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**BATES AND ANR -v- POST OFFICE
GROUP LITIGATION**

draft / ADVICE ON SETTLEMENT

Executive summary

1. The purpose of this note is to provide an overview of the Post Office Group Litigation and to summarise our recommended settlement strategy for an upcoming mediation scheduled for 27-28 November 2019.
2. This is a complex dispute where there are a number of material unknowns. Settlement at this stage of the proceedings therefore will necessarily involve a risk-based judgment in light of provisional assessments of liability and quantum. In our view, the position can be summarised as follows:
 - a. Post Office is likely to be unsuccessful in its defence of most of the claims. Although Coulson LJ's judgment is awaited, we consider it unlikely that Post Office will be given permission to appeal on most of the implied good faith terms. The true battleground in the case is likely to be quantum.
 - b. We consider that settlement at a level between £40m and £65m would be a good result for Post Office. Those numbers are based on a robust analysis of the most significant heads of loss across the 555 claims and take into account a premium for risk, reputational considerations and the anticipated high burn-rate on costs going forward.
 - c. Achieving a settlement will not be a straightforward matter:
 - i. The claims are funded by litigation funders, Therium. Given the level costs invested to date, the funding return - which the Claimants will want covered as part of any settlement - is likely to be disproportionate (we estimate of the order of £75m - £90m and growing). There is therefore likely to be a significant gap between the parties.

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- ii. The Claimants include 61 individuals who were prosecuted by Post Office in the criminal courts. Compromising these claims before the criminal courts have adjudicated on any appeals creates difficulties: it would be unprincipled and also has potentially significant knock-on effects. However, if Post Office were to exclude this highly activist cohort from the settlement process, that is likely to jeopardise the entire mediation.
- d. In view of these issues, there is a strong chance that the upcoming mediation will be unsuccessful. Post Office therefore needs to adopt a negotiating strategy which preserves its prospects of achieving a reasonable settlement later down the line if the November mediation fails. Key elements of the strategy will include:
 - i. Negotiating around Post Office's top numbers at the November mediation only if doing so would close a deal;
 - ii. If the mediation fails, making Part 36 offers to each individual Claimant. This would enable Post Office to (a) shift at least a part of the costs risk going forward and (b) reach out to individual Claimants who may not share the views of the activist members of the class who will likely be in the driving seat in the negotiations; and
 - iii. Maximising pressure by re-focussing the litigation on points where the Claimants are more vulnerable, including a trial of test cases where the weaker individual claims can be brought to the fore.
- e. Resolving this litigation would be of significant benefit to Post Office. Not only would it bring an end to the ongoing cost, diversion of management time and reputational damage, it would allow Post Office to move forward, with the benefit of lessons learned, and focus on its commercial objectives for the future.

Background

- 3. In around 1999/2000, Post Office introduced a computerised electronic point of sale and accounting system called Horizon (the "**Horizon System**"), which sub-postmasters



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("SPMs") were required to use in their branches. The Horizon System requires SPMs to account for stock, sales and takings and, as part of the balancing process, identifies shortfalls or discrepancies. Under the terms of their contracts, SPMs are required to make good any shortfalls out of their own funds.

4. Some Claimants repaid their shortfalls; others hid them by through false accounting so as not to be held accountable for funds they could not, or wished not to, repay.
5. Post Office implemented robust audit and collections procedures to minimise losses from the SPM network. Many offenders had their SPM contracts terminated, some summarily for breach and others on notice. Up until 2013, Post Office in appropriate cases also exercised its powers as prosecutor to convict SPMs of criminal offences - principally theft, fraud and false accounting. Many convicted SPMs pleaded guilty, although it is now said those pleas were motivated by ignorance or pragmatism (i.e. to avoid more serious charges of fraud or theft), rather than true guilt.

The Claims

6. The Claimants are a group of 555 individuals who allege that Post Office's policy of seeking recovery of shortfalls was wrongful because shortfalls were generated by "bugs" in the Horizon System. They also allege that Post Office failed in its "good faith" duties to provide proper training on the use of the Horizon System, to assist with queries or complaints, to disclose the existence of known bugs in the system, to conduct adequate investigations into the cause of disputed shortfalls and to allow suspended SPMs access to records to enable them to challenge Post Office's assumption that unexplained shortfalls were the result of theft or error.
7. As a result of these breaches, they claim damages for the wrongful recovery of shortfalls, the wrongful suspension and termination of their contracts and associated wrongs including harassment, stress related illness and stigma. A breakdown of the claims is attached as Appendix 1.



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The current position in the litigation

8. The litigation is structured as a GLO. Fraser J, the managing judge, has ordered that it be heard as a series of trials on issues of relevance to the claims brought by the Claimant class as a whole.
9. The first trial (the "**Common Issues Trial**") concerned the meaning and effect of the contracts between Post Office and the SPMs. The judgment, handed down in March 2019, was resoundingly favourable to the Claimants. In his judgment, Fraser J found that the SPM contracts were "relational" contracts and as a consequence implied a series of onerous "good faith" terms which undermine, in material respects, the contractual framework which Post Office believed it had in place. Fraser J was critical of Post Office, finding that some of its key witnesses had deliberately misled the Court and described it as having "*a culture of secrecy*". Post Office has sought permission to appeal the judgment (the "**Common Issues Appeal**"). Following the oral permission hearing which took place on 12 November 2019, it seems likely that the majority of the good faith terms will remain in place.
10. The second trial focussed on whether Post Office's Horizon System was, in principle, robust (the "**Horizon Trial**"). The trial concluded in July 2019 and judgment is awaited, although we expect it to be handed down imminently. The trial was dogged with complaints around the adequacy of Post Office's disclosure¹ and allegations that the true extent of problems with Horizon was being concealed in the litigation.² Although the expert evidence on the robustness of the system was relatively compelling, the Claimants will be able to establish that there was a risk (even if small) of bugs causing accounting discrepancies. Leading Counsel for Post Office (Tony de Garr Robinson QC) considers it highly unlikely that Fraser J will give the Horizon system a clean bill of health.
11. A third trial has been scheduled for March 2020. It will deal with the correct measure of damages if the Claimants are able to establish liability in principle³ and will be conducted

¹ Many of the "suspicious" non-disclosures are in all probability red herrings but have been deployed effectively by the Claimants to create a "concealment" narrative.

