

## Speaking Note for BACFI Ethics Webinar – 23 January 2024

I would like to focus on two professional conduct principles:

- Acting in the client's best interests
- Acting with integrity

The difficulty with the former, is that what appears to be in the client's best interests in the short term may actually be counter to its best interests in the longer term.

Being a bit sharp or tough may seem to get a good result, and indeed there may never be a comeuppance, but the Post Office scandal shows that there will remain a real and lasting risk in the longer term.

So to *truly* act in your client's best interests, you may need to advise them against the course which appears to be in their best short term interests.

And it seems to me that the guide for when to do this will be the requirement to act with integrity. Because if something is contrary to the lawyer's duty to act with integrity, it will probably pose a risk to the client in the longer term too.

Three examples arise from the Post Office scandal:

Witness statements

- Many lawyer-drafted statements seem to have been misleading.
- In one case the finessing of contemporaneous documents into a witness statement gave wholly the wrong impression. When the lawyer was asked about it he said, well, it was the witness's statement, not mine.
- In one case a lawyer-drafted statement purporting to testify to Horizon's robustness appears to have been lifted straight from a press release, drafted by Post Office's Communications team.
- We have seen email exchanges in which a lawyer appeared to be "firming up" an expert witness.
- How lawyers go about drafting witness statements is infinitely particular to individual circumstances, but in an adversarial system it is continually tempting, both consciously and unconsciously to tailor them to suit the case your client wants to present, and therefore – potentially – to mislead by omission or commission.
- And while it may be in your client's short term interests to do this, the Post Office Group Litigation exposes the longer term risks it carries for the client, and the lawyer
- Time and again, witnesses in the group litigation edged away from the content of their statements when they came to be cross-examined. The overall impact on the Post Office's credibility before the Court must have been huge.
- But more than that – those overly positive statements were the foundation of the misplaced and overly aggressive litigation, the ruinous cost of which would have sunk a privately owned company.

- So all that needs to be thought about when considering the obligation to act in your client's best long-term interests.
- The Group Litigation was just an extension of the way the Post Office had been running litigation for years – there seems to have been an endemic failure to lay the facts out truthfully in evidence
- They may have got away with it for a long time, but eventually the Bates litigation began the process which has led to where they are now.

Another issue is collateral purpose –

- What lawyers mean by a 'test case' is not necessarily the same as what a business means by it
- Within the Post Office there was a tendency to use litigation as a means of trying to prove that the Horizon system was robust. It was thought that high profile trials were 'test cases' for this purpose.
- We have heard evidence that PO people said those cases 'sent out a message' to all the other SPMs, and to their clients like the Benefits Agency, the banks and the utility companies – the message was that Horizon was 100% reliable
- The effect of that in Mr Castleton's case was the Post Office ran up costs of well over £300K ostensibly to collect a debt of £24K, in circumstances where they knew that they would not recover their costs, because they had investigated Mr Castleton's assets
- Apparently it was seen as 'worth it' because of the 'message'.
- Of course the ostensible legal issues in these 'test' cases had nothing to do with whether Horizon was a robust accounting system
- The reliability of Horizon was only relevant from an evidential point of view, not because any point of law turned on it.
- But for PO, it seems that the reason to pursue the 'test case' was to establish that Horizon was reliable
- The Post Office's purpose in the civil proceedings *should* have been to obtain judgment for a debt genuinely owed to the Post Office,
- And in the criminal proceedings it *should* have been to prove that the defendant had stolen money which belonged to the Post Office.
- The idea that these were 'test cases' should have been alarming to the lawyers, because the courts are not to be used as a vehicle for a business to try to prove some wider point. If a business wants to evidence the reliability of its IT systems it should bring in some expertise, produce a report, and publish the findings.
- Perhaps the lawyers needed to stand back, and ask a few searching questions – Why is the business coming to me, the lawyer? Is it to pursue a goal which can be achieved through application of the law, or is the ostensible goal, which we are pursuing by applying the law, really a cover for something else?
- This is not just about litigation – abuse of the law more broadly, when it is for a collateral purpose such as intimidation or exploitation, is essentially the same problem

