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## **Bates & others v Post Office Limited**

### **Recusal Note**

#### **"Why we are considering a recusal application":**

There is a concern that when the Common Issues Trial ("CIT") Judgment is read one is left with the feeling, using the words of Lord Neuberger QC, that: "...the Judge made findings of fact [which POL says he was not entitled to make in any event – see below] in such a way as to betray a prejudice against PO which justify the PO objecting to his continuing to hear these proceedings."

If the Judge can be said to be prejudiced towards POL and remains the Judge presiding over the proceedings then there is a significantly increased possibility of adverse judgments in trials 2 (being Horizon), 3 (lead Claimants) and 4 (other possible claimants).

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*'.

#### **"What the application (if successful) will achieve":**

If successful, the application for recusal would remove from the sequence of trials scheduled in this matter a Judge who could (based on the above test) be said to be biased against POL.

Alongside an application for recusal, there is highly likely to also be an application to appeal certain findings made in the CIT. If the application for recusal is successful it is likely (although not certain) that parts (at least) of the findings made in the CIT would be struck down. In that circumstance a 'new' Judge would pick up the trial(s) at the point they had reached at the time of recusal and move forward with the benefit of the Court of Appeal's guidance over the CIT Judgment. This is likely to be a beneficial scenario to POL. A further plausible outcome of the recusal application (if successful) together with an appeal of CIT findings could be a retrial of the CIT. Effectively starting again before a new Judge.

#### **"Risks of not proceeding":**

The risks of not seeking a recusal are:

- 1) That the sequence of trials still to come have a possibly biased Judge presiding over them increasing the likelihood of adverse findings against POL leading, ultimately, to damages being awarded against POL together with further adverse comment and findings of fact.
- 2) Importantly, part of POL's appeal from the CIT is connected to "procedural unfairness". The CIT was meant to be about contractual interpretation. In law, what occurs after a contract is formed is cannot be relevant to an enquiry as to what the contract means. Yet in the CIT it appears that is what occurred. This is alluded to above. If POL is to forcefully assert procedural unfairness it is inconsistent to not apply for recusal too as the prejudicial findings of fact and adverse comment are evidence (POL says) of both bias and procedural unfairness. To make one application without the other being made is inconstant and weakens each position.

Lord Neuberger commented that if POL wish to rely on the ground of procedural unfairness at an appeal, then *'PO has little option but to seek to get the Judge to recuse himself at this stage'*.

#### "Prospects of success":

what advice have we received ?,

who from ?

POL has sought advice from Lord Neuberger QC of One Essex Court. Lord Neuberger stepped down last year as the President of the Supreme Court (and as such was the highest judge in the U.K.). POL sought his views on whether the draft judgement demonstrated grounds on which POL could apply for the Judge to recuse himself. In advice POL has received from Lord Neuberger he states that (although he has only looked at the issues cursorily), *"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."*

POL has also briefed a further senior silk, Lord Grabiner QC. POL has taken such a step as Lord Grabiner can appear as an advocate for POL whereas Lord Neuberger cannot.

#### "Risks":

The risks in asking the Judge to recuse himself are that:

- 1) The application is unsuccessful (at first request and in the Court of Appeal) and then it is likely that the Judge is further antagonised by POL, however he will be aware that the CIT issues of law appeal (and perhaps elements of the procedural unfairness appeal) are progressing (in the event such appeals are made). A possible impact in that scenario is the Judge is more cautious as to behaviours to (possibly) POL's benefit.
- 2) A further theoretical downside to a recusal application that fails is that the current Judge remains the judge at Trial 3 which will require multiple findings of fact which are more tricky to appeal.
- 3) Costs incurred by the Claimants would need to be paid by POL. If the Horizon trial is adjourned or if a retrial is order (and then 'lost') the adverse cost to POL could be sizable.

As it is highly unlikely the Judge will recuse himself on the first application POL should not proceed with this course of action unless it is prepared to appeal the refusal to the Court of Appeal.

#### Process & timing:

POL 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 to mid-next week. Thereafter 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.

The urgency is driven by the unfortunate trial sequencing ordered by the Judge and the fact he handed down the CIT Judgment on the Friday before trial 2 (Horizon) commenced on the Monday. The Horizon trial is currently underway and any recusal (if successful) would have a huge impact on that. Dealing with the matter, if the point is to be raised, is therefore urgent.