remediation-style approach can be taken to claims from non-Claimant SPMs.
7. In addition to preparing for mediation, the 9 October 2019 Court of Appeal hearing, and for receipt of the Horizon Issues judgment, we are continuing pre-trial preparations for the third, "Further Issues" trial scheduled for March 2020 to address the legal basis for the Claimants' claims for financial compensation.

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### Input Sought

1. The Board is asked to approve the approach outlined in this paper. The Board will be asked to consider (and if appropriate approve) final settlement numbers by way of an updated paper closer to the mediation date.

### Input Received

2. Our internal and external (HSF) legal teams have approved this paper.

The Board is asked to exercise caution when communicating about potential levels of settlement. The Court of Appeal recently held that written communications (emails) between Board members concerning settlement of a dispute were not privileged from disclosure (*West Ham v E20 Stadium LLP* [2018] EWCA Civ 2652. Post Office would be materially disadvantaged if settlement numbers or strategy were to be disclosed to the Claimant Group. **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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## Contingency Planning

Not underestimating the potential operational, reputation and commercial implications a negative outcome of the Horizon Issues Trial could have for the Post Office, we engaged Deloitte (the risk advisory team which has relevant experience in crisis preparedness and response work) to work with key business area owners to prepare an effective immediate and short-term response to stakeholder reaction to the Judgment. The work to date has included:

- defining worst-case, medium-case and best-case scenarios
- identifying the key stakeholders (Postmasters, Government & Regulators, Commercial & Retail Partners and Customers)
- identifying potential stakeholder reaction to the trial outcome and assessing the operational, reputational and commercial impact of those reactions
- preparing the business response to those likely impacts by identifying and impact assessing business as usual processes; introducing new impact detection processes (eg branch closure monitoring); designing new processes where BAU processes were not adequate for the worst-case scenarios; and putting mitigation plans in place where possible to minimise the impact.

Ultimately, the response from Day One (the day the judgment is handed down) will be determined by what the Horizon Issues Trial Judgment (the Judgment) actually says and how our stakeholders react to it. The output of our work ahead of the Judgment is the Operational Response Plan (available in the 'reading room') which details the business response to stakeholder reaction to the Judgment with the ultimate aim of continuing to maintain business operations and provide service to our customers as normally as possible. This is underpinned by a Communication Strategy and extensive Comms collateral designed to address worst, medium and best case scenarios<sup>1</sup>. This material has been prepared with business area owners, undergone legal review by WBD and HSF and is currently undergoing a further 'tone' review by Lexington.

A Rapid Response Team (RRT) has been established to manage the stakeholder, and execute the Post Office, response to the Judgment. The RRT will be invoked on Day One (preparatory sessions already completed) and will run daily (until deemed no longer required) to coordinate and manage the organisation-wide response to the Judgment, escalating key decisions to the Group Executive as appropriate, collating and distributing business impact information and providing daily update briefings.

## Mediation and Settlement

### *Potential Settlement Range*

HSF's settlement range of **£45m - £65m** has been derived from a detailed analysis of the Claimant Group's claims, and reflects: (a) the quantified claim value; (b) HSF's assessment of the potential legal recoverability of the claims; and (c) the Claimants' anticipated expectations based on their funding arrangements.

<sup>1</sup> E.g. wide-spread, coordinated branch closures across the network; increased non-compliance with branch cash declarations; adverse impact on trading relationships with commercial partners; loss of stakeholder trust in Post Office.

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When assessing a settlement value, the Board can also factor in its risk appetite for inherent uncertainties in the litigation (e.g. that the Claimants better quantify or evidence their claims as the litigation progresses), likely legal costs going forward, reputational and operational considerations (including the operational impacts of the Common Issues judgment), and Post Office's commercial position overall.

The key ranges can be summarised as:

<b><u>Claim Value (£m)</u></b>	<b><u>High End</u></b>	<b><u>Low End</u></b>
<b>Schedules of Information</b>	205.6	
All Claimants		
No convicted, settled or assistant Claimants		122
<b>Additional Funding Costs</b>	108.9	
Costs to May 2020; 4x multiplier		
Costs to November 2019; 3x multiplier		75.9
<b>Recoverable through Court if case proved</b>	42.6	
No convicted claimants; 24 month cap on post-termination losses		
No convicted, settled or assistant claimants; 12 month cap on post-termination losses		22

The figures underpinning HSF's analysis are set out in the table at **Appendix 1**, and discussed further below.

#### *Total claim value*

There are currently 551 Claimants. Their quantified claims as stated in the "Statements of Information" filed in the litigation total **£205.6m**. They also advance a number of quantified claims (e.g. for personal injury, stigma damages, harassment) which could increase this figure as the case proceeds.

Three categories of Claimant can however be excluded:

1. Convicted Claimants - 61 Claimants have been convicted in the criminal courts, typically for fraud, theft or false accounting, often following a guilty plea. HSF recommend that Post Office deal with convicted Claimants separately (see "Strategy" below).
2. Assistants to SPMs - 28 Claimants were assistants, whom the Common Issues Judgment acknowledges have no contractual claims against Post Office. Although they may also have non-contractual claims, these are difficult to establish as they have not yet been set out, but are likely to be modest given the small number of assistants and the difficult legal requirements for these claims. HSF therefore consider Post Office is justified in excluding them from any settlement.
3. Settled Claimants - 147 Claimants have been identified as having entered into previous settlement agreements with Post Office, either under the Mediation Scheme or Network Transformation. Post Office can argue that those Claimants should give credit for (at least some of) the payments received, which currently total £5,679,909. Further work is ongoing to identify the total credit.

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Excluding these Claimants' claims reduces the stated claims value to c. **£122m**.

*Potential Quantum / Recoverability*

HSF considered the law on recoverable losses and the (principally financial) data Post Office holds, and assess the Claimants' potential recoverability if successful at trial to be between **£22m** and **£42.6m** before interest.

The significant drivers for this range are:

- The verification (with some assumptions) of the Claimants' numbers;
- The exclusion of settlement payments, assistant claims and claims of convicted parties;
- Limiting to 12 – 24 months the period for which Claimants can claim losses following termination of their Post Office contracts;
- Disallowing claims for both loss of earnings and loss of investment as a likely double recovery; and
- Making no or limited allowance for the more speculative unproven heads of loss such as personal injury, stigma damages and harassment.

This assessment should not be treated as prescriptive given the Claimants have not yet articulated their individual claims or had them tested. Instead it provides parameters to guide thinking on settlement levels at this stage of the litigation.

*Impact of the Claimants' Funding Arrangements*

The Claimants' settlement expectations are unlikely to be driven by strict legal analysis. We anticipate they will want their full funding costs (typically a multiple of costs invested), even if not legally entitled to it, and for each Claimant to receive a meaningful recovery.

Although we have no information about the Claimant Group's funding arrangements, based on experience we estimate they may look to recover **£75.9m - £90.9m** for their legal costs and expenses at settlement in November 2019, increasing to **£90.9m - £108.9m** at settlement in May 2020 after the third trial.

If each Claimant were also to recover between £10,000 and £50,000, the settlement range would increase to £81.4m - £118m at November 2019, or £96.4m - £136.7m at May 2020 (see the "Funding Costs" table at **Appendix 2**).

*Factors which may justify paying a premium for settlement*

Given the delta between Post Office's anticipated legal liability (£22m - £42.6m plus interest) and the Claimant Group's anticipated settlement expectations in November 2019 (£81.4m - £118m), Post Office will need to assess whether it is in its best interests and indeed willing to pay more than the potential recoverability at trial to settle the litigation.

Subject to the sums involved, factors which justify paying a premium to settle include: (a) the risk that the Claimants improve their cases or increase their claims as the litigation proceeds; (b) assumptions in HSF's analysis may prove to be optimistic; (c)

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the litigation is costly to run and diverts resource from the core business; and (d) the litigation may damage Post Office's reputation.

#### *Settlement authority for mediation*

Under its current Articles of Association,<sup>2</sup> Post Office requires shareholder approval to enter into a transaction which involves making a payment or incurring a liability in excess of £50m, or if it requires certain borrowing. Extracts from the relevant sections of the Articles are set out in **Appendix 3**.

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Shareholder approval is required to approve the terms of any settlement which involves a commitment to pay over £50m, irrespective of how the settlement is financed. The shareholder advises us that it will in turn require approval from HM Treasury for any such settlement.

Whether Post Office would need shareholder approval to fund a settlement (at any level) will depend on whether Post Office can do so without incurring new borrowings:

- If Post Office could fund a settlement by utilising its existing facilities, principally the headroom under Post Office's £950m working capital facility, no borrowing approval would be required. (There is also a £50m short-term committed facility provided by BEIS - presently undrawn - which could potentially be used to bridge into other financing but use of this facility for the purpose of funding a settlement would need to be explored further.)
- Whether Post Office can access sufficient funding from its existing facilities will need to be judged at the time. In its budgeted figures, Post Office projected the security headroom under its working capital facility (the true constraining factor) to be £149m at the end of P7. This improves slightly through to the end of the year but does not go above £200m.
- If Post Office needs new borrowings to fund a settlement (at any level), shareholder approval would be required under Article 11.1(S)(a)(iii). Any such borrowings would likely take the form of a market-rate loan from BEIS. As such, in addition to the approval required under the Articles, time would need to be factored in for putting any such facility in place.

The formal approvals process prescribed by the Articles requires the hand delivery of a written notice containing sufficient information for the shareholder to evaluate the matter being proposed (Article 11.2). That process can be streamlined if the special shareholder gives written consent.

We therefore propose agreeing a process by which (a) the shareholder is briefed on settlement ranges so that any necessary approvals can be given in short order; and (b) approvals in connection with settlement can be sought and given less formally via email.

<sup>2</sup> New Articles are being considered but appear unlikely to be finalised by November 2019.



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HSF advise against seeking and obtaining formal shareholder approval above £50m prior to mediation as it could undermine Post Office's negotiating strategy and position:

- The Claimants will be aware of the £50m government approval threshold - it is in Post Office's Articles (which are public) and they have expressed interest in the scope of government involvement in settlement.
- If they know that Post Office has that approval, they will infer that Post Office (a) is prepared to spend at least £50m to settle (i.e. it sets the floor); and (b) has access to government's substantial resources (i.e. there is no ceiling).
- Post Office is however looking to set more reasonable expectations at mediation by putting forward a compelling case that legally the claims are worth substantially less than £50m.
- Post Office can use the approvals process for leverage at mediation, e.g. because it involves senior external parties and scrutiny, Post Office should only go through it to close a deal, and not just to bring another party's deep pockets to the negotiating table (which the Claimants will want to do).
- There is also a risk that the approval could become public (e.g. because the request for shareholder approval is not privileged). It could also be used to exert unwelcome pressure through a public lobbying campaign.

HSF therefore recommend Post Office enter the first mediation with an authority limit within the power of Post Office's Board to approve – on present financial information perhaps **£40m - £45m**. A pre-agreed process will also need be put in place to facilitate rapid shareholder authorisation to settle above that figure if an acceptable settlement becomes available during mediation.

## Settlement strategy

Given that the Claimants' are likely to have an inflated view of the claim, the settlement negotiations must be approached strategically. Post Office will need to take a firm but highly credible position in the early stages if it is not to be driven to negotiate at unmanageable levels. Key to this will be the following:

- Post Office must cause the Claimants (and the mediator) to question the viability of their claims by challenging their legal basis (as influenced by the Horizon Issues and Common Issues appeal judgments), the need to establish liability, and the optimistic claims valuation;
- Post Office must put forward a credible and robust settlement number (HSF recommend starting at the lower end of the recoverability range, i.e. in the tens of millions);
- A significant financial jump should only be made if it would close a deal. That is because Post Office's best offer at mediation will set the floor for further negotiations. Determining when to make such a jump (if at all) will be a delicate matter, requiring judgment and, probably, help from the mediator.

The parties agreed in late January 2019 that Charles Flint QC will act as mediator. He was selected from a short list of recognised top-tier commercial mediators, having regard to the technical skills, energy and assertiveness likely to be required to resolve

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this complex dispute.<sup>3</sup> Our recommendations for who should attend mediation for Post Office, and why, will be discussed with the Board Subcommittee prior to the Board's October 2019 meeting.

In view of the anticipated size of the Claimants' funding commitments and the levels of success they have enjoyed to date, there is a very real prospect that settlement at an acceptable level will not be possible at the November mediation. If the November mediation is unsuccessful:

- we expect the mediator to continue liaising with the parties to try to achieve a settlement further down the line. Post Office's litigation strategy should therefore be designed to maximise pressure on the Claimant Group at these times (ideally the Claimants would be facing a trial on "difficult" individual test cases and/or appeal on the Common Issues Judgment);
- Post Office should also consider making "Part 36" settlement offers to each individual Claimant shortly afterwards to put pressure on them to settle and give Post Office a degree of costs protection going forward.<sup>4</sup>

#### *Strategy for Convicted Claimants*

A potential stumbling block at mediation will be the convicted Claimants. Given the sensitivity surrounding this cohort, seeking to "exclude" them, even on valid legal grounds, is bound to attract criticism and could frustrate the mediation process.

A better approach would require convicted Claimants to pursue their criminal law remedies to overturn their convictions (through the Criminal Cases Review Commission and/or criminal appeals courts) before entering the civil compensation process, while still offering them "something" in the context of a mediation.

Depending on the content of the Horizon Issues judgment and subject to specialist criminal law advice, that "something" could include Post Office offering:

- to assist the CCRC progress the 33 Post Office-related cases they are currently reviewing;
- to reimburse Claimants for the costs of successful appeals;
- to fund criminal appeals on an unconditional basis;
- to offer to settle with convicted Claimants for a value representing the costs of pursuing a criminal appeal;
- to "not oppose" certain Claimants' appeals as prosecutor;
- to support positively deserving appeals as prosecutor; or even

<sup>3</sup>Mediation is a consensual and confidential process. Either party can therefore end a mediator's appointment at any time (e.g. if they lose confidence in him/her), with the consequences typically confined to the costs incurred while they acted as mediator.

<sup>4</sup> Part 36 offers take their name from the section of the Court's Civil Procedure Rules which deals with this type of settlement offer.

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- a remediation program (with or without a settlement formula) for convicted Claimants who overturn their convictions.

This strategy effectively “leaves the door open” to a later settlement with any Claimants whose convictions are overturned. It does however have the disadvantage of not achieving finality through a settlement, leaving Post Office at risk of (potentially more substantial) compensation claims from this cohort further down the line.

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HSF nevertheless recommend this approach because:

- It is a principled approach: A claimant who has been wrongfully convicted can fairly say they deserve maximum compensation. Where however a claimant has been properly convicted, it is right for that conviction to stand.
- Criminal cases are dependent on their own specific facts: The cases cannot be treated all the same. It is therefore appropriate to filter these claims on a case-by-case basis, which the criminal courts will do.
- It is consistent with the civil law: Convicted Claimants should first pursue their complaints through the criminal courts and only then, if their convictions are overturned, pursue related civil claims through the civil courts.
- Prosecution cases are not representative of the wider Claimant Group: If the convicted Claimants have viable claims, they could be much more substantial, e.g. for stigma damage or malicious prosecution. Their cases should not therefore be used to drive up overall settlement values for the majority of Claimants, who were not prosecuted.

#### *Strategy for SPMs who are not Group Litigation Claimants*

HSF recommend that Post Office takes a reactive, rather than proactive remediation-style approach to future claims, because:

- the Group Litigation and its subject matter has already been the subject of a great deal of publicity, including two rounds of correspondence inviting participation in the case. It is therefore fair for Post Office to take the view that any postmasters with cause for complaint can (and have had ample opportunity to) take the initiative and come forward.
- settlement offers in the Group Litigation can include a contribution to the individual Claimant’s funding costs, with a cash settlement on top. Future claimants could therefore be offered “the same deal” at considerably reduced expense, given they will not have incurred the same funding costs.

#### Next Steps

An overview of the main court and settlement-related activity in Group Litigation through to October 2020 is set out in the “Group Litigation Timetable” at **Appendix 4**.

As well as preparing for mediation, between now and the end of October 2020 we are preparing to:

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- receive the Horizon Issues judgment, which we propose is managed in accordance with the protocol set out in **Appendix 5**;
- attend the Court of Appeal hearing on 9 October 2019 on permission to appeal the Common Issues Judgment;
- respond to the Claimants’ formal articulation of their claim for the third trial; and
- identify “test claimant” criteria for representative cases in the as yet unscheduled trials 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).

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# Appendices

## 1. Potential Settlement Range Table

	Value – lower end of range	Value – upper end of range	Per Claimant value
Quantified Claim Value	£205.6m	Risk factor in unquantified claims and fact that claims may be increased	£370,450
Recoverability – notice period only	£17m	£25.6m	£34,412 - £51,822
Recoverability – 12 months post termination losses	£22m	£33.6m	£44,534 - £68,016
Recoverability – 2 years post termination losses	£28m	£42.6m	£56,680 - £86,235
Recoverability – 3 years' post termination losses	£35m	£51.6m	£70,850 - £104,453
Funding Analysis as at November 2019 (plus 10k/claimant)	£81.4m	£118.7m	£164,777 - £240,283
Pay the Claim Analysis (Quantified Claim Value)	£109m	£205.6m	£196,396 - £370,450
(assumes 12 months post termination loss)			
Add back risk factors including: (a) that Claimants better quantify or evidence their claims; (b) risks around assumptions built into the model; (c) legal costs of continuing to litigate; (d) interest; (e) operational costs of supporting the litigation; (f) reputational risk; (g) benefits of Post Office being able to return to core strategic focus			
Potential settlement range	£45m - £65m		

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## 2. Funding Costs Table

	May 2015	November 2019	May 2020	December 2020
<b>Freeth's costs</b>	£12.6m	£15m	£18m	£22m
<b>CFA uplift (100%)</b>	£12.6m	£15m	£18m	£22m
<b>ATE insurance premium</b>	£5.9m	£5.9m	£5.9m	£5.9m
<b>Funding uplift – total range</b>	£37.8m – £50.4m	£45m – £60m	£54m – £72m	£66m – £88m
(a) Funding uplift – 3x multiplier	£37.8m	£45m	£54m	£66m
(b) Funding uplift – 3.5x multiplier	£44.1m	£52.5m	£63m	£77m
(c) Funding uplift – 4x multiplier	£50.4m	£60m	£72m	£88m
<b>Subtotal</b>	£69.8m – £81.5m	£80.9m – £95.9m	£95.9m – £113.9m	£115.9m – £137.9m
<b>Less £5m costs paid</b>	£64.8m – £76.5m	£75.9m – £90.9m	£90.9m – £108.9m	£110.9m – £132.9m
<b>Add individual Claimant recovery</b>	£5.5m – £27.8m	£5.5m – £27.8m	£5.5m – £27.8m	£5.5m – £27.8m
Scenario 1 – £10k/claimant	£5.5m	£5.5m	£5.5m	£5.5m
Scenario 2 – £15k/claimant	£8.3m	£8.3m	£8.3m	£8.3m
Scenario 3 – £20k/claimant	£11.1m	£11.1m	£11.1m	£11.1m
Scenario 4 – £25k/claimant	£13.9m	£13.9m	£13.9m	£13.9m
Scenario 5 – £50k/claimant	£27.8m	£27.8m	£27.8m	£27.8m
<b>TOTAL</b>	<b>£70.3m – £104.3m</b>	<b>£81.4m – £118.7m</b>	<b>£96.4m – £136.7m</b>	<b>£116.4m – £160.7m</b>

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### 3. Extracts from Post Office Limited's Articles of Association

#### 11. VARIATION OF SPECIAL SHARE RIGHTS

##### 11.1 Matters requiring consent

Notwithstanding any provision in these articles to the contrary (save for article 116 to which this article 11 shall be subject), each of the following shall be deemed to be a variation of the rights attaching to the Special Share and accordingly shall occur and be effective only with the prior written consent of the Special Shareholder:

- ...
- (O) the entry into or implementation of a relevant transaction by any member of the group which involves or is likely to involve (either individually or when taken together with all other related relevant transactions (other than any related relevant transaction previously approved under this article 11.1(O) entered into or implemented in the previous 12 months)) the incurrence of a commitment or liability, or the payment of a sum, by any member of the group which is an amount in excess of £50,000,000;
- ...
- (S) (a) the incurring of (or entry into of any commitment to incur) any borrowing by any member of the group in circumstances where the borrowing:
- (i) (1) individually; or
  - (2) taken together with the aggregate principal amount in respect of borrowings already incurred in the same accounting period without approval under this article 11.1(S); or
  - (3) if part of any series of related borrowings to finance a single investment, then taken together with the aggregate principal amount incurred in respect of such related borrowings
- exceeds £75,000,000; or
- (ii) is to be provided from any source other than another member of the Enlarged Group, the National Loans Fund or the Crown, save in respect of borrowings which are due from the Secretary of State, the Bank of England and (other) Monetary Financial Institutions, a Local Authority or a Public Corporation; or
  - (iii) if taken together with the aggregate principal amount outstanding of all money borrowed by the group from any source (excluding amounts borrowed by any member of the group from any other member of the Enlarged Group, other than amounts to be taken into account under article 11.1(S)(b)(v) below) exceeds an amount equal to the lesser of £2,000,000,000 and 2.5 times the aggregate of:

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- (1) the amount paid up on the issued share capital of the company; and
- (2) the total of the capital and revenue reserves of the group, including any share premium account, capital redemption reserve and credit balance on the profit and loss account, but excluding sums set aside for taxation and amounts attributable to outside shareholders in subsidiary undertakings of the company and deducting any debit balance on the profit and loss account, all as shown in the then latest audited consolidated balance sheet and profit and loss account of the group (or if consolidated financial statements are not prepared, as would have been shown in such consolidated financial statements had they been prepared), but adjusted as may be necessary in respect of any variation in the paid up share capital or share premium account or capital redemption reserve of the company since the date of that balance sheet and further adjusted as may be necessary to reflect any change since that date in the companies comprising the group;

....



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## 4. Group Litigation Timetable

	August 2019	Sept 2019	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
<b>Common Issues Appeal</b>			Oral hearing for Court determination of permission to appeal (9 Oct; decision to follow asap)		File additional documents with Court as required for appeal (if permission granted)							Likely window for hearing (if permission granted) Note: Court vacation August & September so unlikely appeal will be heard in these months.			
<b>Horizon Issues Trial</b>		Likely window for Horizon Issues Judgment		Hearing on costs of Horizon Issues trial											
<b>Further Issues Trial</b>	Disclosure (30 Aug)		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)	PTR (23 Jan)		Further Issues Trial (2-20 Mar)		Likely window for Further Issues Judgment		Hearing on costs of Further Issues Trial			
<b>Trial 4</b>				Agree selection criteria (27 Nov)								Likely window for Trial 4			
<b>Settlement</b>	Scoping settlement / initial engagement with Cs			Target window for first mediation		Window for possible second mediation									

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## 5. Horizon Judgment

Post Office proposes adopting the following protocol for the Horizon Issues judgment:

- i. Authority: Post Office's Postmaster Litigation Board Subcommittee ("Subcommittee") will be authorised to instruct Post Office's external legal team to seek permission to appeal the judgment when it is handed down, if so decided.
- ii. Trial Team Standby: the trial team is on standby to receive and consider the judgment immediately upon receipt from the court.
- iii. Initial Impressions: the trial team will immediately review the judgment to assess at a high level how Post Office has fared over all, and communicate this through the General Counsel and/or Post Office's external lawyers to the Subcommittee within 8 hours of receiving the judgment.
- iv. First Review: the trial team will undertake a more detailed review to identify areas of potential appeal, and within 24 hours of receiving the judgment report these through the General Counsel and/or Post Office's external lawyers to the Subcommittee.
- v. Consultation: the Subcommittee has the opportunity to consult the external legal team on any issue they require to inform their decision on whether to seek permission to appeal. This consultation can take place in person or by phone, with 48 hours of receiving the judgment
- vi. Instructions: the Subcommittee provides its instructions on whether to seek permission to appeal to the external legal team, such instruction to be delivered through the General Counsel and/or Post Office's external lawyers at any time prior to the judgment being handed down.

