

Message

From: Jane MacLeod [GRO]
Sent: 28/01/2018 18:56:46
To: Alisdair Cameron [GRO]; Paula Vennells [GRO]
CC: Rodric Williams [GRO]; Ben Foat [GRO]; Mark R Davies [GRO]; Andrew Parsons [GRO]
Subject: RE: Postmaster Litigation - Briefing Notes for the Board - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE. DO NOT FORWARD

Thanks Al

- The point about potential areas of weakness was to ensure that we are constantly challenging ourselves and our case and not getting complacent. David's thoughts were not to drive more/different work, rather, that compared to other issues, these were the ones where he would have focussed his challenge if he were advising the applicants (whereas the applicants' current approach is somewhat unfocussed!).
- The application for costs argument is finely balanced, and as ever there are risks on both sides. From a strict legal perspective, I think it's the right thing to do, however I wanted to flag the issue so that there is a wider awareness that whatever the decision, there are implications, so your perspective on this is helpful.

Jane



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From: Alisdair Cameron
Sent: 28 January 2018 18:48
To: Jane MacLeod [GRO]; Paula Vennells [GRO]
Cc: Rodric Williams [GRO]; Ben Foat [GRO]; Mark R Davies [GRO]; Parsons, Andrew [GRO]
Subject: Re: Postmaster Litigation - Briefing Notes for the Board - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE. DO NOT FORWARD

Thanks Jane. I note the point about where applicants might focus but various teams have focused on these areas over the last couple of years, including Deloitte particularly. Is there any sense that we need to do additional work to prepare?

On the application of costs it seems to me that if we believe we are defending the P.O. against inappropriate and inaccurate claims then we should file for security of costs. If we don't do so and we win the case and have to bear those costs because the other side fades away into offshore mists, we will be held to have wasted public money just as much as we do by defending the case, if not more.

We may come under public attack for defending but what else are we supposed to do? If we could settle this case for a moderate amount and that would prevent other people making similar claims, enabling us to move forward, we would give it serious consideration. If we had evidence that we had damaged people and taken money off them, we would have compensated them years ago. I agree it will be difficult and public but what

options do we have? That is something I believe we can explain in public and we should be getting ready to do so - unless someone is offering a better solution....

Thanks Al

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From: Jane MacLeod
Sent: Sunday, January 28, 2018 12:24:20 PM
To: Paula Vennells; Alisdair Cameron
Cc: Rodric Williams; Ben Foat; Mark R Davies; Parsons, Andrew
Subject: Postmaster Litigation - Briefing Notes for the Board - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE. DO NOT FORWARD

Paula, Al

As flagged on Friday, the following are my suggested speaking notes for the Board tomorrow. I'm available all day to discuss if you have any queries.

Jane

Summary:

- 4 week trial set for November to hear 'Common Issues' – namely to determine the correct interpretation of the contract between POL and agents, and whether any additional terms should be implied into that contract. Freeths believe a further 20 terms should be implied. The materiality and impact of these vary.
- Process between now and November is to prepare for that trial. Disclosure hearing this Friday (2nd) – there is likely to be further adverse publicity as a result of this.
- Judge also set aside 4 weeks in March 19 however did not specify what that trial was to be used for. Both sides believe that it will be almost impossible to have a substantive hearing during that period due to the dependence on the outcome of the November hearing, the decision in which will not be available until at least mid December.
- We need to make a decision as to whether we want to pursue an application for security of costs.
- Contingency planning is about to commence.

Current Issues

Disclosure Hearing

- There is a Disclosure Hearing this coming Friday (2 Feb). This is a procedural hearing primarily on the scope and timing of documents to be disclosed by Post Office.
- There are disagreements between Freeths and ourselves as to the volume and scope of disclosure:
 - Despite initial encouraging discussions with Freeths, they have since reverted to requesting that 'everything' be disclosed immediately.
 - In aggregate we have offered to provide some c.175,000 documents relating to Post Office policies and processes, technical and operational aspects of Horizon (80,000), the 12 Lead Claimants, and the 27,000 documents reviewed by Second Sight which have already been provided. These documents therefore go to the core issues in dispute in the Common Issues trial.

- Freeths approach, apart from running into potentially millions of documents, amounts to a fishing trip. Tactically, they are keen that matters arising post appointment of agents should be disclosed, however this goes further than the scope of the November trial. For example we have offered to disclose all emails attributable to 9 'inboxes' including relevant functional inboxes. Freeths have asked for disclosure of all of 114 email accounts (NB – Paula this includes yours.)
- Post Office position reflects the new court protocol for disclosure, which protocol was designed to avoid the problems presented by Freeths' wide ranging requests.
- If time and the Judge permit, the Disclosure Hearing on Friday may also consider how the 4 week trial window in March '19, which was ordered by the Judge at the October CMC, will be used:
 - As every major issue is in some way reliant upon the outcome of the Common Issues trial, both parties are agreed that it would be impossible to prepare properly for any type of meaningful trial in the 4 months between the Common Issues Trial (November '18) and March '19 – particularly as the decision in that case is unlikely before mid-December, and there is a real possibility – given that the subject matter of that trial is a matter of law (the interpretation of the contract) rather than fact, that the decision could be appealed.
 - Freeths have suggested the time be used for Mediation - the principle of which Post Office does not oppose, however we clearly need to understand the objectives of the mediation, and as with, the original Complaints Mediation Scheme, we would not agree to mediate any criminal case.
 - Post Office has also proposed a detailed timetable for a subsequent 'Lead Cases Trial', which both sides agree is necessary for the litigation to move substantively towards a conclusion - addressing questions of breach, causation and loss, and avoiding the need for 562 separate trials. Freeths are resisting agreeing to a timetable for this, however in our view it could not be heard before May 2020 at the earliest.

