

Legally privileged and confidential
19 May 2019



POST OFFICE GROUP LITIGATION

SETTLEMENT BRIEFING

This paper aims to provide a background briefing on the current state of settlement in the Post Office Group Litigation. The next step will then likely be a discussion about settlement options, following which WBD can provide formal settlement advice as required.

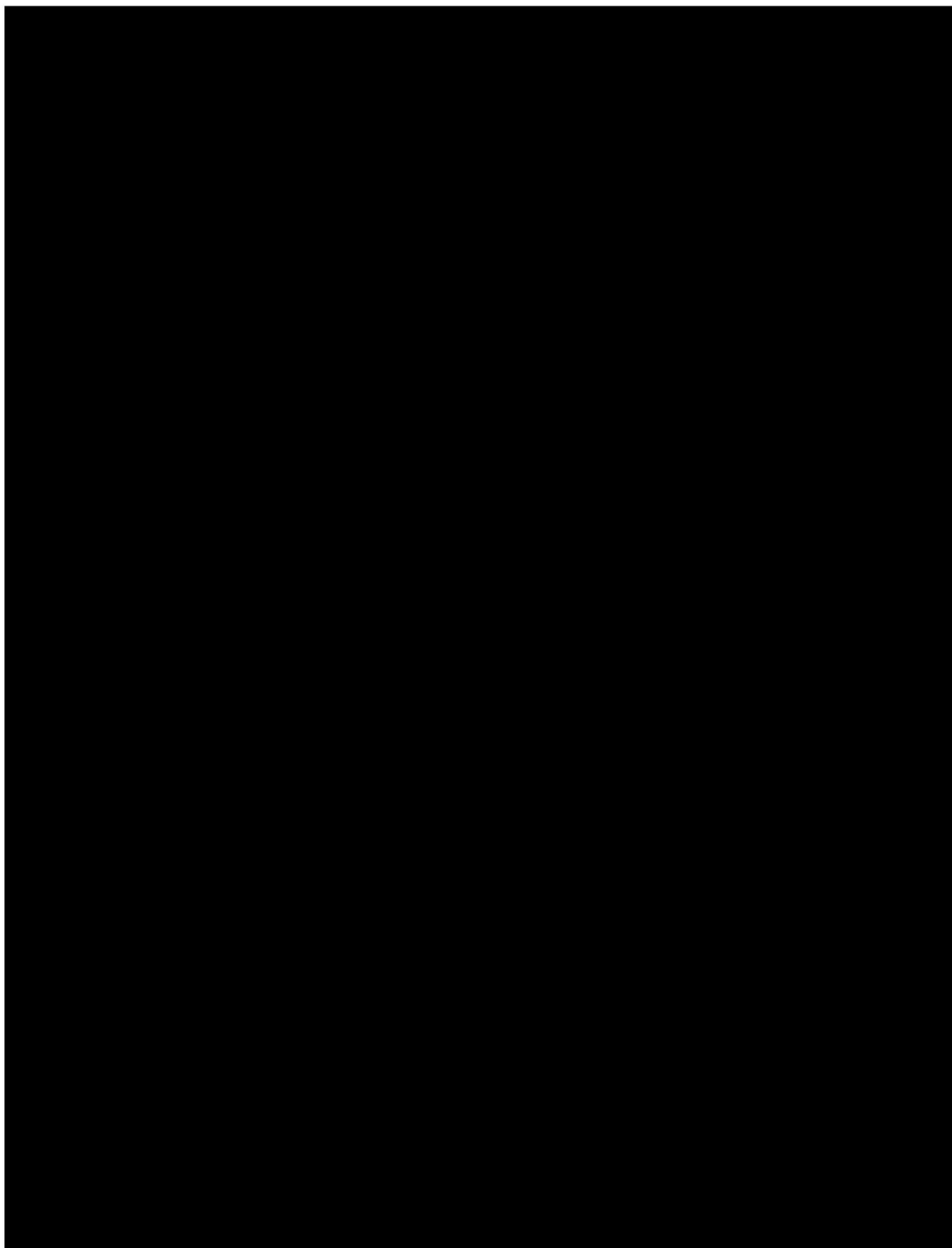
This briefing paper sets out:

