POL00253363

Message

From: Amy Prime GRO
Sent: 13/02/2018 11:52:49
To: Mark Underwood1 GRO GRO
CC: Jonathan Gribben GRO ; Andrew Parsons GRO
Subject: RE: URGENT - Letters to Freeths for approval [BD-4A.FID26896945]
Attachments: _DOC_38099127(1)_Decision Paper_ IT Expert.pdf

Mark

Further to the below, please find attached the Decision Paper for tomorrow's PLSG meeting on selection of the IT expert. Andy will be updating the PLSG verbally on:

1. Security for Costs
2. Model C Disclosure
3. March 2019 issues

Please could we also schedule a PLSG call between 26 & 28 February to discuss the selection of Lead Claimants (decision to be made by 2 March)?

Kind regards
Amy

Amy Prime
Solicitor
Womble Bond Dickinson (UK) LLP

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From: Andrew Parsons
Sent: 12 February 2018 22:26
To: Rodric Williams; Mark Underwood1 GRO
Cc: Amy Prime; Emma Campbell-Danesh; Jonathan Gribben; Victoria Brooks
Subject: URGENT - Letters to Freeths for approval [BD-4A.FID26896945]

Rodric, Mark

Please find below a number of points on which I would welcome your comments / approval. I do not believe that any of these matters require approval by the PLSG because they are either (i) the implementation of decisions already made by the PLSG or (ii) requirements of the Court. I would be happy to update the PLSG on these matters at the meeting on Wednesday but our time is very limited before the next CMC and we would like your urgent instructions on the below during the course of tomorrow if possible.

I'm available at 10:30 tomorrow morning if that would be a good time to speak. I'm then out until about 4:30pm but you may speak to the following if I'm not around:

- Amy – Model C disclosure
- Emma – Security
- Jonny – Horizon issues

All of the points below have been approved by Counsel.

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Security for Costs

Attached is a response to Freeths recent letter on Security. Freeths' letter raises no new info that changes the position on security so our advice is that Post Office should push forward with the security application at the end of this week unless we hear anything new from Therium before then.

Freeths have requested that Post Office agrees to a Costs Management Order before requesting security for its costs. A CMO can cover a number of things but in the majority of cases it means Costs Budgeting. This is a process where we submit a budget for Post Office's litigation costs to the Court for approval. The Court usually holds a hearing where the budget is examined line by line, the other party argues that the budget should be revised down and the Court approves the revised budget. There is an assumption that a party cannot recover more costs than set out in the approved budget. If the shape of the litigation changes or the assumptions in the budget change, a party needs to apply to the Court to revise its Cost Budget. Costs Budgeting is mandatory in most cases, save for those where the claim is for more than £10m.

There are a number of points to consider in the current litigation.

1. If we are correct about the need for security, then POL's costs will effectively be capped at the level of security anyway. A CMO would only materially change POL's cost risk if the security application is not made.

2. The judge is going to have to conduct a quick review of POL's costs budget as part of the security application. We are therefore going to be subject to some level of cost scrutiny anyway.

3. I am concerned (and so are Counsel) about the amount of work needed if we have costs budgeting. Every time the judge makes a new direction, we would need to revise the costs budget. In this litigation that could be quite unwieldy as we have changes of direction at nearly every CMC. I think this will hit POL harder than the Cs, given that Post Office will carry the bulk of the work on disclosure and expert evidence.

4. From a neutral / objective standpoint, it's difficult to see why cost budgeting is needed. The value of the Claimant's claims is £200m+. It would require some massive spending, way higher than current predictions, for us to reach a level where costs were disproportionate.

5. There may be some advantage in Cost Budgeting if it helps control the Cs costs. They have so far spent double what Post Office has spent (£2.7 v £4.5m) but, interestingly, they have not provide us with a cost update in the last 2 months, even though they are required to update us every time they spend another £250k. Either Freeths have forgot to update us or they have significantly slowed their rate of spending.

Unless a CMO would be useful in controlling the Cs costs, we see little reason to support cost budgeting. We therefore need sight of the Cs future costs in order to be able to judge the merits of a CMO.

