

FREETHS

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19 July 2018
Second Letter

Our Ref: JXH/1684/IT106/2/KL

Dear Sirs

BATES & OTHERS v POST OFFICE LIMITED – GROUP ACTION
CLAIM NO: HQ16X01238
FACTUAL MATRIX

We write regarding the scope of the factual matrix for the Common Issues Trial, in November, in response to your second letter received today, 19 July 2018.

We entirely reject the narrative that Post Office has adopted throughout these proceedings. It yet again finds expression in your letter of today and remains misconceived.

When the Court comes to decide this point (and hear full argument on it) the position will be very clear. The very points which you recite the Managing Judge having made in the hearings will come home to roost in relation to the manner in which the Defendant is trying to advance its case.

Our letter of 20 June 2018 sought to clarify your client's position in relation to its own pleaded case on the relevant factual matrix (as set out in both its Generic and Individual Defences), and recited contentions of fact advanced by your client which it insists are "important aspects of factual matrix against which the various Subpostmaster Contracts relied on by the Claimants should be construed" (at paragraph 76 of the Generic Defence, under the heading at "**B.1 Factual Matrix**").

As we carefully pointed out in our letter of 20 June 2018, the matters particularised in paragraph 76 include the extent to which Post Office:

- (i) was able to monitor at first hand the transactions undertaken in branches on its behalf;
- (ii) was unable to monitor at first hand the custody and use of its property (principally, cash and stock) in branches; and

19 July 2018
Second Letter
Page 2

(iii) relies on the accurate reporting by Subpostmasters of accounts, transactions and the cash and stock held at a branch, and the consequences thereof (referencing back to paragraphs 68 and 69).

We also set out the fact that paragraph 85 of the Generic Defence emphasised reliance on the matrix of fact pleaded in paragraph 76, above and that, in relation to Common Issues 8 to 9, the factual matters that Post Office relies upon expressly extend further to the matters pleaded at paragraphs 93 and 94, where your client pleads that:

1. *"it is appropriate to infer and/or presume that the shortfall arose from losses for which [the Subpostmaster] was responsible" because "losses do not arise in the ordinary course of things without fault or error on the part of Subpostmasters or their Assistants"; and*
2. *Subpostmasters bear the legal burden of proving that a shortfall did not result from losses for which they were responsible, because "(1) the truth of the matter lies peculiarly within the knowledge of Subpostmasters as the persons with responsibility for branch operations and the conduct of transactions in branches, (2) it would be unjust for Post Office to be required to prove allegations relating to matters that fall peculiarly within the knowledge of Subpostmasters ...".*

We also noted that the Individual Defences served expressly rely upon paragraph 94 of the Generic Defence which imports paragraph 93 and despite repeated invitations to amend, the Post Office had not done so.

We should add here that the Individual Defences are pleaded in large part not by reference to what Post Office actually did, but by reference to what would have happened. Post Office explains that it will establish this by reference to its (unidentified) *"practices and procedures at the relevant time"*. This aspect of the Individual Defences is presently the subject of a Part 18 Request for Further Information, to which we required an answer by next Friday, 27 July 2018.

We pause to note that none of the pleadings to which we have referred above are in any way expressed to be bound or limited in time and the period in respect of which Post Office proposes to advance its case on that matters is entirely at large.

Your letter of 19 July 2018 recited trite propositions of law which, in themselves, are not the source of any real disagreement between the parties.

However, the application of those principles in this case and particularly given Post Office's pleaded case is not quite so straightforward:-

1. Your letter does not define the period(s) in respect of which you accept that evidence will be relevant. Please explain the position clearly.

19 July 2018
Second Letter
Page 3

2. Your letter does not explain by what evidence of practices (and the extent to which they were or were not followed) Post Office proposes to establish the facts to support the pleaded inferences as to what would have happened. (We accept that this may be revealed in Post Office's answer to the RFI referred to above.) As to this:
 - a. Does Post Office accept that evidence from Lead Claimants that tends to contradict the alleged practices is admissible?
 - b. Or is this simply a one-way street, by which Post Office is at liberty to adduce evidence of its practices, unbounded by time, but the Claimants may not do so, save in relation to events immediately before contracting?
3. Your letter states as follows:-

"Post Office therefore puts down again the following marker: anything that was not known (or at least knowable) to a person in the positions of the parties at the time of contracting cannot be admissible matrix of fact."

- a. What is Post Office's position in relation to evidence which the Claimants may wish to call to contradict Post Office's positive pleaded case set out above as to what Post Office itself must have known due to its dealings with Subpostmasters generally?
- b. Is it Post Office's position that Post Office can assert the facts pleaded at paragraphs 76 and 93, as to what was in both its mind and that of each Lead Claimant, but the Claimants are not allowed to adduce evidence which would contradict that?

Given the tone and import of your letter today, the need for Post Office now to explain its position on the above is acute.

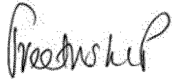
We think that there is absolutely no need for the 2 day hearing which you invite us to agree should be listed. However, we await your answers to the above questions in case the Claimants need such a hearing to deal with the matters above. Again, we think that ordinary co-operation by the parties should obviate the need for any such hearing and we look forward to a clear answer to this letter and the Claimants' outstanding RFI.

Please tell us by return whether or not Post Office is prepared to clarify its position as requested in this letter. We will need to be able to tell the judge what the position is in this respect, particularly as our concerns arise on pleadings already served, rather than in relation to speculative criticisms of witness statements yet to come.

We look forward to hearing from you by return; or, at the latest by 5pm on Friday, 20 July 2018.

19 July 2018
Second Letter
Page 4

Yours faithfully

A handwritten signature in black ink, appearing to read 'Freeths', written in a cursive style.

Freeths LLP
Please respond by e-mail where possible