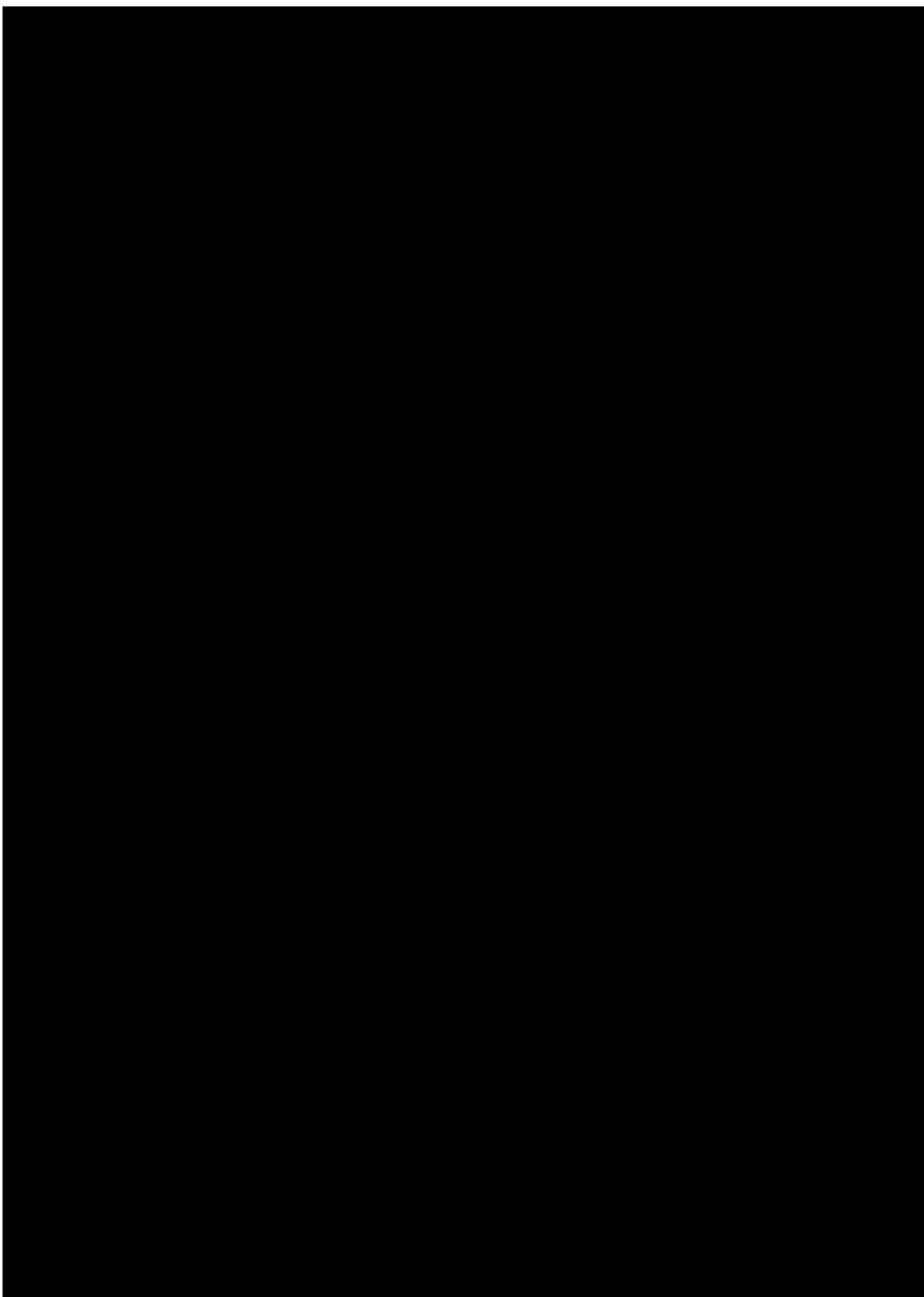
- The history of settlement discussions to date.
- The current understanding of the claim value.
- Factors to be taken into account in any settlement.
- An outline of possible structures for a settlement.

