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PTA Template 269C1 - OCT16 - First Appeal

(GS 17.10.18)

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **A1/2019/0855**

Her Majesty's Court of Appeal SEAL
10 MAY 2019

Post Office –v– Bates & Ors

ORDER made by the Rt. Hon. Lord Justice Coulson

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision: Permission to appeal against Judgment No.4 (Recusal) **REFUSED**

Reasons

Please see separate document entitled 'Reasons for Refusal of Application for Permission to Appeal against Judgment No.4 (Recusal) dated 09.04.2019'.

HER MAJESTY'S COURT OF APPEAL E & W

Information for or directions to the parties

Mediation: Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)? Yes/No (delete as appropriate)

Pilot categories:

- All cases involving a litigant in person (other than immigration and family appeals)
- Personal injury and clinical negligence cases;
- All other professional negligence cases;
- Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;
- Boundary disputes;
- Inheritance disputes.
- EAT Appeals
- Residential landlord and tenant appeals

If yes, is there any reason not to refer to CAMS mediation under the pilot? Yes/No (delete as appropriate)

If yes, please give reason:

Non-pilot cases: Do you wish to make a recommendation for mediation? Yes/No (delete as appropriate)

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)

b) any expedition

GRO

Signed:

Date: 09.05.2019

By the Court

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **A1/2019/0855**

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Reasons for Refusal of Application for Permission to Appeal against Judgment No 4 (Recusal) dated 09.04.19

1. Introduction

1. By an application dated 11 April 2019, the applicant, the Post Office ("the PO") seeks permission to appeal against Judgment No 4 of Fraser J ("the judge") dated 9 April 2019. In Judgment 4 ([2019] EWHC 871 (QB)), the judge refused to recuse himself from hearing and managing the ongoing group litigation in which the PO is defending itself against claims worth £18 million-odd brought by a group of sub-postmasters and mistresses ("SPMs") arising out of the introduction of a new IT system ("Horizon").

2. *Save where stated to the contrary, all paragraph numbers referred to in square brackets below are to Judgment 4.*

3. For the reasons set out below, permission to appeal against Judgment 4 is refused. I set out the reasons for that conclusion in greater detail than usual only because of the volume and nature of the criticisms which have been made, and the importance of the group litigation to both parties. I do not do so because of the merits of the application itself, which in my view is without substance.

2. Context/Background

4. The judge has already provided three lengthy judgments: Judgment No.2, dealing principally with the PO's strike out application and questions of admissibility, dated 15 October 2018 ([2018] EWHC 2698 (QB)); Judgment No.3, referred to as the Common Issues judgment, dated 15 March 2019 ([2019] EWHC 606 (QB)); and Judgment 4.

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5. The next sub-trial, dealing with the Horizon issues which are central to the complaints of the SPMs, is currently well-advanced: indeed, the unheralded recusal application was not made until 21 March 2019, the last day of the factual evidence in the Horizon sub-trial. The relevant factual evidence is now complete but the expert evidence has not yet been heard and awaits the outcome of this application.

6. There was no application for permission to appeal in respect of Judgment 2. There, the judge made a number of criticisms of the stance adopted by the PO in respect of the SPM's written evidence. In addition, there is force in the submissions at paragraphs 12 – 13 of the SPMs' brief statement of objection (undated, but provided on 15 April 2019), that the PO's strike-out application arose because the PO wished to adduce extensive factual evidence in their favour, but objected to any evidence to the contrary from the SPMs. As they put it, "the Post Office wanted the case decided all one way". There remains a distinct flavour of that approach within the recusal application.

7. There is a wider significance arising out of the ongoing nature of this group litigation. A case like this is divided into sub-trials for the convenience of the parties and their advisors. A judge will do his or her best to ensure that, in any particular sub-trial, his or her findings of fact or other observations are anchored to the points in issue in that sub-trial, to avoid straying into matters which may be or might become controversial further down the line.

