

**CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION**



DECISION PAPER: Proposal for the March 2019 Trial and a Long Term Strategy for the Group Litigation

1. BACKGROUND

- 1.1 The Court has ordered a trial in November 2018 to deal with the Common Issues around the standard subpostmaster contracts. The Court has also set aside (on its own volition) a 4 week window in March 2019 for a further trial and it is up to the parties to formulate proposals on the issues to be tried in that window. By July 2018 the parties need to have held discussions and sought to agree those proposals, and in September 2018 the Judge will decide upon the matters to be heard in March 2019.
- 1.2 WBD have a meeting with Freeths on 22 December 2017 which is primarily to discuss the disclosure of further documents that should be given by Post Office. Following this, there is a hearing on 2 February 2018 at which the Court will make disclosure orders, if the parties have not agreed on disclosure.
- 1.3 The challenge is that the scope of the documents to be disclosed is tied to the purpose for which disclosure is being given, and the purpose of the March 2019 hearing and any steps thereafter have not yet been set. The meeting on 22 December 2017 and hearing on 2 February 2018 are therefore likely to move beyond just issues about disclosure into a broader conversation about the future of this litigation.
- 1.4 This paper therefore seeks Post Office's approval of WBD's proposal for what issue should be tried at the March 2019 hearing and, in addition, the long term strategy for this litigation so that we may be on the front foot at our upcoming meeting with Freeths. It sets out our view from a legal perspective on the best way to proceed but we would welcome the PLSG's views on the commercial and operational impacts of this strategy.

2. FUTURE PLANS

- 2.1 As per the Court's directions, WBD and Counsel have given careful thought to the issues which could be meaningfully tried in March 2019. As a result of the claims being so diverse, it has been difficult to find a discrete "common issue" that could be prepared for trial in March 2019 and be of such impact that it would likely move this litigation materially close to an overall conclusion. Having discussed this with Counsel, Jane, Rodric, Mark and Ben Foat, we are in collective agreement that we should suggest using the March 2019 hearing to have those cases with limitation issues or have been previously settled (through NT or the Mediation Scheme) struck out. This would potentially reduce the number of Claimants by up to 50%.
- 2.2 Although this would be obviously advantageous to Post Office, the limitation and settlement issues are not straightforward, turning on whether Post Office concealed problems with Horizon and its operating practices, in particular whether it concealed "remote access" to Horizon. Addressing these issues will require targeted disclosure, witness evidence and expert evidence. We suspect that Freeths are already finding the level of work involved in this litigation challenging and as such, it may be that they and the Court object to this proposal on the grounds that there would be insufficient time to properly prepare for it (given that that preparation would need to take place between September 2018 and March 2019 when the parties will already preparing for the Common Issues trial in November 2018).

- 2.3 However, it remains our belief that this should, in the first instance at least, be tabled as a possible proposal. It allows Post Office to observe the Court's directions whilst providing WBD with an opportunity to shape the long term direction of the litigation in favour of Post Office, through proposing for a more significant trial to take place in 2020. Such a proposal should also illustrate to Judge Fraser as desire to manage this complicated piece of litigation constructively.
- 2.4 Although the CMC Order does not require the parties to submit proposals until July 2018 for the future of this litigation beyond November 2018, we believe that the scope of the disclosure to be agreed now should, with a view to maximising efficiency, be tied into the future course of this litigation and that there may be advantages to setting that in motion now.
- 2.5 At some stage the Court will need to address questions of breach, causation and loss in order to determine the claims being put forward by the Claimants and until it does so the parties will not know where they stand on these matters. Rather than taking a piecemeal approach and addressing each issue at a separate trial, we would like to tackle each issue at one large trial. This would be achieved through trying and deciding around 16 Lead Cases.
- 2.6 Each of Claimant's cases are factually sensitive so it is unlikely that the 16 Lead Cases would be sufficiently analogous to other cases in the Group such that they automatically determine (in a legal sense) all of the Claimants' claims. However, a clear decision on the Lead Cases should give a strong indication to the parties of the likely outcome of other similar cases, thus creating more common ground between the parties on which this litigation might be resolved without the need for 562 separate trials or some other equally time-consuming process.
- 2.7 We believe that, following this "Lead Cases Trial", it should be possible to put most of the claims into sub-groups, with each sub-group being reflective of a particular Lead Case or issue heard at the Lead Cases Trial. This would then allow the parties to see which claims could be discontinued, conceded, settled or subject to further litigation, depending on their status and prospects of success. This should move this litigation much closer to being concluded in the most efficient manner.
- 2.8 A trial of this nature would be a significant exercise taking around 18 months to prepare for (starting in earnest after the November 2018 trial), the actual hearing will likely last for around 10-12 weeks and it will come at a considerable cost. To ensure it is not delayed further, we would propose beginning some of the preparations for it now and for it to run in parallel with any matters that might be heard in March 2019. On this basis, it could be heard in October 2020 or maybe, with Freeths' full cooperation, in May 2020.

3. RISKS AND ADVANTAGES

- 3.1 The Judge wishes to progress this litigation swiftly. At the last CMC, this caused him to book hearing time in March 2019 without properly assessing whether anything meaningful, which would advance this complicated piece of litigation forward, could be tried at this hearing. We now suspect that he will be looking for a route that enables him 'back track' from this order without embarrassment. The proposal above would allow him to do exactly this because, upon proper consideration, a Lead Cases Trial would accelerate the overall resolution of this litigation by getting the majority of the key issues before the Court as soon as possible.
- 3.2 The main alternative to this approach is to wait until after the March 2019 trial before addressing the longer term strategy with Freeths and the Court. This would likely mean not hearing any subsequent Trial until the end of 2021. Our plan therefore reduces the length of this litigation by 12 months, whilst also allowing for a hearing in March 2019 if a suitable topic for that slot can be agreed.
- 3.3 Another alternative would be to try to continue to dissect this litigation topic by topic and hear each topic at a separate hearing, on the assumption that each topic has some common effect on all the Claimants. For the reasons stated above, we believe that this approach would overall take longer, cost more and ultimately fail due to the diversity of the claims in this litigation.

- 3.4 To mitigate the risk of the Court misunderstanding our proposal as being an attempt to delay this litigation, we intend to write to Freeths setting out the proposal for a Lead Claimants Trial in very gentle terms. We wish to draw out their views on this plan, whilst making clear that we are open to all other reasonable options including a March 2019 trial. In doing so, we will be showing the Court an impetus to get on with this litigation whilst also being flexible and cooperative with the Claimants, which was the Judge's desire at the CMC.
- 3.5 Setting out a plan for a Lead Cases Trial will also assist us with disclosure. If we do not table a long-term plan that includes disclosure at relevant stages then that might allow the Claimants to push for full disclosure of everything up front (and at massive cost to Post Office) because there is no alternative option.

4. RECOMMENDATION

- 4.1 It is our recommendation that WBD share with Freeths its proposals for the March 2019 trial and for a Lead Cases Trial to take place in 2020.