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BATES and others v POST OFFICE LIMITED

OBSERVATIONS ON RECUSAL APPLICATION

1. These observations are based on the draft Judgment referred to in paragraph 3 below, a "Note on background to possible recusal application" dated 13 March 2019 ("the Note") and a discussion with David Cavender QC. I do not propose to set out the background facts in any detail because they are helpfully and clearly explained in the Note.
2. The hearing before Fraser J ("the Judge") in November/December 2018 ("the Common Issues trial") concerned 23 issues (several of which had a number of sub-issues) of interpretation of two forms of contract (SPMC and NTC) under which Post Office Ltd ("PO") engaged sub-postmasters. The issues arose in proceedings brought by around 600 claimants, each of whom was responsible for running a branch post office, and PO. The proceedings are the subject of a Group Litigation Order. The Judge, who was appointed to deal with the proceedings by the President of the Queen's Bench Division, has ordered that they to be dealt with in a series of trials, of which the first concerned these issues of interpretation of the SPMC and the NTC ("the contracts") entered into by the claimants.
3. The Judge has made available a draft judgment ("the Judgment") which I understand he is amending, and which he intends to hand down in final form shortly. (These observations are prepared on the assumption that the final judgment will be in substantially the same terms as the draft). Meanwhile, as I understand it, the Judge is proceeding with the next stage of the proceedings ("the current hearing"), which will involve him making findings of fact in relation to various disputes (known as the Horizon Issues) concerning the characteristics and reliability of the PO's computer system, and involves a mix of factual and expert evidence.
4. The PO has three concerns about the Judgment, which are to an extent connected with each other. The first ("the interpretation issue") is that the Judge went

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wrong, in some respects badly wrong, in his reasoning and conclusions on the many of the issues of interpretation. The second concern ("the unfairness issue") is that the Judge made findings of fact in relation to matters that were not before him in the Common Issues trial and in relation to which there had been no disclosure and the PO had not adduced evidence. The unfairness issue inter-relates with the interpretation issue, as it appears likely that the Judge has or may have used facts that he should not have found to interpret the contract and, in particular, justify the implication of terms as "necessary". The third concern ("the recusal issue") is that the Judge made findings of fact (which are also the subject of the unfairness issue) in such a way as to betray a prejudice against the PO which justify the PO objecting to his continuing to hear these proceedings.

5. These observations are principally directed to the recusal issue, and how it might be best addressed. I have looked at the Judge's reasoning and conclusions on the interpretation issue only very cursorily, and it seems to me that at least some of them raise quite significant points on which the PO has a reasonable case, and, at least on the face of it, some points on which the PO has a pretty strong case. The "relational contract"/good faith justification for the implication of terms, which plays a prominent part in the Judge's reasoning is controversial in itself, but, quite apart from that, the Judge appears to have extended its application in a fairly radical way. It also seems to me that there is often very little or no reasoning offered to justify the implication of terms on the alternative, and conventional, basis of necessity.

6. At any rate this stage, I am left with the uneasy feeling that the real justification in the Judge's mind for the implication for at least many of the terms which the Judge implied was the raft of adverse factual findings that he has made. If this can be shown, that is impermissible, as the question of the implication of terms must be considered as at the date of contracting. Interpretation of contracts must be carried out by reference to the factual and commercial circumstances in which the contract was made, and that cannot include facts which occurred after the contract was made. In the present case, there may be room for some argument that some post-contractual factual evidence could have ben relevant to some or

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all of Common Issues 10-13, but I am dubious whether that could be maintained, and anyway the relevant facts would presumably be very limited.

