



## **DRAFT Common Issues Judgment: Appeal Advice**

### **1. THIS PAPER**

- 1.1 This paper outlines the advice of WBD and David Cavender QC on whether and how Post Office might appeal the Common Issues Judgment handed down on 8 March 2019 (**the Judgment**). It assumes that the reader is broadly familiar with the Post Office Group Litigation and the Judgment. This advice will be expanded on at a conference scheduled for 11 April 2019.

### **2. REASONS FOR APPEALING**

- 2.1 We see three key reasons for appealing the CIT Judgment.

#### **2.2 Impact on Post Office's business**

- 2.2.1 The Judgment's imposition of a duty of good faith cuts across and restricts many of the contract rights that Post Office needs to manage the relationship with its SPMs and operate its business. Since the Judgment was handed down, we understand that there have been few immediate operational problems: SPMs are still accounting to Post Office and shortfalls have not gone up. However when issues do arise with shortfalls and/or the need to suspend or terminate SPMs real problems will doubtless emerge.

- 2.2.2 We however see the real problems being longer term. The duty of good faith as applied by the Judge turns SPMs into "super-employees" and gives them significantly more rights than even an employee would enjoy. In particular, it requires Post Office to take account of the interests of SPMs when making decisions. This fetters its freedom to make changes to its business. Amongst other matters, the introduction or withdrawal of products, changes to contractual conditions and remuneration and the opening and closing of branches are all now required to be assessed and balanced against the impact on SPMs. It is unclear from the Judgment how this balance is to be struck and whether Post Office is supposed to balance its business interests against the interests of SPMs as a whole network or against the interests of individual SPMs in their particular situation. This is onerous obligation to comply with in form: it might require consultations across the network and / or a branch by branch impact assessment. In substance it may make unlawful some business transformation activities that have a considerable adverse effect on a large number of branches.

- 2.2.3 Moreover, in our view Post Office's current organisational setup creates a real risk of Post Office not dealing in good faith with an individual SPM. Its current structure has many different touch points between SPMs and Post Office. There is no central point for information about an SPM and no single decision maker with accountability for that relationship. Although there is often communication between departments this is fragmented; there is not, as far as we are aware, an end-to-end process or overarching policy on how Post Office manages SPMs. This has, in some of the cases we have seen, led to silo decision making within departments.

- 2.2.4 The above way of working was legally permitted under the old pre-Judgment legal framework which placed the onus on the SPM to be accountable and self-sufficient. In that framework, it was appropriate for the SPM to be responsible for raising issues and contacting the correct department for help and support. A duty of good faith however requires Post Office to act in a coordinated way, ensuring that its decisions are taken in

full knowledge of its entire relationship and history with an SPM. Put another, it would not be acting in good faith to allow a decision maker to act where they did not have the full picture.

- 2.2.5 Although not experts in business transformation and organisation, we believe that compliance with the duty of good faith in the long term would require a deep restructure of Post Office's support functions for SPMs and possibly the procurement of a new IT solution to centrally store information about them.
- 2.2.6 Even if the above points could be addressed through organisational change, the ambiguous nature of a duty of good faith means that it will be difficult for Post Office to know (even having had legal advice) what it can and cannot do. We anticipate that the duty of good faith and other fetters on Post Office's legal rights will have consequences in ways that are currently unforeseeable. This will inject an additional measure of legal risk (in the form of claims and complaints as well as general resistance from SPMs to change) into its business activities. Post Office may then need to offer more generous remuneration and compensation to get SPMs to support changes in the network because it is unable to unilaterally procure those outcomes through its weakened legal rights.
- 2.2.7 We do not believe that the above difficulties could be fully resolved by making improvements to existing operational practices or re-drafting SPM contract terms. The Judgment goes to the heart of the SPM relationship and challenges the core balance of the relationship between Post Office and SPM. The findings of the Judgment will therefore pervade any changes made by Post Office and, although their effects might be mitigated, they cannot, in our view, be eliminated via this course of action.
- 2.2.8 For the avoidance of doubt, we are not advocating that Post Office ignores the thrust of the criticisms in the Judgment. There are ways of working highlighted above and in the Judgment that require improvement. But there is a substantial difference between being legally required to implement changes and implementing changes for good business reasons. It is perfectly ordinary for a large organisation like Post Office, faced with many competing pressures, to set its legal obligations lower than its best practice objectives. This allows a fair margin of error should it fall short without creating legal risk. It also gives it flexibility to adapt and change its business in the long term.