² The decision not to call Fujitsu's Dr Jenkins (who stated, incorrectly, in some of the criminal trials that Horizon had no bugs) is likely to result in adverse inferences being drawn.

³ This is a peculiar issue to have tried at this stage, before matters of breach. The original order made provision for a trial about both limitation and measure of loss. The limitation issues would have been centred on the Claimants' deliberate concealment defence under section 32 of the Limitation Act 1980.



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on assumed facts, without any evidence. Its scope has yet to be decided. Key points of legal principle that are likely to arise are (a) Post Office's liability for lost earnings claims for extended periods of time (i.e. remuneration until retirement); and (b) a novel claim for the recovery of the Claimants' litigation funding costs as damages.

12. Neither the first nor second trials were concerned with Post Office's liability in respect of the individual Claimants' claims. The impact of bugs and the alleged breaches of good faith duties in individual cases will be left over for future trials, probably involving test Claimants.

13. In parallel with the court timetable, Post Office has agreed with the Claimants to engage in mediation on 27-28 November 2019 with Charles Flint QC officiating as mediator.

Liability Issues

14. Post Office's exposure on liability will likely turn on a consideration of:

- a. Whether Post Office was entitled to hold the Claimants accountable for shortfalls;
- b. Whether Post Office was entitled to suspend SPMs without pay;
- c. Whether Post Office was entitled to terminate the Claimants' contracts with or without notice;
- d. Whether Post Office was in breach of its "good faith" duties and, if so, whether that has a bearing on (a), (b) and (c) or otherwise caused the Claimants any loss.

15. There are distinct issues raised by fact patterns both in the individual claims and by certain categories of Claimants, in particular (a) Claimants convicted of criminal charges; (b) Claimants who have previously settled with Post Office, either under the Mediation Scheme or Network Transformation; and (c) Claimants who were not SPMs (e.g. assistants to SPMs) who had no contractual relationship with Post Office.

Issues raised on the facts of Individual Cases

In view of Fraser J's approach on Common Issues (that Post Office operated a "culture of secrecy") and the obvious sympathy he showed to the lead Claimants whose cases would have formed the foundation of the limitation trial, we took the view that confining the trial to measure of loss issues was the least-worst solution.



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16. The fact patterns of the individual claims raise a variety of issues:

- a. In some cases there is compelling evidence, unrelated to the Horizon system, which explains why shortfalls arose (e.g. confessions from Claimants that cash was misappropriated or lost). Outside of the cohort of the convicted Claimants, these are relatively few.⁴
- b. There are other cases where it might be inferred that shortfalls were the result of lax business management or poor accounting practices.⁵
- c. In the majority of cases, however, the cause of the shortfalls remains unknown. It is inherently difficult for Post Office to prove that shortfalls were caused by SPM error because, apart from the Horizon accounting system, Post Office has no visibility over the operations of the branches. Further, there is a paucity of solid documentary evidence, particularly on older cases.⁶
- d. Many Claimants' contracts were terminated because they were submitting false trading balances so that shortfalls did not come to light.⁷
- e. There some cases where the Claimants have found themselves in unfortunate personal circumstances, which is likely to attract the sympathy of the Court.⁸

17. It is clear from the Common Issues judgment that Fraser J is sympathetic to the Claimants' core complaints. In implying the extensive good faith duties he did, he has given the Claimants a legal mechanism for challenging Post Office's approach to the

⁴ For example, Mr Kutianawala (Claimant 106) admitted during an audit that he inadvertently left numerous cash pouches (containing £100,000) out of the safe which were erroneously taken from the branch in a mail bag. He has since denied this and suggested he fabricated the story under pressure.

⁵ For instance, Ms Connolly (Claimant 45) admitted that she never physically counted the money in one office cash supply for a four year period, passwords were not confidential and branch trading statements were not signed when completed. Ms Connolly was summarily terminated due to evidence of cash inflations and false declarations in accounts submitted.

⁶ For example, on the case of David Gilbert (Claimant 63) there are no documents available to confirm or deny the Claimant's claims concerning shortfalls.

⁷ For instance, Darren King (Claimant 99) admitted that both he and one of his employees inflated cash reserves in order to conceal discrepancies and issues with balancing. Mr King also admitted he did not account for prize money from the lottery correctly on the Horizon System.

⁸ For example, Lawrence Bailey (Claimant 12) was diagnosed with cancer and he alleges that the cancer was not discovered earlier due to depression and suicidal thoughts resulting from Post Office action against him. At the time of the shortfalls, **GRO** **GRO** His wife (Joan Francis Bailey, Claimant 210) was also seriously ill at times, including with a brain tumour.



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recovery of shortfalls, suspensions and terminations. Seen in the round, apart from those few cases where Post Office can point to clear documentary evidence of theft or culpable error on the part of individual SPMs, Post Office's prospects of success on liability are not encouraging.

