

Group Litigation Update

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Executive Summary

Context

Post Office has received the courts' decisions on the Horizon Issues trial (which is embargoed until 2pm on 16 December 2019), and on the application for permission to appeal the March 2019 Common Issues judgment (where permission was refused).

Mediation with the Claimant group commenced on 27 November 2019 and is continuing in light of the progress the parties have made towards settlement.

Post Office has filed its Defences for the "Further Issue" trial scheduled to commence on 2 March 2020, which will determine the types of financial loss the Claimants can recover in principle and how those losses should be quantified.

Questions addressed in this report

1. What is the status of the mediation/settlement discussions?
2. What is the status of the litigation?
3. How is Post Office responding operationally to the Horizon Issues judgment and the refusal of permission to appeal the Common Issues judgment?
4. What are the next steps in the Group Litigation?

An update on the Communications position will be provided separately.

Conclusion

1. Mediation will continue into the week commencing 9 December 2019, during which the parties are likely either to reach a settlement, or conclude that mediation has run its course at this juncture such that the litigation continues.
2. The Horizon Issues judgment has been received in draft and will be made public at 2pm on 16 December 2019. Permission to appeal the Common Issues judgment was refused on 22 November 2019. The third, "Further Issues" trial remains on course to start on 2 March 2020.
3. The operational changes implemented after the Common Issues judgment are being reviewed following the refusal of permission to appeal, which review will now also incorporate any operational changes necessitated by the Horizon Issues judgment.
4. The next key steps in the litigation are to: attend to the handing down of the Horizon Issues judgment on 16 December 2019 and the reaction to that judgment once made public; agree the assumed facts to be used for the March 2020 Further Issues Trial; identify criteria for selecting test claimants for subsequent trials; and prepare

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for the court's PreTrial Review and Case Management Conference in late January 2020.

Input Sought

The Subcommittee is asked to NOTE the updates in this paper and the next steps to be taken in the litigation.

Input Received

This paper has been prepared with the assistance of external legal counsel.

The Board is reminded to exercise caution when communicating about potential levels of settlement. Communications about settlement should therefore only be held orally, but if that is not possible, advice should be sought from Post Office's lawyers.

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Mediation / Settlement

Mediation with the Claimant group began on 27 November 2019 and continued through the week commencing 2 December 2019 into the week commencing 9 December 2019. The parties are likely either to reach a settlement during this week, or conclude that mediation has run its course at this juncture such that the litigation continues. A verbal update on the mediation and the progress made towards settlement will be provided to the Subcommittee at its meeting on 10 December 2019.

Litigation Update

Horizon Issues Judgment

On 28 November 2019 we received Mr Justice Fraser's draft judgment on the Horizon Issues trial (the "HIJ"). The HIJ will be "handed down" and made public at 2pm on 16 December 2019. **The judgment is subject to an embargo, meaning the content of the judgment (including the information in this report) cannot be discussed outside the Post Office until it is handed down.** Failure to adhere to this is a criminal offence.

On the core issue of whether Horizon is a "robust system, the draft judgment has found that:

- the Horizon system in use today (HNG-A) is "*relatively robust*" (a helpful finding which substantially mitigates the immediate operational risks to the network);
BUT
- the robustness of previous versions of Horizon were "*questionable, and did not justify the confidence placed in it by Post Office in terms of its accuracy*" (Horizon Online/HNG-X; 2010 to 2018), and "*not robust*" (Legacy Horizon; 2000 to 2010).

[[PLACEHOLDER for summary of the findings on the 15 specific Horizon issues contained in Section M, received 06.12.19 – this can be put in as Appendix if lengthy]]

It appears that the tone of the HIJ is generally better than the Common Issues Judgment ("CIJ"), but there is repeated and, in places stringent, criticism of Post Office and Fujitsu for not properly and diligently investigating possible IT problems and being too quick to assume that fault rested with the postmaster. This echoes Fraser J's comments in the CIJ about a lack of investigative support and transparency from Post Office.

