

Claim Nos. HQ16XO1238, HQ17X02637 & HQ17X04248

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

The Post Office Group Litigation

BETWEEN:

ALAN BATES & OTHERS

Claimants

– and –

POST OFFICE LIMITED

Defendant

OUTLINE DRAFT / SKELETON ARGUMENT FOR POST OFFICE

CMC ON 22 FEBRUARY 2018

***Suggested pre-reading (2 hours):** (1) Skeleton Arguments, including exhibits; (2) Draft Orders proposed by each party*

References to the Case Management and Hearing Bundles are in the forms [CM/Volume/Tab/page] and [HB/Tab/page], respectively.

A: Introduction

1. This is the Skeleton Argument for D (“Post Office”) for the CMC on 22 February 2018. The CMC is the continuation of the CMC that was adjourned on 2 February 2018. A draft order from that CMC was provided to the Court on the same date. Para. 27 of the draft order provides for the present hearing to address any outstanding questions as to disclosure for the Common Issues Trial In November 2018 and to identify the issues and directions for trial in March 2019.
2. There has been some progress towards agreement on technical Horizon-related issues for trial in March 2019. Nonetheless, there do remain significant areas of disagreement as to how best to have a useful and focused trial of the kind proposed by the Court.
3. The position as regards generic disclosure for the Common Issues Trial remains unsatisfactory. Despite the Court’s ruling on 2 February that the disclosure should be under Model C of the

Disclosure Practice Direction¹, Cs have continued to press for the broad and unfocused disclosure that they sought under Model D.

4. Post Office seeks an order in the form of its proposed Schedule 2 [REF] and an order for the March 2019 trial in the form at [REF].
5. In this Skeleton Argument, Post Office addresses:
 - a. the background to the present hearing – Section B;
 - b. disclosure – Section C;
 - c. issues and directions for the Horizon technical issues trial in March 2019 –Section D.

B: Background to the present hearing

Disclosure

6. At the last hearing, there was a fundamental dispute of principle as to the scope of generic disclosure that should be required of Post Office for the Common Issues Trial. It is this disclosure that is the subject of Schedule 2. In short:
 - a. Post Office argued that the disclosure should be under Model C as identified in the Disclosure Practice Direction and should be limited to documents that may provide admissible evidence for the resolution of the Common Issues, principally matrix of fact evidence. It relied on the well-established orthodoxy as to admissibility of evidence for the purposes of contractual construction.
 - b. Cs sought much broader disclosure, to be given in accordance with Model D, arguing that the disclosure should cover not only the terms of the parties' agreement but also what in fact happened in the course of their relationship. Cs invited the Court to order broad generic disclosure that would bring a "*measure of generic reality as to what was going on*".²
 - c. The Court ruled that the disclosure should be under Model C.

¹ The draft Practice Direction for the Disclosure Pilot for the Business and Property Courts, which shall apply under para. 5 of the draft order, which is agreed.

² Transcript, page 17H – 18A.

7. During the hearing, the Court pressed Cs repeatedly for an explanation as to how the broader disclosure that they sought could assist in the construction of the contracts: see the transcript of the page 16B to page 18B. Post Office submits that no convincing answer could be given to that question and that Cs' approach is unprincipled.
8. Having determined that the disclosure should be given under Model C, the Court placed its faith in the parties' ability to agree the categories of documents to be covered by the disclosure searches for each of the identified disclosure issues in Schedule 2. Post Office respectfully asked the Court to provide some guidance as to what, if any, further categories should be added to those in its draft Schedule 2. The Court indicated that it was for Cs to make requests for further categories to be added and that it would be surprised if Cs, having benefitted from the to-and-fro with the Court in argument, *"were to try and weave a model D approach by putting a whole bunch of categories in model C which actually, when you look at them, [it] is just a rehash of [...] model D"*.
9. Following the CMC, the parties made some progress in agreeing additions to the Post Office's proposed Schedule 2: see the email dated 8 February at [REF].
10. On 9 February, however, Cs requested by letter a further 33 categories of documents. Many of the requests were extremely broad and were very similar to the requests that Cs had advanced for Model D disclosure before the last CMC. Cs sought disclosure of many documents limited only by reference to their content or subject matter, rather than document type or any other narrowing factor.
11. Post Office responded on 13 February 2018: [REF]. Post Office objected to Cs' approach on the basis that it involved precisely the error that the Court had warned against at the hearing on 2 February, namely re-hashing its Model D disclosure as a series of requests under Model C.
12. Unfortunately, Cs were unable to provide any revised proposals until Monday, 19 February. In the revised proposals, they made minimal concessions, whilst retaining a large number of broad and unprincipled disclosure requests.