Appendix 6



HERBERT  
SMITH  
FREEHILLS

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**Draft: 13 September 2019**

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**ALAN BATES & ORS – V – POST OFFICE  
LIMITED**

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**ADVICE ON SETTLEMENT**

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Herbert Smith Freehills LLP



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## 1. **INTRODUCTION**

- 1.1 This note sets out our thoughts on settlement strategy in light of our further analysis of the heads of loss presently claimed in the GLO. It covers:
- 1.1.1 Timetable;
  - 1.1.2 Summary of workstreams;
  - 1.1.3 Preliminary thoughts on case theory;
  - 1.1.4 Comments on particular categories of Claimant;
  - 1.1.5 Comments on particular heads of loss and quantum verification;
  - 1.1.6 Settlement analyses, including:
    - (A) Ground-up recoverability analysis;
    - (B) "Better off paying" analysis;
    - (C) Funding-driven analysis; and
    - (D) Recommended way forward.
  - 1.1.7 Authorisations required pursuant to Post Office Limited's Articles of Association;
  - 1.1.8 Mediation strategy;
  - 1.1.9 Part 36 strategy; and
  - 1.1.10 Strategy for SPMs who have not joined the GLO.
- 1.2 The observations made on these topics come with two material caveats. First, we do not yet know the outcome of the Horizon Issues trial or whether Post Office will be given permission to appeal the Common Issues judgment.<sup>1</sup> Secondly, they have been prepared without the benefit of an analysis of the strength of the individual claims. All these matters will have a material impact on the merits of Post Office's position in the litigation. We will therefore need to consider the position further once the outcome of these matters are known and the ongoing individual claimant review is complete.
- 1.3 Subject to the above, our present view is that Post Office goes into the first mediation with settlement authority of between **£40m and £45m** with a view to obtaining approval to settle for a value up to **£65m** (with a separate process in place for the 61 convicted Claimants, to be implemented in due course) if a deal at that level is available on the day.

## 2. **TIMETABLE**

- 2.1 At the CMC which took place on 23 July 2019, the scope of the March 2020 Further Issues trial was reduced. Instead of covering both limitation and "measure of loss" issues, the trial will now cover only "measure of loss" issues. These are to be determined by way of submissions on assumed facts drawn from the pleadings, without any documentary or oral evidence. This is a helpful development from Post Office's perspective, not only because it means there will now not be an enquiry in March 2020 into the Claimants' fraud and deliberate concealment allegations (likely a difficult area for Post Office<sup>2</sup>), but also because the timetable leading up to trial will now be more relaxed, leaving a window for a meaningful mediation process to take place.
- 2.2 We are in correspondence with the Claimants' solicitors as regards dates for the mediation. As matters presently stand, the parties have provisionally agreed a two-day mediation on 13 and 14 November 2019, subject to having received the Horizon Issues judgment and permission to appeal determination by that time. There is likely to be a preparatory meeting between solicitors in advance.

<sup>1</sup> On 6 September 2019, Coulson LJ ordered that there be a half-day oral hearing of Post Office's application for permission to appeal on 9 October 2019, with judgment to follow "as soon as possible" thereafter. The Claimants have asked for the permission hearing to be scheduled for an alternative date.

<sup>2</sup> See below at paragraph 10.

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- 2.3 Subject to that, we envisage pursuing the same broad timetable outlined in our initial note, namely:
- 2.3.1 an initial mediation designed to gauge expectations and understand the true values attached to the Claimants' funding arrangements, in November 2019;
  - 2.3.2 a formal settlement offer process aimed at protecting Post Office's position on costs in the litigation, in late 2019 or early 2020;
  - 2.3.3 a further mediation at which we hope to make meaningful progress towards settlement, ideally in April/May 2020;
  - 2.3.4 further ad-hoc settlement discussions leading to a final settlement; and
  - 2.3.5 development of a strategy for dealing with SPMs who have not joined the GLO but may bring claims in the future.

### 3. **SUMMARY OF PREPARATIONS**

- 3.1 Our preparations thus far have focussed on six areas:

#### 3.1.1 **Quantum verification**

We have sought to verify the quantum information provided by the Claimants by reference to Post Office records. The focus has been on developing a model based on the earnings of individual SPMs to which appropriate multipliers can be applied to produce sensible pre-and-post-termination figures. We are grateful for the help we have received from Post Office as part of this extensive exercise.

#### 3.1.2 **Recoverability analysis**

We have also done a deeper dive into the recoverability and potential values of the wider heads of loss to help us identify sub-categories of weaker claims.

#### 3.1.3 **Claimant grouping analysis**

We have analysed the different categories of Claimant to which special principles apply, for example convicted Claimants, Claimants who have previously entered into settlement agreements with Post Office, non-SPM Claimants (for example assistants).

#### 3.1.4 **Liability analysis**

Because the individual claims are not of equal merit, the next step is to understand which individual claims, as a matter of principle, have value. In that regard, we are working with WBD to develop workstreams to consider (a) factual and (b) expert IT issues.

- 3.2 Our conclusions on the work we have done to date and recommendations as to the way forward are discussed in more detail below.

### 4. **CASE THEORY**

- 4.1 The starting point for any settlement discussion is to have a case theory which explains why Post Office is not legally liable for the losses claimed.

- 4.2 At the risk of some oversimplification, the Claimants' case is presently put on two broad footings:

#### 4.2.1 **Bug theory**

The argument will likely be that bugs within the Horizon system generated false shortfalls. Alternatively, it may be said that Post Office cannot rely on Horizon to prove disputed shortfalls because the system is insufficiently robust (in effect, obliging Post Office to prove disputed shortfalls by other means).

#### 4.2.2 **Transparency theory**

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The argument will likely be that, whatever the position with Horizon, the Claimants have suffered losses because Post Office breached its duties of co-operation and good faith owed to SPMs as a result of:

- (A) inadequate training;
- (B) inadequate investigation and/or denial of access to records; and
- (C) inadequate disclosure and/or false representations about the existence of bugs and/or complaints about Horizon (i.e. the work referred to at paragraph 3.1 above).

4.3 The way the Claimants' case develops is likely to be driven by the outcome of the Horizon Issues trial and the Common Issues Appeal:

4.3.1 If the findings made in the Horizon Issues trial lend credence to the bug theory, the Claimants' focus is likely to be on the losses said to flow from false or unproven shortfalls (i.e. claims for repayment of shortfalls, suspension and termination-related losses as well as consequential losses such as personal injury, stigma and so forth).

4.3.2 If the bug theory loses traction (and the Common Issues judgment stands), the Claimants' focus is likely to shift to claims under the transparency theory. In the transparency-type claims, the Claimants will seek to demonstrate that they would have been in a better financial position had Post Office complied with its "good faith" duties. There will likely be a debate around whether alleged breaches on the part of Post Office have an impact on its ability to terminate for accounting failures. In particular, we anticipate that the Claimants may allege that any accounting failures on their part were caused by, or connected to, those breaches and, as a result, their contracts could not have been terminated summarily.

4.3.3 Of course, if the Common Issues Appeal is upheld then, subject to the precise scope of the duties found to exist, fewer claims are likely to be available under the transparency theory.

4.4 We have given thought as to how, as a matter of advocacy, Post Office can best advance its case under both the bug and transparency theories so that we can react quickly when the Horizon Issues judgment lands:

4.4.1 Post Office's best arguments on the "bug theory" are likely to be on breach<sup>3</sup>. In view of the anticipated findings in Horizon, we would recommend a strategy aimed at developing:

(A) **Independent factual evidence of breach**

Identifying cases where there is evidence independent of Horizon which demonstrates that the shortfalls (if any) were not caused by bugs.<sup>4</sup>

(B) **Expert IT evidence on the likely cause of shortfalls**

Exploring the extent to which we might be able to show through expert IT evidence that the bugs identified by the Claimants (or found to exist as part of the Horizon Issues trial) are unlikely to have caused the shortfalls complained of, at least in certain cases.<sup>5</sup>

4.4.2 Post Office's best arguments under the transparency theory are likely to relate to the Common Issues Appeal, causation/loss and (potentially) limitation:

<sup>3</sup> Other defences relating to specific categories of Claimant and on quantum are dealt with separately.

<sup>4</sup> For example, cases of clear fraud or those where (unforced) admissions were made.

<sup>5</sup> Even if the IT experts cannot establish why shortfalls arose, it may be possible to demonstrate in particular cases that the alleged bugs were not in play at the relevant period, or that the Claimant's branch did not feature across the "known error log", or that the Claimant's data does not reveal a signature typical to a particular bug.

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(A) **Common Issues Appeal**

If permission to appeal is given, the risk to the Claimants is that some of the duties alleged to have been breached under the transparency theory fall away with the result that the claims available to them are reduced.

(B) **Causation and loss**

In the transparency-type claims, the onus will be on the Claimants to prove the counterfactual scenario (i.e. what would have happened had Post Office complied with all its relevant duties) and/or the link between the breaches and the reason for their termination. We can see scope for Post Office to say, in some cases at least, that any breaches had no relevant bearing. Ultimately this will be a factual question but our impression is that these arguments will be less straightforward for the Claimants.

(C) **Limitation/time-bar**

Some (but not all) categories of transparency breaches are also more likely to be susceptible to limitation/time-bar defences. An SPM who has been inadequately trained or received poor Helpline support ought to have known about it at the time.

- 4.5 If we can identify a selection of "good" cases for Post Office across all these issues, we anticipate that will advance Post Office's position, both in the litigation (allowing Post Office to put good test cases forward) and in the context of settlement discussions (enabling Post Office to put forward a more compelling case theory and make meaningful Part 36 offers). The work involved<sup>6</sup> will dovetail with that required for the Court-ordered test case selection process in respect of which the parties are to serve their proposed test case selection criteria by 27 November 2019.

5. **QUALITATIVE AND QUANTITATIVE ANALYSIS OF THE CLAIMANT GROUP**

- 5.1 Whilst the Horizon Issues judgment is awaited, we have worked extensively with Post Office to conduct a qualitative and quantitative analysis of the Claimant Group.
- 5.2 To date, this has focussed on (a) categories of Claimant who raise unique issues relevant to settlement and (b) the recoverability in principle and potential quantum of the individual heads of loss.
- 5.3 Our work product has been captured in an interactive spreadsheet which allows us to apply a range of different multipliers and percentages to the various claims to enable us to analyse rapidly different settlement scenarios. The numbers referred to in this note have been drawn from that spreadsheet. To place those numbers in context:
- 5.3.1 Where we refer to the "Quantified Claim Value" we mean the value of the claims which have been quantified by the Claimants in their Statements of Information. It does not include claims which have been made in principle but have yet to be quantified by the Claimants (i.e. claims for personal injury, harassment, malicious prosecution and stigma).<sup>7</sup>
- 5.3.2 The "Assessed Value (Quantified Claims)" is our assessment of the potential quantum of the quantified claims.
- 5.3.3 The "Assessed Value (All Claims)" is our assessment of the potential quantum of the claims made by the Claimants, whether quantified or otherwise.

<sup>6</sup> To take this forward we are doing two things: (a) working with WBD to conduct a "good case – bad case" analysis – this will allow us to assign a merits rating to individual cases and selecting some good examples to use by way of mediation advocacy; and (b) investigating with the IT experts how Post Office might go about proving that identified bugs were not responsible for particular shortfalls.

<sup>7</sup> The quantified claims in the Claimants' schedules of information all effectively reserve the Claimants' rights to amend any quantified figures following disclosure and expert quantum assessment.



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- 5.4 As set out above, we are working with WBD to overlay this analysis with factual/expert analyses of the individual claims to form a clearer view on liability. That analysis has not been factored into the assessments made in this note.

## 6. **CATEGORIES OF CLAIMANT**

Our work thus far has identified the following categories of Claimant which raise unique issues:

- 6.1.1 Convicted Claimants;
- 6.1.2 Settled Claimants;
- 6.1.3 Assistants (i.e. non-SPM) Claimants; and
- 6.1.4 Time-barred Claimants.

## 7. **Convicted Claimants**

- 7.1 The Claimant Group includes 61 convicted Claimants. The convictions are typically for fraud, theft or false accounting. In some cases, the Claimant pleaded guilty to a charge of false accounting, with Post Office dropping the associated charge(s) of fraud or theft.<sup>8</sup>
- 7.2 In order to get a flavour of the criminal cases, we have collated the readily available information from Cartwright King (criminal solicitors to Post Office) on a sample of 31 Claimants. To give a flavour, the key points emerging from the 31 cases are summarised at Annexure 1.
- 7.3 The facts of the criminal cases are diverse. Of the sample of 31:
- 7.3.1 4 Claimants were found guilty after a full trial;<sup>9</sup>
  - 7.3.2 The remainder pleaded guilty to charges of either false accounting, theft, fraud by misrepresentation or fraud by abuse of position;
  - 7.3.3 There are a number of cases where the Claimants have admitted that shortfalls were caused by external factors, independent of Horizon:
    - (A) In one case, the Claimant admitted to misplacing funds;<sup>10</sup> and
    - (B) In another 10 cases, there is evidence (typically in the form of admissions) that the Claimants or members of their families took (or "borrowed") funds for their own use.<sup>11</sup>
  - 7.3.4 In at least 12 cases, the Claimants positively accept (over and above their guilty pleas) that they entered false figures into Horizon to cover up discrepancies;<sup>12</sup>

<sup>8</sup> See, for example, Jo Hamilton (claimant 69) where Post Office prosecutors agreed not to prosecute her for a single count of theft but rather to let the charge lie on the file on the understanding that Ms Hamilton would plead guilty to false accounting (14 counts) and repay the entire outstanding shortfall amounts.

<sup>9</sup> (a) Seema Misra (claimant 119) (Ms Misra pleaded guilty to false accounting (6 offences) and not guilty to theft (1 offence)); (b) Damian Owen (claimant 128) (theft (1 offence)); (c) Chantelle Chapman (claimant 242) (fraud by abuse of her position (1 offence)); and (d) Senepathy Narenthiran (claimant 564) (theft (4 offences)).

<sup>10</sup> See the case of Kashmir Kaur Gill (claimant 351) who was convicted of false accounting (2 offences). In interview, she stated that she had mistakenly placed a remittance pouch into a mail bag, thereby losing the cash, and falsely declared more money to ensure the accounts balanced. She does not suggest that Horizon was at fault (there is reference to an ill-defined ATM problem but the Cartwright King report suggests that this was not a Horizon issue).

<sup>11</sup> See, for example, (a) Julie Cleife (claimant 249) who was convicted of fraud by false representation (one offence) following a guilty plea. Ms Cleife admits to allowing her children to withdraw money from her branch till and forgetting to process the transactions; (b) Sarah Rudkin (claimant 444) who pleaded guilty to theft (1 offence). She admitted in interview that she had "borrowed" money from Post Office but had not been able to pay it back and that she had taken cash to pay it into her business account to pay for shop, wage and household bills.

<sup>12</sup> See, for example, Siobhan Sayer (claimant 161) who was convicted of fraud (1 offence) following a guilty plea. She admitted to falsifying accounts to cover up losses. Similarly, Peter Homes (claimant 550

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- 7.3.5 Around half of the Claimants raised issues with Horizon in the course of their criminal investigations;<sup>13</sup>
- 7.3.6 At least 6 Claimants sought to blame inadequate training and support (including Helpline support) on the part of Post Office;<sup>14</sup>
- 7.3.7 One Claimant admitted false accounting on an *R v Eden* basis (i.e. "putting off the day for dealing with the muddle");<sup>15</sup> and
- 7.3.8 Given the number of prosecutions, there are likely to be some convicted Claimants who would attract the sympathy of the Court/the public.<sup>16</sup>
- 7.4 The position likely to be taken by this cohort is that they were misled (through inadequate disclosure or otherwise) about the "bug issues" with Horizon and that (in many cases) they pleaded guilty to false accounting to avoid the risk of being given custodial sentences on more serious charges of fraud or theft.<sup>17</sup> It may also be alleged that Post Office misused the criminal process to achieve civil recoveries in respect of unpaid shortfalls.<sup>18</sup>
- 7.5 To date, 34<sup>19</sup> Claimants have referred their cases to the Criminal Case Review Commission (the "CCRC"). In their most recent annual report (2018/19)<sup>20</sup>, the CCRC stated:

*"In December 2018 the Commission informed the applicants in these cases that we had decided it was necessary for us to wait for the first judgment of the High Court in Group Litigation against the Post Office by more than five hundred former Sub-Postmasters (the judgment in the 'Common Issues' trial) before making any decisions in the Horizon cases under review. The applicants were informed that we would then need to take a view on whether we should also wait for the outcome of the second in the series of High Court trials (the 'Horizon trial') on the basis that that second set of proceedings appeared on the face of it to be the most relevant to the Horizon applications under review. At the end of the*

(personal representative)) who was convicted of false accounting (1 offence) on the basis of a guilty plea. He accepted that he had falsified documents to cover up discrepancies.

- <sup>13</sup> See, for example, Jacqueline McDonald (claimant 377) who pleaded guilty to theft (1 offence) and false accounting (6 offences). In interview, Ms McDonald admitted to entering false amounts into the Horizon system to cover up losses which she described as inexplicable. In doing so, she questioned the reliability of the Horizon system and the Defence commissioned an expert to investigate the case. There was criticism made of the support available.
- <sup>14</sup> See, for example, Jo Hamilton (claimant 69) who was convicted of false accounting (14 offences) following a guilty plea. She presented a statement during interview stating she had received inadequate training, had made calls to the Helpline and that the systems were "shambolic". It is unclear whether she specifically blamed Horizon for the losses. The Prosecution, however, suspected that Ms Hamilton would raise a defence that Post Office systems/lack of training caused her to become muddled which in turn resulted in the false accounting. The Prosecution appear to have been of the view that any such claims should be refuted.
- <sup>15</sup> See Lynette Hutchings (claimant 80) who was convicted of false accounting (1 offence) following a guilty plea. Ms Hutchings pleaded guilty on the basis of *R v Eden* (i.e. putting off the day when she had to deal with the muddle) rather than that she took/intended to take the money.
- <sup>16</sup> See, for example, Allison Henderson (claimant 73) who was convicted of false accounting (1 offence) on the basis of a guilty plea. In an amended Defence statement she pointed to a malfunction of the Horizon system as being a possible cause of the deficit. At no stage in the interview or in the Defence statement did she concede to any false accounting by her or indeed to any dishonesty at all. The plea only came after a Goodyear indication that she would not receive a custodial sentence (Cartwright King note that it is difficult to rule out that her guilty plea was merely a pragmatic decision to avoid an immediate custodial sentence).
- <sup>17</sup> See, for example, Nicholas 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 Pauline Thomson (claimant 178) was not pursued following a guilty plea to false accounting (3 offences).
- <sup>18</sup> The Claimants allege this to be the case in their pre-action letter of claim dated 28 April 2016 at paragraph 147.
- <sup>19</sup> We understand that since the CCRC Report was published, the CCRC have informed Post Office it has concluded its investigation into one Claimant, deciding not to refer the case to the Court of Appeal (Criminal Division) on the basis that it did not concern Horizon and commenced an investigation into another Claimant.
- <sup>20</sup> <https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1/dn5d1f6iq1/uploads/2019/07/CCRC-Annual-Report-and-Accounts-2018-19-Web-Accessible.pdf>

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*reporting year the Horizon trial had not concluded; further delay had been caused by an application by lawyers for the Post Office attempting to have the judge recuse himself from those proceedings (that application ultimately proving unsuccessful). We are acutely aware of the need to ensure that relevant matters from the High Court proceedings are considered in the review of the applications to the CCRC, and will be paying close attention as matters continue to unfold."*

- 7.6 The CCRC therefore appears to be taking the view that the findings in the Horizon Issues judgment will be material to how it proceeds. Post Office has been keeping the CCRC updated on the progress of matters relating to the Horizon Issues trial.

7.7 **Approach**

- 7.8 The cohort of convicted Claimants is likely to prove the most challenging to deal with. They are the most vocal, raise the most significant reputational issues for Post Office and will also likely be the most difficult to appease. There is no obvious half-way house for dealing with these individuals as criminality is a binary (and indeed serious) issue. If an individual has been wrongfully convicted, they can fairly complain that their life has been ruined and that they are deserving of the maximum in compensation. By the same token, if Claimants were properly convicted, it is in the interests of justice that the conviction stands. That is particularly so in view of Post Office's unique position as prosecutor: any (material) settlement could be evidence of an admission of failures on the part of Post Office in the exercise of its prosecutorial powers.

- 7.9 From Post Office's perspective the best approach to this cohort will depend on a number of factors:

7.9.1 From a GLO perspective:

- (A) There is a legal question as to whether the Claimants are entitled to try their claims in the civil courts (i.e. to what extent is the civil court entitled to go "behind" cases where the criminal courts have already made findings?) We discuss this further below.
- (B) There would, however, be something to be said for including criminal Claimants within the process as they are likely to be favourable "test Claimants".<sup>21</sup>

7.9.2 From a settlement perspective:

- (A) Any GLO-wide settlement which excludes criminal Claimants will not achieve finality for Post Office. Post Office may find itself in the undesirable position of having paid a substantial sum by way of settlement without having resolved matters with some of its most vocal critics.
- (B) Brian Altman QC<sup>22</sup> has, however, advised that making settlement payments to convicted individuals risks undermining the safety of all Post Office's (numerous) previous convictions, regardless of whether they relate to Claimants in the GLO.<sup>23</sup>

7.9.3 From a criminal law perspective:

<sup>21</sup> This point should not be overstated. We understand that Post Office stopped prosecuting SPMs around 2013/14 if doing so would entail reliance on Horizon data. There are therefore likely to be some examples of "poor" cases in more recent years.

<sup>22</sup> Brian Altman QC was previously the First Senior Treasury Counsel at the Old Bailey. He has been retained by Post Office to provide independent advice relating to the criminal prosecutions.

<sup>23</sup> We are exploring with Brian Altman QC whether this would be the case even if the settlement offer made was "de minimus" or represented the costs of an appeal against a criminal conviction.

