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Neutral Citation Number: [2017] EWHC 2844 (QB)

THE POST OFFICE GROUP LITIGATION

Case No: HQ16X01238

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date 10 November 2017

Before :

THE HONOURABLE MR JUSTICE FRASER

Between :

Alan Bates and Others	**Claimant**
- and -	
Post Office Limited	**Defendant**

Patrick Green QC, Kathleen Donnelly and Ognjen Miletic (instructed by Freeths LLP) for the **Claimant**
Anthony De Garr Robinson QC and Owain Draper (instructed by Bond Dickinson Solicitors) for the **Defendant**

Hearing dates: 19 and 25 October 2017
Draft sent out to parties on 8 November 2017

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Fraser :

1. These proceedings are subject to a Group Litigation Order ("GLO") made on 22 March 2017 by Senior Master Fontaine. Such an order requires the approval of the President of the Queen's Bench Division, who also nominated me on 31 March 2017 to be the Managing Judge for the group litigation. Under paragraph 10 of the GLO the Managing Judge is to hear, if possible, all pre-trial applications in the litigation and to conduct the trial or trials. This written ruling is made in respect of a subject which has already arisen once before in these proceedings, and is in my judgment highly likely to continue to arise again in this litigation as it progresses, given the current approach of the parties. It is the question of fixing hearings to take account of the availability of counsel. It may also arise from time to time in other proceedings (not simply those subject to a GLO). It is unusual in matters of case management to produce written reasons, but the intention is that these will assist the parties in this group litigation. This judgment has been shown in draft to the Judge in Charge of the QB Lists.

2. The subject matter of the proceedings subject to the GLO are as follows. The claimants are for the most part all sub-post masters, although a small number are Crown Office employees and managers/assistants, whose contracts of employment are different to the contracts of the sub-post masters. The defendant is the entity that operates the network of over 11,000 Post Office branches throughout the UK. All of the claimants (of whom there are now over 500 in number, and regardless of whether they were sub-post masters or Crown Office employees) were at the material times engaged in running Post Offices. The term sub-post master is used to describe the person appointed by the defendant to run a particular branch. The Crown Office employees perform similar functions, but do so at a small number of branches which are directly managed by the defendant as Crown Office branches. For the purposes of this ruling, the distinction is not material (although it may prove material in the substantive proceedings).

3. I wish to emphasise that at this early stage in these proceedings, the outline summary which I now provide is on hotly contested facts. No substantive hearings have yet been held, and no findings have been made. In about 1999/2000 the defendant introduced a system called Horizon, an electronic point of sale and accounting system for all of its branches. It was a computerised system with both hardware and software, as well as communications equipment in the branches and central data centres. In essence it fulfilled a computerised accounting function for Post Office branches. The system was amended from time to time, and in 2010 it became something called Horizon Online, which as the name suggests was an internet based system. All of the claimants were users of the Horizon system, and indeed they were required to use the Horizon system.

4. It is alleged by the claimants that the Horizon system changed the way that the claimants could both account for, and interrogate and investigate, the numerous financial transactions that were made in the relevant branches every working day. A central part of the claimants' case is that the Horizon system had a large number of software coding errors, bugs and defects. The agreed case summary for the first Case Management Conference states that alleged shortfalls in the claimants' financial accounting with the defendant were caused both by the way the Horizon system

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operated, together with other deficiencies. At the time, these shortfalls that came to the notice of the defendant were pursued as exactly that – shortfalls - with the relevant claimants. The defendant's stance was that the claimants were responsible for these shortfalls, and that the shortfalls represented actual amounts of money missing from the claimants' accounting. Some claimants paid these amounts to the defendant out of their own resources, even though they did not believe or accept that there was anything deficient in their accounting. Some of the shortfalls were for modest sums. Some claimants were lucky enough to find accounting irregularities in their favour. Others were convicted in the criminal courts of false accounting, fraud, theft or other offences. These claimants claim malicious prosecution against the defendant, and also claim that there was a "cover up" at the defendant over the shortcomings in Horizon. Some claimants were made bankrupt. There are claims for damages for financial loss, personal injury, deceit, duress, unconscionable dealing, harassment and unjust enrichment brought against the defendant. There is currently a Criminal Cases Review Commission ("CCRC") review underway in respect of the convictions of a significant number of the claimants. These are being dealt with together by the CCRC.

5. The defendant disputes the whole basis of the claimants' case, avers that there were large numbers of sub-post masters who knowingly submitted false accounts under the previous system, maintains that Horizon worked perfectly adequately, that the claims against it are time-barred, and also relies upon a range of other legal defences based on different matters. These include the terms of settlements reached with individual claimants when many branches were closed as the defendant rationalised its branch network. The making of a GLO had been opposed by the defendant.

