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17 January 2018

Fourth Letter

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Your ref:
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Dear Sirs

**The Post Office Group Litigation
Directions and disclosure**

We refer to your letter of 10 January 2018 and our subsequent video conference on 12 January 2018.

1. Points of agreement and key areas for further work

- 1.1 There is now a good measure of agreement between the parties on the structure for disclosure and the concepts for future case management. In particular we welcome your agreement that:
- 1.1.1 the parties should be discussing the future of this litigation now and not wait until the CMC in September 2017;
 - 1.1.2 there should be a Lead Cases Trial following the Common Issues Trial along the lines described in our letter of 18 December 2017;
 - 1.1.3 it is practically difficult to be ready for a substantive trial in March 2019. On this basis, our client will not be seeking to have limitation and settlement issues heard in that window and agrees that the March 2019 trial should be vacated. We are however continuing to think carefully about this and should we identify a viable topic for a hearing in March 2019 we will of course let you know and would invite you to do the same;
 - 1.1.4 disclosure should be given in stages as proposed in our letter of 18 December 2017; and
 - 1.1.5 there should be a disclosure protocol as set out in our letter of 14 November 2017 (with your minor amendments).
- 1.2 Further work is required on the detail of the above proposals and we believe that ongoing discussions between us will be the most useful way to progress this. We set out in this letter our client's position on the key areas for further work so that there is clarity on the current state of play. Those areas are:

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- 1.2.1 Stage 1 disclosure.
 - 1.2.2 The issues for Stage 2 disclosure for the Common Issues Trial.
 - 1.2.3 A timetable for the Lead Cases Trial.
 - 1.2.4 Stage 3 disclosure for the Lead Cases Trial.
- 1.3 In line with our comments below, we enclose our clients' proposed directions Order for your consideration.¹ This includes our proposals for Schedules 1 and 3. We have left Schedule 2 blank for now as we anticipate this will be subject to further discussions between us. We also have not included your Schedule 4 but this is agreed as per the discussion on our video conference.
- 2. Stage 1 disclosure**
- 2.1 We look forward to hearing from you in response to our proposal in our email of 2 January 2018. We have included our proposal in Schedule 1 to our client's draft Order but this is still subject to us confirming that it is technically possible to extract these documents within the time permitted.
- 3. Stage 2 disclosure for the Common Issues Trial**
- 3.1 It is agreed between us that further disclosure beyond Stage 1 will likely be needed for the Common Issues Trial and we are both working towards scoping out exactly what that entails in practice. The key to this is understanding the points of factual dispute that will need to be resolved at trial as this will drive the need for disclosure on those points.
- 3.2 We are hopeful that large parts of the factual background needed for the Common Issues Trial should be possible to agree between us. As we suggested on our video conference on 12 January 2018, we believe the parties should spend some time identifying the facts on which each intends to rely at trial, testing whether they are disputed facts and, if so, drawing up appropriate disclosure orders to help resolve those disputes. That information can then be fed into Schedule 2 of the draft Order. We would welcome your thoughts on this approach and, if you believe that there is merit in exploring this, we suggest that we meet to discuss this in more detail.
- 3.3 You will see that our draft directions also make provision for revising the scope of disclosure once the individual Particulars of Claim have been served. We would ordinarily want this review to take place after all pleadings are served but the trial timetable does not allow time for this. Nevertheless, we believe that even the individual Particulars of Claim will help further refine the issues in dispute and it is sensible to include a mechanism for the scope of Stage 2 disclosure to be adjusted accordingly.
- 4. Lead Cases Trial**
- 4.1 Both parties recognise that much turns on the outcome of the Common Issues Trial and that creates a degree of uncertainty when making plans for the management of this case after that trial. Nevertheless, the Managing Judge was keen that the parties take steps now to prepare for the future and not wait until after the Common Issues Trial before turning their minds to future events.

¹ We have called this *Directions Order No.3* in line with the nomenclature used by the Managing Judge for his first directions order of 25 April 2017 which he labelled *Directions Order No.1*. The case management order in October 2017 is accordingly referred to as *Directions Order No.2*.

