

# Postmaster Litigation

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## Executive Summary

### *Bates & 198 Others v. Post Office Limited*

1. Post Office is due to serve and file its defence to the claim brought by 198 former and current postmasters on 18 July 2017. A copy of the draft defence has been included with this paper. The Board is being asked to give its approval to the defence.

### Purpose of a Defence

2. The Defence is a Court document and Post Office's formal response to the Claimants' Particulars of Claim. It must state which allegations are admitted and which are denied (giving reasons for the denial). It is the foundation for Post Office's legal arguments and the key document in the litigation process.
3. Due to the number of Claimants and therefore the complicated factual background, the Claimants were given permission by the Court to serve Generic Particulars of Claim, without going into details of the Claimants' individual cases. As such, Post Office's Defence is also called a "Generic Defence" and it will not seek to respond to the facts of the individual cases at this stage.
4. The Defence has to be signed under a Statement of Truth. Knowingly making incorrect statements in a Defence is a contempt of Court and a criminal offence.
5. The Defence is a "public" document and the Court may disclose it to members of the public, although it is not automatically posted to any public websites.

### Preparation of the Defence

6. The Defence has been drafted by Tony Robinson QC, instructed by Post Office's external solicitors, Bond Dickinson. Bond Dickinson is familiar with the case having advised since allegations of problems with Horizon arose in 2012, and has continued to act throughout Project Sparrow.
7. In preparing the Defence, the team has been mindful that every statement made in the Defence should, to the best of our knowledge, be wholly true and not misleading. The process followed to achieve this is as follows:

- 1.1 The Claim was reviewed for gaps in current knowledge and enquiries made to subject matter experts in the business for missing information. Briefing notes have been prepared on key areas where detailed information has been required.
- 1.2 In higher risk areas (see below), Deloitte were instructed to undertake forensic investigations.
- 1.3 Workshops have been held between Counsel and Post Office staff, Fujitsu and Deloitte.
- 1.4 Drafts of the Defence have been reviewed by relevant Post Office staff, Fujitsu and Deloitte.
- 1.5 The whole Defence has been reviewed and approved by Rodric Williams, Post Office's Head of Litigation.

## Key Legal Issues and Risks

8. This claim involves only a very small percentage of postmasters, and an even smaller percentage of those who have used Horizon. However, any decision made by the Court in relation to these claims will be binding on Post Office (and the Claimants) and may have implications for its current operations, as well as potentially giving rise to other postmasters bringing claims based on the Court's findings.
9. Integrity of Horizon data. The principal claim is that Horizon is defective and thus the cause of losses in branches, The approach taken in the Defence is that no IT system is perfect, and Horizon is no exception. However, it has robust systems in place to prevent and remediate any defects, and Post Office is not aware of any Horizon error which has generated any loss for a Claimant. The Defence therefore proceeds from the footing that one can have a high degree of confidence in the integrity of Horizon.
10. Fujitsu and Deloitte support the above view. In due course, Post Office will need to submit evidence to support this position and will likely need to allow the Claimants' IT experts to directly inspect Horizon.
11. This is a critical issue in this case. If doubt is thrown on Horizon's ability to accurately record customer transactions and branch accounts, the fundamental basis on which Subpostmasters are held liable for losses is undermined. This would likely make it very difficult to defend the claims. Outside the litigation, it may make it more difficult to recover losses from Subpostmasters.
12. Contracts. The Particulars of Claim seek to attack Post Office's contracts with its postmasters by:
  - 1.6 implying terms into those contracts which are inconsistent with the express written terms; and
  - 1.7 alleging that the contracts contained unfair terms which are unenforceable.
13. These attacks on the standard Subpostmaster's Contract are seeking to make it significantly more difficult for Post Office to recover losses from Subpostmasters and to restrict Post Office's ability to appoint and terminate Subpostmasters.

14. These allegations are robustly denied in the Defence which explains why the express terms form the complete contract, why the terms are fair and enforceable, and why Post Office has not breached the contracts.
15. If any of the contractual terms used by Post Office are found to be unenforceable, or if terms are implied into the contract, this will have an impact on Post Office's contractual position with other postmasters not involved in the claim.
16. Allegations of deceit. The Particulars of Claim state that Post Office is guilty of deceitfulness. Examples include leading Claimants to believe that: they were responsible for losses when they were not, and that Post Office had carried out proper investigations when it had not. These claims are denied in full.
17. However, there are a small number of statements that have been made by Post Office historically that, following detailed investigations by Deloitte, have been found to be not true. These statements relate to the ability of Fujitsu to "remotely access" Horizon and change transaction data. It has been determined that this could theoretically happen, albeit in a highly technical and unlikely way.
18. The Defence therefore admits that Post Office has made untrue statements, but denies deceit on the ground that it believed its statements to be true when they were made.
19. There are obvious reputational issues to consider when admitting that Post Office made untrue statements. However, the very strong advice of Tony Robinson QC is that these admissions must be made; to deny them would be to try to defend the indefensible, thereby undermining Post Office's credibility with the Court.

## Media and Communications

20. Strictly speaking, the Defence should only be used for the purposes of the Court proceedings. In reality, it is expected that the Defence will be leaked by the Claimants to their favoured media outlets.
21. In large part the Defence says no more than Post Office has already stated in correspondence with the Claimant's lawyers, including the admissions as to untrue statements. Nevertheless, the symbolic nature of a Defence presents an opportunity for the Claimants to re-cycle old material into new media briefings.
22. Post Office's communications team is preparing to receive requests from the media in relation to the case. It is proposed that Post Office adopt the strategy of responding to queries put to it (where it considers it appropriate to do so) rather

than adopting a proactive strategy of issuing a press release regarding its defence being filed.

## Next Steps

23. The Claimants have the opportunity to respond to Post Office's Defence in a formal document called a Reply. This is due to be served on Post Office and filed with the Court on 20 September 2017. It is not mandatory for the Claimants to serve a Reply but given the complexity and importance of this case it is expected that they would do so.
24. A further Court hearing, called a Case Management Conference, will take place on 19 October 2017. This hearing, and the preparation for it, will provide an opportunity for Post Office and the Claimants to agree further steps leading up to trial, including selection of those postmasters' cases which the parties wish to put forward as lead cases; disclosure of documents; witness evidence and expert evidence. The Lead Cases will then be examined in greater detail by the Court at mini-trials with the aim of using those cases to determine points of principle or fact that apply broadly to many cases. To be able to do this, the parties will need to set out their positions in relation to these Lead Cases in further, case-specific Particulars of Claim, Defences and Replies.
25. In order to prepare for the selection of lead cases, Post Office has commenced a review of all of the cases of those Claimants that have not previously been reviewed as part of Project Sparrow. The Claimants were ordered to provide Post Office with schedules of basic information about each existing Claimant by 20 June 2017, and for any new Claimants by 6 September 2017. The case review involves obtaining copies of relevant documents and files from Post Office's archives, systems and other sources, reviewing those documents and drafting reports on findings. The purpose of this is to enable us to better understand the Claimants' cases, and whether they would be suitable as lead cases.
26. It is not yet possible to predict the Court process beyond 19 October 2017, however it is unlikely that there will be a trial of substantive issues or Lead cases before mid-2018 and after that there will be numerous follow-up issues and further hearings that will likely run until 2019/2020.