8. But it is necessary to be realistic. Here, there is a single judge, who heard and considered the evidence given over many weeks, and then produced Judgment 3 on the Common Issues that was over 1,100 substantive paragraphs in length.

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Policing the precise boundaries of that sub-trial would not have been his main focus; that would have been the resolution of the myriad issues raised by the parties. They, by contrast, were represented by a total of eight counsel and extensive teams of solicitors.

9. So whilst it will usually be possible to go through such a lengthy judgment with a fine-tooth comb and identify odd findings or observations which, arguably, may not have been directly relevant to the issues in that particular sub-trial, that is ultimately a futile exercise. What matters for the purposes of any recusal application is whether, when looking at Judgment 3 as a whole, a fair-minded observer would conclude that there was a real possibility that, to the extent that he made such findings, the judge was biased in so doing. That is a very different thing and, as explained in greater detail below, the PO has not come close to demonstrating it in this case.

3. Outcome of the Common Issues Sub-Trial

10. The Common Issues sub-trial was concerned with a wide variety of disputes, including questions of contract formation and construction. On those issues, the SPMs were successful on some, and the PO were successful on others. Unlike in some sub-trials, there was no knock-out blow one way or another. At [267] the judge made the point that the PO had been at least partially successful on the Common Issues.

11. It is therefore a curious feature of the recusal application that it was made by a party, the PO, who were partially successful in the relevant sub-trial. As the judge explained at [264] – [266], the PO is now having to argue that the outcome of the sub-trial was irrelevant to the recusal application, and that

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what mattered were individual sentences, scattered through Judgment 3, which they say amount to a demonstration of apparent bias. The judge thought that was a misconceived approach. So do I. Whilst of course the outcome of the sub-trial cannot be the deciding factor in a case of apparent bias, it is not a bad place to start. It is on any view clearly relevant: a fair-minded observer is unlikely to think that the judge is biased against party X if he has just delivered a judgment in which party X was successful.

4. The Law

12. The judge set out the relevant law in detail between [27] and [77]. In this he highlighted the well-known statements of principle in *Locabail* and *Porter v McGill*, and then dealt with some of the more recent cases, particularly those arising out of ongoing litigation, such as *Otkritie* (in which this court rejected the allegations of apparent bias), and *Mengiste (*in which this court accepted that the judge ought to have qualified some of his observations by noting that they were provisional views or views reached on limited evidence).

13. There is no criticism anywhere in the PO's skeleton argument of the judge's approach to the law on apparent bias. Although the PO sets out the applicable legal principles at length from paragraphs 66 – 85 of their skeleton argument, this just redoes the exercise undertaken by the judge in Judgment 4. At no point in those paragraphs do they suggest that the judge erred in law, or failed to ask himself the right questions.

14. Accordingly, this is an application for permission to appeal against a judgment which, on the PO's own case, properly summarised the relevant legal

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principles. The only remaining issue is whether the judge erred in applying those principles to the particulars of the application for recusal.

5. The Substantive Criticisms

15. It has not always been easy to categorise the particulars of apparent bias in the application for permission to appeal. The skeleton argument is oddly structured and repetitive: for example, the heading 'Critical Invective' appears three times, once before paragraphs 61 – 65, again before paragraph 86 and again before paragraphs 120 – 124.

16. However, a careful analysis leads to the identification of the following three categories of complaint relied on in support of the PO's application that the judge was wrong not to recuse himself. They are:

(a) The making of irrelevant or unnecessary findings of facts/observations which were outside the scope of the Common Issues trial (**Section 6** below);

(b) The making of findings that prejudge issues that will form the basis of future sub-trials (**Section 7** below);

(c) The making of comments or observations which are said to amount to "critical invective" of the PO and/or its witnesses (**Section 8** below).

17. Although there is a further issue – indeed, the PO's skeleton argument starts with it – about the judge's finding of waiver, this is only of relevance if any part of the application for permission to appeal on the three substantive categories of complaint (identified above) is successful. It there is no basis for

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an appeal based on any of those three grounds, the finding as to waiver is immaterial.