18. At the risk of some oversimplification:

- a. On bug issues, if the findings made in the Horizon Issues judgment are to the effect that Post Office cannot rely on Horizon data as compelling evidence that shortfalls were genuine⁹, there is limited further evidence that Post Office will be able to rely on in support of its case that it was entitled to demand repayment. Post Office did not typically conduct extensive investigations into the cause of shortfalls. Unexplained shortfalls were effectively assumed to be the result of SPM theft or error.
- b. The extensive good faith terms implied by Fraser J operate, at least arguably, as a fetter on Post Office's ability to exercise its express contractual entitlements. Post Office will be constrained to accept that it acted in breach of many of those terms because its working procedures were simply not designed with the good faith terms in mind. (For example, Post Office believed that it was entitled to rely on Horizon System data; it also believed it was entitled to terminate on notice as of right and did not typically turn its mind to the question of what period of notice might, in all the circumstances, be "fair".)
- c. One area of controversy we foresee emerging is whether Claimants who have falsely accounted for cash or stock in order to "cover up" shortfalls can be said to be in material breach simply because they falsely declared their trading balances. On its face, a failure to follow prescribed accounting procedures might qualify as a material breach justifying summary termination - particularly if it was deliberate. Here, however, the Claimants are likely to blame breaches of Post Office's good faith obligations - for example (a) that errors were made as a result of poor training and inadequate helpline support; or (b) that deliberate false

⁹ It would be unwise to speculate what the judgment will say; however if its effect is that Post Office bears the burden of proving that shortfalls were genuine and it cannot rely on Horizon data as compelling evidence of that fact, it will struggle for want of proof. There are few cases where Post Office can in fact demonstrate how or why cash or stock went missing.

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accounting was justified in light of Post Office's policies of demanding repayment and/or terminating summarily without proper investigation or process. There are legal questions around how the good faith duties interact with Post Office's contractual entitlements in these types of scenarios but we can see ample scope for Fraser J treating accounting failures as non-material, either because they were a consequence of breaches by Post Office of its good faith duties or, quite apart from the Common Issues Judgment, because they were not repudiatory in nature. That assessment is borne out by Fraser J's sympathy for Mr Abdulla in the Common Issues Trial notwithstanding an undisclosed shortfall of £4,398.32 discovered on audit, a practice of keeping an undated cheque in the amount of £2,500 in his till and the overstatement of mutilated notes.

- d. Finally, and of obvious practical significance, the findings made about the credibility of Post Office's witnesses mean that, in the absence of solid documentary evidence, factual disputes are likely to be resolved in favour of the Claimants.

Distinct Issues raised by Categories of Claimant

19. There are also distinct issues raised by certain categories of Claimant.

Convicted Claimants

20. There are 61 convicted Claimants. These Claimants face a threshold issue in that the claims made will, for the most part, involve a collateral attack on the judgments of the criminal courts and such claims are liable to fail as an abuse of process. As such, the convicted Claimants would have a civil remedy only if they succeed in having their convictions overturned in the criminal courts.¹⁰

21. Subject to the outcome of the Horizon Trial judgment, Brian Altman QC's view is that the convicted Claimants are unlikely to succeed in their criminal appeals because they face two substantial hurdles: (a) those who pleaded guilty will need to establish a basis for withdrawing their guilty pleas (for example by alleging incompetent legal

¹⁰ Unless, potentially, they can identify causes of action unrelated to the matters in respect of which they were convicted.



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representation); and (b) they will then need to persuade the appeal court that they were wrongfully convicted. Brian Altman QC acknowledges, however, that his assessment might change in light of findings made in the Horizon Issues judgment. The Criminal Case Review Commission ("CCRC"), which has been asked to review 34 of the criminal cases, is also awaiting the outcome of the Horizon Trial judgment.

22. It would be unwise to speculate how matters might unfold in the criminal courts. For present purposes, we observe simply that the criminal cases do not on their face appear to be of equal merit. In some cases, the Claimants made detailed confessions as to how and why they (or family members) misappropriated funds.¹¹ In other cases, Claimants allege that they pleaded guilty to false accounting only to avoid the more serious charges of fraud or theft and the associated risk of custodial sentences.¹² On its face, the former category of cases appears to pose less risk than the latter, but this is a specialist question of criminal law.
23. From a technical legal perspective, the correct course for the convicted Claimants is to pursue their grievances through the CCRC and/or the criminal appeals courts, not the GLO, until such time as their criminal convictions have been overturned.
24. According to Brian Altman QC, the only proactive duty Post Office has is to ensure that the appropriate disclosures are made to each convicted individual. It may be that findings are made in the Horizon judgment which require Post Office to make fresh disclosures which convicted parties might then be able to rely upon to found criminal appeals. Brian Altman QC has advised that, if fresh disclosures are required, an individual case-by-case review will need to be conducted to determine the appropriate approach in each case.
25. Against this background, settlement with the convicted Claimants raises particular challenges:

¹¹ See, for example, the case of Ms Rudkin (Claimant 444) who admitted in interview that she had inflated cash figures and falsified branch trading statements; that she had "borrowed" Post Office funds and was unable to repay the funds; and she had taken cash from Post Office to pay it into her business account - the money was used to pay for shop, wage and household bills.

¹² See, for example, Mr Clark's (Claimant 248) case where the charge of theft (1 count) was not pursued following a guilty plea to false accounting (7 offences). Similarly, the charge of theft against Ms Thomson (claimant 178) was not pursued following a guilty plea to false accounting (3 offences).



