

*Bond Dickinson*

**LEGALLY PRIVILEGED AND CONFIDENTIAL**

**Q&A FOR GE MEETING ON 13 JULY 2017**

**1. CLAIMANTS**

**1.1 How many Claimants are there?**

There are currently 198 Claimants. 4 of the 198 Claimants have indicated that they intend to discontinue their claims although formal confirmation of this has not yet been provided by Freeths.

The Claimants' solicitors have recently indicated that 200-300 more Claimants may join the Group Action before the window for new claimants closes on 26 July.

A total Claimant population of between 400-500 is therefore expected.

**1.2 Who are the Claimants?**

The vast majority (90%+) of the Claimants are either former or current subpostmasters, but there are also assistants, managers, Crown Office employees, and directors and guarantors of franchises.

Exact numbers vary because some claimants had multiple roles (eg. they were assistants who became postmasters).

**1.3 How many Claimants in the group action went through Project Sparrow?**

88 of the Claimants are postmasters whose cases have already been examined during Project Sparrow. The remaining 110 are Claimants whose cases are new to Post Office and were not involved in Project Sparrow.

**1.4 What information do we have about the Claimants' cases?**

Given the number of Claimants and the different facts for each of them, the Court permitted the Claimants to serve generic Particulars of Claim which did not go into detail about the individual Claimants' cases.

However, the Claimants were also ordered to provide Schedules of Information in relation to each existing Claimant by 20 June 2017. Schedules for any new Claimants are due on 6 September 2017.

The Schedules were in an agreed format and the Claimants were required to give information about themselves and their branch; training and support; shortfalls; audit and investigation; suspension and termination; civil and criminal proceedings; the nature of the claims pursued; and the value of the claims for loss.

The quality of the Schedules received has varied, and it appears some have been completed by the Claimants themselves with little legal input, and many include "stock" claims in identical wording, but they provide sufficient information for Post Office to carry out further investigations as part of the case review process.

**1.5 Will extra Claimants be added to the Claim after 26 July?**

This is a possibility but new Claimants would require permission of the Court. The Court is generally reluctant to allow in lots of extra Claimants after the formal cut-off date (26 July) because it makes the litigation an ever changing beast that is difficult to manage.

**1.6 What is the value of the claims?**

A full claim valuation has not yet been provided by Freeths.

The total amount claimed so far by the current 194 Claimants is around £40m (approximately £200k per Claimant on average). This figure is taken from the SOIs but the information in the SOIs is patchy – there are several heads of claim that have not been valued, which could cause this figure to increase.

Although this figure seems large, Post Office has various arguments to say that these claims have been significantly over-valued.

If one assumes the same value is attached to the claims of the 200-300 additional Claimants expected to join the Group, the total value may be around £100m.

**2. DEFENCE – GENERAL****2.1 Are there any difficult areas for Post Office in the Defence?**

The Claim is a very complex, as is the Defence. The generic structure of the Claim makes it difficult to precisely ascertain the claims against Post Office and the risks to Post Office. It would however be fair to say that:

- We believe that the Claimants face an uphill battle to have POL's standard contract terms overturned and replaced with new terms.
- We are more confident about the robust nature of Horizon and the accuracy of the data it holds, following further work from Deloitte and Fujitsu.
- The greatest area of concern is in the operation of POL's suspense accounts. The Claimants assert that losses in branches may have been caused by the incorrect operation of suspense accounts at Post Office. Preliminary work by Deloitte has highlighted that there are many accounts at POL that could be operated as suspense accounts and the controls around these accounts are weak.

Further work is underway but this will not be completed by the time the Defence is due to be filed. A very limited response in the defence on the suspense account issues is all that is possible at this time.

**3. HORIZON DATA AND REMOTE ACCESS****3.1 What approach have we taken to the integrity of Horizon data?**

At a high level, the approach taken in the Defence is that no IT system, including Horizon, is perfect, but that Horizon has robust measures in place to manage any imperfections and that Post Office is not aware of any problems in Horizon causing any loss to any Claimant. Horizon is discussed at paragraphs 21 to 50 of the draft Defence.

The Defence acknowledges that all IT systems, including Horizon, experience software coding errors, bugs or defects. For a system of the size of Horizon, the number of such bugs has been relatively low. The Defence acknowledges that bugs, errors or defects have the potential to create errors in the data held in the system. The Defence emphasises that there are robust measures in place to detect, correct and remediate any such bug. These measures are explained in the Defence.

The Defence further acknowledges that all IT systems involving the transmission of data over the internet experience data or data packet errors during transmission. Horizon has robust measures in place making it extremely unlikely that a data packet error could result in the recording and retention of transaction data at the central database being different from the data provided by the branch. Again, these measures are explained in the Defence.