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(A) Post Office is in the unique position of prosecutor in many of these cases. Cartwright King has advised that Post Office may well be duty-bound to make further<sup>24</sup> disclosures to convicted parties following the Horizon Issues judgment.

(B) Post Office may also need to take a position before the criminal courts (in its capacity as prosecutor) on any criminal appeals that are brought.

7.9.4 From a reputational perspective:

(A) There are obvious reputational issues for Post Office in relation to this cohort (for example in relation to parliamentary questions). Post Office will need to develop a clearly-reasoned position in relation to such cases.

7.9.5 The findings made by the civil courts relating to Horizon (many of which we anticipate will be made in the forthcoming judgment) are likely to be a key driver behind the approach Post Office decides to take across these interrelated issues. If Horizon is found to have been riddled with bugs, that could create the foundations for reasonable doubt with knock-on consequences for how Post Office decides to approach these Claimants and reputational messaging. If, however, Horizon is found to be robust, Post Office may lean towards taking a neutral approach. Plainly there could be a wide range of more nuanced potential outcomes in between.

7.9.6 Pending the Horizon Issues judgment, it would be premature to develop an inflexible strategy with regard to this cohort. We have, however, set out our preliminary thoughts on strategy and identified some potential options for consideration.

#### 7.10 Convicted Claimants in the GLO

7.10.1 The status of convicted Claimants within the GLO has not yet been resolved. In 2016, WBD invited the Claimants to discontinue all such claims on the basis that they were an abuse of process in that they constituted a collateral attack on the decisions of the criminal courts.<sup>25</sup> The Claimants' position was that the collateral attack doctrine would not apply because fresh evidence had emerged which would have had an important influence on the outcome of the cases. They proposed, however, that the claims brought by the convicted Claimants be stayed pending the outcome of the CCRC's enquiries.<sup>26</sup> WBD responded that any stay would need to be revisited once the parties could assess whether the allegations made in the civil claims mirrored those in the criminal proceedings.<sup>27</sup> The issue has not been revisited since or resolved.

7.10.2 We have given careful thought to whether a civil court would be able to hear fresh evidence in relation to the convicted Claimants' claims. We think that this would be an unlikely outcome:

(A) Under the collateral attack doctrine, the general principle (as summarised in *Hall v Simons*<sup>28</sup>, endorsing the House of Lords' approach in *Hunter v Chief Constable of the West Midlands Police*<sup>29</sup>) is that:

*"It will ordinarily be an abuse of process for a civil court to be asked to decide that a subsisting conviction was wrong. This applies to a plea of guilty as well as after a trial. The resulting conflict of judgments would bring the administration of justice into disrepute ... The proper procedure is to appeal, or if the right of appeal has been exhausted, to apply to the*

<sup>24</sup> Bug issues revealed by the Second Sight report were the subject of a disclosure exercise conducted by Cartwright King, covering all prosecutions that came before the Court after 1 January 2010.

<sup>25</sup> See letter from Bond Dickinson to Freeths dated 28 July 2016.

<sup>26</sup> See letter from Freeths to Bond Dickinson dated 27 October 2017.

<sup>27</sup> See letter from Bond Dickinson to Freeths dated 30 November 2016.

<sup>28</sup> [2002] 1 AC 615.

<sup>29</sup> [1982] AC 529.



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*Criminal Cases Review Commission under section 14 of the 1995 Act. I say it will ordinarily be an abuse because there are bound to be exceptional cases in which the issue can be tried without a risk that the conflict of judgments would bring the administration of justice into disrepute."*

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- (B) The only exception which has been recognised in the authorities is where new facts have emerged. The new fact must not simply have had an "important influence" (as the Claimants suggest) – it must be one which "entirely changes the aspect of the case" and "it was not and could not by reasonable diligence have been ascertained ... before".<sup>30</sup> This is a particularly high threshold.
  - (C) Despite this exception having been recognised in principle, the civil courts have consistently declined to re-open issues decided by the criminal courts, even where fresh evidence is alleged to have been found. In *Smith v Linskills*<sup>31</sup>, the Court reasoned:
 

*"We cannot of course shut our eyes to the possibility that a criminal defendant may be wrongly convicted, perhaps because his defence was ineptly prepared or conducted. When that occurs, it represents an obvious and serious injustice. There are two possible solutions. One is to relax the present constraint on seeking to establish that injustice by civil action. The other is to ensure that, in appropriate cases, the conviction itself can be reviewed. It seems to us clear that it is this second solution which has, over the past century, been favoured: by giving a criminal defendant a right to appeal; by providing a relatively low standard for the admission of fresh evidence on appeal; by empowering the appellate court to order a new trial; by giving the Home Secretary power to refer a case back to the Court of Appeal; and by proposals to establish a new review body [a reference to the CCRC]".<sup>32</sup>*
  - (D) As such, although we cannot discount the possibility that Fraser J will take a novel approach, we consider that he will be constrained to require the convicted Claimants to pursue their remedies through the CCRC and the criminal appeals court first and, only if their convictions are overturned, will he be entitled to consider their claims. The fact that the CCRC is already engaged with a number of Claimant cases would tend to support that outcome.

#### 7.11 Approach to settlement

- 7.11.1 If the right approach is for convicted Claimants to pursue their grievances through the CCRC and not the GLO (at least at this time), the principled position for Post Office to take is that settlement with these Claimants should be considered only after the outcome of the criminal process, and then only if Claimants succeed in having their convictions overturned. This approach presents several difficulties:
  - (A) Post Office will not be able to achieve finality as part of the settlement process.
  - (B) Convicted Claimants may object (possibly in vocal terms) to being excluded on the basis that (a) it creates an extra hoop for them to jump

<sup>30</sup> *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801.

<sup>31</sup> [1996] 1 W.L.R. 763.

<sup>32</sup> Similarly, in the Privy Council case *Hurnam v Bholah* [2010] UKPC 12 Lord Rodger held that: "assuming that this is fresh evidence, the appropriate step would have been for Mr Hurnam to place it before the Supreme Court... and to invite the court on that basis to direct the reopening of the criminal proceedings against him. In other words, if Mr Lowtoo's evidence is really a basis for saying that his conviction was wrongful, then Mr Hurnam should put it before the Supreme Court in a procedure which would allow the court to consider the evidence and either set aside or confirm his conviction, depending on its view of the significance of the evidence. Instead, Mr Hurnam seeks to use it in these proceedings where the conviction cannot be reviewed but where, he hopes, he may achieve a result which will – indirectly – undermine faith in his conviction. That is an utterly impermissible tactic."

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through (which their present funding may not cover); and (b) it will be apparent that they are being treated differently to post-2014 Claimants in respect of whom we understand Post Office took a pragmatic decision to cease prosecutions.

- (C) It may splinter the Claimant Group, making any settlement more difficult to achieve.
- (D) It may also prevent Post Office from making Part 36 offers in respect of this cohort (as to which see below).

7.11.2 We have given some thought as to how Post Office might mitigate these difficulties. The right approach will be driven by future developments – in particular the outcome of the Horizon Issues trial, the CCRC's reaction to the judgment and any progress made with the criminal cases themselves. In the meantime, however, we would make the following observations:

- (A) In view of the sensitivity surrounding this cohort, we would counsel against Post Office seeking to exclude convicted Claimants from the civil process in a unilateral or high-hand fashion. Doing so may well attract criticism (as it did in Parliament<sup>33</sup> and in correspondence with MPs<sup>34</sup> in connection with the Mediation Scheme).
- (B) If Post Office does take the view that these Claimants should first exhaust the criminal process, we think that result could be achieved in a "softer" fashion: Post Office could take a publicly neutral position on whether this cohort should be included in the GLO (a point which will arise when eligibility under the test case selection process is considered) and invite the Claimants (and, if necessary, Fraser J), to decide how they should be treated. Given the legal position, it is likely to be in the convicted Claimants' interests to ask that their claims be dealt with separately (and even if Freeths take a different view, Fraser J is likely to be driven to that conclusion.) If Post Office were to proceed in this way, it can, in effect, relinquish responsibility for the decision made.
- (C) Although it may be in Post Office's interests to remain neutral on convicted Claimants in the context of the GLO, from a strategic perspective we consider it will be necessary for Post Office to take a position on this cohort: (a) in the context of the mediation; (b) in Post Office's capacity as prosecutor; and (c) with reputational considerations in mind. Once the Horizon Issues judgment is to hand, it is likely that numerous parties – the Claimants, the CCRC and also potentially the media – will be considering Fraser J's findings with an eye to determining whether the criminal convictions remain sound.
- (D) If the Horizon Issues judgment is favourable, Post Office might well be justified in maintaining a neutral position and deferring to the CCRC and the criminal courts.
- (E) If, however, the Horizon Issues judgment is critical or the CCRC interpret it unfavourably, an option might be for Post Office to take steps to assist the Claimants with their criminal appeals. That would allow Post Office to offer convicted Claimants something in the context of settlement.

<sup>33</sup> For example, Albert Owen MP in the House of Commons Adjournment debate (17 December 2014) stated: "I was of the opinion that people who had been found guilty, for the reasons we have outlined, would be allowed to enter the mediation system. I am very disappointed with the way this is turning out, because—I shall repeat this a number of times—we are talking about people's lives being ruined by this process."

<sup>34</sup> For example, in a letter to Paula Vennells (8 December 2014) James Arbuthnot MP stated: "You agreed that the Mediation Scheme was to be available to all SPMRs whose cases had been identified by Second Sight as giving rise to concern. Specifically you agreed that it would be available to SPMRs, such as my own constituent, Jo Hamilton, who had pleaded guilty to criminal charges. You knew that I – amongst many other MPs – would not otherwise have agreed to it."

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- (F) Depending on which approach appears most justified in light of the findings made, Post Office could take any one (or a combination of) the following approaches<sup>35</sup>:
- (1) engage with the CCRC in light of the judgment;
  - (2) offer to reimburse Claimants for the costs of successful appeals;
  - (3) offer to fund appeals on an unconditional basis;
  - (4) not oppose certain Claimants' appeals as prosecutor;
  - (5) positively support deserving appeals as prosecutor; or even
  - (6) offer a remediation program (with or without a settlement formula) for convicted Claimants who succeed in having their convictions overturned in view of reasonable doubt on Horizon issues.
- (G) These alternative strategies could be used to break any deadlock in the settlement discussions arising out of the exclusion of the convicted Claimants.
- 7.11.3 Given that these strategies are available to mitigate the downsides of exclusion identified above, our present view is that settling with this cohort on the same basis as other Claimants would probably do more harm than good.
- 7.11.4 One issue that we do intend exploring with Brian Altman QC (criminal counsel to Post Office) is whether it would be open to Post Office to make pragmatic offers to this cohort – by, for example, offering the value of the cost of pursuing a criminal appeal, which individual Claimants could elect to keep instead of spend on an appeal. That sum could form the basis of any Part 36 offers made.

## 8. Settled Claimants

- 8.1 There are around 147<sup>36</sup> Claimants who have entered into previous settlement agreements with Post Office, either under the Mediation Scheme or as part of Network Transformation.
- 8.2 These cases will raise a preliminary question as to whether the settlement agreements are binding on the Claimants. In that regard, there are three potential arguments the Claimants could advance:
- 8.2.1 That the Claimants were induced to enter into the settlement agreements by fraudulent misrepresentation;

<sup>35</sup> Some of these approaches will only be open to Post Office where it prosecuted the Claimant. We understand that in a number of cases the Crown Prosecution Service acted as prosecutor.

<sup>36</sup> We note that 5 Claimants entered into settlement agreements as part of the Network Reinvention Programme; 5 Claimants entered into settlement agreements as part of the Network Change Programme; and 2 Claimants entered into unknown settlement agreements. We do not consider these further in this note as we have not reviewed the underlying settlement agreements.

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- 8.2.2 That, as a matter of construction, the current claims are not caught by the settlement wording in each case;<sup>37 38 39</sup> and
- 8.2.3 By application of the "unconscionability" principle.<sup>40</sup>
- 8.3 On the facts alleged here (that Post Office misled the settled Claimants, whether by omission or otherwise, as to the true position with Horizon), affected Claimants are most likely to take the position that they were induced to enter into the settlement agreements by fraudulent (or reckless) misrepresentations.
- 8.4 If any such claim were to succeed (which will depend on the findings of fact made by the Court), the Claimants would be entitled to set aside the settlement agreements. In doing so, however, they would be obliged to restore the status quo ante (i.e. repay the settlement sums they had received).
- 8.5 Here, it is significant that each sub-category of settlers received fairly sizeable payments from Post Office under their settlement agreements. The payments in question can be broken down as follows:

Settlement agreement type	Number of Claimants	Total payments received
Mediation Scheme	12	£34,000 <sup>41</sup>
Network Transformation <sup>42</sup>	135	£5,645,909.51 <sup>43</sup>
<b>Total:</b>	<b>147</b>	<b>£5,679,909.51</b>

<sup>37</sup> A sample wording from a Mediation Scheme settlement was: *"In full and final settlement, the Applicant releases any and all claims, whether or not presently known to the parties, that she ever had or may have against Post Office and/or of its Related Parties including without limitation anything related to the Complaint".* The Complaint is defined as *"a complaint to the Scheme with reference number M048".* The Scheme is defined as *"the Initial Complaint Review and Mediation Scheme was established to address the concerns of subpostmasters and counter clerks employed by Post Office in relation to Post Office's Horizon IT system and associated issues".* Given the Mediation Scheme was set up against the background of the Horizon issues, it will be more difficult for Claimants to take the position that they did not have these issues in mind when settlement was agreed.

<sup>38</sup> A sample wording from an Network Transformation Converter settlement was: *"The Conversion Payment paid to the Operator under the Agreement shall be in full and final settlement of any and all claims that I (being either the operator being appointed by Post Office Ltd under the Agreement) have or may have against Post Office Limited (or any other member of the Royal Mail Group) or its officers or employees howsoever arising and whether arising out of termination of my position and the Existing Contract and whether under common law, contract, statute or otherwise."* These settlements were not entered into with the object of settling Horizon issues. However, they do specifically cover claims in respect of the termination of the contracts and so it may be difficult for the Claimants to contend that the more significant termination-related losses are not caught by this wording.

<sup>39</sup> A sample wording from an Network Transformation Leaver settlement was: *"The Leaver's Payment is paid in full and final settlement of all and any claims that you have or may have (whether or not contemplated or asserted as at the date on the Covering Letter) against Post Office Limited (or any other member of Post Office Group) or its officers or employees howsoever arising and, without limitation, whether arising out of your resignation and the resulting termination of your Contract and any other associated contractual documents, the occupation of your Premises or otherwise and whether under common law, contract, tort, statute or otherwise".* This wording likewise specifically contemplates losses relating to termination.

<sup>40</sup> The scope of this principle is largely untested in English law. However, the House of Lords in *BCCI v Ali* [2002] 1 AC 251 has expressed the view that equity will not permit a party to rely upon a settlement release in general terms (i.e. releasing all future claims whether known or unknown etc.) if he knew that the other party had a claim and also knew that the other party was not aware that he had a claim.

<sup>41</sup> Of the 12 Mediation Scheme settlement agreements, we are only aware of the settlement amounts for 6.

<sup>42</sup> Claimants that entered into Network Transformation Conversion settlement agreements and remained a SPM would still be able to claim losses which were caused/incurred after the date on which they entered into a settlement agreement. We do not yet have the information needed to calculate the proportion of the claimed values that arose after the settlement agreements were concluded.

<sup>43</sup> Of the 135 Network Transformation settlement agreements, we are only aware of the settlement amounts for 115.



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- 8.5.1 We have identified 53 cases where the settlement payments made are greater than the value of the quantified claims made (excluding claims categorised as "other losses").

## 9. Assistants To SPMs

- 9.1 A number of Claimants are not SPMs. They fall into "other" categories of Claimant which can be broken down as follows:

Type	Number
Assistants/Managers	28
Crown Office Employees	5
Franchisees	3
Temporary SPMs	13
Unknown	5
<b>Total</b>	<b>54</b>

- 9.2 The largest category of "other Claimants" is that of assistants/managers. These are individuals who were employed by the SPM concerned to undertake Post Office related work. In some cases, the SPMs delegated the day-to-day running of the branch to these assistants (the SPMs being largely absent).<sup>44</sup> In other cases, the SPM and assistant were a husband-and-wife team.<sup>45</sup>
- 9.3 Such assistants have no direct contractual relationship with Post Office. Rather, Post Office contract with the SPMs who in turn contract with the assistants. SPMs were simply required to notify Post Office of any assistant's identity.
- 9.4 There are, however, a number of cases where Post Office has prosecuted assistants in respect of shortfalls arising in branch<sup>46</sup> and in some cases sought to make recoveries from them.<sup>47</sup>
- ## 9.5 Analysis
- 9.6 Notwithstanding the contractual distinctions, the Claimants' solicitors have made no real effort to distinguish assistants from SPMs in respect of the losses they claim. Most assistants claim for all the standard "contractual" heads of loss (repayment of shortfalls, loss of earnings during suspension, loss of earnings for failure to give notice, post-termination losses and loss of investment) as well as stigma/reputational damage, personal injury losses, losses related to bankruptcy and/or losses associated with prosecution and harassment.<sup>48</sup>

<sup>44</sup> See, for example, Damian Owen (claimant 128) who was employed as the branch manager by Nicholas Pritchard (who is not a Claimant in the GLO). Mr Owen was prosecuted and convicted for theft.

<sup>45</sup> See, for example, Moresby Parks branch where the branch assistant, Jason Turner (claimant 501) assisted the SPM, his wife, Kerry Turner (claimant 502).

<sup>46</sup> See, for example, Dawn O'Connell (claimant 402) who was employed as a branch assistant (the SPM is not a Claimant in the GLO). The Claimant was found guilty of false accounting and received a suspended sentence (12 months). Similarly, Barry Capon (claimant 237) who was employed as a branch assistant (the SPM is not a Claimant in the GLO) was convicted of false accounting following a guilty plea.

<sup>47</sup> See, for example, Susan Rudkin (claimant 444) who was employed as a branch assistant (her SPM was Michael Rudkin (claimant 156 in the GLO)). The Claimant pleaded guilty to false accounting and received a suspended sentence (18 months). Prior to the criminal trial, she claims that she reached an agreement with Post Office to repay the shortfalls.

<sup>48</sup> See, for example, Nichola Arch (claimant 8) who was a branch assistant (the SPM is not a Claimant in the GLO) and claims heads of loss including (i) loss of investment; (ii) loss of earnings during suspension; (iii) loss of earnings for failure to give notice; (iv) loss of earnings post-termination; (v) stigma/reputational damage; (vi) personal injury; (vii) losses related to bankruptcy/other insolvency procedures; (viii) losses

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- 9.7 In the Common Issues judgment<sup>49</sup>, Fraser J considered two issues relevant to assistants' claims against Post Office and resolved them both in Post Office's favour. Specifically:
- 9.7.1 He held that neither the SPMC or the Local NTC or any of the terms he found to be implied conferred a benefit upon assistants for the purposes of section 1 of the Contracts (Rights of Third Parties) Act (1999); and
- 9.7.2 The SPM (and not Post Office) was responsible for training any assistants to the same level the SPM was trained.
- 9.8 Given that assistants have no third party rights under the SPMC/Local NTC, assistants will not have any contractual claims against Post Office – for example for repayment of shortfalls or lost earnings arising from the termination of their contracts. Any such claims would need to be made against the SPM-employer instead. Further, if Post Office was not obliged to train assistants, no claim in respect of deficient training would be available (any such claim would be that of the SPM instead).
- 9.9 It is fair to say that any SPM who was out of pocket as a result of having been sued by their assistant would be entitled to add any loss suffered as a result of that claim to his or her own claim. Some claims have in fact been brought on that basis (in which the claim is that of the SPM, not of the assistant, and has been dealt with in that context).<sup>50</sup> Notably, however, of the 28 assistant claims made, in 16 cases, the SPM who might be "at risk" of liability for the assistant losses is not even a Claimant in the GLO. We therefore consider that Post Office would be entitled to take the position that the value of assistant claims should be excluded from any settlement.
- 9.10 Post Office does have a residual direct exposure to assistants in respect of tortious and/or equitable heads of loss (for example, claims for the recovery of shortfalls that were in fact repaid by assistants), personal injury, harassment, malicious prosecution, bankruptcy and so forth.<sup>51</sup> Unless we are faced with a situation where assistants' criminal convictions have been overturned (in which case these claims would be dealt with alongside those of other convicted Claimants), these claims are likely to be more difficult to establish and tend to be worth modest sums.
10. **Claimants Susceptible To Limitation/Time-bar Defences**
- 10.1 A number of the Claimants' claims have not been brought within the primary 6-year limitation period applicable to claims in contract, tort, restitution and (in general) breach of fiduciary duty.<sup>52</sup>

related to prosecution; (ix) malicious prosecution; and (x) harassment. See also Susan Rudkin (claimant 444) who was a branch assistant (the SPM was Michael Rudkin (claimant 156 in this GLO)) and claims heads of loss including (i) loss of shortfalls; (ii) loss of investment; (iii) loss of earnings during suspension; (iv) loss of earnings during notice period; (v) loss of earnings post-termination; (vi) stigma/reputational damages; (vii) personal injury; (viii) losses relating to prosecution; (ix) other losses (including re-financing costs and sale of property); (x) malicious prosecution; and (xi) harassment.

<sup>49</sup> Paragraphs 938 to 956 of the Common Issues judgment.

<sup>50</sup> This is perhaps a technical point, but is of significance in terms of Part 36 offers, as to which see below. We note, for example, Alan Bates (claimant 19) claims the amounts (£5,200) he paid to his staff as redundancy payments following the findings of an Employment Tribunal. Similarly, Harish Joshi (claimant 90) also claims redundancy payments he paid to his staff (£6,000).

<sup>51</sup> Some assistants claim damages for deceit. It is unclear how this would work unless the assistant in question had repaid shortfalls out of his or her own pocket. Nichola Arch (claimant 8) suggests the claim arises because Post Office falsely maintained that she was liable to repay shortfalls. However, this is notwithstanding that she does not claim for any losses relating to the repayment of shortfalls and indeed in her schedule of information explains that the SPM, Mr Breakwell (who is not part of the GLO) repaid the shortfalls.

<sup>52</sup> Claims for personal injury are subject to a 3 year limitation period from the later of the date the cause of action accrued or the Claimant discovered the injury.

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- 10.2 WBD has calculated that, of the 555 Claimants, 200 claims fall foul of the six-year rule in their entirety and a further 253 do so in part.<sup>53</sup> Collectively, this would represent as much as 82% of the total value claimed (excluding any applicable discount for litigation risk) (i.e. a substantial proportion of the total claim).

**10.3 Section 32 Limitation Act (1980)**

- 10.3.1 Post Office's difficulty with a limitation defence is that the Claimants rely on section 32 of the Limitation Act (1980). Section 32 has the effect of disapplying the ordinary rules of limitation in three circumstances, namely where:

- (A) The action is based on the fraud of the Defendant (subsection 1)
- (B) Any fact relevant to the Claimant's right of action has been deliberately concealed from him by the Defendant (subsection 2); or
- (C) The action is for relief from the consequences of a mistake (subsection 3).