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- a. The convicted Claimants, who are Post office's most vocal critics, are likely to form a core component of the Claimant committee at the mediation. If Post Office were to take an inflexible position that their claims cannot be considered as part of the mediation process, there is a high risk that the mediation will not get off the ground. Post Office is also likely to be subject to trenchant public criticism, as happened at the time of the original mediation scheme in 2013.
- b. However, settling with the convicted Claimants is problematic:
 - i. It is not a principled way of proceeding. If a Claimant has been properly convicted, it is in the interests of justice that the conviction stands (from our review, it appears that several convicted Claimants admitted to theft of Post Office funds). If, on the other hand, a Claimant has been wrongfully convicted, he is deserving of the maximum compensation. No obvious half-way house exists.
 - ii. Any settlement could be viewed as admission of failures on the part of Post Office in the exercise of its prosecutorial powers, which is a serious matter. If Post Office has got things wrong, it should of course address that. However, given that an admission of any such failing will have consequences,¹³ this is not a step that should be taken lightly.
 - iii. Brian Altman QC's advice is that offering the convicted Claimants anything at all would of itself enhance the prospects of the Claimants succeeding in their appeals (confidentiality over the settlements could not be maintained). It also risks unravelling the numerous other prosecutions where Post Office acted as prosecutor.

26. In light of these complications, Post Office must take a strategic decision as to whether to exclude convicted Claimants from the settlement discussions or take a non-legal approach and seek to settle with these Claimants notwithstanding the risks. There is no wholly satisfactory solution. Having given the matter careful consideration, we consider the best approach is not to make any settlement offers to convicted Claimants.

¹³ Not least the risk of a potential re-examination of all its past convictions – a difficult exercise in light of the passage of time - as well as the increased civil claims.



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That would not, however, preclude Post Office from making a global settlement offer to the cohort of non-convicted Claimants. If the wider Claimant group then agreed to apportion that lump sum amongst themselves, that would be a matter for them.

Assistants

27. There are 28 Claimants who are Assistants (rather than SPMs). Assistants fall into a distinct category because, under the Common Issues judgment, they have no third-party contractual rights and therefore no claims against Post Office for breach of contract (for example, for lost earnings). Such claims might be brought through SPMs but, in a number of cases, the Assistant's SPM is not a claimant in the GLO.

28. Assistants would not be precluded from claiming in restitution (for shortfalls repaid) or in tort (for harassment, personal injury and so forth). Several assistants were convicted and, if their convictions are overturned, they may have some prospects of succeeding. For those that were not, however, these claims appear speculative.

Settled Claimants

29. Approximately 150 Claimants settled with Post Office either under the Mediation Scheme or under one of the Network Transformation restructuring programs and entered into full and final settlement agreements. A sympathetic judge may be persuaded to unwind those settlements on misrepresentation grounds. However, even in that event, Post Office has a good argument that credit should be given for sums that it has already paid.¹⁴ Network Transformation Leavers were, for example, paid relatively substantial sums, roughly equivalent to 26 months' earnings.

Summary

30. In summary, therefore, while we can identify some weak claims or categories of claims within the Claimant cohort, this is not a case where we consider there are likely to be strong arguments on liability across the board. Post Office's position may improve¹⁵ if

¹⁴ There is a partial exception for Claimants who converted under the Network Transformation programme whose settlement releases do not cover claims in respect of Post Office activities going forward.

¹⁵ Even if the judgment is overturned, there is still a strong probability that claims will fail on the facts, particularly if the Horizon judgment is unfavourable.



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the Common Issues Judgment is overturned, but our present assessment is that Post Office is unlikely to get permission to appeal on many (if any) of the good faith terms which go to liability issues and the hearing of any appeal is unlikely to take place until mid or late next year. Further, although many of the claims are old, we are not optimistic about a limitation defence given the likely availability of a deliberate concealment argument.

Quantum

31. In general terms, the claims made comprise:

- a. Claims in contract for the recovery of shortfalls, loss of earnings and capital losses. A novel claim is now also made for recovery of the Claimant's litigation funding costs.
- b. Claims in tort or for breach of statutory duty (e.g. for harassment, stress-related personal injury, stigma damages and malicious prosecution); and
- c. Claims in restitution (e.g. for the recovery of shortfalls repaid by Claimants without a contractual relationship with Post Office).

32. To the extent the claims have been quantified, they total £205.6m. Interest at 8% p.a. is claimed in addition. Because the Claimants have not quantified all their losses and have expressly reserved the right to amend the values claimed, the total claim value is, if anything, understated.

Post-Termination Losses

33. The single most significant driver of value is the period for which the Claimants may be entitled to recover lost earnings resulting from the termination of their contracts. Post-Termination losses (i.e. lost earnings beyond the notice period) presently account for circa £148m of the £205.6m claimed and are sometimes claimed for very lengthy periods (up until retirement).

34. Conventionally, such awards of damages are capped at the amount of remuneration payable during the contractual notice period. Post-Termination losses are typically not recoverable because the "minimum obligation" rule assumes that a contract-breaker would have taken steps to terminate the contract on notice as soon as he or she properly could do so.



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35. Here, the position is complicated by Fraser J's findings in the Common Issues judgment. In short, Fraser J found that certain of the lead Claimants did not receive their contracts. He also held that a "good faith" term falls to be implied into all SPM contracts that Post Office is not entitled to terminate SPM contracts (a) arbitrarily or capriciously; (b) without reasonable cause or (c) in circumstances where Post Office is itself was in material in respect of the matter alleged to give rise to the right to terminate. Our review of the individual cases to date suggests that Post Office in fact terminated most contracts on the basis of shortfalls and/or accounting issues, which the Claimants effectively attribute to bugs. This creates an opening for the Claimants to contend that they are entitled to recover lost future earnings up to the point at which they would have ceased to operate their branches.¹⁶

36. Ultimately, we do not think an argument along these lines is likely to succeed (and this is an area where we consider that Post Office is most likely to be given permission to appeal). It would drive a coach and horses through the law on damages for wrongful termination. It also is quite probable (as a result of comments made elsewhere in the judgment) that Fraser J did not intend those implied obligations to give rise to these sorts of claims. However, the Claimants are advancing claims along these lines in the Further Issues trial. As matters stand, these claims and the very substantial values attached to them, cannot be discounted altogether for the purpose of any risk analysis.

