

**CONFIDENTIAL AND LEGALLY PRIVILEGED  
POST OFFICE GROUP LITIGATION**



***Briefing on selecting Counsel for trial in November 2018***

**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. Tony is professionally obliged to act on the first trial on which he is instructed. If faced with a timing conflict, he is therefore obliged to act in the Edwardian matter.
- 1.2 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 in May 2018.
- 1.3 We have identified Daniel Toledano QC as a suitable alternative Counsel should Tony not be available and have held time in his diary for the trial in November 2018. This time cannot be held indefinitely and should Daniel be asked to act for another client in November 2018, Post Office will have a right of first refusal on whether to instruct Daniel or stick with Tony at that point.
- 1.4 The question is whether Post Office should take the risk of waiting to May 2018 to see if Tony is available or switch now to using Daniel.
- 1.5 When considering this point, it is important to have in mind the Court timetable between now and May 18. At present, the only major events that would involve Counsel between now and May 18 are:
  - 1.5.1 Selection of Lead Claimants.
  - 1.5.2 Hearings on the disclosure of further documents in January / February 18 (see further below).
  - 1.5.3 A security for costs application (though this is a discrete point to which the points below do not materially apply and we may use specialist Counsel for this hearing in any event.)
  - 1.5.4 Drafting of Defences to the Lead Claimant cases (due 4 May 18).
- 1.6 The majority of the trial preparation will commence in June 18, when we will need to start preparing factual evidence and witness statements.
- 1.7 It should also be recognised that no Counsel has perfect availability. Changing to Daniel Toledano will come with its own challenges. Although Daniel is available for the Trial in November 18, he has a trial on another matter in March - April 18, just when Post Office is due to file its Defences to the 6 Lead Claims.

**2. ADVANTAGES OF WAITING FOR TONY**

- 2.1 The principal advantage of continuing with Tony is that we have invested significant time in Tony's understanding of Post Office's business. This is more than just learning about its legal

position and operational practices: it is understanding the culture. Post Office is unusual in that it is state owned business run at arms' length from the government. Its decision making rationales are not like those of pure commercial entities or pure public bodies. Indeed it can be quite difficult to explain to an outsider the delicate balance between commercial outcome and public duty that Post Office faces. However, this balance drives many of its decisions and is vital context as to why Post Office has operated in certain ways. The best way to understand this culture is through experience. Even if we brought in Daniel now we do not believe we could fully replicate the understanding that Tony already has.

2.2 The second advantage of trying to keep Tony is continuity. This arises in three ways:

- 2.2.1 Each Counsel has their own unique style and this is reflected in how a case is presented and how documents are prepared. Changing Counsel can create subtle disconnects in language and approach that the other side may try to exploit.
- 2.2.2 Tony has started to build a rapport with the Judge. Understanding the Judge's personal likes and dislikes allows Counsel to stay onside and be more persuasive. Given the Court timetable, there may be limited opportunity for Daniel to build that rapport between now and May 18. Bringing in Daniel earlier does not therefore mitigate this point.
- 2.2.3 There are dozens of subtle little nuances and pieces of information that have been picked up by Tony during his engagement. No matter how comprehensively we brief Daniel, it is impossible to transfer all this acquired knowledge to him, whether he is engaged now or later.

2.3 The final advantage of keeping with Tony is that Post Office avoids the additional cost of getting Daniel up to speed, which we estimate to be around £100k - £200k.

