

Confidential and legally privileged
9 March 2018



Bates & others v Post Office Limited

Initial summary of the Common Issues Judgment

1. SUMMARY

- 1.1 The Judge has adopted the approach that we feared he might adopt: he has taken into account large swathes of inadmissible material, despite saying before trial that he would not do so and claiming in the Judgment not to have done this. However much of the first 500 paragraphs (out of a total of 1100) are turned over to factual analysis of post-contractual actions.
- 1.2 This has led him to make findings on a number of factual matters on which he has not heard evidence from Post Office, because such evidence (we maintain and on the Judge's own assessment) is inadmissible.
- 1.3 He has also made a small number of findings in relation to Horizon, despite previously stating in an early judgment that he would not do this.
- 1.4 He is highly critical of Post Office's past practices and the conduct of the litigation in general. He heavily criticises some of Post Office's witnesses as being unreliable and its legal team for the conduct of the case. He refers at times to Post Office being oppressive and operating a culture of secrecy. By contrast, even when faced with clear evidence of dishonesty, he refuses to criticise the Claimants.
- 1.5 From this starting point, he has gone on to restrict (but not eliminate) Post Office's rights to recover losses, suspend and terminate Subpostmasters' contracts and vary its contract terms in the future. He has also found that Post Office (and the Claimants) are subject to a wide ranging duty of good faith, that imposes many new obligations on Post Office. He has done so through a novel application of the law and through the misapplication of several established legal principles.
- 1.6 In our and Counsel's view, the Judge's approach is astonishing: it is unfair and unprecedented. With no hesitation, we strongly recommend lodging an appeal.
- 1.7 We set out below a short commentary on the key aspects of the Judgment. This summary inevitably simplifies the complexity of the full legal analysis. It has also been prepared rapidly after the draft Judgment was provided and at a time when some parts of the Judgment are far from clear. A fuller detailed analysis is underway. This initial summary is therefore only intended as a starting point for consideration of how Post Office might respond legally, operationally and publicly to the Judgment when it is handed down (likely on Friday 15 January).

2. LOSS RECOVERY

- 2.1 The Judge has found that Post Office can recover losses when the Subpostmaster is at fault for the loss.
- 2.2 In relation to losses caused by assistants:
 - 2.2.1 Under the SPMC, Post Office must show fault on the part of the assistant.
 - 2.2.2 Under Network Transformation contracts, the Judgment is unclear but on one reading Post Office cannot recover losses caused by assistants. Clarification will be sought on this.

- 2.3 A loss means a real financial harm to Post Office. A shortfall in the branch accounts is not on its own sufficient grounds to recover. The shortfall in branch must either be tied to a physical loss of cash or stock in branch or be traced through Post Office's back-end accounting systems to a real financial loss (eg. non-payment of money by a client).
- 2.4 The burden is on Post Office to prove that (i) a loss has been suffered by Post Office and (ii) it was caused by the fault of an SPM or his assistant.
- 2.5 A branch trading statement is only good evidence of a branch shortfall if an SPM does not dispute the branch trading statement at the time of submitting it. If it is disputed, then Post Office will need to prove a branch shortfall by other means (ie. from the transaction data on Horizon, meaning that Post Office has to prove the veracity of Horizon in every disputed shortfall).
- 2.6 The difficulty with the above formulation is that Post Office often does not know what the exact causes are of a shortfall in a branch and therefore faces difficulty in proving that it has suffered a financial loss. Eg. a SPM mis-keys a bank deposit as £100 rather than £50, this would show as a £50 shortfall at the end of the trading period but how would Post Office know which exact transaction during the trading period was mis-keyed and that that transaction has led to a financial loss?
- 2.7 Finally, the Judge has imposed a restriction that Post Office may not seek recovery of losses unless:
 - 2.7.1 Post Office has established that the alleged shortfall represented a genuine loss to Post Office; and
 - 2.7.2 Post Office has carried out a reasonable and fair investigation (proportionate to the amount in issue) as to the cause and reason for the alleged shortfall, and whether it was properly attributed to the Subpostmaster under the terms of the Subpostmaster contract.

3. TERMINATION RIGHTS

- 3.1 Post Office can terminate a SPM's contract on notice as follows:
 - 3.1.1 The original notice periods in the contract are valid (typically 3 or 6 months). There is no minimum 12 month notice period, save where already provided for in the Network Transformation contracts. The judge has however interpreted these as minimum notice periods.
 - 3.1.2 The exact notice period provided must be set in line with Post Office's duty to act in good faith, which means that it may be required to offer more than the minimum notice periods (for example, for a SPM who has only just been appointed would therefore suffer financial hardship from an early termination).
 - 3.1.3 Post Office cannot terminate SPMs: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where Post Office was itself in material breach of duty in respect of matters which Post Office considered gave it the right to suspend.
- 3.2 Post Office can terminate a SPM's contract immediately where the SPM has committed a repudiatory (fundamental) breach save that it cannot terminate SPMs: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where Post Office was itself in material breach of duty in respect of matters which Post Office considered gave it the right to suspend.

4. SUSPENSION RIGHTS

- 4.1 Post Office's rights to suspend are upheld but it cannot suspend SPMs: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where Post Office was itself in material breach of duty in respect of matters which Post Office considered gave it the right to suspend.
- 4.2 Post Office's right to withhold remuneration during a period of suspension has been struck down. Post Office must now pay all suspended SPMs.

5. RIGHT TO VARY CONTRACTS

- 5.1 Post Office's existing rights to vary its contracts unilaterally are preserved. But any new terms need to pass a test of reasonableness.