- 10.3.2 Where the claim falls within any one of these excepted limbs, time for limitation purposes does not begin to run until the Claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have done so.

- 10.3.3 The Claimants have not specified which parts of section 32 they rely upon; nor have the facts alleged to have been concealed been identified or investigated in any detail.<sup>54</sup> This makes it difficult to be prescriptive about whether (and if so which) claims might benefit from a limitation/time-bar defence.

- 10.3.4 That said, given the broad thrust of the allegations made, there are a number of observations we can make.

**10.4 Deliberate Concealment**

- 10.4.1 We are concerned that Fraser J would be sympathetic to the Claimants' arguments based on deliberate concealment, particularly if the "bug theory" gains traction:

- (A) Deliberate concealment plainly covers positive acts of concealment<sup>55</sup> (for example a "cover-up" or a mischaracterisation of the true position). Fraser J's repeated comments in the Common Issues judgment about there being a "culture of secrecy" at Post Office do not bode well for Post Office's prospects in that regard. Without having done more than a cursory analysis of the position, we can see the Claimants pointing to a number of facts which they will say amount to such positive concealment. For example:

- (1) Post Office's expert in the criminal cases (Fujitsu's Dr Jenkins) gave evidence that bugs could not have been the cause of shortfalls;
- (2) Until Second Sight's report was published, Post Office publicly took the position that its systems were robust;
- (3) Since then, further bugs (in addition to the two identified by Second Sight), have been identified; and
- (4) Post Office is frequently criticised for misstating the position (as in the deceit claims above) or not being transparent about a variety of issues (Post Office, for example, has previously maintained that

<sup>53</sup> We have not verified this analysis.

<sup>54</sup> In the Generic Reply and Defence to Counterclaim the Claimants plead all three grounds generically at paragraph 71.

<sup>55</sup> That is, provided that they are of facts which are a necessary element of the cause of action i.e. necessary to plead a claim.

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transaction data could not be altered remotely by Fujitsu whereas it has transpired that this is not the case).

- (B) Most significantly, however, deliberate concealment also extends to a failure to disclose facts which Post Office was under a duty to disclose. In the Common Issues judgment, Fraser J identified a number of such duties (said to be consequent upon Post Office's duty of good faith and implied on grounds of business efficacy). These are wide-ranging and include duties to:
- (1) explain and produce records in relation to alleged shortfalls;
  - (2) disclose possible causes of alleged shortfalls;
  - (3) disclose known problems or bugs in the Horizon system which could have financial implications for the Claimants;
  - (4) disclose the extent to which others were having difficulties with Horizon and the generation of shortfalls; and
  - (5) disclose (or not conceal) Post Office's ability to make remote alterations to the data used to produce branch accounts.
- (C) Given that Post Office's previous processes did not take account of these sorts of duties then, unless the scope of those duties is considerably reduced on appeal, we would imagine that the Claimants will be able to identify numerous cases of breach through non-disclosure.
- (D) Deliberate concealment is also made out where there has been a "deliberate breach of duty in circumstances in which it is unlikely to be discovered for some time". Counsel has expressed the concern that Post Office may be found to have acted deliberately (in the "reckless" sense) if it has breached duties implied into the SPM contracts on the ground that they were "obvious". If those breaches related to the non-disclosure of bugs, one might expect that the existence of those bugs would be unlikely to be discovered for some time.

10.4.2 If a finding of deliberate concealment is made against Post Office, the Claimants will doubtlessly portray it as a finding that there had been a "cover-up" (notwithstanding that the legal test is more nuanced). That would be damaging to Post Office from a reputational perspective and extends the time period in which claims can be brought beyond the standard limitation periods.

#### 10.5 Claims Based On Fraud Or Mistake

10.5.1 Finally, we should note that limitation is not an independent defence to claims based on fraud<sup>56</sup> or mistake in that those claims cannot be "knocked out" at a preliminary hearing on limitation/time-bar without also resolving the merits of the claim. Most of the Claimants make claims falling into these categories. For example:

- (A) In deceit – it is alleged that Post Office employees (including Helpline operators) told SPMs that Horizon losses were genuine (or not caused by bugs), that Post Office had investigated the position, that SPMs were contractually obliged to repay any shortfalls, that they were the only one experiencing problems with Horizon and/or that there was no ability to alter transactions remotely; and
- (B) In restitution – that Claimants mistakenly paid shortfalls because they misunderstood that they were obliged to do so.

<sup>56</sup> These are claims where fraud is a necessary component of the cause of action, for example claims for fraudulent misrepresentation and/or in deceit.



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- 10.5.2 These claims are either good on the facts (in which case they will also be protected under section 32(1) and 32(3) respectively) or the claims will fail on their merits (in which event they will also be time-barred).
- 10.5.3 The main point to draw from this from a strategic perspective is that a preliminary point on limitation alone is unlikely to reduce the number of Claimants in the GLO.

#### 10.6 Transparency Theory Claims

- 10.7 A limitation defence could fare better in respect of certain claims under the transparency theory. That is because one might expect that some facts relevant to transparency breaches ought to have been self-evident at the time - for example, if someone received inadequate training, or poor Helpline support, or Post Office acted summarily and refused to investigate issues that were raised. This is, however, unlikely to be a complete answer to all the complaints under the transparency theory (Helpline support might have been poor because the operator withheld information or misstated the position). The position will ultimately turn on the facts.

#### 10.8 Impact on Settlement

- 10.9 Given that we are not encouraged by Post Office's prospects (save in the case of some causes of action under the alternative transparency theory), it is difficult to justify excluding (or discounting significantly) the affected claims across the board on limitation grounds at least at this juncture. Doing so would have a very substantial impact on the number. This, we think would be divisive in settlement discussions and encourage focus on an area of the case which, for reputational reasons, Post Office may prefer to keep in the background. A modest per claim potential discount could be factored in (perhaps as part of an overall discount to take account of bad claims) but there would be no science to that number.

#### 11. COMMENTS ON HEADS OF LOSS AND QUANTUM

- 11.1 We have also looked more closely at the different categories of loss claimed by the Claimants and considered (a) their likely recoverability in principle and (b) possible quantum ranges.
- 11.2 The data underpinning this analysis has been drawn from the Claimants' Statements of Information, Post Office's own records and analogous case law. Given the Claimants have yet to fully articulate their claims and Post Office itself is still at an early stage in the investigative process, our conclusions on value should not be treated as prescriptive. Rather, we have sought to draw some broad, indicative parameters which could guide thinking on appropriate levels of settlement at a relatively early stage in the process.<sup>57</sup> Against the background of these figures, the Board will need to factor in its risk appetite in respect of

<sup>57</sup> The main assumptions we have made in relation to the data are:

1. Where we have not yet received data from Post Office/Post Office does not hold remuneration data (i.e. for branch assistants) we have applied a percentage discount to the amounts claimed in the Schedules of Information. This percentage has been calculated by taking the cases where Post Office holds remuneration data for the Claimants and calculating the average percentage difference between the amounts as stated in the Schedules of Information and according to Post Office verified data. Of those Claimants where Post Office will hold data, we have 90% of that data.
2. 68 Claimants in the GLO are pluralists (i.e. they list more than one branch/role). From the Schedules of Information, it is not always clear for which branch/role the Claimants are claiming specific heads of loss. For those that have not specified whether their claim relates to one branch/role or many, the present figures assume that the claim only relates to one branch/role.
3. We have assumed in the Claimants' favour that there are no reductions for branch expenses (e.g. employee wages or rent) or mitigation (e.g. through finding alternative employment).
4. We have made a speculative assessment of the tortious heads of loss (for example, personal injury) by excluding claims where, on the face of the Statement of Information, no valid legal claim would lie and, for the remainder, including a broad estimate of value by reference to decided cases.
5. We have not made allowance for claims under the "other claims" head.
6. We have assumed that there will be no additional claims other than those referred to in the Schedules of Information.

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matters unknown,<sup>58</sup> likely costs going forward, the Claimants' expectations, reputational and operational considerations and Post Office's own commercial position overall.

- 11.3 Subject to that caveat, our comments on recoverability in principle and possible quantum ranges in respect of each head of claim are set out below.

12. **Shortfall Claims**

- 12.1 The Claimants collectively claim the recovery of shortfalls repaid to Post Office to a value of circa £12m.

- 12.2 In principle, any shortfalls found to have been wrongfully repaid are likely to be recoverable, subject to proof of the sums claimed.

- 12.3 A number of issues do, however, arise:

12.3.1 A key issue will be the onus of proof. If the Horizon Issues judgment concludes that Horizon data is not reliable evidence of shortfalls (e.g. due to the risk of bugs) the onus may fall to Post Office to prove that the shortfalls were owing in other ways. This would be an unfortunate outcome because, in many cases this may be difficult or impossible to do.

12.3.2 Even if Horizon data has evidential value, we understand that Post Office holds little relevant data for pre-2007 shortfalls. Of those Claimants that claim losses relating to the repayment of shortfalls, approximately 16% of the Claimant cohort had a last date of service before 1 October 2007.

- 12.4 The examination of the shortfalls has revealed some interesting issues. Based on an initial sample of 26 Claimants conducted by Post Office:

12.4.1 In some cases, the shortfall can be identified in Post Office's records but the amount in question was never in fact repaid (either in full or in part) by the Claimant. Out of the initial sample, there was an average 50% discrepancy in the amounts the Claimants alleged to have repaid to Post Office and the amounts that Post Office actually received. In those cases, we cannot see that a valid claim for repayment would lie.

12.4.2 In other cases, Post Office has no record of the shortfalls arising in the first place. Out of the initial sample, this was the case for two cases. In some cases we anticipate Claimants may suggest that they simply made payments directly into the till (rather than acknowledging a shortfall) with the result that no shortfall was ever recognised on the system. In this latter category of cases we consider Post Office can properly take the position that, at minimum, proof of the "payment-in" would be required. We understand that some Claimants under the mediation scheme were in fact able to provide satisfactory evidence of payments made. However, that is something that would obviously need to be assessed on a case-by-case basis. For the purpose of this analysis, we have assumed that 50% of such claims may be evidenced.

- 12.5 Post Office will continue looking into individual shortfalls. However, in the meantime, if we assume that the present sample of 26 is representative of the class, one could derive a potential standalone settlement range across the 555 Claimants as follows:

<sup>58</sup> These include: (a) uncertainty surrounding the outcomes of the Horizon Issues judgment and the appeal against the Common Issues judgment; (b) liability risks associated with the underlying claims – not all the underlying claims will be of equal merit (and indeed some are likely to be bogus) – this has yet to be investigated; (c) gaps in the data – the remuneration data and associated information is approximately 85% complete but the data on shortfalls is more limited (we have received data on 26 Claimants to date); and (d) the Claimants' own settlement expectations.

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	Sample of 26	Estimated value out of 555
Quantified Claim Value	£597k	£12m
Shortfalls not repaid	£302k	£6m
Assume 50% of unidentified shortfalls repayments can be evidenced	£151k	£3m
<b>Total</b>	<b>£453k</b>	<b>£9m</b>

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- 12.6 The above would produce a standalone settlement range in respect of shortfall claims of between £6m and £9m.

### 13. Loss Of Earnings During Suspension

- 13.1 The Claimants claim circa £3m for loss of earnings during suspension.
- 13.2 Here the key questions will be whether Post Office (i) had the power to suspend an SPM; and (ii) was able to withhold remuneration during the period of suspension.
- 13.3 **The Contractual Provisions**
- 13.4 Under the express contractual provisions, the matters that would entitle Post Office to suspend are:
- 13.4.1 Under the SPMC<sup>59</sup> - arrest; civil or criminal proceedings; and/or irregularities or misconduct having been established, admitted or suspected, or being investigated.
- 13.4.2 Under the Local NTC<sup>60</sup> - arrest, charge or police investigation; civil proceedings; grounds to suspect insolvency; suspicion of material or persistent breaches; and/or irregularities or misconduct.
- 13.5 During suspension, under both the SPMC<sup>61</sup> and Local NTC<sup>62</sup> Post Office is entitled to withhold remuneration and, following the termination of the suspension period, unilaterally opt to forfeit wholly or in part the SPM's remuneration including where the SPM is reinstated.
- 13.6 These express terms must now be read alongside the findings of the Common Issues judgment (subject to our application to appeal).
- 13.7 In the Common Issues judgment, Fraser J held that Post Office's right to suspend a SPM was subject to an implied term not to suspend SPMs: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where Post Office was itself in material breach of duty in respect of the matters which Post Office considered gave it the right to suspend.<sup>63</sup>
- 13.8 Further, Fraser J found that Post Office does not have a right to withhold remuneration during a period of suspension, even where the SPM is suspected of misconduct.<sup>64</sup>

<sup>59</sup> See Section 19, Clause 4 of the SPMC.

<sup>60</sup> See Part 2, Paragraph 15.1 of the Local NTC.

<sup>61</sup> See Section 19, Clauses 5 and 6 of the SPMC.

<sup>62</sup> See Part 2, Paragraph 15.2 of the Local NTC.

<sup>63</sup> Paragraph 748 of the Common Issues judgment. In the event that Fraser J's findings on relational contracts and good faith are incorrect, Fraser J also held that as a matter of construction the power should be construed as only being exercised in the "legitimate interests" of Post Office. Similarly, he would have concluded the term falls to be implied for the purposes of obvious business necessity.

<sup>64</sup> Fraser J reached this conclusion as he held that the provisions of both the SPMC and the Local NTC fail the UCTA reasonableness test. For completeness (and it may be relevant depending on which grounds of appeal we are successful on), Fraser J also found both provisions to be onerous and unusual albeit

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### 13.9 Implications for Settlement

- 13.10 If the Common Issues judgment stands, it will be difficult to justify excluding losses arising as a result of remuneration withheld during the suspension period.
- 13.11 The only basis for discounting them would be for (a) the prospect that Fraser J's findings may be overturned on appeal; and (b) if the losses claimed do not reflect the SPMs' actual prospective earnings for that period.
- 13.12 For the purpose of settlement, we have not made allowance for a discount to reflect the risk that this finding may be overturned by the Court of Appeal (although if Post Office is given permission to appeal on this issue, there would be scope to revisit that conclusion). We have, however, assessed these losses by reference to Post Office's verified remuneration data. This reduces the total sum claimed from £3m to approximately £1.6m.
- 13.13 In essence, for each Claimant we have extracted the relevant remuneration data from Post Office's system (where available); verified the length of the suspension period (if any) using Post Office's information; and estimated suspension payment amounts where data is unavailable.<sup>65</sup> This information can be summarised as follows:

	Quantified Claim Value	Assessed Value (Quantified Claims)	Total
Suspension pay	£3m	£1.6m	£1.6m

### 14. Termination Losses

- 14.1 The Claimants' termination losses fall into two categories:
- 14.1.1 Loss of earnings for failure to give notice; and
- 14.1.2 Post-termination losses.
- 14.2 A key legal issue will be whether Post Office is at risk for the (potentially much more substantial) post-termination losses. If so, the value of the claims will increase exponentially. In a conventional case, this would be a relatively straightforward question. Here, however, the position is complicated by the findings made in the Common Issues judgment.
- 14.3 **Summary Termination**
- 14.4 A preliminary question which arises is whether Post Office was entitled to terminate SPMs contracts summarily. If so, no termination losses will arise at all.
- 14.5 Following some uncertainty on the issue, it is now clear from Fraser J's reasons for refusing permission to appeal that the findings in the Common Issues judgment do not preclude Post Office from terminating summarily for material (i.e. repudiatory) breach.<sup>66</sup>

whether this is an independent basis for treating the provision as having no effect will depend on whether it was properly incorporated. Typically, the term will be incorporated into the Local NTC contract as a signature was required but whether it was incorporated into the SPMC will depend on the facts of the specific case.

<sup>65</sup> We note that under both the SPMC and the Local NTC Post Office had a right to determine at the end of the suspension period whether to provide any remuneration that would have fallen due but for the SPM's suspension. For the purposes of this analysis we have not identified cases (if any) in which Post Office opted to pay remuneration during the suspension period.

<sup>66</sup> This is clear from Fraser J's Written Reasons for Refusing Permission to Appeal at paragraph 7: "It is difficult to see how this can properly be said to amount to a finding on this particular Common Issue that Judgment No.3 imposed a restriction on the Post Office's ability to accept a repudiatory breach." and paragraph 45: "The paragraphs in the Grounds at 38(ii) and 38(iii) which state there is a "fetter" on the ability of the Post Office to accept a repudiatory breach is not an accurate summary of the conclusion in



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- 14.6 Whether there has been a material breach in any given case will be a question of fact that will need to be considered in the context of the individual Claimant case review. At an abstract level, it seems to us that, if the bug theory gains traction, it is unlikely that Post Office would be entitled to terminate summarily for the sole reason that there were unexplained shortfalls which had not been repaid.
- 14.7 A key question that will, however, emerge is whether SPMs who can be shown to 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 cash or stock balances. In that regard, a number of Claimants have been convicted on charges of false accounting (subject to CCRC review).
- 14.8 To the extent that a SPM is in fact guilty of criminal dishonesty, we consider it likely that Post Office would be entitled to treat that SPM as being in material breach justifying summary termination. However, we are concerned that others whose contracts were terminated for accounting issues may seek to blame breach of Post Office's good faith obligations (e.g. to provide adequate training, appropriate Helpline support, to disclose known issues or bugs and/or properly investigate issues that were raised) and may even rely on compulsion-type arguments as a defence. In this context, Fraser J's implied term that Post Office is "*not entitled to terminate in circumstances where [Post Office] was itself in material breach of duty in respect of the matters which [Post Office] considered gave it the right to terminate*" leaves scope for argument because it is unclear when an identified breach on the part of Post Office would be "*in respect of*" the ground of termination. Here, we can foresee a number of factual nuances emerging. For example:
- 14.8.1 Some Claimants will accept having deliberately entered false figures but will say they did so for fear of summary termination/prosecution without having an opportunity to get to the bottom of discrepancies;
- 14.8.2 Some Claimants will likely claim they were simply confused by the system and blame inadequate training; and
- 14.8.3 Other Claimants may assert that they were positively told by Post Office employees (e.g. trainers or Helpline operators) to account in that way.
- 14.9 This is an area that would benefit from further analysis as part of the factual investigations into individual Claimants. That said, for the purpose of settlement, we consider this defence is ripe for concession if the remainder of the earnings claims can be confined to the SPMs' individual notice periods or short periods of post-termination losses (as to which see below). For that reason, we have not applied any further discount in respect of this defence for the purpose of developing a settlement range.<sup>67</sup>
- 15. Notice Periods And Post-Termination Losses**
- 15.1 If Post Office was not entitled to terminate Claimants' contracts summarily, a question will arise as to whether the Claimants' losses must be confined to earnings during their periods of notice or whether longer post-termination losses are recoverable.
- 15.2 Conventionally, where a contract gives a party the unfettered right to terminate upon the giving of specified period of notice, any claim for damages for wrongful termination will be confined to earnings for the agreed period of notice. That is because the "minimum obligation" rule likely<sup>68</sup> applies. Under this rule, it is assumed that a contract-breaker would

*Judgment No.3 on Common Issue 15, and this point is explained further at [6], [7] and [8] above of these reasons."*

<sup>67</sup> It will remain an important issue to investigate for the purpose of arguments on liability. Plainly, if in particular cases Post Office was entitled to terminate summarily, all other earnings claims would fall away.

<sup>68</sup> There is some scope for argument that this operates as a rebuttable presumption, rather than a bright-line rule, allowing the Claimants to adduce evidence to the effect that Post Office would not in fact have terminated their contracts absent the shortfalls.

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have exercised his rights under the contract in the way most beneficial to himself i.e. by terminating the contract at the earliest date at which he could properly do so.

- 15.3 The position under the Common Issues judgment is less straightforward. Fraser J found (both in view of his finding that the contracts were relational contracts and as a matter of business efficacy) that a term falls to be implied into the termination provisions that Post Office was:

*"[n]ot to terminate Claimants' contracts: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where [Post Office] was itself in material breach of duty in respect of the matters which [Post Office] considered gave it the right to terminate."*

- 15.4 On its face, these implied terms are not directed towards the length of the notice period, but rather whether notice can validly be given at all. As a matter of principle, this gives the Claimants an argument that Post Office was not in fact entitled to terminate their contracts upon notice, without showing it had reasonable cause to do so. Reasonable cause would not be confined to cases of material breach – it might, for example, include network restructuring considerations. The difficulty for Post Office on this theory, however, is that the reasons it in fact terminated most SPM contracts is because there were accounting issues or shortfalls, which the Claimants attribute to bugs or other breaches under the transparency theory.
- 15.5 All the above said, it is far from clear that Fraser J intended to make a finding with these consequences. In other parts of the judgment, he suggests that the effect of the implied terms is simply that Post Office could not terminate without giving a "reasonable period" of notice. For example, he says:

- 15.5.1 The term "not less than" must have some meaning:

*"If the notice provision was intended always to be one of precisely three months, it would not use the term 'not less than three months.' If the words 'not less than' are to have any meaning at all – which in my judgment they plainly must – they must require consideration of what the appropriate period of notice should be. If consideration has to be given to what the period of notice should be (with the absolute minimum always being three months) then there has to be some conscious thought given to that decision. It cannot be decided arbitrarily."<sup>69</sup>*

- 15.5.2 The examples he gives of considerations relevant to the exercise of the discretion for the most part relate to questions of timing, rather than cause:

*"[C]onsideration by the Post Office in a termination on notice scenario must be undertaken in compliance with its duty of good faith, as explained above, and take into account all relevant factors, and not take account of irrelevant ones. In a non-exhaustive list, relevant factors would include the reasons that the Post Office wanted to close the branch; the length of time a SPM had been in post; their investment in purchasing the business; and whether they had residential accommodation as part of the business premises in which they themselves lived. Examples of irrelevant ones would be whether they are Claimants in the Group Litigation, and whether they were asking awkward questions about the ability of the Horizon system to account properly or sufficiently."<sup>70</sup>*

- 15.5.3 When dealing with the alternative argument that the express terms do not reflect the true agreement between the parties (which becomes relevant only if he is wrong about the implied terms), Fraser J also states:

*"I consider 12 months would be the very longest period of notice to which a SPM could be entitled; depending upon the factors I have identified above (length of service, price paid and so on) it may be less than that .... The parties would*

<sup>69</sup> Paragraph 894 of the Common Issues judgment.

<sup>70</sup> Paragraph 895 of the Common Issues judgment.

