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JXH/1684/2113618/1/KL

30 November 2016

For the Attention of Mr J Hartley
Freeths LLP
Floor 3
100 Wellington Street
Leeds
West Yorkshire
LS1 4LT

By email only

Dear Sirs

Bates & Others -v- Post Office Limited
Claim Number: HQ16X01238

1.1 We write further to your letter of 27 October 2016 (**Letter of Reply**) and subsequent related letter of 11 November 2016. Capitalised terms in this letter have the same definitions as they did in our letter of 28 July 2016.

1.2 We are disappointed to find that the Letter of Reply provides few further details of the claims that your clients intend to advance in these proceedings, including those claims that involve allegations of fraud or other dishonesty on the part of Post Office. The context is as follows:

1.2.1 We provided on 28 July 2016 a detailed response to your clients' Letter of Claim dated 28 April 2016 (**Letter of Claim**). Our letter ran to 99 pages and included a detailed response to all of the main points raised in the Letter of Claim (**Letter of Response**). Post Office devoted considerable time and money to providing a substantive and, it was hoped, helpful response to the Letter of Claim.

1.2.2 The Letter of Response included a reasoned request that your clients provide details of the claims that they assert.[1] We explained that there was no realistic scope for resolving the disputes between the parties without your various clients making clear what they intended to claim and on what legal and factual basis.

1.2.3 We noted, in particular, that your clients were advancing entirely unparticularised (and even generic) allegations of fraud, malice and bad faith on the part of Post Office.[2] We do not accept that, as you seek to imply, our concerns in this regard were overstated; nor do we accept that there was anything improper in our reminding your firm of its professional duties in relation to allegations of fraud. We reiterate that it is unacceptable for your clients (or some unidentified group of persons amongst your clients) to raise allegations of fraud that they are not prepared to particularise.

1.2.4 On 12 August 2016, you indicated by letter that your clients would require 3 months to produce a reply to our Letter of Response. By our letter of 18 August 2016, we agreed to this timescale on the basis that your letter would "*genuinely address the points raised in our letter, and set out in detail each of the claims raised by each of the*

[1] See, by way of example, paragraphs 3.2 to 3.9 Letter of Response
[2] Paragraph 3.8 Letter of Response

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Claimants and the facts and matters they rely upon". You did not write back to indicate that your clients were not prepared to provide any such information.

1.3 Having waited more than 3 months for your Letter of Reply (it being provided a week late), we regret to say that it has done almost nothing to further the efficient resolution of the disputes between our clients. In particular:

1.3.1 Your clients have chosen to provide no further details of the specific Claims being advanced, including those that involve allegations of fraud or other dishonesty on the part of Post Office. We remain entirely in the dark as to even who amongst the Claimants is alleging that Post Office acted dishonestly and/or maliciously and/or in bad faith, let alone the factual basis on which such allegations are advanced. We also remain in the dark as to which of the Claimants assert which of the various causes of action that you discuss in entirely generic terms. We see no reason why these details cannot be provided as you must have investigated your client's cases given that you have been instructed on this matter for over a year, have signed a Statement of Truth on the Claim Form and have written us long letters.

1.3.2 The absence of proper detail of the Claims is shown most starkly by the fact that Post Office has not been able to identify 15 of the Claimants. Based on the limited details you have provided so far, our client is in the extraordinary position of having no idea why or on what basis these persons are said to have claims against Post Office.

1.3.3 You have also made no attempt to value the Claims (or any of the various causes of action). We are therefore unable to assess the comparative value and significance of the various claims made and thus the various issues raised by those claims. This exercise is central to certain of the procedural questions that fall to be determined in January 2017. We cannot, for example, assess whether and to what extent legal or factual issues between our respective clients are (a) common to all or many of the Claims and/or (b) are important issues in terms of the proportion of the total sum claimed that may turn on the resolution of those issues and/or (c) sufficient to warrant the extremely wide early disclosure you are seeking. We note in this regard that you must have addressed the quantum of the various Claims when obtaining third party litigation funding.

1.4 We are therefore in no better a position than we were in July. We are no more able than we were to understand the case against Post Office, and we are in no better position to assist the Court in making appropriate orders for the conduct of the Claims. We also have no better foundation on which to consider ADR and settlement. Our client is left facing allegations which may or may not apply to some, all or none of the Claimants. We do not consider that it is constructive or sensible to seek to address fact-sensitive questions of procedure in the absence of any detail of the Claims that the parties and the Court are seeking efficiently to manage.

1.5 In the circumstances, we doubt that further lengthy correspondence is likely to provide the information and clarification we need in order to identify matters which may be suitable for things such as early determination or early disclosure. As it seems to us at the moment, the best process for eliciting the necessary information and clarification for each Claimant will be the pleading process.

1.6 In relation to the pleading process, it appears to be your clients' objective to withhold indefinitely the detail of their individual Claims (including the claims in fraud); your proposal being to provide only "generic" Particulars of Claim that focus only on issues arising in relation to the Postmaster Contract. You propose that there then be a preliminary hearing of the issues raised in this truncated pleading. As to this:

1.6.1 You do not identify which Claimants rely on the matters that would be pleaded in generic Particulars of Claim to advance causes of action that they assert (or some of those causes of action).

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1.6.2 We note in this regard that (a) 15 of the Claimants have an unknown connection to this proceeding, (b) our current understanding is that approximately 16 of the Claimants are known to Post Office because they were engaged as assistants to postmasters, but they have never been in any form of contractual relationship with Post Office and so cannot stand to benefit from the resolution of the contractual issues that you seek to determine before anything else is done, (c) certain of the Claimants were engaged by Post Office on contracts which are different from (and in some cases completely different from) the Postmaster Contract and (d) while your clients place heavy reliance on their having contracted with Post Office as individuals, some of the relevant contracts were in fact entered into by corporate entities.

1.6.3 We do not know which, if any, of the Claimants will seek to rely on the various contentions that you suggest are relevant to the construction or enforcement of the contracts at issue. Merely by way of example, we do not know which (if any) of the Claimants asserts that he or she signed up to an agreement with Post Office without having read (or having had an opportunity to read) the terms of that agreement, and we do not know which (if any) of the Claimants assert that he or she was not aware (at the time of contracting) that the agreement included provisions as to termination for breach and/or termination on notice.

1.6.4 We are unable to assess, even in the most general way, the number or value of the claims that will benefit from a resolution of the contractual issues covered in your proposed generic Particulars of Claim (whether for individual Claimants, classes of Claimant or all the Claimants taken together).

1.7 We had hoped to receive meaningful detail of the Claims well in advance of the hearing in January 2017 in order to enable us properly to understand the Claims and so cooperate more effectively in resolving them as efficiently as possible, including by seeking to agree appropriate directions for preliminary issues and/or group pleadings in relation to some or all of the causes of action. As matters have turned out, we consider that the most pressing requirement in this case, both as a matter of fairness to our client and in the interests of the efficient resolution of the proceedings, is that proper details of the Claims be provided. In light of your clients' refusal to provide such detail in correspondence, the only practical course is for your clients to be required to provide particulars of their Claims as soon as possible.

1.8 We therefore presently intend to seek an order that your clients provide Particulars of Claim covering all of the causes of action asserted in the Claim Form, such pleadings to include (amongst other things) full particulars of any allegations of fraud, malice and bad faith that are relied upon by the relevant Claimants. This is the established way to proceed in group litigation and was the approach endorsed by the Court of Appeal in Prudential v HMRC[3]:

> "*Particulars of Claim must comply with CPR Part 16. If the claim is made under Part 8 rather than under Part 7, then the rules require relevant evidence to be served when the claimant makes his claim. Either way, relevant facts must in our view be pleaded. If they are facts generally applicable to all claimants, they may be pleaded in Group Particulars of Claim; if they are specific to a particular claimant they may be set out in a schedule.*"

1.9 We note that you intend shortly to provide your proposed "generic" Particulars of Claim. We will of course consider that pleading and will, if appropriate, revisit the points that we set out above in light of its content.