Merits

- An opinion on the merits of Post Office's case will be sought once pleadings (Particulars of Claim, Defences and Replies) for the Common Issues trial have closed in April 2018.
- It is proposed that this be reviewed again in September 2018 once Witness Statements have been exchanged and the full evidence to be used in the Common Issues is known. The outcome of these reviews will inform whether we should consider settlement discussions – either across all or only some of the issues.

(NB – AI – we now have 2 QCs working on the case (Anthony de Garr Robinson and David Cavender). As part of David's on-boarding we asked him to consider how he would approach the case if he were advising the applicants. This has given us an additional perspective into the way we should approach the case : based on the information available to him, David flagged Horizon, training, agent appointment process and suspense accounts as the areas he would probe most if he were advising the applicants).

Security for Costs Application

- Typically in civil litigation, the losing party makes a substantial payment towards the costs of the successful party.
- Therium Litigation Funding are funding the Claimants and as such, could be liable for Post Office's costs should Post Office successfully defend this litigation. Therium has sought to cover this risk through an "ATE" (After the Event) insurance policy.
- However because a number of Claimants could be found to have acted dishonestly (indeed, some already have convictions for fraud, false accounting and theft), there is a real risk that the insurers could avoid the policy, meaning Post Office would have to look to Therium directly for its legal costs if successful.
- Therium is however a hedge fund, domiciled off-shore with limited transparency of its financial standing, such that we have no certainty that Post Office would be able, in practice, to recover its costs from Therium.
- To address this risk, the court's procedures allow a party to apply for "security for costs", i.e. for a specified sum to be ring-fenced to cover costs.
- WBD has been working with Freeths for the last 18 months to try to address its concerns about Post Office's costs exposure and thus avoid the need for a security for costs application, e.g. by having the ATE insurance re-drafted, and by requesting financial information about Therium.
- The concerns remain unresolved and we are therefore considering whether we should apply to the court for an order for security for our costs. There are risks to doing this:

- in making the application, we will have to disclose the expected quantum of our costs which will be material (£9m in the next financial year if we have 2 trials) giving rise to challenges as to whether this is a good use of public monies – particularly so soon after the announcement of the new funding. Additionally, the application may well generate adverse comment, e.g. claims that Post Office is using legal technicalities and/or economic pressure to stifle the claimants' claims.
- A successful application will require Therium to provide security at a set level and form. Should Therium fail to do this, not only would Post Office be unable to reclaim costs, there is a further risk that Freeths may also be at risk on their costs. It is therefore possible that the Court itself could strike out the claim if satisfactory security is not provided. There is also the possibility that Freeths would withdraw from the action leaving the 560 applicants without legal representation.
- Should the case be struck out/ Freeths withdraw, all the issues arising out of the lack of confidence in Horizon will remain unresolved and will continue to impact operational issues.
- Applications for security for costs should be made promptly. As we appear to have exhausted our ability to resolve this issue directly with Freeths & Therium, we will therefore need to decide shortly whether to make the application and if so, it should be filed within the next couple of weeks, resulting in a hearing on the issue being heard during March (with all the resultant adverse publicity)

Contingency Planning

We are about to kick off a separate piece of work to consider:

- what the impact would be if each/all of the implied terms supported by Freeths were to be upheld such that contracts with all postmasters (whether or not party to the action) had to be interpreted as if that term applied, and
- what action we could take (whether ahead of the decision or thereafter) to mitigate any adverse impact.

We will keep the Board updated on progress and recommendations.

BACKGROUND ISSUES – NOT FOR THE BOARD

Quantum

Based on the information provided to date, the aggregate claim across 560 applicants is c£224m (c£400k per claimant). £150m of this claim is for loss of earnings post termination of contracts and until expected retirement. However none of the applicants have set out the legal basis on which they believe they can claim for loss of earnings post termination.

Further, the facts giving rise to these losses (e.g. whether the claimed losses were in fact suffered) and legal basis (i.e. that they satisfy the legal tests of liability, causation, remoteness and mitigation) for such claims are yet to be tested.

Finally, the basis on which a significant proportion of the applicants participate in the claim remains to be considered by the Court (eg Crown employees, employees of agents, trustees in bankruptcy, those who have already settled with Post Office – including under NT, criminal cases etc) such that the final number of claimants, and therefore the aggregate value of their claims, remains uncertain.

CCRC

- Post Office continues to liaise with the Criminal Cases Review commission as it investigates 30 former Post Office-led postmaster prosecutions.
- The CCRC has appointed forensic accountants Grant Thornton to assist its investigations. The CCR has made public the fact that it has instructed forensic accountants, but has not named the firm, whose identity should be kept strictly confidential. We have provided GT with significant information and they will be meeting Fujitsu during March.
- A 25 January 2018 article in Computer Weekly reported that the “current piece” of forensic accountancy work is nearing completion, which will be scrutinised to see if “it gives rise to any further lines of enquiry”, and that the CCRC expects to provide an update to the postmaster applicants by the end of March 2018.

- Based on our latest understanding of the CCRC processes, we do not anticipate the CCRC reporting on its investigations before at least June 2018.



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