

CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION
Steering Group Meeting: 13 September 2018



DECISION: When should Post Office argue its strike out application?

1. BACKGROUND

- 1.1 On 5 September 2018 Post Office made an application to strike out a considerable part of the Claimants' witness evidence on the grounds that it was inadmissible.
- 1.2 Ideally this application would have been heard before trial to remove the evidence completely or, failing that, force the Claimants to explain why their evidence was admissible so that Post Office could better prepare for trial and take any mitigating actions (e.g. submit additional evidence). It was also hoped that this application would draw out the approach the Managing Judge would take to admissibility.
- 1.3 The court listed the application to be heard at the Case Management Conference scheduled for 19 September, when Post Office's security for costs application is also listed for hearing.
- 1.4 The Managing Judge called the parties into Court on 11 September on less than 24 hours' notice to determine which of Post Office's two applications would be heard on 19 September, as there is not enough time for both. The Managing Judge interrupted his vacation for this hearing, and due to a Court administrative error, had not read the strike out application beforehand.
- 1.5 The Managing Judge ordered that the security application be heard on 19 September and the strike out application on 10 October, noting (despite previous indications) that there was no spare time for a hearing before then. Before 10 October he also ordered both parties to set out, paragraph by paragraph, why they believe the Claimants' evidence to be admissible / inadmissible.
- 1.6 Through his quick review of the application, the Managing Judge continues to suggest that he agrees in principle with Post Office on what amounts to inadmissible evidence. He does not however appear inclined towards striking out inadmissible evidence before trial, expressing sympathy towards the Claimants "*wanting to tell their stories*", which he balanced by asserting that his "analysis of the contract" would not be influenced by inadmissible evidence.
- 1.7 In light of this development, Post Office needs to review its approach to its strike out application.

2. COMMENTARY

- 2.1 The Managing Judge's approach on 11 September backtracks from comments he made in June inviting Post Office to make an application to strike out, and offering Court time to hear it before trial. This is a regrettable flip-flop but one that we recommend that Post Office should adapt to and which, we believe, will be seen as cooperative pragmatism by the Judge.
- 2.2 Not having the application heard in late September is not a desirable outcome. The delay in hearing the application to 10 October eliminates the possibility of Post Office being able to submit further evidence before trial - the start of trial will simply be too close by this time even if the Managing Judge were to permit it (which seems very unlikely). Some of the tactical advantage in making the application has also no doubt been lost.
- 2.3 The 11 September hearing was however helpful. The Managing Judge still appears to be broadly with Post Office on admissibility of evidence, and his order that the Claimants set out in writing why they consider their evidence to be admissible will be very helpful for Post Office. In this sense, the application may have achieved its purpose, albeit sooner and in a different way than envisaged.
- 2.4 The options for Post Office are:

- 2.4.1 Withdraw the application entirely (in a way that mitigates the costs risk).
- 2.4.2 Proceed with the application on 10 October.
- 2.4.3 Seek to adjourn the application and have it heard at the start of the trial.
- 2.5 It should be kept in mind that should the application be dismissed because the Judge does not want to deal the inadmissible evidence before trial, Post Office will likely be liable for the Claimants' costs (£50k - £150k).
- 3. RECOMMENDATION**
 - 3.1 The view of the legal team (including both QCs) is that the application should not be withdrawn. We are confident that we are legally correct in saying the material is inadmissible and that the Judge will largely agree. It would weaken Post Office's legal position considerably to drop this point.
 - 3.2 We also believe that proceeding with the application on 10 October now comes with heightened risk. In light of the Judge's comments, we believe that application will, more likely than not, fail – not on merit, but for reasons of procedural management. It should be noted that if the application is heard on 10 October, it cannot be renewed at the start of trial and therefore Post Office will not know the position on admissibility until it receives the Court's final judgement after the trial has concluded.
 - 3.3 We therefore recommend seeking to adjourn the application to the start of trial:
 - 3.3.1 We believe this presents the best prospects of the application succeeding. By the time the Judge hears the application, he will have spent three days reading the evidence and listening to opening submissions. He will be fully immersed in the case. He will also by this time have seen the scale of the inadmissible material and been told by the Claimants that they do intend to rely on this material (and it's not just "storytelling"). He may then have less sympathy for them than he expressed this week.
 - 3.3.2 A trial judge is a different beast to a judge dealing with case management. It is easy for a Judge dealing with procedural issues to "*kick the can down the road*", whilst at trial there is no more leeway for this and issues must be tackled head on. Judges with their trial hats on also tend to be bolder and more led by what is legally correct, than what is pragmatic or expedient.
 - 3.3.3 The ability to submit extra evidence has been lost regardless of which route is adopted, so there is no difference in this sense between hearing the application on 10 October or at the start of trial.
 - 3.3.4 The Managing Judge has set down a preliminary timetable for the trial. Within this, he has reserved every Friday for applications. He has therefore already created the necessary window of opportunity within the trial period to hear the strike out application.
 - 3.3.5 Having the Judge rule on admissibility at the start of trial still avoids the difficulty of having to set out Post Office's case on two contradictory bases: one with the inadmissible material and one without. This factor presents a real risk to Post Office's prospects of success at trial which hearing the application at the start of trial helps mitigate.
 - 3.4 In the event that the Judge refuses to defer the application to trial (and noting that the Claimants will likely oppose this), our recommendation is that Post Office proceeds with the application on 10 October despite the Judge's comments and costs risk. This point is too important not to try to address it as a stand-alone issue.