

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

Steering Group: 28 November 2018



DECISION: *Should Post Office start making arrangements for a mediation?*

1. BACKGROUND

- 1.1 The Judge has ordered the parties to mediate after he delivers the Common Issues Judgment. We do not know when the Judgment might land. We anticipate around Christmas, but the margin of error on this could be up to 4 weeks either way. This leads us to think that a mediation might take place around the end of January 2019.
- 1.2 Top tier mediators are in high demand and their diaries are often booked up 1-2 months in advance. We would therefore need to place a booking now to secure a quality mediator.
- 1.3 This paper is about the process of mediation given that it has been ordered by the Court as a mandatory step. We will provide a separate paper in due course about Post Office's substantive settlement options. We would however note for now that there are only three ways out of litigation:
 - 1.3.1 One party wins in Court. To win this litigation in Court would require the determination on all 557 cases on an individual basis. That outcome would take years to achieve.
 - 1.3.2 One party quits. For obvious reasons, we doubt this will happen unless the Claimants funding collapses (see below).
 - 1.3.3 The parties settle. There are a wide range of possible settlements, from the Claimants paying Post Office to Post Office paying the Claimants. Absent the Claimants quitting, we believe this is the most likely outcome; the real question is where on the spectrum of possible settlements this matter will land.

2. MEDIATION

- 2.1 Mediation is a separate and parallel process to Court litigation. It does not involve the Judge. The Judge will not know what happens at the mediation at any time (even after the litigation has concluded) because mediations are "without prejudice".
- 2.2 Mediation is a formal structured negotiation. It aims to help the parties reach a compromise. The mediator acts a chairperson who directs discussions between the parties, tests positions, seeks alternative solutions and generally tries to facilitate the parties reaching a mutually agreed settlement.
- 2.3 The mediator has no power to order the parties to do anything or to make any findings. He is not a decision maker. He does not report back to the Court.
- 2.4 Mediation typically takes place over one day. It usually involves the parties and their lawyers meeting face-to-face to discuss their views on the case and then attempting to negotiate a solution. Nothing is binding on Post Office unless it voluntarily and expressly agrees (by signing a contract) to a settlement.
- 2.5 It is open to Post Office to engage in mediation without making a settlement offer. We would therefore strongly recommend that Post Office engages in mediation because, as described below, there are tactical advantages to doing so, even if Post Office is not minded to settle.

3. MEDIATION IN THIS LITIGATION

- 3.1 There are a number of features in this litigation which lead us to believe that mediating this litigation will not follow the usual path.
- 3.1.1 We do not know the claim value. Without this starting point, it is difficult to progress towards a solution.
- 3.1.2 We do not know what the Claimants want. Is it simply money? Reinstatement? A public apology? Help overturning their convictions? Change at Post Office going forward?
- 3.1.3 Are they seeking a group settlement (all settlement money in one pot) or individual settlements?
- 3.1.4 The Claimants fall into different buckets with different characteristics. Some are convicted and cannot be settled without making their convictions unsafe. Some are still live agents. Some have debts owed to Post Office. Some are bankrupt or dissolved companies (which makes settling legally difficult to achieve).
- 3.1.5 The outcome of the Common Issues trial (and the Horizon Issues trial) may significantly influence each side's views on the prospects of success, which in turn will drive their desire to settle or not.
- 3.2 Most of the above factors sit within the control of the Claimants and cannot be progressed without their input.
- 3.3 From Post Office's perspective:
- 3.3.1 There is a real and powerful concern that if it settles with the current 557 Claimants it may open the floodgates to a raft of claims from others.
- 3.3.2 Settling may cause some (other Subpostmasters, the media, etc.) to think that Post Office must be conceding that it did something wrong.
- 3.4 These factors lead us to believe that, even if Post Office was willing to settle, a settlement in January 2019 is unlikely. Also, the mediation / settlement process is unlikely to be over in one day. Instead, we imagine a multi-stage process, whereby the mediator has to spend time scoping of the issues, the classes of claimants and the general shape of any settlement before negotiations begin in earnest at a traditional mediation.
- 3.5 Post Office has no choice but to take part in mediation (it has been ordered by the Judge) but we also see it as a useful step. A key missing ingredient in this litigation is the value of the claims. Issues of loss are not part of the Court timetable yet and they may be months / years away from being explored in Court. Mediation offers Post Office some leverage to force this question with the Claimants as we are sure that it will be topic heavily focussed on by a mediator.
- 3.6 We also anticipate that Post Office will not move on its long-held policy of refusing to settle with anyone who has been convicted. The Claimants are not aware yet of this red-line and this could be a deal-breaker on settlement. From the Claimants' perspective this issue could fracture the group if the 70+ convicted Claimants are excluded from settlement discussions when they may be the vociferous element driving this litigation in the background. Mediation presents an opportunity to table this issue in a genuine way but knowing that it also applies pressure on the Claimants' legal team to hold the group together.
- 3.7 We have reached out to Independent Mediators on a confidential basis for their initial views. Independent Mediators are a leading set of commercial mediators in the UK and a number of their mediators have experience of Group Litigation. They concur with the above assessment, believing that several separate meetings may be needed with each side over a course of weeks

or months before a mediation is formally convened. They also see the possibility of multiple mediations being held in stages and / or by topic and / or by class of Claimant.

