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SPEAKING NOTE FOR POST OFFICE LITIGATION

SUB-COMMITTEE MEETING ON TUESDAY 15 MAY 2018

- **Overview of the litigation**

- Reminder: PO faces some 561 claims from existing and former Postmasters. Quantum remains unclear.

- Nature of claims: heads of damage are numerous – claims are substantial -but main heads of damage in majority of claims:

  (a) to reclaim deficits that they have been made to pay but say were not payable.

  (b) Damages for loss of office.

  (c) Damages for loss to other businesses/bankruptcy.

- Phases: Litigation now been split into three phases by Managing Judge:

  (a) Common issues trial: trial of 23 issues as to the meaning and effect of the Sub Post Masters Contract and the newer version – the NTC: this is to take place in November and scheduled for 4 weeks.

  (b) Horizon trial: trial of issues as to the dependability of the Horizon system – take place in March 2019.

  (c) Trial on breach, causation, loss: as yet unscheduled. Likely to take place sometime after September 2019.

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- Thinking of the Judge would appear to be:

  (a) work out what the contract means and the nature of the relationship that it embodies- in the common issues trial.
  (b) Work out if the Horizon computer system is the likely cause of any shortfalls- in the Horizon trial.
  (c) Apply the findings in the Common Issues trial and the Horizon trial, to a sample of the PM claims- in the breach/causation/loss trial.

- **Common Issues Trial**

- Counsel team recently submitted a detailed 86 page Opinion setting out our views on the 23 issues. It is necessarily dense and complicated. That is the place to go if you want chapter and verse on our views. Nothing I am about to say is intended to deviate from that.

- By way of overview what the common issues trial is going to determine is the nature and effect of the legal relationship that existed (and exists) between PM's and PO – as set out in the express terms of the contracts and terms, which are capable of being implied into those contracts.

- As part of that detailed process – the Court is going to have to decide whether this is a pure commercial relationship (which is more hardnosed- business to business type of relationship), or alternatively whether the relationship is more akin to a special form of employment relationship– and thus borrowing some of the concepts from that body of law tends to be more sympathetic towards the "employee".

- This task is not straight forward given:
  (a) some of the drafting of the contracts (in particular) the SPMC is in places poor, opaque and difficult to follow- and therefore open to different interpretations.

  (b) The relatively recent legal development of an argument that a duty of "good faith" can be implied to long term relationships (such as the PM/PO one) which have been termed "relational contracts"- and that the express terms in the contract be viewed through the

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prism of a duty of "good faith"- the extent of that duty of good faith, so far, being unclear.

- **Our view on the merits of common issues trial**

- Outcome of litigation of this type is notoriously difficult to predict. In particular, need to keep in mind that the way they are putting the case now – is likely to be refined and reformulated after we exchange evidence and start preparations for trial.

- But our view is that PO has the better of the argument on many of the 23 issues – but it is also likely to lose on a number of them.

- In particular we think it unlikely that the Court will find that this was a "relational contract" of the type alleged by the Claimants necessitating the implication of a general "good faith" term. We consider that the Court can regulate the contract sufficiently by the implication of two implied terms which we have ourselves admitted stand to be implied:

  (a) *Stirling v. Maitland* implied term that do nothing to impeded the performance of the other party of its contractual obligations.
  (b) *Necessary co-operation term*

- Those are in and of themselves powerful terms which place certain duties on PO – duties which the PM say have been breached. To be clear, there is a partial overlap between the implied terms contended for by the PM and the implied terms that PO accept are part of the contracts. So this is likely to apply:
  (a) Duty to give training to the PM's
  (b) Duty to provide accounting information and (possibly) assist in establishing causes of shortfalls – particularly where this involves reconciliation with third party data.

  These duties may be found to be significant and may not, in practice have been met in all cases.

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- But given the uncertain state of the law – we think that there is material here – should the Judge be so minded, to imply a duty of good faith. Risk that he might. If he did so we would advise that an appeal be brought. Represents an important and novel point which is likely to radically effect the approach to the construction and operation of the express terms of the contracts. Indeed, whichever side loses this point is likely to seek to appeal.
- The Common Issues judgment will describe and determine the incidents of the legal relationship and making certain findings of fact along the way. Likely to be general and it is not expected that either party will be ordered to pay the other any money.
- Earliest realistically expect the Judgement is end of January 2019. It is possible that it might be a month or so after this.

- **Headline points of dispute**

There are many. Deal with two briefly to give you a flavour:

- <u>Duty of PM to account to PO and in particular to be responsible for shortfalls in its accounts:</u>

(a) PM say: that it is for the PO to show that the shortfalls were due to their error/fault. They say that the problems arose due to issues with Horizon and with issues connected with insufficient training on Horizon and poor advice from the helpline. None of which are their responsibility.

