



**Speaking Note for Board Sub-committee on 10 July 2018**

**1. GENERAL UPDATE ON COURT PROCESS**

**1.1 Common Issues Trial.**

- 1.1.1 The Claimants are still looking to introduce material which Post Office believes is inadmissible. This concern has been flagged to the Judge who has indicated that he is prepared to deal with these matters in September once witness statements have been served.
- 1.1.2 Post Office has filed its Defences to the 6 Lead Claims. In line with above, Post Office has refused to respond to inadmissible material in the claims.
- 1.1.3 The Claimants have begun attacking Post Office's disclosure on the Common Issues, saying that insufficient disclosure has been given. WBD feel confident that we have satisfactory responses to their complaints, especially given that Post Office has now disclosed over 200,000 documents (whereas the Claimants have disclosed less than 5,000).

**1.2 Horizon Issues trial.**

- 1.2.1 At a Case Management Conference on 5 June, Post Office was ordered to give further disclosure about Horizon. This was on the narrow basis proposed by Post Office and not the wide basis requested by the Claimants.
- 1.2.2 The Claimants are making significant requests for explanations about how Horizon works. Where these are reasonable, Post Office is providing information. However about 2/3rds of their requests are disputed and this may lead to future Court hearings.

**1.3 Costs budgets.**

- 1.3.1 There have been several hearings (including one tomorrow – 11 July) to approve costs budgets, with each side saying that the opposing budget is too high. Each side's budget is around £12m.
- 1.3.2 The Judge ordered Post Office to re-serve its budget in a new format so that it matched the format of the Claimants' budget. The Claimants say that this means Post Office should pay the Claimants' legal costs of dealing with the cost budgeting process. That question will be decided tomorrow.

**1.4 Upcoming activity.**

- 1.4.1 The Claimants' Replies to Defences were received on Friday and are currently being reviewed.
- 1.4.2 Witness statements for Common Issues are to be served on 10 August.

**2. UPDATE ON CONTINGENCY PLANNING**

Following receipt of Counsel's preliminary Merits Opinion in early May, we have been looking at the risks of the litigation.

At the heart of the litigation are two key principles:

- is the contract between agents and Post Office a relational contract?
- should additional terms be implied into that contract?

PO has proposed that 2 additional terms should be implied. Claimants have requested a further 21, although these break down into parts.

Nothing we do now can reduce the retrospective impact. Accordingly the contingency planning is to prevent further claims being made in respect of the current/future situation. Key question is cost & complexity of implementation of change. There are legal risks of making some changes (eg contract changes) ahead of litigation. Operational improvements need to be carefully considered to ensure they can be independently justified.

Contingency is to look at likelihood (legal interpretation) and impact (business assessment) of each of these terms being implied. In parallel and using lessons learned during mediation process, we are reviewing a wide range of operational aspects of our interaction with agents.

#### **Input required:**

- **while we will review all claims and develop contingency plans, those that we should be most concerned about have both reasonable probability and reasonable impact (both =3 and above)**
- **will do more work and bring this back to Board at end of July**
- **update to UKGI/BEIS on 11 September - how to proceed?**

#### Likelihood

##### **2 terms @ 5 (certain):**

- our 2 proposed terms
- theirs - exercise of power :
  - relating to (i) contract variation and (ii) withholding remuneration during suspension.
  - honestly and for purpose intended/created to achieve
  - not capriciously or arbitrarily

Risk - remuneration during suspension. We are reviewing how decisions are made, what guidance is provided and what the general practice is.

##### **2 terms @ 4 (likely to lose)**

- Training - duty to provide adequate training and support and in particular where new working practices introduced, new systems introduced and where new services required to be delivered.

Risk - provide enhanced training. We are reviewing the training currently offered to ensure it is fit for purpose.

- Suspension - not without reasonable and proper cause; and not when PO has breached its duties

Risk - We are reviewing how decisions are made, what guidance is provided and what the general practice is.

### 3 terms @3 (50/50)

- PO to supply support services (back office accounting, helpline, training etc) to agents with Reasonable skill & care

Risk - We are reviewing how services are provided to ensure they are of suitable standard.

#### 2.1

- 2.2 [In relation to the possibility of contractual and operational changes being made before the Common Issues trial, WBD and Counsel do not recommend this.

2.2.1 It would be highly detrimental to Post Office's position in Court. It would show the judge that Post Office does not have confidence in its case.

2.2.2 The Claimants would spin this as Post Office abusing its power to make variations to avoid an adverse Court Judgment. This may encourage the Judge to make more findings in the Claimants' favour.

2.2.3 Post Office's power to vary the contracts is one of the Common Issues. Until this point is resolved, it cannot be known if a contract variation would be effective.

2.2.4 The issue could divert resource from the critical task of finalising the witness statement evidence to be filed for the Common Issues trial on 10 August 2018.]

3. **2.3 NEVERTHELESS, TO SUPPORT CONTINGENCY PLANNING THE RELEVANT PART OF THE CONTRACT WILL BE REVIEWED (WITH THE BENEFIT OF COUNSELS' ADVICE ON THE CHALLENGES THAT COULD BE MADE TO IT) TO DETERMINE WHETHER, AND IF SO HOW AND WHEN, IT COULD BE AMENDED TO MITIGATE THE RISK OF THE CLAUSE BEING CONSTRUED BY THE COURT IN A MANNER WHICH WOULD FRUSTRATE POST OFFICE'S ABILITY TO HOLD AGENTS ACCOUNTABLE FOR BRANCH SHORTFALLS. UPDATE ON SETTLEMENT OPTIONS**

- 3.1 Settlement is kept under constant reviewed but there has been no material change in the position.

- 3.2 The existing impediments to settlement are:

3.2.1 Post Office still does not have any reliable information on the value of the claims.

3.2.2 Settling with the 500+ Claimants opens the door to 10,000+ other postmasters to raise claims.

- 3.3 Mediation has been ordered for January / February 2019. By this time, it is hoped that we will have the Judgment on the Common Issues. If favourable to Post Office, this will create a foundation on which to settle.

- 3.4 Before then, planning work will be undertaken to produce settlement models that are commercially viable and which mitigate the risk of setting long term precedents. Those settlement models will factor Post Office's costs risks in the litigation, including the continuing legal costs of

defence, the potential irrecoverability of those costs, and the risk of being ordered to pay the Claimants' costs if we are unsuccessful (each of which could be substantial).

**4. AOB**