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Bates & others v Post Office Limited

[DRAFT] Recusal Note

Introduction

Post Office is actively investigating its legal options for responding to the Common Issues trial judgment (**CIT Judgment**). The orthodox response to an adverse judgment is an appeal on legal and / or procedural grounds. It is recommended that Post Office pursues both these appeal routes.

A more immediate and potent option is to consider whether Mr Justice Fraser's findings are so unfair as to warrant recusing him on grounds of bias. We set out below the grounds for, and effect of, a recusal. Advice has also been sought from the Rt Hon Lord Neuberger, who was until 2017 the President of the Supreme Court, being the most senior Judge in the UK. His advice is summarised below and he will be available to discuss the proposed recusal application with the Board on the call at 5.15 pm on Monday 18th March. We have also instructed Lord Grabiner QC who would appear in any application for recusal, and he has reviewed this paper **[to be done]**.

Why would Post Office seek a recusal?

The Post Office legal team (including Counsel) are concerned that Mr Justice Fraser's judgement demonstrates bias against both Post Office and its witnesses such that there is a real risk that Post Office will not receive a fair trial – particularly in the current Horizon trial, and possibly in the subsequent 3rd and 4th trials to be held later this year and in early 2020.

The Judge has heavily criticised several of Post Office's witnesses in the CIT as being unreliable. He has developed a theory that Post Office is secretive and only interested in self-preservation, which then drives the way its witnesses give evidence. It is a major concern that the Judge will carry across this thinking into subsequent trials and no matter who gives evidence for Post Office they will not get a fair chance. Of particular concern is that Angela Van Den Bogerd is a key witness for Post Office. She was heavily (and in our view, unfairly) criticised in the CIT and is giving evidence again in the Horizon Issues trial on Monday, 18 March 2019 – which puts the presentation of the case on Horizon immediately on the back-foot.

There must be a real risk that unless the opportunity is taken to remove the Judge, he will continue, and Post Office will be stuck in an unfair trial process. It can then expect adverse findings on key issues going forward in future trials including the ongoing trial about Horizon and the third and fourth trials scheduled for Autumn 2019 and March 2020. Moreover, future trials will be focused on factual findings rather than legal findings. Pure factual findings are much more difficult to appeal, even if unfair and plainly wrong, and rarely overturned by the Court of Appeal. If Post Office does not seek to recuse the Judge now, it is very unlikely to have the opportunity again and may not even be able to appeal later adverse factual findings on orthodox appeal grounds.

As we have already seen with the CIT Judgment, adverse findings are likely to have a profound, impact on Post Office.

- There may be findings that would (unnecessarily) severely constrain Post Office's ability to operate and develop its business and / or cause Post Office to incur significant costs of operational change. For example, an adverse finding in relation to Horizon could make recovering losses in branches very difficult and force Post Office into spending significant sums re-designing the system.
- Post Office could be exposed to significant compensation claims dating back 20 years which will clearly be material. Before the CIT Judgment radically altered the landscape, Post Office was

content that there were well-established legal principles that would have substantially limited compensation claims to a lower level.

- The brand damage for Post Office could be severe and irreparable.

In the words of Lord Neuberger, Post Office's concern is that *"the Judge made findings of fact [...] in such a way as to betray a prejudice against the PO which justify the PO objecting to his continuing to hear these proceedings"*. Set out in **Appendix "A"**, are some examples of the statements and language which give rise to these concerns.

A recusal application is also consistent with, and lends support to, any wider appeal that Post Office may wish to make. In considering whether to appeal the judgement (which will be the subject of the a separate Board discussion at the scheduled Board meeting on Monday 25 March 2019), Post Office will need to consider:

- Whether the Judge has correctly applied the law in relation to contractual interpretation when considering the meaning of the Postmaster contracts; and
- Whether in his conduct of the trial there has been an *"procedural unfairness"*. The CIT Judgment was meant to be about contractual interpretation. In law, what occurs after a contract is formed cannot be relevant to an enquiry as to what the contract means. Yet Mr Justice Fraser makes wide findings of fact on post-contractual matters which then influence his findings as to the meaning and effect of the contract.

