

**CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION***Bond Dickinson***Steering Group Meeting: 14 February 2017*****DECISION: Does Post Office agree with the recommended strategy set out in this paper?*****1. STATUS UPDATE AND FUTURE ACTIONS**

The parties and the Court have now agreed the terms of the Group Litigation Order (**GLO**). A copy of the agreed GLO accompanies this paper. The President of the Queen's Bench Division of the High Court is required to approve the GLO but this should be a formality and no substantive changes are anticipated.

The key actions ordered by the Court for the next 8 months are summarised in the table below. During that time, the Claimants will, collectively and individually, set out their claims in more (but not full) detail in formal Court documents. This will lead to a procedural Court hearing, called a Case Management Conference (**CMC**), in late October 2017.

At the CMC, the Court will decide the priority in which particular issues or certain cases should be resolved. Broadly speaking, the Court has two options. It can select a particular legal issue that has a wide application to lots of cases and hear that issue in isolation (eg. the true legal meaning of the postmaster contract). Alternatively, it may select a small number of "lead cases" that are broadly representative of the issues affecting a wide number of Claimants and then conduct a trial of those lead cases, whilst pausing all other cases.

There will likely be a material disagreement between the parties as to the correct approach, with both pushing for issues and a process that favours them. The Court's desire will be to adopt a course of action that promotes the overall resolution of the litigation with the minimum amount of effort.

After having decided on a strategic approach, the Court will then order a new timetable of actions leading up to the next major milestone (which will likely be a substantive Court hearing sometime in 2018).

Date	Court ordered action	By Whom
28 February 2017	Explanation of the claims of assistants and crown employees	Claimants
2 March 2017	First Group Register to be provided	Claimants
23 March 2017	Generic Particulars of Claim to be served	Claimants
20 June 2017	Schedules of Information to be provided in respect of current 198 Claimants	Claimants
18 July 2017	Generic Defence to be served	Post Office
26 July 2017	Close of GLO window (last date for adding new Claimants)	Claimants
6 September 2017	Last date on which a Schedule of Information for each individual Claimant should be served	Claimants
20 September 2017	Generic Reply to be served	Claimants
Not before 18 October 2017	CMC	Both parties

2. RECOMMENDED OBJECTIVE

We recommend that Post Office's objective for the next 8 months should be to manage the litigation in such a way so as to push the Court towards selecting, at the CMC, the issues and cases that favour Post Office (**the Target Issues**). At this stage, we consider those Target Issues to be:

1. **Limitation** – Around 50% of the Claimants are, on face value, time-barred. Freeths are arguing that limitation deadlines should be extended due to Post Office concealing relevant facts. Resolving the limitation questions in Post Office's favour could lead to a large number of claims being struck out.
2. **Recoverable losses** – The Claimants allege that Post Office was not entitled to terminate postmasters' appointments on 3 months' notice and on this basis they are expected to advance significant claims for long term loss of earnings and investment. If the Claimants lose this point it will likely limit any losses to 3 months in most cases, thereby significantly reducing the amounts potentially due in compensation and making settlement easier.
3. **Criminal cases** – Around 33% of the Claimants are subject to criminal convictions. If the CCRC does not overturn those convictions, those Claimants' claims may be struck out.
4. **Focussing on lead cases that favour Post Office.** For example, Alan Bates' case engages both issues 1 and 2 above. He is also the symbolic leader of the litigation. Defeating his claim will shake the confidence of the entire group. See further below on selecting lead cases.

By contrast, we anticipate that Freeths will look to identify strong lead cases (ie. ones without time bars or criminal issues) and / or focus on what they will contend is the "true legal" meaning of the Postmaster Contract.

3. RECOMMENDED STRATEGY

In addition to handling day to day matters with Freeths and using correspondence to focus attention on the Target Issues, we recommend that Post Office undertakes the following actions.

1. **Lead cases:** At the CMC, Post Office may need to identify its preferred lead cases and challenge the Claimants' chosen cases. To do this, Post Office needs to understand the basic factual position of each case so that the pros and cons of the case can be assessed. 88 of the 198 current Claimants have been through the mediation scheme and so there is no need to investigate those cases further. The remaining Claimants, plus any new Claimants who join the Group, should be investigated. That investigation could include:
 - Gathering core documents (contracts, NBSC and HSD call logs, Horizon data, audit reports, branch correspondence, contract advisor files and security team files). This should be done in any event with the duty to preserve documents.
 - Categorisation of cases (criminal, time-barred, method of termination, etc.).
 - Producing a mini factual chronology of key events for each case.
 - Quick assessment of the cause of any shortfall (if possible).

This exercise should allow likely contenders for lead cases to be identified and then those cases can be subjected to a deeper review in preparation for the CMC.

