

Bond Dickinson

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13 October 2016

For the Attention of Mr J Hartley
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Second Letter
By email only

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Your ref:
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Dear Sirs

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

- 1.1 We write further to our letter of 31 August 2016, in particular section 4 which dealt with the GLO to which we have not yet received a substantive response, your letter of 16 September 2016, your letter of 6 October 2016 in relation to your client, Dr Kutianawala and your most recent letter of 11 October 2016.
- 1.2 Although there are serious points of disagreement between our clients, we have always engaged with you professionally and constructively. In our client's Letter of Response dated 28 July 2016 (**Letter of Response**), we offered to meet with you to discuss the general management of this litigation. To date, you have not taken up that offer.
- 1.3 It is therefore regrettable that you have sought to accuse us in correspondence of acting uncooperatively and seeking to focus on satellite issues rather than addressing the real issues in this case. The issues which we have sought to address with you include security for costs, governing law and limitation. These are not satellite issues, as you would seek to characterise them, but are foundational and need to be understood so the parties can make informed case management decisions.
- 1.4 By contrast, your clients have not provided any detailed particulars of the claims alleged against our client (either in the Letter of Claim or in the significant subsequent correspondence you have sent on specific cases). Further, neither you nor your clients have responded to our proposals on the formulation of the GLO that we provided in July 2016: the GLO being the cornerstone of case management in this litigation and despite us pressing for your input for two months now, you have not engaged with this topic.
- 1.5 Nevertheless, in order to focus on the substance of this litigation, rather than your conduct, in this letter we address the outstanding substantive points, namely:
- Your response of 20 October 2016
 - The GLO
 - Security for Costs
 - Access to Second Sight

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2. Your response on 20 October 2016

- 2.1 On the basis that your response will be substantive, genuinely address the points raised in our Letter of Response, and set out in detail each of the claims raised by each of the Claimants and the facts and matter they rely upon, our client was willing to agree to a deadline of 20 October 2016 for your substantive response to the issues in dispute (**Letter of Reply**).
- 2.2 Recently one of your clients, Dr Kutianawala, agreed to a Consent Order in which he was obliged to provide full particulars of the grounds on which he would oppose an Order for Sale. Although you provided some particulars in your letter of 6 October 2016, this information was far from sufficient. For example:
- 2.2.1 Your referred to Dr Kutianawala's "claim" against Post Office but provided no particulars of that claim (paragraph 2.4 of your letter).
- 2.2.2 You said that the Default Judgment against Dr Kutianawala should be set aside but set out no grounds on which it should be set aside (paragraph 3.1).
- 2.2.3 You said that the settlement agreement signed by Dr Kutianawala (after he had received legal advice) should be rescinded or set aside on the grounds of deceit, but provided no particulars of the alleged deceit (paragraph 3.2). We note our comments in paragraph 6.25 of our Letter of Response, which set out the requirements for pleading a claim in deceit. Those requirements are not met by your letter of 6 October 2016.
- 2.3 We are concerned that the level of information provided regarding Dr Kutianawala's position may be indicative of the level of information you intend to provide in respect of the other 198 Claimants' claims in your Letter of Reply. If so this would not be adequate for the reasons set out at length in our Letter of Response.
- 2.4 Since your Letter of Reply will feed into matters to be discussed at the GLO hearing, and so as to assist the parties to narrow the issues in dispute prior to this (for example, the format and substance of Statements of Case), we hope that your Letter of Reply will, at a minimum:
- 2.4.1 Set out the common or related issues (of fact or law) between the Claimants to be managed collectively and identify any features which may be grouped (i.e. criminal convictions and those Claimants whose contracts were terminated more than 6 years ago);
- 2.4.2 Identify and explain the various categories of claims which are being brought, the elements of each of these categories, the Claimants which fall within each of these and the factual basis of their claims;
- 2.4.3 Provide adequate information so as to allow Post Office to investigate each of the claims brought by each Claimant;
- 2.4.4 Explain the grounds on which non-Postmasters (i.e. crown branch employees and assistants) are bringing their claims and why their claims are appropriate to be brought under the GLO; and