37. That leaves open the question of the period for which post-termination losses should, on a reasonable analysis, be payable. In that regard, the following points should be taken into consideration:

- a. Claimants whose contracts were wrongfully terminated are, at minimum, entitled to recover earnings lost up to the expiry of their notice periods (i.e. for 3, 6 or 12 months depending on their individual contracts);
- b. Fraser J found in the Common Issues judgment that, in light of the good faith implied terms, the notice periods in the SPM contracts must be interpreted as

¹⁶ In the Particulars of Claim for Further Issues, Alan Bates, for example, articulates his claim for post-termination losses on the assumed basis he would have continued until September 2019 (i.e. [16] years post-termination losses) or 12 years in the alternative (this being the assumed average period of a SPM's appointment).

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"minimum" notice periods and Post Office was required to exercise a discretion (acting reasonably and not arbitrarily or capriciously) in light of the facts of the case as to how much notice should in fact be given in any particular case. It is uncertain whether Post office will be granted permission on this issue. If it is not, we can anticipate Claimants contending for a variety of potential notice periods. Alternatively, he found that certain Claimants did not receive their contracts and/or that the notice provisions should be struck down as unreasonable, in which event they would be subject to a reasonable notice period. In that event, there are suggestions in the judgment that a reasonable period of notice would be a maximum of 12 months.

- c. Stigma damages offer an alternative route for recovering (uncapped) post-termination losses. These aim to compensate Claimants for unemployability or reduced earning capacity as a result of reputational damage. In the Common Issues judgment, Fraser J found that Post Office owes an implied obligation of trust and confidence¹⁷ which is the precise obligation which could, in principle, sound in stigma damages. The evidential burden for proving that an individual Claimant became unemployable as a result of the stigma associated with his/her suspension and/or termination is high and such claims tend to fail. However, there is a risk that, in certain cases, the Claimants will be able to discharge that burden. Indeed, many suffered financial hardship. That risk is exacerbated for Claimants who were convicted and given a criminal record. In the event stigma damages are recoverable, there is no cap (bar reaching retirement age) on the period for which stigma damages are payable.
- d. It is likely that many Claimants will allege that the closure of their Post Offices led to the collapse of the retail units they ran alongside their Post Office branch. These claims (along with associated business interruption claims for difficulties suffered prior to collapse) are being advanced in the Further Issues trial and, on the right evidence, we consider that they would in principle succeed. This would lead to enhanced loss of earnings claims based on the lost profit from the retail side of the business.

¹⁷ Which obligation could survive a successful Common Issues Appeal.



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38. For illustrative purposes, we have calculated the value of the lost earnings claims on a variety of bases (notice period losses only, 12 months' remuneration, 2 years' remuneration and 5 years' remuneration). However, looking at these various considerations in the round, we consider that, for non-convicted Claimants, the 2-year analysis is the best proxy, principally because of the potential availability of claims for more than 12 months earnings and the availability of additional claims (such as claims in respect of retail premises) which are available to supplement a 12 month notice period. Given the limits of our knowledge of the individual Claimants' circumstances post-termination, there is scope for going higher.

Funding Cost Claim

39. The new claim advanced for the recovery of the premium payable by the Claimants to their litigation funder is also likely to be very substantial. We do not, however, consider that it is likely to succeed. The law is clear that funding costs are irrecoverable as costs and it would be extremely surprising if the Claimants were permitted to circumvent that rule by re-framing the claim as one for damages. It is also contrary to the public policy on litigation funding that was recently examined in the context of the Jackson reforms.

Quantification Models

40. To assist with the assessment of the individual Claimants' claims, we have built a ground-up tool that allows us model Post Office's potential financial exposure in the GLO based on an analysis of the legal merits of the individual claims, both in principle and as a matter of quantum. There is a wide divergence within the Claimant Group as to the losses claimed (the lowest quantified claim is for £200; the highest is for £9m). By approaching quantum assessment by considering each Claimant separately, we can capture Claimant-specific details and avoid the risks inherent in making wide assumptions across the class.

41. The data underpinning the models has been drawn from the information Post Office holds on each individual Claimant (principally as to historic remuneration,¹⁸ contract

¹⁸ The way the Claimants have arrived at their post-termination losses is unclear because they claim global figures without breaking the claim down by annual remuneration x no. of years claimed. As part of our quantum verification assessment, we have extracted Claimant specific remuneration data from Post Office for each Claimant (where available) and analysed the individual Claimant's case (as presented in the SOIs) to take account for remuneration deductions based on branch-related expenditure (namely, the



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terms, dates of service, settlement payments and prosecution history with certain assumptions where data is unavailable). It also takes into account (a) information supplied by the Claimants themselves and (b) our high-level assessment of the recoverability of the unquantified heads of loss (capital losses, personal injury, stigma, harassment, "other losses").

42. Using this Claimant-specific data, we have prepared two financial models to assist Post Office to take an informed view as to an appropriate settlement value of the claims:

- a. **A ground-up recoverability analysis** - this analyses the recoverability in principle of the heads of loss claimed and assesses their likely quantum;
- b. **A "cost of fighting and losing" analysis** - this aims to put some numbers around current realistic worst-case scenarios and could be relied upon to an answer to unrealistic demands from the Claimant Group in the mediation.

43. These models factor in the liability issues arising in respect of Claimants who have been convicted, those who received settlement payments under the 2013 mediation scheme or Network Transformation and assistants who had no relationship with Post Office. In light of the very limited number of claims we expect will fail on their individual facts and the likelihood that quantum considerations will be the true driver behind any settlement, we have for the purpose of settlement made no further discounts for liability issues.

