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SUMMARY OF BRIEFING REGARDING THE POSTMASTER LITIGATION

PROVIDED TO THE BOARD OF POST OFFICE LIMITED

MAY 2018

Background

The Board of Post Office Limited has delegated oversight of the Postmaster Litigation to a Committee comprising the Chairman Tim Parker, the UKGU appointee Tom Cooper and the Senior Independent Director Ken McCall.

That Committee met on Tuesday 15 May 2018 for the purposes of:

- receiving an update on the progress of the litigation from the legal team, and
- meeting the QCs acting for Post Office (David Cavender QC and Anthony de Garr Robinson QC both of One Essex Court) and receiving their initial views on prospects in relation to the first trial scheduled for November 2018, following receipt of the statements of particulars from the lead claimants.

The following summarises the issues discussed at the Committee meeting. A summary of this briefing was then provided to the Post Office Board at its meeting on 24 May, 2018.

Summary of the Action

1. The Committee was reminded of the timetable and subject matter for the Court hearings:
 - “Common Issues” trial on the correct interpretation of the contract between Post Office and agents to be heard over 4 weeks in November, which will consider the nature and effect of the legal relationship that existed (and exists) between sub-Postmasters and Post Office as set out in the express terms of the contracts; and whether as the Claimants argue, some or all of the additional 21 terms should be implied into the contract.
 - “Horizon” trial as to whether Horizon correctly processes and stores branch transactions along with a number of other associated issues, which will be heard over 4 weeks in March 2019. The exact scope of this trial has not yet been determined.
2. Neither of these trials will address the question of liability and causation of losses. Therefore there would need to be at least one subsequent trial on breach, causation, and loss: This is as yet unscheduled, however it is likely to take place sometime after September 2019.
3. There are currently 561 claimants in the action which is being heard under a ‘Group Litigation Order’ which is a court mandated process. The group includes existing and former Postmasters, as well as a handful of former employees and agents’ assistants (being the employees of sub-postmasters). The quantum of the claim remains unclear and is unlikely to be capable of being determined until after the Common Issues trial.¹

¹ Subsequent to these briefings, at a recent procedural hearing, the Claimants indicated that the aggregate claim value was around £80m-£90m. No explanation or methodology was provided to support this valuation and so it is being treated with a high degree of caution.

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4. The approach being taken by the Judge appears to be:
 - Work out what the contract means and the nature of the relationship that it embodies - in the common issues trial.
 - Work out if the Horizon computer system is the likely cause of any shortfalls- in the Horizon trial.
 - Apply the findings in the Common Issues trial and the Horizon trial, to a sample of the claims in the subsequent trial on breach, causation and loss.
5. The nature of claims is currently very wide, with numerous heads of damage, however broadly, the main heads of damage appear to be:
 - to reclaim deficits that agents have been made to pay, but say were not payable.
 - damages for loss of office.
 - damages for loss to other businesses/bankruptcy.
 - damages for distress and harm to reputation.

Current Status

6. The current activity focuses on:
 - Disclosure: in accordance with court orders regarding the scope of disclosure, some c185,000 documents have now been provided to Freeths, the solicitors for the claimants;
 - Statements of particulars have been received from the 6 lead cases. Defences to these are being filed and this process should be complete by 15 June.² Once done, focus will move to preparing Post Office's witness evidence.
 - An application has been made by Post Office for security of costs. This application is on hold in so far as we have received cooperation from Freeths and the lawyers for Therium (the litigation funders) and are now in negotiations with them as to quantum of costs for which security would be provided and the form of security. We can revert to Court on application if progress is not made.³
 - Supporting each side's IT experts to scope the issues to be addressed in the Horizon trial next March. This may include further rounds of disclosure and the provision of information about Horizon by Post Office to the Claimants.

Merits Opinion

7. Post Office's Counsel submitted a detailed 87 page Opinion on 11 May which set out their initial views on the 23 issues. It is necessarily dense and complicated and the following summary should not be relied on as an accurate summary of the analysis, given the complexity of the issues.

8.