- 2.4.5 Include adequate information so as to ascertain when the various causes of action arose for each Claimant.
- 2.5 Despite having been instructed on this matter for at least 10 months (our client's first letter to you being in December 2015), we have not yet been provided with particularisation of each of the Claimants' claims. Only once this level of detail has been provided will the parties be able to hopefully agree the scope of the GLO and, in particular, consider whether generic Particulars of Claim (as you have proposed) would be suitable.
- 2.6 Please confirm that your Letter of Reply will address the above points, as we have previously requested in our Letter of Response and letter of 18 August 2016.
- 3. GLO**
- 3.1 In preparation for the GLO hearing which is now listed for 26 January 2017, please can you respond to:
- 3.1.1 Our letter of 15 July 2016 regarding the GLO; and
- 3.1.2 The draft GLO enclosed with our client's Letter of Response.
- 3.2 Until you provide us with a response, we are unable to begin to work with you to narrow any points in dispute. However, in the interest of progressing these discussions, we have set out above the information and level of detail which we feel, as a minimum, should be included in your Letter of Reply.
- 3.3 In particular, we note from the current draft GLO that "*the Claimants shall file and serve Generic Particulars of Claim*" (section 30). No explanation has been provided by you to date as to what these "*generic*" Particulars of Claim are expected to include (and what they would presumably exclude) and how they would fit into a wider case management plan for this litigation. Having been instructed for nearly a year, you must by now have a view on this topic.
- 3.4 In preparation for the GLO hearing, it will be necessary to consider whether generic Particulars of Claim would be suitable. Due to the fact specific nature of each of the Claimants' claims, it may, for example, be necessary to produce individual Particulars of Claim for each Claimant or, alternatively, to split the claim into categories with separate Particulars for each.
- 3.5 Some of the recent cases that we have been discussing in correspondence show the distinctive difference between the cases and the possible need for full Particulars of Claim:
- 3.5.1 Mrs Stockdale was initially suspended and subsequently terminated as Postmistress of her branch as a consequence of her failure to repay losses and her acknowledged submission of false cash declarations. Throughout our correspondence you requested a number of documents specific to Mrs Stockdale, demonstrating the highly individual nature of each specific claim. Despite your repeated failure to provide any explanation of events at Mrs Stockdale's branch, it is clear from that the specifics of each Postmaster's branch and their conduct will need to be particularised in due course; and
- 3.5.2 Dr Kutianawala is in a different position to Mrs Stockdale, having already had judgment entered against him and then, following receipt of independent legal advice, having entered into a settlement agreement to repay part of that judgment debt. For Dr Kutianawala to even begin advancing a claim, he will first need to set out grounds for setting aside the settlement agreement and judgment. There are also questions around whether his case could be expediently advanced under a GLO given its particular circumstances.
- 3.6 In your most recent letter, you make reference to "Lead Claimants". The possibility of identifying lead claimants, and presumably therefore running a number of test cases, has never been raised

previously by you, nor is it part of the GLO you are seeking, nor is it mentioned in the supporting evidence to that application.

- 3.7 In our letter of 27 May 2016, we asked for you to set out your envisaged directions for cases subject to the GLO. No clear statement of your intentions has ever been provided, though clearly you have in mind the use of generic Particulars of Claim and Lead Claimants. We should be grateful if this explanation is now provided.
- 3.8 As there are a number of different ways to proceed in relation to the GLO, Statements of Case and future directions, it may be best to discuss these matters between us as soon as possible and we repeat our offer to meet with you.
- 3.9 In the meantime, it would assist if draft generic Particulars of Claim could be shared with us so that we may understand what you intend to be covered. We accept that these draft Particulars will be just that, a draft, and that you shall have complete liberty to formally file different Particulars.
- 3.10 Once we have a clearer understanding of your position in relation to the GLO, your response to our previous letters regarding the GLO and you have addressed the above points, we will then be able to determine what information may be needed in Schedule 3 to the draft GLO. It seems to us prudent for all parties to have a clearer understanding of how this litigation may be conducted in the future, before making decisions on what evidence needs to be gathered from the parties. We will nevertheless give this topic further thought pending your response.
- 3.11 Please confirm that you will address the above points in (or at the same time as) your Letter of Reply (ie. by 20 October 2016).
- 3.12 Please provide draft generic Particulars of Claim by 28 October 2016. We have intentionally proposed a date after 20 October so that you may first submit your Letter of Reply.

