



**Noting paper: Update on strategy for the Court hearing on 2 February 2018**

**1. BACKGROUND**

- 1.1 At the last Steering Group meeting, the PLSG endorsed the following strategy for the Court hearing on 2 February 2018:
- (a) In agreement with the Claimants, the parties would ask for the March 2019 trial to be vacated.
  - (b) Post Office would agree to use its reasonable endeavours to attend a mediation in March 2019 but it would oppose a formal stay of proceedings so to avoid any delay to the litigation.
  - (c) Post Office would seek narrower / more targeted disclosure than the Claimants are seeking.
  - (d) Post Office would ask the Court to set down a full trial timetable to a Lead Cases trial in 2020.
  - (e) Post Office would agree to an order that it will provide further information on its case regarding implied terms.
- 1.2 Matters (a) and (e) have been agreed with the Claimants. Matter (b) has been agreed save in relation to the stay. Matters (c) and (d) are not agreed and will be the core subjects for discussion with the Judge at the CMC on Friday.

**2. DISCLOSURE**

- 2.1 The parties have agreed a three-staged approach to disclosure.
- 2.2 **Stage 1 Disclosure in February 2018:** preliminary disclosure of documents that refer to one of the 12 Lead Claimants for the Common Issues Trial. Since the last Steering Group meeting, the Claimants have accepted Post Office's proposals on Stage 1 Disclosure.
- 2.3 **Stage 2 Disclosure in May 2018:** disclosure of additional documents which are necessary for the Common Issues trial in November 2018. Stage 2 disclosure is split into two parts:
- (a) further disclosure on the Lead Claimants; and
  - (b) disclosure of "generic" documents for the Common Issues Trial.
- 2.4 Further disclosure on the Lead Claimants is nearly agreed between the parties, subject to further discussions on the number of custodians to be included. It is hoped that this can be agreed before the Court hearing. This disclosure will be extensive as the Claimants are currently asking Post Office to search around 80 people's email accounts for relevant documents and this will incur a significant e-discovery cost (estimated at £4k per person). We will be trying to agree a shorter list of email accounts with the Claimants before disclosure is given.
- 2.5 In relation to the disclosure of "generic" documents for the Common Issues Trial, there remains a fundamental difference in the approaches of the parties.
- 2.5.1 The Claimants are seeking broad disclosure covering documents which go beyond that which, we say, is admissible at the Common Issues trial. They are asking the Court for

"Model D" disclosure which is disclosure of all types of documents relevant to all factual issues in dispute. This would include emails, notes, memos, reports, presentations, etc.

Our calculations put the number of documents sought by the Claimants in the many millions and so we believe it would not be achievable to deliver this disclosure by May 2018.

- 2.5.2 By contrast, Post Office is proposing "Model C" disclosure, which is to disclose around 30 defined classes of documents. These classes of documents cover things like operating manuals, written policies and procedures, technical documents on Horizon, etc.

The disclosure being offered is still extensive and is expected to run to 100,000 – 200,000 documents. It is however practically manageable in the time available.

- 2.6 The outcome of this dispute will turn on whether the Judge agrees with us on the admissibility of the documents that the Claimants are seeking. If he does, he will likely refuse to order the extensive disclosure sought by the Claimants.
- 2.7 We are taking the orthodox line on admissibility whilst the Claimants are seeking to expand the rules on admissibility to documents that are routinely not permitted in Court. The challenge for the Judge is that he is effectively being asked to determine a substantive trial point on admissibility at an early procedural hearing. If the Judge decides that it is premature to address the admissibility point now, he will likely order Model D disclosure as requested by the Claimants and then deal with the admissibility problems at trial.
- 2.8 **Stage 3 Disclosure in September 2018:** disclosure of documents for a Lead Cases Trial – discussed below.

### 3. LEAD CASES TRIAL

- 3.1 The Judge will be asked to consider two issues which relate to the Lead Cases trial:
- (a) whether a timetable for that trial should be set now; and
  - (b) the scope of the disclosure to be provided in 2018 for the Lead Cases Trial (Stage 3 Disclosure).
- 3.2 Freeths have agreed with Post Office's proposal for a Lead Cases Trial. We have proposed a full timetable for that trial to take place in either May or October 2020. Part of Post Office's timetable includes selecting Lead Cases in 2018 for the trial in 2020. We believe that front-loading this work will save 12 months in the overall litigation timetable. In line with this, we have also proposed giving disclosure of documents on these Lead Cases in 2018 (Stage 3 Disclosure).
- 3.3 The Claimants propose that a full timetable for this trial should not be set until the next CMC in September 2018. The Claimants have said that it is possible to select the Lead Claimants in April 2019 (rather than 2018) and for there still to be a trial in April 2020. On this basis they say there is no need for the full trial timetable to be set down now. The Claimants do however want to front-load some work in 2018, but do not want to select Lead Cases. Rather they want Stage 3 Disclosure to be of further generic documents.
- 3.4 Regardless of the merits of the Claimants' position, both parties are proposing a Lead Cases Trial in early 2020 and so Post Office remains protected from criticism of delaying matters.
- 3.5 As to the merits of the Claimants' position:

- 3.5.1 Their trial timetable is completely unrealistic. It is not possible to complete all the preparations for a Lead Cases trial in 12 months and even proposing this shows the lack of sense in the Claimants' approach. At best the Claimant's approach, which does not begin trial preparation until April 2019, would lead to a trial in 2021.
- 3.5.2 We do not believe that the parties will have any materially better information available to them by the CMC in September 2018 which would make setting a timetable any easier.
- 3.5.3 The Claimants' approach to Stage 3 Disclosure faces a number of problems:
- (a) It is unclear where the Claimants' Stage 2 disclosure ends and Stage 3 disclosure begins, and the Court generally dislikes a lack of precision in Orders of this type.
  - (b) Post Office would need to give extensive Stage 3 Disclosure immediately before the Common Issues trial, disrupting its trial preparation. The Claimants would have no such disclosure to give. Their proposal is therefore inherently unfair.
  - (c) Their proposal requires disclosure of documents before Post Office even knows which claims it is facing.
- 3.6 This matter is going to turn on whether the Judge sees through the Claimant's sham idea of being able to prepare a Lead Cases Trial in 12 months and is thus attracted to our proposal for front-loading the selection of Lead Cases into 2018. If he does, then the natural consequence of this should be to support our proposal for Stage 3 disclosure being limited to the Lead Cases only.

#### **4. OTHER MATTERS**

- 4.1 WBD and Freeths have discussed the option of providing the Judge with a joint note explaining that the parties had been considering the future course of the litigation and asking the Court to extend the CMC to allow such matters to be heard. Freeths and their Counsel strongly opposed the joint note and, to avoid Post Office's first interaction with the Judge for this hearing being a dispute between the parties on hearing length, a decision was taken not to send a note to the Judge on a unilateral basis.
- 4.2 The CMC therefore remains listed for 2.5 hours and due to the outstanding disclosure matters to be discussed (explained above) it is unlikely that the Judge will have an opportunity at this hearing to set a full timetable for the Lead Cases Trial.
- 4.3 If the Judge agrees with our approach in principle, he may decide to list another CMC in the near future to deal with these matters, but there is a risk that the Judge will adopt the Claimants' proposal of setting the timetable at the CMC already listed in September 2018. Whilst this may appear a small point, this decision will have an impact on Post Office's proposals for Stage 3 Disclosure and may mean that Post Office does not get the order it wants.

#### **5. WIDER CONTEXT**

- 5.1 In preparing for this CMC, we have been conscious of the Judge's criticisms at the last hearing. This time around we have adopted a different approach. Rather than adopt the traditional Defendant's position of counter-punching the Claimant's proposals, we have proactively engaged with Freeths. In both sides' skeleton arguments for the CMC, they each highlight the high-level of cooperation between the parties and therefore we hope the risk of judicial criticism has been mitigated. Nevertheless, Post Office remains the "big corporate" against lots of individuals and we should expect to be given robust treatment by the Judge.

- 5.2 We also expect the Claimants' Counsel to take some shots at WBD and Post Office as that is his natural style. Having discussed this with our QC, our plan is to not respond to these points. We believe that engaging in tit-for-tat battles will make Post Office look worse than letting the points lie. The type of points we expect to be made are:
- 5.2.1 Post Office served late evidence for the hearing. We did serve a short witness statement one day before Skeleton arguments were filed, but this was prepared within 3 working days of the Claimant's putting forward their proposals for disclosure and could not have been done sooner.
- 5.2.2 Post Office misled the Court in relation to the availability of Horizon data. The Claimants believe that we failed to inform them that Horizon data is only available from October 2007 onwards. This complaint overlooks that we told them about this in a letter in September 2017 (before the last CMC) and it is also expressly mentioned in Second Sight's Part 2 Report.
- 5.2.3 Post Office is intentionally withholding relevant material as part of a wide strategy to conceal information.
- 5.3 Our QC is not concerned by these points. They are not true and are petty. Post Office will nevertheless need to maintain a thick skin so that we are not drawn into side-fights that distract from the merits of our proposals.

## 6. OVERALL

- 6.1 Our overall preparations for the CMC have gone well and we are in a good position. We have persuaded the Claimants to abandon March 2019, to agree to a Lead Cases trial in 2020, to accept staged disclosure and for disclosure to be conducted in accordance with the new set of Court Rules on disclosure (which mandate much narrower disclosure than previously permitted). There is a good deal of agreement between the parties. There is of course always the possibility that the Judge will disagree with our proposals, but we would be disappointed if there was any material criticism of the way that Post Office has prepared for the hearing.
- 6.2 The points of dispute that remain are fair and reasonable disputes to have resolved by the Judge. Our proposals are logical and defensible compared to the Claimants' proposals that are deeply ambitious and, at times, contrary to well-established legal principles. Our one reservation is that our Judge has shown a tendency to "do his own thing" and come up with Orders that nobody expected. Post Office should therefore be prepared for a full range of outcomes at the CMC.