Strike out of parts of witness statements application dismissed in group litigation (Bates and others v Post Office)

18/10/2018

Dispute Resolution analysis: This decision followed a case management hearing and dismissed an application to strike out roughly one quarter of the lead claimants' evidence (160 paragraphs of the witness statements). The decision considered the court's jurisdiction and discretion to strike out witness statement evidence in the context of a group action and shortly prior to a common issues trial. The case is a complex one involving over 500 claimants and a very broad period of time and involves the construction of contracts made between Subpostmasters and the Post Office across that time period.

The judge found that the Post Office, to succeed in their application, had to discharge a heavy burden and had failed to do so. The judge commented that adverse publicity for Post Office was not a matter of concern for the court if the evidence was relevant and admissible. He also warned against the aggressive conduct of litigation, particularly in a group action of this nature. Written by Adam Heppinstall, barrister, Henderson Chambers.

Bates v Post Office Limited-Judgment No 2 [2018] EWHC 2698 (QB)

What are the practical implications of this case?

The test for the strike out of witness statement evidence in group litigation

Fraser J adopted the approach taken by Mann J in *Wilkinson v West Coast Capital* [2005] EWHC 1606 (Ch). A review of the relevant authorities (notably Harman J in *Re Unisoft Limited (No 3)* [1994] 1BCLC 609 and Hoffman LJ in *Vernon v Bosley* [1999] PIQR 337) led Mann J to conclude at para 5:

> 'I should only strike out the parts of the witness statements which I am currently considering if it is quite plain to me that, no matter how the proceedings look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it. With evidence of this nature, that is likely to be quite a heavy burden.'

Fraser J held (para 24) that it was not appropriate to 'dilute' the test in group litigation and that:

> 'there are in any event good arguments that it should be harder to strike out evidence, not easier, in Group Litigation. This is because Common Issues, or the cases of Lead Claimants, are selected at an early stage in Group Litigation. Relevance has to be considered against the litigation as a whole—unless this is done, steps in the litigation (such as resolving at trial Common Issues that will be relevant to hundreds of claimants) could be taken on an artificially narrow basis.'

He accepted, at para 32, that it is also a feature of group litigation that points of evidence which are 'not of primary or direct relevance to one Lead Claimant could very well be of considerable relevance to a large number of others.'

On the facts, the judge dismissed the application and found that it could not be said that the evidence would never be relevant to the common issues trial. His findings will assist practitioners running group litigation with the task of marshalling large volumes of witness evidence, particularly evidence which is not relevant to all claimants in the group action.

The aggressive conduct of the litigation and publicity

At paras 11 to 16 and at 57 he commented on the conduct of litigation and of group actions in particular. In the context of Post Office's unusual application, he used particularly graphic language, criticising '[b]ehaviour from an earlier era, before the overriding objective emerged to govern all civil litigation (…) this application regrettably falls into a pattern that has, in my judgment, clearly emerged over the last year at least. Attempts are being made to outmaneouvre one another in the litigation, and tactical steps have led to constant interlocutory strife. This is an extraordinarily narrow-minded approach to such litigation.'

He added at para 57:

> 'I wish to make one point entirely clear, so this cannot be misunderstood. An aggressive and dismissive approach to such major Group Litigation (or indeed any litigation) is entirely misplaced. I repeat that such litigation has to be conducted in a cooperative fashion and in accordance with the overriding objective in the CPR.'

He made clear that the fact that relevant evidence, which is properly admissible under the CPR, may generate adverse publicity for Post Office was 'not a concern of the court' and arguments pertaining to the same amounted to 'irrelevant grievances.' He firmly noted 'the court is not a marketing or PR department for any litigant, and the principle of open justice is an important one.'

What was the background?

This judgment is a case management decision in a group action concerning over 500 claimants each of whom was responsible for running a Post Office branch, mostly in the position of Subpostmaster. In 1999/2000, 'Horizon,' a new electronic point of sale and accounting system, was introduced to branches. The claimants were required to use Horizon. The claimants' case is that alleged shortfalls in their financial accounting with Post Office, for which Post Office pursued them with some 'vigour,' were caused by problems with the Horizon system. Mr Bates, the eponymous claimant, is one of six lead claimants. There is currently a Criminal Cases Review Commission review underway in relation to the convictions of a number of the claimants. A group litigation order was made on 22 March 2017 and a common issues trial is listed for November 2018.

What did the court decide?

The focus of the judgment relates to the relevance of the evidence to the common issues coming up for trial. Where such common issues, as is common in group litigation, are being tried by way of lead cases, the issue arises as to whether those lead claimants can give evidence not only about their own case, but about generic background matters. The Post Office objected to such generic evidence in lead claimants' witness statements, while leading its own generic evidence pertaining to the 'overall perspective.' In other words, the Post Office wanted to strike out evidence from lead claimants while leading its own evidence on the same topic. As Fraser J found such an asymmetric result would be 'demonstrably unfair,' he found that the application 'appears to be an attempt by Post Office to secure an advantage at the Common Issues Trial by selectively tailoring the evidence which the court is to consider.'

Further, Fraser J considered whether evidence should be struck out on the basis that it pertained to matters the court was not asked to consider at the Common Issues trial (but would be asked to consider in subsequent trials due to take place in 2019). The Judge held that to admit such evidence would not result in prejudice to Post Office because 'Judges are expected to be able to consider relevant matters pertaining to different issues, keeping them compartmentalised where necessary.'

The application was dismissed.

Case details:

- Court: High Court, Queen's Bench Division
- Judge: Fraser J
- Date of judgment: 15 October 2018

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