

Post Office Group Litigation
Legally privileged



One page summary of Counsel's Opinion on whether to audit Fujitsu

1. In the Horizon trial, the parties and the Court attached particular importance to the KELs and Peaks that had been disclosed. Much of the evidence focused on the number and nature of bugs in Horizon, as shown in these documents. On the basis of the KELs and Peaks, both experts identified the Horizon bugs and discussed the likelihood of Horizon containing other unidentified bugs. The KELs that had been disclosed were central to these issues.
2. It now appears that the KEL disclosure proceeded on an incorrect basis. Long before the Horizon trial, Post Office's Electronic Disclosure Questionnaire (dated 6 December 2017) stated that in relation to the KEL that *"The previous entries / versions of the current entries are no longer available."* That statement was based on information provided by Fujitsu and that Fujitsu signed off on the EDQ. Recently, Fujitsu mentioned that previous versions of KELs are retained on the system and thus the statement made in the EDQ was wrong. On the basis of this statement, Post Office did not give any disclosure of any previous versions of KELs. From the Court's perspective, it is a failure for which Post Office is responsible.
3. A substantial numbers of undisclosed KELs may ultimately persuade the Judge not to finalise his judgment on the Horizon trial until all (1) the undisclosed KELs have been disclosed by the parties (if that is what the Claimants want) and (2) the parties have then had an opportunity to put in further factual and/or expert evidence on the new material. So one possible outcome is that judgment will be delayed for a significant period, and another is that the trial will be resumed to address the new material, with the result that judgment will be delayed for an even more significant period. Another adverse consequence is that Post Office may well be ordered to pay the Claimants' costs of doing any further work needs to be done as a result of the late disclosure of these KELs. Post Office may even be ordered to pay all the costs of the further evidence and the resumed trial referred to above, regardless of their impact on the final Horizon judgment.
4. Against this background, Post Office is considering whether to carry out some sort of audit of Fujitsu's disclosure. At the outset, it should be noted that Counsel strongly suspect that the question whether the audit is privileged is of little practical importance. If the report gives Fujitsu a clean bill of health, Post Office will not want to assert privilege. If it does not, the Post Office will probably be required to give yet more late disclosure of further categories of documents and/or to correct yet more false information from Fujitsu that. It should also be noted that Counsel cannot predict the outcome of any audit or identify the associated risks and assign probabilities to those risks.
5. One advantage of commissioning an audit would be that – if Post Office is open about what it is doing – it could portray itself as doing 'the right thing', as opposed to reluctantly reacting to pressure exerted by the Claimants or the Court. And if Deloitte were to give Fujitsu a clean bill of health, that would be a major additional advantage.
6. At the other extreme, the audit may reveal that a large amount of further, damaging, disclosure needs to be made – either because adverse documents are uncovered (which would then be known adverse documents) or because further examples of categories of disclosed documents are uncovered (i.e. KELs, Peaks, OCRs, OCPs, MSCs, TFS entries, audit reports, Dimensions documents and ARQ data) or because Post Office has previously given the Claimants and/or the Court false information which needs to be corrected. Moreover, if only a narrow audit is carried out (e.g. just regarding the KELs) Post Office may find it difficult to justify its decision not to audit all the other categories of documents as well.
7. If audit's results only come out after the judgment is given, and there are things in the judgment the Claimants do not like, they could seek to appeal the judgment on the basis of late evidence becoming available. In that scenario, a retrial could be ordered which would be much more costly and (not least because of the intervening appeal) involve much more delay than a further hearing. These considerations underline the desirability of deferring the Horizon judgment until after any audit is completed, which necessarily means informing the Court and the Claimants that an audit is underway so that the judgment is not handed down in the meantime.
8. In conclusion, although there are possible benefits to be gained from commissioning the proposed audit, the risks of doing so are very serious. Moreover, Counsel doubt that Post Office will be able to keep the fact, scope or outcome of any audit secret from the Claimants. It may be able to keep these things secret until the audit report is produced, but keeping it secret until then would create some serious risks of its own.