



**Decision paper: Should Post Office respond to inadmissible allegations in its witness evidence?**

**1. BACKGROUND**

- 1.1 A trial to hear the evidence on the Common Issues has been diarised to take place in November 2018 (the **November Trial**). The purpose of the November Trial is to establish the legal position on the Common Issues, all of which relate to the true meaning and effect of the Subpostmaster Contracts.
- 1.2 The parties have now set out their respective cases on the Common Issues in Generic and Individual pleadings. 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.

**2. INADMISSIBLE EVIDENCE**

- 2.1 Evidence is fundamental to the outcome of any civil litigation 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; this evidence primarily being documents that have been disclosed and witness statements.
- 2.2 The Claimants have sought to make allegations in their pleadings which, we say, do not fall within the Common Issues. In our view, these points should not be made at this stage in the proceedings and should not be addressed at the November Trial. This has been loosely referred to as the "Factual Matrix Problem".
- 2.3 For the Common Issues trial the only permissible evidence is that which assists the Court in understanding the context of the Subpostmaster Contracts so that the Judge has this context in mind in determining what the clauses mean – known as the "Factual Matrix". There is a substantial dispute over what falls within this scope. We say (with a high degree of confidence) that the orthodox legal position is that the only admissible evidence is that which was known to the parties at the time of entering into the contract. The Claimants do not accept this legal orthodoxy but we believe that the Judge is with us given comments he has made at previous hearings.
- 2.4 On face value, this should exclude evidence about how a contract was performed in practice, such as evidence around losses in branches, training, suspension and termination (**Performance Issues**). In practice, there are many grey areas:
  - 2.4.1 Where a postmaster was previously an assistant or a Subpostmaster in another branch or transferred to a new contract under NT, they may well have knowledge of Performance Issues from one of these prior roles.
  - 2.4.2 Where a contract is varied, the law says that any knowledge known at the time of variation may be taken into account so to understand that variation and that could include Performance Issues.
  - 2.4.3 Tactically, we would like the Judge to be aware that 3 of the 6 Lead Claimants have committed false accounting but that is a Performance Issue.

- 2.4.4 We would also like the judge to have a basic understanding of how Post Office operates but to do so means describing some Performance Issues.
  - 2.4.5 The Claimants argument under the "Belcher" principle are that the contractual termination provisions are a sham that do not reflect reality and thus should be considered unenforceable. This necessarily requires the Court to consider the reality of the situation after a contract has been signed.
  - 2.4.6 When responding to the Claimants' Implied Terms, we need to be able to say why these terms are unnecessary and, indeed, might be highly damaging to Post Office. This would require us to explain the practical consequence of those terms on the performance of the business.
  - 2.4.7 Similarly, the Claimants allege that some express contractual terms are unfair and Post Office will need to bring evidence to show that the real world application of those terms are fair.
  - 2.4.8 There are sometimes subtle nuances between what a postmaster expected at the outset of his contract and what actually happened. From example, it may be permissible to adduce evidence that when an incoming postmaster signs his contract he has an expectation that Horizon should generally work most of the time (this is Post Office's position). It would not be legitimate to adduce evidence that Horizon did not in fact work most of the time (being the Claimants' position). The former being a state of affairs that existed when the contract was signed; the latter being a state of affairs that can only be determined by looking at the performance of the contract after it was signed.
- 2.5 From their pleadings, it seems very likely that the Claimants are intending to submit evidence on Performance Issues intended to have a prejudicial effect of the Managing Judge's mind, such as submitting evidence of what they say is high-handed or unfair conduct by Post Office towards Subpostmasters. 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 thus will interpret the contract terms in a way that is favourable to the Claimants. 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.

### **3. POST OFFICE'S EVIDENCE**

- 3.1 Once we see the Claimants' witness evidence (likely due on 10 August) we will need to make a decision on whether to apply to have the Court strike out that evidence which we say is inadmissible. Whether we make that application and whether it will succeed is uncertain, and in any event we cannot make that decision until we see the contested evidence.
- 3.2 The immediate question for Post Office is how to prepare its own witness evidence and whether it should respond to inadmissible allegations ie. allegations of unlawful termination, etc.
- 3.3 Option 1 is that we respond to each allegation made by the Claimants. The risk with this approach is that we will be putting forward evidence that we say should be inadmissible. The Claimants will seize on this as justifying their wide approach to evidence and it will make it much harder to (i) have that evidence struck out before trial and/or (ii) have the judge ignore that evidence at trial.
- 3.4 Option 2 is that we do not respond to any allegation that we say is inadmissible. This is the approach we generally took in the Defences. This supports our admissibility arguments, but means that there may be points at trial on which Post Office has no or thin evidence to rebut allegations from the Claimants. If we have no responsive evidence to a point, and the Judge

rules the Claimants' evidence admissible, then save for any attacks we can make in cross-examination, the Judge will have no choice but to accept the Claimants' evidence.

- 3.5 Option 3 is to selectively respond to the Claimants' allegations. We could respond to some inadmissible allegations and ignore others. Those points which we believe are plainly inadmissible will be ignored and those that are plainly valid will be addressed. In the middle, an allegation by allegation approach will be adopted, depending on the importance of the allegation and the likelihood of it being inadmissible. Although this is pragmatic, the Claimants may spin this as Post Office being inconsistent and looking to flex the rules when they are to its own advantage.

#### **4. RECOMMENDATION**

- 4.1 Our and Counsels' recommendation is proceed with Option 3 (selective evidence), but with a strong bias towards not responding to anything that is thought to be inadmissible. We would advise against responding to any Performance Issues encountered by specific Lead Claimants, but Post Office should put forward some high-level generic evidence on how it business works and performs in practice.