1.10 In light of the above, we do not intend in this letter to address in detail the arguments raised in the Letter of Reply. We do not see any merit in spending further substantial time and money in arguing in the abstract the merits of various Claims that your clients may or may not be willing or able to plead. We have already set out in the Letter of Response the reasons for which Post Office's position is that the Claims are bound to fail, and that remains our client's position.

[3] [2015] EWHC 118 (Ch)

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1.11 We nonetheless address below a number of substantive points in your Letter of Reply, principally in relation to the Postmaster Contract, in order to underline why our proposed procedural approach to the GLO and pleadings is to be preferred. These issues may be discussed in detail at the hearing in January 2017. It may therefore assist your clients and the Court to have our client's comments on the relevant parts of the Letter of Reply.

1.12 We ask below for certain information about your clients' case. We think it would be helpful for you to provide such information now, as it will in any event have to be pleaded in due course and must be readily available to your clients. Again, the purpose for doing so is to facilitate the hearing in January. We do not seek all of the information that will have to be provided in the Particulars of Claim.

PART A: SUBSTANTIVE

2. Terms of the Postmaster Contract

2.1 We understand your clients' argument that postmasters should (in some unspecified ways) be treated as being relatively similar to employees. We disagree with that argument for the reasons given in our Letter of Response. However, it is not clear from the Letter of Reply whether or not your clients assert that the Claimants who were or are postmasters were or are, by reason of such engagement, employees of Post Office.[4] Please now make the position clear and identify which, if any, of the Claimants allege that they are or were at material times employees of Post Office.

2.2 It appears from paragraph 79 of the Letter of Reply that there may be some Claimants ("*a number of Subpostmasters*") who allege that they "*were not in fact provided with* [the contract] *...when they were appointed by Post Office*". Your clients contend that Post Office will therefore be required "*in each case*" to prove that postmasters were provided with and agreed to the standard terms of the postmaster contract. As to this:

2.2.1 We do not know which, if any, Claimants allege that they (a) did not read the written terms to which they agreed and/or (b) were not given an opportunity to read those terms before agreeing them and/or (c) are, for this reason, not bound by relevant provisions of their contract with Post Office (identifying such provisions). Nor do we know what terms such Claimants will allege, in fact, governed their relationship with Post Office and, in particular, what terms they will say were breached by Post Office.

2.2.2 It will not assist the parties for these issues to be debated in the abstract and/or on the basis of hypothetical facts that may or may not overlap in whole or in part with the facts asserted by one or more Claimants. We again need to know what is being alleged and by whom.

2.2.3 Accordingly, please identify which, if any, Claimants assert that they did not see (or have an opportunity to see) the terms of their agreement with Post Office, on what basis they say that they therefore contracted with Post Office and, in particular, what terms they say governed the matters in relation to which they assert breaches of contract by Post Office.

2.3 As to the various legal arguments debated in the Letter of Reply:

2.3.1 Please confirm to which of the express terms of the Postmaster Contract the Claimants assert that the *contra proferentem* rule applies, the reasons for that contention and the opposing construction you place on those terms.[5]

2.3.2 Please confirm to which of the express terms of the Postmaster Contract the Claimants assert UCTA 1977 applies and the reasons for that contention. Please particularise the grounds on which such terms are alleged to be unreasonable.[6]

[4] Paragraph 60, Letter of Reply
[5] Paragraph 68, Letter of Reply

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2.3.3 Post Office's position in relation to implied terms remains as stated at paragraph 4.35 of our Letter of Response, namely that there are two such terms: the "Stirling v Maitland term" and the "Necessary Cooperation term". We do not agree that any further terms need be implied. Please confirm whether or not the Claimants (or some of them) agree that such terms are to be implied.

2.3.4 At paragraph 84 of the Letter of Reply (and following), you invite Post Office to express a view on the application of the above implied terms to various factual circumstances that may or may not be relevant to various alleged breaches of contract that some of the Claimants may advance and/or to agree to various further implied terms. We consider that those matters can only sensibly be addressed further through pleadings that set out the relevant factual context in each Claimant's case. Further discussion of these matters in the abstract will not assist either side's understanding.

2.3.5 You allege that "*Post Office undertook to supply the Horizon system*". Please clarify what term (express or implied) is relied upon in making this allegation. It is denied that Post Office agreed to provide the Horizon accounting system.

3. Fiduciary and tortious duties

3.1 At paragraphs 88 to 93 of the Letter of Reply, you discuss the fiduciary duties that your clients (or some of them) allege that Post Office owes to postmasters. In particular, you maintain that "*Post Office was subject to a narrow and specific fiduciary duty, arising from having undertaken obligations to effect, record and account for transactions executed by Subpostmasters*." Post Office denies that it owes any fiduciary duty to postmasters for the reasons stated in our Letter of Response. As far as we can tell, the duty you are suggesting is not a fiduciary duty as such, as that duty is based on the core concept of loyalty. However, in the light of your correspondence to date, we doubt that any further argument would be useful at this stage, without a proper pleading.

3.2 We remain concerned that your clients' case as to tortious duties is both unclear and likely to be misconceived. In particular:

3.2.1 We are not clear as to the formulation of the (concurrent) duties that Post Office is said to have owed in tort to the postmasters engaged under the Postmaster Contract.

3.2.2 Nor are we clear as to the basis a duty in tort is said to have arisen or responsibility to have been assumed by Post Office.

Once again, however, we doubt that further argument would be useful without a proper pleading.

3.3 You have asked us to confirm whether we dispute the factual matters in paragraphs 70.1 to 70.5 of the Letter of Claim. Our client's position on the relevant facts is clear from the Letter of Response. We do not intend to engage in detailed argument as to the formulation and/or significance of your factual assertions (insofar as they are factual assertions rather than submissions). The proper vehicle for exposing the relevant issues is a pleading.

4. Termination rights

4.1 At paragraphs 77, 78 and 166 to 173 of the Letter of Reply, you address the contractual interpretation of the termination provisions contained within the Postmaster Contract. Our client's position remains as set out at paragraph 4.22 of our Letter of Response.

4.2 At paragraph 172, you state that the "*3 months' notice did not reflect the true agreement under which Subpostmasters were engaged*" and the true agreement between the parties was that "*the 3 months' notice provision would not normally be used by Post Office*". This is an extraordinary argument, which appears to be intended effectively to reverse the effect that the Postmaster Contract's termination provision was obviously intended to have. Although we consider the

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[6] Paragraph 68, Letter of Reply

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argument to be misconceived, we are in any event unclear as to its intended scope. Please identify:

4.2.1 The Claimants who assert that they entered into an agreement with Post Office on the basis that their agreements had this restricted (or non-existent) right to terminate on notice.

4.2.2 The precise terms of the alleged agreement and the words used to give rise to such agreement.

4.2.3 Please clarify whether or not the alleged restriction (or prohibition) on the right to terminate on notice applied also to postmasters. If not, please identify the restrictions (if any) that your clients contend applied to the postmasters' right to terminate on notice.

4.3 We do not agree that relying on the express right to terminate on notice to determine the period in relation to which losses may be claimed somehow turns the termination provision into a term limiting Post Office's liability. We consider the case-law to be clear on this point.

5. Assistants, crown employees and corporate Claimants

5.1 Your Letter of Reply focuses on postmasters and the Postmaster Contract, as do the above sections of this letter. At paragraph 209 of the Letter of Reply, you very briefly touch on the claims of crown employees and postmaster assistants. The brevity of your treatment of these persons suggests that you think crown employees and postmaster assistants to be in an analogous position to postmasters. However, they are in a very different position indeed:

5.1.1 Crown employees are employees engaged under employment contracts and not the Postmaster Contract. Their employment contracts are not even similar to the Postmaster Contract. One stark difference is that crown employees are not directly liable under their contracts for shortfalls in branches.

5.1.2 Post Office has no contractual relationship with postmaster assistants at all.

5.2 Please provide confirmation of which Claimants are bringing their claims in their capacity as (a) crown employees, (b) assistants and (c) otherwise than under the Postmaster Contract.

