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Confidential and legally privileged

The Post Office Group Litigation

NOTE ON POTENTIAL AUDIT OF FUJITSU DISCLOSURE

Our Instructions

1. Post Office is considering whether to commission an audit by Deloitte of the completeness/accuracy of Fujitsu's production of one or more of the following categories of documents/information to Post Office:

   (1) The KELs which Post Office was ordered to disclose by the Third CMC Order on 1 March 2018.[1] In addition, the information regarding the storage of KELs which Fujitsu provided to WBD to enable Post Office's EDQ to be completed in December 2017 and the (inconsistent) information on the same subject which Fujitsu has recently provided to WBD.

   (2) The technical documents stored on Fujitsu's Dimensions systems and the ARQ data held in the Horizon audit store, some of which Post Office has at various times been ordered to disclosed.[2]

   (3) The Peaks, the OCRs, OCPs and MSCs, the TFS entries and the audit reports which Post Office was not specifically ordered to disclose but agreed to disclose in late 2018 and 2019.

2. We have been asked to set in a note our views on whether litigation privilege would apply to Deloitte's audit work and on the risks of commissioning this work.

3. We should emphasise that we are in no position to predict what the outcome of Deloitte's audit will be. Nor are we in a position to identify all the risks arising from the audit and

[1] In this note, we assume that the reader understands what KELs, Peaks, OCPs, OCRs and MSCs are and what their relevance is to the Horizon trial and to the other trials that will or may in due course be heard in this litigation.
[2] Post Office was ordered to disclose ARQ data on the lead claimants for the Common Issues trial. There was no formal order to disclose any ARQ data for the Horizon trial but Post Office voluntarily disclosed some ARQ data once the Claimants had served some evidence from individual SPMs.

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assign probabilities to those risks. On the information available to us, all we can sensibly do is to indicate in general terms what seem to be some possible outcomes and then explain our views as to the possible consequences of those outcomes.

Current State of Play

4. The current status of this litigation may be summarised as follows:

   (1) The parties are currently awaiting the Court's judgment in the Horizon trial: this is expected not before the end of October 2019.
   (2) The parties are also preparing for Post Office's application for permission to appeal the Common Issues judgment: an oral permission hearing has been listed for 12 November 2019 in the Court of Appeal.
   (3) At the same time, the parties are preparing to attend a mediation towards the end of November 2019.
   (4) Trial 3 is listed to take place in March 2020: intensive preparations for that are already underway and due to intensify when pleadings are served later this month.
   (5) Trial 4 is likely to be listed for later in 2020 or sometime thereafter.

5. The intention is that the mediation should take place after delivery of the Horizon judgment and after the outcome of the permission hearing is known. However, in light of the events summarised below, this timetable may prove challenging (and we imagine that it would be impossible if is known that an audit into Fujitsu's disclosures is being or has been undertaken). It is notable that Freeths have recently suggested[3] that Fujitsu's latest revelation regarding undisclosed KELs discussed below may have an impact on the application for permission to appeal and, by implication, on the Horizon judgment. We cannot presently see what that connection to the permission hearing in the Court of Appeal is (other than prejudice perhaps), but the Claimants have yet to articulate their arguments on the point. It is therefore right to note that it cannot safely be assumed that Coulson LJ will necessarily disregard these arguments.

[3] Letter dated 11 October 2019.

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The Recent KEL Issue

6. In the Horizon trial, the parties and the Court attached particular importance to the KELs and Peaks that had been disclosed. Much of the evidence focused on the number and nature of issues and bugs which had been experienced in Horizon over the last 19 years, as shown in these documents. On the basis of the KELs and Peaks, both experts identified the Horizon bugs which had been identified by Fujitsu and discussed the likelihood of Horizon containing other unidentified bugs. The KELs that had been disclosed were central to these issues. Post Office's expert (Dr Worden) placed particular reliance on KELs, and although the Claimants' expert (Mr Coyne) criticised him for doing so, Mr Coyne also accepted that there would have been a KEL covering the great majority of the bugs that had been identified.