I've also had a call this morning from Freeths on a without prejudice basis. In essence, they are prepared to put up a bond as security if we agree to cap the costs that Post Office can recover from the Claimants. They are worried that our costs will get too high and want some control over them. They would also like us to explore this possibility before issuing our application for security.

Counsel and I are not minded to hold up our application for security. Freeths have dragged their heels on this for a long while. Also, getting security in place will be tricky – Therium will need to fund it, the insurers will need to put up the bond, the terms of the bond will need agreeing and we'll have to complete some form of costs budgeting process in order to establish the security level. I can see that getting dragged out for weeks if not months.

We also don't see why Costs Budgeting needs to precede the security application. The Court can decide the principle of whether security should be ordered and make an interim assessment on the level of that security, which can be revised later if Costs Budgeting is adopted.

Our recommendation therefore is that we issue the security application, but ask for a hearing date no sooner than 6 weeks. This gives us time to explore Freeths' proposal, but creates a time pressure so that this does not get dragged out.

I should be grateful if you could approve the attached letter which implements this recommendation.

Model C Disclosure

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We have reviewed the Claimants' requests for Model C disclosure. They are, in effect, still seeking massively wide disclosure that goes far beyond the Common Issues for November and far beyond admissible factual matrix. The attached Model C table includes our comments on each request (which has a few points in yellow that need finalising tomorrow).

We recommend that Post Office opposes nearly all these requests, save for those that are sufficiently narrowly defined that giving them would be easy. We believe that it is important that Post Office adopts a consistent approach. If we oppose certain categories of documents on the grounds that they are inadmissible, then we need to oppose all similar documents save where there is an obvious reason not to do so – which leads to a large number of requests being opposed. We should also keep in mind that Post Office's original Model C proposal was drafted very generously and in places went beyond admissible factual matrix, so the Cs are already getting more than they are strictly entitled to.

Counsel and I have a fair degree of confidence that the Court will be with us on this approach so long as we continue to constructively engage with Freeths.

We have prepared the attached draft letter to Freeths explaining this position. We should be grateful for your comments on / approval of this letter.

March 2019 issues

Please find attached a draft Order that we wish to send to Freeths setting out our proposals for the March 2019 trial.

Our approach has been to stick rigidly to only issues that are purely technical in nature, in line with the Judge's comments at the last CMC. We expect Freeths to take a wider approach and seek to pull in issues like training on Horizon and support in using Horizon. We do not believe the Judge will support that idea. We also do not believe that this is an area where we should play tactical games in trying to shape the issues to POL's advantage. That will be seized upon by the Claimants and could lead to criticism from the Judge.

The list of issues Counsel currently proposes is in Schedule 3 to the draft Order. Having reviewed the pleadings, this list represents all the purely technical Horizon issues in dispute. We are going to run this list passed Fujitsu tomorrow and Counsel is going to consider whether this list could be cut down / refined.

The draft Order also sets out our proposed directions to the March 2019 trial. These split out into four phases:

1. Phase 1 (now to May 18) is briefing the experts on Horizon and getting them to refine the issues in dispute into proper technical questions.
2. Phase 2 (May 18 to August 18) is an open period in the timetable into which further directions can be fit. It may be that there should be further disclosure or orders for the inspection of Horizon by experts.
3. Phase 3 (August 18 to October 18) – the experts produce their principal reports into Horizon.
4. Phase 4 (December 18 – February 19) – supplemental reports are produced in light of anything coming out the Common Issues trial.

To accommodate this, we do need to move the March 2019 trial back by two weeks. Despite the Judge's comments at the last CMC, I doubt he would consider this to be an unreasonable request, even if he did not agree to it.

There is no doubt that this timetable will require a considerable amount of work and it will require us to work in parallel to the Common Issues trial. That will be challenging but there is no realistic alternative to this.

Subject to any further comments from Fujitsu or Counsel, we should be grateful for your approval to send this draft Order to Freeths for their comments.

Kind regards
Andy

Andrew Parsons
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