5.3 Please also set out the express terms and other duties that you say exist between Post Office and (a) crown employees and (b) assistants. If you intend to advance claims on behalf of these parties, and wish them to form part of the GLO and also within the scope of your proposed preliminary issues, it is incumbent upon you to explain the position in correspondence, for each of those two categories. We do not, at present, consider your clients to have complied with their pre-action duties in relation to any claims by such persons and, on the information you have provided, we do not understand the basis for including their claims within the GLO.

5.4 We also note that your letter does not address the various different contractual models operated by Post Office, as set out in Schedule 5 of our Letter of Response. Please explain the cases put by the various Claimants who are parties to these different contracts.

5.5 At paragraph 210 of the Letter of Reply, you state that the individuals who contracted with Post Office via a company still have claims in their individual capacity. We do not understand this assertion: if the company contracted with Post Office, the relevant legal relationships are between Post Office and the company. Please identify:

5.5.1 The Claimants who entered into contracts through companies and the companies through which they did so.

5.5.2 The causes of action asserted by each of those companies.

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5.5.3 The legal basis on which the relevant Claimants (as natural persons) are said to have causes of action against Post Office in addition to the causes of action vested in their companies.

5.5.4 How the causes of action asserted by these natural persons are not barred by the reflective loss principle.

5.6 As requested in our letter of 13 October 2016, please also provide your proposals for amending the Claim Form to address the issue of claims which should be brought by different entities. We reserve our client's rights in this regard.

6. Governing law of the Postmaster Contract (and other matters)

6.1 Our client's position on governing law is reserved until such time as the Claims are pleaded. We cannot, without sight of properly articulated causes of action and factual assertions from specific Claimants, determine whether there are any claims that ought to be subject to a Scottish or Northern Irish law analysis.

7. Shortfalls: Real losses and the burden of proof

7.1 You allege at various points that we have conflated shortfalls in branches with losses to Post Office.[7] Our explanation of how shortfalls in branches create losses for Post Office was provided in paragraph 4.14 of the Letter of Response.

7.2 We do not intend to engage in detailed legal argument as to the burden of proof in relation to shortfalls. The legal analysis and importance of the burden of proof may differ depending on the precise facts alleged, and your clients have to date refused to provide particularised allegations. We would simply note the following matters:

7.2.1 At the end of each trading period, a postmaster has to approve their accounts or dispute the accounts through the proper process.[8] Once approved, the accounts are binding on a postmaster and they assume the burden of showing that any accounts they previously approved are inaccurate. This burden is placed on a postmaster because of their status as Post Office's agent. This is a settled matter of law and one that was followed in Castleton.[9]

7.2.2 The approved accounts will state the amount of cash that should be in the branch. The postmaster, as an agent, has a duty (both contractually and as an agent) to return to Post Office all cash shown in the accounts. If there is insufficient physical cash in the branch, the postmaster must make up this shortfall from his own funds. A similar set of principles apply to stock.

7.2.3 It is an established common law principle that "*when an agent cannot explain exactly what has happened to money or property, presumptions may be made against him*".[10]

7.3 Please confirm that you accept that postmasters are subject to the usual rules applicable to all agents in relation to rendering accounts, returning cash and stock to their principal and the making of presumptions against them.

7.4 For the avoidance of doubt, Post Office denies applying any "*economic duress*"[11] or engaging in "*unconscionable dealing*"[12] in relation to the Claimants' accounting to Post Office and, in particular, the decisions taken by certain Claimants to submit false accounts. It does not know which Claimants make these serious allegations and it has no understanding of the factual basis

[7] See, for example, paragraph 65, Letter of Reply
[8] See the description of the "settle centrally" process at paragraph 7.5, Schedule 4, Letter of Reply
[9] 6-090 onwards in Bowstead & Reynolds on Agency
[10] 6-096 Bowstead & Reynolds on Agency
[11] Paragraph 103, Letter of Reply
[12] Paragraph 103, Letter of Reply

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on which the allegations are made. It also does not reflect Post Office's constructive dealings with the vast majority of its postmasters. In any event, the Claimants who falsified accounts cannot blame Post Office for their decisions to do so or for the consequences of doing so.

8. Investigations into Horizon

8.1 At paragraph 24 of the Letter of Reply, you address Post Office's investigations into Horizon in specific cases. You are maintaining your allegation that Post Office has instructed its investigators to ignore issues in Horizon. Please explain the factual basis of this allegation.

8.2 You go on to refer to the case of Elizabeth Stockdale as an example of Post Office's failure to investigate and ask us to clarify our position in this respect. Mrs Stockdale admitted to falsifying her branch accounts and, despite repeated requests, she was unwilling to provide any guidance as to the specific transactions (or time periods of transactions) she considered may be anomalous or explain how she had been running her branch. Making general allegations that Horizon might be at fault was not sufficient. Where postmasters have failed to maintain properly their branch accounts and then do not cooperate with a subsequent investigation, like Mrs Stockdale, it will be very difficult (if not impossible) for Post Office to assist a postmaster. Indeed, in Mrs Stockdale's case, due to her false accounting Post Office was not even aware at the time that there was an issue to investigate. In the circumstances, Post Office undertook all the investigations it could sensibly be expected to undertake.

8.3 You have also asked us at paragraph 129 of the Letter of Reply about obtaining data from Fujitsu in relation to investigations into Horizon. Post Office considers whether it is necessary to obtain historic data from Fujitsu in the context of each request to investigate and depending on the issues raised by the postmaster. It would, for example, take into account any reasoned argument that a postmaster could not, without such data, comply with his duties to Post Office. However, in most cases accessing bulk historic data is not necessary and, as you note at paragraph 127, data is already available to postmasters for up to 42 / 60 days in branch.

8.4 At paragraph 114 of the Letter of Reply you ask us to identify which branches have been affected by the Calendar Square / Falkirk, Payments Mismatch and Suspense Account bugs and to provide copies of correspondence on these issues. This represents a further disclosure request. In our letter of 13 October 2016, we explained that whilst we have complied with your numerous documents where Post Office is able, your requests are putting Post Office to significant and, in the absence of any claim valuations, an entirely disproportionate cost. For the reasons set out in our letter of 13 October 2016, the information and documents requested at paragraph 114 will not be provided at this stage of the litigation.

9. Remote access to Horizon data

9.1 At several points in your Letter of Reply you contend that Post Office has been tampering with transaction data, suggest that this is the root cause of shortfalls in branches and allege Post Office has attempted to cover this up. Although we do not think it appropriate to explore all the issues raised by these allegations in correspondence, it is necessary to make a few comments.

9.2 At the outset, it is important to note that:

9.2.1 No Claimant (nor Second Sight) has identified any change to transaction data that was effected without a postmaster's knowledge and has caused them loss. If any Claimants are alleging that the transaction data for their branch was changed, please identify the Claimants who are saying so and provide details of the allegedly changed data. If not, in the interests of saving time and costs, please say so.

9.2.2 For data manipulation to be the cause of shortfalls in hundreds of branches since Horizon has been in operation, there would have to have been a surreptitious and coordinated effort between Post Office and Fujitsu staff to manipulate data over a 16 year period.

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9.2.3 We cannot think of a plausible reason why Post Office would manipulate transaction data in this way. Quite apart from anything else, intentionally changing data to make branch accounts inaccurate would obviously place Post Office in breach of the obligations it owes its commercial partners (to whom Post Office accounts for the transactions it performs for them in the branch network), and also in breach of numerous regulatory requirements. If nonetheless you or your clients contend that this has in fact taken place, please plead the details of this alleged fraud with the proper particularisation required of such allegations.

9.2.4 It is illusory to suggest that Post Office would contemplate perpetrating a fraud of this sort. It is even more unreal to claim that Fujitsu, an external supplier of IT services, would do so. In this regard, we note that you have not joined Fujitsu to these proceedings as a co-conspirator. Nevertheless, if any Claimants are saying that Fujitsu staff have misused any access rights so as to create false shortfalls in their branch accounts, this would require a further allegation of fraud against Fujitsu, which would involve pleading who would have done this, when and why.

9.3 It is also important to assess the statements that Post Office has made about “remote access” in their proper context. The questions around "remote access" have changed over time, particularly during Second Sight's engagement:

9.3.1 The first "remote access" allegation identified by Second Sight came from Mr Michael Rudkin who claimed that Fujitsu was running a "black ops centre" from the basement of its office in Bracknell (see Spot Review 5). This was checked and proven to be wrong (in a witness statement that was provided to Second Sight, a member of staff from Post Office confirmed that the test environment in the basement at Bracknell was not connected to the live Horizon system).