1. BACKGROUND

- 1.1 A chronology setting out the history of communications with the Claimants and decisions taken by Post Office in relation to settlement is set out at Schedule 1 of this briefing. This is summarised below.
- 1.2 Settlement has been kept under continuous review throughout the litigation, having been regularly discussed with the Steering Group and the Board sub-committee. The view consistently taken to date was that a settlement could result in a flood of claims, both through the Court process and through contested debts within the network. Post Office's preference was to secure a positive judgment on the Common Issues before opening up settlement discussions so that the judgment would dissuade future potential claimants. Further, the lack of a reliable claim valuation and the gulf between the parties' views on the merits made settlement unlikely without some early Court decisions to tip the balance in favour of one party or the other.
- 1.3 [REDACTED]
- 1.4 To address the lack of an overall claim valuation, Post Office secured an order that the Claimants re-do their Schedules of Information to provide better individual claim valuations. For the reasons stated in section 2 below, the available information on claim valuation is still inadequate and unreliable.
- 1.5 The parties have been ordered by the Court to use reasonable endeavours to attend mediation and have agreed that a mediation should be held. Charles Flint QC of Blackstone Chambers has been mutually selected as mediator. Post Office's proposal was for a mediation to be held between the end of the Common Issues Trial and the start of the Horizon Issues Trial. The driver for this mediation was a belief that a mediator would quickly focus on the lack of a clear and realistic claim value as a major obstacle and then place pressure on the Claimants to provide this information. This route was expected to lead more quickly and successfully to better information than waiting for the claim value to become clear through the Court process; a topic which is not scheduled to be considered at all until late 2019 at the earliest.
- 1.6 Due to the late provision of the Common Issues Judgment, a mediation before the Horizon trial was not possible to accommodate. Post Office has not yet voiced to the Claimants a revised

position on when mediation should be held. The last we heard, the Claimants were seeking for mediation to be held after the Horizon Issues Trial judgment has been received (c. September/October 2019).





3. GROUP -V- INDIVIDUAL SETTLEMENTS

- 3.1 A key dynamic in settling this litigation is that the group of Claimants is far from homogenous. We set out below the main sub-groups of Claimants that may create challenges if trying to settle with the group as a whole.

Convicted Claimants

- 3.2 Post Office has previously refused to settle with any Claimant who has been convicted for fear of making that conviction unsafe. This was the position taken during the Mediation Scheme on advice from Cartwright King. We understand that there are 61 convicted Claimants. If this "no settlement" policy is maintained, convicted Claimants will need to be carved out of any settlement which could cause fractures in the Claimant group. Many of the Claimants who are the driving force behind the litigation are those with convictions. This group is also the most vocal, regularly appearing in new articles and being active on social media. If this group cannot be satisfied then they may become a major impediment to settlement. We can also envisage a situation where Freeeths are placed in a difficult position, where they cannot act in the best interests of all Claimants and that could cause the group to split.
- 3.3 It is recommended that refreshed advice is taken from Cartwright King or Brian Altman QC on the risk of settling with convicted Claimants.

Settled cases

- 3.4 A number of the Claimants have already settled their claims against Post Office. The Claimants are seeking to unwind these settlement agreements on the basis of a fraud / concealment claim. Consideration will need to be given to whether Post Office is willing to settle these claims a second time.
- 3.4.1 12 Claimants entered into settlements as part of the Mediation Scheme.
- 3.4.2 39 Claimants left Post Office as part of Network Transformation and entered into settlement agreement with Post Office when leaving.
- 3.4.3 61 Claimants converted from a SPM contract to a NT contract as part of Network Transformation and entered into settlement agreement as part of this. These Claimants would still be able to claim losses which were caused / incurred after the date on which they entered into a settlement agreement.
- 3.5 In particular, the Claimants who exited under NT will have received a substantial "leavers payment" that will likely be tens of thousands, if not hundreds of thousands, of pounds. For these Claimants to rescind their settlements and make new ones would, in the ordinary course of events, require them to return their leavers payments to Post Office. We expect that the Claimants in this sub-group have not properly understood the consequence of bringing their claims as they may well end up in a worse financial position.

