

RE: THE POST OFFICE GROUP LITIGATION

ADVICE ON SETTLEMENT

Background

1. I have been informed that Post Office is considering the possibility of settling the group litigation. Included among the Claimants are 61 in number (of a total of 555) who have been convicted of, or have pleaded guilty to, criminal offences against Post Office.
2. By way of background, I have been told that, although consideration of settlement is in its early stages, any settlement will most likely take the form of a financial payment. Possible structures for this payment include:
 - a. The payment being made on a Claimant by Claimant basis, depending on the individual merits of each claim.
 - b. It could be a settlement pot that is distributed in accordance with agreed criteria, with each Claimant's case being measured against that criteria to determine how much compensation should be awarded.
 - c. It might be that a single lump sum payment is made to the group, which is then distributed among the Claimants as they see fit, but, if that happens, some of that compensation might end up with a convicted Claimant (albeit without Post Office's knowledge or blessing).

3. I am told:
 - a. Some or all of the Claimants are likely to seek public apologies or admissions of wrongdoing from Post Office in addition to financial compensation.
 - b. It is likely that a settlement will contain standard non-admission of liability provisions;
 - c. There is a risk that any payment will likely be portrayed publicly as a success for the Claimants, and the media may nonetheless interpret this as an admission of fault by Post Office.
 - d. Post Office does not believe that any of the convictions are unsafe or that compensation is required in relation to any claim for malicious prosecution or any similar claims arising from any Claimant's prosecution (as opposed to a claim arising from their commercial relationship with Post Office).
 - e. However, Post Office wishes to understand the risk to the safety of a conviction that might be caused by a settlement that directly or indirectly awards some compensation or other benefit to a convicted Claimant.
4. The Horizon Issues Trial is still ongoing, and it is estimated that a judgment will not be delivered until about September.
5. I understand that in the civil jurisdiction, where there has been a settlement, or even where there is the possibility of a settlement, Post Office would be under a duty to notify the court about it, as that might avoid the need for a judgment to be delivered. Post Office has lodged (or is about to lodge) an appeal against the substantive issues judgment in the Common Issues Trial.
6. I am asked to advise Post Office on the risk to the safety of any conviction if Post Office enters into a settlement with any or all of the Claimants.

Discussion

7. Because no structure for any settlement has yet been decided, far less whether in principle any settlement negotiations should be commenced, this advice is inevitably in the abstract. The single question is whether settlement risks, or is likely to risk, the safety of past criminal convictions. The nature of this advice may, I understand, even influence the decision whether to attempt a settlement.
8. As I pointed out in my 14 April 2019 Advice, in the course of his judgment in the Common Issues Trial, the judge made clear that the High Court action had “no jurisdiction or involvement in such criminal matters”.¹
9. The conclusions in that Advice are worth repeating. The judge’s factual findings regarding disputed Branch Trading Statements did not impact on the safety of past convictions, because (1) they were based on his application and interpretation of the law of contract to the contracts that existed between Post Office and the Claimants; (2) the judgment and his factual findings were not binding on the Court of Appeal Criminal Division or even persuasive authority, and so they did not impact on criminal matters, as the judge observed himself; (3) each past conviction had been founded on facts specific to that case, and in any future appeal or on any reference made by the CCRC the safety test would have to be applied according to the issues, and the evidence heard, in each case and based on any fresh evidence the Court of Appeal permitted to be adduced before it.²
10. While the Common Issues Trial judgment has in my opinion no bearing on the safety of convictions, the issues being litigated in the Horizon Issues Trial and in any trials that are to follow may do so in the sense that they could provide new evidence and potential fresh

¹ Common Issues judgment para 10

² Advice 14 April 2019 para 90

avenues of enquiry supporting an eventual application to appeal or a reference by the CCRC, as I intimated in my earlier Advice.³

11. It is not for me to advise on the strategy of any settlement and when and in what circumstances any offer to settle should be made. That must be a matter for Post Office's commercial law advisors to advise. I am directing my attention solely at the potential risks to the safety of criminal convictions in settling (or even attempting to settle) the 61 convicted Claimants' claims against Post Office.

Admission of wrongdoing and public apology

12. The first point is an obvious one. If Post Office insists on no admission of liability, then there can be no admission of wrongdoing. Any admission of wrongdoing in relation to any convicted Claimant, however couched, could risk one or other Claimant attempting to make an application out of time for permission to appeal to the Court of Appeal on new grounds arising from the admission and/or the CCRC acting on it, and is to be avoided.
13. By contrast, while a public apology can be carefully crafted, either bearing no hint of acceptance of fault or bearing a total denial of fault, it might nonetheless be a PR disaster. That particular risk will have to be for others to advise Post Office. A carefully worded apology may not realistically impact on the safety of any conviction, but any apology that goes to any substantive issues in the litigation, however felicitously worded, might be interpreted as an implication of wrongdoing and is also best avoided so as not to encourage any individual to seek to find new grounds to launch an appeal and/or the CCRC to investigate the case further and make a reference.
14. I am, however, unable to assess the risk to the safety of any conviction in either instance in the abstract, because I cannot foresee the nature and terms of any admission or apology to

³ Advice 14 April 2019 paras 32-41

assess its likely impact. My advice is, instinctively, either might present a potential provocation to the individual Claimant or the CCRC.