7. It now appears that the KEL disclosure proceeded on an incorrect basis. Long before the Horizon trial, Post Office's Electronic Disclosure Questionnaire (dated 6 December 2017 and signed with a statement of truth) stated that:

> *"The KEL only contains the current database entries and is constantly updated and so the current version will not necessarily reflect the version that was in place at the relevant time. The previous entries / versions of the current entries are no longer available." (emphasis added)*

8. We are instructed that the statement quoted above was based on information provided by Fujitsu and that Fujitsu signed off on the EDQ. However, we are also instructed that a few weeks ago, in the context of discussing the disclosure of documents recently coming into Post Office's possession, Fujitsu mentioned that previous versions of KELs are retained on the system. Previous versions of KELs were always available and the statement made in the EDQ was therefore wrong. On the basis of this statement, Post Office did not give any disclosure of any previous versions of KELs. We understand that Fujitsu has a considerable number of these previous versions. It follows that a significant volume of material which should have been disclosed has not been disclosed. It is not yet known what this material contains or whether and to what extent it will support or damage either party's case.[4]

[4] In the last day or two, we have also become aware of another set of KELs that have not been disclosed, namely later versions of the KELs which were disclosed in the first tranche of KEL disclosure in May 2018. As we

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9. This revelation came as a shock to Post Office and its legal advisers. It is not the first failure on Fujitsu's part, either in providing information about the documents they hold or in locating and providing such documents. Nor is it even the first serious failure. For example:

   (1) At the beginning of this litigation, Fujitsu misinformed WBD that KELs simply recorded minor issues in Horizon, that they were not a record of bugs and they did not identify any issues that could affect the accuracy of branch accounts. Post Office pleaded this in its Generic Defence and Counterclaim, causing it much awkwardness after the true position was revealed.

   (2) Having similarly been misinformed by Fujitsu that various categories of KELs had been deleted, in the run up to the Horizon trial Post Office discovered that one of these categories had not been permanently deleted at all but was retrievable and available. These KELs were disclosed only weeks before the trial started.

   Nevertheless, this latest failure is a very serious one. From the Court's perspective, it is a failure for which Post Office is responsible: Post Office has (rightly) accepted that, under the terms of its contract with Fujitsu, the KELs have always been under its *"control"* for the purposes of its disclosure obligations under the Civil Procedure Rules. See further paragraph 16 below.

10. The Claimants and the Court have been informed of this revelation and its repercussions are beginning to play out: as yet the Court has not made any observations but Freeths have asked several pointed questions in a letter dated 11 October 2019. Once these questions have been answered, it is to be expected that they and the Judge will ask further questions of increasing detail and difficulty regarding Fujitsu's actions, its processes and its dealings with Post Office and WBD. It should be noted that these questions could include questions about what

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understand it, Post Office's failure to disclose this further set of KELs in the second tranche of KEL disclosure cannot be laid (or laid solely) at Fujitsu door. We understand that the number of KELs in this "later versions" set may be relatively small compared to the number of KELs in the "previous versions" set and, if this is so, the discovery of this set of undisclosed KELs on its own might not have been particularly significant. Further, it may well have been (or should have been) obvious to the Claimants that such further versions were likely to have been created but had not been disclosed. Nevertheless, the combination of two sets of undisclosed KELs, one at least of which consists of a large number of documents, is obviously unhelpful.

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steps Post Office has taken and/or will take to ensure that Fujitsu has provided and will provide all the documents that should have been disclosed prior to the Horizon trial. They may also include demands that steps be taken to ensure these things are done. We return to this point in paragraph 23 below.

11. The revelation of substantial numbers of undisclosed KELs may ultimately persuade the Judge not to finalise his judgment on the Horizon trial until all (1) the undisclosed KELs have been disclosed and reviewed by the parties and (2) the parties have then had an opportunity to put in further factual and/or expert evidence on the new material. So one possible outcome of the discovery that there are further KELs that should have been disclosed is that judgment will be delayed for a significant period, and another is that the trial will be resumed to address the new material and consider its implications on the evidence that has already been given, with the result that judgment will be delayed for an even more significant period. Hence our observation in paragraph 5 above that the timetable set out in paragraph 4 above may prove challenging.

