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POST OFFICE LIMITED BOARD MEETING
Strictly Confidential and Subject to Legal Privilege – DO NOT FORWARD

MINUTES OF A CALL OF THE BOARD OF DIRECTORS OF POST OFFICE LIMITED HELD ON 18 MARCH 2019 AT 17.15 HRs

Present:	**Other attendees:**
Tim Parker (Chairman)	Lord Neuberger, QC (from item 3.)
Ken McCall (Chairman for the meeting)	Jane MacLeod (Group Director Legal, Risk and Governance and Company Secretary)
Tom Cooper	Veronica Branton (Head of Secretariat)
Tim Franklin	
Shirine Khoury-Haq	
Carla Stent	
Alisdair Cameron	

Apologies:

Paula Vennells

1. Conflicts of Interest **Actions**

A conflict of interest was noted in relation to Tim Parker in his role as Chairman of the HM Courts and Tribunal Service.

A conflict of interest was noted in relation to Tom Cooper in his role as UKGI Director, which as an executive part of government, should not be involved in a decision which related to the judiciary.

Article 82 of PO Limited's Articles of Association permitted the Board to authorise a director in relation to any matter the subject of a conflict. The Board determined that Tim Parker and Tom Cooper should be involved in the Board discussions but they would not be party to the decision on whether or not to seek the Judge's recusal.

2. Context

2.1 **Appeal and recusal**

Jane MacLeod explained that the discussion would focus on appeal and recusal issues.

She noted that we had received a written opinion from Lord Neuberger which had been issued on 14 March 2019 and which suggested that Post Office had grounds for appeal and for recusal. She noted that Lord Neuberger would be joining the call so the Board had the opportunity to ask him questions about his opinion on the case.

She noted that Lord Neuberger would not be able to represent Post Office in Court because of his previous role as President of the Supreme Court and therefore it was proposed that Lord Grabiner QC would represent Post Office on any recusal application.

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JM noted that she had met with Lord Grabiner earlier in the day and the Board would also have the opportunity to ask him questions on a subsequent call. Lord Grabiner was a very experienced QC who had appeared in a number of high profile cases. His strong advice was that PO Limited should bring a case for appeal and for recusal; he was confident in the recommendations he was making and was very critical of the Judgment and its legal underpinning.

It was noted that the Shareholder had previously requested that it be consulted on any proposed appeal, although there was sensitivity in relation to a recusal application. It was noted that a recusal application needed to be lodged as soon as possible.

An application to appeal would normally be lodged within 21 days of the Judgment being published but we thought that the Judge might extend this deadline given that the Horizon trail was underway.

2.2 **Horizon Trial**

The Horizon Trial had started on 11 March 2019 and there were a number of comments which suggested that the Judge's views of Post Office (as contained in the Common Issues Judgment) had not changed, including his continued suspicion that Post Office was withholding evidence in relation to Horizon.

3. Lord Neuberger's overview

Lord Neuberger joined the call and was introduced to the Board. He set out the main courses of action that PO Limited could consider at this juncture:

1. Accept the Judgment
2. Take an orthodox defensive position and seek to appeal. This was an entirely justifiable approach and a number of the Judge's decisions were open to attack and appealable from a preliminary reading of the Judgment
3. Seek recusal: the most aggressive approach.

The arguments for not accepting the Judgment as it stood included that the Judge had accepted evidence that was not relevant to the case, having previously stated that only relevant evidence should be allowed. He had included commentary on witnesses which were not relevant to the Judgment and were quasi Judgments. He was meant to be resolving a number of issues in relation to the contract, but had not done this, and had taken into account how the contract had been performed which was not a matter on which findings should have been made.

Lod Neuberger noted that Post Office could argue that the Judgment was such that the Judge could not fairly continue with the other hearings (including the Horizon trial) and that justice would not be seen to be done if he did so. The Court of Appeal (CoA) could be expected to give a judge a certain amount of latitude in how they tried a case. However, we had a good prospect of convincing the CoA to require the Judge to stand down although it was not inconceivable that the case would fail. If we did not seek recusal the Judge could continue with the hearings without any challenge being raised in relation to fairness or potential bias and that would make it harder to argue this point subsequently. Losing the recusal case could alienate the Judge further but equally could make the Judge more careful in

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his approach. Lord Neuberger thought that not taking the aggressive course carried more risk than taking it from a legal perspective but recognised that this was a difficult decision for an organisation like PO Limited which was publicly owned.

