

**CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION
Steering Group Meeting: [5 September 2018]**



Decision: Should Post Office apply to strike out inadmissible parts of the Claimants' evidence?

BACKGROUND

On 24 August 2018, the parties each served their witness evidence for the Common Issues trial:

- Post Office served 14 witness statements – see the Annex to this paper for details.
- The Claimants served 6 witness statements, one for each Lead Claimant.

Having reviewed the Claimants' evidence, WBD and Counsel believe that substantial parts of it are very likely to be inadmissible. The inadmissible parts nearly all relate to events that took place after each Lead Claimant entered into their contract with Post Office, such as complaints about helplines and support, problems with training, allegations against Horizon and the circumstances of their terminations / resignations.

This matter has been considered previously by the Steering Group. When drafting Post Office's Defences to the 6 Lead Claims, Post Office elected (on our advice) not to plead to the inadmissible elements of those Claims. Similarly, when preparing its own evidence, our recommendation, and Post Office's resulting instruction to us, was to avoid giving evidence on inadmissible topics where possible. This approach was taken so to maximise the scope for attacking the Claimants' evidence as inadmissible, without the Claimants being able to criticise Post Office for relying on similar inadmissible material.

We are now seeking Post Office's instructions on whether it wishes to apply to the Court to have the inadmissible parts of the Claimants' evidence struck out in advance of trial in November 2018.

Attached is the Decision Paper from the Steering Group meeting on 17 July 2018 which sets out an explanation of why certain evidence may be inadmissible. We also attach a note from Counsel providing more detailed explanation on the law of admissible evidence. In very simple terms, events that take place after a party enters into a contract are generally (but not always) inadmissible as evidence as to what that contract means. This is the critical point that underpins the proposed strike out application.



PLSG Decision Paper
- Inadmissible Evidence



Counsel Note on
Inadmissible Evidence

THE PROPOSED APPLICATION

Over many months we have flagged the above concerns to the Manging Judge. In June we asked him to give guidance on what material would be admissible and permitted as evidence. From his comments he appeared to be broadly in agreement with Post Office's approach but declined to give any formal directions. His preferred way to proceed was for the evidence to be produced and then Post Office could either (i) deal with it at trial by essentially ignoring it or (ii) apply for it to be struck out. We are now proposing that Post Office takes the second course of action.

Accompanying this paper are:

- A witness statement (by Andrew Parsons) setting out the reasons why the Claimants' evidence should be struck out.

- Marked up copies of the Claimants' evidence – the highlighted sections are the parts that we are suggesting be struck out.

As can be seen from the Claimants' marked-up evidence, we are proposing that around 30% - 50% of each statement is struck out.

In terms of the merits of the application, we are confident that we are targeting material that is very likely inadmissible. The risk of the application failing comes from the very fact of asking a Judge to strike out evidence without hearing it at trial. To ask a Judge to dismiss evidence upfront creates the risk (to the Judge) of being accused of following an unfair trial process. In effect, of having made a decision without hearing all the evidence. Judges are therefore naturally reluctant to strike out evidence in advance of trial without good cause, even where they believe that evidence is irrelevant or inadmissible.

In nearly all litigation about a disputed contract, the evidence contains some inadmissible material because weeding out all inadmissible material takes significant effort. This evidence is usually either ignored by the Judge or dealt with in submissions at trial and then decided on by the Judge in his full judgment after trial. The rules of admissibility are well-trodden legal ground and so issues of this nature tend either to be small and so take very little time to deal with or, where they are important, they are limited in scope to a few finely balanced points or constrained to a specific disputed fact or event. In these circumstances it is feasible to address these matters at trial without any pre-trial intervention by the Court.

What makes the situation different in this case is the scale of the inadmissible material (30% - 50% of the Claimant's evidence) and that it egregiously oversteps the line. Neither Counsel nor we have ever seen a case where a party has so blatantly sought to rely on so much plainly irrelevant and inadmissible evidence.