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Active SPM Claimants.

- 3.9 Any settlement with a Claimant who is still an active SPM will need to factor in any operational impact. We understand that there are over 100 active Claimants.
- 3.10 A settlement would ordinarily wipe out liability on both sides and so Post Office will likely wish to audit those affected branches before settling to ensure there are no hidden losses in those branches that would be made irrevocable by the settlement. Also, the legal mechanics of settling with a party who then has an ongoing legal relationship is more challenging. Active SPMs come with the risk of further claims being brought immediately after settling and the need to make sure that any settlement does not cut across any ongoing legal obligations.
- 3.11 These Claimants may also be looking for more than a financial settlement. They may want operational support going forward (eg. further training, increased remuneration, etc.) or they may want to leave the network, requiring the settlement to manage the termination of their contracts.

4. OTHER CONSIDERATIONS

- 4.1 We set out below a list of other factors that might influence a settlement. In our view, the first three are critically important.
- 4.2 **Common Issues Judgment:** As matters stand, the Claimants will be feeling very confident having the Common Issues judgment in their favour. Negotiating a settlement from the current position will be difficult and favours waiting for the Common Issues appeal to conclude or using the risk of the appeal overturning the Common Issues Judgment as negotiating leverage.
- 4.3 **Common Issues Appeal:** If a settlement is reached with the Claimants before the Common Issues appeal is heard, then the appeal would stop and Post Office would be left with the Common Issues Judgment as handed down. Even if the litigation was resolved, the business would be hamstrung by the Common Issues Judgment and its adverse operational impact for years to come. This weighs in favour of not settling until after the appeal, although preparatory work could be done in advance eg. an initial mediation to flush out the claim value.
- 4.4 **Floodgates:** It is known that Freeths have a list of individuals who did not join the Group within the required timeframe. Freeths' website hints there may be another 400 individuals. A settlement with the 555 current Claimants would not prevent claims from other SPMs and so settling may open the floodgates to more claims.

- 4.5 **Claimants seeking non-financial settlements:** Some Claimants may be seeking more than just compensation (eg. a public apology). Until negotiations begin we cannot know their settlement objectives.
- 4.6 **Claimants' bandwidth for settlement:** The Claimants have previously sought a stay of the proceedings to allow time for settlement discussions. The Managing Judge has refused to order this, saying that mediation can run in parallel. We believe that the Claimants' legal team does not have the bandwidth to conduct the litigation and mediation together. If correct, then some gap in the litigation will need to be found for settlement to be progressed.
- 4.7 **Reputation harm:** It is unlikely that the terms of any settlement would remain confidential and any substantial pay-out will be spun as an admission of fault. This could have an impact on the sign up of new SPMs as well Post Office's reputation as a whole.
- 4.8 **Business disruption:** Settling with the Claimants may set a commercial precedent for future disputes with SPMs causing in-post SPMs to become disruptive / more litigious.
- 4.9 **Deceased Claimants / Bankrupt Claimants / Dissolved Company Claimants:** Additional work will be required to ensure that these Claimants have the legal power to settle historic claims which could slow down the settlement process. A number of the bankrupt Claimants have done a deal with friendly Trustee-in-bankruptcy (Moore Stephens), where the Trustee has re-assigned the claim rights to the SPM. It is not known what role the Trustee will want to play in settlement negotiations.
- 4.10 **Assistants:** A number of the Claimants are assistants who have no contractual relationship with Post Office. Given that the Common Issue Judgment determined that the assistants do not have third party rights under the SPM or NT Contracts, these Claimants have weaker claims than the rest of the group but nevertheless their claims need to be tied up in the settlement.
- 4.11 **Claimant Governance:** We have no visibility of any "group management" type agreement that might exist between the Claimants. We do not therefore know what the Claimants' governance is around deciding to settle. It could be that a small sub-group of Claimants have been nominated to decide matters on behalf of the whole group and have the power to bind the group. Or, all 555 Claimants may have to agree to the settlement and individually sign settlement agreements. We also do not know what influence or power Freeths and Therium have to block or force through a settlement. If Freeths CFA is drafted on standard terms, then it will likely give Freeths the power to cancel the CFA if the Claimants reject a reasonable settlement offer. Similarly, we would expect Therium to have certain gateways and safeguards built into their funding agreement that would allow them to reduce / cease funding if the merits of the claim drop below a certain level or a reasonable settlement is rejected.
- 4.12 **Timing:** There is no guarantee that the Claimants want to settle. Even if they do, the settlement process will be complex and so will likely take several months of work. Any mediation will likely require several meetings, with preparatory work done between meetings. It should not be assumed that a settlement will happen quickly, even with the support of both sides.
- 4.13 **Settlement tactics.** Once Post Office tables an offer of settlement, the Claimants and their funder will know they are going to receive something. This may cause them to litigate further / press for more. Alternatively, tabling a number may put them on costs risk if they accept that the true claim value is much less than currently presented (eg. due to limitation issues, irrecoverable losses, etc.).
- 4.14 **Funding the settlement:** Based on modelling to date, the settlement figure is likely to be tens of millions and greater than Post Office's annual profit. We would recommend that Post Office considers in advance how a settlement might be funded, its impact on cash flow, whether Post Office would require input from the Government and how the settlement would be treated from an accounting perspective.

