

# Group Litigation

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## Executive Summary

### Context

The decision in the Common Issues Trial was formally handed down on Friday 15 March 2019. As the Board has previously been advised, Mr Justice Fraser has found against Post Office on the majority of issues. Post Office is considering appealing this decision, and in addition the Board is being asked to consider whether Post Office should make an urgent application for the Mr Justice Fraser to recuse himself on the grounds of potential bias.

### Questions this paper addresses

- Should we appeal the Common Issues Judgment?
- Why would we consider an application for the Judge to recuse himself?
- What are the risks & benefits of such a proposal?
- Should we consider changing our legal advisers?

### Conclusion

1. Work is underway to prepare for an Appeal, however my initial recommendation – supported by the views from David Cavendar QC and Lord Neuberger QC, is that we should appeal the Common Issues judgment. The grounds for appeal will include whether the Judge has correctly applied the law in relation to contractual interpretation; and whether in his conduct of the trial there has been a "procedural unfairness".
2. In addition the Counsel team recommend that we bring an application for Mr Justice Fraser to recuse himself on the grounds of bias given the material risks to the outcomes of the Horizon, third, and fourth trials.
3. Such an application is not without significant legal and reputational risk. However on balance, my view is that the risks of not making the recusal application (particularly the risks in relation to the successful prosecution of the Horizon and subsequent trials) seem to outweigh the risk of the application itself, although the Board may weigh the reputational issues differently.

4. I recommend that any recusal application should be undertaken by Lord Grabiner QC; that the Appeal should be undertaken by David Cavender QC supported as to advice and strategy by Lord Neuberger QC; that we retain David Cavender QC and Antony de Garr Robinson QC in relation to the third and fourth trials; and that we retain Womble Bond Dickinson as instructing solicitors given the very real risks of changing firms midway through a very tight trial timetable.

### Input Sought

The Board is asked to consider and approve the proposed Recusal application, and endorse the proposals in relation to the appointment of Counsel and instructing solicitors for each of the subsequent stages of the litigation.

# The Proposal

## Background

5. Post Office welcomed the making of the Group Litigation Order in 2016 as providing an opportunity for the allegations made around Horizon to be considered and resolved through a Court process. As has been stated frequently, the case represents the culmination of a series of campaigns by disaffected postmasters and others (including a number of MPs on both sides) who believe that Post Office wrongly attributed branch losses to those postmasters and that as a result, they suffered financial and reputational harm. A theme of these campaigns was that flaws in Horizon (the in-branch point-of-sale IT system) were the cause of these losses.
6. This is also stated in the recent Common Issues Judgment:

“the Claimants’ case is that the Horizon system contained, or must have contained, a large number of software coding errors, bugs and defects, and as a result of this threw up apparent shortfalls and discrepancies in the accounting of different branches. Alleged shortfalls in the Claimants’ financial accounting with the Post Office are said, on the Claimants’ case, to have been caused by these problems with the way the Horizon system operated, the training that was provided to use it, and also a general failure of the Horizon helpline.” (paragraph 7)
7. Post Office position is now, and has always been:
  - there is no evidence that suggests that there are systemic problems with Horizon nor have we seen any evidence to suggest a technical fault in Horizon resulted in a postmaster wrongly being held responsible for a loss;
  - we accept that in individual cases, Post Office may not have met its own standards as to the training it provided, the service or information provided through the Helpline, or how it otherwise engaged with individual postmasters.
8. The Group Litigation was structured to address these questions through a series of trials:
  - The Common Issues Trial (held in November) which was to address questions of contractual construction in relation to the contracts between Post Office and postmasters;
  - The Horizon trial (currently underway) which was to test whether Horizon was indeed robust;
  - The third trial (November 2019) which has now been agreed will address questions of limitation and calculation of damages, and
  - A fourth trial (likely to be in April 2020) which will examine issues of breach, causation and loss.
9. As the Board is aware, the judgment in the Common Issues trial has now been handed down, and the Judge is very critical of Post Office – both as to our historic



operations and behaviours, and our conduct of the case. He has also been very critical of Post Office witnesses who he characterises as 'extraordinarily partisan'.

### Should we Appeal?

10. Post Office's legal team (including myself) recommend that Post Office seriously consider appealing the judgment. Work is underway to assess the options, and a more considered view will be discussed at the Board meeting on Monday 25 March. However the most likely grounds are:
  - Whether the Judge has correctly applied the law in relation to contractual interpretation when considering the meaning of the Postmaster contracts; and
  - Whether in his conduct of the trial there has been a "procedural unfairness". The Common Issues Trial was meant to be about contractual interpretation. In law, what occurs after a contract is formed cannot be relevant to an enquiry as to what the contract means. Yet Mr Justice Fraser makes wide findings of fact on post-contractual matters which then influence his findings as to the meaning and effect of the contract.