In relation to Fujitsu, the Defence says that it was not their role to change the transaction or accounting data on Horizon or to identify and remedy coding errors in bugs in a manner that adversely affected this data. Fujitsu's purpose was to improve the reliability of the record of transactions on Horizon.

All the above has been produced with the support of Fujitsu and Deloitte, who have reviewed and approved the draft Defence.

### **3.2 What approach have we taken to remote access in the draft Defence?**

At a high level, the Defence acknowledges that Fujitsu (not Post Office) had the theoretical ability to change or delete branch data but to the best of Post Office's knowledge this ability has never been used. Remote access is discussed at paragraphs 47 to 50 of the Defence.

The Defence confirms that neither Post Office nor Fujitsu had the ability to log onto a Horizon terminal remotely to conduct transactions. A Post Office employee with global user authorisation could use a terminal in branch to conduct transactions during training or audits, and their transactions would be recorded against the global user ID.

Fujitsu, but not Post Office, has the ability to inject transactions into branch accounts. These "balancing transactions" did not involve changing or deleting any transactions entered by the branch and their purpose was to enable Fujitsu to fix known errors, bugs and defects in Horizon.

The Defence explains that a small number of Fujitsu specialists had privileged user access rights which in theory could have been used to amend or delete a branch's transaction data. This was intended for system support and it would have been very difficult to change transaction data and then conceal that this had happened. To do this would have taken months of planning, writing sophisticated computer programs and circumventing control measures. The Defence states that Post Office cannot see any reason any of the specialists would have sought to change data to create a shortfall in branch, it would have been practically impossible to do it without detection, and it would have been impossible for those responsible to have benefited from the shortfalls themselves.

### **3.3 What approach does the Defence take to Post Office's public statements that "Horizon does not have functionality that allows Post Office or Fujitsu to edit or delete the transactions as recorded by branches" and "transactions as they are recorded by branches cannot be edited"?**

The Defence admits that these statements were false in light of the above "privileged user access".

It goes on to state that these statements were believed to be true at the time they were made and that therefore Post Office denies any act of fraud.

The context in which the statements were made is also explained being that they arose from several different lines of questions that needed to be taken in context (for example by a subpostmaster claimed he had observed a Fujitsu worker passing transactions directly into Horizon and altering the foreign currency holdings of branches from a basement in Bracknell, but that Post Office had ascertained it was not possible to remotely access from the Fujitsu premises in Bracknell, which was a test environment).

There are obvious reputational issues to consider when admitting that Post Office made untrue statements. However, the very strong advice of Tony Robinson QC is that these admissions

must be made; to deny them would be to try to defend the indefensible, thereby undermining Post Office's credibility with the Court.

#### **4. ATTACKS ON THE SUBPOSTMASTER CONTRACT**

##### **4.1 How do the Claimants seek to attack Post Office's contracts?**

The Particulars of Claim seek to attack Post Office's contracts with its postmasters by:

- implying terms into those contracts which are inconsistent with the express written terms; and
- alleging that the contracts contained unfair terms which are unenforceable.

These attacks on the standard Subpostmaster's Contract are seeking to make it significantly more difficult for Post Office to recover losses from Subpostmasters and to restrict Post Office's ability to appoint and terminate Subpostmasters.

##### **4.2 How does the Defence respond to these contractual attacks?**

Post Office's response is in paragraphs 81 to 155 of the Defence.

These allegations are robustly denied in the Defence which explains why the express terms form the complete contract, why the terms are fair and enforceable, and why Post Office has not breached the contracts.

The only implied terms that Post Office is accepting are as follows:

1. Each party would refrain from taking steps that would inhibit or prevent the other party from complying with its obligations under or by virtue of the contract.
2. Each party would provide the other with such cooperation as was necessary to the performance of that other's obligations under or by virtue of the contract.

These are very basic implied terms that would be difficult to oppose. Having discussed these with the business, it is agreed that Post Office acts in accordance with these terms in any event and so they should have little effect on Post Office operations.

##### **4.3 What happens if any of the contractual terms are found to be unenforceable?**

If any of the contractual terms used by Post Office are found to be unenforceable this will have an impact on Post Office's contractual position with other postmasters not involved in the claim, as well as the having an impact on the claim itself.

This may make it more difficult for Post Office to defend a Claimant's claim and to recover losses from subpostmasters.

The exact effect is difficult to determine as there are a number of different outcomes that can be the final result, depending on how the case progresses.

Work is however underway to plan for "worst case" scenarios.