3. Security for Costs

- 3.1 We are currently reviewing the ATE policy you have provided and shall respond separately on this matter.

4. Second Sight

- 4.1 Both parties agree that the Claimants should be able to consult Second Sight, subject to adequate controls being in place to protect our client's privileged information held by Second Sight.
- 4.2 So as to ensure that any privileged information which is held by Second Sight remains protected, we propose that Second Sight, you (in your capacity as solicitors for the Claimants) and Post Office agree a tripartite Protocol which sets out the terms of access to Second Sight. Please find enclosed a draft Protocol for your review.
- 4.3 The Protocol draws a distinction between the provision of documents and information. Second Sight has confirmed to Post Office that it has provided to Post Office all documents (both hardcopy and electronic) which related to Post Office and the Mediation Scheme, and then destroyed any remaining copies. As such, we would be concerned if Second Sight were able to provide you with any documents. If you have previously sought to obtain any documents which Second Sight had sight of, please now provide us with copies of such requests. Further, any additional requests for information should be made through us.
- 4.4 Given the above, access to Second Sight should only relate to the recollections of the staff at Second Sight. Essentially this is limited to their knowledge as witnesses.
- 4.5 There are certain topics that are likely to involve substantial amounts of legally privileged material. There are also topics that may affect the privacy of individuals who are not parties to

this litigation. The Protocol therefore prohibits discussion of these high risk areas. These areas include:

- 4.5.1 Information concerning Post Office's criminal prosecutions against Claimants and generally. Prior to establishment of the Mediation Scheme, Post Office provided Second Sight with access to its internal legal files in relation to certain prosecutions, under a condition of non-waiver of privilege. It will be near impossible for Second Sight to filter privileged and non-privileged material during a discussion with your firm and therefore this topic must not be discussed;
 - 4.5.2 Information concerning previous civil proceedings against Claimants. For similar reasons to above, this topic should not be discussed; and
 - 4.5.3 Information relating to Postmasters who are not Claimants. As you will appreciate, this information is sensitive to individuals who may not wish to be involved in this litigation. It is also covered by confidentiality between Post Office and those individuals, as well as statutory Data Protection safeguards. These Data Protection rules only permit Post Office (and by proxy Second Sight) to release information for litigation purposes where it is "necessary" to do so. If you wish to discuss individuals who are not Claimants with Second Sight, please explain why that information is necessary and we will then seek our client's consent.
- 4.6 The Protocol also provides a framework for addressing other related matters such as data protection compliance, the sharing of information between Claimants, Second Sight's costs and the inadvertent disclosure of privileged material.
- 4.7 You will note that we are not seeking to pre-approve any interaction with Second Sight, nor vet the material they may provide to you. We are trusting your firm to comply fairly with the Protocol. In order to ensure that the above limits are maintained, the Protocol provides that the communications with Second Sight are only to be conducted by you (rather than via individual Claimants), with a single point of contact at Second Sight. This single channel of communication will help to ensure compliance with the Protocol. We note that you provided for something similar in your recent letter where you sought permission to speak to Ian Henderson.
- 4.8 We welcome your comments on the Protocol.

5. Claim Form application

- 5.1 The sections which you have referred us to in McGee on Limitation Periods discuss the methods by which parties can contract out of the statutory limitation period and be estopped from relying on limitation defences. However, the issue we are discussing is the date upon which the claims were brought and whether the parties can agree to a notional claim date of 3 August 2016 for all new claims. The sections which you quote do not appear to deal with this issue. If we have misunderstood, please clarify the relevance of these extracts.
- 5.2 Although you have not provided us with any assurance that your proposal is lawful, we suggest that the parties adopt the following approach:
- 5.2.1 A draft Order is provided to Senior Master Fontaine setting a notional Claim date of 3 August 2016, along with short written submissions (e.g. one page) from both parties;
 - 5.2.2 A request that Senior Master Fontaine decides on the basis of the papers whether she is able to make the Order which is sought; and
 - 5.2.3 In the event that Senior Master Fontaine feels unable to make such an Order, then the application hearing should proceed.
- 5.3 Please find attached a revised draft Order for your review. Please provide any comments which you may have on our proposal and the draft Order by 20 October 2016.