6. Over recent years, this situation regarding Horizon, its efficacy or accuracy and the lengthy saga with aggrieved sub-post masters has resulted in an action group being formed, called Justice For Sub Postmasters Alliance ("JFSA"). At the instigation of a number of Members of Parliament, an independent inquiry was set up by the defendant using a company called Second Sight Services Ltd ("Second Sight") that ran from 2012 until 2015. There was a public debate in Westminster Hall in December 2014, a response to this was published by the defendant in January 2015, and oral evidence was given to a Parliamentary Select Committee by the Chief Executive of the defendant in February 2015. This was in relation to a Mediation Scheme that had run for a while jointly under the auspices of the defendant, Second Sight and JFSA. There have been various reports and documentaries in the media, including a BBC Panorama documentary entitled "Trouble at the Post Office" in August 2015.

7. It is against that background that a number of claims were issued and the GLO came to be made. The first claim form had been issued in April 2016. Numerous other claims followed. The essence of a GLO is that all related claims are managed and tried together, with the use of Lead Cases as suitable, considering common issues that arise. A period of advertisement is permitted indeed required, as other potential claimants who wish to issue similar proceedings are required to join the group litigation and are included on a Group Register. This process was initiated by the making of the GLO on 22 March 2017. Paragraph 40 of the GLO required a Case Management Conference ("CMC") to be held before the Managing Judge on the first open date after 18 October 2017 with a time estimate of 1 day.

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8. Accordingly, shortly after being appointed the Managing Judge, I issued Directions Order No.1 on 25 April 2017 ordering the 1st CMC to take place before me on 19 October 2017. That was a date almost six months ahead.

9. The order was met with a wholly unsatisfactory response from the clerks to leading counsel for the claimants, who notified the court that the hearing that had been ordered could not be accommodated on that date, but the court would be notified of a date that could be accommodated by all counsel jointly, once their clerks had agreed this between themselves. This response was referred immediately to me, and appeared to be a clear case of the tail wagging the dog. It is notable that judicial availability, and the dates ordered both in the GLO and in Directions Order No.1, were considered such a secondary consideration to counsels' diaries.

10. This is a large and complicated case. Quite apart from the fact that there are, as at the date of this ruling, over 500 claimants, the technical subject matter of the Horizon system is likely to be complex, and permission has already been granted for expert evidence in this field. The litigation must be conducted in accordance with the overriding objective. CPR Part 1.1(2)(d) expressly requires the case to be dealt with expeditiously and fairly. CPR Part 1.4(1) requires that it be actively case managed; CPR Part 1.4(2)(g) makes it clear that fixing timetables is part of this; CPR Part 1.4(2)(l) requires directions to ensure that the trial of a case proceeds expeditiously and fairly. Group litigation has its own Practice Direction 19B, but it is re-inventing the wheel to state that this must be considered within the context of CPR Part 1. Not only that, but the subject matter of the litigation is a matter of obvious public interest. The defendant is an important public institution on the one hand; on the other, many individuals have had their lives affected to a very considerable degree, including in some cases bankruptcy and criminal convictions. There is a yawning gulf between the parties as to liability. Resolving the many issues in the group litigation is likely to take some time.

11. In April 2017 I therefore made it clear to the parties that the date for the 1st CMC had been ordered by the managing court; that a formal application to move the date of the 1st CMC would be required; and that this had to be supported by a witness statement in the usual way. This particular direction was then wholly ignored. The letter from leading counsel that did come to the court seeking to justify changing the date (without any application) was based, purely and simply, upon counsel's availability. I then directed that hearings in this group litigation, particularly one directed so far in advance, would not be fixed around the diaries of the many barristers in the case. To do otherwise would, undoubtedly in my judgment, simply lead to considerable delay at every step of the litigation. There the matter rested until the 1st CMC took place on 19 October 2017.

12. At that CMC, and indicated in advance beforehand in correspondence to the defendant in early July 2017, the claimants sought identification of a large number of common issues – essentially legal and contractual in nature -- and sought a substantive hearing of those issues in October 2018. The stated position of the defendant until just a few days before the CMC was that no substantive hearing should be ordered at this stage of the litigation *at all*, and that the case should be case managed for another entire year without any substantive hearing being fixed by the managing court. The defendant's proposal was that the matter should be revisited in the autumn of 2018 with a view to fixing a trial later than that, which would

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inevitably be well into late 2019 at the earliest. To describe this approach as leisurely, dilatory and unacceptable in the modern judicial system would be a considerable understatement. In the event, at the CMC itself the defendant adopted a more constructive approach to the litigation, and a substantive hearing was ordered for 5 November 2018 for 20 days to deal with 23 different common issues.

13. The day after that trial was ordered (as one of a large number of case-management directions issued at the conclusion of the lengthy CMC) a letter was received from leading counsel, this time for the defendant. This explained that he already had a commitment in his professional diary in the Companies Court in the Chancery Division for three weeks, due to commence in late October 2018, and this meant that he would be unavailable for any trial in November 2018. He therefore sought the trial date being moved into 2019, a possible date that had been discussed in outline at the CMC the day before. This was not opposed by the other party.

14. I therefore restored the CMC and heard oral submissions. I declined the application and explained I would give written reasons for doing so.

