

FREETHS

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17 January 2019
Third Letter

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Our Ref: JXH/1684/2113618/1/NP
Your Ref: AP6/364065/1369

Dear Sirs

Alan Bates and Others v Post Office Limited
Claim No: HQ16X01238, HQ17X02637 and HQ17X04248
Round 3, Mediation and Draft Order

Thank you for your Second Letter of 10 January 2019 and to your proposals for the timing of mediation made in your letter of 9 January 2019.

Round 3 trial: purpose

In your Second Letter of 10 January, you have set out a number of detailed proposals in relation to the further trial to take place in 2019 ("**Round 3**") which reflect your suggestion that the effect of any Round 3 judgment should not bind the wider Claimant group, and that there should then be a further 'omnibus trial' in 2020.

We would like to work together with you to identify what will in practice work best to resolve the litigation (or, at least, the major issues in it). With that in mind, we have given careful further thought to your proposals, to what might be achievable in the time available, and how best to resolve the issues that may remain in dispute following judgments on the Common Issues and on the Horizon Issues and the mediation process to which you have helpfully referred in your letter of 9 January 2019 and which has been canvassed before the Court on a number of occasions.

By way of context to this letter, we were informed on Tuesday that the Managing Judge has indicated that judgment on the Common Issues will not be handed down until 31 January 2019 at the earliest. Our working assumption is that a draft embargoed judgment may well be given to the parties in advance of the CMC on that date, but of course the parties cannot, at this stage, know what will be in that judgment. It will obviously be sensible (particularly in the context of group litigation) for the parties to be able to take stock of the effect of the judgment on the Common Issues, both as to what has been expressly resolved and as to how a sensible reading of the judgment might inform the parties' approach to the litigation and its resolution more broadly. We recognise that it may be difficult

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for that exercise to have taken place prior to the CMC on 31 January 2019, particularly given the need for our respective clients to be able to consider and take stock of those matters.

Furthermore, the parties obviously cannot know what the outcome of the Horizon Trial will be, as that trial has not even begun. As your leading counsel pointed out during the Common Issues Trial, it is very important that learning from the Horizon Trial is “plugged into” the way any Round 3 trial is run {Day10/200:3}, by which the Managing Judge said he was persuaded.

Indeed, the outcome of the Horizon Trial will also be able to be fed into the mediation which the Court accepted would not take place between the Common Issues Trial and the Horizon Trial, when listing the Horizon Trial for March 2019 (rather than May or June 2019).

Both parties have now expressed a willingness to mediate after the Horizon Trial and thereby to comply with the spirit of the original direction in the Second CMC Order regarding mediation. There must be real prospects that significant progress will be made at the mediation towards resolving the litigation or issues within it, or at least agreeing how that might best be achieved. It therefore seems to us that the parties will be much better placed to identify the outstanding issues after the Horizon Trial and to refine any outstanding issues after the mediation, even if it has not resolved the proceedings more broadly. It seems to us wrong in principle to ignore these practicalities in planning for Round 3, and what that might best resolve.

Given the progress that the parties appear to be making towards arranging mediation, we would welcome your views on the above and, particularly, whether it is wise in fact to commit to the content of Round 3 at this stage. Although the Court quite rightly is determined to progress the case, there are a number of ways in which this may be done and we think the Court will expect the parties to have given careful thought to the position as they now see it and co-operated in that regard.

Subject to your views on the above, the parties presently have only a narrow window in which to try to agree proposals for a Round 3 trial of lead cases prior to the CMC on 31 January 2019 – at this stage without the benefit of the judgment on the Common Issues. Furthermore, any arrangements that are agreed should really accommodate the need for issues for determination in Round 3 to be identified, or at least, refined in the light of the findings made on the Horizon Issues.

We nevertheless consider that real gains can be made by the parties giving thought to how the issues in dispute in the litigation can ultimately be resolved as promptly and proportionately as possible. It is important that they do so.

