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Bates & others v Post Office Limited

Note of Conference with Lord Grabiner QC of 18 March 2019 at One Essex Court

In attendance:

- Lord Grabiner QC
- Jane MacLeod (GC Post Office)
- David Cavender QC (Barrister at One Essex Court)
- Gideon Cohen (Barrister at One Essex Court)
- Tom Beezer (Partner at Womble Bond Dickinson)

Lord Neuberger's Note

Lord Grabiner explained that he had reviewed:

- Lord Neuberger's note of 14th March 2019 (attached),
- an associated background note from David Cavender QC of 13th March 2019 (attached); and
- he had substantially reviewed the Judgment of Mr Justice Fraser in what has become called the "Common Issues Trial" ("CIT").

Lord Grabiner confirmed that he agreed with the content of Lord Neuberger's note.

Lord Grabiner's Advice:

Procedural Structure: Had the CIT been properly confined to what 'the contract(s)' mean and issues around construction only, then the structure set up by the Judge could possibly have worked, although the timing of trial 2 (Horizon) would always have been awkward if there were to be any appeal of any part of the CIT. The Judge did not confine himself to the parameters that he had set up for the CIT and went way beyond the stated scope of the CIT. He made findings of fact (which he had no need to make at that point in time) without proper evidence or disclosure from Post Office. Lord Grabiner commented that the Judge had "*trespassed onto matters that are for later trials*" and the fundamental problem that builds into the sequential trial structure is that those findings and opinions (which should not have been made or voiced) will be carried through into the later trials **and that is the "perceived bias" that gives rise to the need for a recusal application**. Lord Grabiner commented that the case management displayed in this matter was extremely poor. It was noted that the problems now experienced by Post Office and manifested in the CIT Judgment were predicted multiple times before this Judge at the making of the GLO and many times after. Lord Grabiner also noted that Post Office had attempted to deal with the issue by striking out the Claimants evidence that was irrelevant to the CIT, yet the Judge had refused to do that. The Judge had sufficient warning of the risk of him taking into account evidence that was irrelevant to the CIT and taking into account post contractual matters in a trial supposed to be confined to construction issues only; however he had "*not been able to restrain himself*". As an aside, the number of implied terms found by the Judge was wholly extraordinary but that was to be a matter for an appeal on law – but Lord Grabiner expressed his shock that an English High Court Judge could have arrived at the CIT Judgment.

Urgency: An application for recusal should be made urgently. It was noted that such an application will be tricky and contested so significant preparatory work must be done, however given that the Horizon trial is underway there is urgency in this situation and to delay making an application may cause Post Office to waive its right to do so. If no application is made then findings of fact based on expert evidence will be made in the Horizon trial underway now and Post Office will be stuck with those findings. They will not be appealable.

Duty to act: Lord Grabiner explained that in his view if there is no recusal application made then Post Office will lose the series of trials set up in this matter. Without a recusal application Post Office is stuck with this Judge. An appeal on the law may correct some of the very significant errors in the CIT

Judgment but then the case will be sent back to this Judge who has demonstrable apparent bias against Post Office and hence the firm conclusion that Post Office will lose and the financial impact of that will be substantial. Recusal is therefore essential and Lord Grabiner asserted that in the face of legal advice from Lord Neuberger that recusal should be applied for and the damages that Post Office will pay out on a loss, then it was Lord Grabiner's view that there was a duty on Post Office to seek recusal. Lord Grabiner stated that in his view the Board of Post Office had no option but to seek recusal.

Prospects: Lord Grabiner stated that:

- there are strong arguments in favour of an application for recusal, and
- it was his strong view that a recusal application was the right course of action, and
- there is a "*serious prospect of success*", and
- and that this Judge had done "*an unbelievable nonsense and demonstrated apparent bias*".