

RE: BATES and Ors. v THE POST OFFICE LIMITED

NOTE FOR KH
For 19 March 2020

Abbreviations:

Post Office Limited PO
Sub-postmasters/mistresses SPMs

INTRODUCTION

1. It seems to me that there are several interconnected issues that arise out of the Post Office litigation. To keep this note within a reasonable compass I think two issues are of particular importance; in summary:

- a. The case of **Lee Castleton**, a former SPM, demonstrates that where a small enterprise is engaged in litigation with a substantial institution of massive resources, when faced with institutional denial (aggravated by a weak contractual position) the weaker party, in the absence of resources sufficient to break down the institutional denial - which it invariably will not possess - will be *functionally*, if not formally, be denied access to justice. The same problem arose with the Lloyds Reading branch Impaired Assets Unit.
- b. The PO plainly knew of problems with its Horizon accounting system in 2013 when it received the first Second Sight report. From that date the PO ceased the routine prosecution of SPMs for false accounting on the basis of evidence generated by the Horizon system. The PO nevertheless: (a) maintained up to trial that the Horizon system was robust and reliable - a contention that was fundamental to the position it had maintained against its SPMs for almost 20 years - a position that the judge held to be about as unrealistic as the historic contention that the earth was flat; (b) appears to have failed to review the prosecutions that it had brought until 2013 - in ever increasing numbers. The issue of the PO's knowledge from 2013 is as important and deserving formal investigation as Lloyds Banks' knowledge of the fraud at its Reading IAU.

A. THE ILLUSION OF REAL - AS DISTINCT FROM FORMAL - ACCESS TO JUSTICE FOR SMEs

Post Office v Lee Castleton - A denial of justice and 13 years' of unwarranted judicial criticism and censure

2. In *Post Office Ltd v Lee Castleton* [2007] EWHC 5 (QB) in a judgment given in January 2007, Mr Castleton, a former PO SPM, declined to pay £25,885 that the PO's Horizon system showed that he owed. The PO's claim is known in law as a claim on an account stated. Mr Castleton had raised problems with the Horizon system on a number of occasions. He believed that the Horizon system was not working properly.
3. Rather than pay a debt that he believed was not owed by him, but he believed to be the product of system error, Mr Castleton decided to contest the PO's claim – confident that he would get justice from the courts. (There was no contractual mechanism for an SPM to resolve a disputed debt.)
4. Mr Castleton had run out of money and in the trial in the Queen's Bench Division between 6-13 December 2006 and was unrepresented – let alone did he have funds to obtain an expert technical examination of the PO's Horizon system. Mr Richard Morgan instructed by Bond Pearce, the PO's solicitors (that had become Womble Bond Dickinson by the time of the trials before Mr Justice Fraser in 2018 and 2019) was counsel for the PO.
5. Judge Richard Havery QC sitting as a judge of the High Court, Queen's Bench Division, noted that “*Mr Castleton submitted that there were anomalies in the operation of the Horizon system, thereby implying the system was defective*”.¹ He later noted that “*Mr Castleton sought to adduce evidence of other complaints from subpostmasters of other post offices about the Horizon system. I admitted in evidence the fact that there were a few such complaints, but I refused to admit evidence of the facts underlying such complaints, since that would have involved a trial within a trial*”.² (It was at the heart of Mr Castleton's case that the Horizon system was not reliable – but this was an issue on which there was in fact, bizarrely, no evidence before the court – it took until 2019 to get that evidence – at eye-watering cost.)
6. Judge Havery was impressed by the evidence of Anne Chambers, an employee of Fujitsu who said that there was no evidence of an error with the Horizon system at Mr Castleton's branch. He was also impressed by the evidence of Mr Andrew Wise of the Network Directorate of the PO who was familiar with the Horizon system and how it operated. (In 2018 and 2019 Mr Justice Foster was scathing in his assessment of the POs' witnesses.)
7. In an arguably intemperate judgment, Judge Havery concluded that: “*I am satisfied that the substantial unexplained deficiencies incurred in weeks 42 to 51 and in week 52 up to the close of business on 22nd March 2004 are real deficiencies [Mr Castleton's case was that they were illusory] and as such are irrefutable evidence that Marine Drive was not properly managed at the material time. I conclude that the claimant was entitled ... to terminate Mr Castleton's contract summarily for non-performance of his obligation under clause 5 of [section 1]. Moreover, losses must have been caused by his own error or that of his assistants.*”

¹ Para [13]

² Para [22]