12. Another adverse consequence that may follow the undisclosed KELs revelation is that Post Office may well be ordered to pay the Claimants' costs of doing any further work needs to be done as a result of the late disclosure of these KELs. Post Office may even be ordered to pay all the costs of the further evidence and the resumed trial referred to above, regardless of their impact on the final Horizon judgment.

13. These possible consequences illustrate the seriousness of what has happened. They are not the only possible consequences. For example, during the Horizon trial, various issues emerged regarding the adequacy of Post Office's disclosure. Although the Court stopped short of making criticisms of Post Office at the time, criticisms might well be made in the judgment, and adverse inferences drawn on the facts if the Court takes the view that, as a result of what has happened, there may well be missing documents and/or evidence showing a much higher incidence of problems in Horizon than were revealed during the trial (e.g. bugs, branch accounts including Horizon-generated errors, remote access to change branch accounts etc). The discovery of a substantial number of undisclosed KELs will be likely to increase the number and severity of the criticisms to be made and adverse inferences to be

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against Post Office in the Horizon judgment. This consequence could itself be very serious, but it almost pales into insignificance when compared with the consequences considered in the last two paragraphs. For present purposes, the important points to note is that it is not clear what the ultimate consequences of the undisclosed KEL revelation will be. Much depends on the position adopted by the Claimants in the next few weeks and the reaction of the Judge. Experience suggests that, in relation to these two variables, any sense of optimism would be misplaced.

14. Against this background, Post Office is considering whether to carry out some sort of audit of Fujitsu's disclosure. We are instructed to consider the merits and risks of doing so. As indicated in paragraph 1 above, there are different approaches and scopes of work currently being considered, the narrowest being that set out in paragraph 1(1) above and the widest being that set out in paragraphs 1(1) to 1(3) inclusive. We consider these below.

15. Before doing so, we briefly consider Post Office's disclosure obligations and the nature of the disclosure which has taken place to date. There is a long and complex history to the disclosure which has taken place in this case. Given the time pressures, we cannot set out that history in any detail.

Scope of Disclosure Ordered and Provided to Date

16. By paragraph 5 of the Second CMC Order dated 2 February 2018, the Court ordered that Model C disclosure and that the then draft "Disclosure Pilot" Practice Direction were to apply. Model C disclosure is a request-led form of disclosure: the idea was that the Claimants were to provide focused requests for documents or categories of documents and Post Office would undertake responsible and conscientious searches for such documents. By PD 51U 3.1, a party is under various Disclosure Obligations which include obligations:

> *(1) to take reasonable steps to preserve documents in its control that may be relevant to any issue in the proceedings; ...*
>
> *(4) to undertake any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search;*

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It should be noted the Court has specifically ordered – e.g. in the Second CMC Order dated 8 February 2018 – that the searches to be carried out by Post Office should be *"reasonable and proportionate"*. And as we explained in paragraph 9 above, Fujitsu's KELs (and, indeed its Peaks and other relevant documents) are under Post Office's control.

17. By PD 51U 3.2, a party's legal representative has its own obligations including a duty:

> *(2) to take reasonable steps to advise and assist the party to comply with its Disclosure Duties*

18. In addition, Post Office is under an obligation to disclose *"known adverse documents"*, which PD 51U 2.9 defines as:

> *documents (other than privileged documents) that a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both*
>
> *(a) are or were previously within its control and (b) are adverse.*

By PD 51U 2.7, a document is *"adverse"* if:

> *it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute.*

19. The history leading up to Post Office's disclosure the KELs that were then thought to be in existence in May 2018 is embarrassing because Post Office was misled about the nature and significance of KELs as we note in paragraph 9 above. However, until now Post Office has been able to maintain the position that the Claimants have suffered no prejudice as a result. In its Closing Submissions paras 1147-1149, Post Office was able to say:

> *1147 Post Office has never denied that KELs existed. There was debate in the early stages as to their relevance. However, as early as 22 September 2017 Post Office offered to allow Cs' expert to inspect the KEL database.*[5]
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> *1148 KELs were agreed to be disclosed once the Horizon Issues Trial was ordered, and were disclosed on 9 May 2018. Post Office was not initially*

[5] {H/13}.