9.3.2 A different issue was subsequently raised, namely whether Post Office could access Horizon branch data. Post Office has always had the ability to "access" (in terms of having read only access) Horizon data and it took some time to clarify with Second Sight what they were querying.

9.3.3 At times it was asked whether Post Office could remotely log on to a branch terminal and conduct transactions in the name of a postmaster. Investigations at the time determined that Post Office could not do this but Fujitsu could log on to branch terminals in order to provide technical support, though transactions could not be conducted through this route.

9.3.4 A further question was whether Post Office or Fujitsu could add transactions into a branch's accounts through back-end systems without a postmaster's knowledge. This is the Balancing Transaction issue that is addressed below and that was disclosed to Second Sight.

9.3.5 When preparing our Letter of Response, we identified the theoretical potential for Fujitsu administrators to access Horizon databases in a way which could change branch accounts. This is discussed in more detail below. Post Office regrets that it did not previously identify this possibility even though it is unreal to suggest that this is a true factor behind the shortfalls suffered by any postmasters.

9.4 At each stage, Post Office ascertained the position to respond to the questions it believed it was being asked. With the benefit of hindsight, some of Post Office's statements may have been incorrect in light of what has since been identified in relation to Fujitsu's administrator access rights (see below). But Post Office refutes any suggestion that it ever made false statements deliberately or did so to mislead, deceive or conceal. The Post Office personnel responsible for those statements made them in good faith: what was said reflected what they understood the position to be after they had made relevant enquiries at the time.

9.5 In any event, there is no suggestion that Post Office made any incorrect statements before Second Sight began its work in 2012. By this time, many of the Claimants had left their branches

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and so could not have relied on such statements. Indeed, you have presented no material to suggest that any postmaster has relied on any such statements by Post Office or suffered loss as a result.

9.6 Nevertheless, given the prominence which the Claimants appear to place on these allegations, in connection with this litigation Post Office has undertaken further investigations into whether Global Users, Balancing Transactions and Fujitsu administrator access could be behind the shortfalls you allege. These investigations have focused on Horizon Online, being the version deployed in 2010 and which is still in service.

9.6.1 Except for Global User access and Balancing Transactions, Horizon is designed so that transactions recorded on Horizon that make up a branch' accounts are either input or approved by branch staff before they form part of the relevant accounts.

(a) We addressed Global Users in our Letter of Response. The ability of Post Office staff to log on to terminals when physically in a branch has always been known to postmasters and their actions have always been entirely visible to postmasters.

(b) We also addressed Balancing Transactions in our Letter of Response. Any Balancing Transactions input into the Branch Database[13] are identifiable by Postmasters as they appear on the transaction log report to which Postmasters have access (and which they should review when considering a shortfall in the branch accounts). The transaction user ID does not appear as that of any member of staff at the branch, but appears as " SUPPORTTOOLUSER99" .

(c) The existence of Balancing Transactions was disclosed to Second Sight during the mediation scheme. In addition, the fact that Balancing Transactions show up in a branch's accounts means that there can be no allegation that the existence of a Balancing Transaction was concealed from a Claimant.

(d) If any Claimants are alleging that a Global User improperly conducted transactions whilst in a branch or that a Balancing Transaction was the root cause of a shortfall (or that Post Office tried to conceal either of these), please identify the Claimants who are doing so and provide details of their allegation. If not, now is the time to say so.

9.6.2 In relation to Fujitsu's administrator access:

(a) There are certain circumstances where this access could in principle be used to change parts of Horizon, including the raw data in its databases that reflect transaction records. Although this would be very difficult to do in practice and of questionable benefit to anyone who tried, changes could in theory be made to the Branch Database which could then manifest as a discrepancy in a branch's real-world accounts.

(b) There are a significant range of controls in place to limit access to this data and to make it very difficult (and in many cases impossible) to add, amend or delete data without leaving an audit trail in the system.

(c) Post Office therefore denies that Fujitsu's administrator access has been misused so to cause the shortfalls attributed to any Claimant.

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[13] In Horizon Online, the Branch Database holds the live version of the transaction data used in day to day operations. It is located on a server in a central data centre. Transaction data (other than the immediate data for a transaction being conducted in real time with a customer) is not held locally on terminals in branches. For example, when a postmaster in a branch requests on his local Horizon terminal a list of all the transactions conducted on a specific day, this data is drawn from the Branch Database and sent over the internet to the terminal in the branch. A similar flow of data happens when conducting transactions and rolling over a branch's accounts.

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(d) It should also be noted that a number of Post Office's historic statements were describing the functions of the Horizon system as designed, not what Horizon could be changed to do or show using Fujitsu's administrator access. In the context of those statements, administrator access was not a relevant consideration. As stated above, the context behind each statement is of paramount importance.

9.7 The simple fact is that, while allegations about data manipulation may make good headlines, they have no substance. It is fanciful to contend that there was a conspiracy between Post Office and Fujitsu to manipulate data in order to cause deliberately false shortfalls to appear in Post Office branches. Taking a step back and assessing the realities of this case sensibly, there is no credible material to support such allegations, but only supposition about what Horizon *might* in theory be able to do.

9.8 Turning to the other related questions asked in your letter:

9.8.1 At paragraph 194 you ask whether the Courts have ever been informed about "remote access" issues. Post Office is fully aware of its disclosure duties (including in prosecutions) and believes it makes such disclosures when required.

9.8.2 In response to paragraph 195, Post Office was aware following Professor McLachlan's evidence in Court of a number of issues that could, in a broad sense, be described as concerns over Post Office's investigation into the Misra case. However, this evidence was ventilated before a judge and jury and Seema Misra was convicted of theft. It is not appropriate to comment on this further while the prosecution of Mrs Misra is being considered by the Criminal Cases Review Commission (**CCRC**).

10. Causes of action

10.1 You suggest that the parties agree that "*all claims in which a Claimant has been convicted of a criminal offence relating to an alleged shortfall*" be stayed pending the outcome of the reviews by the CCRC[14].

10.2 We can see the attraction of that approach as regards certain of the claims to which it would appear to apply. However, we are (as ever) in the dark as to the details of the very serious allegations being made against our client, and our client cannot be expected to agree the proposed stay without further detail of the claims to which it would relate, particularly as regards the claims in malicious prosecution. Accordingly, please provide the information requested in paragraphs 10.3, 10.4.2 and 10.5.5 below.

10.3 Please identify the Claimants whose claims would be the subject of the stay that you are proposing.

10.4 As to malicious prosecution claims:

10.4.1 You have not stated which of the many Claimants for whom you act assert a claim in malicious prosecution and in relation to what prosecution or civil proceedings.

10.4.2 Please (a) identify the Claimants who assert a claim in malicious prosecution and, for those Claimants, please (b) identify the conviction or civil judgment (as the case may be) relied upon as having been obtained wrongfully and (c) state whether and on what basis it is contended that those proceedings have been determined in the Claimant's favour.

10.5 As to malicious prosecution claims where there are criminal convictions, the following points are worth noting:

[14] Paragraph 199, Letter of Reply

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10.5.1 You note that certain of the Claimants have criminal convictions that are under review by the CCRC, but you accept that a claim in malicious prosecution based on a conviction "*cannot lie*" unless and until the conviction is in fact overturned[15]. It follows that these claims are untenable and should not have been brought.

10.5.2 Further, as you appear to acknowledge it is not enough for the conviction to have been reviewed by the CCRC or even referred by the CCRC to the Court of Appeal, there is no cause of action in malicious prosecution based on criminal proceedings unless and until those proceedings have been determined in the claimant's favour: see Dunlop v Customs & Excise Commissioners, The Times, March 17, 1998; (1998) 142 S.J.L.B. 135 and in Walpole v Partridge & Wilson [1994] Q.B.106 at 117G-H, *per* Ralph Gibson LJ.

