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**POST OFFICE GROUP LITIGATION**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**BETWEEN:**

**ALAN BATES & OTHERS**

**Claimants**

**- and –**

**POST OFFICE LIMITED**

**Defendant**

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# UPDATE TO THE OPINION ON THE COMMON ISSUES

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## A: Introduction

1. This document is further to the Opinion on the Common Issues dated 10 May 2018 ("the Opinion"). Its purpose is to re-visit the Opinion that we provided in May in light of (i) events in the proceedings since that date, (ii) developments in case-law and (iii) the further consideration that we have given to the Common Issues in the course of preparing for the November trial.

2. We do not consider that there is any reason substantially to change the views that we expressed in the Opinion. Our overall view on the merits is unchanged, and the risks that we identified remain present.

3. By way of update:

   (a) The evidence that was served over the summer is largely as we expected it to be, both as regards the detail and force of evidence that Post Office is able to provide (bearing in mind the passage of time since the events in many of the Lead Claims) and as regards the content and scope of the Lead Claimants' evidence. A factor now is whether and to what extent Post Office succeeds in its application to exclude (entirely or at least from the requirement to challenge by cross-examination) large parts of the Lead Claimants' evidence on the basis that such evidence is inadmissible and/or irrelevant on the Common Issues.

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(b) There have been a few cases in 2018 that justify some comment and that we may refer to at the November trial. None of them changes our views on the Common Issues.

(c) We have given further consideration to issues as to the burden of proof in relation to losses and shortfalls. Our opinion on those issues remains essentially the same, but we can now provide an outline as to how we propose to argue these (fairly difficult) points before the Managing Judge.

## B: Evidence for the Common Issues Trial

4. In the Opinion, we highlighted the risk that the Lead Claimants would seek to rely on inadmissible evidence, explaining that it was difficult to predict whether that evidence could be excluded before trial and, if not excluded, what effect it may have:

> *... we do not know how the Managing Judge intends to manage the trial. It is now clear that the Claimants will be seeking to adduce evidence intended to have a prejudicial* [effect] *on his mind, including evidence of high-handed or apparently unfair conduct by Post Office which the Claimants will say demonstrates a callous, uncaring or even hostile attitude towards Subpostmasters. The Claimants hope that the Managing Judge will see them as a vulnerable group of quasi-employees who need to be protected from a rapacious quasi-employer and that, in order to protect them, he will want to adopt an unusually creative or aggressive approach when interpreting the largely one-sided forms of contract which Post Office required them to sign.*
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> *It is a fact of life that, even though it may be irrelevant to the legal issues which a judge is required to decide, prejudicial evidence can have a major impact on the conclusions the judge ultimately reaches on such issues. We cannot predict with any degree of accuracy the extent to which the Managing Judge will allow the Claimants to rely on such evidence. Nor can we predict what the evidence will look like, whether Post Office will be in a position to produce satisfactory evidence in rebuttal, or how these matters will affect the Managing Judge's approach in deciding the Common Issues. In this respect, Post Office is in a difficult tactical position. It will obviously be helpful to keep as much prejudicial material as possible out before the trial starts. On the other hand, we do not think that Post Office will succeed in keeping all of it out and, if Post Office tries too hard to keep it out, this could itself have an adverse impact on the Managing Judge's perception as to where the merits lie.* (paras 7-8)

5. Since the date of the Opinion, there have been the following developments:

(a) Following an agreed extension of time, the evidence for the Common Issues Trial was exchanged on 28 August 2018. The Claimants included substantial evidence that was inadmissible and/or irrelevant and that addressed issues which were not covered in Post Office's evidence because Post Office had, rightly in our view, sought to adduce only admissible evidence.

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(b) On 29 August, Post Office wrote to the Claimants to request that they remove the inadmissible evidence from the six witness statements that they had served. The Claimants refused to do so.

(c) On 5 September, Post Office issued an application to strike out the inadmissible evidence ("the Strike Out Application"). The Court listed the application to be heard at the CCMC on 19 September.

(d) On 11 September, the Managing Judge invited submissions as to whether the Strike Out Application should be heard at the 19 September CCMC. Post Office submitted that it should be and that it, given the limited time available at the CCMC, it would be content for the security for costs application to be adjourned to another date to allow time for the Strike Out Application to be heard on 19 September and so well in advance of the trial in November.