Ground-up recoverability analysis

44. A summary of the output of our recoverability model is at Appendix 2. A more detailed breakdown of that summary between the various claims and the convicted and non-convicted cohort is attached at Appendix 3. Notwithstanding our view that 2 years' earnings is the appropriate range for assessing the loss of earnings claims, we have included for comparison purposes the sums that could be recoverable if credit was given for earnings for the period of (a) the Claimants' individual notice periods only; (b) 1 years' earnings; and (b) 5 years' earnings.

employment of employees as branch assistants) and the mitigation of this loss (namely, subsequent employment).



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Non-convicted Claimants (494 Claimants)

45. If the period for which loss of earnings are recoverable is limited to 1–2 years, we anticipate that the non-convicted Claimants' realistic potential recovery if successful at trial could be of the order of £30m - £38m (including recoverable costs to date). Interest would be recoverable in addition.
46. Given the fact that some of the cases span over twenty years, any award of interest by the Court is likely to be substantial. If the Claimants are able to demonstrate that their borrowing rates would have been higher than the standard rate (often calculated at LIBOR plus 1%) - for example due to impecuniosity - a Court may award a higher rate. The lead Claimants seek interest at 8%. The appropriate rate depends on the facts but cases have allowed up to 3% and even 5%. The various permutations of interest rate calculations are set out in rows F - I of Appendix 2 for comparison purposes but, at LIBOR plus 1% interest would be of the order of £2m to £3m, and at 3% interest would be of the order of £7m to £10m bringing the total claim value to £37m - £48m.
47. If this litigation proceeded to a conclusion by way of a final trial two years down the line then, unless costs protection is available under Part 36, we expect Post Office's liability would increase to an estimated £55m - £75m as a result of further accrued interest and own and averse costs.

Convicted Claimants (61 Claimants)

48. There are a wide variety of potential quantum outcomes to the Convicted Claimants' claims:
- a. If the Claimants' are unsuccessful in overturning their convictions in the criminal courts, the convicted Claimants' claims are likely to be worth little or nothing because the claims made will, for the most part, fail on grounds of abuse of process.
 - b. If, however, particular convictions are overturned, the affected Claimants will likely have significant claims. Exonerated Claimants would likely have enhanced prospects of recovering stigma damages (assessed as a multiple of earnings for the duration of the period that the Claimant's earning capacity was diminished as a result of having a criminal conviction). They would also be entitled to



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enhanced non-contractual damages e.g. for stress-related personal injuries and harassment. Claims for malicious prosecution may also lie if the Claimants are able to establish malice.

49. The cumulative value of such claims will depend on the number of Claimants who successfully overturn their convictions. The fact-patterns across the criminal cases are different so it may not be the case that all the convicted Claimants will stand or fall together.
50. If one assumes that all the convicted Claimants claims were to succeed in their criminal appeals, we estimate that their total claim value could range from £10.4m to £51m (this number would reduce to £45.6m if as a matter of law the convicted Claimants' two year post termination losses are found to be duplicative of the claim for stigma) - possibly higher if generous awards are made in favour of the (at least) 7 cases where the Claimants received custodial sentences. This would increase our estimate of the total value recoverable across the class to £40.4m – £133.7m (excluding interest and recoverable costs incurred after November 2019).
51. These figures could be understated as a Claimant who can establish that their life has been ruined as a result of a wrongful criminal conviction is bound to attract the sympathy of the Court.

Costs of "fighting and losing"

52. We have also considered the costs of fighting and losing the claim. If it would clearly and obviously be cheaper to take that course, that would be a viable option for Post Office.
53. It is not a simple matter to form an uncontroversial view as to what the realistic cost of losing at trial might be. For present purposes, however, we consider there is a clear risk that Post Office would be worse off financially than settling at the levels we have proposed.
54. The total claim value (as quantified in the Claimants' Schedules of Information) is £205.6m (excluding recoverable costs and interest):



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- a. If the Claimants succeed on all their quantified claims two years down the line, Post Office's liability would be of the order of between £253.8m and £309.4m (being £205.6m principal, £28.2m interest at LIBOR plus 1% or £84m at 3% and £20m costs).¹⁹
- b. If convicted Claimants are excluded, that number would reduce to between £198.6m and £241m (being £157m principal, £21.6m interest at LIBOR plus 1% or £64m at 3% and £20m costs).
- c. If Post Office succeeded in confining post-termination losses to 24 months but all other heads of claim succeed, its liability (including convicted Claimants) is more likely to be of the order of between £104.7m and £124.5m, (being £74.5m principal, £10.2m interest at LIBOR plus 1% and £30m at 3% and £20m in costs).
- d. When convicted Claimants are excluded this number reduces to between £91.9m and £108.9m (being £62.9m principal, £9m interest at LIBOR plus 1% or £26m at 3% and £20m in costs).
- e. Not all Claimants presently claim post-termination losses. If post-termination losses across the entire Claimant Group (i.e. not limited to those where this head of loss is claimed) are confined to 12 months and all other heads of loss succeed, Post Office's liability (including convicted Claimants) is likely to be of the order of between £102.8m and £122.8m (being £72.8m principal, £10m interest at LIBOR plus 1% and £30m at 3% and £20m in costs).
- f. When convicted Claimants are excluded this number reduces to between £93.1m to £110.1m (being £64.1m principle, £9m interest at LIBOR plus 1% and £26m at 3% and £20m in costs).

The claimed figures are likely to be understated. That is because certain heads of claim have not yet been quantified at all (e.g. claims for personal injury, stigma/reputational damages and harassment) and the Claimants have reserved the right to amend their claims in light of further disclosure and expert evidence. In the pleadings for the Further Issues

¹⁹ These figures assume that the litigation will continue for another two years; that Post Office's liability for its adverse costs would be £20m (i.e. absent satisfactory costs protection under Part 36) and that interest is recoverable at a rate of LIBOR plus 1%.