10.5.3 It is improper to issue a Claim Form asserting a claim that, to the Claimant's knowledge, cannot presently be articulated and advanced (even if such a claim may be capable of being asserted in the future): see Nomura International Plc v Granada Group Ltd [2007] EWHC 642 (Comm).

10.5.4 There is no scope for a "protective claim" in relation to malicious prosecution given that, as made clear in Dunlop, time will not run against the Claimant for limitation purposes until the criminal case is determined in his favour.

10.5.5 The claims in malicious prosecution brought by Claimants whose convictions have not been overturned are therefore misconceived and demurrable. The position is even more stark in relation to Claimants (if there are any such) who assert a claim in malicious prosecution based on a criminal conviction which is not under review by the CCRC. In circumstances where a Claimant has not sought to overturn his or her criminal conviction, we cannot see how using these proceedings to mount a collateral attack on the conviction is anything other than an abuse of process, quite apart from being misconceived for the reasons given above. Please identify any Claimants to whom this applies.

10.6 As to malicious prosecution based on civil proceedings that have been determined in favour of Post Office, we consider that the principles set out above apply *mutatis mutandis*. We note that you invite Post Office to identify which Claimants have concluded civil proceedings with Post Office that may give rise to *res judicata* and/or issue estoppel defences. This information can and should, indeed must, be provided by your clients. They are the ones bringing the claim.

10.7 Our ability to identify any such defences is of course hampered by your ongoing refusal to provide any meaningful detail of the claims asserted by the Claimants and the fact that our client does not know who all the Claimants are. We do not consider it appropriate at this stage to provide also the pleadings.

10.8 As regards claims that have been settled, we disagree that it would be unreasonable or disproportionate to strike out claims that are advanced in breach of settlement agreements. The pursuit of such claims is a breach of contract and a plain abuse of process. If any of your clients wish to advance an allegation that Post Office acted deceitfully in the negotiation of a settlement, he or she should provide proper details of that allegation immediately. It is improper to raise an unparticularised allegation of fraud and we would again remind you of your professional obligations in respect of raising such claims.

11. Loss

11.1 At paragraph 177 of the Letter of Reply, you refer to devaluation in the sale price of postmasters' businesses. We explained at paragraph 7.9.4 of the Letter of Response that postmasters do not "*own*" the Post Office branch and it is therefore not a saleable asset or an asset the devaluation of which reflects a recoverable loss to the postmaster.

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[15] Paragraph 161, Letter of Reply

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11.2 In relation to the appointment of postmasters our client has absolute discretion in the selection and appointment of the person or entity with which it contracts to provide services. Any attempt to fetter this discretion, by way of implied terms or seeking to tie the appointment to premises where there is an existing branch or otherwise, is bound to fail.

11.3 In response to paragraph 179 of the Letter of Reply, Post Office's case is that any damages for stigma / reputation losses can only be grounded in claims for defamation and malicious prosecution. For the reasons given above, the claims for malicious prosecution are misconceived and should not be pursued.

PART B: GLO AND OTHER CASE MANAGEMENT ISSUES

12. Pleadings and preliminary issues

12.1 As we understand it, you propose to only prepare generic Particulars of Claim that focus solely on the legal relationship between Post Office and postmasters who are or were party to the Postmaster Contract[16]. For the reasons stated at the opening of this letter, we do not accept that this is the correct way to proceed.

12.2 In addition to the reasons stated above, we note that a preliminary issues trial on contractual matters would not be a straightforward case of legal submissions. On the case you argue in the Letter of Reply, it would require a significant amount of factual matrix evidence on the circumstances in which the relevant contracts were entered into and on what documents were provided at what times. It would also apparently require factual matrix evidence on the operation of a Post Office branch and Horizon. Alternatively, the Court might be asked to make assumptions as to the factual position that may prove to be misplaced on the real facts of some or all of the Claims. We do not consider that the trial of preliminary issues on assumed facts (which may be difficult to agree between the parties) is sensible, given that the material facts will differ from Claim to Claim (and have not even been identified in outline at this stage). Even the factual matrix relevant to the construction of the contracts at issue could differ from one period of time and one Claimant to another.

12.3 From the correspondence to date, it appears that the basic facts of the operation of Horizon and branches more generally are likely to be contested, requiring disclosure, witness statements and the cross-examination of appropriate witnesses. We also could not rule out the possible need for expert evidence on certain aspects of Horizon. In short, a preliminary issue trial would be a complex undertaking requiring considerable time and substantial cost. For the reasons touched on above, it would be of very uncertain value to Post Office and to at least some of the Claimants. The Claims (or many of them) would still require a substantive trial on liability issues, and the expense of a trial of preliminary issues would likely prove to exceed the value of the outcome of that trial, especially where the parties may seek to distinguish the facts and issues in their individual cases from the assumed facts on which the preliminary issues were tried.

12.4 There is also a very real risk of duplication of disclosure and evidence. For example, disclosure and factual matrix evidence in relation to training and support generally would likely need to be re-heard when dealing with specific cases.

12.5 Finally, it is difficult to see how the Court can make decisions on issues of construction in a vacuum. A judge will be being asked to decide on contractual provisions without knowledge of how those provisions may have an impact on the particular conduct which is actually alleged. It is undesirable for a Judge to be asked to consider the meaning of a contractual provision without knowing the factual context in which the competing constructions are advanced, including by reference to the nature of the alleged breaches of the relevant provision.

12.6 For all the above reasons, our client is not in a position to agree that the issues you propose should be tried as preliminary issues, or that they should be tried in the way you suggest, on the basis of incomplete "generic" Particulars of Claim. We believe that full pleadings should be

[16] It is unclear whether this pleading will also extend to crown employees and assistants, but even if this is correct, our position would be the same.

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produced before it can be decided whether it would be appropriate to try any preliminary issues and before any such issues can be selected.

12.7 To be clear, we are not insisting that each Claimant produces individual Particulars of Claim at this time. We can see scope for the Claimants' claims to be batched together and dealt with in group Particulars of Claim, with further Claimant specific information appended in detailed schedules. Our concern is to make sure that all relevant causes of action and necessary facts are pleaded for each Claimant, such that Post Office can understand and respond to the case against it and the Court can manage the Claims effectively in light of their content.

13. Criminal cases

13.1 At paragraph 199 of the Letter of Reply you propose we agree that all claims in which a Claimant has been convicted of a criminal offence relating to a shortfall be stayed. We have already pointed out that, in principle, malicious prosecution claims should be discontinued, but that our client would be willing to consider a stay, subject to your providing the information requested in section 10 above).

13.2 In our view, if a stay is to be imposed, it should be imposed after pleadings have closed. Pleadings are needed in order to identify those claims that should be stayed, as this is not a straightforward exercise. First, some of the Claimants were not convicted, but persons in their branches were convicted. There may still be an abuse of process argument in these cases. Second, given that you do not accept that raising a collateral challenge to the basis of a criminal conviction would necessarily involve an abuse of process, we need to know the details of the relevant Claims to assess any abuse of process arguments (including the nature and extent of contradiction between the facts underpinning the criminal conviction and the facts now asserted by the relevant Claimant). We anticipate that you may contend that, when dealing with a convicted Claimant, some of their claims may overlap with their conviction and some may not.

13.3 Please confirm that you agree with the above approach. If you do agree, we believe that this matter would be best addressed at the first CMC (not the GLO hearing).

14. Counterclaims

14.1 Post Office declines your invitation at paragraph 204 of the Letter of Reply to rely on its counterclaims only in the event the Claimants' claims succeed. Post Office does not agree that pursuing valid debts constitutes victimisation and it will plead such counterclaims as are properly open to it in the course of the litigation.

15. GLO

15.1 We welcome many of the changes you have made to the draft GLO, in particular your adoption of our proposed approach to the GLO Issues which now focus on those issues that are common to multiple Claimants. It is regrettable that it has taken several revisions of the draft Order for you to accept this crucial point.

15.2 Having reviewed your letter, our conclusion is that the GLO should be limited to only postmasters who are or were engaged under the Postmaster Contract (i.e. the Subpostmasters Contract 1994 edition, as amended) or other similar contract to operate a Post Office branch. On the information you have provided, our client is not prepared to agree to crown employees and assistants being part of the GLO on the grounds that (a) you have made no attempt to explain the claims of these individuals or the issues arising on those claims and (b) the legal relationship between these individuals and Post Office is completely different from the legal relationship between postmasters and Post Office.