18. One other general point needs to be made about the particular passages relied on by the PO. The judge said in a number of different places in Judgment 4 that many of the phrases or sentences upon which the recusal application is based are taken wholly out of context by the PO. I agree with that conclusion. This is particularly egregious where, as happens repeatedly, the sentence before or the sentence after the phrase/sentence relied on makes clear that, for example, it is not a finding of fact, or it is an observation based on the PO's own evidence. The fair-minded observer would only consider whether the passages relied on gave rise to a real possibility that the judge was biased by considering those passages in full and in context. That is what being "fair-minded" requires. I consider that the recusal application and the appeal ignore this basic principle and are fatally flawed in consequence.

6. Irrelevant/Unnecessary Findings of Fact

19. As noted above, the first general category of complaint is that the judge made numerous irrelevant or unnecessary or findings of fact. The PO's argument is that, in consequence, since many of these findings were against the PO, there was a real possibility of bias.

20. I consider that this argument fails for two principal reasons. First, the judge in Judgment 4 is meticulous in dealing with and answering these allegations: see in particular [140] – [179] and [235] – [245]. He explained, in respect of those findings said to be unnecessary or outside the scope of the Common Issues, why that finding was made and to which wider argument it went. I am entirely

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satisfied that the judge's explanation is comprehensive and correct. There is no realistic prospect of the PO arguing to the contrary.

21. Secondly, the PO's application is based on a total disregard of what it actually said and did before and during the Common Issues sub-trial. Paragraphs 28-48 and 115-119 of the PO's skeleton argument, in keeping with the oral arguments made to the judge, endeavour to present the sub-trial as a clearly-defined, simple set of issues concerned with the construction of contract terms, where factual disputes were few and far between. On any view of the papers, that is a significant misrepresentation, not only of the issues themselves, but also of the way in which the PO itself ran its case before the judge. It raised factual disputes at every turn.

22. Much of the material upon which the recusal application relies stems from the PO's own case: either the evidence of its own witnesses, or its cross-examination of the SPMs. For example, it is noted at paragraphs 15 and 16 of the SPMs' brief statement of objection that the PO cross-examined and sought findings on Mr Abdulla's use of the Helpline, and adduced from Mr Beal (their first witness) a good deal of evidence about the NFSB. For the PO now to say – as they do - that actually all of this was irrelevant, and that the judge demonstrated apparent bias by dealing with and making findings upon those matters which the PO itself had put in issue, is an untenable position to adopt.

23. Notwithstanding the fact that these two reasons provide a complete answer to the first ground of complaint, it is perhaps helpful to take some generic examples of the sorts of findings that were in issue in the recusal application to

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demonstrate how and why they arose, in order to demonstrate that the PO's appeal is without substance.

24. Perhaps the most obvious example concerns the findings of fact arising out of the PO's decision to put the credit of at least some of the lead claimants in issue. As the judge explains at [82] – [90], and also at [140] – [163], the PO's stance throughout the Common Issues trial was that at least some of the lead claimants had been guilty of criminal offences. For example, Mr Abdullah was said, in the PO's written closing submissions, to have "lied frequently and brazenly". These allegations, and others like them, were widely reported in the Press. In such circumstances the judge was bound to make findings of fact based on the evidence adduced via the PO's cross-examination and their withering final submissions. For the PO now to complain about the making of findings on these issues, which arose out of the way which they themselves put their case, is absurd.

25. Another point arises from the PO's strategic decision to cross-examine some of the lead claimants as to credit. As already noted, the PO's aggressive (and on the judge's findings, unjustified) stance was maintained in their written closing submissions. However, as the judge noted at [83], in his final oral submissions, leading counsel for the PO asked the judge to make no findings of fact. The judge recorded that this was a "confused position" and gave the PO an opportunity to clarify their stance. The PO took that opportunity, but merely deleted one sentence from their closing submissions (leaving intact the principal submission that Mr Abdullah had lied "frequently and brazenly"). That therefore meant that the judge had to decide the matters of fact put in

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issue by the PO. But the judge is now criticised for describing the PO's position as "confused": that is one of the pieces of "critical invective" on which the recusal application is based (others are dealt with in **Section 8** below).