Which leads to my third issue - Abuse of power

- As in the Bates litigation, we have heard some toe-curling evidence about the standard contract that all SPMs were required to sign
- The heart of the unfairness was a provision which pre-dated Horizon, and which said that SPMs were responsible for all losses which were the result of mistakes in their branch
- When the accounts were prepared on paper in the branch, and the SPM had full control of the process, that might have been fair enough
- However, once the accounts were produced by an IT system which the SPM had no control over, it should – obviously – have been re-considered
- In fact the Post Office doubled down on this provision, and because it would not admit that Horizon could produce erroneous figures, it enforced it on the basis that *all* losses in the accounts were due to mistakes or theft within the branch
- And I'm afraid the lawyers seem to have advised on operations and procedures which made enforcement of this provision super-easy, with minimal process
- Then, if an SPM had the temerity to challenge the contract, it seems that they were absolutely hammered
- Mr Castleton has said in his testimony that he was warned that the PO would ruin him if he continued fighting, and indeed they did ruin him
- That over-mighty approach seems to have carried through to the Bates litigation, it may have carried through into the Hamilton appeals, and arguably it is still a characteristic of the way the Post Office is dealing with the SPMs in the compensation proceedings
- At no stage, did the Post Office's legal strategy appear to recognise that its long term interests would be better served if it behaved like a trustworthy business partner, rather than a bully

This ties into my closing thought about acting in our client's best interests.

It may be that this foundational conduct principle needs a bit of supplementing in the modern world of big, powerful institutions.

It seems likely that when the principle arose, the fiduciary relationship between lawyer and client would nearly always follow a straightforward power dynamic, with the professional clearly more powerful than the client not only in terms of legal skill and knowledge, but also in terms standing, position, influence, etc.

Nowadays, many lawyers are far less powerful than their clients, particularly when they are in-house. But this is also true of the external lawyer, keen to curry favour with a big, important client.

- The year 2013 at the Post Office is interesting on this front.
- Two damning Advices were written by a barrister employed by an external firm. Instead of prompting a wholesale re-think of the convictions secured over the preceding 13, it took another 7 years for those convictions to begin to be overturned
- A few months later the General Counsel at the Post Office disappeared, in circumstances which are not yet clear

When the Inquiry reaches that part of the story it will be very interesting. I suspect a relevant consideration will be

- what do we expect of lawyers, in-house or otherwise, when their clients are powerful enough to ruin their careers?

I'm sure most of us like to think that we would risk our job in order to meet our ethical obligations. But giving advice that is in the client's long term best interests, and which upholds the lawyer's integrity are both mutable concepts, no doubt easily affected by self-protective, psychological biases.

I'm afraid poor conduct may have been widespread amongst those who acted for the Post Office.

The only reliable tool I can think of to guard against it in our own practices is the imaginary conversation with the most decent person you can think of – who may even be your local subpostmaster.

If you tell yourself it's too complicated, they wouldn't understand, you're probably kidding yourself.

As someone who's spent most of my time in criminal practice, I've had a lot of conversations with people who ask how I can act for someone who is guilty. I explain about due process, and the ethical orthodoxy that if they tell me they are guilty I can still act but can't advance any positive defence. However, I also explain that I have to advise my client, in their best interests, that staying silent during a trial is unlikely to lead to a good outcome for them.

So anyone can understand the ethical situation – it's important to have a fair trial whenever a defendant denies the offence, even if the evidence appears strong, but when they admit they are guilty, in light of the duty not to mislead, the lawyer will usually give clear advice to plead guilty, because it is very likely to be in the client's best interests.

A decent person will understand all this, and the process of stepping back and explaining is a useful reminder.

If that process of stepping back and explaining a difficult situation leads a lawyer to think they must give unwelcome advice in order to maintain their own integrity, I suspect that unwelcome advice will also be in the client's long-term best interests.

It seems to me that is a lesson for lawyers from the Post Office saga.

It is quite a cautionary tale. And I think it will become much more cautionary over the next year or two.

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