

# FREETHS

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10 January 2018  
Second Letter

Our Ref: JXH/1684/2113618/1  
Your Ref: AP6/364065.1369

Dear Sirs

**BATES & OTHERS -V- POST OFFICE LTD**  
**CLAIM NOS: HQ16X01238, HQ17X02637 AND HQ17X04248**  
**DISCLOSURE AND FUTURE CASE MANAGEMENT**

We write following the helpful progress made between the parties since your letter of 18 December 2017 and particularly in response to your email dated 2 January 2018 (Parsons/Hartley/Randall, 15:02).

We are encouraged by the extent of agreement between the parties as to the principles to be followed for the purposes of disclosure in these proceedings, and the sequencing of such disclosure, which we have attempted to capture below. We also welcome your helpful proposals for the future case management of these proceedings set out in your letter dated 18 December 2017 to which we also respond further below.

You kindly made clear in your letter dated 18 December 2017 that a written response to that letter was not required given the (then) forthcoming meeting on 22 December 2017. However, in the light of the progress which we have made, we set out below:

1. the extent of agreement between the parties as to:
  - (a) the future case management of these proceedings, and
  - (b) the appropriate approach to disclosure of documents;
2. draft directions we propose to seek at the hearing to take place on 2 February 2018 (the "**February Hearing**"); and

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3. further steps we propose be taken in advance of the February Hearing.

### **(1) Extent of agreement between the parties**

As noted above, the substantial measure of agreement between the parties is welcomed and encouraging. In particular, there is now substantial agreement as to the approach to take both as to case management for purposes going beyond the Common Issues Trial in November 2018, and as to both the principles to be applied in respect of disclosure and its sequencing. As yet, the full detail of the disclosure exercise to be undertaken remains to be agreed. To the extent that it cannot sensibly be agreed, any residual disputes can be resolved at the February Hearing.

#### *Case management*

It is common ground that the parties need to consider the long term procedural timetable at this stage. This is because, for reasons of efficiency and the imperative of maintaining proportionate but effective progress towards the resolution of this dispute, further directions for disclosure will be needed for both (a) the Common Issues trial, and (b) any further trial of substantive issues thereafter.

We note that both parties have separately addressed their minds to what further substantive issues may be resolved in March 2019, in accordance with paragraph 32 of the Order dated 27 October 2017 (the “**First CMC Order**”) – albeit over 6 months in advance of the dates in that paragraph. Both parties have reached the view that (apart from your suggestion of limitation, which we address below) there are no further common issues which can be separately tried in March 2018. However, as we indicate in the attached proposed directions, we are of the view that following resolution of the Common Issues at the hearing in November 2018, the parties should attempt to resolve this litigation (or as many issues within it as possible) by mediation. We would suggest that using March 2019 as the window for such mediation to take place would allow the parties a reasonable opportunity (subject, of course, to canvassing this timescale with the Managing Judge) to take stock of the landscape of the case in the light of the Court’s decision.

Nonetheless, we agree that the parties should give constructive thought now to what can be done in 2018 to prepare to make necessary or helpful progress in the proceedings, rather than awaiting the Second CMC, presently listed for 19 September 2018.

Against the above background, it may be helpful to set out the extent to which the parties have reached agreement on so far, so as to focus on remaining issues and hopefully to facilitate agreement on the remaining issues. Subject always to the approval of the court, the parties are agreed as to the following:-

1. After any judgment given following the Common Issues trial, a further trial of lead cases (the “**Lead Cases Trial**”) should take place to determine issues of liability and quantum in further lead claims to be selected by the parties. Lead Cases should be selected to determine remaining common issues in these proceedings, in one trial, in order to facilitate resolution of the maximum number of claims.

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2. To ensure progress towards the prompt resolution of this dispute, certain preparatory work for the Lead Cases Trial can take place in 2018, and should include some preliminary disclosure.
3. The parties will need to agree upon a list of issues for the Lead Cases Trial. Lead Claimants for that trial will need, ultimately, to be selected from a pool of potential further Claimants chosen by the parties on the basis set out above.
4. As suggested in your letter of 18 December 2017, it is difficult to identify discrete issues that could quickly and feasibly be prepared for trial during the period presently set aside by the Court for a further trial in March 2019.
5. As such, it is not feasible for the Lead Cases Trial to take place in March 2019.

*Disclosure – principles and approach*

It is common ground that the parties are free to agree reasonable proposals for further directions for disclosure beyond what has been directed by the First CMC Order, subject to the approval of the Managing Judge. What has been, and can still be, agreed will need to be carefully tailored to the future case management of these proceedings.

Given this, the position thus far (partly agreed) is as follows:-

1. You have said that predicting from the outset the volume of documents responsive to any search is difficult (letter dated 18 December 2017, §2.4) and the EDQs reveal there to be a substantial difference between the volume of documents held by our respective clients.
2. You state that this is however not an admission of any asymmetry of information between the parties (your letter of 18 December 2017, §2.5).
3. It is common ground that different approaches will be required for Post Office and for the Claimants. Further, it is common ground that an iterative approach will be necessary, such that disclosure will be given in stages. As you make clear in your email of 2 January 2018, by agreeing to your proposals in this respect, our clients are not fettering their right to seek further disclosure in the future.
4. While we agree that efforts should be made to focus the breadth of disclosure, our clients are not in a position to verify whether narrowed search criteria of the nature you have proposed would produce adequate disclosure on the issues. You appear to accept this expressly in your email of 2 January 2018, by recognising that your proposals require trust in your client's own judgment.
5. In these circumstances, we agree with the suggestion made in your letter of 18 December 2017 that issues-based disclosure is appropriate. We suggest that this might most sensibly be achieved by adopting the approach set out in the draft Practice Direction produced by the Working Group on Disclosure chaired by Lady Justice Gloster (to which you have yourselves referred in your letter).