7. The construction issue ties in with the unfairness issue, in the sense that, if the point made in paragraph 6 above is right, the Judge should not have made most of the findings about the factual evidence and the witnesses that he did, especially in the light of what had been said to and by him as discussed in paragraphs 13, 16 and 18 below, and that it represented a serious procedural unfairness that he did so. There seems to me to be real force in that argument.
8. However, the urgent issue is the recusal issue. Reading the Judgment, one is struck by the fact that the issues which the Judge had to decide, which he lists in paragraph 45 of the Judgment, all involve questions of interpretation or implied terms. Yet many of the paragraphs in the Judgment are given over to descriptions of evidence, and findings of fact, in relation to what happened after the contracts had been entered into, often in trenchant, even highly critical, terms. And, importantly, as I understand it, those descriptions and findings relate to witnesses who will be called at later trials and evidence which will have to be considered at later trials.
9. Assuming that the PO decides to appeal on the recusal issue, it will need permission to appeal (as it will on the interpretation and unfairness issues) which should be sought first from the Judge, and, if he refuses it, from the Court of Appeal. That, of itself, presents no particular problems. At least on the basis of what I have read, I would be very surprised if the Court of Appeal refused permission to appeal on at least some of the interpretation issues, and I would be surprised if they refused permission to appeal on the unfairness and recusal issues.
10. Turning now to the recusal issue, it proceeds on the basis that the Judge was wrong in principle and unfair in practice to make in the Judgment adverse findings of fact about the character and evidence of certain parties and witnesses, such that he cannot now fairly proceed to conduct the remaining trials in these proceedings.

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11. In that connection, the facts are set out in the Note. The PO's case is that the Judge made findings which related to events after the contracts had been entered into, which were irrelevant to the issues before him, in circumstances where there had not been disclosure in relation to those issues and where the PO had not prepared for the hearing to determine factual issues, or proffered or prepared witnesses for a factual investigation.
12. On reading the judgment, three possible problems to the PO succeeding on the recusal issue occurred to me. First, the evidence had been called, and, even though it was not relevant, the Judge was, in effect, entitled to do his best with it. Secondly, the findings the Judge made did not really impinge on the subsequent trials. Thirdly, in various passages, the Judge went out of his way to make it clear that he was not making conclusive findings (see eg paragraphs 21, 60, 124 of the Judgment).
13. So far as the first point is concerned, it seems to me that the PO has a strong counter-argument based on what they said and indeed the Judge said, prior to the first trial (para 5a-m of the Note), what they said at the opening of the first trial (second paras 1 and 2 of the Note) and what they said in their closing speech (second paras 3 and 4 of the Note). Mr Cavender QC summarised the PO's position admirably in these terms when closing his case:

> "So in summary on important points of this introduction in terms of scope, the court should not have regard to post-contractual evidence, evidence of breach, for two distinct reasons: firstly, to do so would involve a basic error of law, and, secondly, would involve a serious procedural irregularity. It would do the second because the orders of the court setting out the issues for trial and the issues on which evidence were to be admitted is set out in the Common Issues. The Statements of Case have been ordered to be limited to those issues … and the witness statements were limited to those issues." (Day 14, page 64)

14. I very much doubt that it can be said that, for instance by not appealing the Judge's refusal to shut out irrelevant evidence, or by cross-examining on some of the irrelevant evidence, the PO waived any right to object, but I have not had the opportunity of considering all the transcripts.

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15. The mere fact that a judge makes adverse findings against a party whose evidence he will have to consider will not of course justify a recusal application: see *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 and *Otkritie International Investment Management Limited v Urumov* [2014] EWCA Civ 1315, para 16. The fact that a Judge, who has made adverse findings about a party or his case, may then go on to determine other issues of fact, law or discretion in relation to that party is, in effect, part of the normal give-and-take of litigation. However, very different considerations apply when the findings (or even observations – see for instance *El-Farargy v El Farargy* [2007] EWCA Civ 1149) should not have been made.

16. As to the second concern I mention in para 12 above, the relevant findings are set out in paragraphs 7-15 of the Note, and disparaging remarks about the PO's conduct are set out in paragraphs 16-23 of the Note. I am not sufficiently acquainted with the issues in the present and future trials to know whether, and to what extent, the findings in paragraphs 7-15 are relevant to the further trials, but, to put it at its lowest, it does not seem unlikely that they are. On that basis, I think that my second concern is largely put to rest. As to the disparaging remarks, much depends how much they were based on findings or evidence that he ought not have made or heard respectively.

17. Turning to the third concern mentioned in para 12 above, it is, I suppose, conceivable that an appellate court could conclude that statements such as those made in paragraphs 21, 60 and 124 of the judgment can be invoked to expunge the adverse findings rather like the inclusion of a "subject to contract" proviso can be invoked to establish that what is otherwise plainly a contractual document is not. However, I would not expect the Court of Appeal to accept such an argument. We are not here concerned with hallowed expressions in the context of technical law: we are concerned with bias, and the test is very well established: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" - *Porter v Magill* [2002] 2 AC 357, para 103.

