

**CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION**



Noting paper: Appeal Process

1. BACKGROUND

- 1.1 The Common Issues Trial (CIT) concluded on 6 December 2018 and, as expected, Judgment was reserved. The Judgment is expected to be handed down by the end of January 2019 with the draft Judgment being released around a week before (please see our noting paper "Draft Judgment" for more detail on this process and timings).
- 1.2 Once the Judgment has been handed down, Post Office will need to decide whether or not to appeal. This decision will need to be made rapidly and the process should begin when the draft Judgment is received.
- 1.3 This note is to explain the appeals process and timings in relation to the CIT Judgment (please also see our previous noting paper "Events following the Common Issues Trial" and our briefing note "Is an Expedited Appeal Possible?"). Whilst this note has been prepared on the basis that Post Office will be considering whether it wishes to appeal, Post Office should note that the Claimants may also be considering whether to appeal. It is possible that both parties will appeal and likely that at least one will appeal.

2. WHAT CAN AND CANNOT BE APPEALED?

- 2.1 The CIT Judgment may contain both findings of law and findings of fact by the Judge. Although almost all of the Common Issues in the CIT are points of law, the Judgment will presumably also contain findings of fact (for example in relation to whether Lead Claimants received a copy of their contract at or around the time of contracting).
- 2.2 Broadly speaking, Post Office will be able to appeal findings of law but will almost certainly not be able to appeal findings of fact.
 - 2.2.1 An appeal on a point of law would be on the basis that the Judge has reached the wrong legal conclusion in his Judgment. WBD and Counsel will be able to advise Post Office on the merits of such an appeal once the draft Judgment has been received.
 - 2.2.2 An appeal on a point of fact would be more difficult and would need to be based on showing a particular finding of fact was either "perverse" or was the result of procedural unfairness. It is extremely difficult to appeal a well written judgment on the grounds of perversity so ultimately Post Office would probably need to argue for procedural unfairness in order to successfully appeal on a point of fact.

3. PERMISSION TO APPEAL

- 3.1 Whatever the appeal is based on, permission to appeal will be required. This permission can be given by the CIT Judge or can be given by the Court of Appeal on application (please see the flowchart in section 4 below).
- 3.2 Permission to bring an appeal will only be granted where:
 - 3.2.1 The Court considers that the appeal would have a real prospect of success; or
 - 3.2.2 There is some other compelling reason for the appeal to be heard (for example if the case raises an important legal question such that a decision of the Court of Appeal on

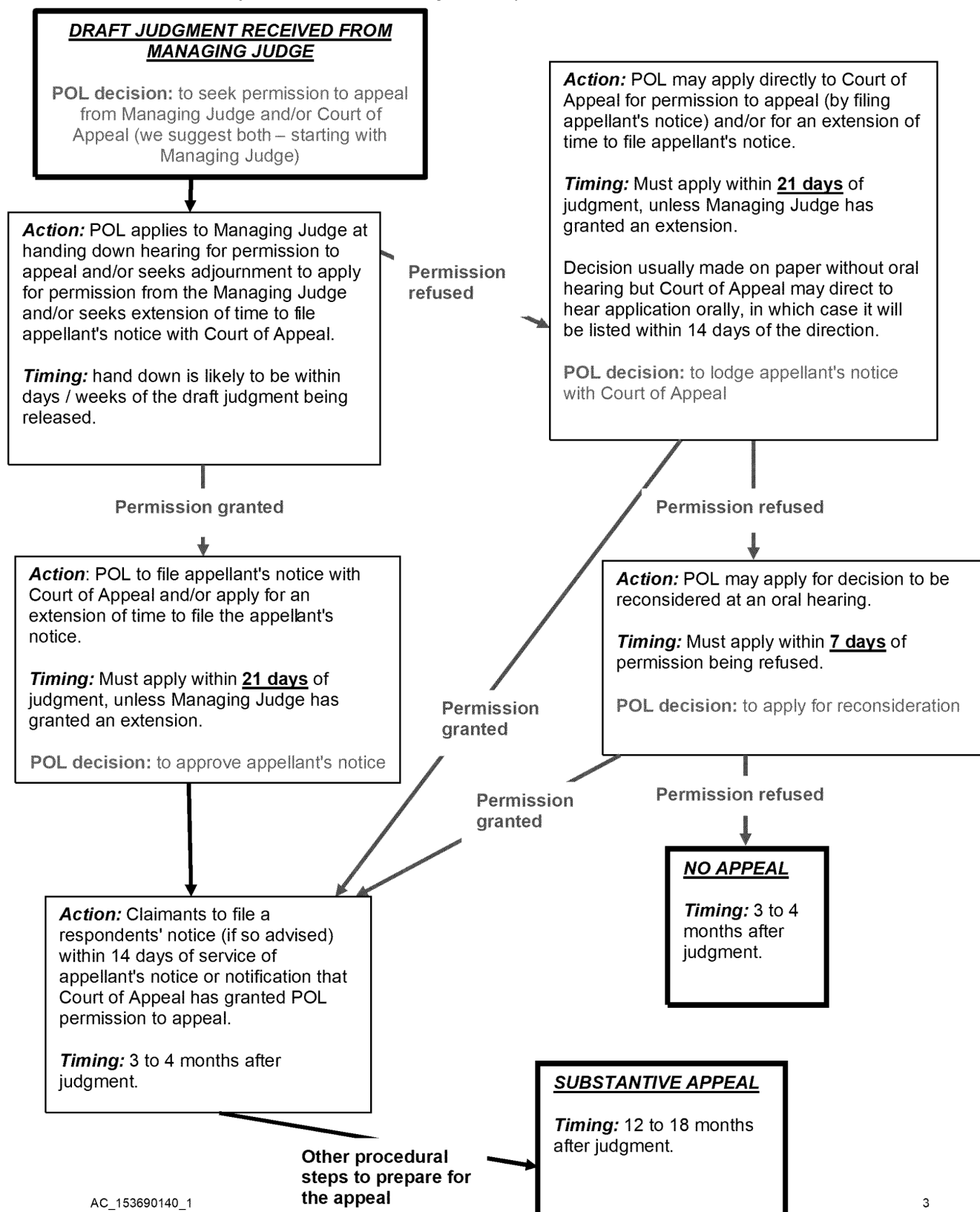
the matter would be in the public interest). This ground is much more rarely relied upon.