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6. In any event, it now appears to be common ground that disclosure should be given for the Common Issues trial in November 2018 in two stages:
  - a. Stage 1: by the end of February 2018 your client is to disclose certain categories of documents (responsive to searches by Potential Lead Claimant name and branch, as proposed at §2.7 of your letter dated 18 December 2017 and in your email dated 2 January 2018), in order to assist with the preparation of statements of case. This our clients would welcome.
  - b. Stage 2: by a date in (we would suggest early) May 2018, further disclosure, including generic disclosure on the Common Issues, is to be given, responsive to searches of a scope that presently remains to be agreed.
7. Stage 3: For the purposes of the Lead Cases Trial, for now it is common ground that some disclosure will need to be given by further tranche(s) (within Stage 3) during 2018. The scope of that exercise also remains to be agreed, and our proposals are set out below.
8. Finally, a substantial measure of agreement has been reached as to the format for the production of documents, which is being finalised between our respective E-Disclosure providers. This will make provision for the format and manner in which electronic and hard copy documents will be disclosed, referenced and stored. For completeness, we enclose a Schedule (Schedule 4) of the parties' agreement to date in this respect, and we envisage that once finally agreed, this will comprise a protocol for the exchange of documentation.

### 3. Draft Directions

As foreshadowed above, we have enclosed proposed draft directions to give effect to the points of agreement that we have set out above and to make constructive suggestions where matters are not yet fully agreed, including our proposals for appropriate further case management of these proceedings and disclosure which can sensibly be ordered now. We hope that this will assist the parties reaching agreement as far as possible and would be grateful to receive your comments as soon as possible and, in any event, well in advance of the February Hearing, so that if any issues do remain to be resolved, the parties' respective Skeleton Arguments can be short and focused on those issues alone.

We draw attention to the following features of the draft directions:

1. As noted above, our view is that this case is suitable for trial adoption of the proposals of the Working Group chaired by Gloster LJ. We will ask that this be directed by the Managing Judge at the February Hearing. While those proposals have yet to be adopted, the issues-based approach and models identified reflect approaches it is presently open to the Court to take pursuant to CPR r.31.5(7) and (8), and adoption of the proposals would be a suitable means of doing so, focusing disclosure upon what is necessary to deal with the case justly and complying with the overriding objective.
2. We propose that orders be given for disclosure upon defined issues, by the Models B to E, to be set out in Schedules 1 (Common Issues (Nov 18) – Individuals), 2 (Common Issues



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(Nov 18) – Generic) and 3 (Lead Cases Trial – Initial Generic). This will focus the extent of the searches to be carried out and go a significant way to allaying the concerns you have expressed as to the potential scope of the exercise.

3. Given the format(s) in which it is agreed documents will be produced, the parties will themselves be able to interrogate the disclosed documents further in a proportionate manner, with the assistance of their respective e-disclosure consultants.
4. We do not agree that it would be possible to select Lead Claims for the purposes of the Lead Cases Trial until after determination of the Common Issues. The outcome will have a significant bearing upon scope and nature of the issues remaining for determination in the Lead Claims Trial and we reasonably anticipate that the issues that remain in dispute will narrow as the case progresses and, for example, as disclosure is given.
5. As it is common ground that progress should be made in 2018 towards the Lead Cases Trial by the giving of disclosure, we propose that the initial tranche(s) of such disclosure that it is agreed can be given in 2018 (within Stage 3, above) be given on specified (generic) issues for the Lead Cases Trial that are likely always to remain in issue.
6. As mentioned above, discrete issue(s) for trial in March 2019 cannot easily be identified. Our view is that it will be fundamental to the proportionate resolution of this dispute that the period following the Common Issues trial be instead used (a) to narrow the issues in dispute the light of the findings made, and (b) for mediation to take place with the benefit of that determination. In our view, this is the proportionate course, and one which need not materially delay progress.
7. Finally, we do not agree that limitation issues can be tried on a discrete or preliminary basis, as you suggest, in March 2019. This would require a full factual enquiry of a substantially similar nature to that required by a full trial, upon evidence that would need to be heard at a full trial in any event. Given that concealment of facts is one of the substantive elements of the claim, it would be wholly inappropriate to try that issue separately. It would be contrary to principle and would be a significant distraction (which would be very difficult proportionately to manage) in the period immediately leading up to the Common Issues trial and, indeed, during the trial itself.

#### **4. Next Steps**

We are greatly encouraged by recent progress and hope that further agreement can be reached on the draft directions enclosed, in good time before the February Hearing.

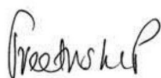
In the period prior to the February Hearing:

1. We invite your comments and helpful suggestions on the draft directions enclosed with this letter.
2. We suggest that the parties agree a pre-hearing timetable for filing Skeleton Arguments and hearing bundles. To that end, please confirm your agreement to the filing of skeleton arguments for the February Hearing by 12pm on Tuesday 30 January 2018.

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3. We will file a hearing bundle by the same date, but will endeavour to provide you with a copy in advance for the purposes of cross referencing Skeleton Arguments. We will liaise with you further as to the bundle index and will inform the Court of the agreed position.
4. It would be extremely helpful if you would confirm whether you intend to respond to our Further Request for Information served on 29 December 2017 by the deadline of 19 January 2018 set out in that request. If your client is not prepared to answer the RFI and provide the information sought, it would be helpful for us to know that in advance so that a very short application can be filed to enable the Court to resolve this difference between us.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'Freeths', is written in dark ink.

Freeths LLP