

23 April 2019

THE POST OFFICE GROUP LITIGATION
BOARD LITIGATION SUB-COMMITTEE: 24 APRIL 2019

This paper is supplemental to the Board paper prepared by the Post Office legal team (Post Office legal, Womble Bond Dickinson and Counsel). In this brief paper, we set out where we agree and disagree with the advice of the Post Office legal team, focusing on the specific points of difference and decisions that need to be made imminently.

QUESTIONS

1. Should the Common Issues judgment be appealed?
2. On what grounds should the Common Issues judgment be appealed?
3. Should the Common Issues appeal be conjoined with the Recusal appeal?
4. At what point should the Post Office seek to settle the litigation?

RECOMMENDATIONS

1. **Should the Common Issues judgment be appealed?**
 - 1.1 We **agree** with the Post Office legal team that the Common Issues judgment should be appealed. We agree that there are good prospects of successfully appealing parts of the Common Issues judgment. Fundamentally we **agree** that an appeal improves the Post Office's position in any discussions to try to settle the litigation.
2. **On what grounds should the common issues judgment be appealed?**
 - 2.1 At present we **agree** with the Post Office legal team's view on the aspects of the Common Issues judgment that should be appealed. This is a preliminary view, as we are not yet able to express definitive views on the Common Issues appeal and therefore must defer to the legal team's better knowledge of the issues in dispute. However, we will have an opportunity to provide input and seek to refine the appeal in due course.
 - 2.2 In particular we **agree** with the legal team's view that the appeal must be legally coherent and those findings which are impracticable operationally going forward will need to be addressed.
 - 2.3 We also **agree** that the Post Office should present an appeal which will most likely be granted permission and therefore appealing findings on relatively untested areas of law (i.e. the relational contract point) will be important.
3. **Should the Common Issues appeal be conjoined with the recusal appeal?**
 - 3.1 This comprises two interrelated sub-questions:
 - 3.1.1 Should the Post Office bypass an application to Fraser J and submit an application for leave to appeal the Common Issues as soon as possible so that it is considered by the same judge (Coulson J) alongside the application for leave to appeal the Recusal?
 - 3.1.2 Assuming permission is granted in both applications what is the Post Office's position on having both appeals conjoined so that they are heard by the same panel of Court of Appeal judges?
 - 3.2 The questions are interrelated as it is likely that if the response to 3.1.1 is "yes" then the Court of Appeal will inevitably conjoin the two appeals and have them heard together. If the answer to 3.1.1. is "no" and we follow the present timetable, the Court of Appeal will likely already have made the decision on whether or not to grant permission in the Recusal appeal before

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the application for leave to appeal the Common Issues judgment is filed on 6 June 2019 (assuming Fraser J refuses leave). The Court of Appeal may still decide have both appeals heard together in this scenario under its case management powers (and there is little the Post Office can do about this) but it is less likely.

- 3.3 While it is a matter of judgment, on balance we **disagree** with the Post Office legal team's view that the Post Office should submit its application for leave to appeal the Common Issues now so that the Court of Appeal hears both appeal applications together. We also **disagree** that it is advantageous to have both appeals heard at the same time by the same panel of Court of Appeal judges. At *Annex 1* is a table summarising our views on the positives and negatives of having both applications for permission to appeal considered together and the substantive appeals conjoined.
- 3.4 Our primary concerns with the legal team's proposed approach are as follows:
- 3.4.1 The Post Office's primary focus should be to succeed in the Common Issues appeal. It is therefore important that the grounds for the Common Issues appeal are not rushed and completed in the next two weeks. Instead adequate time needs to be given to presenting the best appeal case possible.
- 3.4.2 It is in the Post Office's interests to slow down the court process to allow time for settlement. A fast-tracked Common Issues appeal may impact the settlement process, in particular on the Claimants' side, if the parties are too heavily engaged in preparing for an appeal to focus on settlement discussions.
- 3.4.3 We do not agree that the Common Issues appeal will be of great help to the Recusal appeal and we think that there must be a risk that the Court of Appeal will refuse permission in the recusal application if it is in a position to deal with the substance of the matter in the Common Issues appeal at the same time. In addition, there is a risk that the Recusal appeal taints the Common Issues appeal.
- 3.4.4 We do not think that the Post Office should discount the reaction of the Managing Judge, who at present will remain in place for Trials 3 and 4, if the Post Office is seeks leave to appeal directly from the Court of Appeal. In addition, it is difficult to see the Managing Judge using the appeal application to bolster his Trial 1 findings.
- 3.5 At *Annex 2* is an indicative timeline showing the various timescales should the appeals be heard separately or conjoined.
4. **At what point should the Post Office seek to settle the litigation?**
- 4.1 We **agree** with the commercial objective of bringing the litigation to a close as quickly and cost effectively as possible.
- 4.2 In particular we **agree** with the legal team's Option B: appeal the Common Issues judgment and look to commence settlement discussions once permission is granted but before the appeal is heard. An outstanding Common Issues appeal before the Court of Appeal will likely cause the Claimants concern that their position will be weakened by the Court of Appeal – possibly resulting in them becoming more amenable to settlement.
- 4.3 We note that the timing of any eventual settlement will need to be considered, as the Post Office may well wish to have the Court of Appeal's judgment on the Common Issues appeal prior to any global settlement to avoid letting Fraser J's unhelpful judgment stand.
- 4.4 If Option B fails, we **agree** with Option A: complete the Common Issues appeal and use that as a platform to settle.

