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Department for
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OFFICIAL SENSITIVE AND SUBJECT TO LEGAL PRIVILEGE
POST OFFICE LITIGATION: DEVELOPMENTS SINCE SUBMISSION OF RECUSAL APPLICATION ON 21 MARCH

Summary

1. This note summarises developments since 21 March when Post Office Ltd (POL) applied for the trial judge to recuse himself from the rest of the litigation on the grounds of 'apparent bias'. The judge dismissed the application on 9 April and refused permission to appeal, but POL will now seek the Court of Appeal's permission directly. In parallel, POL is preparing an appeal of the Common Issues Judgement. The adjourned "Horizon Issues" trial resumed briefly on 11 April to allow POL's final witness to complete his evidence, with the next phase due to start on 4 June to hear the IT Expert Witnesses for both parties. However, should POL get permission to appeal the recusal, the Court of Appeal may stay the Horizon Trial.

Timing

2. On 11 April POL applied to the Court of Appeal for permission to appeal the recusal decision. The Horizon Issues trial also resumed briefly on 11 April and will continue substantively on 4 June.

Recommendation

3. To note the contents of this advice and indicate if you wish POL to give you an oral briefing to supplement this, as well as to outline its appeal strategy once the Board has decided.

Decision on Post Office's application for the judge to recuse himself

4. On 9 April, Justice Fraser handed down his judgment on the recusal application, and as POL anticipated, rejected POL's application for him to recuse himself on the grounds of 'apparent bias'. He refused POL's application for permission to appeal. In response, POL applied on 11 April directly to the Court of Appeal for permission to appeal the judge's decision and for the second "Horizon Issues" Trial to be stayed in the meantime.
5. In coming to his decision, Justice Fraser's primary finding was that there had been no bias. Broadly speaking he considered that the fair-minded and informed observer would consider all the relevant facts in deciding whether there was bias or the appearance of bias. The judge considered that in its application POL overlooked a significant number of material facts and instead concentrated on isolated passages of the judgment which they took out of context. The judge also considered that POL had unreasonably delayed making



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the recusal application, particularly given the start of the Horizon trial, and so had effectively waived their right to complain about bias. He thought POL should have sought an adjournment of the Horizon trial to allow time to make their application.

Common Issues appeal

6. At the recusal hearing on 3 April, POL announced its intention to submit an appeal against the Common Issues Judgement. The latest date for the Managing Judge to hear consequential orders arising out of the Common Issues judgment including leave to appeal is 16 May. However, since this date does not work for the Claimants' Counsel, it may be brought forward. POL will hold a meeting of its litigation sub-committee w/c 23 April with its QCs and other external legal advisors to discuss the proposed grounds of appeal in the Common Issues trial. You will receive written briefing, and in addition POL can brief you orally, before the appeal is lodged.

Resumption of adjourned second ("Horizon Issues") trial

7. On 21 March, the Horizon Issues trial was adjourned on receipt of POL's recusal application. The trial had already heard the claimant's witnesses and was in the process of hearing POL's final witness at the time of adjournment. Therefore, on taking his decision to reject the recusal application, the judge made an additional, consequential order that the Horizon Issues trial should resume briefly on 11 April to hear the remainder of evidence from POL's final witness. The judge has also set out the calendar for the remainder of the Horizon Trial, commencing on 4 June. However, this is subject to change because when POL filed its application to the Court of Appeal on 11 April it also requested to stay the Horizon Issues Trial pending this decision. All updates on the Horizon Issues Trial supplied by POL, including a summary of yesterday's final witness hearing, are at Annex A below.

Legal team

8. POL has decided to boost the legal team and has provisionally appointed Herbert Smith Freehills to oversee the litigation with a direct mandate from the Board rather than reporting through the Company Legal Counsel. Their mandate will be to revisit the approach to the litigation (both substance and tone), which in the short-term means looking at the appeal relating to the Common Issues trial, the currently adjourned Horizon Issues trial, and the strategy for reaching resolution. Therefore, the legal team will now comprise Herbert Smith Freehills, Womble Bond Dickinson (the long-standing firm of solicitors) and the various QCs that have been retained. POL is open to making other changes depending on the advice received from the new firm. Given the unexpected outcome of the Common Issues trial we have been pressing POL to ensure that their litigation strategy is considered with a fresh set of eyes, so this is a good outcome and we expect it to have a significant bearing on the way the litigation is conducted.