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Trial, just served, the lead Claimants have introduced as yet unquantified claims for funding costs, disruption to their businesses, exemplary damages and distress and inconvenience. If the Claimants succeed on such claims, even at a low value, the total claim value could increase significantly given the size of the Claimant Group. For example, a damages award of £1,000 per Claimant for stress-related injuries would increase the overall claim value by approximately £0.5m excluding convicted Claimants.

55. We are also mindful that questions of damage are particularly susceptible to the exercise of judicial discretion.

Recommended Settlement Range

56. Seen in the round, we consider that a settlement of £40m - £65m would be a good price to pay for the settlement of this litigation with the non-convicted cohort. We say so for the following reasons:

- a. A sensible starting point is the estimated recoverability of the non-convicted Claimants' claims based on two years' loss of earnings including costs to date - **£38m**;
- b. If interest is added at LIBOR plus 1% that sum increases to **£41m**; if interest is added at 3% it increases to **£48m**.
- c. If matters were to progress to trial two years down the line, Post Office's exposure would increase to approximately **£50m - £60m** (excluding interest) in view of the increased costs.
- d. If interest is added at LIBOR plus 1% that range increases to **£56m to £67m**; if interest is added at 3% it increases to **£67m to £81m**.
- e. In view of the risks associated with ongoing litigation in which Post Office has not fared well, it would be reasonable to pay a premium for reputational and operational considerations and to remove the risk that the Claimants are awarded damages in respect of their more speculative, but extremely high value, heads of loss.



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- f. Allowance should also be made for the likelihood that the Claimants put forward improved or increased claims as the litigation progresses.

57. A helpful sense check as to whether these numbers are in the right ball-park could be to consider the average value of a Post Office business. The average SPM remuneration across the Post Office network (i.e. not limited to Claimants in the GLO) stands at circa £38,000 per annum. We note that leavers under Network Transformation were offered 26 months' earnings by way of an exit payment. If that is taken as a proxy for the value of a the loss of an average Post Office businesses, that would suggest the average value of a branch business would be of the order of £82,333, or a total of **£45.7m** across the 555 Claimants.

Settlement Strategy

58. The Claimants' settlement expectations are unlikely to be driven by strict legal analysis. As a practical matter, we anticipate that the Claimants will want to recover their full funding costs (typically a multiple of costs invested) and a top-up payment which allows each Claimant to receive a meaningful (albeit proportionately reduced) recovery on top.

59. We have no visibility as to the Claimant Group's funding arrangements but estimate that they may look to recover £75.9m - £90.9m for their legal costs and expenses at a settlement in November 2019.²⁰ Given the burn rate on costs, this would likely increase to £90.9m - £109.9m at a settlement in May 2020. If each Claimant were also to recover between £10,000 and £50,000 in addition, those numbers would increase to £81.4m - £118.7m as at November 2019 and £96.4m - £136.7m as at May 2020.²¹

60. If our estimates are accurate, there will be a gap between the parties with the result that settlement is unlikely to be achievable given the weak negotiating position Post Office is presently in. Post Office therefore needs a clear strategy which preserves its

²⁰ This is calculated as 3 – 4 x estimated costs incurred to date, assumes that Freeths is on a 100% CFA and assumes an ATE premium of circa £6m was paid.

²¹ Post Office's Board has quite properly observed that, given our assessment of the likely recoverable quantum, it is unclear why the funders agreed to invest in the claim. That is a pertinent question. It seems to us the most likely answer is that the Claimants have exceeded their original budget – possibly by some considerable margin – because they did not anticipate that Fraser J would order quite so many trials and that quite so many contentious issues would arise. It may also be that allowance was made for recovery by all 61 the convicted Claimants and/or for interest at higher rates.



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prospects of achieving a reasonable settlement later down the line if the November mediation fails. Our recommendations are that:

- a. It would be inadvisable to negotiate around Post Office's top numbers at the November mediation unless doing so would close a deal. If the mediation fails, Post Office's best offer will set the floor for future negotiations in which event Post Office risks being driven to negotiate at unmanageable levels further down the line, making the litigation potentially unseizable.
- b. Following the mediation, Post Office should consider making Part 36 offers to each individual Claimant. Doing so could have a number of benefits:
 - i. It may enable Post Office to shift at least a part of the costs risk going forward (in that, if Post Office "beats" the offers at trial, Post Office would only be required to pay adverse costs associated with those claims up to the date of expiry of the offers, and should be entitled to be paid its costs from the date of expiry of the offers). Because our model has been built from the ground up, we can make Part 36 offers in a way that captures the nuances between individual claims;
 - ii. It may assist in preventing rolling interim adverse costs orders which would supplement the Claimants' fighting fund;
 - iii. It enables Post Office to reach out to individual Claimants who may not share the views of the activist members of the class (who will likely be in the driving seat in the negotiations). If the large numbers of Claimants are minded to accept the offers, the size of Claimant Group may be reduced sufficiently to make it uneconomical for the funders to continue the litigation.
- c. Going forward, Post Office will also need to maximise pressure on the Claimants by re-focussing the litigation on points where the Claimants are more vulnerable, including careful selection of test cases which would enable Post Office's best points to be brought to the fore.



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Potential Claimants outside the GLO

61. It is possible that this litigation will give rise to future claims by new Claimants outside the GLO. That said, the GLO has been the subject of a great deal of publicity (including several rounds of invitations from Freeths to join the Claimant Group) so Claimants have had ample opportunity to join. It may therefore be that the reason a significant number of SPMs have not done so is likely because they have no cause for complaint.
62. There is no simple mechanism for managing the risk of future claims. Post Office can take some comfort from the fact that these proceedings have now been active for some time and, notwithstanding the likely availability of a deliberate concealment defence to limitation on the current cases, there is a point at which the facts giving rise to the claim will have become so widely known that the clock can be re-set.²² As the original mediation scheme took place in 2013, it may be that many potential future Claimants will soon be out of time.