Nevertheless the safe option for the Judge is to push this question off and deal with it at trial. The success of the application will therefore turn on persuading the Judge that (i) he is legally correct to strike out the offending material and so not at risk of challenge and (ii) that not doing so will create profound difficulties at trial in terms of having to handle lots of inadmissible material.

We therefore propose to limit the strike out application to that material which we confidently believe to be inadmissible. There is more material in the evidence that is arguably also inadmissible but they we do not propose be struck out before trial. We believe the application will more likely be successful if we do not ask the Court to wrestle with some of these more finely balanced points at a preliminary stage.

ADVANTAGES

The benefits of making the application are as follows:

- The Claimants wish to put in lots of material about how Post Office and Horizon operated because it is easy for them to cast aspersions but difficult for Post Office to quickly rebut these. They are hoping this will prejudice the Judge's thinking into seeing them as a vulnerable group of quasi-employees who need to be protected from Post Office and thus hope that he will interpret the contract terms in a way that is favourable to the Claimants. Removing this material before trial mitigates this line of attack.
- If this material is not struck out, Post Office will be at a substantial disadvantage at trial because there will be points of fact in dispute on which it will not have submitted any responsive evidence.
- The application should flush out the Judge's position on what is admissible in advance of trial (whether that supports Post Office's view or not). This would allow us to:
 - Better assess Post Office's prospects of success at trial, giving Post Office more time to take mitigating action if needed.
 - Potentially (though the scope for this is very limited) submit some further late evidence to address any specific and critical points that the Judge believes to be admissible but on

which Post Office has so far offered no evidence. Without making the application, we see no prospect of getting permission to put in extra evidence now.

- Further time at trial may be needed to explore all the extra points raised in the inadmissible parts of the evidence. At present, we do not believe there is sufficient time to do this in the current 4 week trial period, which could lead to a longer trial or, worse still, an adjourned trial causing months of delay. A strike out avoids these problems.

RISKS

The risks and disadvantages of making the application are as follows:

- If Post Office loses the application, it will likely be ordered to pay the Claimants' costs, which could be in the region of £50k - £150k.
- If the Judge adopts a forensic approach, and goes through the statements line-by-line, this could take 1 – 2 days and would distract substantial resource from trial preparation. We consider this manageable in light of having two QCs instructed and available.
- There is a small prospect the Judge sees Post Office as acting oppressively. We do not believe that this likely given (i) his previous comments and (ii) this is an important substantive issue (and thus different from the Security Application discussed recently which came with the risk of being seen as a distracting satellite issue).
- The Claimants may make a cross-application to strike out parts of Post Office's evidence. In line with the agreed approach, we have carefully policed Post Office's evidence so that it stays largely in bounds, but there are a few areas where we have, for pre-meditated tactical reasons, strayed close to, or slightly gone over, the line of admissibility. We are not overly concerned by the threat of a cross-application because we are confident that Post Office's evidence is robust and any at-risk areas of evidence are not critical to Post Office's case.

ALTERNATIVE OPTION

The alternative option is to not make the application and deal with the inadmissible evidence at trial. This would mean that Post Office would not know the Judge's views on this key topic until his full substantive judgment is received after the trial is concluded, at which point it will be too late to adjust the strategy or take any mitigating steps.

It would also make trial preparation much more complex, as Post Office would need to prepare cross examination on points that it believes are inadmissible even though, in all likelihood, the Judge will not rely on them in his final judgment. This is inherently inconsistent and may make Post Office's case appear muddled and confused.

RECOMMENDATION

The recommendation of WBD and Counsel is to make the application. We anticipate that the Judge will be broadly supportive of the application, striking out many parts of the Claimants' evidence but perhaps not striking out everything that Post Office seeks.

Even if not successful, the application will make us better informed about the approach the Claimants will take at trial on these points (something they have been deeply unclear about up to now), thus allowing us to more accurately advise Post Office on the merits of its position and to be better prepared for trial.

Appendix

Post Office's evidence

Set out below is an overview of the evidence filed by Post Office. Post Office has served 14 statements which cover 3 topics:

- A. Structure of Post Office Limited's business;
- B. Appointment of Subpostmasters; and
- C. Claimant-specific evidence.

