



## **General Update**

### **1. COMMON ISSUES**

- 1.1 There have been no further developments from the Court on the Common Issues trial. We await the Judgment. When the Judgment lands, decisions will need to be made quickly. Preparation for this is underway:
  - 1.1.1 Post Office have discussed this with UKGI (Jane / Rodric)
  - 1.1.2 Portland has been instructed to prepare communications plans (Mark / Mel).
  - 1.1.3 Contingency plans to mitigate commercial impact are in place (Angela)
  - 1.1.4 Plans are in place for the distribution of the draft Judgment and subsequent governance steps (see email from Rodric).
- 1.2 The following Noting Papers accompany this update:
  - 1.2.1 Appeal processes.
  - 1.2.2 Costs consequences.
- 1.3 These have been prepared to pre-brief the Steering Group on the topics that will need consideration once the Judgment has been received. No decisions are needed on these at this stage.

### **2. HORIZON ISSUES**

- 2.1 The Horizon Issues trial is due to commence on 11 March 2019. All the current signs are that this trial will proceed regardless of the outcome of the Common Issues trial.
- 2.2 The following procedural steps are still to be undertaken:
  - 2.2.1 The Claimants are due to file their last round of witness evidence on 17 January.
  - 2.2.2 The IT experts will be submitting supplemental reports on 25 January.
  - 2.2.3 There is a Pre-Trial Review on 15 February at which the Court will check on the preparations for trial and make orders about the conduct of the trial itself.
  - 2.2.4 The IT experts are to produce a joint note (setting out areas of agreements and disagreement) by 20 February.
- 2.3 There has been a recent meeting of each side's IT experts (as required by the Court) to narrow points of dispute. No progress was made, with each side still being diametrically opposed on the robustness of Horizon.
- 2.4 Post Office's Counsel team has commenced full preparation for trial. The team comprises:
  - 2.4.1 Tony Robinson QC (lead Counsel)
  - 2.4.2 Simon Henderson (a specialist IT lawyer)

- 2.4.3 Owain Draper (a long-standing member of the Counsel on the team and who appeared for Post Office at the Common Issues trial).
- 2.4.4 Rebecca Keating (junior Counsel)
- 2.5 A fuller briefing will be provided to the Steering Group on the merits and issues faced in the Horizon Issues trial once Counsel's preparations are further advanced. This will likely be in mid-February.

### 3. CMC ON 31 JANUARY / ROUND 3 TRIAL

- 3.1 At the end of the Common Issues Trial, the Managing Judge ordered a third trial be held starting on 8 October 2019 for 4 weeks (**the Round 3 Trial**). The exact scope of that trial has not yet been set but the Judge has given a firm indication that it should be the trial of all remaining issues in 2 – 4 of the 6 Lead Claimants chosen for the Common Issues trial.
- 3.2 There will be a CMC held on 31 January 2019 at which the Judge will make further orders in relation to the Round 3 Trial. We have submitted our proposals to the Claimants for their comments – attached to this paper. Our proposal is to hear two cases in October 2019 as per the Judge's preference. Save for the one point flagged below, the remainder of our proposals are orthodox Court process. They follow the now well-trodden path of pleadings, disclosure, witness statements, expert reports and then trial, albeit conducted at express pace as is the norm for this litigation.
- 3.3 The Round 3 Trial that we have proposed will allow the Court to explore issues of breach and quantum that have not been looked at in the other trials. In summary:
  - 3.3.1 The Common Issues Trial will have set the legal foundation by determining the legal obligations between the parties.
  - 3.3.2 The Horizon Issues trial should determine, at a general level, whether Horizon is a good and reliable IT system.
  - 3.3.3 The Round 3 Trial will then apply the findings on the Common Issues and the Horizon Issues to specific cases to determine whether or not Post Office has breached its legal obligations, either through a defect in Horizon or otherwise.
- 3.4 The central questions at a Round 3 Trial will likely be:
  - 3.4.1 What was the cause of a shortfall in a Claimant's branch?
  - 3.4.2 Did Post Office provide adequate training and support?
  - 3.4.3 Was Horizon responsible for any of the specific problems encountered by the Claimant?
  - 3.4.4 Was Post Office's termination of a Claimant's contract lawful?
  - 3.4.5 What loss is recoverable as compensation?
- 3.5 These topics will take the litigation into areas that have so far only been lightly touched on with the Judge, some of which may be difficult for Post Office such as the operation of its reconciliation processes with clients and its suspense accounts. It however also allows Post Office to target some areas of weakness for the Claimants, namely that many of their claims appear to be time-barred and the grossly over-inflated value of their claims.
- 3.6 The Judgments made at the Round 3 Trial will be specific to the cases heard and probably not bind the entire group of Claimants. However, many issues in the Lead Cases may be analogous

to other Claimants' cases, allowing the parties to draw sensible predictions as to what may happen in other cases, hopefully moving the parties closer to resolution.