8. Apart from liability of £25,000-odd created by a system now known to have routinely malfunctioned and to have generated accounting errors, Mr Castleton was liable for the PO's costs of almost £300,000. His decision to contest the debt left him financially ruined and with a public record of financial mismanagement (many other SPMs fared worse with criminal convictions). As a result of Judge Havery's judgment, Mr Castleton was made bankrupt and subsequently had difficulty getting a bank account.
9. *(Though slightly technical)* The underlined passages ought to have been qualified by Judge Havery. In the absence of qualification, they are wrong. The point is that *in the absence of evidence of the malfunctioning of the Horizon system* - that Mr Justice Fraser later considered in 2019 - that was the *inference* that the court was driven to on the evidence. The evidence was not "irrefutable" it was simply not refuted and could not be by Mr Castleton without massive resources for a technical inspection of the working of the Horizon system that he simply did not have.
10. Refutation of the PO's position that the Horizon system was reliable required almost £40 million in costs and funding and a further 499 claimants with common issues under a Group Litigation Order (GLO) made in 2017. It took 13 years from Mr Castleton's case.
11. In fact, as Mr Justice Fraser found at the end of the Horizon issues in the Bates litigation, the contention by the PO that the Horizon system was reliable and robust constituted the modern-day equivalent of the contention that the earth is flat and exhibited a similar degree of unreality.
12. In contrast with Judge Havery's assessment of the Fujitsu witness, Mr Justice Fraser has referred to the witnesses from Fujitsu who gave evidence before him to the Director of Public Prosecutions for seeking to mislead him.
13. It is known that the litigation - in some terms successful - incurred costs and expenses to the 500 odd claimants who were parties to the Group Litigation Order made in 2017 of around £40 million. The settlement eventually reached was in excess of £50 million, but under the funding model only some £12 million was going to end up with the SPMs. (That itself is an injustice given the scale of the harm done by the Post Office - but the risks of further litigation were considered substantial, and by the time of the settlement a large number of claimants were facing limitation issues and risks - ordinarily claims require to be issued within 6 years of the cause of action.)
14. That is what it cost to successfully contest and defeat the PO's claims that the Horizon system was robust and worked properly and reliably - that had been its evidence and position from certainly not later than Mr Castleton's trial and no doubt before that in other cases, including criminal cases in which individuals were imprisoned for offences of dishonesty.

QUESTIONS

- (1) Given that it took 12 years, a group litigation order (GLO) extending to 500 claimants, and cost £40 million odd in fees and funding costs, how can the public have any confidence at all that a small business or sole trader, disadvantaged by institutional denial and the deference that the courts routinely accord large institutions, can have real, as distinct from merely formal, access to justice and thereby avoid the kind of wrong-headed judgment of Judge Havery QC in Post Office Ltd v Castleton [2007] EWHC 5 (QB) - a judgment given in response to Mr Castleton's hope and expectation that he would receive justice but in fact a denial of justice.
- (2) The Rules of Court under the Civil Procedure Rules are supposed to ensure that parties, so far as possible, are on a 'level playing field'. Bates v Post Office Ltd demonstrates that, in fact, when it comes to litigation against large institutions, small businesses are often denied access to justice because of 'inequality of arms' as a result of disparity in resources. Are the judiciary and the Civil Procedure Rules Committee, committed to learning any lessons from the Post Office litigation, if so what are they?

B. POST OFFICE KNOWLEDGE

15. The Lloyds Reading branch Impaired Asset Unit provides a template for this issue. It is clear that Lloyds were on notice of the essential structure of the fraud from not later than 2013 and the provision of the Project Lord Turnbull report. Lloyds steadfastly refused to acknowledge or accept that there was any fraud until after the conclusion of the criminal trial. That denial and Lloyds' position is now the subject of the inquiry by Dame Linda Dobbs DBE.
16. It is known that the PO was the prosecuting authority for a large number of private prosecutions for theft and false accounting.
17. FOI requests revealed that (for example) the PO:
 - a. From 2010 to 2011 brought 31 prosecutions.
 - b. From 2011 to 2012 brought 38 prosecutions.
 - c. From 2012 to 2013 brought 42 prosecutions.
18. In the 3 years from 2014-2017 there were 3 prosecutions brought by the PO. These numbers were agreed by the PO in evidence under cross examination on 21 November 2018.
19. Second Sight were engaged to investigate the Horizon System and published their report in 2013.
20. Shortly before Second Sight's final report was circulated the PO sacked the firm.

21. The timeline strongly suggests that, internally at least, from not later than 2013, the PO was aware that there was no proper/safe basis for the allegations of criminal dishonesty that hitherto it had routinely made against its SPMs and that the Horizon system was in fact unreliable and liable to generate errors.
22. As with Lloyds, perhaps the most disturbing aspect of the PO litigation is that from not later than 2013 officers of the Post Office knew of real problems with the reliability of the Horizon system but advanced a case at trial that not only did it now know, but the system was robust and reliable. Several questions arise:

QUESTIONS

- (1) Who in the PO entertained real and substantial doubts about the Horizon system so that, from after the Second Sight first report, from 2014 there were virtually no prosecutions brought by the PO against its SPMs for dishonesty whereas in the previous 3 years there had been 111?
- (2) What, if any steps were taken within the PO to review the previous prosecutions and, relatedly, the safety of the convictions obtained once the unreliability of Horizon and its propensity to generate errors had become known. If none, why not, because it must have been apparent to those responsible for taking prosecuting decisions that in many cases previous prosecutions ought not to have been brought? It is understood that the CCRC is contemplating the largest ever single group reference of cases to the Court of Appeal, on various estimates in the order of 50 references. This suggests the single largest miscarriage of justice in English legal history.
- (3) (Much more difficult) To what extent was Womble Bond Dickinson alive to the developments with Second Sight and the emerging picture of the unreliability of the Horizon system. This is an important regulatory issue though the Solicitors' Regulation Authority will have little appetite for it. In my view it is inconceivable that the PO's legal team did not recognise that its evidence that the Horizon system was robust was unlikely to withstand scrutiny. There is what in my view is a huge professional ethics issue here. After all, it was Womble Bond Dickinson who long ago in 2007 acted for the PO in its claim against Mr Castleton. By the time of trial before Foster J in 2018/2019 WBO must have recognised that the Horizon system was unreliable – because their client knew it from the Second Sight reports or else they were incompetent. On either basis they were content to run their client's case that was analogous, in its unreality, to the contention that the earth is flat.

I hope the above, if imperfect, may provide some lines for inquiry/discussion. Bon chance!

PAUL
17th March 2020