26. I refute that criticism. The PO's position *was* confused, for the reasons I have given. It has all the hallmarks of a strategic decision which, as the Common Issues sub-trial went on, the PO had second thoughts about. Hence the back-tracking in the closing oral submissions. But it was much too late by that stage to pretend that the aggressive cross-examination had not happened, or to expect the judge not to make findings in consequence. Neither could this be described as "critical invective". It was a statement of fact: the PO's position was plainly confused. And finally, given that the judge had expressly raised the point and provided the PO with the opportunity of doing something about it, I agree with [197]: if anything, his approach was generous to the PO.

27. Another repeated criticism made in the PO's skeleton argument is based on the proposition that, because the Common Issues sub-trial was principally concerned with questions of construction, it cannot have been within the scope of that sub-trial for there to be so many findings of fact. But that is much too simplistic; for example, it ignores the factual background to the contracts which is a necessary element of any construction exercise, and which, as the judge made plain ([108] and [157]) were hotly disputed. It was therefore inevitable that the judge would have to make findings of fact in relation to the (different) backgrounds to the (different) contracts.

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28. The same point can be made in answer to the criticism that, although the sub-trial was concerned with contract formation, the judge dealt with various post-contractual matters, such as training, the Helpline and the relationship with the NFSP. Of course, depending on the circumstances, post-contractual conduct can sometimes be a relevant and admissible aid to construction. Moreover, some of these findings related to the agency issues, which were properly matters of fact in any event: the PO certainly thought so during the sub-trial.

29. Accordingly, for the reasons explained in Judgment 4, I am satisfied that no realistic criticism can be made of the making of the findings of fact by the judge. They were in accordance with the Common Issues, as they were understood and pursued by each side at the sub-trial. There is no prospect of the PO arguing to the contrary.

30. However, assume for a moment that this was wrong, and there were some findings of fact which, with hindsight, applying a rigid interpretation of the Common Issues, might have slipped through the net, and might therefore be labelled as "unnecessary". Would such findings give rise to the possibility that, in the view of the fair-minded observer, the judge was biased? The general answer must plainly be in the negative. The mere fact that in a lengthy judgment, the judge may have strayed beyond the strict scope of a particular issue, out of thousands in dispute, is, in one sense, neither here nor there. It is quite capable of correction at any subsequent sub-trial. The making of unnecessary findings of fact could only give rise to a claim for apparent bias if it amounted to a pre-judgment. I deal with that separate topic in **Section 7** below.

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7. Pre-Judgment

31. Throughout Judgment 3, the judge was plainly aware that he was being asked to address matters which might be revisited in later sub-trials concerned with breach, causation and loss. That is apparent from the sheer volume of occasions when the judge expressly says in Judgment 3 that he was not making findings as to breach, causation or loss, or that the fact that he accepted a witness' evidence in the Common Issues sub-trial did not mean that he would accept that witness' evidence at a later stage.

32. It is unnecessary to set out here all of these different caveats and qualifications because, with commendable thoroughness, the judge attempted that exercise in Judgment 4. I refer in particular to [90], [93], [125] – [137], [140] – [143], [169], and [178]. In those and other paragraphs, referring back to different aspects of Judgment 3, the judge made plain that, not only was he *not* reaching final conclusions on matters which were potentially outside the scope of the Common Issues sub-trial, but also that he was expressly leaving the matter open until the relevant sub-trial.

33. On the face of it, therefore, the judge's repeated use of these unequivocal caveats or qualifications constitutes a complete and comprehensive answer to this part of the proposed appeal and, in particular, to paragraphs 49 – 60 and 87 – 119 of the PO's skeleton argument. Not only was the judge not pre-judging any future issue, he was saying in express terms that he would not do so.