We set out our views as to this below.

Identifying outstanding issues and mediation

We think there may now be a consensus developing that a structured mediation is likely to be productive in at least narrowing, if not resolving, the issues in the light of the two judgments. As noted above, that would help to identify those issues that could most usefully be resolved in Round 3. This seems particularly appropriate given the realities of group litigation. What is not clear to us

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is how this might most sensibly be achieved and we would welcome an open and constructive discussion on this, possibly also between our respective counsel.

It appears to be common ground that the parties will need to analyse which issues remain outstanding and their bearing upon the group as a whole and quantum outcomes. This would likely form at least part of any mediation.

By your Third Letter of 9 January 2019 you have made some helpful suggestions as to the timing of mediation, against the background of the direction in paragraph 14 of the Second CMC Order. That Order was of course subject to the Managing Judge's observations (albeit in the context of listing the Horizon Trial) at the Second CMC that not a great deal could be done in any mediation until the parties have answers to the Common Issues and that "*[u]nless the Horizon point is at least grappled with partially, I do not see how mediation will have any prospect of going anywhere*" {B3.3/3/36-37}.

Indeed, as noted above, this was one of the reasons for refusing the parties' request at the Third CMC on 22 February 2018 that the Horizon Issues Trial commence at a later date in order to accommodate a mediation after the Common Issues Trial.

We completely agree that it is sensible to plan for a mediation to take place after judgment on the Horizon Issues and hope to be able to agree upon a suitable mediator next week, which we will write to you about under separate cover. Looking at the matter as a whole, and read with the foregoing judicial indications, paragraph 14 of the Second CMC Order does not oblige the parties to undertake a mediation prior to the Horizon Issues Trial (though would be willing to agree to vary that Order by consent, for good order, which we have included in our suggested draft Order for discussion, enclosed with this letter). Given the care and attention to detail which the Court gave to the issues in the Common Issues Trial, we think that the parties are likely to have much to consider on receipt of what we anticipate will be a detailed judgment, likely in itself to assist the parties at the mediation.

Against that background, it seems clear that both the proposals made for (and significant potential benefits of) mediation and Round 3 must be accommodated within the procedural timetable that follows the Horizon Issues Trial.

The sensible course may be for directions to be given requiring the parties to seek to agree the issues that remain outstanding between them in April/May 2019 following receipt of judgment on the Horizon Issues. The parties should then, by mediation, seek to resolve (or at least narrow) those issues in the light of the findings made on both the Common Issues and the Horizon Issues.

Substantial progress ought to be able to be made with the benefit of analysis of the outcomes by both number of cases and quantum.

Our proposal is that the parties then attend a CMC in June 2019 following that process for the grant of directions for a Round 3 trial thereafter on some identified and discrete narrow issues of liability and quantum that have been identified by them as remaining to be determined following that process and having a meaningful bearing upon claims in the wider group, by reference to an agreed (or ordered) List of Outstanding Issues. If that is to be the approach, it may be that we have to ask the

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Managing Judge to consider a listing in December rather than October and we would welcome your views on that also.

This really is a moment for both parties carefully to consider and co-operate on these issues.

Draft Order

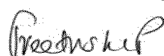
We enclose for your consideration a draft Order which we provide for the purposes of discussion between the parties, as a constructive suggestion which takes account of the willingness of the parties to engage sensibly in mediation, following the judgment in the Horizon Trial.

It appears to us to reflect the common ground that there is between us as to the need for any further trial usefully to resolve outstanding issues that have a wider bearing in the context of group litigation, as to the need for a mediation to take place in the light of findings made.

May we invite you to at least consider our alternative proposals, which we hope are sensibly directed to the narrowing and resolution of the litigation (or issues in it) at as early a stage as possible?

Our counsel team have indicated that they will of course be happy to try to progress discussions in relation to mediation and the possible directions for Round 3 with your counsel team. Please do let us know if that is also their view.

Yours faithfully



Freeths LLP