### 2.3 Litigation merits

- 2.3.1 The Judgment is central to all the claims in the litigation. The adverse findings in the Judgment make it significantly more likely that Post Office will be found to be liable to a larger number of the Claimants and to dramatically increase the extent of its liability. This is because it weakens some of Post Office's best defences, namely responsibility for demonstrating that SPMs losses were not due to the Post Office operating system, that a large number of the claims should be time-barred, and that even successful claims should only result in limited compensation being awarded.
- 2.3.2 The legal team universally believe that an appeal is the correct and obvious course of action when considered from the perspective of the litigation. An appeal in these circumstances would be entirely ordinary. Indeed, not appealing would be considered by many as a peculiar decision- particularly where:
  - (a) The Judge's decision on the implication and, in particular, the width of application of the good faith term is in our view obviously wrong.
  - (b) Post Office are appealing the decision of the Judge (not to recuse himself) for apparent bias and doing so on the basis that he introduced large amounts of irrelevant and inadmissible material into his decision making process in the trial. To *not* appeal the decision itself in those circumstances would be at best surprising.

- (c) The Judge himself in the Recusal Judgment says that the proper remedy for some of the complaints of Post Office is to appeal his decision – not to seek to recuse him.

2.3.3 David Cavender can expand on these points as needed at the conference.

## 2.4 Settlement

2.4.1 If Post Office wishes to consider settling the litigation, an appeal will give it a stronger negotiating position. In the short-term it will cause the Claimants to question whether their current position will be weakened by the Court of Appeal, thus making them more amenable to settlement. In the longer term, a positive Court of Appeal decision will materially strengthen Post Office's legal position. Given that the CIT Judgment was adverse to Post Office on many points, an appeal would not worsen Post Office's legal position: in reality it can only improve.

2.4.2 An appeal will likely cost £2m - £3m (depending on how the recusal application is managed alongside the main appeal, how long it takes and whether, and to what extent, Lord Grabiner is engaged to represent Post Office). Given that on even a very conservative view a settlement will comfortably exceed £30m, we consider it likely that an appeal will reduce the settlement payable by more than the cost of the appeal.

2.5 The above three factors represent the key reasons for lodging an appeal. In our view, the first factor alone would justify an appeal.

2.6 There is no real risk of appealing the Judgment except for the costs of doing so (to which see below). Even Mr Justice Fraser would find it difficult to say that Post Office is acting oppressively in bringing an appeal. Appealing a decision on the interpretation of contracts / agency relationship is common place. That this is so is clear from the terms of the Judgment itself where Mr Justice Fraser makes numerous alternative findings "*in the event that I have got it wrong*" on the good faith point.

2.7 Further, having made a recusal application and appealed that application, an appeal on the Judgment is a lesser and more ordinary step by comparison. Making an appeal should not in itself lead to criticism but care is needed to only appeal important points, to avoid the impression that Post Office is seeking to fight every point in an oppressive manner. It is *that* which is the real challenge given the extent of the errors contained in the Judgment.

## 3. **SCOPE OF THE APPEAL**

3.1 The Judgment covers 23 interlocking issues, with several dozen more sub-issues. The Judgment entwines these issues closely together, often using decisions on one issue to justify and amplify decisions on other issues. The Judge has also included several alternative formulations, meaning that if one part of his judgment fails there is a secondary argument that would produce the same result. Surgically dissecting the judgment for a few cornerstone points that could be appealed with significant benefit for Post Office is not therefore possible. Any appeal will, due to the shape of the issues and the structure of the Judgment, necessarily need raise a large number of points.

3.2 Where possible, however, Post Office is advised to make concessions. When going before the Appellate Courts it is better to have accepted any points that will be difficult to overturn or will be of limited utility in resolving the wider litigation. This would also help counteract the impression that Post Office is acting oppressively if it were to concede some ground.

3.3 It is therefore recommended that Post Office concedes four of the implied terms which the Judge implied, *not* under the "good faith" rubric, but because they were "necessary". Counsel has re-drafted the four terms to narrow their ambit and make them more reasonable and acceptable. These terms are such that they could have fitted within the agreed "Reasonable Co-operation"

implied term that Post Office acknowledged early in the proceedings but to which the Judge failed to give any meaning.