- 5.4 So as to avoid this issue re-occurring in the future, we ask you, again, to confirm that if there are any further new Claimants, you will issue a new Claim Form(s) for them and will not seek to further amend the existing Claim Form.

6. Other amendments to Claim Form

Claims brought by companies

- 6.1 You have confirmed that the amendment to the Claim Form, whereby a reference to Claimant "*companies*" was added, was because some of the Claimants have traded through companies. However, to date, none of the Claimants are companies.
- 6.2 In the circumstances where the principal contracting party with Post Office is a company, the claim against Post Office should be brought by the company rather than the Postmaster in their individual capacity. By way of example, you say in your letter of 8 September 2016 that Dr Kutianawala contracts with Post Office via FSK Enterprises Limited, yet his claim has been brought by Dr Kutianawala in his individual capacity.
- 6.3 It appears that you may have pleaded inaccurate claims, and signed a statement of truth to this effect, as the correct party to the litigation was known to be a company but joined to the proceedings as an individual.
- 6.4 Please provide your proposals for amending the Claim Form to address this issue (in the case of Dr Kutianawala and any others) and confirmation of when you propose to do so.
- 6.5 Alternatively, if you are not proposing to amend the Claim Form further, it would appear that the reference to "*companies*" has been included in the expectation of later adding more Claimants who may be companies to this litigation. We must therefore insist that this will not happen and that you provide the confirmation sought in paragraph 5.4 above.

Network Reimbursement

- 6.6 Thank you for explaining what was meant by "*capital payment entitlements payable by the Defendant upon branch closures*". We note that the claim which relates to the Network Reimbursement has not to date been discussed in pre-action correspondence. This appears to be a new category of claim, the formal basis for and legal ramifications of which are completely unknown to Post Office.
- 6.7 Please confirm that you will provide full details of this claim in your Letter of Reply.

7. Governing Law

- 7.1 We note your position that English law is the applicable law for both the contractual and non-contractual causes of actions in these proceedings. Our client reserves its position in respect of this matter since without full particularisation of each of the Claimants' claims it is not possible to ascertain where the causes of action originated and any affect this may have on governing law. This is another reason why it is critical that you provide proper details in your Letter of Reply of the claims being advanced.

8. Disclosure

- 8.1 We refer to your second letter of 25 August 2016 in relation to disclosure.

Documents provided to date

- 8.2 On 31 August 2016, we provided you with 45 documents (totalling 592 pages) you had requested, which related to different categories of your requests. In addition to these documents, many documents were shared with your clients throughout the Complaints Review and Mediation Scheme (which was hundreds of pages of documents in most cases). We anticipate that those

Claimants will therefore have documents relevant to your requests and which you would be able to obtain from them. Our client has therefore already provided significant pre-action disclosure.

Your requests

- 8.3 As we have said previously, your requests are nothing more than a fishing expedition. Your most recent letter on this subject repeats the requests with little attempt made to (i) explain why the documents are relevant or are needed at this stage of the litigation process or (ii) narrow the requests.
- 8.4 Where possible, we have sought to identify further documents in light of the few clarifications you have provided. In the main, however, your requests remain disproportionate and unjustified. You are effectively seeking to bring forward disclosure in these proceedings before you have pleaded out your clients' claims.
- 8.5 Our principle objection to your requests is that they would put our client to significant cost because the documents requested do not exist in discrete, easily accessible locations. For example, in relation to your request 17 for "*Notes of audits and investigations...*", there are several teams in different locations that deal with audits and investigations, including audit, security and the contract teams. These teams are based across the country, with some team members working remotely. There is support for these teams based in London and Chesterfield, with further off-site archiving facilities for closed files. Consequently, this information is not easily accessible in one location.
- 8.6 We set out below a description of Post Office's organisational structure in order to show that locating the documents you have sought would require an extensive disclosure exercise. We anticipate that the cost of this exercise would run into the hundreds of thousands of pounds (if not more). At a time when your clients have not quantified their claims and are refusing to re-issue a Claim Form in order to remedy a limitation issue on the grounds that it would cost them a further £10,000, this disclosure exercise is clearly disproportionate.