March 2019 trial

13. At the last hearing, the Court indicated that it was not prepared to vacate the March 2019 hearing and that it was unpersuaded that it would not be possible to identify sufficiently discrete issues for such a trial.
14. The Court invited the parties to consider, in particular, whether it might be possible to use the trial window to determine certain technical issues in relation to the Horizon system. In light of concerns then expressed by the parties as to the breadth the issues on the pleadings that relate to Horizon (including matters as to training and issues of breach³), the Court provided the following guidance:
- a. The March 2019 trial should not be of all issues relating to Horizon
 - b. The focus of the trial should be on technical issues that are suitable for determination on expert evidence and that go to the basic functioning and reliability of the system.

See transcript, page 35E-F and page 36E.

15. On 15 February, Post Office put forward 11 Horizon issues with cross-references to the generic pleadings: [REF]. It provided with the issues a draft order containing directions for the trial, including a staged process for expert evidence. Post Office proposed issues that are, insofar as practicable, limited to matters that could be resolved on expert evidence and without the need for lead claimants or extensive factual background.
16. Cs responded on 19 February: [REF]. Cs' proposed issues were wide-ranging and fact-sensitive, and are largely not suitable for determination at a Horizon issues trial focused on expert evidence.

C: Disclosure

17. The Court will recall that broad disclosure is to be given in relation to the Lead Claimants for the Common Issues Trial: see Schedule 1, Part 1 to the Draft Order (which is agreed). Post Office made clear at the last CMC that this disclosure would likely extend well beyond those documents that would be admissible for the purposes of contractual construction but that it had

³ See, for example, transcript page 32C-E and page 35F-36A.

sought to reach a pragmatic compromise in light of Cs' extremely broad requests and the current absence of any proper pleading as to matrix of fact. The Cs will receive very large quantities of documentation, which will fully cover any matters which could even arguably constitute part of the factual matrix (and some matters which could only have, at best, forensic relevance).

18. Post Office's proposals for the Model C generic disclosure under Schedule 2 are similarly broad and were offered as a pragmatic compromise. Under its Schedule 2 proposals, Post Office would anticipate disclosing, in addition to the documents relating to the Lead Claimants under Schedule 1, around [...] documents. This is an extraordinary amount of disclosure to be provided for the purposes of determining the nature and content of the parties' contractual relationship (being principally matters of contractual construction), taking into account the following:

- a. For almost all of the issues, any evidence as to what in fact occurred after the agreement was entered into will be inadmissible: see, for example, **Arnold v Britton** [2015] A.C. 1619 at [21] *per* Lord Neuberger. Post Office anticipates that much of the evidence that Cs may wish to lead in reliance on the disclosure will be inadmissible and liable to strike-out.
- b. It is true that there are Common Issues that go beyond matters of contractual construction. But they are very limited in scope: see Common Issues 17 and 18, relating to the "*true agreement*"⁴ between the parties as to the circumstances in which Post Office could lawfully terminate the agreements.⁵ The Court in November will not be concerned with the facts as to what happened in terms of training, the operation of the Helpline, the discovery and investigation of shortfalls, the operation of Post Office's financial systems and client accounting, *etc.*
- c. The Common Issues trial is a trial of Lead Claims. In the unlikely event that any broader disclosure might shed light on the construction of the Lead Claimants' contractual

⁴ Post Office's position is that the exceptional principle in **Autoclenz v Belcher** [2011] UKSC 41 has no possible application to business-to-business relationships of the kind at issue in these proceedings.

⁵ See paras 69-71 of the AmGPoC [REF].

relationships with Post Office, such disclosure is to be provided in any event under Schedule 1.