If Post Office is to forcefully assert procedural unfairness, it would be inconsistent to not apply for recusal too as the prejudicial findings of fact and adverse comments of the Judge are evidence (Post Office says) of both bias and procedural unfairness. To make one application without the other would be inconsistent and weakens each position.

What is the test for recusal?

The test for recusal is *'whether the fair-minded and informed observer, having considered the facts, would conclude there is a real possibility that the [Judge] was biased'*.

Applications for recusal are not frequent. They usually turn on conflicts of interest such as a judge or a member of his family have a financial interest (such as shares) in one of the parties. There is a recent example of a recusal application being hung off judicial comment. In 2015 Mr Justice Peter Smith was subject to a recusal application (which was successful, in that the judge ultimately recused himself – see: <https://www.scribd.com/doc/272913152/Emerald-Supplies-Ltd-v-British-Airways>) when lawyers acting for British Airways took objection to the judge's criticisms over BA's actions concerning his lost luggage (an issue not connected with the case before him).

Effect of recusal

If successful, and depending on timing, the application for recusal would remove Mr Justice Fraser from hearing the remainder of Horizon trial, as Managing Judge in charge of the GLO proceedings, and from hearing the third and fourth trials. He would be replaced with a new Judge who had overall conduct of the Post Office Group Litigation.

We anticipate that the CIT Judgment would remain binding until considered by the Court of Appeal, who should be able to make their own determination on the issues. A full re-trial of the CIT is unlikely. What the Court should have done at the CIT is to determine issues of law (i.e. interpretation of the contracts and determining any terms to be implied) and the Court of Appeal is in as good a position as the trial Judge to do this.

Depending on when the recusal application is heard, it may also cause the ongoing Horizon Issues trial to be suspended and / or re-tried by a new Judge.

Prospects of success

Post Office was represented at the CIT by David Cavender QC who has been engaged for over a year. Mr Cavender's view is that it is difficult to see how the litigation can be proceeded to a sensible (and fair) conclusion before this Judge. He has behaved in a manner which can only fairly be described as biased against Post Office. See example comments made by the Judge in **Appendix "A"**. A Judge's role is to oversee an adversarial process where each party is required to (a) make their own case, and (b) challenge the case of the other party, against a framework of agreed facts and issues. The Judge has adopted a much more inquisitorial style and is allowing and, in some cases, directing evidence on matters outside this agreed scope, and is then making findings of fact and drawing conclusions without having allowed Post Office to put its case on these issues.

Given the seriousness of a recusal application, Post Office has sought a further opinion from an independent lawyer, Lord Neuberger. His Lordship is well placed to advise on these matters having been President of the Supreme Court Judge. Having been briefed by Mr Cavender and read the CIT Judgment, Lord Neuberger's view is that:

"I consider that there are reasonable grounds for PO to bring an application to recuse the Judge in these proceedings."

In his advice, he also offered a cursory and impressionistic view of the wider matters that could be appealed and commented 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."

Post Office has also briefed a further senior silk, Lord Grabiner QC. Post Office has taken such a step as Lord Grabiner can appear as an advocate for Post Office at any appeal / recusal application whereas Lord Neuberger, being an ex-Judge, cannot. **Lord Grabiner QC has reviewed the relevant papers and this note [and agrees with the content of this note].**

Impact on appeal strategy

Importantly, part of any appeal of the CIT Judgment would be for "*procedural unfairness*". The CIT Judgment was meant to be about contractual interpretation. In law, what occurs after a contract is formed cannot be relevant to an enquiry as to what the contract means. Yet Mr Justice Fraser makes wide findings of fact on post-contractual matters and this seems a fundamental flaw in his judgment. If Post Office is to forcefully assert procedural unfairness, it would be inconsistent to not apply for recusal too as the prejudicial findings of fact and adverse comments of the Judge are evidence (Post Office says) of both bias and procedural unfairness. To make one application without the other being made is inconsistent and weakens each position.

Lord Neuberger also notes in his advice that if Post Office wishes to rely on the ground of procedural unfairness at an appeal with the hope that the Court of Appeal might direct a different Judge to conduct future trials, then *"PO has little option but to seek to get the Judge to recuse himself at this stage"*.