- 4.2 As we understand your proposals, they do not see the parties selecting Lead Cases or beginning pleadings until sometime after a mediation in March 2019. By our reckoning, this would likely mean that the Lead Cases Trial would not begin until late 2021² which is nearly 4 years away.
- 4.3 We believe that much time can be saved and useful preparatory work done if full directions are set out now for a Lead Cases Trial. Your concern appears to be that the parties do not yet have enough information to identify suitable cases for a Lead Cases Trial. Given that there are no current orders for the Claimants to submit further information, revised generic pleadings or more detail on individual cases (save for the limited pleadings for the 6 cases for the Common Issues Trial) we do not see that the parties' ability to make these decisions will be markedly improved by waiting until 2019. We recognise that Judgment in the Common Issues Trial will likely affect how Lead Cases are pleaded out but this will not change the core features of those cases. If you have in mind how further information may come to light over the next year that might make it easier to select Lead Cases, please let us know.
- 4.4 With this in mind, our draft directions set out a process that results in the parties selecting a preliminary pool of 20 Lead Cases before the Common Issues Trial and then pleading those cases once Judgment on the Common Issues has been given. This allows the parties to bring forward this work into 2018 which will save around 12 months from the timetable for a Lead Cases Trial. The difference between our respective clients' approaches results in our client looking for a trial in either May or October 2020, and your clients seeking a trial in around October 2021.
- 4.5 Our client is prepared to consider your proposal of mediation but we do not immediately see the need for a stay until the end of March 2019 as this would invariably cause a delay to the overall litigation. We believe that a mediation can be fitted in alongside the timetable for a Lead Cases Trial and actioned at an appropriate point in time. Our draft Order provides for this more flexible approach.
- 4.6 As a safeguard against the unknown, you will see that our proposed directions make provision for regular CMCs at which the parties can revise the timetable as needed. Not all these CMCs may be needed, and they can be vacated if that is the case, but we believe it prudent to schedule these in at an early stage, subject to the Court's approval.
- 4.7 We should be grateful if you would consider again the idea of setting down directions now for a Lead Cases Trial and would ask for your comments on the timetable we have proposed (which can be entirely without prejudice to your primary position that there should be no timetable set yet). If the Managing Judge were to favour setting down a timetable at the upcoming CMC, having an agreed timetable for him would be preferable to the parties discussing this on the fly at the CMC.
- 4.8 We would also welcome your comments on the preferred date for a Lead Cases Trial. You will see that our draft directions provide two options: a trial in May 2020 or a trial in October 2020. We are attracted the earlier date but this requires a very aggressive timetable and therefore we can also see prudence in an October 2020 trial.

5. Stage 3 disclosure for the Lead Cases Trial

- 5.1 We are both agreed that it would be beneficial to front-load some of the disclosure that will be needed for the Lead Cases Trial and have this done during 2018. We do however take a different approach to you on how this disclosure should be scoped.

² Assuming that the parties take 6 months to select Lead Cases, they would not begin pleading Lead Cases until the end of 2019. It would then take around 24 months from this point to reach a trial. Within this period one needs to factor in the extraction of Horizon transaction data that is central to this litigation. As explained previously, this is a very time consuming process – to extract data for 20-30 potential Lead Cases could take around 6-9 months so this could cause a delay if not started in advance of 2019.

- 5.2 Our view is that Stage 3 Disclosure should be tied into the process for selecting Lead Cases and disclosure given of documents that directly refer to one of those Lead Case Claimants or their branch. Scoping disclosure in this way is easy to formulate (as it is done by reference to a Claimant's name or branch) and will likely return a high percentage of relevant material (because it should all relate to a named Claimant).
- 5.3 Your approach, as we understand it, is to scope disclosure around "likely" topics or issues to be heard at the Lead Cases Trial. This approach is however very much dependent on the outcome of Common Issues Trial as those topics will be influenced by the findings on the Common Issues. It therefore risks disclosure needing to be repeated if the shape of the litigation changes after the Common Issues Trial.
- 5.4 This is not to say that disclosure along the lines you propose will not be required in due course. Our draft directions make provision for this as "**Stage 4 Disclosure**". We note that your approach to Stage 3 Disclosure does not appear to be exhaustive so some form of Stage 4 Disclosure is inevitable in any event. We believe that this will be best done after Judgment on the Common Issues and after individual pleadings on Lead Cases (as would be the ordinary course for litigation).
- 5.5 If there is some preferable reason for addressing Stage 3 Disclosure in the way you propose, please let us know.

6. Your letter and draft Order

- 6.1 In relation to your draft Order, we agree with the following paragraphs and have carried them across into our draft order (with a few minor amendments): 1, 2, 3, 4, 6, 8, 9, 10, 11, 12, 14 and 15.
- 6.2 The other provisions of your draft Order turn on the key areas set out above and we have provide alternative provisions in our client's draft Order.
- 6.3 Our client will be providing a response to your client's Request for Further Information dated 29 December 2017 but will not be in a position to do so before the 2 February CMC. Our client therefore agrees to paragraph 1 in your draft Order.
- 6.4 As to the logistics for the CMC, we agree with your proposals for Skeleton Arguments and bundles. We do however see the potential need for more time than the 2.5 hours that the CMC is currently listed for. We therefore recommend that the parties should write jointly to Managing Judge, explaining that the scope of the CMC may need to be expanded to cover the future of this litigation and not just disclosure, and to enquire about extending the CMC to a full day or the possibility of a further CMC shortly thereafter. We will send you separately a draft joint note for your comments.
- 6.5 We should be grateful if we could speak by close of business on 19 January 2018 to make arrangements for further meetings if you consider this the appropriate way forward.

Yours faithfully

Womble Bond Dickinson UK LLP

Womble Bond Dickinson (UK) LLP