- 3.7 We anticipate needing a large number of witnesses from Post Office and preparation is already underway to identify and speak to possible witnesses. We will also need to call several new expert witnesses, all of which go to calculating heads of loss. For example, the Claimants claim that they have suffered psychiatric harm and so we will need to call medical experts to dispute that claim or assess the extent of the injury.
- 3.8 The Claimants have not commented on our proposals so far or put forward their own directions. We do not know what they intend to do save that they have indicated that they would like to hear more than two claims. There is some force in this suggestion from the Claimants (see below) but we believe that there is insufficient time in a 4 week trial to fully hear more than two cases.

### **LIMITATIONS IN A ROUND 3 TRIAL**

- 3.9 In our view, it is unlikely that a trial of any combination of the Lead Claimants in October 2019 will be sufficient to fully dispose of this litigation. Those Lead Claimants were selected to help determine the Common Issues. No assessment has been undertaken as to whether those Lead Claimants reflect the wide range of other factual matters and legal claims raised by all Claimants – indeed there are some areas that are plainly not covered by the Lead Claimants, such as Claimants who have previously agreed settlements with Post Office or have been convicted of criminal offences. There will also likely be reoccurring factual circumstances that need exploring that may not be covered by the Lead Claimants, for example a number of Claimants raise complaints about the operation of ATMs in their branches but this does not appear to be a central issue in the any of the Lead Claimant cases.
- 3.10 The Round 3 Trial will be useful in exploring the core issues of liability and loss asserted by many Claimants and it will undoubtedly move the litigation forward. But the limitations of the Round 3 trial also mean that a further trial or trials will be needed if a settlement is not reached. In our opinion, there needs to be an "Omnibus Trial" that strives to capture all outstanding matters in this litigation. We envisage that this would be a trial that determines the full claims of around 12-16 test cases so to fairly represent all issues in the wider Claimant group.
- 3.11 Any selection process for new test cases will involve an analysis of all 557 Claimants by both parties, which will naturally be a time consuming process due to the number of cases which will need to be examined. As part of this, we will need further details of the proposed claims from the pool of test cases and the Claimants will likely need some disclosure from Post Office. Even if this selection process were expedited, we believe that it would take at least 6 months. It would then take at least a further 9-12 months to get prepared for trial.
- 3.12 We raised with the Managing Judge the above limitations in his proposed plan for the Round 3 Trial and floated the idea of an Omnibus Trial as an alternative way forward. He was not supportive because it would have resulted in the next trial (after the Horizon Issues trial) being delayed to 2020. He was insistent that there be a further trial in Autumn 2019 – hence the draft Directions below that accord with the Managing Judge's expectations for his Round 3 Trial.
- 3.13 Nevertheless, we do not believe that the current proposed Round 3 Trial is the best way to proceed. We would have preferred a later, but more comprehensive, Omnibus Trial but that is not a viable option with this Judge.
- 3.14 Even if the Round 3 Trial goes ahead, we still believe that an Omnibus Trial will be needed in the long run. Accordingly, we have proposed to Freeths that there be a selection process for identifying new test Claimants and that this selection process is run in parallel with preparation for the Round 3 Trial. If this selection process is not commenced imminently, it will not be possible to obtain binding judgments on the test cases until 2021 at the earliest.
- 3.15 Pressing ahead with the selection process now is therefore important for the following reasons:

- 3.15.1 The Managing Judge has made clear that he wants this litigation to move forward at pace and so we doubt he would favour a 2021 trial date. This would likely result in the Judge forcing through a smaller fourth and maybe fifth trial on shorter timetables that will be wasteful of costs and actually probably take more time.
- 3.15.2 In the Common Issues Trial we selected three of the Lead Claimants and all three performed badly in the witness box, which benefitted Post Office. This advantage was secured through a careful selection process which we would hope to repeat.
- 3.15.3 The Claimants' legal team has less bandwidth than Post Office and so may struggle with managing the Horizon Issues trial, Round 3 Trial and the selection process in parallel. This could put pressure on their funding and / or give rise to tactical advantages.