Aside from the above legal points, we would also note that several of Post Office's witnesses, many of whom are long serving employees, were good enough to give evidence in Court for Post Office and have now had their reputations tarnished.

Risks of a recusal application

There are legal and reputational risks with making a recusal application.

The principal legal risk is that the recusal application is unsuccessful (at first request and in the Court of Appeal) and then Mr Justice Fraser becomes emboldened and openly hostile to Post Office. This increases the risk of further adverse findings.

It should however be noted that even making the recusal application may have the opposite effect – it may make the Judge more cautious and receptive to Post Office's arguments, because he will be under greater scrutiny and this is likely to be the case whatever the outcome of that application.

If the recusal application is unsuccessful, any consequential costs incurred by the Claimants would need to be paid by Post Office. These could be significant if the Horizon Issues trial is delayed (we estimate up to £2m). However, the more likely scenario is that the Horizon Issues trial is not delayed and the Judge presses on regardless despite the recusal application being made to the Court of Appeal. That would leave there being an urgent application to the Court of Appeal to either recuse him or confirm him in place. Also, any re-trial ordered (an unlikely outcome) will inevitably cause double trial costs to be incurred and if Post Office were to lose the re-tried matters, then the adverse costs against Post Office could be sizeable. As we note above, a re-trial of the CIT is an unlikely outcome and not one that is necessary. In the event that the Judge is recused a re-trial of such parts of the Horizon Issues trial that have taken place is likely, but the wasted costs will likely be costs in the action generally.

Outside of Court, making a recusal application is likely to attract significant media attention and is likely to be portrayed as reinforcing the Judge's comments that Post Office is "arrogant". We would note however that there is no guarantee that staying quiet now will protect Post Office's brand from repeat attacks in later judgments.

Process & timing

An application for recusal needs to be made to Mr Justice Fraser himself. He may hear the application or ask another Judge to hear it – the latter is unlikely. It is highly unlikely the Judge will recuse himself on the first application, so Post Office should not proceed with this course of action unless it is prepared to appeal the refusal to the Court of Appeal immediately.

Post Office should make the decision on recusal urgently - preferably not later than Monday with a view to setting the wheels in motion with both the Court and the Claimants' solicitors early in the week. The urgency is driven by the unfortunate trial sequencing ordered by the Judge and the fact he handed down the draft CIT Judgment on the Friday before the Horizon Issues trial commenced on the Monday. A delay in making the application could undermine its prospects of success, because it would be inconsistent to continue with the Horizon Issues trial if Post Office believes the Judge to be acting unfairly.

Once the application is made, the actual steps in any recusal process are harder to predict as it depends how the Judge decides to deal with the matter and, indeed, how the Court of Appeal decides to approach the issue too.

A recusal application might however encourage the Court of Appeal to move quicker on the main appeal. These issues are all interconnected and the Court of Appeal is unlikely to want to leave a recusal application hanging over the litigation for an extended period. This is not certain, as the Court of Appeal may choose to run the recusal and orthodox appeal separately. An expedited appeal would have many advantages, including that it would help limit the amount of operational change Post Office needs to implement in the short term to comply with the CIT Judgement, which may be wasted cost if the judgment is overturned on appeal.

Recommendation

Although a recusal application is difficult and comes with substantial risks, for the reasons stated above, both Mr Cavender and Womble Bond Dickinson recommend that the application is made as soon as possible.

WOMBLE BOND DICKINSON

[17 March 2019]

Appendix A

Suggestions that Post Office has treated SPMs badly

There seems to be a culture of secrecy and excessive confidentiality generally within the Post Office, but particularly focused on Horizon.

The Post Office appears, at least at times, to conduct itself as though it is answerable only to itself.

These are examples, in my judgment, of a culture of excessive secrecy at the Post Office about the whole subject matter of this litigation. They are directly contrary to how the Post Office should be conducting itself. I do not consider that they can be a sensible or rational explanation for any of them.