Financial compensation

15. Financial compensation presents more difficult problems. At present, I presume any merits-based settlement is capable of being gauged by what the judge ruled in the Common Issues judgment (which dealt in the main with contractual issues). As noted above, an early settlement is likely to prevent any judgment on the technical Horizon issues. It is the outcome of that judgment (if adverse) that is likely to provide any fresh grounds of appeal or provide “the technical aspects” of the litigation which the CCRC is awaiting, about which the judge spoke in the Common Issues judgment and is one outcome I assume that Post Office is seeking to avoid.⁴
16. I am therefore assuming that any settlement negotiations begun and/or completed *before* the Horizon Issues Trial judgment, and certainly before any claim for malicious prosecution, or any other action related to the prosecution of the Claimants, is heard and judgment given, is likely to be advantageous from Post Office’s point of view, because any settlement is likely (if at all) to be negotiated on the basis of an assessment of the findings arising from Post Office’s commercial relationship with the Claimants.
17. Any settlement involving financial compensation based on individual merit implies that consideration would necessarily be given to the individual Claimant’s alleged loss or damage in contract, in particular the judge’s finding that Post Office’s reliance on Branch Trading Statements as a settled statement of account at the end of a particular branch trading period could not be supported where the Claimant sought help from the Helpline.⁵

⁴ Common Issues judgment para 10

⁵ Common Issues judgment paras 1115-1116

18. A Claimant who was convicted of, or pleaded guilty to, criminal offences against Post Office will have been sentenced, and in many cases subject to compensation or confiscation orders. Though those orders are geared towards different ends (compensation to the individual and confiscation to the State) they will have been sought by Post Office as prosecutor and ordered by the Court. In the case of a compensation order, because Post Office has proved a calculable financial loss or deficit by reason of the theft, fraud or false accounting; in the case of confiscation, because the offender has benefited from criminal conduct.
19. In the circumstances envisaged here, as I understand it, settlement of a convicted Claimant's case on the merits could presumably only reflect his contractual loss and damage pleaded in the substantive claims made in the litigation, and presumably be assessed according to the judicial findings made thus far. There is, however, in my view, a conflict in principle between negotiating a settlement with such a Claimant in the course of the group litigation and Post Office, as prosecutor, having sought and obtained against that Claimant a conviction for an offence/s of dishonesty, and a compensation order to reflect Post Office's loss, or a confiscation order to reflect the criminal benefit, over and above the sentence of the Court, in the course of the criminal justice process.
20. Essentially, they are the same issue: the commercial/contractual relationship between the Claimant and Post Office, but, in the case of the convicted Claimant, the conviction or the plea of guilty proves to the criminal standard that the Claimant breached that relationship (in a non-technical sense) by acting dishonestly.
21. If Post Office was seen to be enthusiastic to negotiate, and did negotiate, financial settlements with convicted Claimants, there is a palpable risk that someone (a Claimant, the CCRC or a member of the public) will argue that the Post Office's conduct in the criminal trials of Claimants benefiting from a settlement is incongruous, because it is nonsensical to settle such cases if Post Office had confidence in the outcome of the case at trial, and it invites further enquiry and investigation. It is unclear how Post Office can ride

both horses. There is a real risk it would invite critical scrutiny not only of Post Office's prosecution function but also of its prosecutorial decision-making during the pretrial and trial process.

22. While it is difficult precisely to define how this would play out, and while I cannot presently advise that the safety of any convictions would inevitably be put in jeopardy, I have little doubt that the stark inconsistency of approach would be carefully scrutinised with a view to examining if any of the trials or pleas of guilty might be reopened before the Court of Appeal.
23. Compensation that is structured in such a way that a pool of money was distributed among all the Claimants (subject to agreed criteria) which required each Claimant's case to be measured against those criteria to determine the amount of compensation suffers from precisely the same problem.
24. Compensation of a single lump sum distributed among the Claimants implies acceptance that convicted Claimants will share in the pot, whether or not it has Post Office's direct knowledge or blessing but does not avoid the problem.
25. Legally, the mere fact that Post Office settled the group litigation by financially compensating any or all the convicted Claimants cannot alone lead to the conclusion that any conviction is unsafe. Any applicant to the Court of Appeal needs to find substantive grounds and the CCRC cannot make a reference on a whim; they too need to identify a proper basis for doing so. But, not only will settlement fly in the face of the prosecution, and the conviction and sentencing of those offenders, as argued above, but also, overall, the appearance of compensating those convicted of, or those who pleaded guilty to, criminal offending against Post Office is unfortunate, and, despite attempts to control or cosmeticise the optics of the agreement, financial settlement sends out the wrong message: that despite committing criminal offences against Post Office such people are entitled to compensation on merit.