#### **NEXT STEPS**

- 3.16 The greatest unknown for the Round 3 Trial is the Judgment on the Common Issues. The Judgment will have a direct bearing on the Round 3 Trial. If the Common Issues Judgment is appealed by either party, it may be that the Round 3 Trial cannot go ahead until the appeal is heard. We are nevertheless proceeding for now as if Round 3 is going ahead because that is the Managing Judge's expectation.
- 3.17 Once we have the Claimants' full proposals for Round 3, we will be able to assess any points of dispute to be heard at the CMC on 31 January and will return to the Steering Group for instructions on how to proceed.

#### **4. SECURITY FOR COSTS**

- 4.1 Before Christmas, we raised the possibility of obtaining further security for Post Office's costs to cover the Horizon Issues trial. The instructions from Post Office were to explore this with the Claimants but that it was not ready to sanction a full application to the Court.
- 4.2 The Claimants' current position is that security cannot be sensibly discussed until Judgment is given on the Common Issues as that Judgment may lead to costs orders (see *Noting Paper: Cost Consequences*) which may affect the security needed. There is some merit in this approach so discussions are effectively on hold.

#### **5. MEDIATION / SETTLEMENT**

- 5.1 As per the Steering Group's instructions before Christmas, we proposed to the Claimants that mediation is held once the Common Issues judgment is handed down (in line with the Court's order to do so). The Claimants are resisting this, seeking to move mediation back until after the Horizon Issues trial. For the reasons stated in our earlier paper, we think this would be a missed opportunity and so are gently pushing the Claimants to agree to mediate now.

**THE POST OFFICE GROUP LITIGATION**

**Claim Nos HQ16X01238, HQ17X02637 & HQ17X04248**

**IN THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**BEFORE THE HONOURABLE MR. JUSTICE FRASER**

*On Thursday 31 January 2019*

**B E T W E E N :**

**ALAN BATES & OTHERS**

**Claimants**

**– and –**

**POST OFFICE LIMITED**

**Defendant**

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**DEFENDANT'S DRAFT SIXTH CMC ORDER**

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UPON the Court holding a Case Management Conference

AND UPON HEARING Leading Counsel for the Claimants and Leading Counsel for the Defendant

**IT IS ORDERED THAT:-**

**ROUND 3 - LEAD CLAIMANTS' TRIAL**

1. There shall be a trial of all remaining issues in the cases of 2 Lead Claimants, listed for [20] days, commencing Tuesday 8 October 2019.
2. [NAME] and [NAME] [choosing from the Lead Claimants Mr Abdulla, Mr Bates, Mrs Dar, Mr Sabir, Mrs Stockdale and Mrs Stubbs] shall be the Lead Claimants for the trial ("Lead Claimants").



### Individual Statements of Case

3. In respect of each Lead Claimant:

- (a) The Lead Claimants shall file and serve individual Particulars of Claim by 4pm on 1 March 2019, to include pleading out the relevant Lead Claimant's case on limitation, if any. Where a claim for personal injury is made, the Lead Claimant(s) shall file and serve individual Particulars of Claim which comply with paragraph 4 of Practice Direction 16, including attaching or serving a report from a medical practitioner about the personal injuries which he/she alleges in his/her claim.

Note: It is standard practice in personal injury cases for medical reports to be served upfront to ensure there is clarity about the existence and extent of any injuries before substantial time and costs are expended on determining other matters. We believe that this would be a beneficial practice to follow in this litigation.

- (b) The Defendant shall file and serve individual Defences and Counterclaims by 4pm on 15 April 2019.
- (c) The Lead Claimants shall file and serve individual Replies and Defences to Counterclaims by 4pm on 9 May 2019.
- (d) The Defendant shall, if so advised, file and serve individual Rejoinders and Replies to Defences to Counterclaims by 4pm on 24 May 2019.

### Further Individual Disclosure

Note: There is very limited time in the timetable for disclosure to be given. It would assist if some disclosure could be ordered upfront, with scope to make further limited requests once initial pleadings have been served.