4. Questions

1. Directors then had the opportunity to ask questions of Lord Neuberger, including:

The arguments for recusal and appeal were clear and there was a strong case for the former but we also had to consider the communications and stakeholder arguments. What could the impact of not seeking recusal be on subsequent appeals processes? Was there only one chance to seek recusal? For example, what would happen if in our view the bias of the Judge continued or increased during subsequent trials? Whilst it might seem attractive to go down the legal route as it seemed like the right thing to do, was this a really strong case?

Lord Neuberger:

1. *If we did not apply for recusal could this reduce the chance of the success of a subsequent appeal?* It was reported that appeal concerned matters of law only and was not impacted by recusal which concerned issues such as admission of evidence. These were free standing matters
2. *Would this be our last chance on recusal?* If we did not seek recusal now our chances of obtaining a recusal subsequently would depend entirely on how the Judge acted in the future. Any subsequent application for recusal could not refer to the first Judgment. If we did not act now the argument would be that we had been happy for the Judge to continue hearing the Horizon trial and for the claimants to continue spending money pursuing the case. A decision on recusal needed to be taken this week. The usual process was to go to the Judge to say that you were seeking to recuse him. If he did not agree to recuse himself the application would then be made to the CoA
3. *Prospects of success.* Lord Neuberger reported that he did not yet know Lord Grabiner's view of the case; he thought we had a strong case but was slightly diffident because he had not yet seen all of the evidence from the other side. It was entirely possible that CoA would not accept our case but having looked at the case did not think it possible that the PO would receive a fair trial if heard by the current Judge.

2. *The case had just started for the Horizon Trial. The Judge had commented adversely on the PO Witnesses and some of these were appearing in the second trial. Did these witnesses have a fair chance of being heard in the second case given that the Judge had questioned their credibility*? This was a concern and illustrated the unfairness of the Judgment.

3. *Would a charge of unfairness issue form part of the appeal?* A charge of unfairness was more bound into an application for recusal than appeal because if it were flagged in appeal the CoA would not be clear what action it could take. Unfairness was not really linked to the interpretation of the law which was flagged in appeal. However the unfairness and legal interpretation arguments were connected

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because some of the Judge's findings were not relevant to the case and the inclusion of irrelevant findings would form part of the appeal case.

It had been assumed we could run the unfairness argument as part of the appeal or go for recusal at a later stage. Not being able to do so presented a stark choice.

4. *The board had to weigh up risks from a PR perspective. To what extent was recusal an unusual occurrence and how was it usually treated?* It was reported that applications for recusal were not common but not rare either and were generally linked with an appeal. Being recused could be seen as a bit of a "black mark" for a judge but it could be determined that a case needed to go to a re-trial because the judge had got the law wrong.

5. *What would the timings for appeal and recusal be and how quickly did the applications need to be made? Did an application for recusal pause the clock on the trial underway?* An orthodox approach would be to inform the Judge that we were going to appeal partly on prejudicial findings and as such were asking the Judge to recuse himself now. This was a perfectly proper application to make. If we were successful the current trial would be a waste of time. At this point the Judge was likely to ask the claimants for their view as to whether to carry on with the trial. If the parties requested an adjournment and the Judge proceeded with the trial that would not be viewed favourably by the judicial establishment.

6. *How long did the Judge have to decide whether to recuse himself?* There were 3 options: 1) The Judge could recuse himself immediately; 2) The Judge could adjourn the trial and request a different judge to hear the recusal application, or 3) The Judge could continue with the trial. In each case the Judge was likely to seek the claimants' views and would want to understand the grounds for recusal. The Judge was likely to consider the application for recusal overnight or over a few days but could not delay taking a decision for a long period of time. If we sought recusal at the end of week the matter was likely to be resolved by the end of the following week *[post meeting note: the Court will not be sitting in the week beginning 25 March 2019 so a decision could take longer]*.