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> *made aware by Fujitsu that some KELs had been deleted (meaning archived). Once that was discovered the additional KELs were disclosed on 17 January 2019.*[6]
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> *1149 In any event, Cs had the KELs in good time. Mr Coyne says in Coyne 1 that he examined 5,114 of them. There is therefore no legitimate complaint to be made here.*

20. Post Office was ordered to disclose the KELs by the Third CMC Order dated 22 February 2018. It was also ordered to disclose some other Fujitsu documents at various times, including various technical documents stored on Fujitsu's Dimensions systems and various ARQ data. Other categories of Fujitsu documents – including Peaks, OCRs, OCPs and MSCs – were never made the subject of any formal order with the result that, technically, the disclosure that Post Office gave of these categories of documents was voluntary. However, as the litigation proceeded it became clear that they were highly relevant to the Horizon issues, Post Office accepted that they needed to be disclosed and it agreed with the Claimants to disclose them. Had Post Office not agreed, the Claimants could have sought an order for their disclosure and, had they done so, the Court would have ordered their disclosure. In these circumstances, if it were discovered that a number of documents within the agreed categories had been omitted from Post Office's disclosure, we do not think that it would avail Post Office to argue that, formally speaking, it had not breached any disclosure order. Our view is that, one way or another, the Court would regard such an omission as a serious breach of Post Office's responsibilities as a litigant. It is also our view that, if in the next few days or weeks Post Office were to discover and disclose a significant number of one or more of the agreed categories of documents, similar consequences to those described in paragraphs 11-13 above could follow.

Possible Audit

21. It appears to us that the primary criticism for the events described above[7] should be directed at Fujitsu rather than Post Office or its advisers. As we understand it, such documents as Fujitsu have made available to WBD have been disclosed (subject to checks for privilege)

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[6] {H/169/8}.

[7] Other than those described in footnote 4 above, as explained in that footnote.

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and neither Post Office nor WBD has been in a position to second guess what Fujitsu has said can be produced or has in fact produced. However, since Fujitsu is not a party to this litigation and the relevant documents are in Post Office's control, any criticism that is made by the Court will in fact be made of Post Office, and any adverse inferences drawn will affect Post Office.

22. If it is not settled, this litigation is likely to last several more years. While the litigation continues, Post Office's disclosure obligations under existing and future orders will continue to apply. These will almost certainly include obligations to disclose KELs, Peaks and other Fujitsu documents that have not already been disclosed. For this reason alone, it would be natural for Post Office to want to ensure that there are no more revelations of this sort coming from Fujitsu. As the summary of events and further examples given in paragraphs 6 to 15 above shows, Fujitsu is capable of giving clear information or assurances about available documents at one time, only casually to contradict itself later.

23. One way of ensuring no more revelations would be to arrange for an audit to be done by an independent expert (i.e. Deloitte) of Fujitsu's relevant documents, of the accuracy and adequacy of the information it has purported to provide about them, and of its actions in identifying and disclosing them. The Claimants may themselves call for such an audit to take place – Freeths' letter of 11 October 2019 can be read as laying the foundation for this – and it might be difficult to resist such a call. And although this would be unusual, in the light of all the extraordinary things that have happened, the Court could make an order requiring something similar.

24. One advantage of commissioning an audit would be that – if Post Office is open about what it is doing – it could portray itself as doing 'the right thing', as opposed to reluctantly reacting to pressure exerted by the Claimants or the Court. And if Deloitte were to give Fujitsu a clean bill of health, that would be a major additional advantage. In this scenario, Post Office would obviously have every incentive to commission an audit and to be open and clear about the audit report.