15.3 We have also proposed a number of changes to the GLO Issues in Schedule 1. As raised in previous correspondence, the GLO Issues need to be common issues of fact or law as per CPR 19.10 and 19.11 and a number of the issues you have included do not appear to meet this criterion. Our alterations reflect our provisional views on the common issues we have been able to identify in your correspondence to date. We will further consider these issues once we have

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sight of your draft generic Particulars. If you accept our proposed approach to pleadings, then we envisage that these issues may need to be further revised after full pleadings have been provided.

15.4 We enclose a mark-up of your draft GLO, along with a comparison to the version circled with your Letter of Reply, and provide comments below by reference to amended numbering used in our enclosed draft Order unless otherwise stated.

15.4.1 Paragraph 1: We have made two substantive amendments. First, we have included a cross-reference to the GLO Issues, making it clear that the relevant claims must give rise to those issues, as required by CPR 19.10 and 19.11(2)(b). Second, we have included a description of the applicable Claimants (ie. only postmasters). We consider that it is important to make clear who may join the Group Action at the top of the Order.

15.4.2 Paragraph 8: We are content to include a definition of Lead Case. However, it should be made clear that the parties have not agreed that selecting a lead case is a satisfactory way to proceed.

15.4.3 Paragraph 13: In our last draft GLO we included the words "*All such future claims should be commenced by issuing new Claim Forms (whether individual or in batches).*" We have asked you to confirm on several occasions (in our letters of 1 September 2016 and 13 October 2016) that you agree with this approach but you have again not addressed this point in the Letter of Reply. Please now either accept this wording or explain why it is opposed.

15.4.4 Paragraph 16: We still oppose the loose wording "*or similar*". Our client communicates every day, often by letters and emails, with postmasters regarding matters that are similar to the subject matter of the GLO. Expanding this paragraph would place an onerous burden on our client to monitor hundreds, if not thousands, of routine communications during the life of the GLO in case they fell under this paragraph and, in cases of error, would expose our client to the risk of unfair accusations of contempt of court. By contrast, any Claim Forms or Letters of Claim are already routed to our client's internal legal team and can be readily disclosed to you.

15.4.5 Paragraph 17: We have added an extra piece of information to be shown on the Group Register: the date in which the Claimant operated their branch. This is because there may be two or more separate Claimants who have operated the same branch and these dates will help distinguish them.

15.4.6 Paragraph 19: We maintain that the Group Register should be updated monthly and provided within 7 days thereafter. This is not an onerous task. We also do not understand why it would take 14 days to provide the updated Group Register to our client – is this not just a matter of attaching the register to an email?

15.4.7 Paragraph 23: A monthly updated register is not onerous. Please be cooperative and agree that the progress of this litigation should be promptly recorded.

15.4.8 Paragraph 26: This has been amended to bring it in line with paragraph 1 and to avoid duplication of wording.

15.4.9 Paragraph 27: We have added the "statement of truth" wording which we believe is agreed but appears to have been accidentally omitted in your draft Order.

15.4.10 Paragraph 28: Your wording around "*consent not being unreasonably withheld*" is not accepted. Please provide evidence that this wording is "*entirely standard*"[17]. Please also address the point we have made previously that this wording circumvents the usual Court rules on managing extensions of time. We also do not see why this deadline should have a special regime for extending time.

[17] Paragraph 207 (19), Letter of Reply

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15.4.11 Paragraphs 30, 31 and 32: Your proposed “generic” pleadings are not agreed for the reasons stated above. We have proposed new wording and timings for your consideration.

15.4.12 Paragraph 33: We do not accept your cost sharing provisions. Please see our more detailed comments below.

15.4.13 Paragraph 34: We have made a few small changes to this paragraph to make clear that the advertisement in Schedule 4 is the only form of advertising that is permitted; otherwise this clause is otiose.

As amended, this paragraph envisages the parties agreeing the distribution channels for the advertisement. Please could you provide your proposals in this regard so that we may try to agree them now, thereby avoiding any delay. Also, should there be any disagreement, then this could be resolved by the Court in January.

15.4.14 Paragraph 34 (using the old numbering on your draft of the GLO). This is the paragraph that required our client to provide lists of possible Claimants. For the reasons stated in previous correspondence, this paragraph is not accepted and has been deleted.

15.4.15 Paragraph 35. The subject matter of the GLO was highly publicised before the current claims were started. Post Office ran and publicised a mediation scheme, there was coverage in the national press and debates in parliament and the JFSA has been actively seeking members for years. Further, your firm has been involved in this matter and seeking clients for more than a year. There is therefore no need for the GLO window to be open for 6 months. This will cause unnecessary delay. We propose 3 months, to the end of April 2017.

We also cannot envisage any steps that could be taken in 6 months that could not be completed in 3 months. Please could you explain why 6 months is needed.

15.4.16 Paragraphs 38 and 39: We have made provision for a CMC after pleadings have been finalised. We still do not understand the need for a second CMC to be listed at this stage and in any event the parties can apply to the Court for further directions if necessary.

15.4.17 Schedule 1 (comments below refer to the old numbering on your draft of the GLO):

(a) Footnote 1 is not accepted for the reasons stated above.

(b) Issue 1(K) has been deleted. It is not acceptable to include an imprecise "catch-all" provision when the GLO Issues are supposed to only reflect common issues of fact or law.

(c) Issue 4: This paragraph makes no sense and, in any event, is unhelpfully broad and has been deleted. Despite the lack of information you have provided on the issues of "economic duress" or "unconscionable dealing", these issues appear to be fact specific to individual Claimants and not be common issues.

(d) Issue 5: You have confirmed that you are not asserting that there was a systemic issue in Horizon that affected all the Claimants. The factual operation of Horizon is not therefore a common issue and this paragraph has been deleted.

(e) The issue raised in (7) is extremely vague and is likely to be duplicative of other issues (e.g. issue 6) or be specific to individual cases. It has been deleted.

(f) Issue 8, 9(a) and 10(a): These issues have been deleted. They focus on Post Office's "policy" or "standard practice" in relation to training, support and investigations. However, over and above the instructions you have suggested

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(i.e. the instructions referred to in Issues (9) and (10)), it has not been alleged that there has been a single policy or standard practice applied to these matters. Moreover :

(i) Horizon has been active for 16 years and over that time training and support have been frequently updated.

(ii) The breadth of topics covered by Post Office's training and support is very wide. Many parts will have no bearing on the Claimants' cases.

(iii) Even within those elements that could be relevant, until the Claims are fully pleaded it is not known which parts of Post Office's training or support will need to be examined and to how many Claimants that examination would benefit.

(iv) Even if similar threads could be identified, dealing with these issues in the abstract would not be helpful. The application of training and support to individual Claimants in light of their specific complaints is needed in order to dispose of these issues. We cannot see how a hypothetical factual enquiry will be useful.

(g) Issue 11 (harassment) is not a common issue but one that is factually sensitive. It has been deleted.

15.4.18 Schedule 3: As this letter was being finalised, we received your letter of 30 November enclosing a new Schedule of Information. Dealing with the elements of GLO in this ad hoc manner is not helpful - you could have provided this new Schedule with your letter in October. It is less helpful still that you have provided it under cover of a letter accusing us of having not behaving cooperatively – which we do not accept. We were intending to provide a mark-up of Schedule 3 with this letter but will now review your new draft and revert to you as soon as possible.

15.4.19 Schedule 4: Please find enclosed a marked-up version of the advertisement.

15.5 In relation to the cost sharing provisions in the GLO, the provisions at paragraph 32 of your draft GLO are very confusing and, at times, illogical and unworkable. For example:

15.5.1 The definition of "Costs" refers to CPR 43.2 which concerns the scope of the costs rules and applicable definitions before 1 April 2013. As explained in CPR 48.1, the provisions in CPR 43 relate to pre-commencement funding arrangements as they were in force immediately before 1 April 2013. It is unclear why these provisions are applicable to a matter commenced in 2016 or why the date 1 March 2013 has been referred to in 32(a).