5. POSSIBLE SETTLEMENT STRUCTURES

- 5.1 Assuming the settlement is purely financial, we see that there are three main structures which a settlement could follow. There will likely be more options as negotiations progress but we set out below some initial settlement structures for consideration.

Single pot

- 5.2 The simplest structure is to offer a single pot of compensation and for all the Claimants, Freeths and their funder (Therium) to distribute it amongst themselves. Whilst this is the neatest approach, it may result in the Claimants themselves receiving a small amount of money, with Therium and Freeths taking their returns first. Whilst the allocation of the settlement between the Claimants and funder may not be a matter for Post Office, the Claimants may be unwilling to agree to a single pot settlement if they do not receive a sum of compensation which meets their expectations.
- 5.3 This approach could also cause difficulties between sub-groups of Claimants, for example it may result in compensation going to convicted Claimants (see above risks) and settling claims with Claimants who are still active SPMs and with whom Post Office has an ongoing commercial relationship. For these reasons, it is difficult to effectively use Part 36 offers in these proceedings, as Part 36 typically is used to make a single clear settlement offer and does not allow sufficient flexibility to work around the difficulties of treating the Claimants as a single group.

Targeted settlements

- 5.4 An alternative approach is that Post Office seeks to identify higher risk cases and then offers settlements to specific Claimants or sub-groups of Claimants. For example, convicted Claimants and Claimants who have previously entered into settlement agreements could be carved out, a more bespoke approach which provides support as well as compensation could be offered to the Claimants who are active SPMs, and time barred Claimants could receive a proportion of the available compensation on the basis of how much of their claim is not time barred.
- 5.5 This allows Post Office to de-risk the group by settling with high-risk Claimants. However, Freeths and Therium will likely resist this because it splits up the group and causes them significant work. It may also be seen as tactical and divisive.

Settlement criteria

- 5.6 A more sophisticated process is to agree a settlement criteria with the Claimants that provides for pre-determined amounts of compensation for claims with certain characteristics. Each claim is then passed through the criteria, assessed against the characteristics and the resulting compensation paid according to whatever formula is agreed. A settlement criteria allows for a more nuanced approach but is complex to setup and will take a long time to agree.

