

CONFIDENTIAL AND LEGALLY PRIVILEGED
POST OFFICE GROUP LITIGATION
Steering Group Meeting: 17 JANUARY 2018



DECISION: Does Post Office support the proposed strategy for the Court hearing on 2 February 2018?

1. BACKGROUND

- 1.1 Since the last Steering Group meeting, WBD have held a number of calls with Freeths to discuss proposals on disclosure, the subject matter of the March 2019 trial and the longer term strategy of a Lead Cases Trial in 2020. At each of these meetings Freeths have moved closer to Post Office's proposals and as a result a number of the risks surrounding the March 2019 trial and long term strategy have been mitigated.
- 1.2 Most of this movement happened after Freeths met with their QC on 8 January 2018. This has reinforced our belief that Freeths have a disjointed relationship with their QC and are paralysed when he is not available to advise them. This is something we need to be watchful of in the future when trying to reach agreement with the Claimants.
- 1.3 This paper provides an update on the outcome of WBD's discussions with Freeths and seeks Post Office's approval of presenting the Court with a litigation plan which drops the idea of a trial in March 2019 and instead proposes a Lead Cases Trial in 2020.

2. TRIAL IN MARCH 2019

- 2.1 The Court has scheduled time in March 2019 for a second trial and has invited the parties to agree the topics for that trial. As we have advised previously, it is difficult to identify a suitable topic for this trial window for two principal reasons:
 - 2.1.1 Every major issue in this case is in some way reliant upon the outcome of the Common Issues trial. This makes it very difficult, if not impossible, to prepare for future Court hearings before Judgment is given on the Common Issues (likely in December 2018 but may be later).
 - 2.1.2 The window for trial preparation between the Common Issues Trial (November 2018) and a trial in March 2019 is extremely short. This makes it very difficult to be ready for a major Court hearing in March 2019.
- 2.2 Before Christmas, we were not privy to Freeths' position on this point, and we were concerned that outright stating a trial in March 2019 was not possible would make Post Office look obstructive if Freeths pushed for something to be heard in that window. For these reasons, we wrote to Freeths before Christmas highlighting the above difficulties but noting that, if a March 2019 trial had to go ahead, we would tentatively propose settlement and limitation issues being heard (albeit that these faced difficulties too).
- 2.3 For the same reasons as set out above, and having now met with their QC, Freeths agree that it would be practically impossible to be prepared for a March 2019 trial.
- 2.4 Instead, Freeths have suggested we vacate the formal Court hearing in March 2019 and use the window for mediation. During WBD's discussions with Freeths they did not portray this mediation as having the potential to settle the entire claim but thought this was a good time for both parties to take stock and consider settlement options. We agree with Freeths that it would be sensible for the parties to plan for a mediation in or around March 2019 after Judgment on the Common Issues has been given (but this should not be to the exclusion of other settlement discussions at an earlier or later date as we can see the possibility for a mediation 7 months earlier in September 2018 in the run up to the Common Issues Trial).

- 2.5 Freeths are proposing a one month "stay" in March 2019. A "stay" is a formal pause to the litigation process during which no action is required of either party. We would not support this stay because (i) it wastes a month of valuable time and (ii) it should be possible to accommodate a mediation within a gap in the litigation timetable.
- 2.6 In light of Freeths' new stance, it would be in Post Office's best interests to agree to vacate the trial in March 2019.
- 2.6.1 First, this is in line with our initial advice.
- 2.6.2 Second, Freeths are actively opposed to hearing settlement and limitation issues in March 2019 for the same two reasons we identified above.¹ Post Office will therefore face a difficult time persuading a Court to hear these issues in March 2019.
- 2.6.3 Third, even if the Court did order a trial of settlement and limitation issues, there would be a high risk of this trial running into problems and collapsing, causing wasted time and cost.
- 2.6.4 Fourth, not needing to prepare for trial in March 2019 opens up the possibility of pulling forward the Lead Cases Trial from October 2020 to May 2020.
- 2.7 If both parties support the idea of replacing a formal March 2019 trial with mediation, we believe that it is unlikely that the Court would oppose this. However, we have a Judge who has shown a tendency for unusual decisions and he could be annoyed by the parties changing his trial date. In frank discussions with Freeths, they are worried about this too. If the Judge is opposed to dropping a formal March 2019 trial, he will at least direct his frustration at both parties given that we are aligned on this point. We will also be instructing Counsel to keep open the possibility of hearing settlement and limitation issues in March 2019 (or using it as an overflow for any Common Issues that do not get heard in November 2018) so that we have a "Plan B" if the Judge insists on a trial in March 2019.

