

Case No. CR1 01947

IN THE BLACKPOOL COUNTY COURT

B E T W E E N:-

POST OFFICE COUNTERS LIMITED

Claimant

and

MRS JULIE WOLSTENHOLME

Defendants

ADVICE ON EVIDENCE AND QUANTUM

1. I am asked to advise in proceedings arising out of the termination of the sub-postmaster contract of Mrs Julie Wolstenholme. The facts are well known to those instructing me and to the client. I propose therefore only to set out a short summary.

FACTUAL BACKGROUND

2. In November 1999, Julie Wolstenholme became sub-postmistress at Cleveleys modified sub-post office. She entered into a standard modified sub-postmasters' contract. Mrs Wolstenholme actually took over the sub-post office from her father who had run it for a long time previously.
3. In about February 2000, a computer system known as "Horizon" was installed at post offices across the country, including that at Cleveleys.

4. The Horizon computer system did not operate smoothly at all times, and a support help line was set up manned by personnel from the company which supplied the system.
5. Mrs. Wolstenholme claims that she had enormous difficulties with her computer system, and that it frequently malfunctioned, causing inaccuracies in stock and other figures to arise. She claims that she repeatedly contacted both the helpline and the Post Office about problems that she was encountering, but little effective was done to assist.
6. In November 2000, Mrs Wolstenholme became so disillusioned with the computer system that she decided to stop using it. This was in breach of her obligations to the Post Office and she was duly suspended.
7. Prior to this point, a number of errors and/or deficiencies had arisen in relation to Mrs Wolstenholme's Post Office accounts. Mrs Wolstenholme had repeatedly been asked to repay these deficiencies pursuant to her contract with the Post Office. She had refused, claiming that all the deficiencies and apparent errors were caused by the computer system, not by anything within her control.
8. Following a series of correspondence between Mrs Wolstenholme and the Post Office, her contract was finally terminated by letter dated 19th January 2001. This letter purported to give three months notice of termination, but expressed the contract as coming to an end on 28th February 2001.

9. Notwithstanding repeated attempts by the Post Office, Mrs Wolstenholme refused either to pay to the Post Office the monies that it claimed she owed or to return equipment which belonged to the Post Office. Ultimately, the Post Office was required to commence proceedings on both heads.
10. Mrs Wolstenholme has defended the proceedings, claiming that the computer system installed by the Post Office was defective and this was, in fact, the cause of the losses recorded within her accounts. Further, Mrs Wolstenholme puts the Post Office to strict proof of the losses it claims. Finally, Mrs Wolstenholme counterclaims for damages in respect of: wrongful termination of her contract; breach of her human rights; a claim under the Commercial Agents (Council Directive) Regulations 1993; a claim for breach of the implied term to provide a computer system fit for its purpose.
11. The trial of this matter is now about one month away. A joint computer expert's report has been obtained. This report concludes, from the limited records available, that the computer system installed by the Post Office did appear defective. There is a very limited amount of documentation available in respect of the detail of calls made by Mrs Wolstenholme and problems with her computer at the relevant time as well as in relation to the errors and losses which built up in her Post Office records. This is because these records were destroyed about 18 months after events occurred.
12. Recognising the weakness of its position, the Post Office has made a payment into court of £25,000.

13. I am asked to advise in relation to quantum and evidence. I am asked to take into particular account that the Post Office is anxious for the negative computer experts' report to be given as little publicity as possible.

ADVICE

14. I shall address the issues of this case in the following order:
- (i) The case brought by the Post Office against Mrs Wolstenholme and the issues of evidence that it raises.
 - (ii) Mrs Wolstenholme's contractual claim for failure to give notice.
 - (iii) Mrs Wolstenholme's contractual claim alleging breach of an implied term to provide a computer fit for its purpose.
 - (iv) Mrs Wolstenholme's Human Rights Act claim.
 - (v) Mrs Wolstenholme's Commercial Agents Regulations claim.

THE POST OFFICE CLAIM AGAINST MRS WOLSTENHOLME

15. Part of the Post Office's claim relates to the collection of equipment from Mrs Wolstenholme's premises. I understand this has largely been dealt with. Insofar as it remains extant, it is a simple case for the Post Office to prove precisely what has and has not been collected, and I see little justification for Mrs Wolstenholme refusing to deliver up such equipment.
16. The more difficult part of the Post Office's claim is in relation to the alleged losses lying in Mrs Wolstenholm's Post Office account. The evidential difficulty is that the primary evidence by which such losses could be established and calculated no longer

exists. The Post Office will be forced to rely upon secondary evidence as to what such primary evidence would have shown. A further difficulty is that caused by Mrs Wolstenholme's allegation that the inaccuracies are the result of the defective computer system, which, in turn, undermines the reliability of the secondary evidence relied upon.