4. THE APPEAL

- 4.1 Assuming that permission to appeal is obtained, the appeal itself will proceed as a review of the legal correctness of the decision of the CIT Judge. Unless the Court orders otherwise, it will not be a rehearing, and there will be no new evidence (or indeed reconsideration of conclusions reached in relation to the existing evidence). The hearing will be legal argument presented by counsel.
- 4.2 An appeal will only be allowed (i.e. successful) where the Court of Appeal finds that the decision of the lower Court was, in one or more respects:
 - 4.2.1 Wrong (i.e. an error in law or an error in the exercise of the lower Court's discretion); or
 - 4.2.2 Unjust because of a serious procedural (or other) irregularity in the proceedings before the lower Court.
- 4.3 Post Office's options for appealing will depend on the precise contents of the CIT Judgment. However, based on the issues to be decided at the CIT the most likely scenarios for an appeal are:
 - 4.3.1 There is a finding of law in relation to one or more of the Common Issues which is wrong in law; and/or
 - 4.3.2 The Judge makes findings of fact or law that fall outside of the Common Issues to be decided at the CIT and this constitutes a serious procedural irregularity that would render the Judgment unfair.
- 4.4 It is possible for Post Office to obtain permission to appeal and then to choose not to proceed with the full appeal (please see the flowchart below which sets out the various decision points in this regard).
- 4.5 The timings for the appeals process (see the flowchart below) are tight and strict. Decisions will therefore need to be made rapidly by Post Office, particularly on receipt of the draft Judgment.

5. APPEALS FLOWCHART

- 5.1 The appeals decision-making process starts as soon as the draft Judgment has been received. The flow chart below sets out the main steps that must be taken and the decisions that need to be made by Post Office at each stage in that process.



6. TIMINGS AND IMPACT ON OTHER TRIALS

- 6.1 The flowchart above contains the timings and deadlines in relation to the appeals process. On the assumption that the draft Judgment is received by mid-January 2019, the approximate timings for an appeal are likely to be:

| | |
|---------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| Mid-January 2019 | Draft Judgment received. |
| 31 January 2019 | Judgment handed down. |
| 21 February 2019 | Deadline to apply for permission to appeal and file appellant's notice. |
| March - April 2019 | Respondent to file respondents' notice within 14 days of appellant's notice to appeal or final decision on permission to appeal if not already granted. |
| Autumn 2019 – Spring 2020 | Substantive appeal heard. |

- 6.2 We would therefore not expect an appeal to be finalised until 12 to 18 months after the CIT Judgment is received in January 2019. Although expedited appeals are possible (please see our briefing note "Is an Expedited Appeal Possible?") it is not likely that the appeals process would be much quicker than the timings set out above.

- 6.3 It is not at all clear what would happen to the rest of the litigation while an appeal of the CIT Judgment is underway:

- 6.3.1 It seems likely that the Horizon Issues Trial will proceed as planned regardless of whether or not there is an appeal; but
- 6.3.2 Any future trials are likely to be significantly impacted by the outcome of the CIT and so it is less obvious what the merit would be in proceeding with the October 2019 "third stage" trial in the event of permission to appeal being granted by the Court of Appeal—although the Managing Judge may be resistant to any suggestion that his ambitious timetable should be delayed. For this reason, consideration should be given to seeking a stay of the October 2019 trial in any application for permission to appeal whether before the trial judge or the Court of Appeal— as an order consequential on the matters sought to be appealed.

Womble Bond Dickinson (UK) LLP

11 January 2019