(e) The Managing Judge decided that the Strike Out Application should instead be listed on the first available date that he could accommodate, 10 October. He appeared to be fairly hostile to the application. This was surprising given that he had previously indicated that such an application may be required and would be dealt with by the Court, over two days if necessary. We would note, however, that the Managing Judge had only just returned from vacation and did not seem to have had a sufficient opportunity to consider the Lead Claimants' evidence in detail; nor was he entirely on top of the detail of the application. He indicated that he would not accede to the application unless satisfied that it would be proportionate, as a matter of case management, to strike out the evidence rather than leaving it to be addressed as appropriate at trial.

(f) In light of this development, Post Office applied at the CCMC on 19 September to have the Strike Out Application adjourned to the first week of the trial. It argued that this would have the advantage of avoiding duplication of effort (in that ordinary trial preparation would involve all the reading necessary to decide the application) and would put the Court in the better position of being able to consider the evidence with the benefit of the parties' Opening Submissions. The Managing Judge refused that application. His attitude towards the Strike Out Application did, however, appear to have shifted again: he now appeared willing to "roll up his sleeves" and consider the evidence point-by-point.

6. The Managing Judge is at times inconsistent. This inconsistency brings unwelcome risk and uncertainty, and we have to take this into account when weighing the balance of risk and reward in relation to procedural disputes.

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7. In this context, since the hearing on 19 September, our instructing solicitors have engaged with the Claimants on an open and, separately, on a without prejudice basis to narrow the scope of the Strike Out Application and so limit the size of the task that the Managing Judge has to undertake on 10 October. We consider that this approach is likely to maximise the prospects of excluding (either entirely or from the requirement to challenge by cross-examination) the most objectionable parts of the Lead Claimants' evidence.

8. Our view is that the Managing Judge is likely to decide the Strike Out Application largely in Post Office's favour. There are various ways to achieve that outcome that could fall short of formal strike out, including that the Managing Judge could provide rulings or even mere indications as to admissibility that (although perhaps expressed to be only provisional before the trial) will have much the same practical effect as strike out in terms of constraining the Claimants' own evidence, submissions and cross-examination of Post Office's witnesses.

9. We consider that the Strike Out Application, however precisely it is determined, will achieve the objective of bringing the issue of admissibility to the fore and enabling the Court to tackle it head-on, rather than it becoming a distraction at trial. We do not consider that there was or is now any sensible alternative approach for Post Office to take given the Lead Claimants' approach and the Managing Judge's understandable desire not to be seen to "shut out" their wish to "tell their story" (the language he used at the hearing on 11 September). Ultimately, we expect the Managing Judge to realise that the November trial could become unworkable unless he provides a strong and clear ruling on admissibility, and we are confident that he will then do so. There is always scope for argument about the status of particular passages of evidence, but we remain of the view that it is likely that the Managing Judge will agree with Post Office's submissions as to the principles by which admissibility is to be determined in this case and will thus accept the basic thrust of the application.

## B: Update on relevant case-law

10. There have been no major developments in the case-law relevant to the Common Issues. Nonetheless, there are several cases that are worthy of some comment.

11. In relation to Common Issues 2 and (implied terms), there have been two helpful cases:

    (a) In **J N Hipwell & Son v Mrs Clare Szurek** [2018] EWCA Civ 674, the Court of Appeal reasoned that the Judge had erred by implying a term to reflect what she considered to be the parties' subjective intentions (see [19], referring to the parol evidence rule, and [25]). The Court of Appeal also re-stated the orthodoxy that

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**Liverpool City Council v Irwin** [1977] A.C. 239 concerns the implication of terms in law, which is distinct from the implication of terms in fact (see [25]).

(b) In **Robert Bou-Simon v BGC Brokers LP** [2018] EWCA Civ 1525 at [12] to [13], the Court of Appeal[1] emphasised two important points of principle: first, that it is impermissible to use hindsight to justify the implication of a term and, second, that the Court cannot proceed to consider implying a term without first construing (the relevant) express terms:

