

Confidential and Legally Privileged

**Post Office Group Litigation****Summary of Counsels' Opinion on the Common Issues**

1. Counsel's Opinion focuses exclusively on the Common Issues that will be heard at the trial in November 2018. Those issues all relate to the true meaning and effect of Post Office's standard contracts with its Subpostmasters.
2. The Opinion runs to 87 pages of detailed legal analysis. This summary is a useful aid to the key points but it is not a substitute for a careful reading of the Opinion which explains the full complexity and nuances of the Common Issues. This summary should not be relied on by Post Office.
3. Comments below in **RED** are from WBD and reflect where we believe Counsel's views on the legal merits are more likely, at a general level, to manifest into real-world issues for Post Office. It should however be noted that any particular case could have unique features that might place Post Office in difficulty.
4. Overall, Post Office has the stronger of the arguments on most of the Common Issues, though some are finally balanced. There are 23 Common Issues (with many more sub-issues) to be tried in November 2018. It is expected that Post Office should win most of these, but with so many issues in play, the odds are that it will also likely lose on some, and some of those may be significant.
5. The most important Common Issue is around the liability of Subpostmasters for "losses". The Claimants argue that Post Office needs to show that a Subpostmaster's actions have caused Post Office to suffer a net economic detriment, not just that a branch's accounts show a shortfall. Post Office's position is that if a shortfall is shown in the branch's accounts then the default position is the Subpostmaster is liable for that shortfall (absent any conflicting evidence to the contrary).
  - a. In Counsel's view, Post Office is in the stronger position on this key issue, but it is finely balanced. In their view, the Subpostmaster Contracts require Subpostmasters to repay shortfalls in the branch's accounts they have submitted without Post Office having to show that the accounting shortfall has resulted a net economic detriment to Post Office (ie. it does not need to show that it is a "real loss"). This is however a very complex point and the drafting of the Subpostmaster Contracts is in places unclear and open to challenge.
  - b. It is likely as a matter of agency law that:
    - i. Post Office is entitled to rely on the branch accounts submitted by a Subpostmaster as good evidence that there has been a loss in a branch.
    - ii. A Subpostmaster who wants to challenge a loss in the branch accounts he has submitted bears the burden of proving that those accounts were inaccurate.
    - iii. This starting point does not apply where a Subpostmaster has not submitted his accounts or has submitted them under protest.
  - c. The above statements reflect the default position in the absence of any other evidence. If a Subpostmaster can point to circumstances that show his accounts were inaccurate (eg. an incorrect Transaction Correction issued by Post Office caused the branch accounts to wrongly show a shortfall) or that he was not responsible for a shortfall (eg.

the shortfall was caused by a bug in Horizon), then the above assumptions will be displaced. This will need to be assessed on a case by case basis.

- d. Post Office must provide reasonable cooperation to assist a Subpostmaster in investigating a loss if the Subpostmaster needs such support. Failure to provide such support would be a breach of contract by Post Office that could prevent or limit the recovery of loss from a Subpostmaster.
  - e. In WBD's experience:
    - i. Post Office has not consistently provided information (particularly branch account information) to Subpostmasters who have been suspended or terminated so to allow them to investigate losses.
    - ii. The involvement of the Security Team has in some of the cases we have seen delayed Post Office's cooperation. The Security Team's priority was to establish criminal misconduct and, for proper reasons of criminal procedure, other cooperation was often paused whilst the Security Team investigated a matter. This creates a tension between Post Office's contractual duty to cooperate and the need to prioritise Security Team investigations.
6. The greatest areas of weakness for Post Office are set out below. On all these points Post Office has an arguable case, but they are finely balanced and could go either way at trial.
- a. There may be an implied obligation to act in "good faith" but there is considerably scope for argument over what this might mean in practice. In its most basic form, it may mean little more than acting honestly which would place very little burden on Post Office. The Claimants however contend that it goes much further and requires Post Office to subjugate its own interests to the interests of Subpostmasters.
  - b. The Subpostmaster Contracts give Post Office wide powers to suspend Subpostmasters without pay. There is a significant risk that the Court will imply a term that restricts this power to only circumstances where Post Office has a legitimate commercial reason to suspend based on reasonable grounds.
  - c. The above implied term would also prevent Post Office keeping Subpostmasters suspended for long periods unless there are reasonable grounds to do so.
    - i. In WBD's experience, we have seen cases where Post Office has taken a very long (and arguably unjustified) amount of time to investigate a problem in a branch whilst a Subpostmaster has been suspended.
  - d. The 3 month notice period in the standard Subpostmaster Contract is open to challenge as being unduly short and unfair. If found to be unfair, it will be unenforceable and would be replaced with termination on reasonable notice. The longer termination periods in the NT Contracts are unlikely to be unfair.
  - e. It is possible that Assistants of Subpostmasters operating under an NT Contract may be able to establish that they have a legal right to be trained by Post Office (by asserting that they are entitled to directly enforce the obligations on Post Office under the NT Contracts to provide training).
  - f. There is likely to be an implied term that Post Office will not exercise either arbitrarily or capriciously any contractual discretion it has. This restriction is commonplace; the argument is whether there is any "contractual discretion" in the Subpostmaster Contracts to which it might apply. Counsel's view is that this would not, for example, apply to Post Office's right to terminate (as that is not a discretion but a right) but it might apply, for example, to Post Office's discretion to pay (or not) suspended Subpostmasters. At present, the Claimants have not identified the parts of the Subpostmaster Contracts that they say are discretionary.

