

Postmaster Litigation

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Executive Summary

Context - *Bates & 90 Others v. Post Office Limited*

1. On 11 April 2016, 91 (mostly former) postmasters issued a High Court Claim formally starting a court case against Post Office (the "**Claim**").
2. The Claimants have until 11 August 2016 to "serve" the Claim Form, which will trigger Post Office's obligations to respond to the Claim through the Court. We have however been provided with a copy for information only.
3. The Claim Form contains very little information. However, on 28 April 2016 the Claimants' solicitors (Freeths LLP) sent a 53-page "Letter of Claim" setting out the allegations in more detail (the "Letter"). Court Protocol requires us to respond to the Letter before the Claim passes to the Court for formal case management.
4. The Claim potentially poses significant legal, financial, operational and reputational risk to Post Office.
5. This paper:
 - summarises the status of and next steps in the Claim;
 - provides an initial overview of timing and costs; and
 - sets out a proposal for managing Post Office's defence of the Claim.

Questions addressed in this report

- What are the Claimants alleging?
- What process will the Claim follow and over what time frame?
- What are the estimated costs of responding to the Claim?
- What are Post Office's objectives for the Claim?
- Who are the stakeholders and how should the Claim be managed?

What are the Claimants alleging?

7. The Letter sets out the bases on which the Claim will be made. Despite its length, there is nothing new or surprising in the Letter, and it does not set out how much the Claimants are claiming or how they propose calculating that amount.
8. Much of the Letter focuses on technical points of law, with the main focus being the relationship between Post Office and postmasters, seeking to place greater responsibility on Post Office for branch accounting difficulties.

9. Apart from some generalised statements, there is no allegation that there is a systemic failure in the Horizon software. Rather, the Letter claims that because Horizon has the potential to cause discrepancies in branch accounts, Post Office should not have relied on it so heavily and done more to investigate it as a possible source of branch shortfalls.
10. Other familiar allegations include poor training/support, the ability of Fujitsu to alter remotely branch transactions, inadequate investigations of shortfalls, improper criminal prosecutions, and putting undue pressure on postmasters to make up shortfalls.
11. The Letter asks Post Office to agree to deal with the Claim under a "Group Litigation Order" ("**GLO**") so the issues common to the Claimants can be efficiently managed through the Court.

What process will the Claim follow and over what time frame?

The Letter

12. The Letter asks Post Office to agree in principle to a GLO by 12 May 2016, and to respond to all other issues in the letter by 29 May 2016.
 - 12.1. A Letter of Claim should be responded to within a "reasonable time", which should be no more than 3 months in very complex cases. That period is reasonable here given the issues raised in the Letter, which took Freeths 5 months to prepare.
 - 12.2. There are practical and tactical implications for agreeing to a GLO which will substantially influence the way the Claim proceeds. For example, Freeths may not be able to fund the litigation if we can show the individual claims are not sufficiently common for a GLO. Equally, an early favourable ruling on an issue we want to treat as common (e.g. the effect of a criminal conviction or limitation period) could reduce the number of claimants and thus the economic viability of the litigation.
 - 12.3. Post Office is therefore entitled to know more about the Claim and the purported common issues before making any decision about a GLO.
13. We therefore propose working to a 28 July 2016 deadline to provide our substantive response to the Letter. We have informed Freeths of this timeframe and why it is reasonable, and in the meantime will seek clarification in relation to a number of issues, including the specific issues they want to deal with under a GLO, and the scope of the document disclosure they want Post Office to provide.
14. Freeths have questioned whether Post Office would be prepared to mediate these claims. At this stage it is not possible to form a view as to whether mediation would be viable in some or all of the cases, however we will keep under constant review whether options to mediate or settle would provide a better outcome for Post Office.

The Claim

15. Freeths need to decide by 11 August 2016 whether to serve the Claim Form and start the formal Court procedures.

16. Set out at the Appendix to this Report is an "Estimated Litigation Timetable", which sets out the main steps in standard litigation through to trial, assuming the Claim Form is served during August 2016.
17. The Court's procedures are designed to examine the issues rigorously, and accordingly take time. Assuming that this case follows standard procedures, the Claim might not come to trial until November 2018. Whether or not the Claim proceeds under a GLO could impact substantially this timeframe, e.g. the standard timetable may not start to run until the GLO issues are finalised, which could take some months, or the litigation may not proceed at all if no GLO is made.
18. The Court's procedures provide for regular assessment of the Claim and the risks and benefits of continuing with it, which ensures that the vast majority of cases are settled before trial.

What are the estimated costs of responding to the Claim?

19. Legal costs and expenses are a central feature of Court litigation due to the resources it consumes and the "loser pays" presumption which requires the unsuccessful side to pay a substantial portion of the successful side's costs (typically 65% to 90%).
20. The Court actively manages costs as a claim progresses. Central to this is the "Precedent H" procedure which requires parties to set out at an early stage all anticipated costs through to trial (typically after "Statements of Case" – stage 3 in the Estimated Litigation Timeframe).
21. The Court's processes also require a fair amount of "front end loading", meaning significant costs are incurred at the beginning of a claim to narrow down the issues and save costs overall.
22. The Claim has the potential to consume substantial resources. We estimate that responding to the Letter in a robust and proportionate manner will incur external legal costs at approximately the same rate as during the Sparrow Mediation Scheme, i.e. £30,000 to £50,000 per month for the next three to six months. More detailed costings will be provided and updated as the Claim progresses.
23. Should the matter proceed to a full trial, Legal costs and expenses for the Claim could easily exceed £1million, particularly if the performance of the Horizon system itself becomes a key issue. By way of reference, Post Office successfully defended at trial a 2006 "Horizon"-related claim brought by one former agent, the costs of which exceeded £300,000.