17. In view of the negative expert's report in this case regarding the computer system in place, Mrs Wolstenholm's suggestion that the errors that arose were the result of defects in the computer system must be taken seriously. It is sufficient to place genuine and significant doubt on the evidence relied upon by the Post Office. In my opinion, to dispel that doubt and to persuade a Court that its claim was justified, the Post Office would need to be able to produce to the Court sufficient original evidence in support of its claim. It is unable to do so. I therefore conclude that the Post Office's claim against Mrs Wolstenholme in respect of losses on her account would be likely to fail.
18. I am reinforced in this view by a Court of Appeal decision on a very similar, if not identical, issue in the case of *Post Office Counters Limited v Mahida [2003] EWCA Civ No.1583*. In that case, the Court of Appeal held that in the absence of providing the original documents, such as dockets, foils and summary forms, in support of the claim made, the Post Office's case could not succeed. I can see nothing significant in the facts of Mrs Wolstenholme's case that distinguishes it from the case of *Mahida*.

19. Further, for the Post Office to have a chance of succeeding in its monetary claim against Mrs Wolstenholme, it would also need evidence of the following:
- (i) clear proof that the secondary evidence provided by the Post Office had to be or was extremely likely to be, correct;
 - (ii) clear evidence that the computer problems reported by Mrs Wolstenholm would not or could not have had any impact on the losses and figures contained within her accounting system;
 - (iii) ideally, clear evidence to counter the criticisms made by the computer expert in this case.
20. On my understanding of this case, I do not anticipate that such evidence will be available.

MRS WOLSTENHOLME'S CLAIM FOR WRONGFUL TERMINATION OF HER CONTRACT

21. Given the lack of evidence in support of the Post Office's position on losses, and also the strong evidence suggestive of serious failures in the computer system installed at the Cleveleys' premises, the suggestion that Mrs Wolstenholme was in serious or repudiatory breach of her sub-postmaster agreement appears unsustainable. In the circumstances, there would appear not to have been grounds for summary termination of that contract. Accordingly, pursuant to paragraph 9(1)(m) of the Contract, Mrs Wolstenholme was entitled to a minimum of three months notice of termination.

22. In the letter of termination sent by the Post Office to Mrs Wolstenholme, three months notice was purportedly given. This can be treated as further evidence in support of the proposition that Mrs Wolstenholme was not in fact in breach of her contract and/or that such breach was not relied upon to effect a summary determination of the contract.
23. Unfortunately, Mrs Wolstenholme was not in fact given the full three months notice to which she was entitled. As the date of the letter of termination was 19th January 2001, termination of Mrs Wolstenholme's contract should not have occurred prior to 19th April 2001. If three months notice was to be construed as three months from receipt of the written notice, that time could be extended by a few days.
24. In her Particulars of Claim, Mrs Wolstenholme claims that her period of notice should have expired on 22nd April 2001. This does not seem unreasonable.
25. In the circumstances, Mrs Wolstenholme's breach of notice claim appears likely to succeed.
26. The next issue is as to the level of damages that Mrs Wolstenholme might receive as a result. At paragraph 17(4) of her counterclaim Mrs Wolstenholme claims loss of wages from the date of her resignation until 22nd April 2001. It is my understanding that Mrs Wolstenholme has, indeed, received no wages or remuneration for all of this period. Mrs Wolstenholme treats this as a five-month period, and calculates her remuneration per month in the sum of £5,000. Having seen a "Pay Advice" for Mrs

Wolstenholme dated 31st August 2000, which shows a net payment of £5,537.65, the figure contended for by Mrs Wolstenholme does not seem inaccurate.