15.5.2 Throughout this section there is reference Lead Cases. To date, you have not proposed any Lead Case and accordingly we have not agreed any Lead Cases. Indeed, there may never be any Lead Cases, in which case these provisions would be unworkable.

15.5.3 Even if there were Lead Cases, it is not understood why the assessment and payment of costs to our client should be deferred until after the conclusion of those Lead Cases - see 32(f)(7) and 32(f)(8).

15.5.4 You appear to have allocated costs associated with Lead Cases to both Individual and Common Costs – even if we were to accept Lead Cases, their respective costs could only fall into one pot or the other.

15.5.5 In 32(f)(2) the first accounting period is stated to run from 1 October 2015, yet in 32(f)(3) the first accounting period is stated to run from 1 January 2017.

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15.5.6 We also do not understand why the first accounting period runs from either 1 October 2015 or 1 January 2017 – neither of these dates have any particular significance.

15.5.7 Paragraph 32(f)(8) refers to "Common Issues" but this term is not defined.

15.5.8 In relation to 32(h), we do not understand why your firm should have a veto over our client's ability to recover costs incurred in dealing with another firm of solicitors acting for certain Claimants.

15.6 Putting aside the above drafting issues, more fundamentally, we do not believe that the parties are yet in a position to set out a prescriptive regime for costs sharing:

15.6.1 First, the course of this litigation is far from clear, as we have explained in the rest of this letter.

15.6.2 Second, this Group Action does not lend itself to the usual binary distinction between common and individual costs. There are dozens of sub groups in this litigation already which militates towards giving the Court more discretion to deal with costs questions on an issue by issue basis. For example:

(a) If your formulation of the GLO Issues were accepted, there would be three distinct groups of Claimants: postmasters, employees and assistants.

(b) Within these groups there would then be sub-groups of Claimants facing particular procedural issues, e.g. where they are subject to criminal convictions, settlement agreements, limitation defences, etc.

(c) It is far from clear that all the Claimants will raise all the substantive issues raised in your correspondence. Indeed it is highly likely that they will not or cannot.

15.6.3 Third, if you accept the points raised in our letter of 8 November 2016 regarding security for costs, then all the costs of this action will flow between Post Office on the one hand and Therium / your client's ATE insurers on the other hand. This may well eliminate the need to draw a distinction between common and individual costs, as no particular individual Claimant will actually be paying either your firm's or our client's costs.

15.7 We therefore propose that the default costs provisions in CPR 46.6 apply for now, with the matter reviewed at the first CMC. Our proposed drafting reflects this.

PART C: OTHER MATTERS

16. Document requests and preservation

16.1 In the Letter of Reply you request a wide range of documents. In our letter of 13 October 2016, we set out in detail the extensive disclosure exercise required in order to provide the documents you have sought. Since you have not particularised the claims brought by each individual Claimant and when each cause of action is alleged to have arisen, Post Office is unable to target any searches for documents towards categories of documents which are relevant. Therefore, giving disclosure at this early stage in the litigation process would be massively inefficient and wasteful of time and costs. The proportionality of giving such disclosure also cannot be assessed as you have not valued your client's claims.

16.2 By way of example, at paragraph 125 of the Letter of Reply you request that Post Office provides the training records for all of the named Claimants, or alternatively, the records in relation to the first 25 named Claimants. It may not be the case that all of the 198 Claimants' claims are based on the grounds of inadequate training being provided and therefore the training documents may not be relevant to all Claimants. It would be disproportionate and unreasonable to provide documentation which is irrelevant to the matters in dispute. Once an explanation has been provided as to which Claimants are bringing a claim under this head and why this level of

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documentation is required at this early stage in the proceedings then Post Office can consider whether it is reasonable and proportionate to provide the documents. In the interim, we refer you to the Part 1 Mediation Briefing Report which sets out the training provided by Post Office and how this has evolved.

16.3 A further example is at paragraph 20 where you state that you "*have not asserted a systemic flaw*" in Horizon. Despite this clarification, at paragraph 113 you repeat your request that we provide internal notes, memoranda, correspondence, emails and briefing documents regarding errors, bugs or problems in the Horizon system. On the basis of your assertion there is no systemic flaw in Horizon your request is disproportionate and unjustified.

16.4 Whilst we have only highlighted the two above examples, they reflect Post Office's general inability to assess whether the documents requested are properly disclosable, proportionate and reasonable in relation to the claims. Once particularisation of the individual Claimants' claims have been provided so as to allow Post Office to understand the documents which are relevant to each Claimant, Post Office will be in a position to begin to assess the provision of these documents. This is of course the usual way that litigation is conducted – pleadings are provided first and then disclosure is given.

16.5 At a number of points in your Letter of Reply, you say that you are unable to particularise your clients' claims without further disclosure. We do not accept that this is correct. For example, you have refused to explain your clients' claims in relation to training until training records are disclosed.[18] However, your clients will be able to say what training they received and why they considered it deficient. This is information within your clients' knowledge and can be provided now without disclosure being given. Instead, you seem to be asking our client to incur costs in order to avoid the need for taking instructions yourselves. This dynamic applies to many of the issues you raise and is inappropriate.

16.6 We refer to your query about whether Post Office has informed Royal Mail and Fujitsu of the need to preserve documents in relation to your litigation.[19] Post Office is aware of its disclosure obligations however, Royal Mail and Fujitsu are third parties to this litigation and are not themselves under Post Office's control. Due to the lack of particularisation and absence of pleadings, we do not yet know what the scope of disclosure is. To the extent either Royal Mail or Fujitsu have documents which are under Post Office's control, Post Office will act appropriately.

17. Access to Second Sight

17.1 As explained in our letter of 13 October 2016, the proposed Protocol should ensure that any legally privileged information which is held by Second Sight remains protected and that the privacy of postmasters who are not Claimants is not infringed. Post Office has only sought to avoid appreciable risks and we do not believe that it unduly fetters your access to Second Sight. We maintain that the Protocol represents a reasonable way to proceed and that as the lead solicitors for the Claimants you should be bound to the Protocol.

17.2 Due to the role played by Alan Bates and the fact that a number of the Claimants participated in the Mediation Scheme, Post Office are proceeding on the basis that you have access to the many documents which were generated by Second Sight. If this is not the case, please identify which documents your clients do and do not have. Assuming it is the case, the only information which is available from Second Sight and you have not had access to is the information stored in the minds of the persons working for Second Sight which was not considered sufficiently important to be worth including in their various reports.

17.3 This being the case, we find it difficult to see the benefit to your clients in having access to Second Sight, given that anything significant will have been included in their reports. We are concerned that money and time may be wasted on this issue.

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[18] Paragraph 124, Letter of Reply
[19] Paragraph 215, Letter of Reply

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17.4 Nonetheless, you wish to communicate with Second Sight and our client does not seek to prevent this, even though it is under no obligation to waive any of its rights as regards Second Sight. Your proposal of an independent solicitor is not workable as that solicitor, who will have no understanding of this matter or Post Office, would not be able to reliably identify our client's privileged material, particularly in the course of any live and free flowing discussions you may have with Second Sight. This would also place on Second Sight the burden of filtering out privileged material and we would be surprised if they were prepared to take on such a heavy burden.

17.5 We have therefore reviewed the objections you have raised to the Protocol contained in our Letter of Response and amended the Protocol with a view to achieving a workable consensus. Please find enclosed a revised version of the Protocol incorporating some amendments, including removing the bar on the Claimants seeking Court orders that challenge the Protocol and removing the indemnities sought from your firm.

17.6 We hope that this matter can now be agreed. If you do not accept our revised Protocol, please confirm by return whether you intend to raise the issue of access to Second Sight at the hearing in January 2017, since we will need to address this in our evidence.

18. Claim Form amendments application

18.1 You say in paragraph 221 of your Letter of Reply that our client's conduct in relation its application under CPR 17.2 has been unreasonable. We disagree, for the following reasons:

18.1.1 You amended and served the Claim Form on 5 August 2016 without reference to us, notwithstanding that we had already (in our letters dated 1 July 2016 and 15 July 2016) raised the point that some of the existing and anticipated claims were (or would soon be) time-barred.