4. PROPOSAL

- 4.1 We propose that WBD writes now to Freeths on a Without Prejudice basis noting that the Judge has ordered mediation and that we believe it would be prudent for the parties to begin planning for this. In particular, we would seek their views on:
- 4.1.1 The mutual selection and appointment of a mediator now so that the mediator can read into the case.
 - 4.1.2 Agreement of a provisional date for a formal mediation at the end of January 2019 so that the time is held in everyone's diaries.
 - 4.1.3 The possibility of pre-meetings with the mediator before the formal mediation.
- 4.2 In relation to proposed mediators, we would recommend selecting a heavyweight commercial mediator. Although the choice of mediator is important this selection is not as sensitive as choosing an expert or Counsel. The mediator also has to be chosen jointly by the parties. This means that a degree of flexibility is permitted, and required, when selecting a mediator.
- 4.3 There are a number of leading organisations with strong benches of commercial mediators:
- Independent Mediators: [HYPERLINK "<http://www.independentmediators.co.uk/>"]
- Brick Court Chambers: [HYPERLINK "<http://www.brickcourt.co.uk/practice-areas/mediation>"]
- In place of strife (IPOS): [HYPERLINK "<https://mediate.co.uk>"]
- CEDR: [HYPERLINK "<https://www.cedr.com/solve/panel-mediators/>"]
- 4.4 IPOS and CEDR have the deepest benches of mediators but this comes with more variable quality. Post Office used CEDR for the mediation scheme and we would suggest not using them again so to ensure a healthy degree of separation from past events. We would therefore recommend a mediator for Brick Court or IM.
- 4.5 We would start with Independent Mediators as all nine of their mediators are first class. They are frequently used in heavyweight disputes and are well-known to all law firms. In particular, IM recommend Bill Marsh and Phillip Howell-Richardson, both of whom have experience of mediating in the context of Group Litigation. We have worked with Bill before but not Phillip.
- [HYPERLINK "<http://www.independentmediators.co.uk/our-mediators/phillip-howell-richardson/>"]
- [HYPERLINK "<http://www.independentmediators.co.uk/our-mediators/bill-marsh/>"]

5. RISKS

- 5.1 The above letter will be the first letters between the parties about settlement. Being the first party to raise the topic of settlement might be seen by the Claimants as Post Office being keen to settle and thus a sign of weakness. We are not worried by this. Any experienced litigator will recognise that mediation has been ordered by the Court and that our letter is nothing more than prudent planning.
- 5.2 The letter may also be leaked to the media who, without a proper understanding of mediation, may also look to spin this as Post Office admitting fault / looking for a way out of the litigation.

- 5.3 Given these optics, the exact day of sending the letter needs to be carefully chosen so that it is not sent on a day where Post Office may have had a weaker day in Court.
- 5.4 We have considered whether the letter should be marked "Without Prejudice". Sending the letter on a Without Prejudice basis means that the letter cannot be placed before the Court at any stage. We see little advantage in this. If this letter were ever put before the Judge we strongly believe that he would see this as Post Office being pragmatic rather than weak. Marking the letter "Without Prejudice" will not help mitigate the risk of a leak to the media or affect the Claimants' perception of Post Office's confidence in its case. To the contrary, an "open" letter gives the Claimants less place to hide if they wish to avoid a mediation or behave disruptively.

6. CLAIMANTS' RESPONSE

- 6.1 The proposed letter needs to tie into planning for the third trial in this litigation. The Court is still insisting on this trial taking place in around June 2019 but the scope of this trial has not yet been set and it has not been formally ordered. The Claimants are pushing for the trial to be held later so that there is space in May 2019 for a mediation after the Horizon Issues trial. It is unclear if the Claimants see a May 2019 mediation as being an alternative to, or in addition to, a mediation after the Common Issue trial.
- 6.2 We suspect (though have no evidence to support this theory) that the Claimants' funding is running out, with the funder reluctant to spend more money unless the Claimants get a positive result from the Common Issues trial. This may be why they are keen to push off an expensive third trial to a much later date (in comparison mediation is much cheaper).
- 6.3 Given that the Court has ordered mediation after the Common Issue trial, and given that refusing to mediate will be dimly viewed by the Judge, we believe that the Claimants will ultimately be forced to engage with the mediation process if we push for it to start in January 2019. They may however drag out the process or only pay lip-service to the mediator in an attempt to frustrate progress without outright refusing to engage. Note if they do this, there is nothing that the mediator nor the Judge can do to force the Claimants to engage other than moral condemnation of their unreasonable behaviour that might, in the very long term, lead to costs penalties.
- 6.4 Even if the Claimants resist mediation in January 2019, our view is that Post Office should press firmly but not zealously ahead as an early mediation:
- 6.4.1 can be tied in with the mediation sought by the Claimants in May 2019, if it is seen as part of a multi-stage process; and
- 6.4.2 it places further financial pressure on the Claimants as they need to spend money preparing for mediation and communicating the costs / benefits of any proposals to the Claimants. With 557 Claimants, all of whom are entitled to independent legal advice from Freeths, this will be burdensome task.
- 6.5 If the Claimants do look to obstruct or delay mediation, Post Office will need to be careful about pushing too hard as that may give the impression that Post Office has a strong desire to settle, weakening its negotiating position. A balance will therefore need to be struck as matters progress or not.

