

**CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION****Steering Group Meeting: 1 February 2018****DECISION: *Should Post Office make an application for Security for Costs?*****1. THIS PAPER**

On 17 November 2017, the PLSG supported the making of a Security for Costs application. This was conditional on there being one last attempt to resolve the need for security through agreement with Freeths and Therium. Those efforts have now been exhausted and we are seeking approval from the PLSG to issue an application for Security for Costs at Court.

2. BACKGROUND

Normally in civil litigation the costs of the successful party are paid by the losing party. If Post Office is successful in defending the Group Action, there is a fair chance that the Claimants would be liable to pay (at least some of) Post Office's legal costs. Similarly, if the Claimants are successful, Post Office will likely need to pay a proportion of the Claimants' legal costs.

The Claimants in the Group Action are largely individual postmasters. They do not have the funds to finance this litigation and are therefore unlikely to have the money to pay Post Office's costs.

The Claimants have litigation funding from Therium Litigation Funding IC (**Therium**). Therium is funding the Claimants' own legal costs in return for a slice of any compensation that is awarded to the Claimants. As a general rule, if a third party funds a Claimant to bring a claim, the Court is usually prepared to make that third party liable for the Defendant's costs as if the third party funder was a Claimant. In effect, there is a strong prospect that Therium will be ordered to pay Post Office's costs if Post Office successfully defends this litigation.

The Claimants also have the benefit of adverse costs protection insurance, commonly known as "After the Event" insurance (**ATE insurance**). The ATE insurance is designed to pay Post Office's legal costs, if the Claimants are ordered to pay them by the Court. In effect, the ATE insurance protects both the Claimants and Therium against Post Office's costs.

Normally, the above financial measures would be sufficient to give Post Office comfort that there was someone who would have deep enough pockets to pay Post Office's costs (namely either Therium or the ATE insurers). However, we have identified two potentially critical weaknesses in this protection.

First, the Therium Group is a reputable and well-capitalised litigation funder. However, the funding entity in these proceedings is not the main Therium parent company, but an offshore subsidiary based in Jersey. As an offshore company there are few public records on its financial position. We are therefore unable to determine whether Therium (Jersey) would have sufficient funds (or an adequate line of funding from its parent) to meet a costs order and Therium has refused to provide us with this information. There is therefore a risk that Therium (Jersey) is thinly capitalised and could be collapsed rather than pay out on a costs order.

Second, on reviewing the ATE insurance there are a number of provisions that could mean that the Insurers could avoid cover:

- Whilst Freeths have confirmed that the limit of cover is "*well in excess of £1 million*", it has to date refused to provide an actual figure. It is clear that Post Office's costs will be higher than £1 million as they estimated to be up to £9.5m by the conclusion of the Common Issues trial.
- There are a number of provisions that allow the insurer to cancel the policy. There are also certain types of legal costs that are not covered by the policy (although these are few). Freeths have informally agreed to notify Post Office should the ATE insurance be cancelled or become unenforceable in whole or in part. We have asked for this to be formalised into an enforceable

solicitor's undertaking but Freeths have refused to do this. This creates a risk that the policy could be withdrawn without Post Office's knowledge.

- The ATE insurance contains clauses permitting the insurers to avoid cover where:
 - the legal action is abandoned, discontinued, settled or lost at trial as a result of the dishonesty of the Insured or the Claimants' committee; and/or
 - the Insured has made fraudulent or false representations to the Insurers.

Given that a number of the Claimants have been convicted of false accounting (a dishonesty offence) and we believe that many others may have committed false accounting even if not criminally prosecuted for it, there is a material risk that the above provisions may be engaged. Freeths agreed to amend the ATE insurance to address this but the amendment makes no sense and offers no extra protection.

If the above risks were to manifest, then the ATE insurance might be withdrawn and Therium may collapse, leaving Post Office with no one to recover its costs from.

