



Briefing paper: Witness statements – how to deal with inadmissible evidence

1. BACKGROUND

- 1.1 The parties have set out their respective cases in the Generic Particulars of Claim, the Claimant's Individual Particulars of Claim, Reply to Defence and Counterclaim and in Post Office's Generic Defence and Counterclaim and Individual Defences.
- 1.2 The next stage of the procedure for the Common Issues element of this litigation is for the parties to prepare and exchange witness statements. These are due to be exchanged on 10 August 2018.
- 1.3 A trial to hear the evidence on the Common Issues has been diarised to take place over 20 days in November 2018 (the **November Trial**). The purpose of the November Trial is to establish the legal position on 23 Common Issues. It is not a trial to deal with *all* of the issues which are linked to the litigation.

2. INADMISSIBLE EVIDENCE

- 2.1 Evidence is fundamental to the outcome of any civil litigation case because the facts in issue in a claim must be proved by evidence. The judge will decide the case on the evidence presented by the parties.
- 2.2 The Claimants have sought to muddy the waters by making allegations in their pleadings which do not fall within the 23 Common Issues, and so technically should not be made at this stage in the proceedings and should not be addressed at the November Trial.
- 2.3 For example, they have included arguments about issues relating to that specific individual which do not affect individuals from the wider group of Claimants, such as:
 - 2.3.1 their personal relocation costs when they were improving their premises/ changing premises/ installing new equipment;
 - 2.3.2 their individual training which fell outside the standard training programme;
 - 2.3.3 their retail businesses;
 - 2.3.4 the provision or refusal to provide certain products and services and/or vary the model they operated on and/or their opening hours;
 - 2.3.5 their problems with the assistants they employed;
 - 2.3.6 their personal shortfalls and false accounting;
 - 2.3.7 the personal circumstances of their suspension/ termination.
- 2.4 This evidence should not be admissible at this stage of proceedings nor it is appropriate to deal with *any* issues outside of the 23 Common Issues at the November trial.
- 2.5 Unfortunately, it is now clear that the Claimants are intending to submit evidence intended to have a prejudicial effect on the Managing Judge's mind, such as submitting evidence of what they say is high-handed or unfair conduct by Post Office towards Subpostmasters.

- 2.6 By including this evidence, the Claimants hope that the Managing Judge will see them as a vulnerable group of quasi-employees who need to be protected from Post Office and the powers it holds under the parties' unique relationship.
- 2.7 It is a fact of life that, even though it may be irrelevant to the legal issues which the Managing Judge is required to decide, prejudicial evidence can have a major impact on the conclusions a judge ultimately reaches on such issues.
- 2.8 We cannot predict with any degree of accuracy the extent to which the Managing Judge will allow the Claimants to rely on what we say is inadmissible evidence. We also cannot predict what the evidence will look like or whether Post Office will be in a position to produce satisfactory evidence in rebuttal if we have not addressed the same in witness evidence. There is also a question mark over how these matters will affect the Managing Judge's approach in deciding the Common Issues at the November Trial.

3. WITNESS STATEMENTS

- 3.1 The purpose of the witness statement is to provide written evidence to support a party's case that will be used as evidence in Court. The statements are therefore a crucial part of the case, designed to show it in its strongest light.
- 3.2 We do not propose to prepare witness statements which cover the issues which we consider to be inadmissible.

4. RISKS

- 4.1 If the Judge agrees that the evidence is inadmissible, the Claimants will be unable to rely on that part of the evidence at the November Trial.
- 4.2 However, if the Judge does agree to hear the Claimants' submissions on these points at the November Trial, there are a number of risks as follows:
 - 4.2.1 This may prejudice the Managing Judge's approach as set out above;
 - 4.2.2 Post Office will not have dealt with these issues in its witness statements and so be a hole in Post Office's evidence in relation to these points;
 - 4.2.3 There is a risk of appeal as the Managing Judge may come to a different conclusion on the issue further down the line in subsequent trials; and
 - 4.2.4 The November Trial is not be long enough able to deal with all of the issues raised to date by the Claimants. This could cause the November Trial to overrun or for it to be adjourned. This could delay the progress of the overall litigation, which will increase both parties costs.

5. RECOMMENDATION

- 5.1 Post Office is in a difficult tactical position. It will obviously be helpful to keep as much prejudicial material as possible out before the November 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.
- 5.2 Our recommendation is to:
 - 5.2.1 address the individual's evidence where it falls within the 23 Common Issues; and
 - 5.2.2 not to address the inadmissible evidence in the witness statements we are currently preparing.