POL00024653

CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION

Bond Dickinson

Steering Group Meeting: 24 May 2017

DECISION: Should Post Office bring counterclaims against the Claimants?

1. SUMMARY

In July 2017, when Post Office provides the Claimants with its Defence, Post Office has the opportunity to plead a Generic Counterclaim against the Claimants.

To bring a counterclaim, a generic pleading would be included at the end of Post Office's Defence. This would be a high-level assertion of the nature of the claim Post Office intends to bring but would not need to set out detail relating to each individual Claimant. Freeths may request Schedules of Information setting out details of the loss claimed from each Claimant and, if so, this can be built into the procedure which follows the CMC in October 2017.

There are two counterclaims which can be asserted:

1. Non-payment of outstanding shortfalls; and

2. Loss of profit caused by the postmaster's breach of contract.

Outstanding shortfalls

Post Office's claim would be based on the contractual obligation of postmasters to repay shortfalls. The counterclaim is consistent with the Defence being pleaded, that the postmasters are liable to repay the shortfalls, and in these circumstances a Judge would expect a counterclaim to brought (it would be considered peculiar not bring a counterclaim).

Collating information for this counterclaim should be a straightforward exercise and would primarily be based on the information which is provided by Freeths, since each Claimant has been ordered to provide Post Office with the amount of any outstanding shortfall.

We anticipate that the majority of these counterclaims will be brought against former agents. However, there may be some current agents who have large shortfalls but whose contracts have not yet been terminated. There is no legal reason why a counterclaim could not be brought against current agents, but it will need to be assessed on a case by case basis whether these should be pursued (relevant factors would include amount of shortfall, how these shortfalls have accrued and whether Post Office wish to have an ongoing commercial relationship with that agent, etc.). We would anticipate that this review would not need to be done until after October 2017.

It has already been brought to the Claimants' attention that Post Office would bring counterclaims for the outstanding shortfalls along with interest (in the Letter of Response dated 28 July 2016).

Loss of Profit

An additional counterclaim could be brought for the profit which Post Office has lost as a result of the immediate termination of postmasters for breach of contract. Post Office's claim would be for the revenue which Post Office would have gained from a branch if it had not closed.

These claims would be limited to the amount which was lost over the postmaster's notice period (typically three months) and due to the number of factors taken into account, the calculation of this loss would be complicated.

We do not believe that Post Office has sought to bring such a claim against a former agent before and these counterclaims should not be pursued due to the potentially limited recover and complex legal arguments and quantum calculations required.

2. ADVANTAGES OF BRINGING COUNTERCLAIMS

- Since the majority of the 198 Claimants have outstanding shortfalls owed to Post Office, there is a potential opportunity to recover a substantial amount of outstanding debt.

POL00024653

- Under the Court rules, if Post Office decides not to pursue a counterclaim now, but wishes to do so at a later date, then it would be necessary to obtain the Court's permission. To obtain this permission Post Office would need to explain the reason for the delay in bringing a counterclaim. As Post Office is only required to provide a Generic Counterclaim there may not be grounds on which to obtain permission at a later debt and if permission is not granted then it would not be possible to recover the debt.

- Post Office maintains its previously stated position that it would pursue counterclaims.

- When negotiating settlement figures, the value of the counterclaims would be taken into account.

- Bringing a counterclaim will not affect the timeframe for the Group Action as it would run alongside the Claimants' claims and Post Office would receive the Claimants' Defence to the Counterclaim before the CMC.

3. DISADVANTAGES OF BRINGING COUNTERCLAIMS

- Post Office may be portrayed by the media as acting in an oppressive manner.

- Due to the timing of the CMC, Post Office would have a very limited window in which to draft a Reply to the Claimants' Defence to the Counterclaim.

- There is a cost associated with bringing a counterclaim:

    - Court fee of £10,000;

    - the legal costs of drafting the counterclaim - these will be minimal due to the simple contractual basis for the counterclaim; and

    - the internal Post Office time / cost of quantifying the shortfalls. Due to the information which will be provided by the Claimants and the work undertaken by Post Office in gathering such information, quantifying the outstanding shortfalls should be a relatively straightforward exercise;

4. RECOMMENDATION

At the same time as providing the Claimants with Post Office's Defence, Post Office should bring a Generic Counterclaim for the outstanding shortfalls only.

If Freeths seek for Post Office to provide information on each of the individual counterclaims, then Bond Dickinson should push for this to be built into the process following the CMC.