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Post Office scandal

Post Office scandal exposes ethical dilemmas of general counsel

The affair highlights the responsibilities of in-house lawyers when warned of improper practices in their organisation



Hundreds of sub-postmasters were prosecuted based on what emerged as flaws in the UK Post Office IT system © Carl Court/Getty Images

Rafe Uddin in London APRIL 23 2024

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Post Office executives played a leading role in publicly defending their organisation over the hundreds of prosecutions it brought against the sub-postmasters who ran its branches, based on the flawed Horizon accounting system.

But, behind the scenes, it was in-house lawyers who took on the task of briefing senior executives on the robustness of its Horizon software. They were also responsible for commissioning relevant audits and setting out the UK state-owned organisation's approach to litigation.

More than 900 people were convicted of a range of offences, including theft and false accounting, in cases involving data from Fujitsu's flawed Horizon system, which was introduced in 1999. More than 700 prosecutions were brought by the Post Office itself.

However, it was another lawyer — James Hartley, partner and head of dispute resolution at law firm Freeths — who represented 555 of the sub-postmasters in a landmark 2019 High Court case in which the extent of the IT scandal emerged. The judge ruled that several “bugs, errors and defects” meant there was a “material risk” that the Horizon system was to blame for faulty data used in the Post Office prosecutions.



James Hartley © Charlie Bibby/FT

“It’s quite a complex web of obligation, responsibility and culpability,” says Hartley, reflecting on the reach of the affair into the legal profession. “Somewhere along the way, lawyers have stepped over the red line.”

Now, a public inquiry into the scandal is gaining momentum as it takes evidence from senior Post Office executives, government ministers and figures from Fujitsu, ahead of its conclusion this summer.

In the coming months, the inquiry will hear testimony from several former general counsel at the Post Office, each of whom will give evidence against the backdrop of a debate about whether the role of an in-house lawyer needs to be more strictly regulated.

Susan Crichton, the Post Office's general counsel between 2010 and 2013, will appear today at Aldwych House in London to respond to claims that, under her watch, the business brought prosecutions against sub-postmasters despite concerns surrounding Horizon.

Audio recordings shared with the inquiry, of conversations between Crichton and forensic accountants Second Sight in 2013, suggest she briefed the company's chief executive that claims made by accused sub-postmasters about the Horizon system were, in fact, true.

Their discussions include the detail, long denied by the Post Office, that third parties could access systems remotely and alter transaction data. Sub-postmasters successfully argued in court that they could not be held solely responsible for any shortfalls because of this third-party access.

Crichton's evidence is also expected to spell out some of the difficulties that existed for general counsel in raising concerns, particularly when executives fail to act in response.

Chris Aujard, Crichton's successor, is scheduled to appear at the inquiry tomorrow. Jane MacLeod, who succeeded Aujard, is due to appear in June, shortly after current counsel Ben Foat takes the stand.

Somewhere along the way, lawyers have stepped over the red line

James Hartley, Freeths

Contemporaneous documents suggest that there may have been opportunities for the Post Office to prevent litigation.

The Post Office's general counsel were involved in commissioning half a dozen reports and reviews by external auditors and consultants, including BAE Systems, Deloitte, EY, and Second Sight, in the decade leading up to the 2019 High Court

case.

Some of these reports found faults with internal systems and how they were managed. External lawyers in 2013 warned the Post Office that the business was at risk of breaching its obligations as a prosecutor over improper practices, if any decision were made to shred documents, which prevented disclosure.

Richard Moorhead, a professor of law and professional ethics at the University of Exeter, says matters should be reported “up the ladder” and that general counsel need to act as a “moral compass” within an organisation. “They need to speak up if they think things are being done which are improper and ensure the client hears those things,” he says.

Moorhead, who sits on the government-appointed Horizon Compensation Advisory Board, is a vocal critic of the lawyers involved in the Post Office Horizon scandal.

He adds that there were occasions when in-house lawyers at the Post Office should have sought to “blow the whistle” once it became obvious that errors in the Horizon system could account for shortfalls.

General counsel play a prominent role in shaping the legal strategy of a company or organisation and advising executives on the best approach to compliance and handling legal risk. But there is sometimes tension between serving the business and acting in the public’s interest.

In the aftermath of the Enron and WorldCom fraud scandals in the early 2000s, US regulators introduced new security laws that required general counsel to report adverse information to audit committees, directors and other officials when senior leadership was unresponsive.

[GCs] need to speak up if they think things are being done which are improper and ensure the client hears those things

Richard Moorhead, University of Exeter

Brian Cheffins, a professor of corporate law at the University of Cambridge, says the new rules produced a playbook for in-house lawyers who had been “stonewalled internally”, particularly as these individuals could find themselves in “deep water” when misgovernance became evident.

But Cheffins is opposed to plans to set out general counsel’s obligations formally, and warns that doing so risks duplicating duties that already exist elsewhere.

General counsel in the UK operate under the same rules as any solicitor or barrister advising a client, which stipulate acting with integrity in ensuring that senior figures are briefed on unpalatable information. The Horizon affair has reminded lawyers of their duties when advising executives.

Hartley says: “In-house lawyers need to recalibrate their thinking on where that red line is so they know when to turn around to the person they’re advising and say, ‘No, we cannot do that’.”

Post Office general counsel: in the spotlight

Susan Crichton

In 2012-2013 she was involved in instructing Second Sight to conduct an independent investigation into Horizon. The forensic accountants raised concerns but these were not actioned by the business despite executives being briefed. Crichton left the Post Office to take on a similar role at TSB Bank in 2013; she retired in 2018.

Chris Aujard

After becoming general counsel in 2013, he was tasked with winding down a mediation scheme set up for affected sub-postmasters and removing Second Sight from its role investigating the Post Office. Meeting minutes from 2014 showed he was present when executives discussed setting aside £1mn in “token payments” to mitigate any reputational damage.

Jane MacLeod

In position as general counsel when 555 sub-postmasters brought a suit against the Post Office, MacLeod was responsible for overseeing the business’s initial response. The public inquiry will explore her handling of disclosure and response to litigation when she gives evidence in June. She resigned from the Post Office in 2019.

Ben Foat

Appointed to general counsel in 2019, Foat previously served as the business’s legal director. He appeared at the inquiry in the middle of last year after widespread disclosure failures resulted in weeks of delays to evidence. Sir Wyn Williams, chair of the inquiry, has since threatened officials with criminal penalties if such problems recur.

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