26. It is naturally impossible for me in the abstract to advise on the precise risk to any conviction in the absence of seeing and considering substantive grounds or any reference. But even if a settlement agreement was reached on the basis of no admission of fault by Post Office, while that might bind the convicted Claimants *contractually*, it will not prevent individuals from seeking to find and attempting to pursue an appeal against conviction if there are grounds to support it (I would think to bind them against it in any settlement agreement would be held contrary to public policy and struck down); and at all events nothing will operate to prevent the CCRC continuing to examine the case, and deciding to pursue a reference to the Court of Appeal under its “exceptional circumstances” jurisdiction if so advised.⁶
27. Foreseeing all the possibilities is impossible, but I do see another subtle yet possibly significant risk: if the Court of Appeal was ever asked to adjudicate on the matter on behalf of an individual or by means of a CCRC reference, there is no question in my mind that the settlement of convicted Claimants’ cases could risk unwelcome and possibly critical consideration by the Court of Appeal of the settlement itself (or possibly the reasons underlying it) over and above any grounds of appeal or the substance of any CCRC reference. The Court could not reopen the agreement, but the Court would be aware (or made aware) of the settlement and its terms and might seek answers to some difficult questions about it which could affect its view of any convictions it was being asked to consider.
28. I have enquired whether Post Office had in mind any differential approach as between convicted Claimants and others. I am told that if a settlement materially risked the safety of their convictions then Post Office might seek a settlement structure that ringfences the convicted Claimants from the others so that they receive nothing. However, I have also been told that that could be seen as a divisive step that could fracture the Claimants’ group between those who wish to settle and those wishing to fight on.

⁶ Section 13 of the Criminal Appeal Act 1995

29. While I understand the politics, in my view Post Office cannot avoid the fact that convicted Claimants represent a very special category who have either pleaded guilty or been convicted by a Court of offences of dishonesty against Post Office. Settlement with them, before any Horizon Issue judgment, sends out a message (rightly or wrongly) that Post Office has/had little or no faith in its civil defence against all the Claimants, including the convicted ones; also it potentially undermines the view of Post Office's confidence in those Claimants' criminal convictions (as indicated above). It is not only a potential sign of weakness that would, I think, be a message the CCRC will seize on and scrutinise at whatever stage any settlement offer is broached or agreed and could influence their decision-making, but also would have a subliminal effect on the Court of Appeal if they became seized of any appeal or reference.
30. In my opinion, there is some risk to including convicted Claimants in any settlement agreement or package. At this stage, and in the abstract, I am unable exactly to define or to quantify the risk. While it has to be a matter for others to advise and decide how far Post Office should go in progressing a differential approach among the convicted Claimants and the rest, my advice must be that reaching any settlement agreement with the convicted Claimants should be a red line for all the reasons given above.

Conclusions

31. In summary:
- a. Any admission of wrongdoing by Post Office to convicted Claimants is to be avoided, as is any public apology that risks misinterpretation or the implication of an admission of fault.
 - b. Although settlement by financial compensation including the convicted Claimants cannot of itself lead to the conclusion that any conviction is unsafe, I foresee a real risk of Post Office taking an approach which could be interpreted as incongruous with the

processes it instituted as prosecutor when seeking conviction and sentence of, and ancillary compensation or confiscation orders against, convicted Claimants.

- c. There is a real risk such a settlement would invite critical scrutiny not only of Post Office's prosecution function, but also of its prosecutorial decision-making during the pretrial and trial process.
- d. There is also some risk that Post Office settling or seeking to settle the case at any stage, even prior to delivery of the Horizon Issues judgment, might be viewed as a sign of weakness or a lack of confidence in both its civil and criminal cases by the convicted Claimants as well as by the CCRC who may then be encouraged to investigate "the technical aspects" of the case heard in the Horizon Issues Trial evidence and to seek to appeal or to make a reference, which will potentially open the settlement agreement (or the rationale underlying it) to consideration or questioning by the Court of Appeal as part of any appeal/reference hearing.
- e. There is therefore in my judgment some risk to the safety of convictions of including convicted Claimants in any settlement agreement or package.

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