Next steps

9. POL have produced the following table to summarise the next steps. The Horizon Issues Trial dates are subject to the outcome of POL's application to stay this trial:



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w/c 23 April	Post Office Board litigation sub-committee to discuss application for leave to appeal the Common Issues judgment
tbc	Briefing meeting with Minister Tolhurst on appeal strategy - if required
16 May	(Subject to outcome of recusal application) Latest date for Managing Judge to hear consequential orders arising out of Common Issues judgment including leave to appeal
23 May	Hearing to decide the costs of the Common Issues Trial
4-7 June	Horizon Issues Trial resumes with cross-examination of IT expert witness for claimants
11-13 June	Cross-examination of IT expert witness for Post Office
27 June	Written closing submissions
1-2 July	Oral closing submissions

Contributors

10. UKGI Legal (Richard Watson) have been consulted and agreed the content of this advice.
11. BEIS Policy Team have been consulted and agreed the content of this advice.
12. We consider there are no additional communications, financial and parliamentary handling considerations to those covered in previous updates.

Annexes

- A. POL's summary of second ('Horizon Issues') trial



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Annex A: POL updates on second 'Horizon Issues' Trial

These updates are provided by Post Office Limited legal team, and do not represent the views of UKGI and BEIS

Update 1: 18 March 2019

Last week the Horizon Issues trial concerned the Claimants' witnesses of fact, when Post Office's counsel team cross-examined seven witnesses:

- The majority of the cross-examination was spent on Mr Richard Roll, who alleged Fujitsu routinely accessed and changed branch data when he was a Fujitsu employee between 2001 and 2004.
- In his cross-examination, Mr Roll gave evidence that:
 - o He could not recall much about his time at Fujitsu given how long it had been since he had worked there or in the IT industry;
 - o A very small proportion of the matters that he would have dealt with while at Fujitsu would have concerned software bugs, an even smaller proportion would have been bugs affecting branch accounts, and he would not have dealt with them in any event given his relatively junior position;
 - o Fujitsu nevertheless would have taken very seriously and resolved any issue with the Horizon software; and
 - o Any "remote access" of branch data would have been infrequent, strictly controlled, unlikely to have involved transaction data, and even less likely to have altered that data (to an "infinitesimally small" chance).
- Five former postmasters or assistants also gave evidence about branch losses which they blamed on Horizon. In each case, credible explanations for the losses were put to the witnesses based on Horizon transaction records and support system logs.
- The final witness for the Claimants was Mr Ian Henderson from Second Sight Support Services Ltd, the forensic accountants who reviewed postmaster cases through the Complaint Review and Mediation Scheme in 2013-2015. Given Mr Henderson was not giving expert evidence (which will be provided for the Claimants later in the trial by Mr Jason Coyne), his evidence was limited to the terms of his engagement by Post Office, including that the engagement only concluded once Second Sight had completed reviews of all cases submitted to the Scheme.

Overall, the cross-examination should have supported Post Office's case that Horizon was and is reliable and unlikely to have had any lasting effect on branch accounts. However, the challenges to Post Office's case overall include that:

- Post Office was able to explain the losses because of the resources available to it, supporting the view that Post Office is better placed than postmasters to explain how and why branch losses occurred;
- In providing explanations for the losses, Post Office may be seen to have laid improperly blame on the witnesses/postmasters;
- Much will now turn on how the judge views the evidence given by Post Office's witnesses, including those from Fujitsu, given that that evidence laid the foundation for many of the concession made by the Claimants.

Post Office's witnesses of fact will give their evidence this week. That will mostly involve them being cross-examined by the Claimants' counsel team, who will seek to show that Horizon's reliability is overstated.