Where a Defendant, such as Post Office, is concerned that it does not have a real prospect of recovering its costs, even if it is successful, it may seek an order for "security for costs" from the Court. Such an order can be obtained against a funder (i.e. Therium) rather than the Claimants themselves. The order will likely require Therium to put up security, typically in the form a guarantee from a reputable person or by way of placing cash in an escrow account or the Court's account.

WBD has been working with Freeths for the last 18 months to try to address the above concerns and thus avoid the need for a security application. We have tried to have the ATE insurance re-drafted to avoid the dishonesty exemptions but Freeths are now refusing to make any further amendments. We have also asked Freeths and Therium to provide financial information about Therium to address the concerns about Therium's solvency. They have refused to do this.

This has been frustrating because the above matters appear easy to solve. Therium is a reputable funder and should be able to provide the financial information needed about its subsidiary. Likewise, the insurance is provided by reputable insurers, who would might be prepared to flex their policies to address these risks. The fact that Freeths have dragged this out for months and are refusing to take these simple steps causes us concern, and potentially indicates that there is a fundamental problem somewhere in their cost protection scheme that is not currently visible to us.

3. MERITS OF AN APPLICATION FOR SECURITY

In light of the above, we have engaged a specialist barrister, Jamie Carpenter, who advises on issues with legal costs. We have also held a Conference with Counsel that was attended by Jamie, our primary Counsel, David Cavender QC, WBD, Rodric and Mark. In summary, the advice from Counsel is that:

- The application for security should be made. There are no other steps that Post Office needs to take before making the application.
- As things currently stand, Post Office has a better than evens chance of getting security if an application were made.
- However, we would expect Therium to disclose the financial information that it is currently withholding once the application is made. This information will likely prove that Therium is of good standing and that will defeat the security application. At that point, Post Office would need to withdraw the application.
- We will then have an argument about who should pay the legal costs incurred in dealing with the withdrawn security application. Counsel believe that there is a good chance that the Claimants (ie. Therium) will be ordered to pay Post Office's costs because it has refused to disclose financial information to date.

- If Post Office's application proceeded to a full hearing and was allowed by the Court, the Claimants / Therium will likely be ordered to pay Post Office's costs of the application.
- If Post Office's application proceeded to a full hearing and was dismissed by the Court, Post Office would likely be ordered to pay the Claimants' and / or Therium's costs.
- Post Office needs to make a decision on this application now. Delaying an application for security weakens its prospects of success and we have already spent 18 months trying to resolve this issue amicably with Freeths.

The costs of making a security application are as follows:

- Post Office's costs will be around £40k.
- Therium will engage their own lawyers and we would anticipate their costs to be around £80k.
- It is currently unclear whether Freeths will appear at the application. If they do, we anticipate that their costs may be around £80k.

4. OTHER POINTS TO NOTE

First, a party rarely recovers 100% of their costs from the other side. Under the Court rules on how costs are assessed, a party usually recovers around 60-70% of their incurred costs. We will therefore be telling the Court that Post Office's costs are estimated at £9.5m, but we will only be seeking security for the recoverable element, being around £6m.

Second, we will be placing on the public Court record a statement that Post Office's costs could be up to £9.5m. This may get picked up by the media and reported on.

Third, if security is ordered, this will come at a cost to Therium who may need to raise funds and pay interest on them. In recent correspondence, Therium have asked that Post Office gives a cross-undertaking for those financing costs. This is essentially an indemnity from Post Office to Therium against these financing costs in the event that Post Office loses the litigation and therefore never needs to call on the security. We will attempt to object to this but it is becoming increasingly for the Court to require cross-undertaking when ordering security.

5. RECOMMENDATION

In essence, Post Office is being asked whether it wishes to take a slightly better than 50/50 chance on Court application to guarantee that its future costs of £6m are adequately secured, with the risk that if unsuccessful it may need to pay out around £160k in legal costs to the Claimants and Therium.

Given the amount of costs at stake, our recommendation is that Post Office should make the security application, even though there is a chance that it might fail.

If Post Office does not make the application now, it should be prepared to proceed through this litigation without any security.