A. STRUCTURE OF POST OFFICE'S BUSINESS

Angela Van Den Bogerd

General overview of Post Office's business, including:

- Post Office as a business
 - Public ownership
 - Commercial operating model [see also **Nick Beal**]
 - Network size and coverage
 - Brand
 - Market change and competition
 - Technological change
 - Client products and requirements
 - Regulatory requirements
 - Change programmes
- Subpostmasters and their branches
 - Subpostmasters' businesses [see also **Nick Beal** and **Michael Shields**]
 - Operating a branch
 - Assistants
 - Horizon
 - Training and support
 - Causes of shortfalls [see also **Helen Dickinson**]
 - Post Office's reliance on Subpostmasters
 - Responsibility for shortfalls

Nick Beal

Overview of Post Office's contracts with Subpostmasters [see also **Angela Van Den Bogerd**] and the role of the National Federation of Subpostmasters.

Helen Dickinson

The risk of fraud and dishonesty in branches, including:

- Fraud in branches;
- Concealing shortfalls;
- Shortfalls caused by dishonesty; and
- Monitoring assistants.

B. APPOINTMENT OF SUBPOSTMASTERS

John Breeden

The selection and appointment of Subpostmasters and the circumstances in which a Subpostmaster's contract may be suspended or terminated with or without notice, including:

- The appointment of new Subpostmasters [see also ***Sarah Rimmer*** and ***Paul Williams***];
- Vacancies [see also ***Sarah Rimmer***];
- Business plans [see also ***Timothy Dance***];
- Interviews;
- Suspensions [see also ***Michael Shields***];
- Termination without notice; and
- Termination on notice.

Paul Williams

- The appointment of new Subpostmasters in the 1990s

This statement also deals with specific evidence as set out in section C below.

Sarah Rimmer

Post Office's appointment process for Subpostmasters from around 2007 to May 2017, and the checks that Post Office undertakes regarding the appointment of assistants, including:

- The vetting of Post Office assistants
- Advertising a vacancy;
- The application process [see also ***Timothy Dance***]; and
- The paperwork and contracts provided to applicants [see also ***Nick Beal***].

Timothy Dance

This statement provides further detail on business plans, as introduced in the statements of ***John Breeden*** and ***Sarah Rimmer***, and investment in branches, including:

- Purpose and content of business plans;
- Completion of business plans;
- Review of business plans;
- Passing and failing business plans;
- Investment in NT branches; and

- Investment in other branches.

David Longbottom

This statement provides information on transfer audits when a new Subpostmaster takes on a branch. This statement also deals with specific evidence as set out in section C below.

Michael Shields

Temporary Subpostmasters, including:

- Appointment process for Temporary Subpostmasters;
- Process for interviewing and appointing Temporary Subpostmasters; and
- Number of Temporary Subpostmasters.

C. CLAIMANT SPECIFIC EVIDENCE

LEAD CLAIMANT: ALAN BATES

Paul Williams

In addition to the issues in section B above, Paul Williams' statement deals with Lead Claimant Alan Bates' Conditions of Appointment.

LEAD CLAIMANT: MOHAMMAD SABIR

Michael Haworth

This statement deals with Lead Claimant Mohammad Sabir's interview.

Michael Webb

This statement deals with Lead Claimant Mohammad Sabir's transfer audit in respect of the Cottingley branch.

LEAD CLAIMANT: NAUSHAD ABDULLA

Elaine Ridge

This statement deals with Lead Claimant Naushad Abdulla's interview.

LEAD CLAIMANT: LOUISE DAR

Brian Trotter

This statement deals with Lead Claimant Louise Dar's interview on 9 December 2013.

LEAD CLAIMANT: ELIZABETH STOCKDALE

Andrew Carpenter

This statement deals with Lead Claimant Elizabeth Stockdale's interview.

David Longbottom

In addition to the issues in section B above, David Longbottom's statement deals with Lead Claimant Elizabeth Stockdale's transfer audit.