> *It seems to me that the judge succumbed to the temptation described by Bingham MR in the Philips case, referred to in Marks & Spencer at [20] and therefore, fell foul of the first proviso to what Lord Neuberger described as a "notion" at [23]. The judge implied a term in order to reflect the merits of the situation as they now appear. He did not approach the matter from the perspective of the reasonable reader of the Agreement, knowing all its provisions and the surrounding circumstances at the time the Agreement was made. It is not appropriate to apply hindsight and to seek to imply a term in a commercial contract merely because it appears to be fair or because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for the implication of a term: see Marks & Spencer per Lord Neuberger at [21].*
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> *Furthermore, in my view, the judge began the task of determining whether a term should be implied from the wrong starting point. As Lord Neuberger pointed out at [28] of his judgment in the Marks & Spencer case, it is only after the process of construing the express words of a contract is complete that the issue of an implied term falls to be considered. Until one has determined what the parties have expressly agreed, it is difficult to decide whether a term should be implied and if so, what the term should be. The judge concluded at [89] of his judgment that: ". . . any notional reasonable person would have regarded the contract as an agreement for the making of a repayable loan which would be forgiven only on completion of the full four years of the initial term of engagement, by which, if the initial period was not completed in the circumstances which actually occurred, was repayable in full . . ." It seems to me that in doing so, he construed the Agreement in order to fit the Implied Term rather than begin with the express terms themselves.*

12. In relation to Common Issue 1 (relational contract and an implied term as to good faith), there is a potentially helpful Scottish case. In **Unicorn Tower Ltd & Others v HSBC Bank Plc** [2018] CSOH 30, the Court of Session reasoned at [71] to [72] that any implied term as to good faith (whatever its juridical basis) would have to satisfy the (strict) test for implication in **Marks and Spencer v BNP Paribas Securities Services** [2015] 3 WLR 1843.[2] We may refer to this case in support of an argument that the agreed implied terms

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[1] Asplin LJ, with whom Singh and Hickinbottom LJJ agreed.

[2] We find some of the reasoning in this case difficult to follow. The Court of Session proceeded on the basis that it was not necessary to decide whether or not Scots private law contains a general obligation as to good faith. If that submission had been accepted, however, the term

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as to necessary cooperation and the prevention of performance (Stirling v Maitland) fill any gap that might otherwise call for the implication of a term as to good faith, making such a term unnecessary.

13. The Court of Session also held at [71] that an implied term as to good faith could not restrict an express contractual right to terminate on notice. This is a helpful re-statement of the orthodoxy on this point.

14. In relation to Common Issues 5 and 6 (onerous and unusual terms), in **Woodeson v Credit Suisse (UK) Ltd** [2018 EWCA Civ 1103 at [42] to [46], the Court of Appeal strongly doubted the applicability of the **Interfoto Picture Library v Stiletto Visual Programmes** [1989] QB 433 in cases where the parties sign a written contract. At [45], the Court of Appeal placed weight on the fact that the party seeking to rely on **Interfoto** had been told of the need to obtain independent legal advice. In the following paragraph, the Court of Appeal[3] stated as follows:

> *In any event, when the contractual documentation is signed, the Interfoto principle has no, or extremely limited, application, see Peekay v Australia and New Zealand Bank [2006] EWCA Civ 386, para 43 per Moore-Bick LJ.*

15. We refer to the long discussion at paras 184 *et seq* of the Opinion. In that context, it may prove useful to have a further and very recent example of the Court of Appeal's hostility to reliance on **Interfoto** in ordinary commercial cases.

## C: Burden of proof

16. We refer back to paras 39 and 40 of the Opinion, in relation to the construction of Section 12, Clause 12 of the SPMC (Common Issue 8) and to paras 42 to 48 in relation to part 2, para. 4.1 of the NTC. The issues here are complicated. We have considered them further and presently intend to argue the burden of proof as follows.

17. First, Section 12, Clause 12 does not involve any express contractual allocation of the burden of proof. Its words do not allocate the burden to one party or the other. The same is true of Part 2, para. 4.1 of the NTC.

18. Second, Section 12 Clause 12 should, however, be construed consistently with the principles identified in para. 93 of the Generic Defence and Counterclaim. It should not cut across those principles Again, the same applies to Part 2, para. 4.1 of the NTC

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would surely have been implied in law, rather than in fact, making the test in **Marks & Spencer** inapplicable.

[3] Longmore LJ, with whom Leggatt LJ agreed.