WOMBLE BOND DICKINSON

19 May 2019

SCHEDULE 1
CHRONOLOGY

Date	Action
12 April 2016	Freeths invited Post Office <i>"to consider seeking to resolve the issues (or at least to seek to narrow them) by mediation."</i>
15 April 2016	<p>Post Office confirmed to the Claimants that: <i>"If mediation is to be effective, there must be clarity around the issues in dispute. You have not yet provided us with any details of the 91 claimants or their legal claims, or anything to support your view that there are common issues affecting those claimants or any wider group of Postmasters. We cannot therefore form any view as to whether mediation could resolve or narrow the issues arising in the proposed group action at this time."</i></p> <p><i>Post Office's voluntary decision to establish the Complaint Review and Mediation Scheme shows we are open to pragmatic solutions for resolving issues. We are also well aware of our duty to consider alternative dispute resolution procedures in the context of court proceedings. We will therefore keep under constant review whether mediation, or indeed any other alternative dispute resolution procedure, would assist in resolving or narrowing your clients' issues with Post Office, once you have set out for us what those issues are."</i></p>
19 April 2016	Freeths wrote to Post Office acknowledging <i>"that the parties may both require some clarity on the issues if mediation is to be effective, and note that you say that at this stage you "cannot... form any view as to whether mediation could resolve or narrow the 'issues arising in the proposed group action' at this time"."</i>
26 April 2016	In response to Freeths letter of 19 April 2016, Post Office stated: <i>"As you have also acknowledged, the parties will be in a better position to assess whether and how mediation may be able to assist the resolution of your clients' claims once you have provided a Letter of Claim."</i>
28 April 2016	At pages 3, 4 and 41 of the Letter of Claim, Freeths invited Post Office to seek to settle the issues by mediation either before the parties needed to issue proceedings, or after the close of pleadings before substantial costs are incurred.
16 May 2016	<p>Post Office Board are briefed on the group litigation.</p> <p>In relation to mediation / settlement, the board were informed <i>"Freeths have questioned whether Post Office would be prepared to mediate these claims. At this stage it is not possible to form a view as to whether mediation would be viable in some or all of the cases. However we will keep under constant review whether options to mediate or settle would provide a better outcome for Post Office."</i></p>
8 July 2016	Post Office Steering Group considered the question of whether Post Office should engage in further mediation. A decision was taken to politely refuse mediation at this stage but confirm to Freeths that Post Office would keep the position under review. It was also decided to confirm in the Letter of Response that Post Office will not settle under any circumstances with convicted postmasters.
28 July 2016	At page 57 of the Letter of Response, Post Office informed the Claimants that <i>"Twenty-two of these 25 had been convicted of a criminal offence. It would be wrong for our client to countenance the possibility of paying any sum to a postmaster who has been and remains convicted of a criminal offence by a Court. Whilst those convictions remain, our client will not mediate or settle with any convicted Claimant."</i>

Date	Action
	<p>At page 58, Post Office provide an offer to the Claimants that <i>"Post Office is prepared not to pursue any claim for the costs our client has incurred to date should your clients discontinue these proceedings now."</i> This offer was open for acceptance for 30 days or until the Claim Form was served.</p> <p>Further, also on page 58, Post Office confirmed in response to the Claimants invitation to mediation: <i>"Our client's extensive efforts to resolve matters, both through the Scheme and through the above offer, have discharged any duty it may be regarded as having to seek a resolution without litigation. The current deficiencies in how your clients' claims have been presented, the lack of details on individual Claimants (including Claimants who did not take part in the Scheme) and the total absence of particulars of loss mean that we cannot see how a further mediation at this point would have any prospect of success. Our client does not propose to engage in a further mediation at this stage."</i></p>
27 October 2016	<p>In the Letter of Reply, at page 59 Freeths responded: <i>"We note your client's position and it is clear from the way it is expressed that Post Office has a closed mind to mediation as a means of resolving the present claims. The authorities show that Post Office's position will expose it to additional costs risks. There has been no mediation of any legal case such as the present proceedings. The Mediation Scheme which Post Office set up and disbanded was of a different type entirely. For the avoidance of any doubt, we believe that considerable progress towards resolution of this dispute could be made by use of ADR and, in particular, mediation. This would, at a minimum, be likely to assist the efficient resolution of the proceedings by focusing and narrowing the issues between the parties, even if no overall settlement were to be achieved. However, we would expect there to be real chances of reaching a settlement by the use of mediation and would invite Post Office to re-consider its stance on this issue."</i></p> <p><i>It would be helpful to know what Post Office's position is on this point as soon as possible and it will certainly be necessary to have a clear idea of it by next month so that sensible consideration can be given to its inclusion or exclusion from directions to be given at the GLO hearing in January"</i></p>
February 2017	<p>Freeths wrote to prospective Claimants stating (and this was inadvertently disclosed by a Claimant to Post Office):</p> <p><i>"You will receive more information about [compensation] at a later stage, however, a key point to note is that the funding structure is such that all money recovered on individual claims (including yours) will be pooled into one fund, and at the very end of the case a calculation will be done to establish what money (if any) is left over to pay a proportion to each Claimant. That proportion will be on a pro rata basis."</i></p>
14 February 2017	<p>Post Office Steering Group considered whether Post Office wished to try and settle the group litigation at this stage and would the stance on not settling with convicted postmasters be maintained.</p> <p>The Steering Group agreed with WBD's recommendation that Post Office does not offer any form of settlement at this point but waits until the claims are valued and the Group is closed to new Claimants. A mediation in November 2017 following the CMC would be a reasonable objective.</p>
11 September 2017	<p>In consideration the overall strategy for the litigation, Post Office Steering Group considered the approach to be taken in relation to settlement. WBD advised that <i>"To be able to settle any litigation, the first thing that needs to happen is to establish what is being claimed. At present, we do not have reliable information on this point and so even contemplating a settlement is not possible. We therefore believe that Post Office should ask the Court to order the Claimants to value their claims more completely and with more precision (as we have been asking them to do for nearly 18 months)."</i></p> <p>A settlement at this stage was also not recommended since <i>"it would result in Post Office having to pay significantly over the odds."</i></p>