² Five defences have been filed. One defence is to follow due to the claim being amended

³ The Court has oversight of costs and a hearing on costs management (but not security for costs) will be heard in the week commencing 18 June.

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9. There are challenges for Post Office as some of the drafting – particularly of the older contracts, may be open to different interpretations. Further, there is a relatively recent legal development that could be argued that a duty of “good faith” can be implied to long term relationships (such as the one between Post Office and its agents) which have been termed “relational contracts”- in which case it could be argued that the express terms in the contract should be viewed through the prism of a duty of “good faith”. However the extent of that duty of good faith has not yet been clarified by the Courts.
10. The outcome of litigation of this type is difficult to predict, and we remain at an early stage of the proceedings. In particular, the way Freeths are developing their case will continue to be refined and reformulated after we exchange evidence and start preparations for trial. There is also a substantial disagreement about the admissibility of certain evidence, with the Claimants looking to submit evidence that it hopes will cast Post Office in a bad light despite being irrelevant material.
11. Counsels’ view currently is that PO has the better of the argument on many of the 23 issues – but Post Office should not expect to win on all of them.
12. Counsel advised that they think it unlikely that the Court will find that the postmaster contract is a “relational contract” of the type alleged by the Claimants necessitating the implication of a general “good faith” term. They consider that the Court could regulate the contract sufficiently by the implication of the two terms which Post Office have already admitted stand to be implied.
 - neither party should do anything to impede the performance by the other party of its contractual obligations; and
 - both parties should provide the cooperation necessary to give effect to the contract.
13. These are in and of themselves powerful terms which place certain duties on PO – duties which, as a matter of fact in specific case, may have been breached by Post Office. It is however necessary to concede these terms so to prevent the implication of more onerous terms. The Common Issues judgment will describe and determine the incidents of the legal relationship and making certain findings of fact along the way. The decision is likely to be on general issues and it is not expected that either party will be ordered to pay the other any money, at this stage.
14. Given the uncertain state of the law, there is a material risk that the Judge could choose to imply a duty of good faith. There is also a risk that he may accept some of the Claimants proposed implied terms. If he did, Counsel are likely to recommend an appeal as such decisions will (i) be setting a foundation for this whole litigation and (ii) reflect a novel approach in a developing area of law which would radically affect the approach to the construction and operation of the express terms of the contracts in general.
15. Counsel noted that even if the decision on the Common Interests trial was largely favourable to Post Office, it is likely that the Claimants may appeal.
16. The earliest we could realistically expect the Judgement is end of January 2019.
17. Counsel will update their view on merits in late September following the submission of witness evidence when we will have the most comprehensive view of the arguments to be put by Freeths and the evidence to support them.

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Next steps

18. The legal team is currently simultaneously preparing for the Common Issues trial (November 18) and the Horizon computer trial (March 19).
19. The Horizon trial is important. If the Court is able to find as a matter of fact that generally the Horizon system was dependable, then it will be much harder at the third hearing (which will deal with breach and causation) for postmasters to say that deficits at their branch were caused by Horizon. In practice it will place an evidentiary burden on the postmasters to prove that the general findings made about Horizon in the Horizon trial do not apply to their claim.
20. Counsel cannot yet offer an opinion on the merits of the Horizon trial because the scope of that trial is still taking shape.

Settlement

21. We continue to keep the possibility of settlement under review, including whether there are sub-groups with whom settlement may be possible due to the particular nature of their claims. However we do not currently believe settlement at the present time is a realistic option. Following the Common Issues trial, the Judge expects the parties to mediate in order to seek to settle the matter and/or reduce the issues in light of the Common Issues judgement. There is a very short time between that mediation and the Horizon trial.
22. If Post Office do well in the two hearings, there is the possibility that the Claimant group will start to splinter. The economics (legal costs) would be more difficult if large numbers withdrew for any reason.

Contingency Planning

23. At the Board meeting, we advised the Board that in parallel with the litigation, Post Office is assessing the impact if it lost on any one or all (or a combination) of the implied terms, and considering whether mitigating actions could be taken and if so the costs and timeframe of doing so. The initial output from this work will be presented to the Board at its meeting on 31 July.