

Confidential and legally privileged advice
Do not disclose, forward, scan or copy



Bates & others v Post Office Limited

Note of Conference with Lord Grabiner QC of 18 March 2019 at One Essex Court

Updated Note of Post Office Board Dial-In attended by Lord Grabiner (by phone) of 20 March 2019

In attendance:

- Lord Grabiner QC
- Jane MacLeod (GC Post Office)
- David Cavender QC (Barrister at One Essex Court)
- Gideon Cohen (Barrister at One Essex Court)
- Tom Beezer (Partner at Womble Bond Dickinson)

Lord Neuberger's Note:

Lord Grabiner explained that he had reviewed:

- Lord Neuberger's note of 14th March 2019 (attached),
- an associated background note from David Cavender QC of 13th March 2019 (attached); and
- he had substantially reviewed the Judgment of Mr Justice Fraser in what has become called the "Common Issues Trial" ("CIT").

Lord Grabiner confirmed that he agreed with the content of Lord Neuberger's note.

Lord Grabiner's Advice:

Procedural Structure: Had the CIT been properly confined to what 'the contract(s)' mean and issues around construction only, then the structure set up by the Judge could possibly have worked, although the timing of trial 2 (Horizon) would always have been awkward if there were to be any appeal of any part of the CIT. The Judge did not confine himself to the parameters that he had set up for the CIT and went way beyond the stated scope of the CIT. He made findings of fact (which he had no need to make at that point in time) without proper evidence or disclosure from Post Office. Lord Grabiner commented that the Judge had "*trespassed onto matters that are for later trials*" and the fundamental problem that builds into the sequential trial structure is that those findings and opinions (which should not have been made or voiced) will be carried through into the later trials **and that is the "perceived bias" that gives rise to the need for a recusal application**. Lord Grabiner commented that the case management displayed in this matter was extremely poor. It was noted that the problems now experienced by Post Office and manifested in the CIT Judgment were predicted multiple times before this Judge at the making of the GLO and many times after. Lord Grabiner also noted that Post Office had attempted to deal with the issue by applying for the striking out of the Claimants evidence that was irrelevant to the CIT, yet the Judge had refused to do that. The Judge had sufficient warning of the risk of him taking into account evidence that was irrelevant to the CIT and taking into account post contractual matters in a trial supposed to be confined to construction issues only; however he had "*not been able to restrain himself*". As an aside, the number of implied terms found by the Judge was wholly extraordinary but that was to be a matter for an appeal on law – but Lord Grabiner expressed his shock that an English High Court Judge could have arrived at the CIT Judgment.

Urgency: An application for recusal should be made urgently. It was noted that such an application will be tricky and contested so significant preparatory work must be done, however given that the Horizon trial is underway there is urgency in this situation and to delay making an application may cause Post Office to waive its right to do so. If no application is made then findings of fact based on expert evidence will be made in the Horizon trial underway now and Post Office will be stuck with those findings. They will not be appealable.

Duty to act: Lord Grabiner explained that in his view if there is no recusal application made then Post Office will lose the series of trials set up in this matter. Without a recusal application Post Office is stuck with this Judge. An appeal on the law may correct some of the very significant errors in the CIT Judgment but then the case will be sent back to this Judge who has demonstrable apparent bias against Post Office and hence the firm conclusion that Post Office will lose and the financial impact of that will be substantial. Recusal is therefore essential and Lord Grabiner asserted that in the face of legal advice from Lord Neuberger that recusal should be applied for and the quantum of damages that Post Office will pay out on a loss, then it was Lord Grabiner's view that there was a duty on Post Office to seek recusal. Lord Grabiner stated that in his view the Board of Post Office had no option but to seek recusal.

Prospects: Lord Grabiner stated that:

- there are strong arguments in favour of an application for recusal, and
- it was his strong view that a recusal application was the right course of action, and
- there is a "*serious prospect of success*", and
- and that this Judge had done "*an unbelievable nonsense and demonstrated apparent bias*".