2. **Remote access:** The alleged concealment of "remote access" is one of the key grounds on which Freeths are looking to extend the usual limitation deadlines. Post Office should press on with getting Fujitsu on board with the litigation and then concluding the work started by Deloitte. This needs to be concluded by no later than the end of April 2017 (see "Resourcing" below).

3. **Burden of proof:** If the Court decides to focus on the Postmaster Contract, a key issue will be burden of proof. In many cases it is not possible to determine the root cause of a shortfall. This then gives rise to a question of who is responsible for the shortfall where the root cause is not known. This is a mixed question of fact and law and one on which we recommend that Counsel's written advice is obtained.
4. **Disclosure:** Further disclosure should be voluntarily given to Freeths for the following reasons:
 - a. Giving disclosure on the above Target Issues should make it easier for a Court to select those issues at the CMC.
 - b. Freeths are hiding behind the lack of disclosure to avoid explaining weak points in their case. The lack of clarity allows them to keep unmeritorious claims alive.
 - c. We believe that Freeths are struggling to cope with the volume of work and extra disclosure makes their job more difficult. Work pressure drives a greater prospect of a good settlement.

The areas where further disclosure could be given are set out in Schedule 1.

5. **Prepare for Post Office's Defence:** There are number of points in the draft Particulars of Claim to which Post Office will need to respond in due course. Post Office's Defence needs to be signed by a Statement of Truth and can only be amended with the consent of Freeths or the Court. Post Office should ensure that it has sufficient evidence to support any position adopted in the Defence. It is therefore recommended that Post Office collates documents and / or takes witness statements on the issues in Schedule 2, being issues which have so far garnered little attention or on which the position remains unclear.
6. **CCRC:** Freeths are intending to stay the "criminal cases" until the CCRC review is complete. Post Office has so far adopted a supportive but passive approach to the CCRC. This should shift towards gently pressuring the CCRC to conclude its review sooner given it is now affecting the Group Litigation.
7. **Settlement:** It is not recommended that Post Office offers any form of settlement at this stage. Post Office should however make clear to Freeths that it will not entertain any settlement involving payment to convicted postmasters. This may help dissuade those with convictions from joining the litigation as well as causing division inside the group of Claimants. See Schedule 3 for more detail.
8. **Communications:** Post Office should maintain its current approach of not engaging in media commentary. However, like in the mediation scheme, Post Office should consider directly approaching any live postmasters who are Claimants with a view to resolving their issues without the need for litigation.

4. RESOURCING

Based on the above recommended strategy, we anticipate the following resourcing requirements.

- The investigation of individual cases in order to identify or challenge possible lead cases (action 1 above) will require significant resource from both Post Office (in terms of accessing documents and assessing information eg. Kath / Shirley) and Bond Dickinson (reviewing evidence and analysing legal issues). Further work is needed to draw up an outline process for these investigations and map out resourcing requirements.
- The total number of claims will be unknown until end of July 2017. Also, Freeths may withhold details of any new claims until the last deadline, being 6 September 2017. If Freeths do delay the new claims, this could lead to a very intense period of work in September and October in the lead up to the CMC. Sufficient resourcing needs to be available in this period, particularly from

the Steering Group / senior management as long-term tactical decisions may need to be made on short notice.

- In order to investigate the matters raised under point 5 above, we will require access to a small number of staff at Post Office. The taking of witness statements tends to cause a short-term but material disruption to day to day activities. With careful handling, this should be manageable.
- Tony Robinson QC is in a major trial from June to August 2017 which will make him extremely difficult to contact during this period. Post Office will therefore have to have its Defence materially complete by mid-May at the latest (despite the Court deadline not being until July). This drives the need to complete action points 2, 3 and 5 above by the end of April as these actions will feed into the Defence.
- In addition to the above, there will continue to be day-to-day correspondence with Freeths regarding a number of side issues. We also anticipate that there will be ongoing correspondence about Claimants who are still in post and who are subject to contractual action by Post Office (eg. audits, suspensions, terminations, etc.). At present there are approximately 1 – 2 substantial letters per week. This can be largely handled by Bond Dickinson but will require regular instructions from Rodric.

5. OTHER ISSUES TO BE CONSIDERED AT A LATER DATE

For the sake of completeness, we note that the following issues are likely to need addressing during the next 8 months however no action is required on them at this stage.

1. **Security for Costs** – Should Post Office keep pushing for security against its legal costs?
2. **Second Sight** – Should Freeths be allowed to contact Second Sight?
3. **Counterclaims** – To what extent does Post Office wish to advance counterclaims?