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25. However, this is obviously not the only possible scenario. For the purposes of this Note, we assume that Deloitte could provide:

    (1) a report containing criticisms of the completeness/accuracy of the documents and information provided by Fujitsu (ranging from a few mild criticisms at one extreme to a large number of serious criticisms at the other);
    (2) one or more documents which Fujitsu should have produced for the Horizon trial but which the parties and the Court have not yet seen (ranging from a few documents in one category of documents disclosed to large numbers of documents in all categories); and
    (3) new information contradicting in new ways statements that Fujitsu has previously made to Fujitsu about its documents, about the nature and adequacy of its disclosures and even about its operating capabilities and practices (the range of which is almost infinite).

26. These possible scenarios would raise a large number of issues. We propose to deal with the principal issues that we have identified in the course of addressing the two questions on which we have been asked to state our views, namely:

    (1) Would such an audit be privileged?
    (2) What might the consequence be of carrying out an audit?

Would Such an Audit be Privileged?

27. At the outset, it should be noted that we strongly suspect that the question whether Deloitte's instructions and its report are privileged is of little practical importance. If the report gives Fujitsu a clean bill of health, Post Office will not want to assert privilege. If it does not, the Post Office will probably be required to give yet more late disclosure of further categories of documents and/or to correct yet more false information from Fujitsu that it has passed on to the Claimants and the Court. These actions will inevitably provoke some hard questions which Post Office would not be able to answer without referring to Deloitte's audit (the most obvious questions being: why is this being disclosed now and why wasn't it disclosed long ago?). In these circumstances, we find it hard to see how Post Office could prevent the Court

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from drawing some very serious adverse inferences against it unless it reveals that an audit has just been done.

28. There are two types of legal professional privilege: (i) legal advice privilege and (ii) litigation privilege.

29. Legal advice privilege covers confidential communications between a party and their lawyer written to or by the lawyer for the purpose of getting legal advice. Such privilege attaches whether or not litigation is in contemplation. However, such privilege only applies to communications between a lawyer and their client. It would not apply to a communication between, say, WBD and a third party auditor: and that is the case even if the purpose of WBD's communication is to provide legal advice to Post Office.[8]

30. Litigation privilege applies to communications between a client or their lawyer and third parties which come into existence once litigation is reasonably contemplated or has commenced, and which come into existence for the dominant purpose of obtaining information or advice in connection with such litigation: the principle was restated and confirmed by the House of Lords in Three Rivers DC v Bank of England (No 6) 1 AC 610 per Lord Carswell @ para 102.

31. The dominant purpose of a document does not necessarily fall to be ascertained by reference to the intention of its actual author: the person under whose direction a document is produced will often be the author's employer, for example (see Guinness Peat Properties v Fitzroy Robinson Partnership [1987] 1 WLR 1027). Here, it is Post Office's purpose(s) which will be relevant.

32. Some illustrations of possible purposes of an audit and what different dominant purposes might be helpful:

    (1) At one extreme, if Deloitte were instructed to carry out an audit to ascertain whether Fujitsu had properly carried out the searches which it said it had, and these instructions

[8] See Thanki, The Law Of Privilege 3rd ed para 2.03 for a summary of the position

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were given solely in order to confirm for the purposes of the litigation that Post Office's disclosure obligations had been fulfilled, then the instructions and resultant audit report would be privileged.

(2) Similarly, if the same audit were to be carried out for the purpose stated above and for the purpose of, assisting with the decision of whether to begin legal proceedings against Fujitsu, both purposes would qualify for privilege and so the instructions and report would still be privileged.

(3) By contrast, if the audit was commissioned for a business purpose (i.e. ascertaining in general terms how Fujitsu provides information to Post Office and how reliable that information is), then the dominant purpose would be assisting Office's business and no privilege would attach – even if a by-product of the audit was to establish that some documents had not been disclosed which should have been.