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*therefore, on the terms of the NTC, be in dispute about periods between 6 and 12 months long; on the SPMC, the range is a little longer, but not by very much".<sup>71</sup>*

- 15.6 This suggests that, notwithstanding his formulation of the implied term, what Fraser J was in truth driving at was a good faith obligation which bites on the length of the notice period that must be given, rather than the question of whether it is right to give notice at all.
- 15.7 The fact that Fraser J appears to have conflated the right to terminate with the length of the period of notice is one of many unsatisfactory aspects of the judgment. It may be resolved at the forthcoming "measure of loss" trial or as part of the Common Issues appeal. For present purposes, however, it creates a risk for Post Office on post-termination losses. As matters presently stand, Post Office must, at best, give a "reasonable" period of notice, potentially beyond the contractual periods of notice (as to which the 12-month period to which Fraser J refers in the context of the "true agreement" issue might be taken to be a reasonable proxy). At worst, Post Office would not be entitled to terminate without providing a good reason, be it a breach (arguably of the SPM's duty to account properly), a restructuring or broader commercial reasons. Unhelpfully, perhaps, Post Office's evidence to date has been that it would seldom terminate for purely commercial reasons.<sup>72</sup>
- 16. Quantification Of Termination-Based Claims**
- 16.1 Working together with Post Office, we have built a series of models which can be used to quantify the various earnings-based claims.
- 16.2 In summary, for each Claimant we have extracted the relevant remuneration data from Post Office's system (where available); verified the length of the contractual notice periods (if any) using Post Office's information; and estimated remuneration amounts where data is unavailable. The product of this analysis can be summarised as follows:

	Quantified Claim Value	Assessed Value (Quantified Claims)	Totals
Summary termination	n/a	n/a	£0
Suspension pay	£3m	£1.6m	£1.6m
Notice pay	£6m	£2.6m	£4.2m
1yr post-termination losses (in lieu of notice pay)	n/a	£11.5m	£13.1m
2yr post-termination losses (in lieu of notice pay)	n/a	£23m	£24.6m
5yr post-termination losses (in lieu of notice pay)	n/a	£57.5m	£59.1m

- 16.3 The data we have examined reveals weaknesses in the Claimants' case. Some Claimants, for example, claim income for extraordinarily long periods. Some make no allowance for expenses notwithstanding they are known to have hired (non-family member) assistants.<sup>73</sup>

<sup>71</sup> Paragraph 925 of the Common Issues judgment.

<sup>72</sup> See, for example, paragraph 982 of the Common Issues judgment: "*The evidence of Mr Breeden was that this would be done very rarely for commercial reasons, and if there were "performance issues" these would be explored firstly with the SPM who would be given the opportunity to remedy them first.*"

<sup>73</sup> For the purposes of the assessed value we have not applied reductions the Claimants would have been expected to make from their remuneration or steps they would have been expected to take to mitigate their loss. The specific amount of reductions will of course be determined on a case-by-case basis. As an indication, however, based on the 150 Claimants who have noted deductions in their Schedules of Information that would have been made for employee costs, the average percentage deduction is 29% and based on the 50 Claimants who have noted deductions in their Schedules of Information that would

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And some claim for loss of earnings from their separate newsagent businesses (rather than simply the Post Office branch).<sup>74</sup>

- 16.4 From a settlement perspective, given the confusion in the judgment, the risk to the Claimants that summary termination would be justified in some cases and the risk to Post Office that more substantial post-termination losses would be payable, we consider that a 12-month notice pay figure is a justifiable starting point. To make allowances for risk and the assumptions built into the data (e.g. as to deductions and mitigation), we suggest working off a range which takes the notice period figure as the lower end and the 2 year notice pay figure as the higher end.

## 17. Stigma Damages

It is convenient to deal next with stigma damages because they are, in effect, an alternative legal route for claiming post-termination losses – the rationale being that an individual who has been unfairly stigmatised in breach of duty becomes unemployable.

### 17.1 The Claimants' Claims

- 17.1.1 According to the Statements of Information, some 57% of Claimants claim stigma damages. The information provided in their Statements of Information is extremely vague and no value is put on the claims.
- 17.1.2 Damages are claimed for a mixture of:
- (A) Pure stigma (circa 79%);<sup>75</sup> and
  - (B) Financial loss such as loss of trade and/or prejudice to future employment or business prospects arising from Post Office's characterisation of Claimants as dishonest resulting from stigma (circa 21%).<sup>76</sup>

### 17.2 Comments on Liability

- 17.2.1 Pure stigma damages are not recoverable. However, consequential financial loss caused by stigma arising from a breach of contract can be recoverable, subject to the usual principles of causation, foreseeability and remoteness.
- 17.2.2 Here, the House of Lords' decision in *Mahmud v BCCI*<sup>77</sup> is potentially problematic for Post Office. The Claimant in that case worked for BCCI. He alleged that his future employment prospects were damaged as a result of his association with BCCI because BCCI had conducted its business in a corrupt and dishonest fashion. The House of Lords held that BCCI was under an implied obligation not to engage in conduct likely to undermine the relationship of confidence and trust between employer and employee and that, by operating the business in a corrupt and dishonest manner, BCCI had breached that obligation. Accordingly, if the

have been made for mitigation of the loss (i.e. finding alternative employment), the average percentage deduction is 45%.

<sup>74</sup> See, for example, Malik Nazar (claimant 565) who includes future loss of earnings arising from a newsagent business which was operated from the same premises as his Post Office branch. He also fails to make any deductions to the future loss of earnings claim arising from his Post Office branch for his two assistants' salaries.

<sup>75</sup> See, for example, Brian McAulay (claimant 370) who states: "In the beginning I tried to keep the issues I had and the reasons for my suspension quiet. However, rumours soon began to circulate in my local community and I know that people think that I have stolen from Post Office."

<sup>76</sup> See, for example, Anup Patny (claimant 424) who states: "Following the closure of the Post Office since the audit of 17 August 2016, a number of customers have stopped using my newsagents and are going elsewhere. I feel like my good reputation within the community has been tarnished and I feel stigmatised."

<sup>77</sup> [1997] UKHL 23.



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Claimant could show that BCCI's breach had adversely affected his future employment prospects, his continuing financial losses were, in principle, recoverable (subject to questions of causation, remoteness and mitigation).

- 17.2.3 Although the GLO is not an employment case, Fraser J found in the Common Issues judgment that Post Office owed the identical implied obligation (i.e. not to engage in conduct likely to undermine the relationship of trust and confidence between the parties) that was found to exist in BCCI.
- 17.2.4 The Claimants in BCCI ultimately failed because they were unable to prove that their failure to secure alternative employment was as a result of the stigma associated with BCCI: the reliable and tested evidence of a prospective employer was necessary and vague allegations of being hampered in the employment market were not enough. A similarly high evidential hurdle applies in "loss of custom" cases: in *GKN v Matbro*<sup>78</sup>, Stephenson LJ suggested that some (although not all) actual prospective customers would need to give evidence to the effect that, absent the breach, they would have made further orders.
- 17.2.5 The high evidential burden of proving causation may be enough to dispose of a large majority of the stigma claims brought in this litigation. From our review of the case law, we have identified only one case where a Claimant has successfully claimed for stigma damages.<sup>79</sup> That case concerned an employer who divulged in breach of duty, that the Claimant had pursued a claim against the employer, hampering the Claimant's future employment prospects. It is not, therefore altogether analogous. In any event, it is clear from the data we have gathered that a number of Claimants who claim stigma damages have in fact since been re-employed.<sup>80</sup>
- 17.2.6 Where we do foresee issues arising is in the case of convicted Claimants - logic suggests that a prior criminal conviction is very likely to undermine a person's future employment prospects. Including the convicted Claimants in settlement discussions alongside the remainder of the Claimant class might open the door to a negotiation about recovery for stigma damages (which other Claimants can piggyback off). This may be another good reason for suggesting that convicted Claimants be dealt with under a separate process in the context of any settlement.

### 17.3 Comments on Quantum

- 17.3.1 If stigma damages can be proven, the appropriate measure of loss will be a multiplier of the Claimants' earnings. In the one successful case we identified, the Court gave no guidance as to what an appropriate multiplier might be. Logically, it would be for the length of time the stigma persists.
- 17.3.2 Given the potential for a successful appeal around the implied term, the evidential difficulties and the risk of duplication if post-termination losses are recoverable, we would be inclined to value this claim at zero. If pressed to ascribe a notional settlement value as part of a worst-case scenario analysis, the numbers might look as follows:

<sup>78</sup> [1976] 2 Lloyd's Rep 555 (CA).

<sup>79</sup> *Chagger v Abbey National plc and another* [2010] IRLR 47.

<sup>80</sup> See, for example, Lisa Brennan (claimant 532) and Abrar Yasin (claimant 592) who both state in their Schedules of Information they have subsequently found employment.

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	Potentially recoverable stigma claims ((49) (excluding all convicted Claimants))	Convicted Claimants (51)	Potentially recoverable stigma claims and convicted Claimants
Best case scenario	£0	£0	£0
Additional 12 months stigma	£1.6m	£2.2m	£3.8m
Less 50% discount	£0.8m	£1.1m	£1.9m
Additional 2 years stigma	£3.2m	£4.4m	£7.6m
Less 50% discount	£1.6m	£2.2m	£3.8m
Additional 3 years' stigma	£4.8m	£6.6m	£11.4m
Less 50% discount	£2.4m	£3.3m	£5.7m

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- 17.4 On a standalone basis, this would produce a justifiable settlement range of between zero and £2.4m. We should emphasise that this is a very approximate range which aims to recognise that stigma claims are unlikely to be recoverable (save perhaps for convicted Claimants whose convictions are overturned on appeal). However, if any such claims can be sustained, the multipliers mean they could be substantial.

#### 18. Loss Of Investment/Diminution In Capital Value Of Branch

- 18.1 Some £30m (plus further unquantified losses) is claimed by 315 of the 555 Claimants for damages for the loss of investment and diminution in the capital value of their branch.
- 18.2 The claims made are wide ranging and extremely vague. They include, for example:
- 18.2.1 Loss of initial investment into the Post Office branch;<sup>81</sup>
- 18.2.2 Diminution in the capital value of the Post Office branch and its attached business;<sup>82</sup> and
- 18.2.3 The diminution in the capital value of the Claimant's residential premises linked to the Post Office branch.<sup>83</sup>
- 18.3 It is possible that some such claims may be made out on the facts. However, a key issue that will arise is the extent to which these claims are duplicative of the post-termination loss of earnings claims. As a general principle, where the business continues to operate, the diminution in the capital value of the Claimants' branch ought to be calculated by reference to the loss of future profits. Where, however, the business has ceased to operate, the right approach is probably a discounted cash flow analysis (i.e. valuing the business by reference to the present value of its future expected cash flow at the date of the breach as compared to its value absent the breach). These claims are likely to overlap with sums that are also claimed as part of the loss of earnings claims. An area where there is scope for uncertainty is where an SPM claims that they would have operated the branch for a period of years and thereafter sold it at a more favourable price than they received under a forced sale.
- 18.4 In either case, it will be difficult evidentially for the Claimants to prove that the capital value of the branch decreased due to Post Office's breach as opposed to market factors.

<sup>81</sup> Nichola Arch (claimant 8), for example, claims for expenditure she incurred in refitting the branch at the start of her appointment as branch manager (approximately £4,000-£5,000).

<sup>82</sup> Lorraine Kirkman (claimant 100), for example, claims for the difference between the purchase price of the Post Office branch and retail shop and its sale price (approximately £30,000). She claims this was due to the purchaser's direct knowledge of her situation.

<sup>83</sup> Gary Brown (claimant 33), for example, claims for losses arising out of a quick sale of his residential property (£125,000). He also claims for the loss of the value of his business (unquantified).

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#### 18.5 Comments on Quantification

18.6 The true value of any loss of investment claim will be a matter for expert evidence. This makes any early assessment of quantum - even on a rough and ready basis – necessarily speculative. That said, the Claimants will know full well that they have not done any expert analysis so, from a settlement perspective, both parties will be approaching the issue "blind".

18.7 Given the absence of any valuation calculation, expert or otherwise, Post Office would be entitled to assess these claims at zero. However, if we were to come up with a figure that could be justified as part of an early settlement, our starting point might be to make an offer for either loss of capital value or post-termination loss of earnings, but not both. A substantial discount could reasonably be applied to any capital loss figure on the basis that it is entirely unproven. If a 50% discount were applied to the claims where no recovery for post-termination losses is sought, the figures might look as follows:

	Loss of Investment Value
Quantified Claim Value for Claimants who claim loss of capital value and do not claim post-termination loss of earnings	£3.3m to £5.5m <sup>84</sup>
Less 50% discount for uncertainty	£1.65m - £2.75m

18.8 On a standalone basis, a justifiable range for purposes of settlement would be between zero and £2.75m.

#### 19. Personal Injury

19.1 Some 368 Claimants make claims for personal injury.

19.2 The information provided in the Statements of Information is vague and incomplete and no effort has been made to quantify the claims (WBD estimated that these claims could be worth around £93m).<sup>85</sup>

19.3 On our analysis of the information available, the claims fall into three broad categories:

19.3.1 Injury to feelings/mental distress – 267 Claimants<sup>86</sup>;

19.3.2 Psychiatric injury – 158 Claimants<sup>87</sup>; and

19.3.3 Physical injury – 94 Claimants<sup>88</sup>.

<sup>84</sup> A number of Claimants are vague in their quantification of this head of loss. The range used attempts to capture (as far as possible) the range of these values.

<sup>85</sup> WBD has calculated this figure based on the number of Claimants claiming personal injury loss multiplied by 10 years of average earnings (calculated to be £27,000).

<sup>86</sup> See, for example, Tracy Irwin (claimant 332) who claims personal injury losses on the basis of being very distressed. Symptoms included feeling she was treated like a thief, difficulties facing customers and impact on her self-esteem.

<sup>87</sup> See, for example, Angela Bartholomew (claimant 220) who claims personal injury losses on the basis of depression.

<sup>88</sup> See, for example, Derek Cossey (claimant 255) who claims personal injury losses for two heart attacks he attributes to stress.

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- 19.4 Some claims appear outlandish and/or seem on their face unlikely to have any causal relationship with the ailments one might expect to be caused by stress.<sup>89</sup> Others are more standard.<sup>90</sup>
- 19.5 The Court's approach to recoverability will depend to a large extent on the facts of individual cases. However, the general approach is that:
- 19.5.1 Damages are generally not recoverable to compensate for injury to feelings or mental distress (even if they were within the contemplation of the parties at the time the contract was made).
- 19.5.2 Damages may be recoverable to compensate for recognised psychiatric injuries such as depression and anxiety or an actual breakdown in health. The Claimants will, however, need to prove both causation (i.e. that the injury in question was caused by Post Office's breach), foreseeability and remoteness (i.e. that the losses were within the contemplation of the parties at the time the contract was made).
- 19.5.3 In principle, damages may also be awarded for physical injury (including compensation for pain and suffering) but recoverability will again be subject to the Claimants being able to prove causation, foreseeability and remoteness. On its face, it seems likely that a number of the physical ailments in respect of which loss is claimed were pre-existing conditions rather than ailments caused by anxiety or stress.
- 19.5.4 The Claimants will need to adduce medical evidence to prove both the cause and extent of their losses. The information provided by the Claimants is both scant and inconclusive on these points. Some 59% of those claiming for psychiatric illness refer to having received medical attention or of having medical evidence. None of the Claimants claiming for physical injury refer to having received medical advice.
- 19.6 Based on the information in the Schedules of Information, it appears that the majority of personal injury claims will be irrecoverable due to issues of causation, foreseeability and remoteness. If however one were to ascribe a notional figure of £10,000 per claim in respect of psychiatric harm in respect of which the Claimant in question refers to having medical evidence, then one could derive a value for the purposes of settlement of around £1m. This number is necessarily speculative.
20. **Harassment**
- 20.1 Some 300 Claimants make claims for harassment.<sup>91</sup> The information provided in the Statements of Information is often vague and the Claimants have not attempted to quantify their claims.
- 20.2 The Claimants focus on the actions of the Debt Recovery Department during audits and disciplinary hearings and related correspondence concerning the repayment of shortfalls.<sup>92</sup>

<sup>89</sup> See, for example, Anish Kavi (claimant 94) who claims personal injury losses for Type 2 diabetes and Chantelle Chapman (claimant 242) who claims personal injury losses for rheumatoid arthritis and breast cancer.

<sup>90</sup> See, for example, Joanne Foulger (claimant 60) who claims personal injury losses for stress, anxiety and suicidal thoughts.

<sup>91</sup> The tort of harassment is codified in the Protection of Harassment Act (1997) (the "1997 Act").

<sup>92</sup> See, for example, Sally Graham (claimant 67) who states: "During the audits and disciplinary hearings I was told that I would have to pay back the money to Post Office. I was extremely anxious and stressed as a consequence of being told that I would have to pay a large sum back to Post Office and by the prospect of having to pay it back." Similarly, Paula Gorman (claimant 64) states: "I was harassed by the Post Office Debt Department when they suspected I had taken money. I was a suspect in relation to alleged criminal activity; several calls were made to the branch and letters were sent to me demanding payment."



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However, in many cases, it is far from clear that Post Office's conduct amounts to harassment. Harassment for the purposes of the 1997 Act has been held by the Supreme Court to be "a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress."<sup>93</sup> In many cases, Post Office's conduct may simply amount to ordinary commercial interaction.

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- 20.3 One area to be cautious of is the allegation that threats were made to prosecute Claimants unless outstanding shortfalls were paid. Brian Altman QC has advised that there is a risk that Post Office could be criticised if it is found to have used its prosecutorial powers as a means for achieving civil recoveries.

20.4 **Comments on Quantification**

- 20.5 The absence of detail in the Claimants' claims means that an assessment of quantum at this stage is necessarily speculative.

- 20.6 In principle, harassment can give rise to a claim for damages (among other things) for any anxiety caused<sup>94</sup> and any consequential financial loss.<sup>95</sup>

- 20.7 The true value (if any) of an harassment claim is likely to differ substantially among the Claimants. The Court's approach to quantification will be dependent, in broad terms, on the nature, seriousness and frequency of the behaviour, its impact and effect on the Claimant; and whether the Claimant has clear and cogent evidence of both the behaviour and its impact. However, the Courts often follow the Vento guidelines (as updated) which translate these factors into broad financial bands:<sup>96</sup>

Nature of case	Bands
Less serious cases	Lower band: £900 to £8,800
Moderately serious cases	Middle band: £8,800 to £26,300
Most serious cases	Upper band: £26,300 to £44,000
The most exceptional cases	Highest band: capable of exceeding £44,000

- 20.8 In *S&D Property Investments Ltd v Nisbet*,<sup>97</sup> which concerned alleged harassment in pursuance of an unpaid debt, a Claimant was awarded damages of £7,000 where the Defendant had sent threatening text and phone messages, referred to a temptation to beat the Claimant within an inch of his life, shouted abuse and visited his home. With the possible exception of any claims which convicted Claimants may be able to sustain, we doubt Post Office's debt recovery processes would have involved conduct as serious as that described in *Nesbit*.

- 20.9 For the purposes of settlement, we consider it is fair for Post Office to take the position that, unless these claims are evidenced, it is appropriate to value them at zero. If Post Office wished to make an offer in respect of this head of loss it could take the median figure of the Vento guidelines' lower band multiplied by the number of non-criminal Claimants claiming harassment damages. This would produce a settlement value of £1.2m. That number is necessarily speculative and does not factor in the possibility that convicted Claimants might seek substantially higher amounts if their convictions were to be overturned in due course.

<sup>93</sup> *Hayes v Willoughby* [2013] UKSC 17 [2013] 1 WLR 935.

<sup>94</sup> In principle, it is also possible that aggravated damages may also be awarded where the injury to the Claimant's feelings is increased by the flagrancy, malevolence and the particularly unacceptable nature of the Defendant's behaviour. We are not aware of any awards of aggravated damages made for harassment. See section 1(1) / section 3 of the 1997 Act. We are not aware of any cases illustrating such recovery.

<sup>95</sup> The Vento Guidelines are not specific to the quantification of harassment damages, rather they provide judicial guidance for the calculation of damages for injury to feelings and psychiatric injury.

<sup>97</sup> [2009] EWHC 1726 (Ch).

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## 21. Prosecution Losses

- 21.1 Some 79 Claimants make claims for losses incurred as a result of civil or criminal prosecutions.
- 21.2 The total value of the quantified claims is £0.8m. A large number of these claims are, however, unquantified.
- 21.3 As a matter of principle, damages are not recoverable for prosecutions that fall short of malicious prosecution. On this basis, for the purposes of settlement, we propose ascribing a value of zero to all these claims.

## 22. Malicious Prosecution

- 22.1 Some 86 Claimants make claims for malicious prosecution.
- 22.2 The information provided in the Statements of Information is vague. The Claimants do not provide a quantified amount and seldom provide the bases of their claims.
- 22.3 The Claimants will only have a claim for malicious prosecution (against Post Office) if Post Office itself brought the civil claim or brought the criminal prosecution itself (in its capacity as prosecutor).<sup>98</sup>
- 22.4 Claimants claiming this head of loss fall into four broad categories:
- 22.4.1 Where the Claimant pleaded guilty/was found guilty by the criminal courts and has referred the case to the CCRC<sup>99</sup>;
- 22.4.2 Where the Claimant pleaded guilty/was found guilty by the criminal courts and the case has not been referred to the CCRC<sup>100</sup>;
- 22.4.3 Where criminal proceedings were withdrawn<sup>101</sup>, dismissed<sup>102</sup>, or where the Claimant was found not guilty<sup>103</sup>; and
- 22.4.4 Where a Claimant faced civil proceedings but was not prosecuted.<sup>104</sup>
- 22.5 In order to claim damages for malicious prosecution, the Claimant will need to establish (a) that he was prosecuted by the Defendant on a criminal charge or via civil proceedings; (b) the prosecution was determined in the Claimant's favour; (c) the prosecution was without reasonable and probable cause; and (d) the prosecution was malicious.
- 22.6 Based on the limited information provided, it would appear that:

<sup>98</sup> We understand that in some cases the prosecutions were brought by the Crown Prosecution Service without the involvement of Post Office in its role as prosecutor. In such cases, the Claimant will not have a claim against Post Office for malicious prosecution.

<sup>99</sup> See, for example, Stanley Fell (claimant 59) who pleaded guilty to charges of false accounting and received a suspended sentence (50 weeks). His conviction has been referred to the CCRC.

<sup>100</sup> See, for example, Timothy Brentnall (claimant 30) who pleaded guilty to charges of fraud by false accounting and received a suspended sentence (20 weeks). His conviction has not been referred to the CCRC.

<sup>101</sup> See, for example, Susan Hazzleton (claimant 71) who according to her Schedule of Information pleaded not guilty to a charge of theft. Post Office did not present any evidence in the proceedings and withdrew the case a day prior to its listed hearing.

<sup>102</sup> See, for example, Sarah Burgess-Boyde (claimant 37) who according to her Schedule of Information pleaded not guilty to a charge of theft. The Judge dismissed her case when the prosecution elected to present no evidence (it is unclear from Ms Burgess-Boyde's Schedule of Information whether Post Office acted as prosecutor in this case).

<sup>103</sup> See, for example, Nichola Arch (claimant 8) who according to her Schedule of Information was charged with theft, false accounting and fraud by false accounting but was found not guilty of all charges.

<sup>104</sup> See, for example, Margaret Bateman (claimant 18) who according to her Schedule of Information entered into a settlement agreement with Post Office prior to civil proceedings being issued.