Post Office is obtaining advice from Leading Counsel on the prospects of appealing the HIJ. Advice is also being obtained on the costs consequences that flow from the judgment. A verbal update on these issues will be provided to the Subcommittee at its meeting on 10 December 2019.

HIJ Impact on Criminal Convictions

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Brian Altman QC has been instructed to advise Post Office on the impact the HIJ may have on postmasters convicted in connection with branch losses, and the steps Post Office should now take with respect to those convictions in light of the judgment.

Brian's preliminary views are that:

- the HIJ may be of limited relevance to convicted postmasters or the CCRC because it largely deals with the potential for branch accounts to be affected by Horizon errors generally, rather than whether Horizon had any actual effect on an individual's specific case (which is what the Court of Appeal (Criminal Division) should be concerned with);
- the HIJ has however put Post Office on notice that it may (as a prosecutor) need to give disclosure to convicted postmasters on the existence of bugs and errors in Horizon, the reliability of a Branch Trading Statement, and/or Post Office and Fujitsu's ability to access remotely a branch's accounts; and
- Post Office should liaise and ideally agree with the CCRC the approach to take to the disclosure issue so that any action best assists their reviews and is taken with their sanction.

Brian will provide finalised advice on this once the final version of the judgment has been handed down.

Common Issues Appeal

On 22 November 2019, Court of Appeal judge Lord Justice Coulson refused Post Office's application for permission to appeal the CIJ. The key points to note are:

- Coulson LJ considered that Fraser J's conclusions were too difficult to disentangle from the findings of fact he made at trial (which findings should not be the subject of an appeal);
- He also considered that some points taken on the permission application could and should have been taken at trial;
- He emphasised that the good faith duty is not a demanding obligation, and only requires the parties to "refrain[] from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people".
- There is again some criticism of Post Office in the judgment, but not about the way the permission application was pursued in the Court of Appeal.

The effect of this decision is that the findings made in the CIJ will govern Post Office's relationship with postmasters (discussed further below). Post Office has been advised that it has no prospect of successfully reopening this decision.

Third / Further Issues Trial

On 25 November 2019 Post Office filed its Defences for the March 2020 Further Issues trial, which will determine whether the losses the Claimants are claiming are recoverable in principle and, if so, how they should be quantified. The Claimants can file Replies to the Defences by 16 December 2019. Post Office can then file Rejoinders by 10 January 2020 if so advised.

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The parties will now produce by 16 January 2020 a list of assumed facts against which the Claimants' claims can be assessed. There will then be a court PreTrial Review with Fraser J on 23 January 2020 to address any outstanding issues which need to be resolved before the scheduled start of the trial on 2 March 2020.

Future Trials

The parties have asked the Court to convene a Case Management Conference on the first available date on 23 January 2020 (i.e. when the parties will be before him for the Further Issues PreTrial Review) or shortly after to agree the procedural steps and timetable required for the further conduct of the Group Litigation.

If the litigation is not settled, the most effective way to conclude the litigation is for there to be a trial of all the issues raised by around 5-15 test cases. We also consider that putting the full story of the Claimants' cases, including some of their improper conduct, in front of Fraser J may be the only way to change his general perception of Post Office. This would result in a trial in possibly late 2020, but more likely 2021. The Claimants may however argue (and the Court may prefer) to continue to break the litigation down into phases.

The parties required to file on 23 January 2020 criteria for selecting test cases which are representative of cases in the wider Claimant group. Significant work has been undertaken to understand each individual Claimant's case, and to identify the high-level features of the claims which should be reflected in the test cases. We intend drafting the criteria so as to allow Post Office to select Claimants most favourable to our case.

Costs

[[MARK UNDERWOOD TO UPDATE the November 2019 UPDATE: As presented to the Board on 30 April 2019, £8m was initially included in the 19/20 Budget for the cost of the litigation. Since then, and as included in the October 2019 Quarterly Delivery Board Paper, this allocation in the 19/20 Budget has been increased to £15m and as at P7, £7.7m has been spent. By the end of November 2019, we will know whether we have permission to appeal the Common Issues judgment, the Horizon judgment will have been received, and the first mediation meeting will have taken place. A revised spend forecast will be provided at the January 2020 Board.]]