19. Post Office has sought to reflect in its proposals the need for Model C disclosure to proceed by reference to “*narrow classes of documents relating to a particular Issue for Disclosure*” (Practice Direction, page 7; emphasis added). It is not appropriate to request, as Cs do, categories of document that are defined only by the information that they contain. A request for all material relating to a particular subject matter is not a proper request under Model C.
20. The Requests which remain in dispute, as set out in the summary document exhibited to this skeleton argument (which has had input from both parties), are numbers 3; 10; 11; 12; 24; 30; 31; 33; 34; 37; 48; 49; 51; and 55. It is anticipated that, if the Cs maintain these Requests, it will be necessary at the upcoming hearing to go through each of them with the Court. Broadly, though, three overarching observations fall to be made:
- (a) The proper scope of factual matrix disclosure should not be in doubt (and if there was any doubt, it ought to have been removed by the discussion at the last hearing). Matters which occurred after the entry into, or variation of, the relevant contracts cannot be relevant to their proper construction. Similarly, no material which was only within the purview of one party to a contract can be relevant to its interpretation. The purpose of the Common Issues trial is to establish, in the context of the upcoming Lead Claimants’ trial, the meaning of the relevant contracts. The disputed Requests have no relevance to that exercise; as opposed to, for example, the subsequent exercise of determining whether any breach has occurred.
 - (b) In their letter of 19 February, the Cs suggest that disclosure going beyond the factual matrix is required. They observe that one issue in the Common Issues trial will be as to the ‘burden of proof’, i.e. whether, under the relevant contracts, the Post Office is entitled, in the absence of evidence to the contrary, to treat any shortfall as being the responsibility of the relevant Subpostmaster. The Cs note that Post Office’s pleading on this point makes reference to background facts such as the Post Office’s difficulty in knowing what explains any given loss. They argue that this justifies wide-ranging disclosure on related matters. That is wrong. The only matters relevant to the proper construction of the contract (as to

burden of proof or anything else) are matters which were publicly known or ‘crossed the line’ between the parties – including what both parties knew about the difficulties for Post Office in determining the cause of a shortfall. But if some internal Memorandum at Post Office lamented how difficult it was to determine the cause of a shortfall, that would not be a reason for construing the contracts in the way that Post Office submits they should be construed, i.e. with ‘burden of proof’ on Subpostmasters. The converse is equally true – some internal Memorandum privately lauding the ease of investigating shortfalls would not assist the Cs’ case on construction.

- (c) The Cs have withdrawn a number of Requests on the basis that further disclosure, in respect of the March 2019 trial or otherwise, is anticipated. For the avoidance of doubt, Post Office does not make any concession in the context of this hearing as to whether any such disclosure should be made, and its position is entirely reserved.

21. To take specific examples from Cs’ requests:

- (a) Requests 11 and 12 cover documents that could only shed light on Post Office’s subjective views as to the construction of a contractual provision. Such evidence would be inadmissible and is irrelevant.
- (b) Request 24 relates to discussions between Post Office and Fujitsu as to bugs, errors or defects in Horizon. It is entirely irrelevant to the construction of the parties’ agreements.
- (c) Request 30 is extremely broad (covering all “instructions”, irrespective of the class of document in which such instructions might be provided) and relates in any event to accounting operations in practice, rather than shedding any light on the construction of the agreements. Similar comments apply to request 37.
- (d) Request 33 proceeds on a fundamental misunderstanding of Post Office’s case on the burden of proof: see paragraph [REF _Ref506890853 \r \h][REF _Ref506890855 \r \h] above.

22. Post Office has sought to scope the disclosure by reference to the evidence that might plausibly be admissible and useful in the resolution of the Common Issues. It has focussed on disclosure that might plausibly bring to light documents that could assist in identifying facts known to the

parties at the time of agreeing the contractual documents (and variations to those documents) and that might assist in construing the express terms of the agreements and/or determining whether or not an alleged implied term is necessary.

23. Post Office has gone very far towards accommodating Cs' desire for extensive generic disclosure. It resists strongly any attempt to rely on its pragmatic approach to drive all principle out of the exercise and to divorce the disclosure process from the resolution of the Common Issues.

D: Issues and directions for the trial in March 2019

Issues

24. At the last hearing, the Court gave some clear guidance as to the proper scope of the March 2019 Horizon Issues trial. The presiding Judge indicated that, while the trial should not focus on *“every single issue that arises from Horizon”*, there could be a trial of *“fundamental Horizon points on the pleadings about how it works or how it does not work”*: Transcript, 35F. The instructions which the Court gave to the parties were to *“either agree or each propose an isolated number of issues on the pleadings related to Horizon that would involve expert evidence, but not evidence of individual cases”*: Transcript, 36E.
25. All of the issues proposed by Post Office obey this guidance. While Cs' issues overlap to some extent with Post Office's (and to that extent there is a measure of substantive agreement) they stray well beyond the proper subject matter of expert evidence, and into areas requiring significant factual evidence. In his submissions opposing a March 2019 trial, Cs' counsel warned that it would be *“very difficult to strip out an Horizon issue that was not absolutely inexorably bound out with breach, causation of loss”*: Transcript, 32C. With respect, Cs' proposed issues appear to be less an attempt to focus on the key issues for expert resolution in March 2019, and more of an attempt to make this warning come true.
26. A table is exhibited to this skeleton argument showing the key points of comparison on an issue-by-issue basis, including where, in the interests of being as accommodating as possible, Post Office can accept some part of Cs' proposals. However, as that table indicates, Cs'

proposed issues are frequently focused on questions going far beyond the proper and manageable scope of the Horizon Issues trial:

- (a) Horizon is designed to store the data put into it. It does not create shortfalls or reconcile errors. Questions about its ability to do these things are therefore not appropriate for a trial focused on Horizon, and could not result in any sensible answer from the expert evidence. This fault infects, in particular, Cs' Issues 1 and 5.
- (b) A number of Cs' proposed issues focus not on how Horizon works, but on the factual context in which it is operated. For example, proposed Issue 8 asks whether *"Subpostmasters have the means reasonably to identify whether such bugs, errors or defects in Horizon...were the cause of [any] shortfall"*. Issues 9 to 12 are expressly concerned with the relationship between Post Office and Fujitsu, which cannot be relevant to the technical question of how Horizon works. Issue 14 asks how often Post Office/Fujitsu used whatever abilities they had to adjust data. Issue 15(b) asks about what Post Office knew, and what it told Subpostmasters. These issues, insofar as they are relevant at all, go to breach – and are only suitable to be resolved in lead cases which will involve substantial factual evidence. They are wholly inappropriate for a trial focused on how Horizon works.
- (c) Other proposed issues are focused on the consequences of alleged defects. Cs' Issue 7(i) asks whether particular bugs or defects caused shortfalls to Post Office. Issue 15(a) asks to what extent any ability remotely to alter data affected the reliability of accounting balances. These issues are similarly inappropriate for a trial focused on how Horizon works.
- (d) Insofar as Cs' proposed issues are focused on the correct subject-matter, they are frequently far too broad and/or nebulous. Issue 1 requires an analysis of every single upgrade to Horizon, however minor. Issue 3(c) brings in a potentially vast number of communications with third parties. Issue 6 (*"To what extent did bugs, errors or defects occur in the Horizon system?"*) is not apt for judicial determination. The Horizon Issues trial needs to be rigorously focused on issues which can, following expert evidence, admit of a clear answer. Issues which ask the Court to rate the prevalence of errors on an undefined scale, or which bring in large quantities of irrelevant material, will not aid that purpose.

Directions

27. As the Court will see from comparing the parties' proposed draft Orders, there is a broad measure of agreement on next steps. There are a number of differences on points of detail (such as when the Horizons Issues trial should be held). More significantly, there are three key points in dispute:

- (a) The Cs' draft Order deletes the requirement, set out in Post Office's draft Order, that the Cs should, via their expert, set out their case on what relevant faults existed in the Horizon system – and that the experts should agree what questions their reports will address. This is essential, in order to provide a framework within which the debate at the Horizon Issues trial can take place. In the absence of provisions to this effect, the Court will be left with an unfocused discussion, and the trial will lose most or all of its utility.
- (b) Post Office's draft Order proposes a detailed timetable leading up to the Horizon Issues trial, including the service of expert reports, supplemental expert reports, and a joint memorandum. Cs have not included any such timetable in their draft Order. It is a practical necessity that a timetable should be ordered, and dates reserved in the experts' diaries. The Cs' opposition to this is unexplained.
- (c) Cs have added, to paragraph 4 of the draft Order, requirements that Post Office should demonstrate how it identified and corrects shortfalls (para 4(a)(ii)), and how it compares its records against the records of Post Office clients (para 4(a)(iii)). For the reasons given above, none of this is relevant to the question of how Horizon works, and there is no reason to add these provisions. The Cs also propose (para 4(a)(iv)) a demonstration of how data can be edited. It is difficult to see how such a demonstration could assist in the determination of any issue in dispute; nonetheless, in the interests of being pragmatic and cooperative, Post Office is prepared to agree to the inclusion of this provision.

DAVID CAVENDER QC

OWAIN DRAPER

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One Essex Court,
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20 February 2018

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SKELETON ARGUMENT FOR POST OFFICE

CMC ON 22 FEBRUARY 2018

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