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- 22.6.1 Claimants that fall into the first and second categories are unlikely to have a legal basis for claiming malicious prosecution while their conviction stands<sup>105</sup>;
- 22.6.2 Claimants that fall into the third category may have a legal basis for claiming malicious prosecution, subject to the usual tortious principles and being able to prove malice and the absence of reasonable and probable cause. These are high hurdles which, based on the evidence we have reviewed and the pleaded case, we believe the Claimants will have difficulty overcoming; and
- 22.6.3 Claimants that fall into the fourth category will not have a legal basis for claiming malicious prosecution as they were not prosecuted.

## 22.7 **Comments on Quantification**

- 22.8 Damages for malicious prosecution will naturally depend on the loss the individual Claimant is able to demonstrate they have suffered. As a rough indication, the Court of Appeal suggested that where the elements of malicious prosecution are satisfied,
  - 22.8.1 £2,000 should be the lowest figure awarded as damages;
  - 22.8.2 £10,000 is an appropriate award of damages for a prosecution continuing for as long as two years; and
  - 22.8.3 A larger award of damages may be appropriate if the malicious prosecution results in a conviction which is only set aside on an appeal.<sup>106</sup>
- 22.9 Interestingly, there appear to be some Claimants in this cohort who have neither been prosecuted nor have been the subject of a civil claim. For the remainder, given the difficulties of proof we expect they would face (particularly on malice) and the fact that no Claimant has yet had their conviction overturned on appeal, for the purpose of settlement we have ascribed a value of zero to these claims. In the event that the convicted Claimants are successful in the criminal courts in due course, we envisage that this head of loss will be more vigorously pursued and, if the Claimants are able to establish malice, the values at risk could be substantial.

## 23. **Bankruptcy Losses**

- 23.1 Some 52 Claimants make claims for losses relating to bankruptcy/insolvency.
- 23.2 The total amount of the quantified claims is around £1.5m. A large number of these claims are, however, unquantified.
- 23.3 From a review of documents held by Post Office and publicly available documents we have been able to verify that 40 out of the 52 Claimants claiming this head of loss were indeed declared bankrupt/insolvent.
- 23.4 The Court's approach to recoverability will depend on the facts of individual cases. In principle, damages may be recoverable to compensate for pecuniary losses stemming from being declared bankrupt/insolvent as a result of a breach of contract. The Claimants will, however, need to prove causation (i.e. that the bankruptcy/insolvency was caused by Post Office's breach), foreseeability and remoteness (i.e. that the losses were within the reasonable/actual contemplation of the parties at the time the contract was made).
- 23.5 We consider based on our experience of these types of claims generally that it will be extremely difficult for the Claimants to demonstrate that Post Office's breach (as opposed to

<sup>105</sup> This point is often noted by the Claimants (see, for example, Stanley Fell (claimant 59)).

<sup>106</sup> *Thompson v Commissioner of Police of the Metropolis* [1998] Q.B. 498 CA 515H. Taking into account inflation, it is likely the lowest figure awarded today would be around £3,500 and the larger sum would be around £17,500.

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wider financial difficulties) resulted in the bankruptcy/insolvency. For the purposes of settlement, due to the lack of evidence provided by the Claimants and the difficulties the Claimants will have in proving causation, we propose ascribing a value of zero to all these claims.

#### 24. Other Losses

24.1 Some 537 Claimants make claims for other losses.

24.2 The total amount of the quantified claims is around £6.3m. A large number of these claims are, however, unquantified.

24.3 The types of losses claimed by the Claimants are extremely wide ranging. It is difficult to draw trends of the types of losses claimed but common categories include:

24.3.1 Pecuniary losses linked to the repayment of shortfalls<sup>107</sup>;

24.3.2 Costs linked to the sale of the SPM's branch<sup>108</sup>; and

24.3.3 Pecuniary losses consequential on Post Office's alleged breach.<sup>109</sup>

24.4 Recoverability will depend upon the types of losses claimed and the facts of individual cases. In principle, the Claimants will be able to recover damages for losses stemming from Post Office's breach. The Claimants will, however, need to prove causation (i.e. that the specific losses were caused by Post Office's breach), foreseeability and remoteness (i.e. that the losses were within the reasonable/actual contemplation of the parties at the time the contract was made).

24.5 For the purposes of settlement, we consider it is fair for Post Office to take the position that, unless these claims are evidenced, it is appropriate to value them at zero. If, however, we were to take a position at mediation that we would pay – for the sake of argument - 25% of the quantified claim value, that would produce a figure around £1.6m.

#### 25. SETTLEMENT SCENARIOS

25.1 There are a number of ways to approach the settlement of this litigation:

25.1.1 A ground-up recoverability analysis - this involves analysing the legal merits of the Claimants' claims (both in principle and as a matter of quantum) and applying appropriate percentage discounts for risk.

25.1.2 A funding-based analysis - this analysis budgets for payment of (a) the Claimants' funding/costs commitments and (b) a (proportionately reduced) top-up payment to each individual Claimant.

25.1.3 A "cheaper to pay" analysis - this aims to provide an answer to unrealistic demands from the Claimant Group driven by costs and funding arrangements by identifying the amount it would cost to simply pay the (realistic) claim value.

25.1.4 A "cost per Claimant" analysis - this provides a sense-check across each scenario by working out the average settlement value payable to each Claimant (excluding costs commitments made under their funding arrangements).

<sup>107</sup> See, for example, Anish Kavi (claimant 94) who claims the fees of loans taken out to repay the shortfalls and Jo Hamilton (claimant 69) claims for interest on credit cards and the costs of a re-mortgage to repay the shortfalls.

<sup>108</sup> See, for example, David Hedges (claimant 72) who claims costs relating to the advertising and marketing fees of his Post Office branch and the attached business.

<sup>109</sup> See, for example, Adrian Corner (claimant 46) who claims for the value of a car he allegedly was forced to sell following termination at one branch (the Claimant does not appear to make any allowances for the value he would have received).



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- 25.2 In developing a settlement range or deciding on the levels of settlement authority which Post Office might wish to seek for the purpose of a mediation process, it is sensible to have regard to all four approaches, as well as broader strategic considerations.

**25.3 Ground-up Recoverability Analysis**

- 25.4 This involves analysing the legal merits of the Claimants' claims (both in principle and as a matter of quantum) and applying appropriate percentage discounts for risk.

- 25.5 Here, we have considered a number of different settlement scenarios, the results of which are summarised below:

	All Quantified Claims	Assessed Value – notice period only	Assessed value – 12 months' remuneration	Assessed value – 24 months' remuneration	Assessed value – 36 months' remuneration
Total (including settled claims, assistants and convicted Claimants)	£205.6m	£13m	£22m	£33m	£45m
Exclude settled claims	£180m	£9m	£17m	£27m	£36m
Exclude assistants	£197m	£12m	£21m	£32m	£43m
Exclude convicted Claimants	£157m	£11m	£19m	£28m	£37m
Exclude all 3	£122m	£7m	£12m	£18m	£25m
Subtotal (Exclude convicted Claimants)	£157m	£11m	£19m	£28m	£37m
Add back recoverable costs (£15m less £5m costs order paid)	£10m	£10m	£10m	£10m	£10m
Subtotal <sup>110</sup>	£167m	£17m-£21m	£22m-£29m	£28m-£38m	£35m-£47m
Add personal injury (include settled Claimants and assistants)	£0	£1m	£1m	£1m	£1m
Add harassment (include settled Claimants and assistants)	£0	£1.2m	£1.2m	£1.2m	£1.2m
Add stigma (include settled Claimants and assistants)	£0	£2.4m	£2.4m	£2.4m	£2.4m
Subtotal <sup>111</sup>	£0	£4.6m	£4.6m	£4.6m	£4.6m
Total	£167m	£21.6m-£25.6m	£26.6m-£33.6m	£32.6m-£42.6m	£39.6m-£51.6m

- 25.6 Given that we are at an early stage in the case with many unknowns regarding the claims, we consider that these scenarios would justify settlement within a broad range of £22m to £32.6m. This represents an Assessed Claim Value calculated on the basis of 12 – 24 months post-termination losses with the upper end of that range making a rough-and-ready allowance for some of the unquantified claims.

<sup>110</sup> This subtotal for the assessed values is a range with the lower amount being the figure excluding settled Claimants, assistants and convicted Claimants and the higher amount being the figure solely excluding convicted Claimants.

<sup>111</sup> This subtotal is the total of the assessed quantified amount for personal injury, harassment and stigma.

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- 25.7 A settlement along these lines excludes convicted Claimants who we have suggested be carved out of the process for the time being. Post Office would therefore remain exposed to potential further liabilities respect of this cohort:
- 25.7.1 If Post Office were to make an offer to this cohort to pay the costs of pursuing their appeals, a further sum (which would need to be discussed with criminal counsel) would need to be made available for this purpose.
- 25.7.2 Further, any such offer would not settle the convicted Claimants' claims in the GLO. If any convicted Claimant was to have his or her conviction overturned, Post Office would remain exposed to likely increased civil claims (including claims for damages for stigma and, potentially, malicious prosecution). These could be for substantial amounts. By way of illustration, if the convicted Claimants were to recover all their quantified losses this would amount to approximately £49m. An assessed value figure for the quantified heads of loss would be in excess of £15m.<sup>112</sup> These figures do not make allowance for damages relating to malicious prosecution, harassment and personal injury. Whether the convicted Claimants will be able to bring such claims will, of course, depend on the specific facts but, if such claims can be proven, the assessed value figure is likely to rise substantially.
- 25.8 **Limitations of the Recoverability Analysis**
- 25.9 The issue which Post Office may face is that the Claimants may not be willing to settle at the levels suggested by the recoverability scenario, either because the claim has become a point of principle for Claimants or because the financial commitments under the funding arrangements mean that the individual Claimants will receive very little from the settlement sum paid. Post Office will therefore need to assess whether it is willing to pay a premium in order to dispose of the litigation.
- 25.10 Subject to the sums involved, paying a premium might be thought to be in Post Office's best interests when one considers that: (a) the Claimants may increase or better-substantiate their claims in a way that does not reflect the assumptions built into our model; (b) the litigation is reputationally-damaging for Post Office; (c) it is expensive to run; and (d) it is diverting management time away from the business, hindering Post Office's ability to move forward with its core strategic plans.
- 25.11 **Funding-Based Analysis**
- 25.12 This analysis approaches settlement from the standpoint of the Claimants and those involved in their funding arrangements.
- 25.13 As a matter of law, funded Claimants are not entitled to recover all the costs incurred as part of litigation-funding arrangements from an unsuccessful Defendant. Specifically excluded are: (a) the litigation funder's uplift or return (typically a multiplier of the costs invested); (b) the costs of the after-the-event ("ATE") insurance premium which the Claimants would have bought for protection against adverse costs orders; and (c) the solicitors' success fees (capped by legislation at 100%). Instead, those fees must be met by the individual Claimants out of any award or settlement they receive.
- 25.14 As a practical matter, however, the Claimant Group will approach settlement on the basis that their funding costs must be met in full. On top of that, each Claimant will expect to make a satisfactory (albeit proportionately reduced) individual recovery.
- 25.15 Although we do not know what the Claimant Group's funding costs will be (this will be a matter of negotiation in each case between the various participants in the funding

<sup>112</sup> This figure assumes (a) post-termination losses equating to 12 months will be paid for notice periods; and (b) assumes 4 years post-termination losses will be awarded to compensate for consequential financial loss stemming from the stigma/reputational damage.

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arrangement), based on our own experience of these types of arrangements we can, for present purposes, estimate a likely range (we would hope to get clarity on the precise structure and multipliers in the course of the mediation). Because the solicitors' success fees and funding uplifts are typically a multiplier of the costs invested, it is important to bear in mind that the funding costs will increase over time.

- 25.16 We have assessed the likely funding costs at key points in the litigation as set out in the table below. To these we have added some indicative figures representing the top-up which the individual Claimants might expect to receive.

	May 2019	November 2019	May 2020	December 2020
<b>Freeths' costs</b>	£12.6m	£15m	£18m	£22m
<b>CFA uplift (100%)</b>	£12.6m	£15m	£18m	£22m
<b>ATE insurance premium</b>	£5.9m	£5.9m	£5.9m	£5.9m
<b>Funding uplift</b>	£37.8m – £50.4m	£45m – £60m	£54m – £72m	£66m – £88m
(a) Funding uplift – 3x multiplier	£37.8m	£45m	£54m	£66m
(b) Funding uplift – 3.5x multiplier	£44.1m	£52.5m	£63m	£77m
(c) Funding uplift – 4x multiplier	£50.4m	£60m	£72m	£88m
<b>Subtotal</b>	£69.8m – £81.6m	£80.9m – £95.9m	£95.9m – £113.5m	£115.9m – £137.9m
<b>Less £5m costs paid</b>	£64.8m – £76.5m	£75.9m – £90.9m	£90.9m – £108.9m	£110.9m – £132.9m
<b>Add individual Claimant recovery</b>	£5.5m – £27.8m	£5.5m – £27.8m	£5.5m – £27.8m	£5.5m – £27.8m
Scenario 1 - £10k/Claimant	£5.5m	£5.5m	£5.5m	£5.5m
Scenario 2 - £15k/Claimant	£8.3m	£8.3m	£8.3m	£8.3m
Scenario 3 - £20k/Claimant	£11.1m	£11.1m	£11.1m	£11.1m
Scenario 4 - £25k/Claimant	£13.9m	£13.9m	£13.9m	£13.9m
Scenario 5 - £50k/Claimant	£27.8m	£27.8m	£27.8m	£27.8m
<b>TOTAL</b>	£70.3m – £104.3m	£81.4m – £118.7m	£96.4m – £136.7m	£116.4m – £160.7m

- 25.17 The above suggest that the Claimant Group will be looking to recover approximately £80m-£120m at a settlement in November 2020 or £95m-£140m at a settlement in May 2020 (after the Further Issues trial).
- 25.18 Whilst it may be possible to persuade the funders and/or solicitors to take a small cut in their returns in order to close a deal, generally speaking there is not much incentive for funders to negotiate as they will always have the benefit of a cast-iron claim against the individual Claimants provided those Claimants receive a settlement in excess of their proportionate share of the overall funding liability.
- 25.19 **"Pay the Claim" Analysis**
- 25.20 In a funded claim, it is helpful to have in mind the amount it would cost to simply pay the Claimants' (tenable) claims as this number can help answer unrealistic demands from the



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Claimant Group driven by funding commitments which may have become disproportionate to the size of the claim.

- 25.21 A "pay the claim" analysis is complicated by two factors in this case. First, part of the claim has not yet been quantified at all. Secondly, the heads of loss claimed are of varying degrees of plausibility and their availability in principle will often depend on the quality of the evidence the Claimants are able to produce. As such, it is not a simple matter to form an uncontroversial view as to what the realistic claim values are.
- 25.22 In view of these issues, we have sought to develop a sliding scale which takes as a starting point the Claimants' reasonable quantified claims and assesses the impact of adding back other heads of loss on a line-by-line basis. This would allow Post Office to react to offers from the Claimant Group by identifying the liabilities that a particular offer would cover and/or calculating the true increase in value produced by adding back particular categories of Claimants and/or losses.
- 25.23 The results (exclusive of costs) might be summarised as follows (figures in bold approximate those in the examples which follow the table):



Tab 4 Settlement/ Mediation (Draft Board Report)

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	Total Claim Value	Total Claim plus Assessed Post-Termination Losses	Assessed Claim Value	Exclude Convicted Claimants	Exclude Settlement Values Paid	Exclude Assistants	Exclude all three
Shortfalls	£12m	£12m	£6m	£4.9m	£4.5m	£5.9m	£3.2m
Suspension Pay	£3.1m	£3.1m	£1.6m	£1.4m	£1.3m	£1.5m	£1.1m
Notice Pay	£6.1m	£6.1m	£2.6m	£2.1m	£2.2m	£2.4m	£1.7m
Capital losses	£27.8m	£27.8m	£2.8m	£2.4m	£1.2m	£2.6m	£0.6m
Prosecution Losses	£0.8m	£0.8m	n/a	n/a	n/a	n/a	n/a
Personal injury	n/a	n/a	£1m	£1m	£1m	£1m	£1m
Stigma	n/a	n/a	£2.4m	£2.4m	£2.4m	£2.4m	£2.4m
Harassment	n/a	n/a	£1.2m	£1.2m	£1.2m	£1.2m	£1.2m
Bankruptcy	£1.5m	£1.5m	£0	£0	£0	£0	£0
Malicious prosecution	n/a	n/a	£0	£0	£0	£0	£0
Other losses	£6.3m	£6.3m	£0	£0	£0	£0	£0
<b>Subtotal</b>	<b>£57.6m</b>	<b>£57.6m</b>	<b>£17.6m</b>	<b>£15.4m</b>	<b>£13.6m</b>	<b>£17m</b>	<b>£11.2m</b>
Subtotal (excluding notice pay losses)	n/a	£51.5m	£15m	£13.3m	£11.6m	£14.6m	£9.5m
Add back post-termination losses - 12 months	n/a	£11.5m	£11.5m	£8.8m	£9.9m	£11m	£6.6m
<b>Total # 1</b>	<b>£57.6m</b>	<b>£63m</b>	<b>£26.5m</b>	<b>£22.1m</b>	<b>£21.5m</b>	<b>£25.6m</b>	<b>£16.1m</b>
Add back post-termination losses - 2 years	n/a	£23m	£23m	£17.6m	£19.8m	£22m	£13.2m
<b>Total # 2</b>	<b>£57.6m</b>	<b>£74.5m</b>	<b>£38m</b>	<b>£30.9m</b>	<b>£31.4m</b>	<b>£36.8m</b>	<b>£22.7m</b>
Add back post-termination losses - 3 years	n/a	£34.5m	£34.5m	£26.4m	£29.7m	£33m	£19.8m
<b>Total # 3</b>	<b>£57.6m</b>	<b>£86m</b>	<b>£49.5m</b>	<b>£39.7m</b>	<b>£41.3m</b>	<b>£47.6m</b>	<b>£29.3m</b>
Add back post-termination losses- 5 years	n/a	£57.5m	£57.5m	£44m	£49.5m	£55m	£33m
<b>Total # 4</b>	<b>£57.6m</b>	<b>£109m</b>	<b>£72.5m</b>	<b>£57.3m</b>	<b>£61.1m</b>	<b>£69.6m</b>	<b>£42.5m</b>
Add back post-termination losses - as stated in SOIs	£148m	n/a	n/a	n/a	n/a	n/a	n/a
<b>Total # 5</b>	<b>£205.6m</b>	<b>£83m-£109m</b>	<b>£28.5m-£72.5m</b>	<b>£22.1m-£57.3m</b>	<b>£21.5m-£61.1m</b>	<b>£25.6m-£69.6m</b>	<b>£16.1m-£42.5m</b>

25.24 This analysis tells us, for example, that:

25.24.1 If the Claimant Group were to make a settlement offer of £200m, that would represent full value of the majority of quantified heads of loss (exclusive of recoverable interest and costs).

25.24.2 If the Claimant Group were to make a settlement offer of £100m, that would represent full value for the quantified heads of loss, some value for unquantified heads of loss and 5 years' worth of post-termination losses (exclusive of recoverable interest and costs);

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- 25.24.3 If the Claimant Group were to make a settlement offer of £65m, that would represent full value for all the quantified heads of loss, some value for unquantified heads of loss and 12 months' post-termination losses. It could also represent the full Assessed Value (excluding assistants) of the quantified heads of loss, some value for unquantified heads of loss and 5 years' worth of post-termination losses (all exclusive of recoverable interest and costs); and
- 25.24.4 If the Claimant Group were to make a settlement offer of £25m, that would represent close to the full Assessed Value (excluding convicted Claimants) of the quantified heads of loss, some value for unquantified heads of loss and 12 months' worth of post-termination losses (all exclusive of recoverable interest and costs).

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#### 25.25 Payment per Claimant Analysis

- 25.26 Finally, and because Post Office is likely to have a good sense of the value of money to the SPM population, we think it is helpful as a sense check to be alive to the value of any settlement offers made on a per Claimant basis (before deductions in respect of each Claimant's contribution towards their costs and funding obligations).
- 25.27 Drawing from the numbers developed in the context of the recoverability, funding and "pay the claim" analyses, the value per Claimant can be understood as follows:

Settlement offer	Value per Claimant excluding convicted Claimants	Average Annual Claimant remuneration of those claiming post-termination losses
Recoverability analysis – £22m to £26.6m		
Lower end of range	£44,543	£36,057
Higher end of range	£53,846	£36,057
Funding Analysis (Nov 2019 estimates) - £81.4m – £117.5m		
Lower end of range	£164,777	£36,057
Higher end of range	£237,854	£36,057
Pay the Claim analysis – (say) £70m – £205.6m		
Lower end of range	£141,700	£36,057
Higher end of range	£416,194	£36,057

#### 25.28 Interest<sup>113</sup>

- 25.29 The Court has the discretion (which is usually exercised as a matter of course) to award simple interest at such a rate it thinks fit on all/any part of damages in respect to which judgment is given to the successful party.
- 25.30 If the Claimants are successful in the litigation, the Claimants are likely to recover interest calculated from the date on which the Claimant in question is adjudged to have been out-of-pocket in respect of each head of loss. The below table seeks to offer some broad, indicative figures as to the amount of interest the Court may award in relation to the key scenarios outlined above:

<sup>113</sup> 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 14 November 2019 (this being the likely date of the first mediation). The interest rate used is the LIBOR rate + 1% over the period.

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	Value - lower end of range	Interest	Value - upper end of range	Interest
Recoverability – notice period only	£17m	£2m	£25.6m	£3m
Recoverability – 12 months post termination losses	£22m	£2.6m	£33.6m	£4m
Recoverability – 2 years post termination losses	£28m	£3.3m	£42.6m	£5m
Recoverability – 3 years post termination losses	£35m	£4.1m	£51.6m	£6m
Funding – November 2019	£81.4m	£9.5m	£118.7m	£13.9m
Pay the Claim (Quantified Claim Value)	£109m	£12.2m	£205.6m	£24m

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## 26. OVERALL APPROACH

26.1 The results of the analyses set out above can be summarised as follows:<sup>114</sup>

	Lower end of range	Upper end of range	Per Claimant analysis – lower end of range	Per Claimant analysis – upper end of range
Recoverability – notice period only	£17m	£25.6m	£34,412	£51,822
Recoverability – 12 months post-termination losses	£22m	£33.6m	£44,534	£68,016
Recoverability – 2 years post-termination losses	£28m	£42.6m	£56,680	£86,235
Recoverability – 3 years post-termination losses	£35m	£51.6m	£70,850	£104,453
Funding – November 2019	£81.4m	£118.7m	£164,778	£240,283
Pay the Claim (Quantified Claim Value) <sup>115</sup>	£109m	£205.6m	£196,396	£370,450

26.2 Arriving at a view as to an appropriate settlement range for this case at this early stage is not a science. However, the analyses set out above suggest that:

26.2.1 A funding analysis is likely to be the true driver of value from the Claimants' perspective because it produces a number that is considerably higher than the other analyses. As the claims are presently advanced, if post-termination losses

<sup>114</sup> In relation to the recoverability analysis, the lower end of the range excludes convicted Claimants, settled Claimants and assistant claims but includes recoverable costs (that have not already been paid) and the upper end of the range excludes only convicted Claimants but includes allowances for personal injury, harassment and stigma and recoverable costs (that have not already been paid). The recoverability analysis per Claimant is based on all Claimants excluding convicted Claimants.