Operational Impacts

Horizon Issues Judgment

As a result of our contingency planning, we are ready to identify and respond to the likely immediate reactions (postmaster, customer, client) to the HIJ and any subsequent operational impacts. Our external and internal communication material is extensive and able to be refined quickly to suit the need. An update on the Communications position will be provided separately.

Having assessed the embargoed HIJ, we expect our post office network to continue to operate normally, however some postmasters may raise some of the findings in the HIJ, turn to Post Office for confirmation that the Horizon system they are using is fit for

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purpose, and question the validity of previously settled discrepancies and TCs whilst using older versions of Horizon (pre-HNG-A).

We therefore anticipate 'historic claims' to flow from the Horizon Issues Judgment once handed down on 16 December 2019, either in a piecemeal fashion or as part of a secondary group, from current and former postmasters who have repaid/are repaying shortfalls, were suspended without remuneration, and/or question whether they received adequate notice of contract termination.

The agreed view across Legal and Operations is that we apply the same distinction to resolving historic claims that Fraser J has made between the Horizon systems, and distinguish claims that arise out of events post HNG-A going live in a branch ("new claims") from those that arise out of truly "historic" events.

New claims are to be assessed through the recently introduced Operations investigation processes, and historic claims are to be resolved by the Post Office case review team within LCG. We are currently developing the scope and design of the 'historic claims' approach with the aim of including this in our public statement to the HIJ, and as part of any agreement to settle the litigation as a whole.

Common Issues Judgment / No Permission to Appeal

The Court of Appeal's refusal to grant Post Office permission to appeal the CIJ means that Post Office's legal relationships with postmasters must be managed in accordance with the findings made in that judgment.

Since the CIJ was handed down, a number of operational changes were introduced to reflect its findings. An overview of Operational position following the refusal of permission to appeal is set out at **Appendix 3**.

Now that we have been refused permission to appeal the CIJ, and have also received the HIJ, Legal and Operations are revisiting our policies, processes and ways of working to discharge our legal obligations consistently with the courts' findings. The intention is to have one plan that addresses both judgments. Internal and external assurance will be built into this plan.

Central to this plan will be revising Post Office's standard postmaster contracts to address the courts' judgments. A preliminary legal workshop was held on 4 December 2019 to identify contract reform objectives and strategy options, the contractual amendments that could be made, and the means by which any variations could be implemented. The discussion paper prepared for this workshop has been placed in the Reading Room.

Next Steps

An overview of the main court and settlement-related activity in the Group Litigation through to October 2020 is set out in the "Group Litigation Timetable" at **Appendix 1**.

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Between now and January 2020 we will:

- continue to mediate and pursue settlement discussions with the Claimant Group;
- attend to the HIJ handing down on 16 December 2019, the reaction the judgment receives once made public, and operationalising the outcomes of the HIJ and refusal of permission to appeal the CIJ decisions; and
- continue to prepare for future trials, including agreeing the assumed facts to be used for the March 2020 Further Issues Trial, identifying criteria for test claimant selection for subsequent trials, and preparing for the court's PreTrial Review and Case Management Conference in late January 2020.

A timeline of the key milestones through January 2020 is set out at **Appendix 2**.