#### **4.4 What does the Defence say about the allegation that postmasters were not aware of the terms of their contracts?**

If any Claimant alleges he did not receive a copy, Post Office will respond individually to that Claimant. However, a search has already been undertaken to for all the Claimant's contracts and so could not be found. This may be a minor weakness in Post Office's case.

Post Office does not accept that there were unusual or onerous terms in the contracts which required Post Office to draw a postmaster's specific attention to them. The contracts were entered into in a business to business context. Post Office's position therefore is that it does not matter where a postmaster did not see his terms, so long as he signed an Appointment document.

#### **4.5 How does the Defence deal with the argument that terms should be implied into the contracts?**

Other than the two terms that are admitted above, all the Claimants' implied terms are denied.

The proposed implied terms overlap with and/or are inconsistent with a number of the express terms of the contracts. Other proposed terms do not meet the relevant tests to be implied i.e. they are not so obvious as to go without saying or necessary for business efficacy. Other terms, such as not to conceal bugs in Horizon, not to conceal the extent to which other postmasters were having problems with Horizon, and not to conceal the ability to alter data remotely, are too specific, complex and contentious to have gone without saying, and are more extensive and specific than would be needed for business efficacy.

### **5. WHAT STEPS ARE BEING TAKEN AND WHEN?**

#### **5.1 When is Post Office's Defence due?**

It must be filed with the Court and served on Freeths by 4pm on 18 July 2017.

#### **5.2 When is the Claimants' Reply due?**

It must be filed with the Court and served on Bond Dickinson as Post Office's solicitors by 4pm on 20 September 2017. The Reply is not mandatory but we expect the Claimants to serve one given the complexity and importance of the case.

#### **5.3 When will the Court next consider this case?**

The first Case Management Conference is taking place at the Royal Courts of Justice on 19 October 2017. It is expected to last one day.

#### **5.4 What will happen at the Case Management Conference?**

This hearing, and the preparation for it, will provide an opportunity for Post Office and the Claimants to agree further steps leading up to trial, including selection of those postmasters' cases which the parties wish to put forward as lead cases; disclosure of documents; witness evidence and expert evidence.

#### **5.5 What steps will take place after the October Case Management Conference?**

It is not yet possible to predict the Court process beyond 19 October 2017, however it is unlikely that there will be a trial of substantive issues or Lead cases before mid-2018 and after that there will be numerous follow-up issues and further hearings that will likely run until 2019/2020.

We have recently had a letter from Freeths that, in broad terms, proposes the following steps:

- Further disclosure to be given by Post Office on selected areas (eg. bugs in Horizon).
- Each party picks 20 proposed lead cases.
- At a further CMC (likely in mid-2018) the Court then selects Lead Cases from the pool of 40 proposed cases.
- The Claimants provide further Particulars of Claim for each Lead Case.

We are still considering this letter and deciding on a way forward.

## **5.6 What is the purpose of the Lead Cases?**

The Lead Cases will be examined in greater detail by the Court at mini-trials with the aim of using those cases to determine points of principle or fact that apply broadly to many cases. To be able to do this, the parties will need to set out their positions in relation to these Lead Cases in further, case-specific Particulars of Claim, Defences and Replies.

## **5.7 What is the case review?**

Post Office is already familiar with and has investigated the claims of those postmaster Claimants who went through the Project Sparrow process. However, there are an additional 110 postmaster Claimants who did not go through this process whose cases are now being examined in order to prepare for the selection of lead cases. The Claimants were ordered to provide Post Office with schedules of basic information about each existing Claimant by 20 June 2017, and for any new Claimants by 6 September 2017. The case review involves obtaining copies of relevant documents and files from Post Office's archives, systems and other sources, reviewing those documents and drafting reports on findings. The purpose of this is to enable us to better understand the Claimants' cases, and whether they would be suitable as lead cases.

## **6. OTHER MATTERS**

### **6.1 Media / Comms**

[To be updated, following discussions at the PLSG on Wednesday]

### **6.2 Settlement**

The Steering Group has considered the merits of a settlement. At this stage, whilst the Group is still open to new Claimants, offering any possibility of settlement would only encourage more Claimants to join the Group Action.

The issue of settlement will be re-considered in the run up to the CMC in October.

### **6.3 CCRC**

The Criminal Cases Review Commission review continues. The CCRC have now appointed Grant Thornton to undertake a technical review of Horizon. The exact scope of GT's work is unclear.

To help with this, arrangements are being made to demonstrate Horizon to GT. During this process, we hope to be able to understand the scope of their work and, perhaps, pre-empt some of their questions using the findings made during Sparrow and more recently by Deloitte.