18.1.2 You chose to make the amendments without acknowledging that some of them, unless disallowed through an application under CPR 17.2, would have the effect of depriving our client of any limitation (or similar) defences arising after the date of the original Claim Form but before the service of the Amended Claim Form. This is the result of "relation back" under the Limitation Act 1980. You have asked on what basis we assert that the Court may not prevent the doctrine of relation back taking effect. Please see section 35 of the Limitation Act 1980, which imposes mandatory rules (reflected in CPR 17.4 and 19.5) from which the Court may not depart.

18.1.3 As soon as you served the Amended Claim Form, we explained that our client's position appeared to be prejudiced by the doctrine of relation back, we invited you to issue a new Claim Form for the relevant claims and we pointed out that, under the mandatory rule CPR 17.2, our client had only 14 days from the service of the amended Claim Form to oppose the amendments. We also noted that any delay in issuing a new Claim Form was at your clients' own risk.

18.1.4 You did not reply until 17 August 2016 (following our request that you provided us with a response), only two days before the CPR 17.2 deadline expired. In your letter of that date, you claimed that our client had no basis for opposing the amendments, and refused to contemplate any change to your clients' position. Significantly, you made no proposal to address any prejudice our client might suffer as a result of relation back, you did not suggest that the parties should discuss the matter further with a view to achieving a compromise that was fair to both sides, and you did not even offer any extension of the CPR 17.2 deadline.

18.1.5 In those circumstances, it was not merely reasonable for our client to issue its application on 19 August 2016 but in the light of your clients' uncompromising position it was the only course that our client could sensibly take to protect its position.

18.1.6 Since then, your clients have not conceded the application or demonstrated that it was unnecessary. On the contrary, they continue to oppose the application. However, you

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have now proposed what you say is a practical compromise that would save your clients the cost of paying the Court fee that would be due had they issued a new Claim Form as they should have done. We have previously stated in our letter of 1 September 2016 that this is not a good reason in circumstances where your clients have the benefit of litigation funding and the issue of the new Claim Form amounts to less than £100 per a new Claimant.

18.2 It is in this context that your clients demand that Post Office provide its agreement to a Consent Order. We have made clear that, in our view, the Court cannot properly make (or at any rate effectively make) the kind of order that is being proposed. Notwithstanding that the Consent Order confirms that the parties have agreed that the commencement date for the purposes of limitation is to be treated as 3 August, we note that section 35(1)(b) of the Limitation Act 1980 provides that the commencement date should be the date on which the Claim Form was originally issued (namely, 11 April 2016). You do not dispute that there is a risk that the Consent Order may fail (because, as we have suggested, the Court may consider itself bound to apply section 35(1)(b) despite the proposed agreement between the parties).

18.3 At paragraph 222 of your letter, you make clear that your clients' position is that this risk should rest with our client and that your clients should have the benefit of certainty. On any view, the risk is substantial, but there is no justification for exposing our client to any risk of any sort in connection with your clients' exposure to the expiry of limitation periods. Post Office is entitled to, and does, assert its right to the preservation of any limitation (or other similar) defences that accrued after the date of the original Claim Form and before the service of the Amended Claim Form.

18.4 It is for your clients to ensure that Post Office is not prejudiced by the amendments that they have unilaterally made, especially given that there is an obvious alternative course that would preserve Post Office's right to assert limitation defences, namely your clients bringing the new claims within a new Claim Form. This is what the Court requires where amendments could otherwise deprive the defendant of a limitation defence.

18.5 We therefore do not accept that our client's conduct has been unreasonable, and nor do we accept that it should be put to any risk of prejudice as a result of your clients' decision not to serve a new Claim Form, as is the proper practice.

18.6 Nonetheless, our client has from the outset made clear that it would consider any practical compromise that would not jeopardise its ability to pursue its limitation (or similar) defences.

18.7 In these circumstances, although it is not obliged to do so, our client is willing to make one last effort at compromise. We attach a draft agreement that we think could provide our client with the protection to which it is entitled. By the draft agreement, our client seeks to obtain the same protection it would have been provided if your clients had on 3 August 2016 issued a new Claim Form containing the new claims. We invite your clients to agree the terms of this draft agreement. Given that our client is entitled to the preservation of all its limitation (or other similar) defences, it would not countenance any substantial departure from these terms, or from the order as to costs discussed below.

18.8 The draft agreement is between the Claimants, as per the Amended Claim Form, and Post Office. We assume that on the basis of the solicitor – client relationship between yourselves and the Claimants that you have authority as their agent to sign such an agreement on behalf of the Claimants. However, please provide confirmation of this and details of any decision making governance structure through which such authority is obtained.

18.9 If these terms can be agreed, we would propose to have (in addition to a signed agreement), a Consent Order referring to such agreement and recording the discontinuance of the CPR 17.2 application. As for the costs of the application, as a matter of principle, our client should have all the costs it has incurred in seeking to deal with the difficulties caused by your clients' decision to unilaterally amend their Claim Form, and their uncompromising stance once those difficulties were explained to them, despite the need to make the application being evident from the draft Consent Order which you provided. This would include our client's costs in making its application,

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of our subsequent correspondence and of drafting the attached agreement. However, if the terms of that agreement are all agreed without the need to incur any further costs, our client would be prepared to consider an order under which they have their costs of preparing and issuing the application, to be assessed if not agreed, and the other costs are reserved.

19. Non-Victimisation

19.1 Your Letter of Reply is the first time you make explicit reference to employees and contractors of Post Office and Fujitsu who may be assisting the Claimants. We are not aware of who these people may be or what they may be doing. It is not our client's intention to "*victimise*" any person merely because they are involved in this litigation. Our client has from the outset sought to engage constructively in resolving the subject matter of the Claims, and it has already spent considerable amounts of money providing information and documents to your clients (including information and documents that they should have been able themselves to provide).

19.2 Our client does not, however, agree to give up in advance any rights it may have to take appropriate steps to restrain any breach of duties owed to it by any third parties, including duties of confidentiality. Nor can it be expected to do so. If and to the extent that any such breaches have taken place, Post Office reserves its rights. Your clients have no doubt already been advised as to any potential liability for any steps wrongfully taken to procure any breaches of contract and/or confidence.

20. Security for costs

20.1 We shall respond separately to your letter of today's date on security for costs.

21. ADR and next steps

21.1 Post Office is open to alternative dispute resolution proposals. However, until sufficient details are provided so as to understand the Claims being brought by each individual Claimant, when and how these causes of action arose and the value of the loss allegedly suffered, the parties are not in a position to meaningfully approach any form of alternative dispute resolution. We cannot see how a further mediation at this point would have any prospect of success. We consider that the appropriate stage at which to revisit the possibility of mediation or other ADR is after full Particulars of Claim have been served which properly set out who is claiming what and how much.

21.2 In terms of the provision of evidence for the hearing in January, we agree with your proposals in your letter of 11 November 2016 subject to you providing:

21.2.1 your draft "generic" Particulars of Claim by 1 December 2016 as per your previous commitment; and

21.2.2 a reply to the various procedural matters raised in this letter (namely sections 12,13, 15, 17 and 18) by 8 December.

21.3 Any delay in providing these two documents may delay the provision of our evidence until the New Year.

21.4 We should be grateful if you would submit your evidence in two statements: one in reply to our evidence in respect of the GLO and a second statement in relation to our application regarding the Claim Form amendments. As these are two separate applications, it makes sense to keep the evidence separate. We trust that you do not object to our client filing any further supplemental statement in reply to your evidence on the Claim Form amendments by 19 January 2016.

21.5 As we have stated previously, we and our client remain prepared to meet with you and your clients to discuss this litigation if it would help progress matters expediently.

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Yours faithfully

Bond Dickinson LLP

Bond Dickinson LLP

Enclosures

1. Draft GLO (clean and tracked versions)
2. Invitation / Publication to join GLO (tracked version)
3. Agreement in compromise of the application under CPR 17.2
4. Protocol governing Second Sight's interaction with Freeths (clean and tracked versions)