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Appendices

1. Group Litigation Timetable

| | Oct 2019 | Nov 2019 | Dec 2019 | Jan 2020 | Feb 2020 | March 2020 | April 2020 | May 2020 | June 2020 | July 2020 | Aug 2020 | Sept 2020 | Oct 2020 |
|-----------------------------|---|--|--|---|----------|---------------------------------|------------|---|-----------|--|----------|-----------|----------|
| Common Issues Appeal | | Oral Hearing (12 Nov) Permission refused (22 Nov) | Permission to Appeal Refused – no further action | | | | | | | | | | |
| Horizon Issues Trial | | Horizon Issues Judgment handed down (16 Dec) | | Hearing on costs of Horizon Issues trial | | | | | | | | | |
| Further Issues Trial | Costs Budgeting (2-23 Oct) Particulars of Claim (25 Oct) | Defences (25 Nov) | Replies (16 Dec) | Rejoinder (10 Jan) Statement of Assumed Facts (16 Jan) PreTrial Review (23 Jan) | | Further Issues Trial (2-20 Mar) | | Likely window for Further Issues Judgment | | Hearing on costs of Further Issues Trial | | | |
| Trial 4 | | | | Test case selection criteria (23 Jan) CMC (first available date on or after 23 Jan) | | | | | | Likely window for Trial 4 | | | |
| Settlement | Lawyers meeting (10 Oct) | Mediation (27-28 Nov and ongoing) | | Window for possible second mediation | | | | | | | | | |

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2. Group Litigation Timetable

| <u>No.</u> | <u>Date</u> | <u>Milestone</u> |
|------------|-----------------------|--|
| 1. | 27 – 28 November 2019 | Mediation (ongoing): UKGI/BEIS authority to be obtained if required. |
| 2. | 10 December 2019 | Post Office Board Subcommittee Meeting |
| 3. | 16 December 2019 | Horizon Issues Trial: Handing down of trial judgment (2pm) |
| 4. | 16 December 2019 | Further Issues Trial: Deadline for Claimants to serve Replies to Post Office's Defences |
| 5. | 10 January 2020 | Further Issues Trial: Deadline for Post Office to serve Rejoinders to Claimants' Replies (if advised) |
| 6. | 16 January 2020 | Further Issues: Parties to set out assumed facts and issues to be decided at Further Issues Trial |
| 7. | 22 January 2020 | Post Office Board Subcommittee Meeting |
| 8. | 23 January 2020 | Further Issues Trial: PreTrial Review |
| 9. | 23 January 2020 | Further Issues: Proposed date for parties to serve and file their proposed Selection Criteria for Test Claimants |
| 10. | 23 January 2020 | Overall GLO: Case Management Conference (first available date on or after 23 January 2020) |
| 11. | 28 January 2020 | Post Office Board Meeting |

3. Operations planning post appeal outcome

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Summary

The refusal of permission means that the Common Issues Judgment (**CIJ**) has radically reshaped the relationship with SPMs. It will now be more difficult to make commercial decisions about the network without legal challenge, recover shortfalls and suspend or terminate SPMs where there is improper conduct. Beyond the legal issues, the CIJ calls for a new relationship with SPMs grounded in good faith, trust and confidence and transparency. In light of the CIJ, many operational changes have already been implemented and further changes will be required.

Operational changes to date

Changes have been made to the Branch Support model applying the requirements of the CIJ:

1. **Transaction Correction** wording changed and under strict quality control to ensure these are plain English and correct
2. **Transaction Correction Disputes Team** mobilised to help SPMs if they do not agree with a Transaction Correction
3. **Tier 2 Branch Support** implemented with dedicated Case Handlers helping Postmasters by investigating discrepancies if Tier 1 call is unable to identify the cause (this is currently running at 99% success rate)
4. **Horizon Knowledge Based Faults (KBFs)** formerly known as KELs – joint work with IT and Fujitsu completed to separate known faults from Knowledge Based Articles (KBA) and Knowledge Based Information (KBI)
5. **KBF Process** – the process for identifying faults has been formalised and the (current) 11 known faults have been documented and uploaded to Dynamics and the Branch Insights Tool for reference by the Branch Support, Loss Prevention and Area Manager teams if a Postmaster reports a discrepancy
6. **Branch Insight Tool** – developed and launched to all Area Managers and branch support teams and is designed to be shared with SPMs to give detailed Operational performance information to enable supportive discussions around Operations conformance.