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- 4.5 If the Post Office is unsuccessful in the Common Issues appeal, settlement as a negotiated exit is still likely to be more favourable than a Trial 4 judgment. The precise strategy in this scenario will need to be discussed but will depend on factors such as: the outcome of the Horizon Trial, the outcome of Trial 3, whether the Common Issues are appealed in the Supreme Court, the pressure that can be put on the Claimants to evidence actual causation and loss for each SPM.

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Is it in the Post Office's best interests to apply to the Court of Appeal at the same time for permission to appeal in both (i) the recusal of Mr Justice Fraser and (ii) the Common Issues trial; and, assuming permission is granted, to have both appeals heard concurrently? In other words should the appeal in the Common Issues trial be fast-tracked to catch up with the recusal appeal?

Issue	Yes	No
<i>Success on Common Issues</i>	There is a risk of Fraser J refusing permission to appeal the Common Issues and in doing so making further unhelpful comments which bolster his Trial 1 judgment.	In general, a party loses nothing from seeking permission to appeal from the lower court and losing that application. It is difficult to see how the Judge can substantively bolster his Trial 1 judgment.
	The Court of Appeal may exact particular scrutiny on Fraser's findings in the Common Issues trial if aware of the nature and detail of the recusal application.	The Common Issues are central to all claims in the litigation. Adequate time is required to prepare fully thought through Grounds of Appeal. The recusal application is secondary to the Common Issues. A more well thought through Grounds of Appeal will have a stronger chance of success.
		The Court of Appeal may see the Post Office fighting every point at every turn if it is considering recusal and Common Issues together; leading to a view that the Post Office is oppressive.
		Recusal is a high threshold – there is a risk of the Court of Appeal being in that mind-set when considering the Common Issues appeal – and possibly being defensive of Fraser J.
		Having only one panel of judges involved means that there is added pressure on the constitution of that panel. If the panel is not pro-Post Office the risk of negative findings on both appeals is enhanced. Two appeals and two panels gives the Post Office two bites of the cherry.

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<i>Success on recusal</i>	The application for permission to appeal the recusal decision may be enhanced by the same Lord Justice seeing the Common Issues Grounds of Appeal. The number of errors of law reinforce that the recusal appeal is substantial – and justified.	An application for judicial recusal is exceptional and there must be a significant risk of the Court of Appeal agreeing with Fraser J in this case. Also, if the appeals are conjoined, it is perhaps more likely that the Court of Appeal will deny the recusal appeal on the basis that any relief for the Post Office is best provided via the Common Issues appeal.
	The Court of Appeal may dismiss the recusal application but seeing the issues in the judgment in the context of the Common Issues appeal which, while not evidence of bias, are evidence of a somewhat compromised judge, may be persuaded that a different judge should hear the remaining cases.	If the Post Office loses the recusal appeal, the Court of Appeal may still (of its own motion) direct as part of its Common Issues appeal judgment that a different judge hear the remaining trials.
<i>Success in later trials</i>		Bypassing Fraser J when a consequential hearing has been fixed may result in further animosity from the judge in Trials 2, 3 and 4.
<i>Future operations</i>	A swift resolution of the Common Issues will mean that the Post Office has certainty in its SPM contractual obligations and can implement any required changes quickly to stem the flow of future claimants.	If the Post Office's objective is to reach a compromise position with both Claimant and non-Claimant SPMs, keeping the appeals separate will slow the Court process and allow further time for a resolution to be reached.
<i>Settlement</i>	If the Common Issues appeal goes well it will put the Post Office in a stronger negotiating position more quickly.	An outstanding appeal also gives the Post Office a strong negotiating position as it will cause the Claimants to consider if their position will be weakened by the Court of Appeal – possibly resulting in them becoming more amenable to settlement. If the Post Office fast-tracks its appeal and loses on certain key issues, it will not be in as strong a negotiating position.
	A negative Court of Appeal decision on recusal will strengthen the Claimants' and the Judge's resolve, which will be unhelpful going into any settlement discussions. It	Slowing down the timetable is in the Post Office's interests. Any steps that can be taken to put a pause on Trial 4 in particular should be carefully considered. An outstanding

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	will also result in a further costs order. If the Court of Appeal needs to list the recusal appeal and Common Issues appeal together it will likely take longer than it would otherwise to obtain a recusal judgment.	appeal in the Court of Appeal on the Common Issues is a basis to adjourn Trial 4.
<i>Expense and publicity</i>	There is little chance of Fraser J giving permission on some (if not all) of the grounds of appeal – bypassing that argument reduces costs and minimises adverse publicity.	There is likely to be adverse comment from the Judge at the May hearing if he is bypassed, potentially leading to negative publicity for the Post Office.
	Lower expenditure to have the recusal and Common Issues appeals heard together	Given the potential claim value the cost of having two separate Court of Appeal hearings should not be determinative. Having both appeals heard together may result in the separate counsel team on recusal sitting in the Court of Appeal for the full duration of the Common Issues appeal doubling up on costs.
	It may happen in any event given the cross-over of issues. The Court of Appeal may not want to consider the same points twice.	