- Implied term (a) *"to provide reasonable training and support if Post Office imposed new working practices or systems or required the provision of new services"*
- Implied term (b): *"to ensure that the Horizon computer system was reasonably fit for purpose"*
- Implied term (c): *"properly and accurately to effect all transactions using Horizon and to maintain and keep records of such transactions for a reasonable time"*
- Implied term (t): *"that Post Office take reasonable care in performing its functions under the SPMC and NTC contracts which could affect the accounts of Subpostmasters"*

- 3.4 In our opinion Post Office should however appeal the points below. These are all points of law and commonly subject to appeal. Although this is a large number of points they are all inter-linked and so need to be appealed together.
- 3.4.1 The implication of a duty of good faith.
- 3.4.2 The other implied terms not conceded above.
- 3.4.3 The proper construction of the express terms of the contract, in particular the clauses that entitle Post Office to recover losses.
- 3.4.4 The striking down of express terms as unfair and unenforceable.
- 3.4.5 An SPM's obligations as agent of Post Office and the binding nature of the Branch Trading Statement as an account rendered by an agent.
- 3.4.6 The fettering of Post Office's rights to suspend and terminate.
- 3.4.7 The notice of contractual terms given to SPMs under the SPMC by the contractual paperwork sent to SPMS in the days of Mr Bates and Mrs Stubbs.
- 3.5 Further, in our opinion Post Office ought to seek an order from the Court of Appeal that it quash the large number of findings made by the Judge on matters extraneous to the Common Issues before him – as those matters are to be determined in future trials on the basis of full disclosure and witness evidence. There are a large number of these. These are the *same* points as raised on the recusal appeal. They are the manifestation of the same points in the guise of an appeal to actually get those findings quashed. That is a form of relief that is not sought in the recusal appeal itself – as it might well muddy the waters in that appeal which would be unwelcome.
- 3.6 Careful consideration has been given to appealing findings of fact in the Judgment on the grounds that those findings are perverse. Appeals of this nature are less common and more difficult. They should be used sparingly, both as a legal tactic and because it comes with a higher risk of Post Office looking like an aggressive litigant. There are however a number of findings of fact that we believe should be challenged. This has however been limited to following findings which are only a small fraction of the total findings in the Judgment. We have placed them in three categories:
- 3.6.1 Mr Bates: receipt of SPMC contract. This is a single issue. On its face this may seem to be unnecessary but we think that it should be included as it is a clear example where the Judge has wholly ignored the documents to get to the conclusion that he wanted to get to and so it will strike the appeal court as very odd.

- 3.6.2 Findings adverse to Post Office's behaviour and witnesses. These findings are unfair and are directly relevant to the Claimants' claim for indemnity costs. There are 6 of these. These overlap with some of the recusal grounds.
- 3.6.3 Litigation conduct of Post Office. There are two of these. They are relevant to indemnity costs arguments made by the Claimants.

#### **4. MERITS OF APPEALING**

- 4.1 The legal team's view is that Post Office has reasonable to strong prospects of success on nearly all above recommended legal grounds of appeal, with some points stronger than others. The appeals of factual findings are most finely balanced but we believe they should still be pursued.
- 4.2 To validate this decision, Lord Neuberger has been instructed to review the draft Grounds of Appeal and will advise on (i) whether the scope of the appeal is appropriate and (ii) the likely reaction of the Court of Appeal to an initial reading of the Grounds of Appeal.
- 4.3 In the longer term, Lord Neuberger could be engaged to review Common Issues entirely and offer his view on the likely outcome of the appeal. This is however a significant task that would take weeks / months to complete.