### Why would we consider an application for the Judge to recuse himself?

11. Additionally, the language used in the Judgment and the findings as to fact and as to the credibility of witnesses, suggest that the Judge may be biased against Post Office. The legal team have therefore recommended that Post Office consider whether an application should be made for the Judge to recuse himself on the grounds of bias.
12. We have sought preliminary advice from Lord Neuberger QC on the question of appeal and recusal: his opinion is attached. Additionally, as Lord Neuberger (being a former Supreme Court Judge) cannot appear before the Court, we have taken the precautionary step of instructing Lord Grabiner QC who would argue any recusal application. Womble Bond Dickinson ('WBD') have prepared a note of advice (also attached) which has been reviewed by David Cavendar QC and, at the time of writing, is under review by Lord Grabiner. As will be seen from that note, the legal team recommend making the application for recusal, and I support that recommendation.

### What are the risks & benefits of such a proposal?

#### **Benefits**

13. As set out in the WBD note, the reason for taking such a material step is to ensure that Post Office receives a fair trial – particularly as regards the Horizon trial which is underway and where we have some of the same witnesses giving evidence as for the Common Issues trial.
14. While a successful appeal would go some way to mitigating the legal impacts of the Common Issues trial, the timing of the appeal is such that the Horizon trial will have been finished, and arguably the Third Trial (on limitation and damages) could also proceed under the oversight of Mr Justice Fraser ahead of the appeal. If we believe that the Judge is biased against Post Office, then potentially the outcome of both of these trials is at risk if we do not seek to have him recused.



15. As pointed out in Lord Neuberger's opinion, there are also risks of not proceeding with the recusal application to the extent that perceived bias underpins the arguments for procedural and actual unfairness in the conduct of the case.
16. The risks of an adverse outcome on the Horizon trial are significant as they would undermine the confidence of not only postmasters, but also upstream government and other clients such as Banking Framework participants and bill pay clients. While this is a risk of the Horizon trial in any event, the approach of the Judge to Post Office witnesses and his apparent view that Post Office conceals information about Horizon operational issues, increases that risk considerably.

### **Risks**

17. There are both legal and reputational risks of proceeding with the application for recusal. The legal risks (an unsuccessful application, which would further antagonise the Judge, and material costs) are described in the WBD paper.
18. However there are significant reputational and stakeholder risks and these need to be set against the legal benefits. Challenging a judge for bias – particularly in these circumstances, will be seen as very aggressive behaviour by Post Office and will play directly into the criticism that Post Office is oppressive in its behaviour towards postmasters and in its conduct of the case, and will be construed as running counter to the recent messaging following the judgment that 'we are listening'. It could potentially have much greater media coverage than the judgment; will be heavily criticised by the CWU and vocal postmaster bodies, and will drive further parliamentary activity from MPs of both parties.

### **Who will Represent Post Office in the ongoing legal actions?**

19. As flagged above, we have instructed Lord Neuberger to provide us with preliminary advice in relation to the appeal and recusal options, and have retained Lord Grabiner who would conduct any application for recusal. This was to avoid any impression that the application was being driven by a disgruntled advocate.
20. There are different options available in relation to an appeal:
  - The normal practice on an appeal is for the same counsel (in this case David Cavendar QC) to undertake the appeal as he prepared and presented the case at first instance, conducted the trial whose judgment is being appealed, and is most familiar with the evidence presented, the process followed, and the legal arguments put forward which together underpin the appeal rationale.
  - In our situation, we propose that this be supplemented by Lord Neuberger QC who will be able to provide a unique insight into the thinking of the Court of Appeal in relation to the developing trends for contractual interpretation.
  - An alternative option is to instruct completely new counsel, however this has the disadvantage of them not being familiar with the case or its background (eg in our case there were a number of decisions made in case management hearings that will be material) or the issues that occurred at trial.
21. Consideration should also be given to representation at the third and fourth trial. Preparation for the third trial is underway and this will focus on limitation of losses and basis of damages. Depending on the decision on representation for the Appeal, and the timing of an Appeal:

- Trial 3 and 4 could be led by either David Cavendar or Antony de Garr Robinson (and the other would then be appointed for Trial 4 in March 2020). This is our preferred option as these trials build on the knowledge and strategy developed in the Common Issues Trial, and to a lesser extent, the Horizon Trial.
  - Alternatively, we could appoint a new trial team for trials 3 and 4, who would bring a fresh perspective, however they would be at a disadvantage in terms of timing and preparation.
22. The litigation strategy is firmly led by the external counsel team. WBD do the 'leg work' to support this. I am aware that board members have queried whether WBD remain the right firm given that they have been involved in these issues since the beginning. Nevertheless this gives them a very deep understanding of the history, the individual cases and the political sensitivity. I have queried privately with the Counsel team whether they are properly supported by WBD, and have had confirmation of this. No matter what firm we instruct, there will be some degree of criticism, however WBD are a good match for Freeths, and bringing in a 'Magic Circle' firm would only reinforce the 'David v Goliath' impression. While it would be possible to bring in a new firm of solicitors, I would be reluctant to do this now given the tight timeframes and the potential impact on the agreed trial strategy and the ability to properly support the Counsel team.
23. We have recently re-tendered the legal panel and Norton Rose have been appointed – not having had any previous engagement with Post Office. We have instructed them to support the BAU rectification work which will assist in bringing them up to speed on our more operational and contractual issues.