(4) If the purpose of the audit were both to assist with Post Office's business and to assist with actual or contemplated litigation, then it would be a matter for analysis and quite possibly debate as to what the dominant purpose was. What is the dominant purpose is a question of fact. It is not sufficient if the relevant litigation purpose is merely a secondary, or even an equal, purpose: see Waugh v British Railways Board [1980] AC 521 per Lord Wilberforce @ para 532:

> *On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation.*

Note that, where there is an issue as to the dominant purpose of a report, the author of the report cannot guarantee the answer just by putting some form of words into the report: the dominant purpose will be ascertained by all the surrounding circumstances (see e.g. Alfred Crompton Amusement Machines Ltd v Customs and Excise (No 2) [1974] AC 405, 435-6 per Lord Kilbrandon).

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33. There are many authorities recording how dominant purpose is established. However, each case turns on its fact. The following observations taken from Thanki on Privilege, 3rd ed @ para 3.92, provide a helpful summary of the overall approach:

> *A claim for privilege is unusual in the sense that the legal advisers are generally the judges in their own client's cause, and hence the court will be particularly careful to consider how the claim is made out. The mere fact that a communication or document expressly contains within it a statement that it is for the purpose of submission to lawyers to enable them to advise or defend litigation which is anticipated to ensue is not determinative. Similarly, the mere claim in evidence before the court that a document was made for a particular purpose will not be decisive. Courts will examine 'purpose' from an objective standpoint, looking at all the relevant evidence, including evidence of the relevant person's subjective purpose. Evidence from that person must be specific enough to show something of the deponent's analysis of the purpose for which the documents were created, and should refer to such contemporary material as it is possible to do so without disclosing the allegedly privileged material. Mere conclusory statements are unlikely to be sufficient.*

34. Where there are mixed purposes there is often scope for divergent views. If a significant part of Post Office's purposes in commissioning an audit is the proper and efficient conduct of its business, potentially awkward factual questions could be raised regarding the relative significance of that purpose. But if (1) it is an insignificant part, or if the sole purpose or purposes was or were litigation purposes, and (2) if the only questions Deloitte are asked to address are litigation questions (i.e. specific questions about the categories of documents and information of the sort discussed above, as opposed to more general questions about documents and information which Fujitsu provides to Post Office in the usual course of their businesses), then Deloitte's instructions and report would be privileged.

35. However, for the reasons we touch on in paragraph 27 above and describe in more detail below, we suspect that, if privilege attaches to Deloitte's audit, both the fact and scope of the audit and its outcome will become known to the Claimants. Indeed, it is possible that Post Office could expose itself to what it might regard as an unacceptable risk if it did not make these things known to the Claimants when commissioning the audit (see paragraph 43 below). We think that, pragmatically, Post Office should work on the assumption that both the fact and outcome of any audit is likely to become known to the Claimants.

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What are the Consequences of Carrying Out an Audit?

36. As we have already said, we cannot predict the outcome of Deloitte's audit or identify the associated risks and assign probabilities to those risks. There are too many variables in play, including the actions of third parties. For example, we cannot safely predict what the Claimants will say or do as the debate about the undisclosed KELs develops, and nor can we safely predict what the Court will either be invited or decide to do. As we have already noted, that debate may result in demands – or even an order – for an audit of FJ's documents which could render much of this Note otiose. What we can do is do is to cover what seems to us to be the range of possible outcomes and explain our views as to the possible consequences of those outcomes.

37. Before doing this, we should repeat that we do not think it would matter whether the audit is limited to documents that have been the subject of a Court order or whether it would include documents that have been disclosed voluntarily. If, for example, an audit uncovered further Peaks, these would have to be disclosed notwithstanding the fact that this category of documents has not been the subject of a formal order. It follows that we do not consider there is likely to be any difference between arranging for an audit for categories of documents which were disclosed pursuant to a disclosure order and a wider audit which also looks at categories which were disclosed by agreement – although, obviously, the wider the scope of the audit, the more likely it is that a greater volume of undisclosed documents may come to light.

