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Womble Bond Dickinson (UK) LLP
DX 38517 Southampton 3

Direct dial: GRO
Direct fax: GRO
Switchboard: GRO
Email: james.hartley@ GRO

7 May 2019
Third Letter

By email only: Andrew.parsons@freeths.com GRO

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
Further Supplemental Report of Dr Worden

We write in response to your Second and Third Letters of Friday, 3 May 2019, and following our Second Letter of today's date.

Your letter presents an immediate difficulty by (a) referring to the exercise which Dr Worden says he has undertaken in his draft report, which he communicated to Mr Coyne on a without prejudice basis, whilst simultaneously (b) stating that you are not waiving privilege in the draft report. The difficulty which this presents must be obvious, particularly as to how we are to respond to your request that we should "*share with [you] [our] views on how these matters should be handled and [our] reasoning for that pending the next expert meeting.*"

What we are able to say is that we are extremely concerned by what you propose, for reasons which would require us to spell out in open correspondence matters which you claim not to be waiving privilege on.

Horizon Issue 1

We note that as regards whatever Dr Worden might wish to say on Horizon Issue 1, you yourselves recognise "*the work that might be required in relation to this analysis and the potential adverse impact on both the Claimants and the Horizon Issues trial*" and are not therefore "*currently minded to apply for permission to rely on the Peak based analysis*" on that issue.

It would be helpful for you to spell out with clarity what you and your expert positively will be inviting the Court to consider and to find. This is obviously necessary. It is also more acute given the position in which the Court found itself at the Common Issues Trial, at which on one view, there was a lack of clarity as to the Defendant's position in those respects. The present position is materially unclear. At this stage, well after the Horizon Trial was due to have completed, this is unsatisfactory.

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Horizon Issue 12 and 13

Again, for the reasons identified above, we cannot properly respond without referring to the content of the draft report.

However, at the resumed Horizon Trial (Day 12) our Leading Counsel made it plain to the Court that the approach which was ventilated before the Court by your Leading Counsel would amount to the Court determining what happened in individual Claimants' cases, for every single Claimant, but without disclosure in relation to each of their cases – the very exercise which your client claimed the Court had wrongly and unfairly undertaken at the Common Issues Trial.

The Horizon Issues were specifically formulated, agreed and ordered by reference to the system as a whole, as a proportionate approach to determine an important aspect of this litigation. Post Office repeatedly objected to disclosure sought by the Claimants on that very basis, for example in two responses on 8 August 2018, as follows:

(1) D's response to Coyne RFI 26 June 2018 – 8 August 2018 {C5/21}

"It also appears to be an attempt to obtain documents containing information that could potentially be tied to individual cases. That is not the purpose of the Horizon Issues trial." at {C5/21/6}

"It also appears to be an attempt to obtain documents containing information that could potentially be tied to individual cases. That is not the purpose of the Horizon Issues trial." at {C5/21/8}

"Further, Post Office remains of the view that this appears to be an attempt to obtain documents containing information that could potentially be tied to individual cases, which is not the purpose of the Horizon Issues trial." at {C5/21/8}

(2) D's response to Coyne email of 20 July 2018 – 8 August 2018

"Post Office objects to this request.

Mr Coyne is seeking documents relevant to specific Claimants, but the Horizon Issues Trial will not be considering the circumstances of individual Claimants. Post Office's solicitors requested an explanation for this in a letter dated 1 August, but no response has been received." at {C5/22/2}

Indeed, Post Office also made wider objections to disclosure of OCPs, OCRs and MSCs, in response to Mr Coyne's first request made by email on 20 July 2018 {C5/16}, as stated in its response at (2) above, as follows, at {C5/22/2}:

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“Post Office objects to this request.

Fujitsu has advised that it would be necessary to carry out a retrospective analysis to attempt to answer this question as the information has not been pooled or collated as part of ordinary working practices.

Further:-

- there are in excess of 36,000 MSCs and OCPs combined; and*
- OCRs would not be used for any such change (OCRs were used minor support changes that did not required the full approval process that was needed for OCPs).*

Additionally, Post Office does not understand what is meant by ‘financial impact’. Clarification was sought on this point but not provided before the date of this response.”

So yet again, Post Office seeks to adopt inconsistent positions likely to create difficulties for both the Court and the Claimants in relation to the proportionate and proper determination of issues in this Group Litigation, here the Horizon Issues.

Furthermore, it has been a long-standing concern of the Claimants that Dr Worden has set out to disprove the claims of the particular Claimants in this litigation, rather than to answer the Horizon Issues as formulated and ordered. What was announced to the Court as Dr Worden’s new approach only serves to heighten the Claimants’ concerns in this respect, particularly given the blanket refusal of disclosure above and Post Office assertions about individual claims which were prayed in aid to justify it.

Leaving aside the timing of Dr Worden’s change of tack and to what extent it follows from how the Defendant’s fact evidence came out at trial, there is a further reason why this development at this stage is extremely unsatisfactory. For many months, Dr Worden insisted upon confining his investigation and analysis to the KELs, which Mr Coyne regarded as providing a very incomplete dataset. We do not address the history of this here, but the genesis of these matters may well be relevant to any decision which the Court is called upon to make in relation to the admissibility or fairness of Dr Worden’s new (possible) approach.

Post Office disclosed “*a tranche of OCRs*” between 28 August 2006 and 31 January 2011 very late, on 24 January 2019, with some OCPs at that time too. We then received the secondary set of OCR disclosure on 18 April 2018 with a supporting letter from you stating in summary, that metadata overlays had been placed on the documentation and you were “*in the process of liaising with Fujitsu the provenance and status of these OCRs and will revert to [us] once these investigations are complete.*”

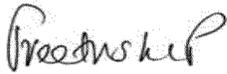
Despite your Third Letter, we remain concerned about the layout and content of this further disclosure, and particularly need clarification of precisely how the content and metadata in these documents have been derived. This is still unclear to us, long after the trial was due to have completed in relation to documents the relevance of which is now positively asserted by Post Office and/or its own expert. We will consider this further with our expert and revert thereafter.

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Please provide your response as soon as possible.

Yours faithfully



Freeths LLP