Post Office Board Dial-In attended by Lord Grabiner (by phone) of 20 March 2019

In attendance:

- Tim Parker
- Ken McCall
- Paula Vennells
- Alisdair Cameron
- Tom Cooper
- Tim Franklin
- Shirine Khoury-Haq
- Carla Stent
- Jane MacLeod
- Lord Grabiner QC (Barrister at One Essex Court) [on call between 11.45am and 12.10pm]
- Glenn Hall & Ruth Cowley, Partners Norton Rose Fulbright
- Tom Beezer (Partner at Womble Bond Dickinson) [on call between 11.45am and 12.10pm]

Background:

Lord Grabiner explained to the Board members that in his view the Judge had been warned about admitting material into the CIT that should properly be looked at only in later trials when proper evidence and disclosure was before the Court. The Judge had rejected Post Office's quite proper Strike Out Application and had appeared to appreciate what the problem might be with inadmissible evidence from the Claimant group, but at trial (the CIT) the Judge had gone well beyond his remit for that CIT and made a range of findings on breach and the credibility of Post Office witnesses. Lord Grabiner confirmed his view that the Judge had behaved quite improperly and it was now right to ask him to stand down. Lord Grabiner explained that it is apparent that this Judge has concluded views on matters and as there are further trials to come, then those concluded views would be a significant issue for Post Office unless this Judge is asked to recuse himself.

Lord Grabiner confirmed that the apparent concluded views of this Judge are so strong that there is no other way to deal with the issue than recusal. If Post Office does not take such a step, yet later goes to the Court of Appeal on matters of law from the CIT, the Court of Appeal will be left wondering why such a step (i.e. recusal) was not taken.

Advice:

Lord Grabiner confirmed that his firm view was that Post Office has no option but to seek the recusal of this Judge. Lord Grabiner confirmed that, whilst guarantees cannot be provided, Post Office does have a strong case for recusal. Lord Grabiner confirmed that his strong recommendation to the Post Office Board was to seek a recusal. The sequencing of the trials, ordered by this Judge, compounds the issue

that Post Office faces as this Judge would be looking at the same witnesses and issues in later trials – hence there is no other real option but to seek recusal.

Post Office Board Questions:

A question was posed concerning the circumstance where **recusal is sought, but fails**. Lord Grabiner explained that if the Judge refuses to recuse himself then Post Office must ask the Court of Appeal, and if that fails too then this Judge will remain in place for Horizon and later trials. Lord Grabiner pointed out that this Judge has already formed a view of Post Office and so a failed recusal application is unlikely to make a difference to outcomes when compared to plausible outcomes from a situation where no recusal application is made.

A question was posed as to whether there was **some "middle way"** ? Lord Grabiner explained that his firm view was that if Post Office does anything short of applying for recusal, that strategy will fail. There is no middle course which works and in that regard Lord Grabiner confirmed that he had seen and agreed with an e-mail on the point sent by David Cavender QC.

A question was posed over a scenario where **one assumes that the criticisms of Post Office in the CIT Judgment were true** ? Lord Grabiner explained that in his view many of the implied terms and 'good faith' findings were wrong in law so if there were a different Judge then the findings would be different as the assumed background and legal background would be different so it is hard to place oneself in the assumed position that all of the criticisms are correct. One must assume that a different Judge would get the law right and give Post Office a fair hearing. Theoretically it is possible a different Judge could get to the same position – and if so *"so be it"*.

A question was posed as to whether Post Office could **arrive at a recusal scenario via a different route** ? Lord Grabiner explained that he could not think of any mechanism that would arrive at such an outcome for Post Office, without Post Office making the application itself. Lord Grabiner explained that if Post Office does not take the step to apply for recusal then, as a certainty, it will have this Judge for all following trials. Lord Grabiner explained that if he could have found another way to proceed he would have discussed it with the Post Office Board.

As a **concluding comment**, Lord Grabiner reminded the Post Office Board that Lord Neuberger agreed with the advice on recusal that Post Office was receiving and Lord Grabiner explained that there were few, if any, more respected QCs and ex-Judges in this country.