A Clean Audit

38. We turn now to the range of possible outcomes. At one extreme, the audit may conclude that Fujitsu have now provided all the material they were supposed to provide, that no further disclosure needs to be made and that no further information they have provided in the past requires correction. If the audit is privileged there should be no need to disclose either the fact of the audit nor any additional documents. Needless to say, in that situation Post Office would probably be keen to tell the Claimants and the Court about the audit and its conclusions, thereby waiving any privilege it might otherwise have had.

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A Bad Audit

39. At the other extreme, the audit may reveal that a large amount of further, damaging, disclosure needs to be made – either because adverse documents are uncovered (which would then be known adverse documents) or because further examples of categories of disclosed documents are uncovered (i.e. KELs, Peaks, OCRs, OCPs, MSCs, TFS entries, audit reports, Dimensions documents and ARQ data) or because Post Office has previously given the Claimants and/or the Court false information which needs to be corrected.

40. In this scenario it is easy to see how both the fact and scope of the audit would end up being disclosed, hence our view that pragmatically Post Office should assume that any audit will become known about in due course. If further disclosure is given, the Claimants (and the Court) are bound to demand an explanation. In that discussion, the fact of the audit is bound to come out and it will be a few short steps to having to provide a full explanation as to the audit's scope and results. Moreover, if only a narrow audit is carried out (e.g. just regarding the KELs) Post Office may find it difficult to justify its decision not to audit all the other categories of documents as well. A wider audit could be inevitable.

41. As we have already noted, we do not yet know what the Claimants intend to do about the revelation recently made about undisclosed KELs. Still less can we know how any additional disclosure thrown up by an audit would be treated. In each case, however, it is feasible that the Claimants would seek permission to do some or all of: make further written submissions; prepare and call further expert evidence at a further hearing; prepare and call further lay evidence at a further hearing; and/or seek to cross-examine Post Office's witnesses again at a further hearing. If the Claimants seek to do any of these things, they will seek to do them at Post Office's expense (the Claimants have already asked Post Office to pay the costs they are incurring as a result of the late disclosure). Putting it at its lowest, our view is that the Claimants would have good prospects of obtaining an order from the Court requiring Post Office to pay the costs of these exercises.

42. Regarding our reference to the possibility of a further hearing, timing is important here. If the Claimants decide that they want a further hearing, and apply for such a hearing before

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the Horizon judgment is handed down, the Judge may well delay his judgment to allow the further hearing to take place (which may well not happen for several months). But if the Claimants are unable to make this decision until after judgment is handed down, and if there are things in the judgment they do not like, they could seek to appeal the judgment on the basis of late evidence becoming available. This appeal could well be upheld, with an order for the costs of the first trial and of the appeal in the Claimants' favour. In that scenario, a retrial could be ordered which would be much more costly and (not least because of the intervening appeal) involve much more delay than a further hearing.

43. These considerations underline the desirability of delaying the Horizon judgment until after all further documents that need to be disclosed have been disclosed. But they also underline the risk that Post Office would be taking if it commissions an audit and keeps the fact of its having done so secret until it knows the outcome of the audit. If it does not reveal that an audit is being done, it would have no basis for delaying the Horizon judgment until it knows the outcome. Assuming that the audit identifies that significant further material needs to be disclosed which is relevant to the Horizon issues, and assuming that judgment has been handed down in the meantime, the consequences outlined in paragraph 42 could follow. Post Office may think that the risk of these consequences is not worth taking.

An Intermediate Audit

44. A further scenario, which lies between the two extremes described above, is that the audit uncovers only a small number of documents to be disclosed and perhaps none that are particularly damaging, i.e. documents that, had they been disclosed when they should have been, are unlikely ever to have been referred to during the Horizon trial.

45. This result might seem innocuous, but it should not be assumed that none of the consequences outlined above in relation to the previous scenario would follow. Again, further disclosure would have to be given and again, the Claimants are likely to demand an explanation as to how the additional disclosure came to be made. Again, it is likely that the fact, scope and findings of any audit would, one way or another, come into the open.