There is no doubt that the Post Office is in an extraordinarily powerful position compared to each and every one of its SPMs. It appears to wield that power with a degree of impunity.

The Post Office describes itself on its own website as “the nation’s most trusted brand” (at <http://corporate.postoffice.co.uk/our-heritage>). So far as these claimants, and the subject matter of this Group Litigation, are concerned, this might be thought to be wholly wishful thinking. Trust is an element of an obligation of good faith, a concept which I find is to be implied into the contracts between the Post Office and the SPMs because they are relational contracts. The Post Office asserts that its brand is trusted by the nation, but the SPMs who are claimants do not trust it very far, based on their individual and collective experience of Horizon.

Post Office knowledge of problems

What Post Office knew about any problems in Horizon will be important at future breach trials (including, in particular the trial focused on limitation and associated issues of breach which is currently scheduled for November 2019).

a number of contemporaneous documents internal to the Post Office show that there was, at least to some degree, an awareness of Horizon problems within the Post Office itself over a number of years

These internal Post Office entries make it clear that, notwithstanding the tenor of the Post Office evidence before me, behind the scenes there were at least a number of people within the Post Office who realised that there were difficulties with the Horizon system.

I find that in some instances, there was discussion internally at the Post Office about the altering of branch transaction data directly, and also of the Post Office and/or Fujitsu carrying out changes to Horizon and/or transaction data which could affect branch accounts.

Harassment/ malicious prosecution

The Claimants claim that Post Office breached its obligations by improperly sending them letters demanding payment, and by threatening and maliciously bringing proceedings (civil as well as criminal) against them.

There can be no excuse, in my judgment, for an entity such as the Post Office, to mis-state, in such clearly wrong terms, in letters that threaten legal action, the extent of the

contractual obligation upon a SPMC for losses. The only reason for doing so, in my judgment, must have been to lead the recipients to believe that they had absolutely no option but to pay the sums demanded. It is oppressive behaviour.

Yet during this period the Post Office was, acting as it did with Mrs Stockdale, shutting her branch and stating she was considered to have committed a criminal offence. It also expressly stated to her that it was taking into account that she had not contacted the NSBC or asked the Post Office for assistance. The documents available in this litigation show that this was simply not true, and she had expressly done both of these things.

Post Office's default position regarding their SPMs. This is that shortfalls and discrepancies are not caused by the Horizon system, therefore those that do occur can only be the responsibility of SPMs. This conclusion means that the Post Office fraud prevention and debt recovery procedures will be used against SPMs in this position, unless an SPM can show that the shortfall or discrepancy was not their fault.

even putting it at its best for the Post Office, such conduct towards Mrs Stockdale during this early stage of the litigation could potentially be construed as threatening, oppressive, and potentially discouraging to other potential claimants to become involved in the litigation, whether by accident or design. I can think of no reason why such an approach was taken unilaterally by the Post Office in such a way, without the Post Office's solicitors giving advance notice to her solicitors, so that a less confrontational and aggressive path was adopted, given her role as a claimant in the litigation. However, even once it was done and she was suspended, the Post Office continued to act in a highly regrettable fashion.

For the reasons I have expressed above, I have considerable misgivings about the Post Office's motivation for the treatment of Mrs Stockdale during this litigation, and for the treatment itself in terms of refusal to provide obviously relevant documents.

Horizon Issues

The Judge also made the following findings relevant to the ongoing Horizon Issues trial:

Claimants were themselves unable to carry out effective investigations into disputed amounts because of the limitations on their inability to obtain the necessary information from Horizon.

it is clear that Fujitsu were able to obtain greater information about a particular branch's transactions than either the Post Office or the SPM.

Training

The adequacy of training will be an issue at future breach trials.

nowhere in the training (or the interview, or anywhere else) is there any recognition of how to deal with a shortage, discrepancy or disputed TC of the order of magnitude of these six Lead Claimants, and if the steps instructed on these laminated instructions were followed, there would be shortages in the cash accounts of branches where these occurred.