7. *Could the CoA say that the second and subsequent cases should not be heard by the same judge even if a recusal application had not been lodged?* It would be odd to go the CoA alleging unfairness without seeking recusal. In other circumstances it might be decided not to apply for recusal however as the second trial had already started, these circumstances were different. PO Limited's concerns about publicity surrounding a recusal application were however understandable.

8. *If you were advising the claimants having received a request for appeal and recusal how would you advise them?* Lord Neuberger would advise them to look at their position very carefully. He would want to understand their QC's rationale for including all the evidence he had. The Judge's findings had been made in very strong terms and he would be worried about the chances of the recusal being successful. He would want to understand if there was anything that was not obvious that could support the approach taken. It was hard to see what findings of fact could apply to the contract at its inception.

Ken McCall thanked Lord Neuberger for joining the call.

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5. Follow-up discussion

It was noted that these were not easy decisions to take and one element of those decisions was understanding the costs of taking an appeal and recusal action. It was reported that costs had not yet been provided but a range of £100–200k was likely for recusal. This entailed 1 – 2 weeks' work and some work had already been undertaken.

JM provided an overview of the issues posed for us by the Common Issues Judgment and the process for reaching a decision.

The Board would need to have the chance to talk to Lord Grabiner to ensure that it had received a range of expert advice.

The purpose of the Common Issues Trial was to establish the true nature of the contract. Any additional terms applied through the Judgment could be appealed. It had been ruled that the contract was a relational contract and therefore additional terms could be implied.

Other finding and observations had been based on the evidence from the claimants but not from PO Limited. The Judge's finding that NFSP was not independent was a good example of making a finding based on partial evidence. If we did not challenge those findings of fact they would stay on the record.

Decision making process and conclusion

A decision on recusal should ideally be taken at the Board call on 20 March 2019. An application to the Court would need to be supported by witness statements and evidence and would be heard by our Judge within 24 hours. The timetable was then in the hands of the Judge. If he decided immediately that he would not recuse himself we would need to be prepared to go the CoA.

A number of points were raised:

- we might disagree with how the Judge has reached his conclusions but needed to test whether the heart of his findings were correct, for example, we funded the NFSP which could have affected their independence. It was noted, however, that whatever the merits or otherwise of particular findings where these had been based on partial evidence they could not be regarded as fair
- appeal on the contractual findings had merit from a legal perspective but we must be clear that we were not being defensive. We were committed to making operational changes and improvements
- the Horizon trial ought not to have been a dramatic trial because both expert witnesses had found the system to be reasonably robust. However, if the views of a small number of claimants were extrapolated and represented as symptomatic of the entire system, then that posed a threat to this view. Finding that system errors might have occurred in certain instances was radically different to finding that the system was not reliable. This trial was

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focussed on findings of fact rather than interpretations of the law and would be very difficult to appeal

- the ongoing costs to the business of needing to prove that money had been taken had major implications for the operation of the business and the scope for others to seek compensation if these cases were found against us
- we needed a process for checking whether anybody had been treated unfairly even if our case was ultimately successful. We also needed to be sure that we were set up to be fair in the future. It was reported that we were working through all the contractual issues. We were focussed particularly on the transparency of processes. These were two of the most urgent issues to be resolved
- the Board still needed a greater understanding of the "big picture" and financial implications. The Board wanted to be confident that irrespective of legal process, there was an understanding of whether claimants (and others) had not been treated appropriately over the period of time in consideration.
- If was noted that if Post Office lost the case overall that would have significant financial and operational outcomes, however at this point there wasn't a clear understanding of the potential scenarios at the conclusion of the trials. This would help shape the overall view of whether we should seek to appeal and/ or apply for recusal. It was **AGREED** that Jane MacLeod and Al Cameron would set out their best view of the possible scenarios and this would be circulated in advance of the Board call on 20 March 2019. **JM/ AC**

GRO

Chairman

02/07/2019

Date