<sup>115</sup> The lower end of the range for the Quantified Claim Value includes all quantified losses excluding post-termination losses and notice period losses but including 5 years' post-termination losses. The upper end of the range includes all quantified losses. These figures do not include recoverable costs. The recoverability analysis per Claimant is based on all Claimants including convicted Claimants.



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- are limited to 12 months and no further losses are quantified, it would be cheaper for Post Office to pay the claim than pay the Claimants' projected funding costs;
- 26.2.2 By contrast, our provisional assessment of recoverability suggests that the sums likely to be recoverable as a matter of law are comparatively modest. This assumes that post-termination losses will not be recoverable for more than 1 – 2 years (which we consider is a fair assumption to make);
- 26.2.3 The key risks are that (a) contrary to our expectations, post-termination losses are held to be recoverable; and/or (b) the Claimants begin focussing on quantifying and better evidencing their more speculative heads of loss. Given the size of the Claimant class, if even modest values are assigned to, for example, personal injury, stigma or harassment claims, the total value of the claim could increase exponentially. For example, if 555 Claimants are each entitled to £10,000 for personal injury and £10,000 for harassment, that of itself would increase the overall claim value by more than £11m.
- 26.2.4 In some cases, there is an obvious point of overlap in the numbers produced by the various analyses which can be a useful way to identify realistic settlement ranges. Here, we see no obvious point of overlap.
- 26.3 From Post Office's perspective, the settlement of this case is not simply a matter of money. It is also about buying off risk, preserving reputation and being able to return to business as usual without the distraction of an uncomfortable and high-profile piece of litigation.
- 26.4 Seen in the round, the above suggests to us that, as matters presently stand, settlement within a broad range of **£45m - £65m** would be justifiable. That range sits at an approximate mid-point in the numbers and, as such, would be achievable only if financial compromises were made by both sides. From the Claimants' perspective, it would produce an average recovery per Claimant of £91,093 to £131,579 (exclusive of funding costs), which is a generous return when seen against an annual average Claimant remuneration of circa £36,000.
- 26.5 We would want to revisit these numbers once the outcomes of the Horizon Issues trial and the application for permission to appeal the Common Issues judgment are known as both these matters could have a material impact on the merits of Post Office's position in the litigation.
27. **AUTHORISATIONS FOR THE PURPOSE OF MEDIATION**
- 27.1 If settlement at this level were contemplated, Post Office may need authority to proceed from its shareholder.
- 27.2 Under Post Office's Articles of Association, Post Office would need the approval of its shareholder to commit to transactions in the following circumstances:
- 27.2.1 Transactions - Under Article 11.1(O) approval is required to enable Post Office to enter into a relevant transaction which (individually or as part of a series of related transactions) involves making a payment or incurring a liability in excess of £50m.
- 27.2.2 Individual Borrowings - Under Article 11.1(S)(a)(i) Post Office requires approval to incur any borrowing which either (a) individually; or (b) taken with existing unapproved borrowings incurred in the same accounting period; or (c) as part of a series of borrowings to fund a single transaction in excess of £75m.
- 27.2.3 Aggregate Borrowings - Under Article 11.1(S)(a)(iii) Post Office requires approval to incur any borrowing which, taken together with the aggregate principal amount outstanding of all money borrowed by the group from any source, exceeds the lesser of £2bn or 2.5 x the aggregate of the amount paid up on the issued share capital of the company and the total of the capital and revenue reserves of the group.



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- 27.2.4 Amendments to Strategic Plan - Under Article 11.1(K), approval is required if Post Office would need to make any amendments to an existing Strategic Plan to allow for settlement.
- 27.3 The upshot of the above provisions is that:
- 27.3.1 Shareholder approval would be required to approve the terms of any settlement which involves a commitment to pay over £50m. That is regardless of how the settlement is financed.
- 27.3.2 Whether Post Office would need shareholder approval to fund a settlement (at any level) will depend on whether Post Office can do so without incurring new borrowings.
- 27.4 As regards the latter, Mark Dixon has informed us that:
- 27.4.1 If Post Office could fund a settlement by utilising its existing borrowing facilities - principally the headroom under Post Office's £950m working capital facility - no borrowing approval would be required (we understand there is also a £50m short-term committed facility provided by BEIS (presently undrawn) which could potentially be used to bridge into other financing but use of this facility for the purpose of funding a settlement would need to be explored further).
- 27.4.2 Whether Post Office will be able to access sufficient funding from its existing facilities is something that would need to be judged at the time. In its budgeted figures, Post Office projected the security headroom under its working capital facility (the true constraining factor) to be £149m at the end of P7. This improves slightly through to the end of the year but does not go above £200m.
- 27.4.3 If Post Office would need to enter into new borrowings to fund a settlement (at any level), shareholder approval would be required under Article 11.1(S)(a)(iii). Any such borrowings would likely take the form of a market-rate loan from BEIS. As such, in addition to the approval required under the Articles, time would need to be factored in for putting any such facility in place.
- 27.5 The Articles make provision for a formal approvals process which requires the hand delivery of a written notice containing sufficient information for the shareholder to evaluate the matter being proposed. In the case of most approvals, the shareholder is required to respond within 10 days (but may ask for another 10 days). In respect of approvals sought under Article 11.1(S), the shareholder must respond within 28 days and no provision is made for an extension of that period. If no response from the shareholder is received, consent is deemed to have been given.
- 27.6 The Articles would, however, permit a streamlined process to be put in place by agreement (which would enable Post Office to receive the necessary approval at short notice and by email from a designated shareholder representative). Based on our preliminary discussions with Tom Cooper and Richard Watson, we understand that this may be a feasible way of proceeding.
28. **MEDIATION STRATEGY**
- 28.1 At mediation, it is very likely that the Claimants' settlement expectations will be driven by the size of their funding commitments and therefore be inflated. It will therefore be important to

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approach settlement negotiations strategically to ensure that Post Office is not driven to negotiating at levels which will later become unmanageable.

28.2 As we see it, there are both legal and practical considerations in play.

### 28.3 Legal Considerations

28.4 The Claimants' expectations will have been buoyed by their success in the Common Issues trial. They may also enter the mediation process off the back of success in the Horizon Issues trial. In those circumstances, we consider it will be key for Post Office to put forward a case and quantum theory that will genuinely cause the Claimants (and the mediator) to think twice about the viability of the claims.

28.5 One important way of doing so will be to demonstrate that, regardless of the success the Claimants have had in the trial(s), the claims cannot be worth the values that have been suggested. The recoverability analysis and interactive spreadsheet we have developed (as outlined in this note) already go a substantial way towards achieving this.

28.6 Post Office will also need to develop a thesis on why the Claimants are at risk that individual claims will fail. This must necessarily await the outcomes of the application for permission to appeal and the Horizon Issues trial. However, in the meantime, work is being done to analyse the merits of the individual claims with a view to:

28.6.1 identifying obviously bogus, factually flawed or exaggerated claims;

28.6.2 developing a thesis as to whether (and if so when) scenarios (arguably) independent of alleged shortfalls (such as false accounting) may justify the summary termination of SPM contracts; and

28.6.3 exploring whether, in certain cases, Post Office is able to eliminate bug issues as the cause of shortfalls.

28.7 If Post Office knows the Claimant Group better than the Claimants, has identified good test cases which pose a future threat to the Claimants in the context of the court process and is able to raise issues on the individual Claimants at mediation which the Claimant Group does not have the knowledge to answer, its position will be materially improved. If, on the other hand, it is unable to advance a positive case, there is a real risk that the Claimants (and the solicitors and funders who benefit from the continued prosecution of the litigation) may conclude that they have a "free run" at Post Office which would justify the continued pursuit of the claims and the Claimant Group's unreasonable demands.

### 28.8 Practical Considerations

28.9 Practical considerations and negotiating strategy will also need to be managed carefully.

28.10 The Claimants' settlement expectations are likely to increase over time. This is a function of the funding multipliers in play which disproportionately inflate the impact of costs. This might suggest that it is preferable to make rapid strides at an early mediation in order to have the best chance of reaching settlement at an early stage.

28.11 We think this would be a mistake. The early offers made in settlement negotiations are almost always calculated to gauge the settlement expectations of the other side. Once Post Office has made an offer, that number will for practical purposes set the floor for further negotiations. If settlement is not then achieved at the first mediation, Post Office may find itself in an untenable position at a later stage by which time funding costs will have increased.

28.12 Notwithstanding that we consider settlement could be justified at a higher level, we would recommend that Post Office enter the mediation process with settlement authority at a relatively low upper limit – specifically one that is within the power of Post Office's Board to

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approve without shareholder support. We would recommend **£40m-45m**. That is for the following principal strategic reasons:

- 28.12.1 The Claimants will be aware of the £50m shareholder approval threshold to which Post Office is subject (because Post Office's Articles of Association are publicly available);
  - 28.12.2 If the Claimants are aware that Post Office's figures have government support, they will (a) infer that Post Office is willing to spend in excess of £50m; and (b) likely proceed on the basis that a route exists for tapping into (potentially unlimited) government resources. That will set expectations that settlement is available at a value in excess of £50m, without any hard upper limit. In those circumstances, the Claimants will have no incentive to be realistic but, rather, a tangible incentive to explore how far they can get with attempts to drive settlement values upwards.
  - 28.12.3 However, if Post Office can put forward a compelling case that the Claimants' claims are not worth more than (for example) £20m-£30m and is able to communicate, as a matter of fact, that it has no authority to negotiate at the Claimants' (likely inflated) numbers, it has a credible practical reason for declining to engage at unrealistic levels which might otherwise set the floor for any future discussions.
  - 28.12.4 On this approach, a gulf may well develop between the parties. In these circumstances, it would be open to Post Office to indicate (perhaps quasi-confidentially to the mediator) that if a firm deal is available at acceptable levels, scope would exist for seeking to obtain government approval. However, because obtaining approval is a practical step involving government processes and senior people, the mediator is likely to be sympathetic to Post Office's position that any such request would need to be for a number that would close a deal (rather than as part of an incremental process as part of which the number could be driven upwards). By positioning things in this way, we would hope to force the Claimants' better numbers out onto the table at the first mediation.
  - 28.12.5 Determining the point in the process at which it may be appropriate to make a (likely significant) financial jump in order to close a deal is a delicate matter. It will require an exercise of judgment and, probably, help from the mediator on the day.
  - 28.12.6 If the Claimants' best proposal is not sufficiently realistic to warrant making a significant financial jump to close a deal, it will hopefully at least set more realistic parameters for future discussions.
- 28.13 A further reason for not seeking shareholder approval in advance of the mediation is the risk that the request (or even the numbers) could leak. A request for authorisation to commit to a transaction above a specified amount may not, of itself, be privileged. We note further that, under the Information-Sharing Protocol, Post Office's shareholder is entitled to reveal even privileged information in response to a Freedom of Information Act request (of which Alan Bates has made several) and this might place the government in an awkward position if a prior, formal request for authorisation is made. If the number for which authorisation is sought becomes known, that will effectively set the floor for any settlement discussions (and indeed the mere fact that a request for approval has been made will suggest that Post Office has access to government funding.<sup>116</sup> If that happens, Claimants may seek to exert unwelcome pressure on government through a public lobbying campaign.
- 28.14 If, however, Post Office's shareholder is briefed in detail in advance of the mediation (but without formal authorisation being sought) and it becomes evident on the day that an

<sup>116</sup> We understand that Jo Hamilton (claimant 69) has asked her MP in forthright terms whether the government will be supporting Post Office in the settlement of the GLO. Freeths has also asked in

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acceptable deal at a level requiring authorisation is available, then it is hoped that a structure could be put in place which would allow approval to be given in relatively short order.

#### 28.15 Potential Issues

28.16 One cannot predict all the issues and sticking points which might emerge in the course of mediation or settlement, but a number of possibilities have occurred to us:

28.16.1 A settlement that does not include substantial payments for convicted Claimants may be considered a deal-breaker. That is not just because of the likely strength of feeling associated with convicted Claimants but also because carving this cohort out for settlement purposes may leave its members vulnerable from a funding perspective - continuing the litigation with a smaller group of Claimants is less economical because costs would then need to be spread across a smaller group. Our suggested approach for this cohort is set out above.

28.16.2 There may also be a group of Claimants who demand a public apology. Post Office will need to consider how far it is willing and able to go without risking fresh claims or undermining its current operational strategy. Care would also need to be taken that any statement made would not, of itself, materially influence the CCRC's or Criminal Appeal Courts' assessment of the criminal cases.

28.16.3 Post Office might also wish to consider making different settlement offers to different cohorts of Claimants to reflect the relative merits of their respective claims. If those offers are good for some but poor for others, a conflict within the Claimant Group might emerge. Creating difficulties for the Claimant Group might, of itself, be considered an attractive strategy. However, Post Office should also bear in mind that being divisive may not be in its interests if doing so would ultimately make settlement more difficult to achieve.

28.16.4 If a settlement is available with the majority of the class, but a "hard core" group remains, Post Office will need to consider whether a settlement with the majority alone would advance its interests. To continue the proceedings with a small group would be disadvantageous for the remaining Claimants as they will incur disproportionately larger funding costs per Claimant. There is, however, a possible risk that this might encourage those who remain in the litigation to co-opt further Claimants in order to spread the costs (and do so before the expiry of any running limitation period). In that regard, we are conscious of the rumours that Freeths has other Claimants waiting in the wings. Post Office would also need to bear in mind that, if the litigation proceeds - even with a small group of Claimants - it will need to continue defending the litigation at essentially the same cost, and possibly greater reputational risk if the Claimants who remain are those with the better claims. One way to mitigate these risks would be to make any settlement offer conditional upon it being accepted by the entire GLO class (convicted Claimants excepted).

#### 29. UNSUCCESSFUL FIRST MEDIATION - PART 36 OFFER STRATEGY

29.1 In view of the anticipated size of the Claimant Group's funding commitments and the levels of success they have enjoyed to date, there is a very real prospect that settlement at an acceptable level will not be available at the proposed November mediation. In that event, Post Office may wish to consider making a formal offer under CPR Part 36.

29.2 Although the effect of using the Part 36 procedure in a class action context has not yet been tested in English law, we consider that, as a matter of principle, this could be a useful way of giving Post Office a degree of costs protection going forward and also putting pressure on the Claimants to settle.

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correspondence for WBD to identify the government representatives who will be attending the proposed mediation.



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- 29.3 The precise level at which any such offer should be pitched can best be assessed after mediation but, given a key purpose of the process is to obtain costs protection, the Part 36 offers could simply formalise the final offer made by Post Office at the mediation (albeit to be effective it would probably need to be broken down into offers to individual Claimants, rather than made to the Claimant Group collectively).
- 29.4 **CPR Part 36<sup>117</sup>**
- 29.5 To make a Part 36 offer in this case, we would need to offer to pay a fixed sum of money to a specified Claimant (inclusive of interest, but exclusive of costs) in settlement of that individual's claim. If the offer is accepted within the period specified in the offer (which must be not less than 21 days), Post Office will become liable to pay the Claimants' costs (to be assessed on a standard basis if not agreed) up until the date of acceptance.
- 29.6 If, however, the offer is not accepted within the specified period (i.e. 21 days), special costs consequences follow:
- 29.6.1 Where the Claimant accepts the offer after the expiry of the relevant period, the Court must (unless it considers it positively unjust) order that:
- (A) Post Office pay the Claimant's costs up to the expiry of the relevant period; but
  - (B) the Claimant pay Post Office's costs from the expiry of relevant period to the date of acceptance.<sup>118</sup>
- 29.6.2 Where the Claimant fails to "beat" Post Office's Part 36 offer (i.e. the Claimant rejects the Defendant's offer and fails to obtain a judgment that is equal to or better than the offer), the court must (unless it considers it unjust) order the Claimant to pay:
- (A) any costs incurred by Post Office from the date on which the relevant period expired, on the standard basis; and
  - (B) interest on those costs.
- The court will usually order the Defendant to pay the Claimant's costs of the proceedings that were incurred before the end of the relevant period.
- 29.6.3 If the Claimant "beats" Post Office's Part 36 offer, i.e. by rejecting the offer and obtaining a more advantageous judgment, costs will be decided in the usual way (i.e. Post Office would likely be ordered to pay the Claimant's costs).<sup>119</sup>
- 29.7 Although Part 36 does permit a judge to depart from the prescribed costs consequences, this will only be warranted in exceptional circumstances. As such, the Part 36 procedure deprives Fraser J of the very broad discretion he would otherwise have when it comes to making orders of costs – a point that may be useful if it is perceived that he has "taken against" Post Office in this litigation.
- 29.8 **Part 36 Offers in the context of the GLO**
- 29.9 It is fair to say that the Part 36 procedure was not designed with GLOs in mind and indeed there are no reported cases which deal with Part 36 offers in that context. However, there is no reason in principle why it should not apply to individual offers made to individual Claimants.

<sup>117</sup> The current Part 36 regime is governed by CPR 36 as re-enacted by the Civil Procedure (Amendment No. 8) Rules 2014 (SI 2014/3299), supplemented by Practice Direction 36 (as substituted by CPR Update 78).

<sup>118</sup> CPR 36.13(5).

<sup>119</sup> CPR 44.2.

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- 29.10 One issue we foresee arising is how any costs due to Post Office would be determined if the Claimants "beat" some offers but not others. In those circumstances, on a strict application of Part 36:
- 29.10.1 Post Office would likely have to pay the recoverable costs of all the Claimants, but only up to the date of expiry of the specified period; but
- 29.10.2 The Claimants would need to pay Post Office's costs of Claimants who do not beat the offer from the date of expiry of the specified period.
- 29.11 The obvious issue which arises is how costs will be apportioned as between individual Claimants. In that regard, group litigation, distinguishes between two types of costs:
- 29.11.1 Common costs: this comprises (i) costs incurred in relation to GLO issues; (ii) individual costs of claims proceeding as test cases; and (iii) administration costs of lead solicitors.
- 29.11.2 Individual costs: this comprises costs incurred in relation to an individual claim.
- 29.12 Common costs are usually equally apportioned among the group members, but the Claimants may agree some other split. The court may also depart from the starting point of an equal apportionment where there is a large disparity between the values of the Claimants' claims.
- 29.13 This is novel legal territory but the above analysis tends to suggest that, if the Claimants are unable to "beat" a sufficiently large number of Part 36 offers (whether in number or value terms), Post Office would not only be protected from the risk of a sizeable adverse costs order, it might even become a recipient of value from the Claimants. If it were to become an net recipient overall, the funders and/or the individual Claimants would be directly liable for any costs that are not covered by the relevant ATE insurance. That risk could be a pressure point when it comes to settlement.
- 29.14 **The Effect of Part 36 on Interim Costs Orders**
- A further advantage of using the Part 36 procedure is that its prescriptive provisions make it difficult for a court to make interim costs orders in split trial cases like the GLO. That is because it is not possible to ascertain whether a Claimant has "beaten" a Part 36 offer (and therefore which costs consequences should follow) until a final money judgment has been given. This could be helpful to Post Office from a strategic perspective. If the Claimants are able to continue through the litigation obtaining interim costs orders after each trial, that gives them a "fighting fund" with which to continue the litigation. If we could eliminate that source of funding, the Claimants may be less incentivised to continue with their claims.
- 29.15 **Risks of Part 36 offers**
- The risk in making Part 36 offers in this case is that undeserving Claimants may "pick off" offers thought to be favourable, leaving Post Office litigating against a smaller number of Claimants with better claims. That risk can be mitigated to some extent by pitching offers at a level which, taken together, equal the value of Post Office's closing offer in the mediation which by definition will already have been rejected. Another mitigation technique is to ensure, insofar as we are able, that the offers reflect the merits of the individual claims.
- 29.16 **Other formal offers post-mediation**
- 29.17 Making a Part 36 offer does not prevent a party from also making alternative settlement offers in Calderbank form.<sup>120</sup> It might be advantageous for Post Office to frame alternative offers (to the same value as its Part 36 offers) to:

<sup>120</sup> This right is specifically preserved under CPR 36.2(2).

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29.17.1 The Claimant Group as a whole (as this would give the Claimant Group the flexibility to divide up the offer amongst themselves) and

29.17.2 To particular cohorts of Claimant.

29.18 Such offers would (probably) not have the prescriptive costs consequences of Part 36<sup>121</sup> but they can be taken into account in the exercise of the judge's discretion in any award of costs that is made.

### 30. SETTLEMENT POST-MEDIATION

30.1 It is usual for the mediator to keep in touch with the parties following an unsuccessful mediation and continue his efforts to achieve a settlement further down the line. There is a strong possibility that this is how any settlement will ultimately be achieved in this case.

30.2 It would be helpful if the litigation strategy could be made to work to maximise pressure on the Claimant Group at these times. If, in the litigation, the Claimants were facing a trial on "difficult" individual test cases (rather than a series of issues in principle which will not help to change the narrative or which the Claimants are likely to win) that may encourage settlement. It will also improve Post Office's negotiating position if it has some costs protection in place.

### 31. SPMS OUTSIDE OF THE GLO

31.1 Regardless of when the GLO is settled, Post Office will need a strategy for dealing with the remaining SPMS who did not join in the litigation.

31.2 Our present view is that a proactive approach (i.e. some form of a remediation scheme) would be ill-advised.<sup>122</sup> It is likely that any such scheme would simply invite claims. A proactive approach would also require a process to be in place for dealing with claims. This would be particularly expensive and time-consuming in the context of this dispute because the claims are not of equal merit. As such, a full assessment of liability (rather than a formulaic approach) would be required. It would also require Post Office to make available a fund out of which compensation could be paid.

31.3 In the circumstances of this case, we consider Post Office would be justified in taking the position that any SPMS with cause for complaint should take the initiative and come forward. The GLO has already been the subject of a great deal of publicity (including several rounds of invitations from Freeths to join the Claimant Group). This means that SPMS ought to be aware of the opportunity to claim. The reason a significant number of SPMS have not done so is likely because they have no cause for complaint.

31.4 A further advantage of a reactive approach is that it may enable Post Office to rely on the laws on limitation. Even if it is found that Post Office has, in the past, been guilty of deliberate concealment (such that many of the existing Claimants' claims will be treated as having been made in time), there will be a point at which the facts giving rise to the claim will have become so widely known that the clock can be re-set.