What are Post Office's objectives?

24. The Claim challenges a critical part of Post Office's business - how we engage with our postmasters, and how we allocate risk and responsibility for the Post Office transactions, cash and stock they handle.
25. Even though most of the Claimants are former postmasters, the Claim raises issues in respect of current and future b.a.u. activities (e.g. those concerning branch accounting, agent contract management, and current and former agent debts) because it concerns the core branch accounting principles and systems, including Horizon, currently in use.
26. We therefore see two main objectives in responding to the Claim:

- 26.1. Proportionately manage Post Office's legal defence.
- 26.2. Protect the Network going forward so that Post Office and current agents have confidence in our systems.

Stakeholders and Managing the Claim

27. In terms of substance, the Claim impacts a variety of functions across Post Office including from Network (Contract Advisor teams, NBSC, Branch Support Programme), the HR Advice Centre, Finance and the FSC, and IT (including our relationship with Fujitsu).
28. Management of the Claim will involve support from among others, Legal, Comms (internal, external/media, public affairs), and Finance (defence cost management).
29. To defend the Claim, the Legal team will need input and decision-making from each (and at times all) of these groups.
30. Other stakeholders will be interested in the Claim, e.g. BIS and the NFSP. However, the involvement of external stakeholders should be limited to appropriate updates provided as part of an agreed communications plan so as to maintain legal privilege and confidentiality in the legal advice we receive and the strategy and tactics adopted in our defence of the Claim.
31. We therefore propose to manage the defence of the Claim as follows:
 - It be treated as a new "project", distinct from Legal b.a.u. and the previous Mediation Scheme activity.
 - A sponsor from the business is appointed to provide business leadership on the "project". We believe that because of the issues raised, this should be a SLT member from Network.
 - Day-to-day management of the Claim be handled by Post Office Legal (which may require additional resource) with support from external solicitors Bond Dickinson.¹
 - A Steering Group be formed of representatives from each of the business sections identified above which will:
 - o have one person with overall responsibility for decision making;
 - o support and instruct the Legal team in its management of the Claim;
 - o inform the communications plan to be managed by the Comms Team;
 - o report to GE and other senior management as required; and
 - o monitor and control expenditure.

¹ Bond Dickinson has substantial familiarity with the issues in the Claim having successfully defended similar claims in 2006 and 2011/12, and provided support over the past three years to Project Sparrow, which substantively considered the individual cases of 70 of the 91 Claimants. Replicating with another firm the institutional knowledge Bond Dickinson has acquired will be time and resource intensive, and very costly.

POST OFFICE

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Input Sought

GE is requested to:

1. note the content of this paper;
2. endorse the Claim Management proposal outlined above.

Appendix - Estimated Litigation Timetable

Step	Estimated completion date	Proportion of overall work
1. Pre-Action Correspondence: Initial investigations into alleged issues and correspondence between the parties to establish the basis for the claim and the defence	August 2016	5%
2. Claim Form served: Legal proceedings are formally begun with service of the Claim Form on Post Office	August 2016	
3. Statements of Case: Each party produces formal Court documents setting out their legal positions. The SPMRs will produce a Particulars of Claim. Post Office will then produce a Defence. The SPMRs will then file a Reply to the Defence.	January 2017	10%
4. Case Management: The Court orders the steps to be undertaken before trial and a timetable for their completion. This may require multiple short Court hearings.	April 2017	5%
5. Formation of the Group: The SPMRs will apply for formal recognition that their claims form a Group Action. The Court will define the issues common to the Group and set a deadline by which further Claimants may join the Group.	June 2017	5%
6. Disclosure: All parties are required to search for relevant documents and provide those documents to the other parties.	November 2017	25%
7. Witness statements: All parties must draft and exchange statements setting out the evidence to be given by each of its witnesses.	March 2018	15%
8. Expert evidence: Parties commission experts to investigate and report on technical issues (eg. Horizon). Reports are exchanged and meetings held between experts to narrow the points of disagreement.	July 2018	15%
9. Trial: A trial will likely take several weeks and require several months of preparation.	November 2018	20%
10. Judgment. It will likely take a Judge several months to consider the case and draw up the judgment.	February 2019	

Notes

Step 5: Formation of the Group could occur at an earlier stage and possibly before Step 3: Statements of Case. This depends on how the SPMRs wish to proceed.

The above timetable assumes that all points of dispute will be considered in one single trial. It is possible that certain discrete or preliminary points may be dealt with separately at an earlier stage. If there are any preliminary hearings these will likely occur before Step 6 and will the delay the above timetable by 3 - 6 months.

Following Step 10: Judgment, there is the possibility of an Appeal and there will also be costs proceedings. These could take a further 6-12 months.