27. My one reservation is in relation to sums for which credit should be given. For example, no account appears to have been made in respect of tax. However, given that Mrs Wolstenholme was not an employee, but was to be treated for tax purposes as a separate trading entity, she was unlikely to be taxed on the full sum as set out on the Pay Advice referred to. I have seen Mrs Wolstenholme's profit and loss account figures for the period ending 31st December 2000, and her net profit (at £23,929) appears to be significantly lower than what she was in fact paid by the post office (£80,531). Whilst, therefore, it would be appropriate to take some account of taxation, it would be inappropriate to calculate tax on the full sum received from the Post Office.
28. Insofar as Mrs Wolstenholme made savings by not having operated the Post Office during the period in question, the Post Office should also receive appropriate credit. However, I do not have within my papers sufficient evidence of such outgoings to be able to calculate appropriate figures. This is a matter which should be addressed with Mrs Wolstenholme in correspondence, and, in the absence of co-operation, by way of application to the Court.
29. It may be that the Post Office considers that taking such further legal steps might not be cost effective in this matter where it appears that there is little prospect of recovery of any legal costs. That is of course a matter for the Post Office's consideration.

30. There are further matters which might give rise to compensation arising out of termination of Mrs Wolstenholme's contract. In general, these would arise if Mrs Wolstenholme could demonstrate that, by reason of the premature termination of her contract, she suffered specific loss over and above that which would have occurred had contractual termination taken place in the ordinary way. For example, if Mrs Wolstenholme were to prove that the early termination of her contract deprived her of a sale of the business and goodwill to a third party, she could include this in her claim for damages. At present, no such claim has been brought.
31. However I have seen some reference in correspondence from Mrs Wolstenholme to the cost of dealing with Employment Tribunal claims brought by ex-employees of the Post Office. I have no detail of these claims, and I would hope that they must be weak given the strong case of redundancy that Mrs Wolstenholme would be able to advance. However, if, for reasons which I do not know, Mrs Wolstenholme were to be found liable for these claims, and if that liability could be linked to the early termination of her contract, then it is arguable that such liability might also be included in her claim for compensation against the Post Office. At present, I can only speculate on this issue, and I have seen no further documents or evidence to support the contention.
32. In her counterclaim, Mrs Wolstenholme does, however, claim the sum of £82,500 in relation to "ingoing" that she claims she paid to the Post Office. I am informed that no such payment was ever made, because Mrs Wolstenholme took over as sub-

postmaster of the Cleveleys office in the context of a family transfer which gave rise to no such payment. This appears to be borne out by the documentary evidence. I would therefore expect Mrs Wolstenholme's claim on this to fail unless she can prove with appropriate evidence that such payment was made.

33. Mrs Wolstenholme has also referred, in correspondence, to the purchase price that she alleges she paid to her father for the sub-post office. On balance, I do not consider that the Post Office should be liable for this sum. It does not seem to constitute reasonable reliance expenditure, but, rather, is the result of a commercial and speculative risk undertaken by Mrs Wolstenholme at her own volition. To pay a substantial sum of money for a business which is entirely reliant upon the continuation of a contract with the Post Office which is terminable upon 3 months notice, is a substantial risk. It was, however, a risk undertaken by Mrs Wolstenholme without advice or representation from the Post Office. For that reason, I do not consider that the Post Office should be held liable.
34. Furthermore, on my understanding of the facts, the Post Office was not made aware of any payment having been made by Mrs Wolstenholme to her father at the time of contracting. Accordingly, upon breach of the contract between the Post Office and Mrs Wolstenholme, losses claimed in respect of the alleged purchase price would not have been within the reasonable contemplation of the Post Office at the time of originally entering into the sub-postmaster contract. The damages claimed, therefore, ought be considered too remote to be recoverable.

35. Mrs Wolstenholme also claims loss of the opportunity to earn income from related activities in her post office premises. This does appear a legitimate head of claim for which the Post Office could be held liable. However, I have seen no evidence of what such earnings were prior to Mrs Wolstenholme's suspension or the termination of her contract. It is therefore not possible at this stage to assess the level of any such compensation.
36. I enclose in my papers as a useful parallel a decision from the Court of Appeal in respect of damages to be claimed arising out of wrongful summary determination of a sub-postmaster contract: the case of *Moeze Lalji v Post Office Limited [2003] EWCA Civ No.1873*.