Changes have also been made to the approach to losses, suspensions, terminations applying requirements of the CIJ:

7. **New Loss Prevention** function has been established to minimise loss whilst supporting branches against the threat of internal and external losses
8. **End to end process review** – all data, decisions, letters, processes involved in supporting branches, identifying losses, supporting recovery of discrepancies, moving into loss dispute, recovery, suspensions and terminations have been reviewed and adjusted to address the requirements of the CIJ

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9. **Loss Prevention Case Workers** - new team mobilised to administer the end to end audit process ensuring accurate, consolidated information is maintained at an individual case level
10. **Audit Rationale Document** – produced for every audit and shared with the branch operator at the start of each audit to improve the transparency of the rationale for the audit
11. **Audit opening and closing scripts** – have been produced to ensure a consistent conversations the branch operator at the start and end of each audit
12. **Audit attendance** - all audits now have a minimum of two auditors to ensure consistency and cross check
13. **New telephone quality assurance** process to gain feedback from branch operators on their audit experience
14. **Weekly management of suspension cases** introduced to improve visibility and speed of resolutions
15. Contract management restructured to create **one point of decision making** for all suspension, termination and reinstatement decisions to improve consistency and speed.
16. **Correspondence** review and amended ensuring legal compliance, but supportive tone of voice (including remedy letters sent by Contract Advisors and discrepancy letters sent by Loss Recovery)
17. **Loss Recovery call monitoring** introduced to ensure quality and consistency of telephone calls
18. **PACE interviews** – no longer carried out by Security given that prosecution processes are on hold
19. **Increased support and Operation Torch visits** – are being carried out by the Security teams to focus on helping operators prevent their exposure to increasing retail crime and to drive security compliance
20. **Culpability reviews** – processes for operator culpability (e.g. sleight of hand) have been reviewed to ensure consistency and a focus on support for the branch operator

Next Steps

In light of the refusal of permission, some key Operational issues require further review and amendment. Work is underway between Legal and Operations to review and focus on the four areas outlined below to ensure Post Office has fully embedded the outcomes of the CIJ:

21. **Loss recovery and Branch Trading Statement (Grounds of Appeal 21-24):**
The BTS is a high level end-of-month summary showing cash and stock movements over the period. It shows whether there was a net surplus or shortfall at the end of the month. Currently, Post Office relied on an undisputed BTS as a basis to recover shortfalls from Postmasters on the basis of it being a "stated account" as a matter of agency law. The CIJ questioned whether the BTS could ever be a "stated account", pointing to the lack of a mechanism to dispute entries in the branch accounts within Horizon and the BTS not showing that sums may be disputed. Consequently, Post Office can no longer rely solely on an undisputed BTS to recover shortfalls. The possibility of delivering improvements to the BTS should now be considered to improve the clarity of the information shown on the BTS. This

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will increase the evidential weight of the document, as part of a new loss recovery framework.

22. **Establishing losses:** The current processes for establishing losses cannot always distinguish between the total level of loss and level of loss caused by 'negligence, carelessness or error' of the agent or their assistants. (Grounds of Appeal 25-26). This impacts all investigations into disputed losses as losses are currently considered on the balance of probability to be caused by 'negligence, carelessness or error' where other potential causes have been ruled out, rather than through positive establishment of a direct cause. Losses can be proven via a Tier 2 investigation (implemented after the CIJ), and this will show specifically where the error occurred if there was one. Where losses are disputed, e.g. where the Tier 2 investigation outcome is inconclusive, it is unclear how a direct cause can be established unless there is an admission by the agent or their assistant.
23. **Suspension:** Suspension periods are currently used for investigation purposes, where the CIJ states that Post Office needs to have first complied with all its other implied duties (which would include investigation of a discrepancy) prior to suspension (Grounds of Appeal 11-13). This is currently not possible in all cases and in the most extreme circumstance where Post Office believes there are significant sums at risk, or where there is a clear breach of contract (akin to Gross Misconduct). Post Office is currently suspending on full remuneration in line with the requirements of the CIJ.
24. **Repudiatory breach:** Operationally, there is not currently an exhaustive list of what constitutes a repudiatory breach of contract. This is required to ensure compliance for terminations (Grounds of Appeal 8, 14-20). This accelerates the need to re-write SPMs contracts and work is underway to confirm approach.