

Message

From: Andrew Parsons [GRO]
on behalf of Andrew Parsons [GRO]
Sent: 02/11/2018 09:47:50
To: Rodric Williams [GRO]
Subject: FW: May 2019 [WBDUK-AC.FID26896945]
Attachments: _DOC_152628601(1)_May 2019 Timetable.XLSX; May 2019 Scope.DOCX

Rodric

FYI – this is the email we we’re discussing. It’s a brain dump so please don’t take this as actual advice and please excuse my rather casual email style!

A

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From: Andrew Parsons
Sent: 01 November 2018 16:38
To: 'Anthony de Garr Robinson'; 'David Cavender'; Owain Draper [GRO]; Gideon Cohen; Simon Henderson [GRO]
Cc: Sushma MacGeoch; Victoria Brooks; Rachel Lawrie; Dave Panaech; Amy Prime; Jonathan Gribben
Subject: May 2019 [WBDUK-AC.FID26896945]

All

This is a long email setting out some initial thoughts on a possible trial in May 2019. I presume that at some point during the CI trial Fraser will grab one of the free days to talk about this and so we need a plan. The below represents a straw man for everyone to take shots at.

I appreciate that everyone is extremely busy but we do need to put some time aside with the full Counsel team to talk through our proposal for May. I'm going to suggest a con call for Monday at 10am. Shout now if you really can't do it.

Also, I'm sure that everyone can raise a million reasons why the below is crazy... I think it's crazy... but we need to find a way forward so we all need a positive (if deluded) mental attitude!

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Background

To recap, Fraser's off-the-cuff suggestion at the last hearing was to hear the breach issues on 3 of the Lead Cases. He also made clear that something had to happen between March and the Autumn, but wasn't adamant this had to be in May.

We have not yet had any formal notification of dates for a trial in May 2019.

We have heard nothing formally from Freeths. Informally, they have said that they would prefer a pause after the HIT so to allow space for mediation.

Key dates

- CI trial finishes on 6 December.
- CI judgment: unknown, my guess is before Xmas
- HI trial: 12 March – 4 April
- HI Judgment: unknown, let's say two weeks later, 18 April
- May Court vacation – 27-31 May
- Last day of term: 31 July

Note: if you assume a four week trial finishing before the May vacation, it will need to start on 29 April.

General objectives of a third trial

I can see 3, potentially conflicting, objectives for a 3rd trial:

1. To progress the litigation as a whole towards conclusion
2. To secure some form of tactical advantage that forces the Cs to quit / settle.
3. To keep Fraser happy by doing something "productive" in May 19.

Challenges / factors to consider

- Any issue that touches on alleged problems in Horizon may require expert evidence and that evidence logically follows the HI trial. This makes a May 19 trial very difficult due to insufficient time after the March trial, but could feasibly be achieved if the 3rd trial is moved back to start in mid / late June.
- Any trial that relies on part of the SPM contract, will likely depend on the outcome of the CIs. I think (other may disagree) that there is a high likelihood that whatever the CI judgment one or both parties will appeal. Current lead time for appeals is about 12 months. If an appeal is lodged, it would make little sense holding a further trial on related issues, as the findings may be made unsound by the C of A.
- We have a Court ordered mediation after the CI judgment – estimated in January. This will require a lot of work, much more than an ordinary mediation and it should not be under-estimated how much strain this will place on resources.
- Whatever route, we will need to undertake another round of cost budgeting and security applications, for both the March trial and any further trial.
- We should not assume that we have deeper resources than the Cs. We undoubtedly have more bench-strength, but every task is much more onerous for us (our disclosure is at least 10 times larger than the Cs; we will have loads of witnesses, they will have a few, etc.).
- That said, my instinct is that the Cs funding is under pressure and they do not want to be burning money on a 3rd trial.
- The Lead Cs have not pleaded their full cases on breach or loss so further pleadings will be needed to advance those cases.
- The Cs case on limitation could be wide ranging. To recap, they allege that PO committed fraud and / or concealed information such that the limitation date is extended. None of the Lead Cs have pleaded to limitation at all. The alleged frauds / concealments potentially touch on many issues including remote access, defects in Horizon, and the failure to communicate problems / the extent of shortfalls at other branches. The relevant pleadings:
 - Generic Defence 188: Limitation defence.
 - Generic Reply 71: Response on limitation citing acts of concealment and fraud in GPOC.