3. LEAD CLAIMANT TRIAL

- 3.1 Freeths have agreed with Post Office's proposal for a Lead Cases Trial which deals with all major issues in one go and they recognise that this will require considerable preparatory work. The Claimants have not proposed their own timetable for this trial and wish to revisit this timetable at the next CMC in September 2018.
- 3.2 The difficulty with the Claimants' approach is that it means that preparation for the Lead Cases Trial would not start until after March 2019 at the earliest, meaning that the trial could not be heard until 2021, a year after Post Office's proposed trial date. In discussions with Freeths, they recognise this consequence.
- 3.3 On one level this is useful because it protects Post Office from criticism that it is trying to delay the litigation, which was previously a major concern. The downside is that Freeths' approach would delay matters by around 6-12 months.
- 3.4 The alternative is to ask the Court to set out a full trial timetable to a Lead Cases Trial in May or October 2020. This timetable would include selecting the Claimants for the Lead Cases Trial in 2018, thereby front-loading this work and saving at least 6 months in the trial timetable. An outline list of the steps that could be taken in the lead up to the Lead Claimant Trial is set out at Schedule 1.

¹ The difficulty with settlement and limitation is that they both turn on the results of the Common Issues. For example, Freeths claim that limitation periods should be extended on the grounds that Post Office concealed key information. They premise this on saying that Post Office had a duty to disclose certain information to postmasters and failed to do so. This duty to disclose is found in the Claimant's implied terms, which are one of the Common Issues to be heard in November 2018.

- 3.5 Freeths will likely oppose this on the ground that they believe it is too early to select Lead Cases and will say that this should happen after the Common Issues Trial in November 2018 when the issues in dispute will be better understood.

4. DISCLOSURE

- 4.1 Freeths' original position was for disclosure of all documents relevant to all issues be given before the November 2018 trial. By contrast, Post Office's proposal was for staged disclosure that tied into the Court process:
- 4.1.1 Stage 1 Disclosure in February 2018: disclosure of documents that refer to one of the 12 Lead Claimants for the Common Issues Trial.
 - 4.1.2 Stage 2 Disclosure in May 2018: disclosure of additional documents which are necessary for the Common Issues trial in November 2018.
 - 4.1.3 Stage 3 Disclosure in August 2018: disclosure of documents to enable the parties to select representative Lead Claimants for a Lead Cases Trial in 2020.
 - 4.1.4 Stage 4 Disclosure in around September 2019: further disclosure which is necessary for the Lead Cases Trial. Note – Stage 4 is by far the largest tranche of disclosure.
- 4.2 Freeths have now moved away from their original position and accepted Post Office's proposal of staged disclosure tied to the Court's timetable. The stages, timing of the stages and the general purpose of each stage are agreed, but the exact scope of disclosure under each stage is still under discussion. Their key points of dispute are:
- 4.2.1 The scope of Stage 2: Freeths have still not made a firm statement of what documents they want at this stage.
 - 4.2.2 Stage 3 disclosure: Freeths are looking for broad disclosure of documents on issues that are "likely" to be heard at the Lead Cases Trial (ie. they want some elements of Stage 4 brought forward into Stage 3).
- 4.3 The agreement reached on staged disclosure and the timing of disclosure reduces the risk of Claimants portraying Post Office as seeking to withhold documents. It is hoped that further agreement on the scope of disclosure may be reached either prior or shortly following the hearing.
- 4.4 It should be noted that the Court's approach to Stage 3 disclosure is linked to its approach on the Lead Cases Trial. If the Court agrees to set out a full timetable to trial, including the selection of Lead Cases in 2018, then Post Office's more targeted proposals for disclosure are more appropriate. If the Court rejects this approach, then it may be prepared to order the more wide ranging Stage 3 disclosure sought by Freeths. We believe that this may be one of the reasons that Freeths do not want to agree a full timetable to a Lead Cases Trial because it would reduce their prospects of getting lots of disclosure upfront.

5. REQUEST FOR FURTHER INFORMATION

- 5.1 Under the Court Rules, Freeths are entitled to make a "Request for Further Information" or "RFI". If Post Office does not voluntarily answer an RFI, Freeths can seek a Court Order compelling Post Office to respond.
- 5.2 The Claimants have requested that Post Office provide further information on Post Office's case relating to which terms should be implied into the contract. Freeths have asked for a response to

by 19 January 2018, failing which Freeths will make an application to the Court at the upcoming CMC.