Schedule 1: Further Disclosure

Category of documents	Reason	Action
Contracts of Claimants	Requested by Freeths / Will force Freeths to plead more accurately	Work already underway
Further info on the 3 bugs disclosed to SS	Requested by Freeths / Goes to limitation points on concealment	Ask FJ if they have any further information
Schedule of software architecture since launch in 1999	Requested by Freeths	Ask FJ if they have a Horizon architecture diagram.
Known Error Log	Requested by Freeths / Goes to limitation points on concealment	Discuss with FJ whether this could be disclosed.
NBSC call logs with Claimant	Easy to identify and provide / helps prove that issues were not concealed	Identify and disclose call logs.
Contract Advisor correspondence with Claimant	May help show that Claimants knew of issues at an early stage and therefore issues were not concealed	Identify and disclose correspondence.
FSC investigations of matters (Andy Winn emails)	We understand that Andy Winn was the principal investigator of accounting issues at FSC for a long period of time. Disclosing his emails may show that Post Office was not concealing issues.	Extract Andy's emails from archives and review for disclosure.
Mass communications to branches re Horizon problems	Mass communications to branches may prove that branches knew of Horizon issues and show that issues were not concealed.	Identify whether a record of these is kept and if so collate documents for disclosure.

Schedule 2: Evidence needed for Post Office's Defence

Paragraph in draft GPOC	Issue
12	What was the pre-Horizon accounting system?
15	Can a postmaster dispute a Transaction Acknowledgement?
30	What are Post Office's investigation processes when a shortfall arises?
36	Are shortfalls caused by Post Office's suspense accounts?
64.5	Are postmasters able to access information whilst suspended?
66.4	Is there any type of accounting error by a postmaster that would not cause a real-loss to Post Office?

Schedule 3: Settlement

Issues

Does Post Office wish to try to settle at this stage?

Will Post Office maintain its previous stance on not settling with convicted postmasters?

Background

It is open to Post Office at any time to make a settlement offer or to invite Freeths to mediate. The Courts actively encourage settlement and a refusal to consider settlement or engage in mediation may be seen as unreasonable conduct and can lead to costs penalties.

The corollary of the Court's approach is that by making an early settlement offer (that is refused by the Claimants), Post Office may secure some protection against having to pay the Claimants' legal costs should it lose at trial.

Freeths expressed a willingness to mediate in their Letter of Claim but nothing much has been said on this topic since that letter some 10 months ago.

In the course of preparing for the GLO, we discovered information that suggests that Freeths and their litigation funder will be taking the first £21m of any compensation recovered from Post Office.

Recently, Freeths wrote to prospective Claimants stating:

"You will receive more information about [compensation] at a later stage, however, a key point to note is that the funding structure is such that all money recovered on individual claims (including yours) will be pooled into one fund, and at the very end of the case a calculation will be done to establish what money (if any) is left over to pay a proportion to each Claimant. That proportion will be on a pro rata basis."

Pooling the damages in this way could make settlement difficult if Post Office maintains its previous stance that it cannot, directly or indirectly, pay compensation to those with criminal convictions without risking the safety of those convictions (as per Cartwright King's previous advice).

Advantages of opening up a settlement dialogue now

1. The litigation could be settled early thereby saving significant legal costs.
2. We may learn more about Freeths' / the Claimants' expectations for settlement.
3. Post Office looks reasonable in the eyes of the Court.

Disadvantages of opening up a settlement dialogue now

1. The claims are not yet valued so it is difficult to see how the litigation could be settled at this stage.
2. Offering some form of settlement now may only encourage Claimants to pursue the claims further.
3. Offering settlement whilst the Group is open to new Claimants may encourage more Claimants to join the litigation.

Recommendation

The chances of reaching a successful settlement at this stage are slim but proposing some form of settlement dialogue would encourage the Claimants. It is therefore recommended that Post Office does not offer any form of settlement at this point but waits until the claims are valued and the Group is closed to new Claimants. A mediation in November 2016 following the CMC would be a reasonable objective.

If Post Office maintains its position that it will not compensate convicted postmasters under any circumstances, it would be beneficial to write to Freeths now making that position clear for the following reasons:

1. It would drive a wedge through the Group with around a third of Group being denied any possibility of settlement. This would place Freeths in a difficult position given that they have a professional duty to act in the best interests of each Claimant and each individual Claimant's interests cannot be subjugated to the interests of the wider group.
2. It may discourage other convicted postmasters joining the Group if they have no prospect of settlement and may therefore be forced to give evidence on their previous misconduct.
3. There are legitimate reasons for Post Office adopting this position so it would be a reasonable step to make Post Office's position clear at an early stage. Indeed if this red-line is not disclosed and it later collapses settlement discussions, it might be seen as unreasonable conduct by Post Office.