6. IMPLIED TERMS

- 6.1 Post Office is subject to a general duty to act in good faith. The scope of that duty is poorly defined in the Judgment save in its manifestation of implied terms (see below). It is also unclear whether this duty is mutual on the Claimants.
- 6.2 20 new terms are implied into the Post Office contract as either incidents of the overarching duty to act in good faith or on the grounds of necessity. See table below for full details.
- 6.3 Some of these implied terms relate to loss recovery, termination and suspension and their effects are described above. The other freestanding implied terms can be summarised as:
 - 6.3.1 Post Office must provide adequate training and support.
 - 6.3.2 Horizon must be reasonably fit for purpose.
 - 6.3.3 Post Office must accurately effect and record all branch transactions.
 - 6.3.4 Post Office must take all reasonable care in performing its functions.
 - 6.3.5 Post Office must communicate problems with Horizon to SPMs.
 - 6.3.6 Post Office must assist SPMs in investigating shortfalls.
 - 6.3.7 Post Office must not exercise any contractual right in bad faith.

7. STRIKE DOWN OF EXPRESS TERMS

- 7.1 A small number of other express terms have been struck down as unenforceable. These are unlikely to have immediate commercial or operational impact, but further explanation can be provided as needed.

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Implied term sought by the Claimant	Incident of the implied duty of good faith?	Implied term on grounds of business efficacy?	Any modification to the term by the Judge?
(a) To provide adequate training and support (particularly if and when the Defendant imposed new working practices or systems or required the provision of new services)	No	Yes	No
(b) To provide a system which was reasonably fit for purpose, including any or adequate error repellency	No	Yes	To provide a Horizon system which was reasonably fit for purpose, including any or adequate error repellency
(c) Properly and accurately to effect, record, maintain and keep records of all transactions effected using Horizon	Yes	Yes	No
(d) Properly and accurately to produce all relevant records and/or to explain all relevant transactions and/or any alleged or apparent shortfalls attributed to Claimants	Yes	Yes	No
(e) To co-operate in seeking to identify the possible or likely causes of any apparent or alleged shortfalls and/or whether or not there was indeed any shortfall at all	Yes	No	No
(f) To seek to identify such causes itself, in any event	Yes	No	No
(g) To disclose possible causes of apparent or alleged shortfalls (and the cause thereof) to Claimants candidly, fully and frankly	Yes	No	No
(h) To make reasonable enquiry, undertake reasonable analysis and even-handed investigation, and give fair consideration to the facts and information available as to the possible causes of	Yes	No	No

the appearance of alleged or apparent shortfalls (and the cause thereof)			
(i) To communicate, alternatively, not to conceal known problems, bugs or errors in or generated by Horizon that might have financial (and other resulting) implications for Claimants	Yes	No	No
(j) To communicate, alternatively, not to conceal the extent to which other Subpostmasters were experiencing relating to Horizon and the generation of discrepancies and alleged shortfalls	Yes	No	No
(k) Not to conceal from Claimants the Defendant's ability to alter remotely data or transactions upon which the calculation of the branch accounts (and any discrepancy, or alleged shortfalls) depended	Yes	No	No
(l) Properly, fully and fairly to investigate any alleged or apparent shortfalls	Yes	No	No
(m) Not to seek recovery from Claimants unless and until: (i) the Defendant had complied with its duties above (or some of them); (ii) the Defendant has established that the alleged shortfall represented a genuine loss to the Defendant; and (iii) the Defendant had carried out a reasonable and fair investigation as to the cause and reason for the alleged shortfall and whether it was properly attributed to the Claimant under the terms of the Subpostmaster contract (construed as aforesaid)	Yes	Yes	<p>"the Post Office would not seek recovery from Claimants unless and until the Post Office had established that the alleged shortfall represented a genuine loss to the Post Office, and the Post Office had carried out a reasonable and fair investigation (proportionate to the amount in issue) as to the cause and reason for the alleged shortfall, and whether it was properly attributed to the Claimant under the terms of the Subpostmaster contract."</p> <p>[This wording only applies if implied under business efficacy]</p>
(n) Not to suspend Claimants: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where the Defendant was itself in material breach of duty	Yes	Yes	Not to suspend Claimants: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause; and/or (iii) in circumstances where the Defendant was itself in material breach of duty in respect of matters which the Defendant considered gave it the right to suspend.
(o) Not to terminate Claimants' contracts: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and proper cause;	Yes	Yes	Not to terminate Claimants' contracts: (i) arbitrarily, irrationally or capriciously; (ii) without reasonable and

and/or (iii) in circumstances where the Defendant was itself in material breach of duty			proper cause; and/or (iii) in circumstances where the Defendant was itself in material breach of duty in respect of matters which the Defendant considered gave it the right to suspend.
(p) Not to take steps which would undermine the relationship of trust and confidence between Claimants and the Defendant	Yes	No	No
(q) To exercise any contractual, or other power, honestly and in good faith for the purpose for which it was conferred	Yes	Yes	No
(r) Not to exercise any discretion arbitrarily, capriciously or unreasonably	Yes	Yes	No
(s) To exercise any such discretion in accordance with the obligations of good faith, fair dealing, transparency, co-operation, and trust and confidence	Yes	No	No
(t) To take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls), business, health and reputation of Claimants	No	Yes	To take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls); business, health and reputation of Claimants
(u) The ability of the Defendant to recover and/or seek to recover any alleged shortfalls, whether while the relevant Claimant was a Subpostmaster or post-termination, was subject to an implied term requiring Post Office to do the same within a reasonable time of discovery or the date by which, with reasonable diligence, Post Office could have made such discovery.	No	No	No