BREACH OF IMPLIED TERM IN RESPECT OF COMPUTER

37. Mrs Wolstenholme claims that there was a breach of an implied term that she be provided with a computer system that was fit for its purpose. This term has not been admitted by the Post Office, and there is a case for arguing that any such term should only extend as far as the obligation to take *reasonable steps* to provide a computer system that was fit for its purpose. The basis for implying either term would be that it was necessary for the purpose of giving the sub-postmaster contract business efficacy and/or as representing the obvious but unexpressed intentions of the parties.
38. Turning to the value of this claim, it is difficult to identify specific loss that a breach of either implied term has in fact caused Mrs Wolstenholme. I have seen little evidence of such loss. Arguably, the only loss such a breach seems likely to have

caused is, on Mrs Wolstenholme's case, to have incurred the "false" liabilities recorded in her Post Office accounts. On the assumption that the Post Office's claim for recovery of these losses either fails or does not proceed, then Mrs Wolstenholme will not have suffered this loss.

39. Alternatively, Mrs Wolstenholme might, at trial, seek to argue that, were it not for the defects in the computer system, relations between the parties would never have broken down, and her contract, accordingly, would not have been terminated. This is a more general claim, and involves essentially valuation of the loss of a chance to continue to do business. The value of such a claim would be calculable by reference to Mrs Wolstenholme's annual profits for a reasonable period, and applying a percentage to represent the value of the lost chance. It is very difficult to predict what approach a court might take in assessing such a claim, given its speculative nature. However, if the court were sympathetic to Mrs Wolstenholme, if she succeeded on this point, the loss could be fairly substantial given her annual profits were apparently in excess of £25,000.

40. It is in relation to the possibility of such a claim being advanced by Mrs Wolstenholme that the form of any implied term in respect of the computer system becomes important. If the term extended simply to the Post Office taking all reasonable steps to provide a computer system fit for its purpose, then the fact that the system provided may have been defective on occasion does not necessarily indicate a breach of this term. However, evidence would need to be adduced, on behalf of the Post Office, that reasonable steps were indeed taken. For this reason, I consider it

would be advisable to seek to introduce, on behalf of the Post Office, further evidence setting out further detail as to: support provided in respect of the computer system installed; and attempts made to rectify defects identified. This evidence might be from an appropriate employee within the Information Technology part of the Post Office business, and/or from an appropriate employee from the suppliers of the computer system itself.

41. Further, in relation to the strength of this aspect of Mrs Wolstenholme's claim, it is to be noted that, in view of its rather speculative nature, it will be open at trial to argue that it is too remote to be recoverable.

THE COMMERCIAL AGENTS REGULATIONS CLAIM

42. Mrs Wolstenholme claims that she is constituted the agent of the Post Office pursuant to the Commercial Agents (Council Directive) Regulations 1993. There has been no detailed response to this suggestion made in the statements of case lodged by the parties. However, it is my understanding that Mrs Wolstenholme was acting as an agent for the Post Office in the provision of *services* not in the sale of goods. If this is the case, then the Commercial Agents Regulations do not apply, as they extend only to agents who negotiate for and represent principals in the sale of *goods*. I am not aware of any authority to the contrary that suggests that sub-postmasters are commercial agents within the sense of the Regulations.
43. However, if this understanding is incorrect, and the Regulations do indeed apply, Mrs Wolstenholme is likely to have a significant claim for compensation arising out of

termination of her agency under Regulation 17. There is not a great deal of case law on how to determine the appropriate level of such compensation, and, as can be seen from decisions returned with my papers, no consistent approach has yet been achieved. One possibility, however, which has been adopted by the High Court on at least one occasion is to take the French method of awarding two years gross receipts. [See the cases returned with my papers of *Barret McKenzie v Escada (UK)* and *Ingmar GB Limited v Eaton Leonard Inc.*]

44. Obviously, if Mrs Wolstenholme were to be awarded two years' receipts, this would be a very significant sum indeed. It is therefore important to attend any relevant hearing of this matter prepared to deal robustly with the Commercial Agents' argument. Also, if considered necessary by those instructing me, some consideration might be given to the possibility of seeking to adduce some short additional evidence setting out the ambit of activities undertaken by Mrs Wolstenholme for and on behalf of the Post Office. I would anticipate that the possibility of one of its subpostmasters being found to be an agent within the Commercial Agents Regulations would be a serious matter for the Post Office.

THE HUMAN RIGHTS CLAIM

45. Mrs Wolstenholme claims that the Post Office was a public authority for the purposes of the Human Rights Act 1998. She claims interference with her property, namely her remuneration and her goodwill in her business, along with an alleged breach of the right to a fair hearing.