- 5.3 Post Office's position is that, if there is a gap in the contract that needs an implied term, this gap can be sufficiently addressed by the two implied terms proposed by Post Office and which have already been accepted by the Claimants. It is therefore not necessary to imply any of the Claimants' terms. This point will be at the very heart of the November 2018 trial.
- 5.4 The Claimants are seeking confirmation that Post Office's implied terms cover the same subject matter as the Claimants' implied terms and have the same legal effect (i.e. is there an overlap). They are trying to get Post Office to accept the Claimants' implied terms by the back-door.
- 5.5 The Judge may view this as a simple question that Post Office should be able to answer fully however, in practice, this question is very difficult to answer because it is factually sensitive and the Claimants have not yet set out the factual basis on which their terms are to be implied.
- 5.6 Post Office's answer to the RFI will essentially be that it cannot answer the question at this stage without further information from the Claimants. The risk is that this negative response may look to the Court like Post Office is being obstructive. We have discussed this at length with Counsel and believe that it is important to give the correct answer to the Claimants' RFI, even though that means giving a non-answer which may play out poorly with the Court.
- 5.7 We are particularly concerned with the RFI question coming up at the CMC on 2 February 2018. At that CMC, we will likely be proposing a timetable that runs to a trial in 2020, which is far later than the Judge was expecting. The RFI issue may unfairly skew the Judge's view of Post Office, labelling it as being difficult and then rejecting its long term strategy as delay tactic. It is important therefore to keep the RFI and the long term strategy issues separated.
- 5.8 In a draft Court Order from Freeths, they have provisionally included wording that Post Office be ordered to respond to the RFI by 9 February 2018. In an unusual step, we propose accepting that Order against Post Office as it has the effect of moving the RFI problem to after the 2 February CMC.
- 5.9 The risk of agreeing to the Claimants' proposed Order is that the Judge may assume that Post Office has failed to co-operate with the RFI. However, Freeths have not sought to make any such allegation so far and this can be explained by Counsel in Court if needed. In any event, this is a lesser problem than the risk of dealing with a contested RFI application at the CMC.

6. RECOMMENDATION

- 6.1 We recommend that Post Office:
 - 6.1.1 agrees to vacate the March 2019 trial;
 - 6.1.2 agrees to use its best endeavours to attend a mediation but opposes a formal stay;
 - 6.1.3 asks the Court to set down a full trial timetable to a Lead Cases Trial in 2020;
 - 6.1.4 maintains its current stance on disclosure (ie. less disclosure than the Claimants want); and
 - 6.1.5 accepts the Claimants' Order against Post Office for further information.
- 6.2 Although attempts will be made over the next two weeks to close out any remaining points of dispute with Freeths, we doubt that this will be successful on all fronts. There will therefore be some level of dispute at the CMC, but these disputes are fair points of disagreement. We would normally be confident that a Judge would see the benefit of the work done by the parties to date and then assist the parties in closing out the remaining points of dispute. However, our Judge is

unpredictable, and there remains a chance that he may criticise the parties. This risk is however significantly lower than it was at the last Steering Group meeting due to Freeths having accepted several of Post Office's key proposals.

[Dates in red set out a timetable to a trial in May 2020]

[Dates in green set out a timetable to a trial in October 2020]

Date	Event
9 February 2018	Post Office responds to the Claimants' Request for Further Information.
2 March 2018	Final Lead Cases are selected for the Common Issue Trial <i>[Freeths have requested that the original deadline is moved back by 1 week]</i> .
28 February 2018	Stage 1 Disclosure Parties provide disclosure relating to the Lead Claimants to assist with pleadings.
February & March 2018	Parties to agree the criteria on which to pick Lead Claimants for the Lead Claimant Trial. Any issues to be resolved by the Judge.
April 2018	Following receipt of the pleadings, the parties seek to refine the disclosure to be provided at Stage 2. Any issues to be resolved by the Judge.
May 2018	Stage 2 Disclosure Parties provide disclosure relating to the Common Issues Trial.
May 2018	Parties select pool of 30 Claimants for Lead Claimant Trial.
Beginning of August 2018	Stage 3 Disclose Parties provide disclosure relating to Claimants for the Lead Claimant Trial.
End of August 2018	Reduce pool of Claimants for the Lead Claimant Trial.
19 September 2018	Hearing with the Managing Judge to discuss any outstanding issues.
January to March 2019	Parties to use best endeavours to hold a mediation.
February to June 2019 / March to August 2019	Pleadings for Lead Claimant Trial.
March 2019	March trial is vacated.
July 2019 / September 2019	Agree final Claimants for Lead Claimant Trial.
May 2019 / July 2019	Parties to agree the scope of Stage 4 Disclosure (relating to the Lead Claimant Trial).
August 2019 / October 2019	Stage 4 Disclosure to be provided.
October 2019 / January 2020	Witness Statements.

Date	Event
September 2019 / November 2019	Parties to agree the scope of expert evidence.
December to February 2020 / April to July 2020	Expert reports to be provided.
May 2020 / October 2020	Lead Cases Trial.