

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



DECISION: Should Post Office defer its strike out application to the start of trial?

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. The plan was for that application to be heard in good time before the trial began. It was thought that this would be possible because (i) the Court had already reserved a day of time on 19 September and (ii) the Judge had previously said that the Court would make time available to hear a strike out application (after we had made a request in July to reserve further Court time in September).
- 1.2 The aim of making this application before trial was to either have the evidence (and its prejudicial effect) removed from the trial completely or, failing that, force the Claimants to explain why their evidence was admissible, thereby allowing Post Office to be better prepared for trial. Either way, addressing this point upfront would allow Post Office more time to take mitigating actions, including potentially submitting additional evidence.
- 1.3 On less than 24 hours' notice, the Managing Judge called the parties into Court on 11 September to discuss the sequencing and timing of Post Office's applications to strike out and for security for costs, as well as other matters relevant to the trial in November. The hearing lasted around one hour. It was primarily a scheduling hearing but the Court did touch on the substance of the strike out application.
- 1.4 The Court ordered that the security application be heard on 19 September and the strike out application be heard on 10 October, with the Managing Judge noting (contrary to what he previously indicated) that he had no spare time before 10 October. Before the hearing on 10 October he has ordered both parties to set out, paragraph by paragraph, why they believe the Claimants' evidence to be admissible / inadmissible.
- 1.5 On points of substance, the Managing Judge said, in pretty clear terms, that he agreed in principle with Post Office on what would amount to inadmissible evidence. He also however indicated that he was not attracted to the idea of striking out inadmissible evidence before trial. His view was that matters of inadmissible evidence could be adequately dealt with at trial. He also expressed a degree of sympathy with the Claimants "*wanting to tell their stories*". There was no criticism of Post Office in making the application; he simply expressed a view that he was minded to approach things differently to the way proposed by Post Office.
- 1.6 Due to an error by the Court the strike out application had not been passed to the Managing Judge before the hearing and he was only able to quickly skim a copy of the application that was handed to him during the hearing. It would be fair to say that his views were his initial impressions without having yet given the application due consideration. Nevertheless, this Judge has repeatedly shown a predilection for making snap impressionistic decisions and then sticking to them.
- 1.7 In light of these new circumstances, it is appropriate for Post Office to reconsider and, if appropriate, adjust its strategy for making the strike out application.

2. COMMENTARY

- 2.1 The Managing Judge's comments reverse the comments he made in June, inviting Post Office to make an application to strike out. He has also reversed his position on making Court time available. This is a regrettable flip-flop in his position 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 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.
- 2.3 Much confidence should be taken from the fact that Judge is broadly with Post Office on the admissibility of evidence. Also, the Judge's order that the Claimants set out in writing why they consider their evidence to be inadmissible will be very helpful for Post Office. In a sense, the purpose of the application was to flush out the Judge's and the Claimants' positions and that has happened, just not in the way expected.
- 2.4 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).
- 2.5 Not having the application heard in late September (as we expected to happen) is not a desirable outcome. Some of the tactical advantage in making the application has no doubt been lost. The question now is how to maximise Post Office's position in these new circumstances.
- 2.6 The options for Post Office are:
 - 2.6.1 Withdraw the application entirely (in a way that eliminates the costs risk).
 - 2.6.2 Proceed with the application on 10 October.
 - 2.6.3 Seek to adjourn the application and have it heard at the start of the trial.

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 largely agrees with us. 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, failure – not on merit, but due to the Judge's approach to the procedural management of this litigation. It should be noted that hearing the application on 10 October removes the possibility of hearing the application at the start of trial. If the application fails on 10 October, 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 four 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 fair or reasonable.
 - 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 make submissions on two contradictory bases: one with the inadmissible material and one without. This factors presents a real risk to Post Office's prospects of success at trial and so hearing the application at the start of trial has real benefit.
- 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 upfront.