(b) PO say: that PM are in control of the branch and determine what goes on there. That in the normal case when they sign trading accounts (without qualification) that if they subsequently want to dispute them – then the burden is on them to demonstrate why the accounts are wrong- in accordance with well-established principles derived from the law of agency. Furthermore, that Horizon is a dependable computer system very unlikely to be the cause of any particular shortfall and that suitable training was offered to all, and helpline was generally available and useful.

We consider that PO have the better of this argument- but it is not clear cut. In particular the term section 12 clause 12 of the SPMC is not free from doubt and that is not a well drafted contract. There is also the point made by the PM's that they acted

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under duress in signing their trading accounts and/or under the instruction of the helpline – so the burden should not be on them to prove why they are wrong.

Issues about the likelihood of Horizon being the cause of shortfalls in PM's accounts will be considered as a general matter at the Horizon trial. Issues about the adequacy of training and the helpline will be tied up in the third trial dealing with issues of breach, causation and loss.

- Ability of PO to suspend PM's and the basis on which they can terminate their contracts:

(a) PM say: the right to suspend is subject to a whole range of implied terms about fairness and natural justice – before the right can be exercised. They also say that the 3 months and the 6 months right of termination – do not reflect the true agreement between the parties and/or are onerous terms which are not enforceable as they were not sufficiently brought to the PM's notice. They contend for a much longer period of "reasonable notice" – minimum of 12 months.

(b) PO say: the right to suspend is a right which exists for PO to protect its business – including if it harbours suspicions. And the right to terminate on 3 months or 6 months notice is an express term in a business to business contract.

On suspension: we consider that the court might well imply a limited term that the subjective belief of PO (that a contractual ground of suspension has arisen) must be based on reasonable grounds and such grounds must continue during the duration of the suspension for it to be lawful- but not all the other fairness/public law implied terms contended for. In most cases not expect PO have a difficulty fulfilling the "reasonable grounds" implied term.

On termination: We are concerned about the 3 month notice of termination – not attractive given the long term nature of the potential relationship and the investment made by both sides in it. But although it is capable of operating harshly it is a term contained – in a signed contract. It is vulnerable but we would expect the Court to uphold it in cases where the PM had a copy of the contract in advance – has had a chance to read the term.

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There are a number of cases – not sure how many – where no contract was provided prior to the appointment and others where no real opportunity to read it was provided. In these cases much more difficult to seek to rely on 3 months or 6 months notice – either because such term was not incorporated into the contract – or that it was of an onerous nature and sufficient notice of it was not given. In this scenario, the contracts will be terminable on reasonable notice which is is likely to be [6 months / 12 months / similar to the NTCs]

- **The future**

- Currently simultaneously preparing for the Common Issues trial (November 18) and the Horizon computer trial (March 19).

- The Common Issues trial will determine some issues but not all- in particular the commercial duress issue is not part of that trial. In some cases the decision as to the meaning of the contract will not be determinative – as the question of whether there has been a breach of such a term, and whether that breach has caused any loss will need to be decided- at the breach and causation trial.

- The Horizon trial is important as – assuming the Court finds that generally the Horizon system was dependable then, it is going to make it much harder at the third hearing dealing with breach and causation – for PM to say that deficits at their branch were caused by Horizon- and in practice will place an evidentiary burden on them to prove that the general findings made about Horizon in the Horizon trial do not apply to their claim.

- We should always keep the possibility of settlement under review. But at the moment we do not see any other realistic option than to go ahead with the Common Issues trial. There is then a mediation ordered to seek to settle the matter and/or reduce the issues in light of the Common Issues judgement. There is a very short time between that mediation and the Horizon trial.

- Following, the judgement in those two hearings , we will have a much better idea of how the land lies with likely eventual outcome of this litigation.

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- If PO have done well in those two hearings - there is the possibility that the Claimant group bringing the litigation will start to splinter and fall apart. The economics (legal costs) will soon be very difficult for them if large numbers decide to settle or withdraw. There is also often a herd mentality in such cases- if a significant number of Claimants fall by the wayside – leaving the hard-core exposed.

- It is also possible – that one or both parties may seek to appeal the decision of the Managing Judge in the Common Issues trial to the Court of Appeal. It is particularly susceptible to appeal as it is primarily a question of construction (as opposed to the hearing of detailed evidence) where the Court of Appeal regularly overturn Judges at first instance.

- Happy to answer any questions or expand on any points as required.