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19. Third, in this context, the burden of proof operates as follows:

(a) Post Office bears the burden of proving that there was a "*loss*" for the purposes of Section 12, Clause 12 and/or Part 2, para. 4.1 of the NTC . We believe that it would be prudent for Post Office to accept in argument that a Horizon-generated loss would not qualify as a genuine "*loss*" under these clauses.[4]

(b) In the ordinary case, Post Office can prove that there were one or more "*losses*" by inference from the fact of a shortfall in the branch accounts. This inference is sound because (i) the Subpostmaster is bound by his account and (ii) it is, in the absence of evidence to the contrary, reasonable to infer that a shortfall would not have arisen without one or more losses. As a matter of construction, a requirement for Post Office to identify and prove directly the underlying loss or losses would be impracticable and uncommercial. Post Office would typically have no way of knowing whether cash was lost or stolen from the branch, for example.

(c) The inference of a "*loss*" from a shortfall would, however, be undermined in a case where there was some reason to believe that the shortfall (and/or losses underlying it) may have been generated by Horizon. In our view, whether or not the inference could be sustained in that kind of case would depend on the particular factual circumstances, including (i) the likelihood of the alleged Horizon error(s) having generated that shortfall and (ii) any evidence indicating that other causes for the shortfall were comparatively more likely (such as other shortfalls having arisen in the branch in circumstances where Horizon was not potentially at fault, dishonesty on the part of the Subpostmaster and/or Assistants, etc).

(d) The practical effect of this may be to shift the evidential burden to Post Office to prove a "*loss*" to be genuine where the Subpostmaster can provide reasonable evidence or argument to suggest that the shortfall resulted in fact from error in Horizon. It is unclear precisely what threshold would have to be crossed before the burden would shift, but we do not consider that the *possibility* of error comes anywhere close to to the required level of evidence.

(e) Where Post Office proves a loss, it is for the Subpostmaster to show that the conditions for liability in Section 12, Clause 12 are not met (i.e. loss caused by an act or omission of an Assistant or caused by the Subpostmaster's negligence, carelessness or error).

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[4] We consider that this is the better view as to the construction of the word "*loss*". See also para. 38 of the Opinion.

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Similarly, it is for the Subpostmaster to prove that the exception to liability in Part 2, para. 4.1 of the NTC applies on the facts.

20. We do not resile from para. 39 of the Opinion as to the potential for the issue in sub-para. (c) above to be determined by reference to the principle that an agent is bound by his account unless he can show it to contain a mistake. This principle should provide support for Post Office's case as to how the contractual provisions must have been intended to operate (i.e. consistently with the agency relationship that the parties chose).

**D: Further implied terms**

21. We anticipate that the Managing Judge may well be looking for some points on which he can give a small victory to the Claimants, especially if (as we anticipate) he will decide most of the construction and implication issues in Post Office's favour. It may be in Post Office's interests to subtly identify small weaknesses in its case, where there is no real downside to losing on the point. We identify two possible candidates for this approach below.

22. We remain of the view expressed in para. 53(a) of the Opinion that the Court may well imply a term to restrict Post Office's right to suspend, requiring that there be "*reasonable grounds*" for suspension (on one or more of the grounds identified in Section 19, Clause 4 of the SPMC or Part 2, para. 15.1 of the NTC). We presently propose to argue this issue in light of that real risk and, in particular, not to press hard the inappropriateness of such a term.

23. We consider that a similar approach may be appropriate for the issues (which do not strictly arise on the Common Issues) identified in para. 55 of the Opinion. In particular, we consider that the Managing Judge may be more sympathetic to Post Office's case on suspension if he is satisfied that Subpostmasters would have a meaningful opportunity to seek repayment of remuneration after a period of suspension (with Post Office's discretion in that regard being subject to a requirement of honesty, rationality or even reasonableness).

24. Specifically, at the time of filing the Individual Defences, we sought instructions to plead that section 19, clause 6 of the SPMC was subject to an implied term that the discretion as to the remuneration paid to suspended Subpostmasters would not be exercised dishonestly or in an arbitrary, capricious or irrational manner, but Post Office was understandably reluctant to concede the point at that time. It has since been drawn to our attention that Post Office conceded a similar implied term in **Lalji v Post Office Ltd** [2003] EWCA Civ 1873, which we think was prudent. In our view, the Court is likely to imply a similar term in this case. We can see real tactical merit in conceding the point (or at least not arguing it hard)

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and so avoiding losing credibility with the Managing Judge when it comes to other arguments focussed on the commercial sense of the agreement.

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**28 September 2018**