

**CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION
Steering Group: 2 November 2018**



DECISION: Should Post Office appeal the judgment against its strike out application?

1. BACKGROUND

- 1.1 In this paper we advise on whether Post Office should appeal the decision of the Managing Judge to dismiss Post Office's application to strike out parts of the Claimant's evidence (**Judgment No.2**) or, at least, preserve its rights of appeal by applying for a time extension to do so after the Common Issues Judgment is rendered.
- 1.2 The lead time for an appeal is around 12 months. There is no prospect of appealing Judgment No.2 before the Common Issues trial. This note focuses on protecting Post Office's long-term rights of appeal should the Managing Judge make adverse findings at the Common Issues trial, because some of those appeal rights arise from Judgment No.2 for the reasons explained below.

2. APPEALS ARISING FROM JUDGMENT NO. 2

- 2.1 The Claimants have served evidence that does not directly relate to the Common Issues but instead involves allegations that Post Office has breached obligations owed to the Lead Claimants. This evidence strays into issues that are properly the subject matter of the Horizon Issues trial and later trials regarding breach and loss in individual cases.
- 2.2 Because of the Court's Order that evidence for the Common Issues trial should be in relation to the Commons Issues only, Post Office has not fully put forward its responsive evidence to these wider Horizon and breach issues.
- 2.3 In his Judgment, the Managing Judge used a very restrictive test that *"for the evidence to be struck out, it must be quite plain that, no matter how the proceedings may look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful, to any of the Common Issues."*¹ If this is the correct test, then the wider evidence served by the Claimants should not be struck out.
- 2.4 However, by adopting the restrictive test, the Managing Judge has possibly set up a trial process that is inherently unfair to Post Office. He has allowed the Lead Claimants' wider evidence relating to the alleged Horizon errors, information imbalances, shortfalls and problems with support and training on the basis that this evidence could possibly be relevant to any one of the Common Issues. Allowing the wider evidence is inconsistent with the staged process of the Group Litigation where the Common Issues, Horizon issues and breach issues are to be decided separately.
- 2.5 In Judgment No.2, the Managing Judge makes the point that the Court (i.e. he) will not be making findings on matters which are to be dealt with at the Horizon Issues trial or at the later breach and loss trials. If he keeps to this, then there will not be a problem.
- 2.6 However, there may be facts that are arguably be relevant to multiple issues. By allowing in the evidence that may possibly be relevant to the Common Issues but is also relevant to the Horizon and breach, the Managing Judge risks making findings of fact at the Common Issues trial which may prejudice Post Office at the later trials. As an extreme example - he makes a finding of fact that Post Office's NBSC helpline provided unsatisfactory advice.
- 2.7 The difficulty for Post Office is that the above risk will not crystallise until its knows what findings of fact are made in the Common Issues judgment. By this time it may be too late for Post Office

¹ Paragraph 24 of Judgment (No. 2).

to take any corrective action. This is because, first, findings of fact (as opposed to mis-directions as to the law) are not appealable. Second, once a finding of fact is made, the doctrine of issue estoppel may prevent Post Office from adducing responsive evidence to overturn the adverse finding in the later Horizon Issues and/or individual claimant breach trials.

- 2.8 If the Managing Judge makes findings of fact he should not have, Post Office's remedy would be to appeal his decision to allow inadmissible evidence into the Common Issues trial (i.e. appeal Judgment No.2); not that his finding of fact was incorrect. The former evidential decision is appealable; the latter factual decision is not.
- 2.9 The time pressure to address this issue now is because Post Office only has 21 days to appeal against Judgment No.2. It therefore cannot file an appeal against Judgment No.2 after the Common Issues Judgment is given. Once the deadline passes it is very rare for the Court of Appeal to retrospectively give a party permission to appeal, particularly if the appeal relates to a procedural decision.
- 2.10 By coincidence, the 21 day appeal window expires on the first day of the Common Issues trial. The appropriate time to make any application to appeal would therefore be at the start of the Common Issues trial.
- 2.11 To be clear, the above does not affect Post Office's ability to appeal either the legal findings in the Common Issues trial or whether facts are admissible in making those legal findings (the relevance and admissibility of facts is a question of law and capable of appeal in its own right).
- 2.12 We also believe that there may be other ways to appeal or attack any factual finding on a breach or Horizon Issue that the judge intentionally or inadvertently makes at the Common Issues trial. For example, by saying that the Judge has made findings of facts in relation to issues where he said he would not make such findings (see para 2.5 above).