Date	Action
27 October 2017	The First CMC Order contains at paragraph 24: <i>"At all stages, the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise."</i>
30 October 2017	Following the CMC on 19 October 2017, the Post Office Steering Group was provided with an update on the directions ordered by the Court and future work streams. One of these work streams was in relation to settlement: <i>"Post Office should consider again whether there is merit in trying to settle this litigation. In particular, there is an obvious window for a mediation in September / October 2018 to explore the possibility of settlement before Trial 1 and in light of any risks flagged by Counsel's advice."</i>
8 February 2018	The Second CMC Order contains at paragraph 14: <i>"The parties shall use their reasonable endeavours to attend mediation as soon as practicable after receipt and consideration of the Judgment on the Common Issues to attempt to resolve (or at least narrow) the dispute by way of mediation."</i>
7 December 2018	WBD wrote to Freeths proposing mediation could take place between the handing down of the Common Issues Judgment and before the start of the Horizon Issues Trial and seeking to select/appoint a mediator who should read into the dispute and formulate initial views on (i) further information required and (ii) how mediation process could work. At this time, the Common Issues judgment was expected in late January / early February.
19 December 2018	WBD chased Freeths for a response to the above letter.
21 December 2018	Freeths responded with their position that mediation could be held after the handing down of the Horizon Issues Judgment and agreed that a mediator should be appointed.
9 January 2019	WBD wrote to Freeths seeking further information on the mediators proposed by Freeths. In relation to timing, WBD reinforced that mediation could be held following receipt of the Common Issues Judgment and pursuant to the Second CMC Order, the parties were required to use reasonable endeavours to attend mediation at such time. To progress that the matter it was proposed that a mediator was appointed now and his thoughts be sought on when mediation may most usefully be held.
17 January 2019	Cs position remained that mediation should be held following handing down of the Horizon Issues Judgment.
21 January 2019	Cs provide further information on their proposed mediators and reasons for not wishing to appoint the mediators proposed by Post Office, but wished to appoint a mediator in advance of the CMC on 31 January 2019.
23 January 2019	Post Office reinforced its position that mediation could sensibly be held before the commencement of the Horizon Issues Trial since even an initial meeting could help progress the resolution of this matter.
24 January 2019	Freeths continued to position that mediation cannot meaningfully take place without the parties also having receipt of the Horizon Issues judgment.
29 January 2019	Post Office agreed to the appointment of Mr Flint QC and re-stated its position that Post Office was willing to hold mediation in February. Post Office also provided the Claimants with a reading list containing documents for Mr Flint QC's reading in.

