

# FREETHS

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6 July 2017

Our Ref: JXH/1684/2113618/1  
Your Ref: AP6/364065.1369

Dear Sirs,

**BATES & OTHERS -V- POST OFFICE LTD**  
**Claim No: HQ16X01238**  
**DRAFT ORDER FOR CMC**

In advance of the CMC listed for 19 October 2017, we write enclosing proposed directions (see draft Order attached) as to which we seek your agreement and co-operation.

We also enclose proposed Amended Particulars of Claim, which we invite you to agree, so that the brief additions to the Particulars of Claim can be pleaded to in your Defence. The Amended Particulars of Claim simply plead a term implied by the Supply of Goods and Services Act and make clear that error detection and repellency in the Horizon system is in issue.

There is also the urgent matter of disclosure of the Known Error Log(s), which we address immediately below.

**Known Error Logs**

We need the Known Error Logs (and/or similar logs or audit records of bugs, errors or defects). These are plainly of central relevance to the case and, in particular, the issues which depend on upon the presence or absence of bugs, errors or defects in the Horizon system. We have been asking for these documents (and others) since the Letter of Claim dated 28 April 2016. We also note that extracts from these Logs were referred to during the trial of Seema Misra.

This case obviously involves whether there were such errors, as well as what Post Office knew of them. There is no basis for not disclosing these documents and, as you are well aware, your refusal to provide them to date has prevented us from providing any detailed particulars of bugs, errors or defects in the Particulars of Claim.

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Please confirm by return that you will now provide these documents. An obviously convenient time to provide the Known Error Logs (and/or similar) would be with your client's Defence on 18 July 2017. We need to be in a position to give these issues careful consideration well in advance of the first CMC, and in any event when considering our clients' Reply.

### **Draft Order**

#### **TRIAL OF PRELIMINARY ISSUE**

1. At the CMC the court will consider whether or not to order the trial of any preliminary issue(s). We have previously suggested to you the resolution of whether the contractual relationship between the parties amounts to a relational contract may be identified as a preliminary issue.
2. We consider that whether or not there should be a trial of this or any other preliminary issue would best be considered after service of your Defence, at which point the parties will be able see how the issues between them have crystallised, and we will be better placed to consider the matter and to give some consideration to possible agreed facts.
3. However, if at this stage you have any proposals in relation to trial of any preliminary issue please let us know.

#### **DISCLOSURE**

4. To date there has been considerable correspondence between us regarding disclosure of documents by Post Office, and we have made repeated requests to which your client has not acceded. You are well aware of the documents which will be in issue in this case (in addition to the Known Error Logs above), and the obligations which your client has in relation to disclosure.
5. You have resisted many of our disclosure requests to date on the basis that "*a full disclosure exercise would be required*" to locate relevant documents, but at the CMC after close of pleadings there can be no doubt that orders for disclosure will be made.
6. Rather than seek standard disclosure of all documents, you will see from the draft Order that we have proposed disclosure in stages, initially limited to documents relating to the following matters, which are essential to our understanding of the key generic issues in the case:
  - a. the Horizon system architecture (documents which evidence the overarching systems architecture are obviously essential for our expert to understand the operation of the Horizon system);
  - b. bugs, errors or defects in the system which were or may have been the cause of discrepancies or alleged shortfalls attributed by the Defendant to any of the Claimants [GPOC §22]
  - c. the operation of the helpline [§29-30];

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- d. the conduct of investigations [§31];
- e. Post Office suspense account(s) [§38-39].

7. We suggest disclosure of these generic documents at the first stage as an appropriate and proportionate way to proceed.

8. If you disagree with our proposal for staged disclosure, please explain why. If you would prefer to provide standard disclosure, we are prepared to consider with you how that might best be achieved.

9. We will need to have discussions with you in relation to e-disclosure, which we think would most naturally follow your response to our proposal above, but if you do wish to set out your proposals (or initial proposals) in relation to e-disclosure now, then please do so.

10. Proposals for disclosure solely relating to individual Claimants are made below, under Lead Cases.

#### LEAD CASES

11. We are intending to issue a further Claim Form later this month, and at that stage we anticipate there will be a total of around 400 - 500 Claimants. Management of the Group will obviously require selection of Lead Cases. The approach to this process which we suggest is that the parties initially identify a pool of Claimants in respect of which each party gives disclosure, from which Lead Claimants may then be selected and managed by the Court.

12. As you will see from the draft Order, we suggest the initial pool be comprised of 20 Claimants identified as potential Lead Cases by each party, giving a pool of 40 Claimants, which should be more than sufficient to cover the GLO issues. The parties then give standard disclosure for those cases in the pool.

13. After disclosure, the parties should then co-operate to seek to agree 16 cases from that pool to be Lead Cases. The court would then be in a position to manage further progress of the Lead Cases at the next CMC.

14. We invite your agreement to this approach, or any other constructive proposals you may have.

#### EXPERT EVIDENCE

15. Expert IT evidence in respect of the operation and accuracy of the Horizon system is plainly required, and we propose that each party be given permission to adduce expert evidence in the field of IT accordingly.

16. We think further consideration is necessary as to whether any additional expert evidence is necessary and if so, in what discipline, however if you have specific proposals in relation to this issue please let us know.

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17. It is important that our IT expert is able to carry out inspection and testing, and we are presently in discussions with our expert as to what initial access is required for our expert to begin work. We will write to you further in due course about this issue. Inevitably our expert's views will be informed by disclosure of the generic documents relating to the system architecture, bugs and errors etc, therefore these discussions will need to be ongoing.
18. The draft Order accordingly proposes that prior to the next CMC, the parties should co-operate and seek to agree further directions in relation to these expert issues.

#### ALTERNATIVE DISPUTE RESOLUTION

19. We repeat our preparedness to seek to resolve or at least narrow the issues by any means of Alternative Dispute Resolution (including Mediation). We invite your agreement to the standard direction that we have included in the Draft Order.

#### CUT OFF DATE

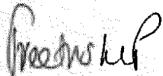
20. We are monitoring the rate of new prospective claimants, and whether any extension to the cut-off date for claims to be entitled to be entered onto the Group Register may be required (particularly in circumstances where we were not able to advertise the GLO in the form approved by the Court prior to it actually being made). For the avoidance of any doubt, the potential need to extend the cut-off date was expressly envisaged by paragraph 37 of the GLO therefore we do not consider any separate application in relation to extension of the cut-off date is necessary.

#### COSTS MANAGEMENT

21. We remind you of the obligation at paragraph 35 of the GLO that 14 days before the CMC the parties shall serve and file a statement which sets out the costs incurred to date and the projected estimate of costs to the conclusion of the CMC.
22. As to further costs management, we are giving continued consideration to this issue, but as you will see from the draft Order, our current proposal is that the parties regularly report their costs, as they pass particular milestones of £500,000, £750,000, £1 million and any increment of £250,000 thereafter.

We look forward to hearing from you.

Yours faithfully



Freeths LLP