7. Of particular concern is that in some cases Subpostmasters may not have been given sight of the terms of their contract before they started operating a branch, even though they signed conditions of appointment referring to those terms.
  - a. In such circumstances, the terms of the Subpostmaster Contracts may not be binding at all.
  - b. Alternatively, if they are binding, there is an increased risk that some of those terms being considered unfair and thus rendered unenforceable.
  - c. This will need to be addressed on a case by case basis and this point is being alleged by some of the Lead Claimants for the Common Issues trial.
  - d. Our investigations into this area have shown a very inconsistent practice by Post Office about what information is provided to new Subpostmasters. A common story we hear is that the contract terms were often left in the branch for the new Subpostmaster and this would mean that they were not provided in advance. This problem appears to affect Subpostmasters under the standard Subpostmaster Contract more than under the NT Contracts.
8. The above legal analysis is premised on Post Office have accepted two implied terms into its Subpostmaster Contracts, namely that:
  - i. Each party would refrain from taking steps that would inhibit or prevent the other party from complying with its obligations under or by virtue of the contract (**the Stirling v Maitland Term**).
  - ii. Each party would provide the other with such reasonable cooperation as was necessary to the performance of that other's obligations under or by virtue of the contract (**the Necessary Cooperation Term**).
  - a. Accepting these terms fills a number of gaps in the standard Subpostmaster Contracts and gives Post Office a much stronger defence against the more onerous implied terms sought by the Claimants.
  - b. However, these implied terms may have the practical effect of requiring Post Office to do things that are not expressly required by the Subpostmaster Contracts. For example:
    - iii. The standard Subpostmaster Contract from 1994 does not require Post Office to train Subpostmasters but these implied terms would require training to be provided. If Post Office then failed to provide training and that was the root cause of a loss, then the loss may be irrevocable.

Post Office's record keeping on training, especially historically, has been unstructured and confusing. We have struggled to consistently find documents and knowledgeable witnesses. This does not mean that training was not provided or that it was inadequate; but Post Office may struggle to evidence this.
    - iv. A failure by Post Office to reasonably assist a Subpostmaster in investigating a loss that is reasonably disputed by a Subpostmaster may make that loss irrevocable.
    - v. Post Office will likely be obliged to provide information to Subpostmasters that is necessary for them to operate their branches.
9. Counsel's Opinion is subject to the following limitations that could cause the merits of Post Office's position to change:
  - a. Counsel has only given a view on the legal rights and obligations which apply generally to all Subpostmasters. The facts of any specific case could change this analysis.

- b. The Claimants' case on many important issues is unclear, undeveloped and/or unconvincing. There are areas of uncertainty which will not be revealed until the Claimants serve their evidence or possibly even until the trial starts. It is however anticipated that they will improve their case by the time the trial starts, and so this Opinion will need to be revised iteratively as the case develops.
  - c. The Claimants will be seeking to adduce evidence intended to have a prejudicial effect on the Judge's mind, including evidence of high-handed or apparently unfair conduct by Post Office. Even though this evidence may be irrelevant to the legal issues which the Judge is required to decide, prejudicial evidence can have a major impact on the conclusions the Judge ultimately reaches on such issues.
  - d. In relation to some of the arguments being run on the Common Issues, the law is in a state of development or is not entirely clear (eg. implied terms of good faith). This makes the Judge's decision less predictable and increases the possibility of an appeal (by Post Office or the Claimants).
  - e. All decision makers, even Judges, are prone to trying to maintain balance in their decisions. Even if the Judge broadly agrees with Post Office, he may give some "wins" to the Claimants so that his judgment does not appear one-sided.
10. It should be noted that Counsel has not given a view on whether Post Office has in practice complied with its legal rights and obligations, either in general or in specific cases. The litigation has not yet reached the stage where such an opinion could be given.

**Womble Bond Dickinson**

**12 May 2018**