15. There is no doubt that the other matter upon which leading counsel for the defendant is engaged is also very complicated and of extremely high value, namely an unfair prejudice petition under section 994 of the Companies Act in relation to a company valued at approximately £1 billion. It is also the second tranche of the trial, the first tranche being one of liability which is to be held in January 2018 with a trial estimate of seven weeks. There are however two points that arise in this group litigation which are, in my judgment, of considerable importance and outweigh any other considerations in favour of delaying the hearing. The first is the nature of this litigation generally, and the interests of the administration of justice in resolving the issues. The second is the likely consequence of granting the request, and its possible effect on the litigation generally.

16. Fixing hearings in this group litigation around the diaries of busy counsel, rather than their fixing their diaries around this case, is in my judgment fundamentally the wrong approach. If the court embarks upon a course of organising hearings around counsel, more and more time will creep into the timetable of the litigation as a direct result. This applies to all hearings, but particularly to trials of substantive issues. All the parties are to be treated fairly. If a request by the defendant for delay of two to three months into 2019 is agreed by the court at this stage, there will be the risk of at least the appearance of unfairness if similar requests by the claimants' counsel are not acceded to in the future.

17. Counsel for the defendant pointed out that by declining the application, there was a risk that the defendant would be deprived of the counsel of their choice. That is a risk, although it is difficult so far in advance of the autumn of 2018 to quantify it. Given the nature of the other commitment, on one potential outcome of the liability hearing in that other case, the risk will be zero. This is because with liability findings in their favour, the party in the other matter represented by leading counsel will not be participants in the quantum trial at all. Even if the risk is appreciable, given this is group litigation, not all of the claimants have counsel of their choice either (or solicitors, for that matter). The nature of a GLO is that claimants are included on the Group Register and have to progress their cases with single representation ordered by the GLO. They are not entitled to choose their own legal representatives.

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18. On the face of it, a delay in the first round of substantive hearings from November 2018 into early 2019 could be viewed as modest. However, in this case it would mean that the first substantive hearing would commence almost two years after the making of the GLO. That is simply far too long in my judgment. The delay until November 2018 is more than enough as it is. I was persuaded at the CMC, given the large amount of work to be done before the first common issues are tried, that this timescale was necessary. However, further delay must be avoided. My approach in this group litigation will be to fix reasonable durations for certain steps to be taken, and consider requests for modest extensions on their individual merits. The parties may however find that extensions are only granted grudgingly, given the matters identified in paragraph 10 above. All of the many claimants, and the defendant, need resolution of the matters in issue.

19. Counsel of high repute – which in this case they are – are extremely valuable in the marketplace and have many potential clients. They all work extremely hard and it is a function of the independent Bar that they will usually have multiple cases underway simultaneously. However, such counsel will, by definition, usually have a large number of hearings in their diaries. Fitting hearings around their availability has all the disadvantages of doing an intricate jigsaw puzzle, with none of the fun associated with that activity. This difficulty becomes even more acute if hearings of four weeks and longer are required, which in this group litigation they will be. Whilst it may be regrettable that one party might be deprived of their counsel of choice because of listing, that is a not unusual situation. Where there is reasonable notice of a diary conflict, which there undoubtedly is in this instance, arrangements for a suitable replacement can invariably be made by the disappointed party, if a replacement is necessary.

20. The other consideration in terms of incremental delay to hearings is that this will lead to the litigation overall taking longer than it otherwise would. This will undoubtedly add to the costs. One of the favourable points from the earlier so-called Woolf Reforms identified by Jackson LJ in paragraph 1.1 of his Review of Civil Litigation Costs: Preliminary Report (May 2009) was "the case management function, which the court has assumed following the Woolf reforms, prevents cases from being parked indefinitely, whilst the parties or their lawyers attend to other matters" (emphasis added). His report was initiated due to the mounting concerns about the cost of civil justice. If delaying hearings will lead to higher costs – and it undoubtedly will – then delaying hearings must be avoided if at all possible.

21. Taking all these circumstances into account therefore, hearings in this group litigation will not be fixed to take account of the availability of counsel. They will however be fixed well in advance, where possible, so that counsel will know when they will be taking place and plan accordingly. To that end, at the restored CMC I ordered that there would be a further trial of substantive issues set down for 20 days, commencing Monday 11 March 2019. The issues to be resolved in that tranche of the litigation have not yet been identified but will be in September 2018.

Finally, litigation of any type, but particularly of this type, can only be conducted in a cost-effective and efficient way if the parties co-operate between themselves, are constructive, and conduct the case efficiently. The parties have a duty to help the court to further the overriding objective in CPR Part 1.3. The following have all occurred so far in this group litigation: failing to respond to proposed directions for

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two months; failing even to consider e-disclosure questionnaires; failing to lodge required documents with the court; failing to lodge documents in good time; refusing to disclose obviously relevant documents; resisting any extension to the "cut-off" date for entries of new claimants on the Group Register; and threatening pointless interlocutory skirmishes. On the material before me, this has been more or less equally on both sides. Such behaviour simply does not begin to qualify as either cost-effective, efficient, or being in accordance with the over-riding objective. A fundamental change of attitude by the legal advisers involved in this group litigation is required. A failure to heed this warning will result in draconian costs orders.