34. In those circumstances, the PO was obliged to argue that what the judge repeatedly said by way of caveat or qualification was "a mantra" (presumably

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meaning a repetitive and meaningless form of words), "which would not convince the fair-minded observer". That is a surprising submission. On its face, it seems to assume that it was for the judge to persuade the fair-minded observer that he was *not* biased, an inversion of the ordinary burden of proof. More seriously, it suggests bad faith on the part of the judge: that, although he was expressly saying that he had not pre-judged a particular issue, in fact he had. At its starkest, it is a suggestion that the judge was guilty of conscious misrepresentation: see, for example, paragraph 109 of the PO's skeleton argument.

35. There is simply no basis for such a submission. There is nothing on the face of Judgment 3, or the collection of the various references to the caveats and qualifications in Judgment 4, to indicate that, when the judge said that he had not prejudged a particular matter, he did not mean precisely that. If it became a mantra, that was only because it was often repeated, and that itself is unsurprising in such a long judgment. Indeed, the fact that there are so many caveats and qualifications is testimony to the fact that the judge was very aware of guarding against the dangers of pre-judgment.

36. Moreover, what the judge did was precisely in accordance with the law. The judge in *Mengiste* should have recused himself because he made criticisms "without inserting an appropriate qualification that they were provisional views, or views made on the limited evidence available to him, thus being seen to leave the door open to the possibility that there might be another explanation". In this case, the judge did just that: he qualified his findings and he repeatedly made plain that the door was open, just as *Mengiste* required

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him to do. To say now that, in some way, these were just empty words and should be discounted, or considered as a basis for recusal, is wholly unjustified.

37. I note that paragraphs 50-60 of the PO's skeleton identifies various alleged pre-judgments. But these paragraphs make no reference to the fact that this issue was expressly addressed by the judge (see the references in paragraph 32 above). Although this purports to be an appeal against Judgment 4, some parts of the PO's skeleton argument appear to operate as if Judgment 4 had never happened.

38. I take just two examples:

-It is said at paragraph 52 of the PO's skeleton that there was no indication that the judge was going to revisit any of his findings in Judgment 3 involving (for example) Mrs Stockdale's actions and that they therefore amounted to a pre-judgment. But [328] explains that the judge had expressly said in Judgment 3 that "whether or not Mrs Stockdale was right to act as she did at the time regarding her accounts is a matter for another trial. As with the other Lead Claimants, I am making no findings in respect of breach, causation or loss."

-It is said at paragraph 59 of the skeleton that paragraph 955 from Judgment 3 is a pre-judgment. But [118] explains that that is because the passage cited by the PO omits the opening words "I have certain (non-binding) observations…"

39. Paragraphs 89-119 of the PO's skeleton do at least endeavour to address some of the points made in Judgment 4. But these paragraphs are based on at least

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three false premises: 1) that this was a sub-trial limited to issues of pure construction (as explained above, it emphatically was not); 2) that issues of factual matrix, credit and agency did not require findings of fact (that was a matter for the judge and he decided that they did) ; and 3) that the PO's case at the sub-trial was very different to the one which it actually advanced (the rewriting point). In my view, these paragraphs are not a proper basis for an appeal, let alone a recusal application.

40. For all these reasons, I consider that the pre-judgment argument is without substance and has no realistic prospect of success.

8. 'Critical Invective'

41. This is, on any view, a curious complaint. A number of aspects of the PO's case on the Common Issues, and a number (but by no means all) of their witnesses at that sub-trial, were the subject of criticisms by the judge. Subject to the prejudgment issue (which I have rejected) the judge must have been entitled to form a critical view of a line of argument or a particular witness. Indeed, the making of such criticisms (where warranted) is an integral part of the decision-making process in cases like this. In this way, the making of these observations were part and parcel of the judge's job.