- GPOC 115: Allegations of deceit, which refer to...
 - GPOC 108: Representations made by PO – only described by class of representation, not the actual words used.
 - GPOC 25: Allegation of concealment.
- Generic Reply 98: Limitation goes both ways as it affects PO's counterclaims.
- If we deal with any breach issues, we may need to address the PO suspense account (GPOC 38, Generic Defence 73, Generic Reply 2.1 and 29). To recap:
 - PO has suspense accounts like any other business. They are not real bank accounts, just accounting ledgers within the overall PO accounting system.
 - When it holds money that it doesn't know where it should go to, it temporarily puts this money in a suspense account. After 3 years, the general practice is that PO takes the money to its own Profit and Loss if it cannot find the correct home for the money.
 - The Cs say that this means that PO might receive money back from a client that should have been returned to a branch (via a TC) which would offset a loss in branch. Instead PO pockets that money on some occasions through its suspense accounts.
 - The accounting process for POs suspense accounts is fiendishly complicated. Deloitte have done some preliminary investigations and found that the accounting controls around the use of suspense accounts were poor. My instinct therefore is that the suspense account is a risk area for PO and a very difficult subject.
 - We have given no disclosure on the suspense account so far.
- If we open up loss issues, these might include:
 - Personal injury losses (note – the Cs were required to obtain medical records but have not yet been required to disclose it).
 - Loss of investment on their business – which may require expert evidence (?).

Options

The high-level range of options I can think of are:

1. Try 1-6 of the Lead Cases
2. Select a further discrete issue to determine:
 - a. Limitation?
 - b. Settled cases / res judicata cases?
 - c. The principles of recoverable loss?
 - d. Anything else?
3. Select new Test Cases and try them.
4. Kick the whole thing back until Autumn 2019
5. Anything else?

We can quickly knock on the head option 3. To select new test cases would take 3-6 months because:

- The objective of the exercise would be to pick 5-15 cases that are representative of the group as a whole.
- That would require an analysis of the features of all 557 cases to draw out common themes.
- There would then likely need to be an agreement between the parties on the right criteria for selecting cases
- A shortlist of cases would be needed and some preliminary disclosure given against the shortlist.
- Then the parties would need to select the final list, which inevitably would require Court intervention.
- We have not done this exercise before – when we selected Lead Cases, there were only 198 Claimants.

Option 4 is not possible with Fraser, unless we give him some red meat in May 19.

So that leaves us with option 1 and 2.

Option 1: Trial of Lead Cases

Due to the high risk of an appeal on the CIs, I cannot see option 2 working. However, if we say this to Fraser he will go bananas because (i) he's too good to be appealed (ii) it will look like we are trying to frustrate his master plan and (iii) it is, in his mind, only a possibility that may not happen.

Putting that problem to one side, to hold a Lead Case breach trial before the May vacation, we would need to:

- Disclosure only of documents on which a party relies (eg. no disclosure requests from C).
- Have no expert evidence, as there are only 3 weeks from the end of the HIT to the start of trial 3.
- Not deal with loss – this will need expert evidence / additional disclosure of Cs finance records to evidence the losses.
- Limit the trial to 3 cases. My guess is that we will have at least 5 witnesses per case (trainer, helpline witness, auditor, contract advisor (who did the termination), person with analysis of accounts). They will call the Lead Claimant. This means around 4 days of evidence per case, plus one day for opening and closing per case. 3 cases x 5 days = 15 days.

This seems a very unattractive proposition as it will require a lot of work to make little progress. I also struggle to see how we can make decisions on Lead Cases without Horizon evidence from an expert on whether Horizon caused a problem for that specific Claimant.

So... that leads to a later trial, say starting in mid-June, which then allows for limited disclosure and some expert evidence on Horizon.