7. ALTERNATIVE OPTION

- 7.1 The alternative course is to do nothing. Post Office waits for the Claimants to initiate the mediation process which we predict will not happen until after the Common Issues judgment is given – the Claimants have shown little desire to proactively do anything in this litigation. As the Claimants need to do much of the early running (eg. valuing the claim) a later start to mediation

may leave little time for this to happen before the Horizon Issue trial, leading to a rushed mediation and / or frustrating the whole idea.

- 7.2 A late start also means Post Office is less likely to get a good quality mediator on short-notice and may miss out on some of the tactical advantages described above (eg. causing the Claimants to incur costs, splitting the group, etc.).

8. COST

- 8.1 A good mediator costs about the same as good Counsel, around £5,000 per day. Mediator's fees are usually paid 50 / 50 between the parties. A standard one day mediation (plus 1-2 days preparation) typically costs around £12,000. For large cases, the lead mediator may also want a junior mediator to assist him.
- 8.2 As we believe that this will be an atypical mediation, the parties will need to agree an initial budget for the mediator. Our best guess, and it is no more than a guess, is that a budget of around 10 days' work should be sufficient for the mediator to understand the case, hold several pre-meetings with the parties and hold a full one day mediation (£25k to Post Office).
- 8.3 In parallel, Post Office will incur legal costs in scoping a possible settlement. We will cover this in more detail in a subsequent paper, but should we need to start splitting up all 557 Claimants into buckets based on their individual circumstances, thus requiring some level of review of each case, this could cost hundreds of thousands of pounds eg. a conservative figure could be 557 cases x £500 per case = £278,500.

9. RECOMMENDATION

- 9.1 For the reasons stated above, we recommend sending a letter to the Claimants initiating the mediation process. A first draft of a possible letter is annexed for consideration.

Annex – Draft Letter

Dear Sirs

**Post Office Group Litigation
Mediation**

We refer to paragraph 14 of the Second CMC Order which requires the parties to use their reasonable endeavours to attend a mediation as soon as practicable after receipt and consideration of the Judgment on the Common Issues. We have been considering how the parties might implement the above Order. We set out below our initial thoughts and proposals for your consideration.

In relation to the timing of mediation, this is very much dependent on the timing of the Common Issues Judgment. Our best estimate is that this will be handed down around Christmas or the early New Year. There is also sense in any mediation taking place, if possible, a good time before the Horizon Issues trial so as not to disrupt preparation for that trial. In light of this, we consider that a mediation in late January 2019 or early February 2019 is a real possibility.

The parties will need to select a mediator. There is a significant dispute between the parties; many components of which have not yet been considered by the Court. In our view, a deeply experienced mediator, accustomed to mediating complex disputes, is needed. Ideally, the mediator will have experience of multi-party or group litigation. Mediators of this calibre and experience are rare and their diaries tend to be booked up 1- 2 months in advance. If the parties wish to appoint the best mediator possible, it would be useful to select a mediator soon so that time can be reserved in their diary.

It is fair to say that this matter is more complex than most disputes that go to mediation. It may take a mediator some time to read in to the background. The parties' respective positions on many aspects of this litigation have not yet been fully explored and so it may also be that the mediator needs to meet with the parties to gather more information before the mediation is convened. Ultimately this will be a decision for the mediator to take in consultation with the parties. This however leads us to believe that appointing a mediator now, before the Common Issues Judgment is handed down, would be beneficial.

Against this background, our proposals for your consideration are as follows:

1. The parties seek to provisionally agree a date for mediation around the end of January / early February 2019. This will ensure that there is one day held in everyone's diaries in what is an otherwise very busy trial timetable. This date can of course be changed depending on the timing of the Common Issues Judgment.
2. The parties appoint a mediator now, with the instruction that the mediator is to read into the dispute and asked formulate initial views on (i) further information that he or she might need and (ii) how the mediation process might work in this matter.
3. We have made some initial enquiries into possible mediators. Independent Mediators have proposed Bill Marsh and Phillip Howell-Richardson as both having experience of dealing with group litigation. We have worked with Mr Marsh before, albeit many years ago, and can recommend him but we have no experience of Mr Howell-Richardson. We would welcome your views on these two mediators.

We should be grateful for your comments on this letter and the above proposals by [DATE – 7 days].

Yours faithfully

Womble Bond Dickinson (UK) LLP