4. By 21 June 2019, in respect of each Lead Claimant:

- (a) The Defendant shall disclose the documents set out in Schedule 1.
- (b) Each Lead Claimant shall disclose the documents set out in Schedule 2.
- (c) This shall be referred to as "Stage 4 Disclosure".

5. By 26 April 2019, each party shall make any further requests for Extended Disclosure in accordance with paragraph 6.5 of Practice Direction 51U.

Note: the above date has been selected to be after service of Defences. Although it would be preferable for disclosure requests to follow the close of all pleadings, there is insufficient time to accommodate this.

- (a) Any further requests shall be limited to documents that (i) are strictly necessary and (ii) can reasonably be provided by the deadline for disclosure in paragraph [5(d)].
- (b) By 3 May 2019, the party from whom disclosure is sought shall agree or reject any request, giving written reasons for any rejection.
- (c) Any outstanding issues in relation to disclosure may be considered and determined at the CMC listed in accordance with paragraph [29] below.
- (d) Any disclosure pursuant to an agreed or ordered further requests shall be given by 28 June 2019.
- (e) This shall be referred to as "Stage 5 Disclosure".

#### **Witness statements**

6. The parties shall file and serve witness statements by 4pm on 2 August 2019.

#### **Single joint expert**

Note: The Managing Judge indicated that a single joint expert may be appropriate for quantum issues. We believe that a SJE could usefully be used for loss of profit calculations, but are open to considering other proposals.

7. A single joint expert shall be appointed by the parties in the field of accountancy to report on the quantification of any loss of revenue or profit arising from the suspension and / or termination of a Lead Claimant's contract with the Defendant.

Note: the directions below reflect the MOJ model paragraphs:  
<https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/list-of-cases-of-common-occurrence>

8. By 4pm on 12 July 2019 the expert should be agreed and instructed. If no expert has been instructed by that date, further directions in this regard may be given by the Court at the CMC listed in accordance with paragraph [30] below.
9. By 4pm on 23 August 2019 the expert will report to the instructing parties.
10. By 4pm on 6 September 2019 the parties may put written questions to the expert.
11. By 4pm on 20 September 2019 the expert will reply to the questions.
12. Either party may call the expert to give oral evidence at trial.
13. A copy of this order must be served on the expert by the Lead Claimants with the expert's

instructions.

14. The expert may apply direct to the court for directions where necessary under CPR r.35.14.
15. Unless the parties agree in writing or the Court orders otherwise, the fees and expenses of the single joint expert shall be classed as individual costs in this litigation and paid by the parties giving instructions for the report equally.

#### Individual experts

16. Each party has permission to rely on their own expert in each of the following fields:
  - (a) IT in relation to the operation and accuracy of the Horizon system ("**IT experts**").
  - (b) Business and / or property valuation in relation to the quantum of any claim for loss of investment or diminution in capital value of any asset ("**valuation experts**").
  - (c) Medicine in relation to any claim for personal injury ("**medical experts**").
  - (d) Employability in relation to any claim for loss of revenue, profit or earnings arising from personal injury or reputational harm suffered by a Lead Claimant ("**employability experts**").

*Note: although permission is sought for the above experts now, it may be that evidence from all these experts is not be needed depending on (i) the outcome of the Horizon Issues trial and (ii) the Lead Claimants' pleadings on loss and quantum.*

17. Any Lead Claimant claiming personal injury shall make themselves reasonably available to be examined by the Defendant's medical expert.
18. By 12 July 2019, the parties' experts of like discipline are to commence their meetings and discussions pursuant to CPR r.35.12, for the purposes of both CPR r.35.12(1)(a) (identifying and discussing issues) and r.35.12(1)(b) (where possible, reaching agreed opinion on those issues). Those discussions shall continue as necessary.
19. By 4pm on 23 August 2019, the Lead Claimants shall serve any expert reports on which they intend to rely, save in relation to their medical expert where each Lead Claimant only has permission to rely on the expert report served with their Individual Particulars of Claim.
20. By 4pm on 6 September 2019, the Defendant shall serve any expert report on which it intends to rely.

*Note: If the trial start date is put back (see below), then an extra week should be allowed here for D's expert reports. There may also be scope to include an order for simultaneous exchange of supplemental reports.*

21. By 4pm on 20 September 2019, the parties' experts of like discipline shall have discussed their respective reports and produced a joint statement pursuant to CPR r.35.12(3), identifying the issues:



- (e) upon which they agree; and
- (f) upon which they disagree, together with a summary of their reasons for disagreeing.