I've attached two docs. The first sets out the possible scope for a Lead Cases trial. The second are some outline trial timetables.

Option 2: Discrete issue - limitation

For this to work, we need to offer up something that is substantive. The only topic is limitation.

Limitation has the inherent risk that it looks tactical. If we win, we will knock out lots of claims. However, dealing with limitation is very important from an evidential perspective. If the standard 6 year limitation date bites (2010) we will then have available full Horizon data for every case (data runs from October 2007). The data is critical to our analysis of any case – I cannot stress this enough. Without the Horizon data we are in real difficulty; and it makes the Court's job so much more difficult. Determining limitation (assuming it goes in PO's favour) will change the selection of cases for any Test Cases trial, hopefully forcing the Cs to pick cases where we have good information to make useful decisions.

The difficulty is that the Cs have not ever properly set out their case on limitation. We don't know what they will say or precisely what representations they will be relying on. Further pleadings will be long way round to get this as the Cs will not plead until their reply.

What we do know is that they will tie limitation to knowledge of bugs in Horizon and so limitation must necessarily follow the HIT. This again means that this issue cannot be heard in May, but could be heard in June / July.

There is also a possible connection between limitation issues and the Common Issues – the Cs are seeking implied terms for PO to disclose info about bugs and problems which they may try to weave into their arguments on concealment.

Lead cases

As background info on the lead cases:

- We chose Abdulla, Sabir and Stockdale. Freeths picked Bates, Stubbs and Dar.
- Limitation:
 - Bates, Stockdale and Sabir are fully time barred
 - Stubs is partially time-barred (her termination happened a few months after the limitation date)
 - Stockdale and Dar have no limitation issues.
- We have:
 - Full Horizon data for Stockdale, Dar.
 - We have data for the last 2-3 years of Abdulla, Sabir and Stubbs
 - No data for Bates.
- False accounting:
 - Bates, Abdulla, Sabir and Stockdale submitted false accounts

- Dar probably did a little bit of false accounting over the last few weeks of her tenure.
- Stubbs was honest

The best test cases are perhaps Sabir and Abdulla because we have transaction data and they are time barred, meaning that they raise the widest spectrum of issues.

Straw man

Drawing the attached together, I think we need a plan that can be flex to accommodate the possibility of an appeal. Also tactically the best options for PO are (i) to force the Cs to burn money and (ii) to target limitation. My straw man therefore tries to achieve these objectives whilst trying not to look tactical!

- We agree to a Lead Cases trial of 3 cases on the basis that we agree with Fraser that forward progress must be made even if the road might be bumpy.
- We seek two minor modifications:
 - Ask for the trial to slip back to June / July so to allow suitable time (i) to digest the HIT judgment and (ii) for mediation as requested by the Cs.
 - Limit disclosure to those documents each side relies on, so to keep down costs and save time.
- We prepare full pleadings on all 6 Lead Cases to begin immediately on receipt of the CI judgment.
- One significant unknown factor is limitation and what the Cs say on limitation. To accelerate the pleading process (rather than waiting for the replies, which will necessitate rejoinders) the Cs are to set out now their case on limitation so that PO can investigate their allegations.
- We then take stock of the position in February, by which time any appeal will have be launched. At this point, the parties / Court can:
 - Determine whether the Lead Cases trial should go ahead.
 - If there is an appeal, whether certain issues should be parked / deferred to later.
 - Reduce the pool from 6 to 3 cases based on their suitability to determine the above issues.

My prediction is that an appeal will be lodged and that the Lead Cases trial will either (i) collapse completely or (ii) be restricted in scope to limitation issues.

- If it goes ahead as limitation only then it has to be Sabir + Abdulla + Bates (as these are the only 3 fully time barred cases).
- If it does go ahead as a full breach trial, then we should press for three from Sabir, Abdulla, Stockdale and Dar (because we have data on these and so they will be the most useful).

All thoughts welcomed.

No matter which way we go, it is clear that a third trial will put a (greater) strain on resources and so Sushma, copied, has kindly agreed to come on board as another WBD partner on this case in general and with a focus on the third trial.

A

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