

Message

From: Andrew Parsons [REDACTED] **GRO**
Sent: 21/10/2019 09:12:41
To: Emanuel, Catherine [REDACTED] **GRO**; Ben Foat [REDACTED] **GRO**; Rodric Williams [REDACTED]
CC: Watts, Alan [REDACTED] **GRO**; Lerner, Alex [REDACTED] **GRO**; Deas, Emma [REDACTED] **GRO**
Sushma MacGeoch [REDACTED] **GRO**; Belinda Fox [REDACTED] **GRO**; Rachel Lawrie [REDACTED]
Subject: RE: Scope of FIT - harassment and costs [WBDUK-AC.FID26896945]

I agree with Kate – in crude terms, I would equate this to at least a 60% chance of success (I could be persuaded to go higher). But we would need to re-assess this once the Cs have properly set out their position.

A

Andrew Parsons

Partner

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From: Emanuel, Catherine [REDACTED] **GRO**
Sent: 21 October 2019 09:31
To: Ben Foat [REDACTED] **GRO**; Andrew Parsons [REDACTED] **GRO**; Rodric Williams [REDACTED]
GRO
Cc: Watts, Alan [REDACTED] **GRO**; Lerner, Alex [REDACTED] **GRO**; Deas, Emma [REDACTED] **GRO**
Sushma MacGeoch [REDACTED] **GRO**; Belinda Fox [REDACTED] **GRO**; Rachel Lawrie [REDACTED]
GRO; Rosie Gaisford [REDACTED] **GRO**
Subject: RE: Scope of FIT - harassment and costs [WBDUK-AC.FID26896945]

This is not a claim that has to our knowledge ever been raised before in a litigation context and our preliminary view, per our earlier advice, is that the Claimants will face an uphill battle.

Given the Fraser J factor, we are looking at it more closely (both from a merits and strategic perspective) with a view to sharing more concluded views and will liaise with Helen Davies (while Tony Robinson is working on other aspects).

From: Ben Foat [REDACTED] **GRO**
Sent: 21 October 2019 09:23
To: andrew.parsons [REDACTED] **GRO**; Rodric Williams [REDACTED] **GRO**
Cc: Watts, Alan [REDACTED] **GRO**; Emanuel, Catherine [REDACTED] **GRO**; Lerner, Alex [REDACTED]
GRO; Deas, Emma [REDACTED] **GRO**; Sushma MacGeoch [REDACTED] **GRO**; Rosie Gaisford [REDACTED]
Belinda Fox [REDACTED] **GRO**; Rachel Lawrie [REDACTED] **GRO**; [REDACTED] **GRO**

GRO**Subject:** Re: Scope of FIT - harassment and costs [WBDUK-AC.FID26896945]

Thanks Andy - what's the level of risk that the claimants could succeed in recovering their funding costs (I've never seen it done and thought it was against public policy but would be helpful in having a broad understanding on the likelihood ie 20%, 40%, 50%, 60%, 80% etc.)

Kind regards

Ben

Ben Foat
General Counsel
Post Office Limited
Ben.foat@**GRO**

From: Andrew Parsons **GRO**

Sent: Monday, October 21, 2019 8:41:12 AM

To: Ben Foat **GRO**; Rodric Williams **GRO**
Cc: Watts, Alan **GRO**; Emanuel, Catherine **GRO**; Lerner, Alex **GRO**
GRO; Deas, Emma **GRO**; Sushma MacGeoch **GRO**
Belinda Fox **GRO**; Rachel Lawrie **GRO**; Rosie Gaisford **GRO**

Subject: Scope of FIT - harassment and costs [WBDUK-AC.FID26896945]

Ben, Rodric

Last week we received letters from the Cs about the scope of the Further Issues trial in relation to two points: harassment and litigation funding costs. The legal team met on Friday and below is the combined view of Counsel (HDQC and TRQC), WBD and HSF. We should be grateful for instructions to respond to these matters as proposed below. We should respond to the Cs by close of business tomorrow and so could discuss this on our call at 4pm today.

Harassment

The Cs wish to extend the scope of the FIT to include a limited question around liability for harassment (as distinct from questions around the measure of loss that might arise from a harassment claim, which already properly form part of the trial). They are seeking for the Court to confirm that Post Office sending debt letters to SPMs can, in theory, amount to harassment. This would require an extension to the scope of the FIT as it would not fall within the Court's current Order.

The legal team's view is that this should be opposed.

- First, harassment is a highly factually sensitive topic and the Court needs to understand the full circumstances of a case to form a view on whether conduct can amount to harassment. At present, the FIT should be proceeding on assumed (uncontested) facts, with no witness evidence.
- Second, the formulation of this question by the Cs sets the bar very low. Post Office would have difficult task in disproving this "in theory" case as nearly any conduct can amount to harassment if taken to an extreme, and indeed there are precedents where debt recovery processes have been found to amount to harassment. This could lead to a decision that is of little legal utility (as the question of harassment would still turn on its own facts in each case) but a judgment against Post Office on this theoretical point could be misunderstood by the public as a finding that Post Office has harassed SPMs.
- Third, the Judge has already expressed dim views about Post Office's debt recovery procedures in the CIT judgment and so this is an unsafe area for us.

Recommendation - that Post Office should oppose the inclusion of this liability question in the FIT. That may then provoke Cs to apply for it to be added and that point may be heard by the Judge at the CMC on 7 November. If the Cs

make a formal application on this topic that would expose Post Office to a costs risk (c.£50k based on previous figures) should the Judge agree with the Cs.

Litigation funding costs

The Cs have asked whether Post Office agrees that it can recover its litigation funding costs as a head of costs in the litigation. If Post Office does not agree this point, the Cs may then try to recover their litigation funding costs as damages and put that as a point to be decided in the FIT. We do not know what their litigation funding costs are but they are estimated in the tens of millions of pounds.

The legal team's view is that Post Office should, at this early stage, contest the recoverability of litigation funding costs:

- There is no precedent for litigation funding costs to be recovered as costs in litigation. Indeed, as a matter of public policy changes were made to the CPR to exclude their recoverability. This would be a novel point for the Cs to run. It would also be outside the scope of the FIT as currently defined.
- We have not yet found any precedent for being able to recover litigation funding costs as damages. We cannot however stop the Cs pleading out this head of damage in their claims due at the end of week. Therefore, if the Cs wish to include this point in the FIT, Post Office cannot stop that.
- We are also concerned that the Cs are using this a vehicle to highlight to the Judge that the funder may be taking a large share of the Cs damages. This may make the Judge more sympathetic to agreeing in principle to higher damages on more orthodox heads of loss so to ensure that the Cs get to walk away with some compensation.

Recommendation - that Post Office denies that litigation funding costs can be recovered as a head of cost in the litigation but stays silent on the recoverability of litigation funding costs as damages until the Cs plead out that claim. If they do plead out a damages claim, further advice can be provided at that point.

Kind regards
Andy

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