3. OPTIONS AND MITIGATIONS

- 3.1 The above problem only materialises if the Judge makes findings on issues of breach and Horizon that he should not be making. There are steps that Counsel will be taking to mitigate against the risks. During cross examination of the Lead Claimants, David Cavender QC will be putting 'blocking questions' which are intended to show to the Managing Judge that there is insufficient evidence before him to make findings of fact on matters that will be determined at the Horizon Issues and later breach trials. Whilst this should go some way to reduce the risks of the Managing Judge making adverse findings of fact on the Horizon and breach issues, it will not completely eliminate it.
- 3.2 To start an appeal, Post Office first needs permission to appeal. That permission can be sought from the Managing Judge or the Court of Appeal. Usually an appellant asks the Managing Judge first, and if he refuses permission, then asks the Court of Appeal. The strong view of the legal team is that the Managing Judge will refuse permission – this the normal response of judges to requests for procedural appeals. Also, in the current case, we do not yet know if there is a problem and so an appeal could easily be dismissed as premature.
- 3.3 If Post Office did wish to keep the option open for an appeal, it could make an application to extend the time it has to lodge its notice of appeal to 21 days after the Common Issues Judgment is given. This application will have to be made first to the Managing Judge. If he disagrees, then an application (either for more time or full permission) may be made to the Court of Appeal.
- 3.4 The advantage of making the application for more time is that in setting out the reasons for the time extension it should be apparent to the Managing Judge the risks Post Office is facing and that it is taking a measured approach by not appealing and only asking for the time extension. A further effect of this is that the Managing Judge may take more care in the findings of fact he may be making in the Common Issues Judgment if an appeal hangs over him.

- 3.5 However, if we make any application in relation to an appeal, it may antagonise the Managing Judge. As a general rule, Judges dislike being appealed and are naturally resistant to giving permission. Our Managing Judge is particularly thin-skinned and intemperate. We therefore risk getting him "off-side" from day one of the trial.

4. RECOMMENDATION

4.1 Our view is that:

- 4.1.1 There is only a low risk that the Judge will make material findings of fact that are wholly irrelevant to the scope of Common Issues trial. If this does happen, this is more likely to be inadvertent than intentional on his part because the issues are complex and sometimes it is difficult to see how some facts can affect multiple issues.
- 4.1.2 Even if the Judge does make out-of-scope factual findings that does not necessarily mean there is a problem for Post Office. The finding may be trivial. We strongly doubt that he is going to make any major findings in relation to breach or Horizon issues – that would be wholly extraordinary.
- 4.1.3 If the Judge does make a factual finding that is problematic in a later trial, we believe that Post Office has a good prospect of identifying some alternative route of appeal or other practical way around that finding (regardless of whether Judgment No.2 is appealed) To be clear, we are not saying that such an appeal will succeed, only that there is a good prospect of there being a route of appeal available.
- 4.1.4 In light of the above, appealing Judgment No.2 is unlikely to be of benefit to Post Office.
- 4.1.5 We also believe that raising the question of an appeal with the Managing Judge comes with real risk of him reacting adversely to Post Office and that this outweighs the limited benefit of appealing Judgment No.2.
- 4.2 Our recommendation therefore is that Post Office should not appeal, or seek further time to appeal, Judgment No.2.
- 4.3 This view is supported by David Cavender QC.