31.5 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*

<sup>121</sup> CPR 36.14(1) provides that, if a Part 36 offer is accepted, the claim will be stayed. Thus, if some Claimants were minded to accept a global offer but others were not, the Part 36 procedure would not work. It is doubtful whether a Defendant can overcome this issue by making a Part 36 offer which states that the offer can only be accepted if all the Claimants accept it because any such offer would not be made on an unconditional basis. Further, in *Sycamore Bidco Ltd v Breslin and Dawson* [2013] 4 Costs LO 572, a Claimant who made a global offer to two Defendants without apportioning it between them was held not to have beaten the offer as against one Defendant whose individual liability was less than the joint offer. In that case, the Court construed the global offer as an offer to each Defendant to pay the total sum claimed. The case is not on all fours with a GLO scenario but parallels could be drawn.

<sup>122</sup> For reputational reasons, convicted SPMS might be an exception to this strategy.

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*reasonable diligence have done so".<sup>123</sup> Whether, here, the relevant facts could have been discovered using reasonable diligence will be a question of fact but the rule of thumb is that the Claimants' conduct should be tested against that of an ordinarily prudent individual in the Claimants' shoes who is motivated to investigate the position. Given the publicity associated with this claim and the length of time the dispute has been running,<sup>124</sup> it may be that the run-off period for future claims is comparatively short.*

- 31.6 It is fair to say that Post Office's reliance on limitation defences in the prior Mediation Scheme was the subject of criticism. Now, however, given that SPMs have had every opportunity to claim, Post Office would in our view be entitled to say that expecting Post Office to deal with very old claims - in circumstances where the evidence it needs to investigate them probably no longer exists - is stretching the bounds of reasonableness.
- 31.7 Finally, we think it would be advantageous to Post Office to present any settlement offer made to the current Claimants in accordance with the "funding analysis" approach (i.e. as an offer to pay an amount towards the Claimants' costs and funding commitments plus an amount per Claimant/Claimant class). This would allow Post Office to offer future Claimants (who are not saddled with weighty costs and funding commitments) "the same deal" which Claimants in the GLO received, but at a significantly lower cost.

**Herbert Smith Freehills LLP**

<sup>123</sup> The relevant discovery must be of the facts underpinning the relevant cause of action i.e. the Claimant must know not only what the true underlying facts are but also be aware that they were the subject of a fraudulent misrepresentation, deliberate concealment or mistake.

<sup>124</sup> The Claim Forms were issued between April 2016 and November 2017.



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## **ANNEXURE 1**

### **Criminal case summaries<sup>125</sup>**

<b><u>Tahir Mahmood (claimant 559)<sup>126</sup></u></b>
<p>Convicted of theft (1 offence) following a guilty plea prior to trial. Received a suspended prison sentence (126 days) and an unpaid work requirement (150 hours). Mr Mahmood was sentenced on 16 November 2011.</p> <p>In interview, Mr Mahmood admitted to taking Post Office funds and fraudulently covering up losses. It does not appear that Mr Mahmood raised issues relating to the Horizon system.</p>
<b><u>Damian Owen (claimant 128)<sup>127</sup></u></b>
<p>Convicted of theft (1 offence) following a trial. Received an immediate prison sentence (8 months). He was sentenced on 7 December 2011.</p> <p>Mr Owen made vague and generalised attacks on the Horizon system at various stages.</p> <p>Mr Owen is a CCRC applicant.</p>
<b><u>Della Robinson (claimant 154)<sup>128</sup></u></b>
<p>Convicted of false accounting (1 offence) following a guilty plea prior to trial. Received an unpaid work requirement (180 hours). She was sentenced on 18 January 2013.</p> <p>During an initial interview, Ms Robinson admitted to false accounting to hide unexplained losses. She could not explain these losses but suggested error or theft by staff. During the Committal Hearing, however, Ms Robinson's counsel raised issues relating to the reliability of Horizon Online. This matter was not pursued. Ms Robinson did not advance a Basis of Plea when she pleaded guilty to false accounting.</p> <p>Ms Robinson is a CCRC applicant.</p>
<b><u>Seema Misra (claimant 119)<sup>129</sup></u></b>
<p>Convicted of theft (1 offence) and false accounting (6 offences) following a trial. Ms Misra pleaded not guilty to theft but guilty to false accounting. Received an immediate prison sentence (15 months for theft and 6 terms of 6 months for the 6 offences of false accounting. These terms were served concurrently, however). She was sentenced on 11 November 2010.</p> <p>In her first Defence statement, she stated the entire losses were caused by employees stealing from her in 2006. In the statement, Ms Misra did not raise any issues relating to the Horizon system. Following a change of Ms Misra's solicitors, she partially resiled from the allegations made in her first Defence statement and instead asserted that the Horizon system was at fault. She also stated her training was deficient. Similarly, during the trial, issues of Horizon's fallibility and issues</p>

<sup>125</sup> The summaries are intended to give a high level overview. The information where indicated is drawn from Sift reviews conducted by Cartwright King and Brian Altman QC's advices. The underlying case files have not been reviewed.

<sup>126</sup> Source: Sift report (24 September 2013)

<sup>127</sup> Source: Sift report (19 November 2013)

<sup>128</sup> Source: Sift report (27 September 2013)

<sup>129</sup> Source: Sift review (22 January 2014) and Brian Altman QC's advice of 26 July 2016

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relating to training and support were fully aired. She accepted that she had changed her position after seeing press articles concerning alleged Horizon failures.

Ms Misra is a CCRC applicant.

#### **Grant Allen (claimant 205)<sup>130</sup>**

Convicted of fraud by misrepresentation (1 offence) following a guilty plea. Received an unpaid work requirement (200 hours). He was sentenced on 24 January 2013.

Throughout, Mr Allen sought to rely in his defence on alleged failings of the Horizon system (specifically a non-polling incident) coupled with a lack of business support. His solicitors also sought disclosure of "the independent review of the Horizon system".

#### **Lynette Hutchings (claimant 80)<sup>131</sup>**

Convicted of false accounting (1 offence) following a guilty plea. Received an unpaid work requirement (120 hours). She was sentenced on 24 August 2012.

Ms Hutchings pleaded guilty on the basis of *R v Eden* (i.e. putting off the day when she had to deal with the muddle) rather than that she took/intended to take the money. Ms Hutchings also stated that ever since her branch migrated to the Horizon system balances were wrong. She also made reference to some difficulties potentially linked to Horizon (e.g. the cursor sticking and unit recalibration issues).

Ms Hutchings is a CCRC applicant.

#### **Chantelle Chapman (claimant 242)<sup>132</sup>**

Convicted of fraud by abuse of her position (1 offence) following a trial. Ms Chapman pleaded not guilty. Received a suspended sentence (12 months) and an unpaid work requirement (300 hours). She was convicted on 26 June 2013. It is not clear if she was sentenced immediately following the jury's guilty verdict.

It does not appear she suggested that the Horizon system was at fault.

#### **Kanagasundaram Prince (claimant 143)<sup>133</sup>**

Convicted of fraud by false representation (1 offence) following a guilty plea. Received *inter alia* a suspended sentence (12 months) and an unpaid work requirement (200 hours). He was sentenced on 15 June 2012. It does not appear he suggested that the Horizon system was at fault.

Mr Prince is a CCRC applicant.

#### **Julie Cleife (claimant 249)<sup>134</sup>**

<sup>130</sup> Source: Sift review (16 July 2013)

<sup>131</sup> Source: Sift review (19 July 2013)

<sup>132</sup> Source: Sift review (3 December 2013)

<sup>133</sup> Source: Sift review (27 November 2013)

<sup>134</sup> Source: Sift review (19 November 2013)

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<p>Convicted of fraud by false representation (1 offence). Received a suspended sentence (12 months) and an unpaid work requirement (100 hours) following a guilty plea. It does not appear she suggested that the Horizon system was at fault. Ms Cleife admitted to allowing her children to withdraw money from her branch till and to forgetting to process transactions.</p>
<p><b><u>Jo Hamilton (claimant 69)</u></b><sup>135</sup></p> <p>Convicted of false accounting (14 offences) following a guilty plea on all counts. Ms Hamilton was also charged with theft (1 count) which was dropped on condition of the repayment of the monies. Received a supervision order (12 months). Ms Hamilton was sentenced on 4 February 2008.</p> <p>Ms Hamilton presented a statement during interview stating she had received inadequate training, had made calls to the Helpline and that Post Office's systems were "shambolic". It is unclear whether she specifically blamed Horizon for the losses. The Prosecution, however, suspected that Ms Hamilton would raise a defence that the Post Office's system/lack of training caused her to become muddled which in turn resulted in the false accounting. The Prosecution appear to have been of the view that any such claims should be refuted.</p> <p>Ms Hamilton is a CCRC applicant.</p>
<p><b><u>Julian Wilson (claimant 195)</u></b><sup>136</sup></p> <p>Convicted of fraud by abuse of position (2 offences) following a guilty plea. Mr Wilson was also charged with false accounting (3 counts) which were not pursued but ordered to lie on file. Received an unpaid work requirement (200 hours). He was sentenced on 3 August 2009.</p> <p>It does not appear that he suggested that the Horizon system was at fault.</p> <p>Mr Wilson is a CCRC applicant.</p>
<p><b><u>Allison Henderson (claimant 73)</u></b><sup>137</sup></p> <p>Convicted of false accounting (1 offence) on the basis of a guilty plea. Ms Henderson was also charged with theft (1 count) but a not guilty verdict was entered as the Prosecution offered no evidence on this count. Received an unpaid work requirement (200 hours). She was sentenced on 15 December 2010.</p> <p>An amended Defence statement pointed to a malfunction of the Horizon system as being a possible cause of the deficit. Ms Henderson did not admit to false accounting or any dishonesty during her interview nor in her Defence statement. The guilty plea only came after a Goodyear indication that she would not receive a custodial sentence (Cartwright King note that it is difficult to rule out a pragmatic decision to avoid an immediate custodial sentence).</p> <p>Ms Henderson is a CCRC applicant.</p>

<sup>135</sup> Source: Brian Altman QC's Advice of 14 April 2019 at paras [51] to [52] and Brian Altman QC's Advice of 26 July 2016 at paras [57] to [108].

<sup>136</sup> Source: Brian Altman QC's Advice of 14 April 2019 at paras [55] to [56] and Brian Altman QC's Advice of 26 July 2016 at paras [138] to [150].

<sup>137</sup> Source: Sift report (2 September 2014), Brian Altman QC's Advice of 14 April 2019 at paras [62] to [64] and Brian Altman QC's Advice of 26 July 2016 at paras [183] to [202].  
Advice of 26 July 2016 at paras [183] to [202].



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**Jacqueline McDonald (claimant 377)<sup>138</sup>**

Convicted of theft (1 offence) and false accounting (6 offences) on the basis of guilty pleas. Received 18 months imprisonment on each count to be served concurrently. She was sentenced on 21 January 2010.

In interview, Ms McDonald admitted to entering false amounts into the Horizon system to cover up losses that she could not explain. Ms McDonald also raised issues relating to the reliability of the Horizon system in interview and the Defence commissioned an expert to investigate the case. There was a direct attack on the figures produced from the audit, a direct challenge to the Horizon system and criticism of the help available.

Ms McDonald is a CCRC applicant.

**Peter Holmes (personal representative is claimant 550)<sup>139</sup>**

Initially charged with theft (1 count) and later charged with false accounting (1 count). No evidence was offered for the charge of theft. Convicted of false accounting (1 offence) on the basis of a guilty plea. Received a home detention curfew order (3 months). He was sentenced in January 2010.

Mr Holmes claimed that he had no idea as to how the shortage in the audit occurred and that Horizon had let him down/had been faulty in 2008. He did accept that he had falsified documents to cover up discrepancies but said this was only because he thought that error notices would be generated and that the money was not actually missing.

Mr Holmes's case is being reviewed by the CCRC.

**Nicholas Clark (claimant 248)<sup>140</sup>**

Convicted of false accounting (7 offences). Mr Clark was also charged with theft (1 count) but this was not pursued following his guilty pleas to false accounting. Received a suspended sentence (6 months) and an unpaid work requirement (220 hours). He was sentenced on 24 February 2010.

It does not appear he suggested that the Horizon system was at fault (there may be an implied suggestion that the Horizon system itself generated the losses). However, there is ample material independent of Horizon to suggest that Mr Clark had taken the funds for his own use. There is an admission in interview, for example, that Mr Clark used the funds to pay employees.

**Kashmir Kaur Gill (claimant 351)<sup>141</sup>**

Convicted of false accounting (2 offences). Ms Gill was also charged with theft (1 count). Ms Gill pleaded guilty to false accounting. She was sentenced on 12 April 2010. Her sentence is not stated.

In interview, she stated that she had mistakenly placed a remittance pouch into a mail bag, thereby losing the cash, and falsely declared more money to ensure the accounts balanced. It does not appear she suggested that the Horizon system was at fault (there is reference to an ill-defined ATM problem but Cartwright King suggests that this is not an Horizon issue).

<sup>138</sup> Source: Sift review (29 April 2014) and Brian Altman QC's Advice of 26 July 2016 at paras [30] to [56].

<sup>139</sup> Source: Sift review (3 September 2014) and Brian Altman QC's Advice of 26 July 2016 at paras [151] to [165].

<sup>140</sup> Source: Sift report (18 March 2014)

<sup>141</sup> Source: Sift report (5 June 2014)



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<b><u>Susan Rudkin (claimant 444)</u></b> <sup>142</sup>
<p>Convicted of theft (1 offence) following a guilty plea. She pleaded guilty on 23 March 2009. It is unclear when she was sentenced.</p> <p>She admitted in interview that she had inflated cash figures and falsified branch trading statements; that she had "borrowed" money from Post Office but had not been able to pay it back; and she had taken cash from Post Office to pay it into a business account (the money was used to pay for shop, wage and household bills). The case predates Horizon online.</p> <p>Ms Rudkin is a CCRC applicant.</p>
<b><u>Senepathy Narenthiran (claimant 564)</u></b> <sup>143</sup>
<p>Convicted of theft (4 offences) following a full trial where the jury delivered an unanimous guilty verdict. He had pleaded not guilty to all counts. Mr Narenthiran was sentenced to 3 years imprisonment on 3 February 2009.</p> <p>He made a written admission to auditors during the audit that he had stolen the money (he unsuccessfully sought to argue against the admissibility of his written admissions to the auditors at trial). His first Defence statement directly questioned the branch's electricity system. He also instructed a forensic accountant to examine the financial paperwork. In trial, Mr Narenthiran gave evidence that he was following Post Office's instructions that the money in the pouches should be "reversed back" for insurance purposes (Cartwright King note that these comments appear absurd).</p>
<b><u>Kanapathipillai Sathyan (claimant 581)</u></b> <sup>144</sup>
<p>Convicted of defalcation (1 offence) following an admission of guilt. He was sentenced on 27 November 2009.</p> <p>Mr Sathyan alleges that intruders stole the bulk of the deficiency. This is not an Horizon case.</p>
<b><u>Gillian Howard (claimant 77)</u></b> <sup>145</sup>
<p>Convicted of fraud (1 offence) following a guilty plea. Ms Howard received a community order (6 months) and a supervision requirement (6 months). She was sentenced on 26 May 2011.</p> <p>She admitted to falsifying branch trading accounts on Horizon. She was aware that the discrepancies were increasing so started to use personal funds to balance her accounts. In interview, Ms Howard cited an article relating to glitches in the Horizon system and complained about a lack of support from Post Office.</p> <p>She took over managing the branch after her husband (also a Claimant in the GLO) suffered a stroke. She stated that she felt unable to manage the branch. After Ms Howard was suspended (along with her husband), the losses in the branch continued to occur. The branch assistant's son later admitted to theft which likely explains some of the discrepancies (although it is unclear from the Sift report which precise amounts).</p>

<sup>142</sup> Source: Initial sift result sheet (9 June 2014)

<sup>143</sup> Source: Sift review (8 September 2014)

<sup>144</sup> Source: Initial Sift Result Sheet (10 June 2014)

<sup>145</sup> Source: Sift report (26 July 2014)

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<b><u>Siobhan Sayer (claimant 161)</u><sup>146</sup></b>
<p>Convicted of fraud (1 offence) following a guilty plea. Ms Sayer received a suspended prison sentence (40 weeks) and an unpaid work requirement (200 hours). She was sentenced on 15 February 2010.</p> <p>In interview, she admitted to falsifying accounts to cover up losses. This was a pre-Horizon Online case. There was no outright attack on the Horizon system but an attack may be implied on the basis that Ms Sayer was unable to account for the source of the losses. In a statement she stated that she did not take the money and denied having any dishonest intent. She also criticised Post Office's training.</p>
<b><u>Pauline Thomson (claimant 178)</u><sup>147</sup></b>
<p>Ms Thomson was initially only charged with theft (1 count). On the day of trial, false accounting (3 counts) was added to the indictment. Convicted of false accounting (3 offences) following a guilty plea. The theft charge was not pursued. Ms Thomson received a community order and an unpaid work requirement (120 hours). She was sentenced on 18 March 2010.</p> <p>During an interview, Ms Thomson stated that she had experienced a number of "bad balances" with Horizon. She consequently falsified her branch trading statements. She did not report any losses as she was aware she would have "to make it good" and did not have the funds to do so. The Defence statement sought details of problems with Horizon (the extent of the subsequent disclosure is unclear as the Prosecution file was not reviewed as part of the initial Sift report).</p> <p>It appears that Cartwright King requested further files relating to this case from Royal Mail Group. We have not reviewed any subsequent analysis.</p>
<b><u>Margery Williams (claimant 194)</u><sup>148</sup></b>
<p>Convicted of fraud by false representation (4 offences) following a guilty plea. Ms Williams received a concurrent, suspended prison sentence (52 weeks) and an unpaid work requirement. She was sentenced on 3 May 2012.</p> <p>During an interview, Ms Williams admitted to inflating her cash and the number of stamp books on hand. She stated that the losses were linked to the Horizon system and concluded that the stamp books had been remmed into Horizon incorrectly. In the pre-sentence report, Ms Williams admitted she used some of the money to support her underperforming shop and also to "cooking the books" deliberately. The case did not rest solely on Horizon data. There is evidence (independent of Horizon data) to suggest that Ms Williams was guilty of fraud by false representation.</p> <p>Ms Williams is a CCRC applicant.</p>
<b><u>Barry Capon (claimant 237)</u><sup>149</sup></b>
<p>Convicted of false accounting (1 offence) following a guilty plea on the basis that he wanted to cover up inexplicable losses. He denied stealing any funds. We are not aware of the sentence but know that he was sentenced on 14 October 2009.</p>

<sup>146</sup> Source: Sift report (27 March 2014)

<sup>147</sup> Source: Initial Sift Result Sheet (26 March 2014)

<sup>148</sup> Source: Initial Sift Result Sheet (10 March 2014)

<sup>149</sup> Source: Initial Sift Result Sheet (7 June 2014)

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<b><u>John Dickson (claimant 53)</u></b> <sup>150</sup>
<p>Convicted of fraud by false representation (1 offence) following a guilty plea. Mr Dickson received a suspended prison sentence (8 months) and an unpaid work requirement (180 hours). He was sentenced on 26 July 2012.</p> <p>Mr Dickson admitted to falsifying branch trading statements and to inflating the cash on hand on repeated occasions to hide unexplained shortages. He did not seek to rely on any failings on the part of the Horizon system.</p>
<b><u>Timothy Brentnall (claimant 30)</u></b> <sup>151</sup>
<p>Convicted of fraud (1 offence) following a guilty plea. Mr Brentnall received a suspended prison sentence (20 weeks) and an unpaid work requirement (200 hours). He was sentenced on 29 June 2010.</p> <p>In an interview, he denied taking Post Office funds but admitted to entering false figures into the Horizon system. In sentencing remarks, the Judge noted that this was a case of somebody who had run into difficulties due to "sloppy accounting practices".</p>
<b><u>Wendy Buffrey (claimant 34)</u></b> <sup>152</sup>
<p>Convicted of fraud (2 offences) following a guilty plea. Ms Buffrey received a community order (12 months) and an unpaid work requirement (150 hours). She was sentenced on 18 October 2010.</p> <p>Ms Buffrey argued that she did not obtain any benefit from the funds. Her Defence statement inferred that the "losses" may have been caused by defects in the Horizon system. She also she specifically requested information as to whether there had been accounting problems experienced by other SPMs using the Horizon system.</p> <p>Ms Buffrey is a CCRC applicant.</p>
<b><u>Scott Darlington (claimant 51)</u></b> <sup>153</sup>
<p>Convicted of false accounting (5 offences) following a guilty plea. Mr Darlington received a suspended prison sentence (3 months) and an unpaid work requirement (120 hours). He was sentenced on 23 February 2010.</p> <p>In an interview, he admitted to falsifying branch trading statements and that his accounting systems did not follow proper procedures. Mr Darlington raised a point relating to an "error" in the workings of the Horizon system and made reference to an unexplained "disappearance" of money. There was ample evidence from employees coupled with unexplained/badly explained deposits into his personal bank accounts to suggest that Mr Darlington had in fact been stealing Post Office funds.</p> <p>Mr Darlington is a CCRC applicant.</p>

<sup>150</sup> Source: Sift Report (25 July 2013)

<sup>151</sup> Source: Sift Report (9 April 2014)

<sup>152</sup> Source: Sift Report (3 September 2014)

<sup>153</sup> Source: Sift Report (8 September 2014)



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<b><u>Stanley Fell (claimant 59)</u></b> <sup>154</sup>
<p>Convicted of false accounting (1 offence) following a guilty plea. He had initially been charged with theft (1 count) but pleaded guilty to false accounting as an alternative offence. Mr Fell received a suspended prison sentence (50 weeks) and a supervision order (12 months). He was sentenced on 27 July 2007.</p> <p>In an informal interview, Mr Fell admitted that he had taken money "to keep the shop afloat".</p> <p>Mr Fell is a CCRC applicant.</p>
<b><u>David Hedges (claimant 72)</u></b> <sup>155</sup>
<p>Convicted of theft (1 offence) and fraud (3 offences) following a guilty plea. Mr Hedges received a suspended prison sentence (7 months) and an unpaid work requirement (125 hours). He was sentenced on 4 February 2011.</p> <p>In an interview, he admitted to entering false figures into the Horizon system but denied taking money from Post Office. He implied that there must be a problem with the Horizon system causing it to generate losses. Following his guilty plea, his counsel argued in mitigation that he had in effect "borrowed" money from Post Office to prop up his struggling business and that he intended to repay the money to Post Office when he sold the business.</p> <p>Mr Hedges is a CCRC applicant.</p>
<b><u>Timothy Burgess (claimant 36)</u></b> <sup>156</sup>
<p>Convicted of false accounting (1 offence) following a guilty plea. Mr Burgess received a community order (12 months) and an unpaid work requirement (150 hours). He was sentenced on 1 September 2011.</p> <p>He admitted to altering figures deliberately as he could not afford to repay losses accrued through cheque fraud. He did not make any criticisms of Post Office's training or the Helpline.</p>

<sup>154</sup> Source: Sift Report (3 June 2014). Cartwright King completed the review of Mr Fell's case following a request in Mr Fell's Mediation Scheme Application.

<sup>155</sup> Source: Sift Report (8 April 2014)

<sup>156</sup> Source: Sift Report (23 September 2013)