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Update 2: 20 March 2019

On Monday and Tuesday, the Claimants' counsel team cross-examined Angela van den Bogerd, Dawn Phillips, Tracy Mather and Paul Smith from Post Office, with Angela's cross-examination by the Claimants' QC Patrick Green occupying just over a day and a half of the two days.

The cross-examination was aimed at, and was largely successful at demonstrating:

- a variety of incidents with Horizon, both in its software and the transaction records it generates, which:
 - o impact branch accounts;
 - o paint a picture of a system susceptible to failures, even if they are isolated and ultimately resolved; and
 - o are consistent with the errors experienced by the Claimants.
- Post Office's reliance on Horizon is overstated and blinkered, leading to an improper presumption of postmaster fault and liability for branch losses.
- Post Office has access to far better information from Horizon about branch accounting issues, which it is better placed to use but does not share with, or actively withholds from, postmasters.
- Post Office has overstated the improvements made to Horizon over the years, which it has been slow to roll out and implemented purely to save costs.

Through the cross-examination, the Judge has challenged on a number of occasions the content of the Post Office witnesses' statements (e.g. where the witness has provided information collated with the assistance of other Post Office personnel, or has corrected or clarified the evidence). He has also taken issue with Post Office's document disclosure, in particular where redactions have been made. When considered in the context of the Common Issues Judgment, these challenges suggest he could be equally critical of Post Office's evidence when giving judgment on the Horizon Issues.

The Claimants will today cross-examine the final Post Office employee, Dave Johnson, before starting their cross-examination of the four witnesses Post Office has called from Fujitsu. The Claimants are required to complete their cross-examination by the end of Thursday.

Update 3: 12 April 2019

The Court heard evidence from Steve Parker of Fujitsu. Mr Parker is the head of the Horizon support team at Fujitsu. In layman's terms, it is his team that is on the front line looking for bugs in Horizon. Mr Parker was cross-examined on 3 main topics:

- The Claimants' main witness was an ex-Fujitsu employee, Mr Roll, who had made claims that Horizon had many problems. Mr Parker's witness statements gave evidence that Mr Roll was not sufficiently senior to know this and that Mr Roll's work was largely unrelated to fixing software problems in Horizon. This evidence had been effectively deployed when Post Office cross-examined Mr Roll, to the extent that Mr Roll made a number of concessions. The Claimants attacked this evidence from Mr Parker in order to re-build the credibility of Mr Roll. They did this through trying to show that Mr Parker's views were based on historic documents and that those documents inaccurately portrayed the work undertaken by Mr Roll. They were partly successful in this approach but Mr Parker was able to explain that the documents were reinforced by his own personal knowledge of Mr Roll from the time they had worked together, and so he stood by his evidence.



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- In his statements, Mr Parker also gave evidence of a review carried out by his team into the number of times that remote access was used in legacy Horizon. After his evidence was served, a member of Mr Parker's team did some further analysis and this was provided to the Claimants in a letter from WBD. The Claimants mounted an attack on Mr Parker claiming that this was late evidence and that by providing the information by letter, Mr Parker was somehow covering up this further work. It was quite odd for the Claimants to try to show that something was covered up, even though it was clearly disclosed in a letter to the Claimants. The legal team's view was that this was not effective. Nevertheless, the Judge showed interest in it by asking follow-up questions.
- Mr Parker was asked about his team's review of 80+ Known Error Logs that are relied on by Mr Coyne. The question was put that Fujitsu's analysis was strikingly similar to Dr Worden's analysis (which it is). We expect that this was groundwork for an attack on Dr Worden. As a general rule each side's expert should have parity of access to information. We have therefore sought to minimise any direct interaction between Fujitsu and Dr Worden so that he does not have an unfair advantage. The Claimants may say that the similarity in the KEL analysis shows that the two must have been interacting. In fact, the interaction was only one way, from Dr Worden to Fujitsu, which is fair and permitted. Dr Worden is aware of this possible line of attack and is preparing for it.

In general, Mr Parker performed well. He was measured in his answers and resisted being drawn on points not within his knowledge. The overall outcome was about even between the parties, favouring Post Office on some issues.