

**CONFIDENTIAL AND LEGALLY PRIVILEGED  
POST OFFICE GROUP LITIGATION****Steering Group Meeting: 3 November 2017*****DECISION: How should Post Office address Counsel's availability for trial?*****1. BACKGROUND**

- 1.1 At the CMC on 19 October 2017, the Court ordered a 20 day trial starting on 5 November 2018. Post Office's Counsel, Tony Robinson QC, is potentially unavailable for this trial as he is already instructed on another matter (known as "Edwardian") which has a trial around the same time. Under the Bar Standards Rules, Tony is obliged to act on the first trial on which he is instructed. If faced with a timing conflict, he is therefore professionally obliged to act in the Edwardian matter.
- 1.2 At a further hearing on 25 October 2017, we sought to have the trial moved to a new date (likely January 2019). In a very unusual decision, the Judge, Mr Justice Fraser, refused to do this. This is out of the ordinary as trials are usually only listed for when Counsel are available. Despite our protests about how this might prejudice Post Office, the Judge refused to change his decision. His reason was that he wants this matter to move forward as quickly as possible and that he would be scheduling all hearings and trials regardless of Counsel's availability. He recognised the difficulty he was causing Post Office and noted that his decision was finely balanced. He is producing a written judgment of his reasons, which again is highly unusual in what is normally a routine procedural matter. We believe that he is producing a written judgment to help protect his decision against an appeal by Post Office.
- 1.3 Tony's Edwardian matter is a two part trial; the first part is being heard in January and February 2018. If Tony is successful at this first trial, the second trial in October – November 2017 may not be needed. Tony believes that there is a 65% chance that the second trial will not proceed, which effectively means that there is a 65% chance Tony will be available to represent Post Office in November 2018. The outcome of the first trial in the Edwardian litigation should be known by May 2018.
- 1.4 Clashes within Counsels' diaries are not uncommon. Significant trials are very time consuming, requiring Counsel to block out several months of time for preparation. However, usually the Court works around Counsel's diary. Where Counsel is unavoidably unavailable, it is standard practice to bring in alternative Counsel.
- 1.5 The quality of Counsel we are using means that they will have the ability to pick up the case from Tony (and indeed we have had to do this before in other matters using barristers from Tony's chambers). However, this will not be as satisfactory as using Tony, given the amount of time he has already spent in understanding this case. There is also value in the continuity of Counsel. Each Counsel has their own unique style and this is reflected in how a case is presented and how documents are prepared. If Counsel of comparable quality to Tony is engaged, we believe that the merits of Post Office's case will only be marginally affected by the change of Counsel, but nevertheless some disruption is inevitable. There will also be an increased cost in getting new Counsel up to speed that will likely run to around £100k - £200k.
- 1.6 We set out below the options for resolving this issue.

**2. OPTIONS****A. Appeal**

- 2.1 We could appeal the Judge's decision. His decision is very unusual and it could be argued that it prejudices Post Office's right to a fair trial and / or that it is not in accordance with the Court rules which require decisions to be made in the interests of justice.
- 2.2 We do not however recommend an appeal. First, the chances of a successful appeal are at best 50% as the Appeal Courts tend to defer to the decision of the first instance judge on case management issues rather than replace that decision with their own. Second, Mr Justice Fraser has been docketed to this case. This means that he will be hearing all matters, both procedural and substantive, for the foreseeable future. Appealing his decision will make him angry – Judges hate being appealed. Whether Post Office wins or loses on appeal, it may then have to live with a hostile Judge for the remainder of this litigation.

B. Rely on Junior Counsel

- 2.3 We could rely on Junior Counsel in the event that Tony is unavailable. Indeed, this is why we engaged junior Counsel so that in the event that Tony was not available, we would have a fall-back advocate.
- 2.4 We currently instruct Owain Draper to assist Tony. Owain has been practising for around 8 years (whereas Tony has been practising for nearly 30). Going forward, and regardless of the trial date problems, we would be looking to instruct another more senior barrister to assist Tony. Now that we have visibility of the scale of the work required between now and the trial, it is clear that a further barrister on the Counsel team would be warranted. This is also necessary given the Judge's indication that he anticipates regular court hearings, potentially every four weeks, and his position that those hearings will proceed regardless of Counsel's availability. Although Owain may have been suitable cover for the odd minor hearing, we would be better placed with a more senior Counsel on the team to cover Tony.
- 2.5 In light of the above, Post Office could therefore rely on this senior Counsel to conduct the trial, should Tony not be available.
- 2.6 This would be the most cost effective option but we do not recommend it. This is a significant piece of litigation with a strong minded judge. Post Office needs a heavyweight QC to lead the case.

C. Instruct a new QC now

- 2.7 We could instruct a new QC now to replace Tony. This has the advantage of giving us a stable team in the run up to the trial.
- 2.8 However, it may be that this decision is premature and that Tony may be available for the trial. If Tony were to later become available, we will have incurred (and arguably wasted) significant costs in getting new Counsel up to speed.
- 2.9 Furthermore, our view is that although the alternative Counsel that are available are very good, the best option is still to proceed with Tony if he is available.

D. Wait until May 2018 to make a decision

- 2.10 Between now and May 2018 there is no absolutely critical work for Tony to do. The next 6 months are largely focussed on disclosure which will be driven by the solicitors. There may be a limited strike out application in November / December, a potential security for costs application around the same time and there will be disclosure hearings in January / February. All of these could be handled by a strong senior junior.

- 2.11 The next key step for Counsel would be pleading Post Office's defences in the 6 Lead Cases in May 2018. Tony will be available to do this and then following the Edwardian decision, Post Office could decide whether to change Counsel or not.

### **3. RECOMMENDATION**

- 3.1 We recommend bringing on-board a senior junior now so that, whether or not Tony is available, we have a senior Counsel with continuity from now to trial.
- 3.2 One Essex Court have agreed to double book the trial, effectively blocking out the time in Tony's diary and another QC's diary until May 2018. This is a significant commitment on their part as we will be locking at least one barrister out from doing other work in the period August – November 2018. The only exception to this will be if the alternative Counsel is asked to appear in a major trial during the same period. If that is the case, we will be given first choice of whether to stick with Tony or change to the alternative Counsel.
- 3.3 Having reviewed the list of alternative Counsel with Rodric Williams, our recommendation is that Post Office:
- lines up Daniel Toledano QC as alternative Counsel to Tony but defers a final decision until May 2018; and
  - instructs Jamie Goldsmith now as the extra senior Counsel on the team.

Daniel Toledano QC - <http://www.oeclaw.co.uk/barristers/profile/daniel-toledano-qc>

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