46. I have not been able to find any precedent case law dealing with the issue of whether the Post Office, or more specifically Post Office Counters Limited, constitutes a public authority as defined at Section 6 of the Human Rights Act. At Section 6(3)(b) of the Act, a “public authority” is defined as “*any person certain of whose functions are functions of a public nature*”. In my view, it does appear possible to characterise Post Office Counters Limited as a public authority within this definition.
47. Having said this, however, it is more difficult to see the breaches of human rights alleged. If it is indeed a breach of Mrs Wolstenholme’s human rights to interfere with the remuneration that she earned in her capacity as sub-postmaster, it is difficult to see how such a contract could ever be lawfully terminated. This is clearly an absurd proposition, and it applies equally to the notion of loss of goodwill.
48. In respect of the claim for a right to a fair trial or hearing, there was no trial or hearing, there was simply a termination of a contract as contemplated by the parties in the very terms of the contract that was brought to an end. If that were done in an unlawful manner, Mrs Wolstenholme would always have recourse to the Courts, by which she would be afforded the right to a fair hearing. She does not, therefore, appear to have been deprived of the right to a fair trial or hearing, and I accordingly do not see what damage or compensation flows from that part of her claim.

CONCLUSIONS

49. On the basis of the above, it can be concluded that the Post Office claim against Mrs Wolstenholme will fail, save for the return of the equipment which she has possibly

retained. Her claim against the Post Office in respect of failure to give proper notice is likely to succeed. What is the appropriate course of conduct in the circumstances, particularly given the desire of those instructing me and the Post Office to avoid, if possible, publication of the negative experts' report in the public arena?

50. I know those instructing me have made a substantial payment into Court, and I have already discussed with those instructing me the advisability/possibility of increasing this sum by, perhaps, an additional £10,000. However, it seems from Mrs Wolstenholme's stance that no payment into Court will be accepted unless it is considerably larger. From this, one can assume that by making sensible payments into Court, the Post Office is unlikely to prevent this matter from going to trial, and some other approach would have to be taken to try to control what occurs in the trial process.
51. In the circumstances, it seems that one method by which seems the Post Office might best achieve its objectives could be by making careful admissions within the Court proceedings. This is a matter which I have already discussed with those instructing me, but I can set briefly out a possible approach.
52. To illustrate, the Post Office could formally abandon its claim against Mrs Wolstenholme and formally admit her claim of wrongful termination of her contract. The matter could then proceed to a more limited hearing to deal specifically with the remainder of her counterclaim. This could possibly be addressed by way of preliminary hearing on specific issues identified in my discussion above. Eg. the

absence of loss in relation to the implied term concerning the computer equipment; the inapplicability of the Commercial Agents Regulations; the absence of breach of Human Rights. All could be relatively shortly dealt with. None of these points require publication of the negative experts' report.

53. A further possibility – although one which would of course require careful consideration by the client – might even be to admit the breach of the implied term alleged. However, this would be a rather more dangerous course, as it exposes the Post Office to the possibility of the claim for loss of the chance to make profits, identified above. The preferable course, in my view, would be to seek to focus on the issue in respect of the appropriate contractual term to be implied, and then to argue the point on absence of loss.
54. The opportunity for taking these points will of course be the dates already listed for trial. The issues for the client and those instructing me are the additional evidence raised above and the question of how the trial should be approached. Again, I have already discussed this with my instructing solicitor. Having considered the matter further, my view is that the most appropriate course would be for these matters to be raised at trial following appropriate application having been made in respect of any further evidence and/or changes to the statement of case put forward by the Post Office. With careful case management, the issues identified could then be isolated at trial and dealt with as deemed fit by the trial judge. I consider that it would be appropriate to provide advance notice to Mrs Wolstenholme and the Court as to the issues that the Post Office sees as requiring determination.

55. I did consider the possibility of making a formal Part 25 (summary relief) application. However, in view of the proximity of trial, the fact that Mrs Wolstenholme is not legally represented, and the additional cost that such application would doubtless incur, I have reached the view that this would not be the best way forward.
56. On a final note, in assessing the level of compensation appropriate in this case, those instructing me should note that I have not dealt with the question of interest. In particular in respect of payments withheld from Mrs Wolstenholme by the Post Office, interest should be calculated from the mid-point at which such payments were due.
57. I trust this Advice is of assistance to the client and those instructing me. In respect of further evidence to be adduced, and amendments to the Post Office's statement of case, I can, of course, be contacted in Chambers. For the purpose of amending the Post Office's statement of case, I would be grateful if a copy of the original could be emailed to me.

S. A. Brochwicz-Lewinski

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26th July 2004

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