#### **5. TIMING AND PROCESS FOR AN APPEAL**

- 5.1 There is a hearing on 16 May 2019 before Mr Justice Fraser at which Post Office can seek permission to appeal. If this is refused, or simply in the alternative, Post Office can apply direct to the Court of Appeal for permission to appeal. With or without permission from Mr Justice Fraser, Post Office will need to lodge an Appeal Notice with the Court of Appeal by 6 June 2019 or it will lose its right to appeal.
- 5.2 Having refused to recuse himself, Post Office is required to lodge its recusal appeal by 11 April 2019. The recusal appeal and the main appeal are two separate appeals but with much overlap. It would be beneficial if draft Grounds of Appeal for the main appeal were submitted to support the recusal appeal. A Lord Justice looking at the recusal appeal will be expecting the main appeal to follow and will be interested in understanding the scope of the main appeal before deciding how to proceed.
- 5.3 Given Mr Justice's Fraser's refusal to give permission to appeal the recusal decision, we believe there is little chance of him giving permission on the main appeal- and even if he did it would likely be limited to the "good faith" finding. He is very unlikely to give permission on all the grounds so that Post Office will need to go to the Court of Appeal in relation to *those* grounds in any event. Also – expedition for the appeal is sought which can only be given by the Court of Appeal. Therefore, in these circumstances, the only real reason to seek permission from the Judge is out of a sense of politeness - which alone does not seek to justify the delay involved. We therefore advise that Post Office does not seek permission from Mr Justice Fraser but proceeds straight to the Court of Appeal. The appeal will therefore need to be lodged in good time before the 16 May 2019 hearing.
- 5.4 Once both appeals are lodged, the Court of Appeal will then decide whether to hear them together or separately. If separately the recusal application will likely move faster, perhaps being heard within 1-3 months. The main appeal, being much more complex, will likely take 6 – 12 months but we would ask for this to be expedited given the ongoing impact of the Judgment on Post Office's business. If two appeals are heard together, they will likely move on the slower timetable.
- 5.5 In our view, there are strong reasons for the two appeals to be heard together:

- 5.5.1 The recusal appeal will require the Court of the Appeal to form of view on whether Mr Justice Fraser has pre-judged issues outside the scope of the Common Issues trial. It will therefore need to consider the issues in the main appeal to an extent in forming that view. It is also the case that the findings of fact that Post Office seeks to quash on the main appeal are the same findings that are the subject of the recusal appeal. If the appeals are not heard together the Court of Appeal would need to consider the same points twice. This is inefficient. It is very unlikely that the single Lord Justice managing the appeal will allow this to happen.
- 5.5.2 The two appeals give complimentary impressions. The extent of the errors of law in the main appeal reinforce that the recusal appeal is one of substance not just form. The main appeal makes clear that Mr Justice Fraser has not made a trifling error for which he should not be recused, but lays out the full extent of the flaws in his reasoning and helps justify (publicly and to the Court) why Post Office has sought the sanction of recusal. The Judge's findings on the law are so bad that they will dissolve any sympathy the Court of Appeal might otherwise have.
- 5.5.3 This will be the most efficient use of resources. One hearing will always take less work and cost less than two separate ones, which will benefit both parties and be attractive to the Court of Appeal.
- 5.5.4 Even if the recusal appeal went forward separately and quickly, the litigation could not be fully re-started (if re-started at all) before the main appeal was determined.
- 5.5.5 We anticipate that the Claimants may want the two appeals heard together. Their principal argument against recusal is that the Judgment, and the Judge's approach in the Judgment, was correct. They will therefore want to argue for the Judgment which should properly be the subject matter of the main appeal.
- 5.6 The outcome of these appeals if successful would be:
  - 5.6.1 A new judgment on the Common Issues from the Court of Appeal that is more favourable to Post Office.
  - 5.6.2 The recusal of Mr Justice Fraser and either a re-trial of the Horizon Issues trial or a new Managing Judge ordering a new trial process.

## **6. RECOMMENDATION**

- 6.1 There is clear recommendation from the legal team that appealing the Judgment maximises the chances of a successful result in the litigation, whether that be future Court decisions or settlement.
- 6.2 We also believe that there are good business reasons for lodging the appeal, but that is a decision for Post Office.
- 6.3 If Post Office approves lodging an appeal against the Judgment, we would recommend that:
  - 6.3.1 Post Office should continue to implement short-term operational changes so that its current practices do not directly collide with the Judgement (and we understand this work is underway).
  - 6.3.2 It may also wish to implement more extensive changes that both satisfy the Judgment and deliver the best practice that Post Office would want to achieve in any event. Even if the appeal is successful, this work will still deliver benefit to the business.

- 6.3.3 In parallel with the appeal, Post Office should also plan for, but not yet commit to, the longer term and deeper structural changes that would be needed to comply as fully as possible with the Judgment should the appeal fail.
- 6.4 Even on pessimistic timetable of the appeal taking 12 months, our view is that this would be a faster, cheaper and more effective route than implementing the long term operational and contractual changes that would be needed to comply with the Judgment, particularly given that achieving full compliance through operational and contractual change alone is unlikely to be fully successful given the broad and imprecise impact of the Judgment on Post Office's business over many years into the future.

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