Herbert Smith Freehills LLP
12 November 2019

²² Under section 32 of the Limitation Act (1980), time will start to run again once the Claimant "has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have done so".



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Appendix 1: Breakdown of Claimants' Claims

Head of loss	Total Claim Value
Shortfalls	£12m
Suspension Pay	£3.1m
Notice Pay	£6.1m
Post-Termination Losses	£148m
Capital losses	£27.8m
Prosecution Losses	£0.8m
Bankruptcy	£1.5m
Other losses	£6.3m
Malicious prosecution	Unquantified
Personal injury	Unquantified
Stigma	Unquantified
Harassment	Unquantified
Business Interruption	Unquantified
Retail premises losses	Unquantified
Exemplary damages	Unquantified
Litigation funding premium as damages	Unquantified
Interest	Unquantified
Total	£205.6m



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Appendix 2: Ground-up Recoverability Analysis

Ground-up Recoverability Analysis [23]						
		(a)	Assessed Value [25]			
		All Quantified Claims [24]	(b) Notice period earnings	(c) 12 months' earnings	(d) 24 months' earnings	(e) 5 years' earnings
A.	Total quantified claims [26]	£205.6m	£66.8m	£75.8m	£86.8m	£121.8m
B.	Exclude previous settlement amounts [27]	£199.3m	£59.8m	£68.8m	£79.8m	£114.8m
C.	Exclude assistants [28]	£197m	£65.8m	£74.8m	£84.8m	£118.8m
D.	Exclude convicted Claimants	£157m	£20m	£27m	£35m	£62m
E.	Subtotal (exclude all three)	£142.1m	£13m	£20m	£28m	£53m
F.	Interest (1% + LIBOR) [29]	£17m	£2m	£2m	£3m	£6m
G.	Interest (3%)	£49m	£5m	£7m	£10m	£18m
H.	Interest (5%)	£82m	£8m	£12m	£16m	£31m
I.	Interest (8%)	£132m	£12m	£19m	£26m	£49m
J.	Recoverable costs (£15m less £5m costs order paid)	£10m	£10m	£10m	£10m	£10m
K.	Total	£201.1m	£28m	£37m	£48m	£81m

- 23 The figures in this table factor in 1) £12m shortfalls (or part thereof as proportionally applicable), 2) £6.3m for previous settlement amounts and 3) assessed figures for unquantified claims.
- 24 These figures are based on the figures as stated the Claimants' SOIs and do not include any allowances for unquantified heads of loss
- 25 The assessed value figures include allowances for personal injury, stigma and harassment
- 26 In the event the convicted Claimants are able to bring claims against Post Office, we envisage that these assessed figures will increase significantly. A convicted Claimant, for example, is likely to have a substantial claim for stigma damages.
- 27 We continue to gather from Post Office information on previous settlement agreements. The figure used in this calculation may give undue credit for negative numbers.
- 28 Of the 28 assistants in the GLO only 12 of the linked sub-postmasters are also Claimants in the GLO. It is possible that the SPM Claimants may bring a claim against Post Office for any liability they have to their assistant.
Although the assistant Claimants have no contractual claim against Post Office, they may still be able to bring a claim in tort. Of the non-convicted assistants, our assessment suggests that 7 Claimants may have a likely recoverable claim for personal injury (total: £70,000) and harassment (total: £48,500). These have a negligible impact on the assessed figures.
- 29 Interest calculated until November 2019.



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Appendix 3: Breakdown of Ground-up Recoverability Analysis

Head of loss	Total Claim Value	Ground-up recoverability analysis – notice period only		Ground-up recoverability analysis – 12 months' remuneration		Ground-up recoverability analysis – 24 months' remuneration		Ground-up recoverability analysis – 5 years' remuneration	
		Convicted Claimants	Non-convicted Claimants	Convicted Claimants	Non-convicted Claimants	Convicted Claimants	Non-convicted Claimants	Convicted Claimants	Non-convicted Claimants
Shortfalls	£12m	£2.2m	£9.8m	£2.2m	£9.8m	£2.2m	£9.8m	£2.2m	£9.8m
Suspension Pay	£3.1m	£0.2m	£1.4m	£0.2m	£1.4m	£0.2m	£1.4m	£0.2m	£1.4m
Notice Pay	£6.1m	£0.5m	£2.1m	n/a	n/a	n/a	n/a	n/a	n/a
Post-Termination Losses	£148m	n/a	n/a	£2.7m	£8.8m	£5.4m	£17.8m	£13.5m	£44m
Capital losses	£27.8m	£0.4m	£2.4m	£0.4m	£2.4m	£0.4m	£2.4m	£0.4m	£2.4m
Prosecution Losses	£0.8m	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Bankruptcy	£1.5m	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Other losses	£6.3m	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Malicious prosecution	Unquantified	£4.1m	n/a	£4.1m	n/a	£4.1m	n/a	£4.1m	n/a
Personal injury	Unquantified	£3m	£1m	£3m	£1m	£3m	£1m	£3m	£1m
Stigma	Unquantified	£33m	£2.4m	£33m	£2.4m	£33m	£2.4m	£33m	£2.4m
Harassment	Unquantified	£2.7m	£1.2m	£2.7m	£1.2m	£2.7m	£1.2m	£2.7m	£1.2m
Subtotal	£205.6m	£46.1m	£20.3m	£48.3m	£27m	£51m	£35.8m	£59.1m	£62.2m
Total Convicted and non-convicted	£205.6m	£66m		£75m		£87m		£121m	