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46. Moreover, we think it unlikely that the Claimants would accept unquestioningly that Post Office's audit had gone far enough. Post Office is currently considering various types of audit: the starting point is an audit which only considers the KELs issue and the events leading to the EDQ. But if Post Office confines itself just to those documents, the Claimants would be likely to question the basis on which it can be confident that the disclosure of other categories of documents (Peaks, OCPs etc) was properly carried out – after all, they will say, the discovery of the KEL deficiencies was entirely fortuitous and there is no reason to think that Fujitsu's approach to KELs was deficient but its approach to the other categories of disclosed documents was impeccable. Thus, however narrow the audit commissioned by Post Office, the Claimants may demand that wider audits are carried out of all categories of disclosed documents. Further and in any event, they may even demand a further audit to be carried out by a different auditor with no previous connection with Post Office. And they may apply to Court for orders to this effect.

47. Accordingly, even though the audit itself may not throw up anything of particular concern, or if the audit originally done is narrow in scope, it is possible that Post Office may nevertheless find itself in a situation where the audit prompts the sort of consequences that might be thought to be more likely to follow an audit which caused extensive and damaging further disclosure to be given.

48. Quite apart from these matters, there is a real risk that an audit would risk throwing the current timetable for mediation off track. As things currently stand, the ball is in the Claimants' court on this. It is already open to them to seek to call a halt to progress (including asking the Judge not to issue his judgment) until the full picture in relation to the missing KELs is revealed. For example, they could seek costs protection and then seek permission to review the KELs, file further evidence and submissions etc. Equally, the Claimants may take the view that they are happy to proceed to mediation with the threat that they may take such steps in the future.

49. There is a further possible important consequence. As set out above, under the CPR, Post Office's obligation is to carry out *"reasonable and proportionate"* searches in a *"responsible and conscientious manner"*. Until now, Post Office has relied on the expertise

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and conscientiousness of Fujitsu in searching for its own documents. However, Deloitte may conclude that Fujitsu's approach to the disclosures it has been asked to give is deficient, and Deloitte could do so in terms that makes it apparent that during this litigation Fujitsu has not searched for documents properly. In these circumstances, Post Office could not, or could no longer, properly say that the searches carried out on its behalf were responsible and conscientious.

50. It would be an enormous task to ascertain to whether in all the circumstances and in particular in light of recent revelations, the obligation to carry out searches responsibly and conscientiously has in fact been properly discharged. We are not in a position to take a view on that at this stage. What we can say, however, is that Deloitte's report could suggest that, at least arguably, Post Office needs to procure that all of Fujitsu's previous searches for documents are carried out again in a more rigorous manner, possibly under an independent expert's supervision. If substantial further documents are uncovered as a result, all the consequences outlined above could apply.

51. Even if Fujitsu's searches do not need to be carried out again, if the Claimants know (as we think likely) that Post Office has commissioned an audit of Fujitsu's disclosures, that may well be taken as acceptance or at least evidence that, in relation to Fujitsu's documents, Post Office's disclosure obligations now require it to ensure that all future document searches are audited.

52. Assuming that Deloitte is appointed to carry out any audit, just as we think that the fact and scope of any audit is likely to become known to the Claimants, we also think that is likely to become known that Deloitte is the auditor – who is of course what the Claimants have described as the unidentified *"shadow experts"* whom Post Office has instructed in connection with these proceedings. We cannot tell how such revelations might emerge nor what might be made of them, but Post Office should be alive to this possibility.

Conclusion

53. As explained above, although there are possible benefits to be gained from commissioning the proposed audit, the risks of doing so are very serious. Moreover, we doubt that Post

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Office will be able to keep the fact, scope or outcome of any audit secret from the Claimants. It may be able to keep these things secret until the audit report is produced, but keeping it secret until then would create some serious risks of its own.

Anthony de Garr Robinson QC

Simon Henderson

17 October 2019