### **3. ADVANTAGES OF CHANGING TO DANIEL NOW**

- 3.1 The advantage of bringing in Daniel now is that he has more time to get up to speed on the case. In terms of reading all the background material and holding meetings with key people so to understand the case, we are confident that this could be done with intensive work in 3-4 weeks. The advantage of bringing in Daniel earlier is that he may well pick up more of the nuances of Post Office and the case whilst advising on issues before May 18.
- 3.2 The other advantage is that we may have unexpected events between now and May 18 which require further Court hearings at which Post Office would want to be represented by a QC.
- 3.3 First, the disclosure hearings in January / February 18 are on face value limited to the further disclosure of documents. This is a procedural point rather than a substantive one. We would ordinarily be quite comfortable with our Junior Counsel<sup>1</sup>, Jamie Goldsmith, conducting this type of hearing.
- 3.4 However, the scope of disclosure may indirectly influence the scope of the Second Trial in March 19. The scope of Trial 2 will not be set by the Judge until a hearing in September 18. There is not much time between September 18 and March 19 to prepare for that trial and there would be insufficient time to give large amounts of disclosure in that period. This leads us to suspect that whatever disclosure is ordered in February 18 may create practical restrictions on what the Judge would be prepared to determine at Trial 2 in March 19. If this is the case, then the disclosure hearings are more than routine procedure and become key strategic hearings on the future of this litigation.
- 3.5 Second, a major point of dispute in relation to Trial 1 will be the scope of admissible evidence. In very simple terms, Freeths are looking to rely on many factual matters that we say are

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<sup>1</sup> All barristers are classified as either "juniors" or "QCs". Although Jamie is a "junior" he has in fact been practising for 15 years, is a highly experienced barrister, and anecdotally we understand that he is likely to be appointed QC within the next couple of years.

inadmissible. There is a possibility that this question will require a further Court hearing before trial and perhaps before evidence is prepared in June 18. As this topic goes to the heart of Trial 1, it would be preferable for the same QC to appear at this hearing and Trial 1. This therefore weights in favour of engaging Daniel now. We do not however expect this issue to come to a head before the Claimants file the Lead Claims in April 18, by which time we will be close to knowing about Tony's availability (and we note that Daniel may be unavailable in April 18 due to other commitments).

- 3.6 A further consideration is that we expect the Judge to make further orders in September 18 regarding the steps to be taken for Trial 2 in March 19. It may be that these steps will run in parallel with preparation for Trial 1 (ie. September 18 to November 18). Preparing for trial is a deeply intense exercise. The team dealing with Trial 1 will be unlikely to have time to deal with Trial 2 matters. We may therefore need to stand up a separate legal team to run Trial 2 in parallel and that could extend to having a second QC. If this is the case, then instructing Daniel now would make us well-resourced to handle any parallel trial work.

#### 4. OTHER OPTIONS

- 4.1 The above analysis describes the two binary options of having to choose between Tony and Daniel.
- 4.2 There are other options but these will incur significant additional, and potentially wasted, costs:
- 4.2.1 **Fully engage two QCs.** In very large cases, sometimes two or more QCs are engaged simultaneously and they share the work between them. For example, this may be done for very long trials. We could do this with Tony and Daniel and this would guarantee Daniel's availability for Trial 1 whilst also keeping Tony engaged on the case. This would however incur double Counsel costs at around £Xm per QC over the next 12 months, some of which may be wasted as we would not need two QCs to run Trial 1.
- 4.2.2 **Engage Daniel on a watching brief.** We could get Daniel up to speed now and then he could shadow Tony on all matters up to May 18. This will get him earlier exposure to the case thereby making it easier and quicker for him to take over if an unexpected hearing occurs before May 18 or the disclosure hearings in January / February 18 become contentious. The downside is that this would likely cost an additional [£300,000], Daniel's help may never be needed (ie. there may be no additional hearings and Tony may be available for trial) and so this expenditure may be wasted.
- 4.2.3 **Book Daniel for Trial 1.** Daniel is a highly sought after QC and there will be other organisations looking to retain his services. At present, we have a right of first refusal on Daniel should he be offered any competing work around the time of Trial 1. We could fully book Daniel for Trial 1 but that would mean paying a non-refundable fee whether or not Post Office engaged him. That fee would be [Andy to speak to the clerks].

[Jane / Rod – I need to speak to the clerks about this section so please don't circulate yet]

#### 5. RECOMMENDATION

- 5.1 Tony conducting Trial 1 gives Post Office the best chance of success and so our recommendation is to wait to see if Tony is available.
- 5.2 If Post Office would like additional comfort against unexpected Court hearings in early 2018, it could engage Daniel now on a watching brief.
- 5.3 We cannot recommend fully engaging two QCs. This would be a disproportionate response to the 35% chance that Tony may not be available for Trial 1.