Date	Action
6 February 2019	WBD chase Freeths for a response to its letter of 29 January 2019.
11 February 2019	Freeths confirm the appointment of Mr Flint QC.
13 February 2019	WBD responded seeking to reach agreement on the reading list for Mr Flint QC.
21 February 2019	WBD chased for a response to our letter of 13 February 2019 seeking to agree to reading list for Mr Flint QC.
22 February 2019	Freeths propose that a one day mediation could be held between 17 and 21 June or 1 and 19 July 2019.
1 March 2019	Parties agreed the reading list for Mr Flint QC.
11 April 2019	WBD produce settlement analysis slide deck on which Jane McLeod is briefed.

SCHEDULE 2**SETTLEMENT MODELS**

First column show cost contribution to the Claimants as a group.

Header row shows average compensation paid to each Claimant.

	All Claimants (557)				
Costs Contribution £	£10,000	£20,000	£30,000.00	£40,000.00	£50,000.00
£0	£5,570,000	£11,140,00	£16,710,000	£22,280,000	£33,420,000
£10,000,000	£15,570,000	£21,140,000	£26,710,000	£32,280,000	£43,420,000
£20,000,000	£25,570,000	£31,140,000	£36,710,000	£42,280,000	£53,420,000
£30,000,000	£35,570,000	£41,140,000	£46,710,000	£52,280,000	£63,420,000
£40,000,000	£45,570,000	£51,140,000	£56,710,000	£62,280,000	£73,420,000
£50,000,000	£55,570,000	£61,140,000	£66,710,000	£72,280,000	£83,420,000

	Excluding Convicted Claimants (496)				
Costs Contribution	£10,000	£20,000	£30,000.00	£40,000.00	£50,000.00
£0	£4,960,000	£9,920,000	£14,880,000	£19,840,000	£29,760,000
£10,000,000	£14,960,000	£19,920,000	£24,880,000	£29,840,000	£39,760,000
£20,000,000	£24,960,000	£29,920,000	£34,880,000	£39,840,000	£49,760,000
£30,000,000	£34,960,000	£39,920,000	£44,880,000	£49,840,000	£59,760,000
£40,000,000	£44,960,000	£49,920,000	£54,880,000	£59,840,000	£69,760,000
£50,000,000	£54,960,000	£59,920,000	£64,880,000	£69,840,000	£79,760,000

	Excluding Convicted, Mediation Scheme Settlements and Leavers under NT (445)				
Costs Contribution	£10,000	£20,000	£30,000.00	£40,000.00	£50,000.00
£0	£4,450,000	£8,900,000	£13,350,000	£17,800,000	£26,700,000
£10,000,000	£14,450,000	£18,900,000	£23,350,000	£27,800,000	£36,700,000
£20,000,000	£24,450,000	£28,900,000	£33,350,000	£37,800,000	£46,700,000
£30,000,000	£34,450,000	£38,900,000	£43,350,000	£47,800,000	£56,700,000
£40,000,000	£44,450,000	£48,900,000	£53,350,000	£57,800,000	£66,700,000
£50,000,000	£54,450,000	£58,900,000	£63,350,000	£67,800,000	£76,700,000

	Excluding Convicted, Mediation Scheme Settlements, Leavers under NT and Fully Time Barred (253)				
Costs Contribution	£10,000	£20,000	£30,000.00	£40,000.00	£50,000.00
£0	£2,530,000	£5,060,000	£7,590,000	£10,120,000	£15,180,000
£10,000,000	£12,530,000	£15,060,000	£17,590,000	£20,120,000	£25,180,000
£20,000,000	£22,530,000	£25,060,000	£27,590,000	£30,120,000	£35,180,000
£30,000,000	£32,530,000	£35,060,000	£37,590,000	£40,120,000	£45,180,000
£40,000,000	£42,530,000	£45,060,000	£47,590,000	£50,120,000	£55,180,000
£50,000,000	£52,530,000	£55,060,000	£57,590,000	£60,120,000	£65,180,000