



Noting paper: Costs of Common Issues Trial

1. BACKGROUND

- 1.1 The Common Issues Trial (CIT) concluded on 6 December 2018 and Judgment was reserved. At the conclusion of the CIT, the Managing Judge indicated that he will be handed down the Judgment at the end of January 2019 with the draft Judgement being released about a week before. When the CIT Judgment is handed down, one of the issues the Court will determine is what costs orders should be made for the costs of the CIT.
- 1.2 This note outlines the costs orders that might be made in relation to the CIT and summarises the advice we received from our Costs Counsel, Jamie Carpenter of Hailsham Chambers.

2. GENERAL APPROACH TO COSTS IN GROUP LITIGATION

- 2.1 In group litigation, as in regular litigation, the starting point is costs follow the event i.e. the loser pays the winner's costs.
- 2.2 However, the loser pays rule may be modified in group litigation where there are staged trials. This is to reflect the fact that:
 - 2.2.1 The earlier trial(s) were intended to determine issues for the benefit of the group as a whole; and
 - 2.2.2 The outcome of the earlier trial(s) may not reflect or be determinative the likely outcome of the litigation for the individual members of the group.
- 2.3 The effect of the above is that the Court may be more likely to reserve costs of the earlier trial pending the outcome of the later individual trials particularly where the result of the earlier generic trial may not be determinative of the later individual claimant trials.
- 2.4 However, it should be noted that costs orders are at the discretion of the Court and how a Court may approach the issue in this context is difficult to predict.

3. POTENTIAL COSTS ORDERS

- 3.1 There are a number of possible costs orders depending on how the Managing Judge determines the Common Issues in his Judgment.

CLEAR WINNER

- 3.2 If all or most of the Common Issues are determined in favour of POL or the Claimants such that there is a clear winner of the CIT, then the Managing Judge may order the loser to pay the winner's costs.
- 3.3 However, even if there is a clear winner, the Court may take into consideration the fact that a particular determination of the Common Issues may not determine whether POL or the individual claimants ultimately win the litigation. Given this, the Court may be persuaded to reserve the determination of the costs the CIT until after the trials determining the individual claims.

- 3.4 Another possibility is that the Court may order a percentage of costs of the CIT to be paid and reserve the balance to after the determination of the individual claims.

NO CLEAR WINNER

- 3.5 It may be more likely that the Managing Judge may determine certain issues in POL's favour and other issues in the Claimants' favour. In addition, on certain issues he may take a third way determining a point in a manner that neither party had proposed. In this scenario, it would be difficult for either party to argue that they have 'won' the CIT. Where there is no clear winner, the potential costs orders are:
- 3.5.1 Make no order as to costs (each party bears their own costs);
 - 3.5.2 Order costs in the claims (costs will follow the determination of the claims in full); or
 - 3.5.3 Reserve costs (to be assessed by the Court at a later date).
- 3.6 Of the above, ours and our costs Counsel's view is that the most likely outcome is that the Court will reserve costs pending results in the individual claims. This maximises flexibility for the Court.

4. PAYMENT OF COSTS

- 4.1 Including sub-issues, there are upward of 40 issues to be determined in the CIT judgment. The CIT was a complex trial and it is difficult to predict how the Managing Judge will determine each issue.¹ In addition, the Managing Judge has shown himself to be unpredictable, at times adopting unconventional approaches in his judgments and the orders he makes. Given this background, Post Office may wish to plan for how it would pay any costs ordered in the Claimants' favour.
- 4.2 If the Court decides to make a costs order, the usual rule is that it will order a payment of the Claimant's costs on account pending a detailed assessment of the Claimant's costs. In the context of a staged group litigation, it is unlikely that the Court will order an immediate detailed assessment of the Claimants' costs as this process would disrupt the parties' preparation for the Horizon Issues trial and the October 2019 trial. The more likely order is that detailed assessment is to be postponed to the end of the litigation.
- 4.3 However, in order to ensure that that Claimants are not out of pocket for a lengthy period, it is usual practice for the Court to order a payment on account of the likely sums payable to the Claimants following the detailed assessment. Costs budgets were submitted by the parties in July 2018. The Claimant's Costs Budget stated that they had incurred costs amounting to £6,141,540 as at 13 April 2018. Thereafter their budgeted costs up to the end of November 2018 were £3,840,328.
- 4.4 The usual rule where the Court orders costs on account is that the paying party should pay 90% of the budgeted costs and around 60% of the incurred costs. However, when the Claimants submitted their Costs Budget, they did not separate the costs of the CIT from other costs incurred, such as for the HIT. Notwithstanding this complexity the Court is likely to make a rough and ready assessment. We reckon that the Court may order 50% of the incurred costs and 80% of the budgeted costs, being a sum around £6m (assuming that is minded to make any order in relation to costs at all in the first place).
- 4.5 If an order for payment of costs on account is made, Post Office will have to make payment within 21 days of the order. That is within 21 days from when the Judgment is handed down. If there is any possibility that Post Office may be unable to make this payment, please let us know immediately. It may be possible to request an extension for payment to be made but this will

¹ Please refer to our Updated Risk Assessment Table where we provided an assessment of the likelihood of success that the Managing Judge will determine each issue in the manner that Post Office submitted at the CIT.

have to be supported by witness evidence fully explaining why payment cannot be made within the 21 days.