One feature which seemed to me to be wholly absent from the training courses run by the Post Office for the Lead Claimants was any sort of assessment or test of competence at the end of the training. Every case will of course be wholly different, but whereas one individual might, after four days, be wholly competent to use the Horizon system unsupervised, another might need longer than that. If they are all given four days of training regardless, and there is no assessment at the end of that four days, then

some incoming SPMs might not be conversant with all the features of the system. This situation is in no-one's interests, and in my judgment I would go further and say it is contrary to business logic.

Shortfalls

At the breach trials there will be important issues as to the cause of shortfalls, and how SPMs dealt with them.

Her experience was not a happy one. Unexplained shortfalls would appear on Horizon when she was completing a weekly balance or submitting a trading statement. There were no explanations for these, and there was no way available for her to get to the bottom of them either. She found it very difficult to obtain any details from the Post Office, and did everything she could think of to keep the most detailed records within the branch itself.

All Mrs Van Den Bogerd was prepared to accept about this complaint by Mrs Stockdale was that there was "some truth" in it, but it was "not entirely true" because the information was there, but sometimes took too long to find. This answer is inconsistent with the documents she had drafted internally.

Investigations

There will be issues in future breach trials as to the quality of the investigations which Post Office conducted into shortfalls.

"It might be thought that if there were any proper investigation which actually reported on this, it could and should have been put to Mrs Stubbs, but if what was put to Mrs Stubbs in this trial is said by the Post Office to amount to such an investigation, then it is telling. The "investigation" appears, on the material deployed in this Common Issues trial, to have consisted of no more than Fujitsu asserting that there was "nothing wrong with the kit". That is not, in my judgment, an investigation under any normal understanding or meaning of that word in society generally. The Post Office's way of dealing with this wholly ignores the provision in the SPMC and a SPM's liability for losses in that document (which on the Post Office's case is what applied). There was simply a blanket assertion by the Post Office that she had to pay these sums."

Helpline

The Claimants will say, at breach trials, that operators of the Helpline (a) provided an inadequate service, and (b) made misrepresentations to them.

The Lead Claimants' evidence made it clear that just getting through to the Helpline was an achievement in itself, and when this was finally accomplished, the experience would be variable at best, and does not seem to have come close to resolving any of the disputes. Some operators would assist with getting Horizon to permit rollover into the next trading period by suggesting "work arounds". These "work arounds" did not resolve disputed items. No particular investigation appears, in the case of any of the six Lead Claimants, to have been initiated by reporting a dispute to the Helpline. An item "settled centrally" would be subject to debt recovery processes by the Post Office regardless of what the particular Lead Claimant did regarding the Helpline.

It is therefore the case that, on the evidence before me, the Helpline did not operate for the Lead Claimants in the manner that the Post Office contended for. What was presented to the court by the Post Office in respect of disputes notified to the Helpline show that, for the most part, initially the SPM was told they would have to pay the

shortfall. Even when persistent, all that would happen is the sum would be “settled centrally” and after a period of a few weeks the SPM would be chased for the Post Office for that sum as though it were a debt. Detailed findings of fact as to this must however wait for a later trial.

Reasonableness of suspensions/ terminations

A large part of the Claimants' case at the breach trials will be that the process by which they were suspended/ terminated involved breaches of duty by Post Office.

Some sub-postmasters had their contracts with the defendant terminated, sometimes very abruptly. In Mr Bates' case, this was done whilst he was expressly challenging the accuracy of Horizon and he believes this was expressly done because he was so challenging this. In Mrs Stubbs' case, notwithstanding her 27 years' experience, service and prior record (both as assistant to her husband, who was originally the sub-postmaster, and as sub-postmistress herself after he died), she found herself suspended and locked out of her Post Office.

I do not know why risks to the Post Office's reputation should be a relevant factor in such an appeal, or why a SPM's entitlement to be heard on appeal would differ from case to case. Also, the Post Office's reputation might be significantly affected if it were found to have suspended a SPM on grounds that were wholly unjustified. Unjustified suspension ought to be a factor in favour of an appeal succeeding, on any sensible view. The Appeal Managers are senior Post Office managers who are said to have had training to hear appeals. The reputation of the Post Office would best be served by appeals that were justified succeeding, and those that were not failing. It should not have formed any part of the criteria.