Post Office's organisational structure

- 8.7 As many of your clients will be aware, Post Office Limited and Royal Mail Group Limited (**Royal Mail**) became separate companies in April 2012. This split led to significant changes to the structure of Post Office and how it was run. We note that you seek historical documents dating back 18 years, to 1998. It is self-evident that in this time, responsibilities will have moved between different teams and a full mapping exercise will be needed to ascertain where documents have been held in this period.
- 8.8 Currently, there are many different teams that are involved in the running of branches that also diverge, depending on whether the branch is run by agents or Post Office employees. Teams include those related to security, audit, remuneration, field support, NBSC, sales, training, anti-money laundering, recruitment, HR, agent contractual support, and different commercial and support teams for the various products offered across Post Office's network. It is estimated that at least dozens, if not hundreds, of employees are currently engaged by these teams (and historically there will have been many more). There are therefore many different teams and people that may have held / hold the information you seek.
- 8.9 Post Office also holds documents in several different office locations, in off-site storage and in branches. Consequently, the documents that you seek are held in many different physical locations.
- 8.10 In addition to the normal IT development that any organisation experiences, since the split with Royal Mail, there have also been changes to Post Office's IT services. Relevant documents are held in several different databases and software solutions, which have changed during the time period relevant to this matter. This will include different email systems and archiving for those emails, individuals' laptop hard drives where documents are stored (not all of whom share their documents over any network), different networked drives and cloud storage locations, database systems such as SAP and other specialised software. Post Office has several third party

suppliers of IT software and support beyond just Fujitsu, all of which will need to be liaised with to locate the information sought. These suppliers are also likely to charge Post Office for conducting a mass search and retrieval of information in the form that you are seeking.

- 8.11 Therefore, in order to locate the documents you seek at this early stage, a full disclosure exercise will be required to scope the document holders, locations of documents and how they are stored. Forensic teams will then be needed, again, at a cost, to retrieve the documents so as to preserve the metadata.
- 8.12 We anticipate, based on our experiences in the Mediation Scheme, that this exercise could return hundreds of thousands, if not millions of documents. For example, Post Office has made available to the CCRC approximately a quarter of a million documents and these documents were only generated by Post Office's security team. The documents will therefore need to be keyword searched in order to identify potentially relevant material. To do this would require Post Office to use, at a cost, an e-disclosure software solution.
- 8.13 Following this, a manual review will still be required in order to filter out *inter alia* privileged material and confidential yet irrelevant material (e.g. material related to Postmasters who are not part of the Group Action). This would require a team of paralegals to be engaged at considerable cost, performing a review that may take weeks, if not months.
- 8.14 Such an exercise may need to be repeated once your clients' claims are pleaded and full disclosure is ordered.
- 8.15 As can be seen from above, conducting this work now is therefore not cost proportionate (again noting that you have not in any way sought to quantify your clients' claims) and nor in accordance with the Overriding Objective.

Further disclosure

- 8.16 We have nevertheless, through appropriate endeavours, located additional documents for disclosure. A full list of these documents, and line by line comments on your requests, is enclosed.
- 8.17 If you wish to adopt a more co-operative approach by making more targeted requests for documents, we will of course consider these.
- 8.18 We would however ask that you focus on more important matters, namely gathering information from your own clients and presenting their cases substantively. As explained in our letter of 28 July 2016, the information held by your clients is critical but, as yet, you have presented practically none of this information. Once you have pleaded your clients' claims properly, the parties will be much better placed to provide proportionate and reasonable disclosure.

Yours faithfully



Bond Dickinson LLP