*Note: This leaves only two weeks from the last direction to the start of trial. It may be prudent to push back the trial start date by 2-4 weeks, subject to the approval of the Managing Judge.*

## PREPARATION FOR FURTHER TRIALS

- 22. To prepare for future trials after the Round 3 Trial, the parties shall take the steps below to identify a pool of potential Test Claimants ("**Test Claimants**"). The start date and length of any future trial(s) and the number of claims to be heard thereat shall be determined at the CMC listed in accordance with paragraph [32].
- 23. The Test Claimants shall be selected so to reflect, as far as reasonably practicable, the material factual circumstances and legal claims raised by the wider group of Claimants in this Group Litigation.
- 24. By 4pm on [8 March 2019], each party shall serve on the other a document setting out the features and characteristics which the Test Claimants should reflect to comply with paragraph [23] above ("**the Selection Criteria**").
- 25. The parties shall discuss and seek to agree the Selection Criteria. By 4pm on [19 April 2019], either the agreed Selection Criteria shall be filed with the Court or the parties shall notify the Court that the Selection Criteria will need to be determined at the CMC ordered in paragraph [29] below.

*Note: the above two dates have been selected to fall before and after the Horizon Issues trial*

- 26. By 4pm on [19 July 2019], each party shall produce a list of up to [15] Claimants who they propose could be Test Claimants in line with the agreed or ordered Selection Criteria ("**Shortlisted Test Claimants**").
- 27. By 4pm on [20 September 2019]:
  - (a) Each Shortlisted Test Claimant shall give disclosure of the documents in Schedule 3.
  - (b) The Defendant shall give disclosure of the documents in Schedule 4 in relation to each Shortlisted Test Claimant.
  - (c) This shall be referred to as "**Stage 6 Disclosure**".

*Note: This is initial disclosure to assist with the selection of Test Claimants. It is anticipated that there may be further disclosure orders made in relation to future trials.*

- 28. The parties shall use their reasonable endeavours to agree a final list of Test Claimants. By [18 October 2019], the parties shall notify the Court of the agreed list of Test Claimants or

inform the Court that the matter will need to be considered at the CMC ordered in paragraph [32] below.

## CMCs AND OTHER HEARINGS

*Note: It would be prudent to provisionally fix a CMC date in each term.*

29. There shall be a CMC listed for 1 day on [17 May 2019] to address any outstanding matter in this litigation, including those in paragraphs 5 (Disclosure), 25 (Selection Criteria) and 36 (Costs Budgets).

*Note: this date ties directly into the timetable for disclosure for Round 3; moving it may therefore affect other directions.*

30. There shall be a CMC listed for 1 day between [15 July 2019 and 31 July 2019] to address any outstanding matter in this litigation, including any matter arising from paragraph 8 (Instruction of Single Joint Expert).

*Note: This is the last two weeks before the Summer vacation.*

31. There shall be a Pre-Trial Review (for the Round 3 - Lead Claimants Trial) and CMC listed for 1 day in the week commencing [1 October 2019].

*Note: 1 October 2019 is the first day of term.*

32. There shall be a 1 day CMC listed during or immediately after the Lead Claimants Trial at which the Court may:
- (a) resolve any outstanding disagreement on the selection of Test Claimants;
  - (b) give directions for future trial(s); and/or
  - (c) address any other outstanding matter in this litigation.

33. The parties shall inform the Court 7 days before any CMC as to whether the CMC is required or should be vacated.

34. The Claimants and Defendant shall lodge skeleton arguments and draft order(s) by 12pm, 2 clear days before any CMC, setting out what order(s) are sought by them at the CMC.

35. The parties to liaise with one another and co-operate regarding documents that it will be necessary to put before the Court for any CMC, such documents to be contained in a separate hearing bundle, and to be lodged by 4.30pm, 2 clear days before the CMC.

## GENERAL

36. The CMC in paragraph [29] shall also be a Costs Management Conference at which the parties budgets shall be reviewed in accordance with the Costs Consent Order dated 27 April 2018.

37. Any disclosure to be provided under this Order shall be provided on the basis of a reasonable and proportionate search.
38. Costs of this Order and the Sixth CMC are common costs in the case.
39. The parties shall have liberty to apply in respect of any provision in this Order.

Dated this                      day of January 2019