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18. In my view, the Judge's attempts to distance himself from, or to water down, his illegitimate findings, in some ways render them worse rather than better. What was he doing making findings (sometimes in trenchant, even damning terms about the PO's witnesses, and exculpatory or better about several of the Claimants), if he knew that the findings were, at best, unnecessary, indeed inappropriate? Having said that, if an appellate court was for some reason desperate to rescue the Judge, I suppose that it is conceivable that they would refuse a recusal order on this ground. But it does not appear to me to be at all likely: I do not think the notional "fair-minded and informed observer, having considered the facts, would conclude that there was [no] real possibility" of the Judge having made findings unfairly about a witness and/or his/her evidence, which renders it unfair for the judge to proceed further with these proceedings.
19. For all the reasons set out above I consider that there are reasonable grounds for PO to bring an application to recuse the Judge in these proceedings. Furthermore, if it is PO's intention to bring an appeal on the basis of the "unfairness issue" (as I understand to be the case) – and on that appeal will ask the Court of Appeal to return the case to a different Judge, then the PO has little option but to seek to get the Judge to recuse himself at this stage.
20. I turn to the question what to do about the current hearing, bearing in mind that the PO does not want to alienate or be seen to threaten the Judge. In my view, if the recusal argument is to be pursued in the Court of Appeal, it would be right to apply to the Judge to recuse himself from the present trial. It could be seen to be an aggressive step to take, and it would have to be handled carefully, but if the PO's case is that, having seen the final version of the Judgment, the Judge should not be conducting further trials in the proceedings, I think the PO could risk being held to have waived its rights, or at least to have weakened its position on the recusal issue, if it sits on its hands and lets the present trial proceed without making its objection clear. The fact that this course would be taken without notice and after the present trial has begun cannot be blamed on the PO: until they have the Judgment, they are not in a position to take a view on the recusal issue.

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21. I had wondered whether there might be a middle course of telling the Claimants about the proposed recusal application and asking them whether they would like the PO to raise the point with the Judge now or not (on the basis that it would not be said to waive or weaken the PO's rights). However, I think that there is also the point that the Judge may decide to adjourn the current hearing if he knew of the recusal issue. From what I have heard, this is unlikely, but the PO ought to give him the chance, bearing in mind a party's duties under the Overriding Objective.
22. It would be worth considering whether to have the application to the Judge for permission to appeal on the recusal and interpretation issues heard at the same time as the application to consider recusing himself or, if he does not, adjourning the current trial. That said, the recusal application is urgent and it might be better to give further time to properly draft and present the permission to appeal application to the Judge. So it may well be they will need to be separate applications.
23. On the issue of presentation of the argument to the Judge, I make the following suggestions with some diffidence, as it is very much for the advocate presenting the case to decide how to play it. But I can see some benefit in a different leading counsel from Mr Cavender QC presented the argument; that is not implying any criticism of Mr Cavender: it simply would indicate that this is a not a disappointed advocate venting his spleen (which, given what I have read and been told) is the sort of reaction one might expect from the Judge. I also think that it should be said that the point is being brought before the Court because of the very unusual circumstances, namely the Judgment in the first trial just being handed down, and the second trial being just under way. It should also be pointed out that the PO considers that it is under a duty to raise the point now, as otherwise it may be held to have waived it, and anyway the Judge's attention should be drawn to the point so that he can decide whether to adjourn or proceed with the second trial. If he suggests that this is being raised as a threat, then the PO can say that it is being/would have been raised anyway as a ground on which they would seek permission to appeal.

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24. The PO could also consider delicately suggest that he might like to refer the recusal application to another Judge as suggested by Ward LJ in *El-Farargy*, para 32. But that is a point which has classically to be played by ear, and may well be best omitted.

25. Assuming (which seems very likely from what I have heard) the Judge refuses to recuse himself or to adjourn the current trial, consideration should perhaps be given to appealing that decision urgently (a) to ensure that it cannot be said that the PO has waived its right, (b) to bring this matter to the attention of the Court of Appeal in the hope that they might expedite the application for permission to appeal. Peter Smith J's refusal on a Friday to recuse himself was reversed by the Court of Appeal the following Monday in *Howell v Lees Millais* [2007] EWCA Civ 720, but that was a very plain and very simple case.

GRO

David Neuberger

One Essex Court

14 March 2019