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THE POST OFFICE GROUP LITIGATION
BLACK HAT REVIEW

INTRODUCTION

I have been asked to undertake a "Black Hat" review of the Group Litigation, and in particular I have been asked to consider:

- 5 things that have been done well so far.
- 5 things that could have been done better.
- 5 things that Post Office should be doing / thinking about now.

5 THINGS DONE WELL SO FAR

- Accepting at the outset the principal of the making of a Group Litigation order to manage the 562 claims faced by Post Office to allow effective management by the Court - even though, in reality, (and leaving aside the question of establishing the precise nature of the legal relationship which applies equally to all) – there are not a range of "common issues" that are susceptible to easy determination by way of test cases.

  On analysis what one actually has here is a large number of separate claims albeit there are similarities in what many of them are claiming. I say this because opposing a GLO on this basis although completely logical, would have been doomed to failure. Also, in fact, although a GLO is of benefit to the Claimants (in joining together for funding purposes etc.) – it also benefits Post Office, who would otherwise be fighting 562 separate claims in County Courts/High Courts all over England and Wales - with all the administrative difficulties and duplication that would involve.

- Setting up a common issues trial in November 2018 on Post Office's strongest point first: the contract. If it is successful (or even significantly successful) in this trial the Claimants are going to have considerable difficulties in framing a structure for their detailed claims for any trial that follows. There is a prospect that the funder could get cold feet and the whole thing could collapse at that stage.

- Accepting at the outset in our Defence the two implied terms (*Stirling v.Maitland* "prohibit/prevent" term - and the "necessary cooperation" term)– which the court would routinely imply into a contract of this sort. This significantly narrows the area into which Claimants can imply further terms – which should make the objective of

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re-writing the commercial deal contained in the express terms of the agreement – all the more difficult. Also – this tactic may give a measure of costs protection on this point – depending on the eventual outcome.

- Focusing attention on the accounting position and the legal effects of false accounting generally (and as regards burden of proof) - more particularly given the accepted relationship of principal agent and well established legal incidents of that relationship. This is a weak point for the Claimants – and not a point that they have gone any way to seek to explain/ deal with, in an intelligent or indeed any manner.

- Playing a straight bat to the seemingly deliberately aggressive/antagonistic inter-solicitor correspondence engaged in by Freeths on behalf of the Claimants. This is never very impressive and Judges quickly tire of it.

5 THINGS THAT COULD HAVE BEEN DONE BETTER

- I can only identify two things – and in reality they are each aspects of the same point.

- In retrospect, at the last CMC Post Office could have done more to prevent the Claimants painting Post Office as a party who was not co-operating properly in the spirit of group litigation in the way the Judge had expected/wanted. He also criticised the Claimants in a similar way for unnecessary skirmishes. It seems to me that this was unfair of him and was based on his partial reading of the materials- and the jumping to conclusions. It was clear to me from the papers put before the Judge that Post Office had agreed to the principle of a Group Litigation Order being made, and indeed for preliminary issues to be heard to determine the legal relationship between the parties. The dispute between the parties was (and clearly was) limited to what precise issues those were –and when a trial of those issues could sensibly be heard. Nonetheless the view the Judge formed was that Post Office was not being sufficiently engaged with the process and was seeking to put the trial of issues off into the distant future.

- In retrospect, the legal team have perhaps underestimated the ability/intent of the Claimants and their advisors to exploit the Group Litigation process and to unfairly manipulate circumstances to their best advantage. A "re-set" letter has recently been sent to try to get Freeths to stop their pugilistic correspondence and to engage more constructively in jointly managing this Group Litigation with the assistance of the Court (as requested by the Judge at the last hearing)- rather than constantly seeking to score points in such correspondence.

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5 THINGS POST OFFICE SHOULD BE DOING / THINKING ABOUT NOW

- Suggesting to Freeths/the Court, positive ways in which the core of the bulk of the claims can be determined – rather than merely seeking to respond/shoot down inappropriate ideas put forward by the Claimants. And seek to manage that process to the best advantage of Post Office.

  - It seems to me that we should be looking at setting out for discussion with the Claimants (bearing in the mind the Court will look at this in due course) a grand plan for the phasing of different strands of the litigation to resolve the disputes between the parties. At the moment there is no master plan that has even been articulated by the Claimants nor the Court. This is a significant deficiency. We need to fill that space with ideas – to seek to set the agenda and to prevent the Claimants seeking to suggest Post Office is dragging its feet and use that as a platform to seek draconian orders against the Post Office on, say, disclosure.

  - My current view is that we should be looking at setting up a trial of up to 16 lead claimants (on all issues, breach, causation and quantum) which if chosen intelligently should be able to cover circumstances similar to the bulk (but not all) of the claims in the GLO ("the Omnibus Trial"). The aim is *not* that the determination of those 16 claims would be determinative of the other 546 claims in the GLO but that the way the different issues about the application of the terms of the contract (whose meaning would have previously been determined in the "common issues" trial), breach (including the operation of Horizon and the operation of the burden of proof), causation and damage are determined would provide a guide to how similar issues would be determined in the remaining population of claims. Further, such a trial would provide a costs disincentive to the "loser" from taking *other* similar claims to a trial – as if the Court found that such a "similar" claim was simply a re- run of the earlier claims, then an indemnity costs order would be a likely consequence for the loser.

  - We should look to put a timetable together with a view to there being a 12 week trial – ideally in May to July 2020 - with pleadings starting in January 2019 immediately following the November 2018 trial. However, I have in practice found it very difficult to set out a sensible timetable leading to a trial starting on that date. Accordingly, we might have to suggest an October 2020 trial – although this does sound a long time in the future, and so the Judge is unlikely to be enthusiastic. We must expect him to need persuading and must be prepared to put forward analysis to support our position. At the end of the day such an Omnibus trial is an ambitious undertaking which will need to be properly prepared if its supposed benefits are to be obtained. If insufficient claims are chosen or the wrong claims or wrong range of claims –then the determination of the lead claims will be determinative of nothing but themselves.

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- An indicative timetable commencing *after* the determination of the legal relationship in November 2018 (and therefore commencing in Jan 2019) might look something like this:

  POC: By end of March 2019 (3 months).
  Def: By end June 2019 (3 months)
  Reply: By end of July 2019 (1 month).
  Disclosure: on a rolling basis from March 2019 to be completed by end of October (7 months).
  Witness of fact: End of February 2020 (4 months).
  Expert reports: End of May 2020 (3 months).
  Reply reports: End of July 2020 (2 months).
  Joint statement of expert: End of August 2020 (1 month).
  September 2020: Overruns
  12 week trial commences October 2020:

- Review the information we do have on the Claimants (through the questionnaires) and consider what *further* information we would require – as a minimum- to be involved in a process where a pool of up to 30 potential lead claimants are chosen (from which 16 lead claimants would be chosen) which the parties can be reasonably assured cover the bulk of the broad range of circumstances that exist in the whole population of claims involved in the GLO. And identify the categories of claim that we ideally would want to be covered in such a body of claims

- Investigating with the Claimants solicitors what "common issues" they think exist and which could be the subject of the March 2019 trial. This would give us early warning of their thinking and allow us to start prepare for this eventuality and to prepare an appropriate response.

- Seeking to identify groups of claims that are susceptible to being picked off and thereby to reduce the cohesion of the Claimant group and to undermine their common purpose. An example is those Claimants who are subject to counterclaims and/or returns of sums paid under settlement agreements which the Claimants now seek to set aside. Another example, to be kept under review, is the possibility of settling any individual claims that might turn out to raise issues that cause potential difficulty or embarrassment for Post Office.

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15 December 2017