42. Accordingly, the highest that this argument can be put is an attack on the judge's use of language when expressing certain conclusions. That is a point of semantics; it is not, in my view, a substantive ground of appeal, let alone an application to recuse. The way in which a judge expresses his or her critical view of, say, a particular witness' evidence on issue X, can have no bearing on the outcome of a future issue, issue Y, which is to be dealt with in a future

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sub-trial (and *a fortirori* in circumstances where, as here, the judge provides an express qualification to that effect). The PO has failed to make out any case to the contrary.

43. It is perhaps instructive to take one or two examples of the criticisms which are made in this connection, to demonstrate the flaws in the PO's approach. I have already dealt with the complaint that the judge described the PO's case on some of the lead claimants as "confused" which was an entirely accurate summary, the consequences of which the judge dealt with in a way that was generous to the PO.

44. Another area of dispute in the Common Issues trial concerned disclosure and the loss of certain physical evidence. As the judge explained in Judgment 4 (see [191], [192], and [222] – [223]) he had formed a critical view of the PO's approach to disclosure and the retention of evidence. That view was inevitably going to find expression in the judgment on the Common Issues. But that is one of the many advantages of judge-managed litigation: it means that, by the time of any particular sub-trial, the judge has a detailed knowledge of the interlocutory stages prior to the sub-trial itself, and the parties' compliance (or otherwise) with the orders of the court. It is misconceived to criticise the judge in this case because, as a result of his case-management, he was aware of certain deficiencies – some of which were manifested during the Common Issues sub-trial – in the PO's approach to documents and other evidence.

45. I note that, although this part of the application featured strongly in the argument before the judge, it is dealt with much more briefly in the PO's skeleton argument. For the avoidance of doubt, I consider that paragraphs 120-

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124 to be wholly unpersuasive on the 'critical invective' issue. The appeal based upon that suggestion therefore has no prospect of success.

9. Timing/Manner of Recusal Application

46. As noted above, it is unnecessary to decide the waiver point, given that, for the reasons I have given, the substantive appeal has no prospect of success. However, it would be wrong to leave this application for permission to appeal without dealing with the timing and manner in which the recusal application was made.

47. The judge learned of the recusal application by accident just before the afternoon session of the last day of the factual evidence on the Horizon Issues trial: see [15] and onwards, [123] and [274] – [289]. This was at best discourteous; at worst, it betrayed a singular lack of openness on the part of the PO and their advisors.

48. There is no doubt that the PO did not make the application as soon as they should have done. It is also troubling that the delay was said to be, at least in part, due to the consideration of an unnamed "judicial figure or barrister", referred to as "another very senior person", before the application was made. Such a comment, presumably made *in terrorem*, should not have been made at least without proper explanation of its relevance.

49. Furthermore, the scattergun way in the original application was made, now mirrored in the way that this appeal has been pursued, can be seen in the continually changing nature of the PO's arguments. Thus, the original application relied on oral submissions about some passages in Judgment 3

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which had not been identified in the witness statement: see [246] – [250] of Judgment 4. Other matters too arose orally, dealt with at [251] – [262], which were also new. Whilst of course I accept that some matters might emerge more clearly during oral submissions, I have the firm impression that the PO's case on recusal has remained something of a moving target. That impression is further confirmed by the differences between the case advanced before the judge, and the case outlined in the skeleton argument for the appeal, which again purports to raise some matters, and some paragraphs in Judgment 3, which have never been raised before.

10. Conclusions

50. For the reasons which I have given, this application for permission to appeal is refused. The recusal application never had any substance and was rightly rejected by the judge.

51. In my view, it is a great pity that the recusal application and this application for permission to appeal have had the effect of delaying the conclusion of the critical Horizon sub-trial. Indeed, the mere making of these applications could have led to the collapse of that sub-trial altogether. Although I can reach no concluded view on the matter, I can at least understand why the SPMs originally submitted on 21 March that that was its purpose.

HER MAJESTY'S COURT OF APPEAL E&W

Lord Justice Coulson

9th May 2019

By the Court

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DATED 9TH MAY 2019
IN THE COURT OF APPEAL

POST OFFICE LIMITED

- and -

ALAN BATES & OTHERS

ORDER

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