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Dear Sirs

Post Office Group Litigation
Inadmissible Evidence

We write in advance of the service of witness statements.

Your clients' Individual Particulars of Claim, served on 13 April 2018, traversed a large number of matters which were apparently irrelevant to determination of the Common Issues. These included extensive pleading on various matters alleged to have occurred after entry into the relevant contracts, including complaints as to the training received by the Claimants and their assistants, the Claimants' experiences of Post Office's Helpline, the introduction and withdrawal of products or services to be offered in the relevant Post Office branches, and the Claimants' experiences of shortfalls, suspension and termination.

At the hearing held on 5 June 2018, Leading Counsel for Post Office highlighted Post Office's ongoing concerns that your clients would serve extensive evidence relating to the performance of Post Office and the Lead Claimants after a contract was agreed and alleged breaches of contract. The Learned Judge observed that Post Office had made this point "*four different times over a period of many months*" (Transcript, p.57).

For the avoidance of doubt, the Learned Judge underscored that both evidence of "*what is said during the negotiation of the contracts*", and of "*the subsequent conduct of parties*", would be inadmissible (Transcript, p.61).

Our letter to you dated 27 June 2018 asked for confirmation of your clients' acceptance that "*evidence of matters that occurred only after the entry into the contracts will be inadmissible for the purposes of construction*".

No reply to this letter has been received.

Instead, on 6 July 2018, your clients' Individual Replies were served. These Replies amplified Post Office's concerns. Taking Mr Bates' Reply as an example, it stated:

a. At paragraph 4.1, that all of the post-contractual matters identified by Post Office would be relied upon in relation to the Common Issues;

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b. At paragraph 61.8, that Mr Bates would rely on "*the experience of each of the other Lead Claimants*" (in respect of training and support provided by Post Office);

c. At paragraph 61.9, that the difficulties which Mr Bates allegedly experienced with Horizon are retrospectively relevant to whether terms should be implied.

In sum, the Claimants' approach appears to be that anything occurring after the contracts were entered into is potentially relevant. That approach is contradicts the Learned Judge's guidance and the clear law that what occurs after an agreement was entered into is inadmissible: see, for example, **Arnold v Britton** [2015] A.C. 1619 at [21] *per* Lord Neuberger.

Post Office therefore puts down again the following marker: anything that was not known (or at least knowable) to a person in the position(s) of the parties at the time of contracting cannot be admissible matrix of fact.

It follows that nothing which happened after entry into the relevant contracts can be admissible evidence for the purposes of the Common Issues trial. The only three relevant (narrow) possible exceptions to this rule are as follows:

a. Your clients' case is that the parties' 'true agreement' as to termination was made manifest after the relevant contracts were entered into. In principle, evidence going to this could be admissible – although it remains unclear, on your clients' own case, what that evidence could be.

b. Insofar as any contract term was varied, the factual matrix relevant to construing that term, as varied, will be that obtaining at the time of variation. That is the proposition set out, for example, at paragraph 4.4 of Mr Bates' Reply. Post Office agrees. However, for this exception to be relevant the Claimants (or any of them) would have had to (a) plead a relevant variation, (b) set out the respects in which the factual matrix existing at the time that the variation was made was different from that existing at the time of entry into the contract, and (c) set out the way in which those differences in factual matrix are said to have a bearing on construction of the varied term. They have not done so.

c. Some, very limited, evidence of post-contractual behaviour may be relevant to the question of agency. It is, however, difficult to see how individual evidence from particular claimants (as opposed to general evidence of practices persisting over time) could assist.

There is therefore little or no scope for any evidence premised on these exceptions. Evidence on the Claimants' personal experiences of training, the Helpline, products and services, shortfalls and suspension will be inadmissible *in toto*. Evidence on their personal experiences of termination will also be largely or wholly inadmissible.

It appears plain, from your clients' Replies, that they will not adhere to these principles. As well as being wrong, that approach will mean that the Common Issues trial risks becoming unmanageable. The inadmissible evidence would likely take up most of the trial; or, if Post Office adduces evidence in reply, all of the trial.

Accordingly, we intend to invite the Learned Judge at the CMC on 25 July to set aside a two-day hearing, in mid-September, at which he can, if necessary, go through your clients' evidence and strike out those parts which are inadmissible and/or irrelevant and/or provide other directions as to the evidence to be heard at trial. As you will recall, this was the course of action mooted by the Learned Judge at the hearing on 5 June 2018. We believe it prudent to enquire about securing this time now given that witness statements will be served over the Summer vacation and the close proximity of the trial.

Of course, if your clients clearly state that they will pull back from the stance taken in their Replies, and curtail their evidence accordingly, it may still be possible to avoid the need for this hearing, at which point the hearing dates may be vacated.

Even if your clients do not agree with the substantive points in this letter, we invite them to agree to the listing of a hearing in September.

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Yours faithfully

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