

UK Government
InvestmentsDepartment for
Business, Energy
& Industrial Strategy

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OFFICIAL SENSITIVE
JUDGMENT IN POST OFFICE COMMON ISSUES TRIAL

Summary

1. A judgment in the Post Office Common Issues trial will be sent to the parties next week (w/c 4 March), under strict embargo, before being formally handed down in the following week (w/c 11 March). This submission provides:
 - an overview of the case and the wider context of an ongoing legal process
 - advice on whether to ask that ministers get early sight of the judgment
 - UQ rebuttal (annex A) and draft answers to initial and follow up questions (annex B)

Timing

2. We expect the judgment to be provided to the parties under strict embargo in w/c 4 March.

Recommendation

3. We recommend that you
 - Agree not to seek permission from the judge to have early sight of the judgment
 - Consider a verbal briefing once the judgment has been handed down
 - Note the draft UQ rebuttal and answers (annex A and B)

Advice

4. The Post Office 'Common Issues' trial was held before Justice Fraser in November and December 2018. A judgment will be sent to the parties next week (w/c 4 March), under strict embargo before being formally handed down the following week (w/c 11 March).
5. The judgment must be kept strictly confidential during this period and as it stands will not be made available to ministers. You have asked for advice on whether we should seek permission from the judge for ministers to have advanced sight of the judgment (paras 13-16)
6. The full judgment is likely to run to hundreds of pages and POL will provide a summary as soon as the judgment has been formally handed down, which it has committed to pass on immediately. Given the likely complexity of the judgment, we recommend that you also have a verbal briefing as soon as possible, with representatives from POL as well as officials.



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7. This trial is only the first phase of an ongoing trial process. A second trial focusing on the integrity of the Horizon IT system is due to begin on 11 March. A third trial is scheduled in November to examine the 6 lead claimants' cases, and a fourth trial in March 2020 will address issues relevant to a wider group of Claimants. The final outcome of the litigation will only be clear once the overall trial process is concluded. The parties will consider possible mediation after judgement in the first two trials is handed down.
8. The Common Issues trial is itself complex, concerning 23 Common Issues that relate to the six lead claimants. The closing arguments focused on
 - The express terms of the postmaster contracts which deal with liability for branch losses
 - Whether the postmaster contracts are "relational contracts" such that they should have implied into them duties of good faith and fair dealing
 - Whether the postmaster contracts should have further terms implied into them
9. There are a very wide range of possible outcomes, with 23 Common Issues at stake, some of which are broad (e.g. one seeks the implication of 21 separate implied terms. Given the wide range of possible outcomes (including that Post Office wins on all counts), we will revisit the UQ answers once the judgment is available.
10. Regardless of the legal findings, Post Office expect the judge to continue to be critical of some aspects of Post Office's handling of the case and its treatment of claimants. We expect these largely to relate to historic behaviour and do not believe that POL currently has problems with its operational culture.
11. While Post Office Ltd is 100% owned by HMG, it operates as an independent, commercial business. As such, the relationship with its sub-postmasters and the management of its IT systems are operational matters for Post Office Ltd. The legal defence and the costs involved are being handled by them.

Appeal

12. Either party can ask the Court for permission to appeal and permission is initially sought from the trial judge when the judgment is handed down. If this is given, the appealing party must make their formal application within 21 days of the judgment being handed down. In the event of an adverse judgment relating to issues that POL believe would have a significant impact on the business, we would anticipate that they will seek leave to appeal. We have agreed with POL that there will be time for ministers to be informed about the appeals before they are made. The litigants may also appeal. The judge has so far indicated that appeals will not delay the start of the Horizon trial on 11 March.

Seeking permission for early sight of the judgment

13. In principle, the Secretary of State could make an application to the judge to ask for permission for (named) individuals in BEIS, particularly ministers, to see the draft judgment. This application would also be served on the claimants and POL. We would argue that this would be on the basis that there will be strong public interest in the case and, as sole shareholder of POL, the Secretary of State for BEIS is accountable to Parliament for the Post Office. BEIS Ministers will be required to answer questions in Parliament (or privately from MPs) on the outcome of this judgment, therefore it would be important to have advance sight of the judgment so that they can prepare.



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14. BEIS legal and UKGI legal advisors have consulted relevant GLD litigation advisers and advise that such an application is highly unlikely to be successful. The Secretary of State as shareholder is in the same position as any other shareholder of a private company, namely a separate legal entity. We have not been able to find any similar precedents where shareholders of companies have successfully applied for advance sight of a judgment involving the company of which they are shareholder. The need for Ministers to be prepared to answer questions about the judgment would not be a persuasive ground for applying for permission, particularly in a case which does not raise any public law issues but a private law matter between POL and the claimants.
15. As well as being highly unlikely to receive permission, the application for permission and the judge's response will be made public. An application would run counter to the position the Department has taken thus far regarding this litigation (including in Parliamentary Questions), namely that it is an operational matter for POL.
16. Therefore, we advise that the Minister **does not seek** permission to have early sight of the judgment. UKGI will work with BEIS communications and with POL to ensure that appropriate responses are made ready as soon as the judgment is out.

Contributors

17. This advice is not considered to have financial considerations.
18. BEIS Legal (Gareth Evans) and UKGI Legal (Richard Watson) have been consulted and agreed the content of this advice.
19. Communications considerations have been taken into account, and agreed with Annabelle Miles.
20. Parliamentary handling has been taken into account, and agreed with Tom Aldred.

Annexes

- A. UQ rebuttal
- B. UQ draft answers