

LEGALLY PRIVILEGED AND CONFIDENTIAL – PLEASE DO NOT FORWARD



## Summary of the Common Issues Judgment (CIJ)

**(Bates and Others v Post Office Ltd ((No 3) Common Issues) [2019] EWHC 606) (15/3/2019)**

### Background

The CIJ was one of two key intermediate steps in the Group Litigation brought by 555 Postmasters under a Group Litigation Order (GLO), seeking civil damages for terminations and prosecutions. The intention was that each postmaster's case would ultimately need to be judged individually<sup>1</sup>, but it was recognised that there were a number of issues which were common to all or most of the cases, and that it made sense to try these 23 points together in one central hearing. These common issues covered how Postmaster contracts were entered into and the way they should be interpreted. Mr Justice Fraser ruled on these points in the CIJ in March 2019.

The judgment is 1,122 paragraphs long, so this is the briefest of summaries; please let Neil Wallis know if there are any aspects where more detailed briefings would be helpful. In particular, we have not focused on the judge's assessment of the evidence and witnesses, or issues of procedure, the postmasters' individual cases, agency issues, relations with NFSP, or how the Postmaster contracts were entered into.

### The Postmasters' Case

The approach taken by the Postmasters was that the contracts were very one-sided documents written by POL and imposed, without negotiation, on Postmasters. They were very light on the obligations and limitations placed on POL, yet they regulated a long-term relationship which depended on mutual trust and confidence. The case put forward was that Post Office were required to operate in good faith, and in particular the Postmasters claimed that:

- a large number of 'implied terms' should be understood as governing the contracts; and
- some other terms, which were unfair, should be deleted from the contracts.

The postmasters argued that there were 21 implied terms, and because the central concern was the liability for apparent accounting shortfalls, and the prosecutions that had followed, they focused on issues such as:

- the obligation for POL to provide an IT system that was fit for purpose, with 'error repellency';
- the need for fair, transparent, consultative investigations of problems;
- the need for POL to disclose whether similar issues had occurred elsewhere; and
- the need for any remedies (eg terminations, or suspensions without pay) to be proportionate.

### The Post Office Case

The Post Office case was effectively the opposite. The approach was that these were commercial B2B contracts with no overriding duties of good faith and where implied terms should be approached with the utmost of caution. POL accepted that it should not be dishonest, arbitrary or capricious, but would not go further than this.

### The Judgment

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<sup>1</sup> in the end this did not happen, because the parties reached a settlement

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The judgment sided with the Postmasters in almost all areas, and the judge indicated that much of the evidence provided on behalf of POL was unsatisfactory.

- He held that the law recognises a category of commercial contracts as being '*relational*'; and that in such contracts there would be a duty of good faith between the parties; having set out a number of factors taken from caselaw that would decide this, he held that the Postmaster contracts were indeed '*relational*' contracts, and accepted (with one minor amendment) all the implied terms the Postmasters had argued for.
- He defined the duty of good faith broadly: it included honesty, but went much further, and required that the parties refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, cooperation, trust and confidence are implicit in this duty.
- He also agreed that these contracts were subject to the 1977 Unfair Contract Terms Act, and noted a significant differential in bargaining power between POL and Postmasters; on this basis he deleted a number of other clauses which he decided were unfair.
- Finally, whilst the wording allowed Post Office to terminate for material breaches of contract, and for a number of specific breaches, he held that only the most serious ('repudiatory') breaches could actually justify a termination.

The case did not award damages – it was only an intermediate case – but it was clearly a vitally important victory for the Postmasters' campaign. It was followed by a second intermediate case, which focused on the reliability of the Horizon System itself, and on the existence of various bugs.

### **Key takeaways for today**

1. **Clauses:**
  - a. The current Postmaster contracts must be read in line with the judgment, with the additional wording added and with other clauses deleted.
  - b. Other clauses in the contracts are subject to the overriding duty of good faith; this makes it more difficult to apply the Postmaster contracts, as the words on the page are not necessarily the whole obligation once 'good faith' is taken into account.
2. **Processes**
  - a. All contractual actions and decisions by Post Office must be made on the basis of the good faith duty, even if there are no specific words in the contract limiting Post Office's discretion.
  - b. Therefore all processes must be auditable and defensible as being in line with the good faith duty.