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## Bates & others v Post Office Limited

### Recusal Note

#### Introduction

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

A more immediate and potent option is to consider whether the 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.

#### Basis for seeking a 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*'.

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.*"

A recusal application is also consistent with, and lends support to, any wider appeal that Post Office may wish to make.

#### Effect of recusal

If successful, the application for recusal would remove Mr Justice Fraser and he would be replaced with a new Judge who had overall conduct of the Post Office Group Litigation.

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. We anticipate that the Common Issues judgment would remain binding until considered by the Court of Appeal, who should be able to make their own determination on the issues. A further plausible outcome of the recusal application (if successful) together with an appeal of CIT judgment could be a full re-trial of the Common Issues. Effectively starting again before a new Judge- although we consider this unlikely as what the Court should have done at the CIT trial 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 Common Issue trial by David Cavender QC who has been engaged for over a year. Mr Cavender's recommendation 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 (and is apparently continuing to behave to the current Horizon issues trial) in a manner which can only fairly be described as biased against Post Office. It is almost as though he is a party and has his own position – as opposed to being a neutral tribunal overseeing a adversarial process. That bias is reasonably obvious in the manner that he has behaved and the findings that he has made. But the issues of law he has determined can be overturned and the irrelevant findings of fact likely quashed the current position can be rectified by the Court of Appeal.

But in the current Horizon trial and the forthcoming trial (dealing with breach of contract issues) in November 2019, Judge will also be required to make findings of fact and give his view on competing expert evidence. Such findings are much more difficult to attack as it will involve showing that such findings were not open to the Judge on the evidence – which is close to having to show perversity. This is extremely difficult, and in practice the Court of Appeal do not generally overturn findings of fact. So there is an opportunity to do something about this Judicial behaviour now which will not arise again. There must be a real risk that unless this opportunity is taken this Judge is only going to get worse – as he gets emboldened by his earlier findings, and Post Office will be stuck in an unfair trial process and can expect adverse and draconian findings going forward.

Furthermore, the appeal that is planned against the CIT judgment involves (1) an appeal against the legal findings (2) an appeal on the basis of procedural unfairness. The procedural unfairness part of the appeal would be on the basis that the Judge made findings of fact he should not have done – and then fed those findings of fact into the legal issues he has determining- which he also should not have done. Given the nature of the second part of the appeal it would be inevitable that the party making that allegation would then ask the Court of Appeal to return the case to a *different* Judge - given that behaviour. However, if that party has not mounted a recusal application – there is very little the Court of Appeal can do but return it to the Judge- a Judge whose legal findings would (hopefully) have been significantly reversed and his behaviour (hopefully) been criticised by the Court of Appeal – perhaps in trenchant terms. How he would behave in that scenario is at best uncertain.

Therefore, Mr.Cavender's view is that it is difficult to see a realistic alternative and so a recusal application should be made. [DAVID TO ADD HIS VIEWS ON RECUSAL HERE IN HIS OWN WORDS].

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 a Supreme Court Judge and, during that time, having given a number of seminal judgments on matters of contractual interpretation that are at the heart of the Common Issues.

Having been briefed by Mr Cavender and read the Judgment, Lord Neuberger's view is that:

*"For all the reasons set out above 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.

## Advantages of a recusal application

Most critically, if the Judge is prejudiced against Post Office and remains the Judge presiding over the proceedings then it is unlikely that Post Office will get a fair hearing on any issue. Any small weakness in Post Office's case will be magnified into a major problem and any points of dispute will be tilted against Post Office. This leads to a significantly increased risk of adverse judgments in future trials, including the ongoing trial about Horizon and the third and fourth trials scheduled for Autumn 2019 and March 2020.

Adverse Judgments in these trials, like the Common Issues judgment, could have profound, potentially existential, impact on Post Office.

1. There may be findings that would 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.
2. Post Office could be exposed to significant compensation claims dating back 20 years. It is difficult to value such claims, but they could be in the hundreds of millions of pounds. Before the Common Issues judgment radically altered the landscape, we were content that there were well-established legal principles that would have substantially limited compensation claims to a lower level.
3. The brand damage for Post Office could be severe and irreparable.
4. Further adverse judgments might ultimately call into question the convictions of dozens of Subpostmasters, potentially leading to those convictions being overturned.

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 (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 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'*.

### Risks of a recusal application

The principal 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. It may well have an immediate effect on his behaviour in the current Horizon issues trial.

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 Issue trial is delayed (we estimate up to £2m). However, the more likely scenario is that the Horizon trial is not delayed – the Judge refuses to recuse himself and the Court of Appeal either recuse him or confirm him in place. Also, any re-trial ordered 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 sizable. But -as we note above – a re-trial of the CIT litigation is an unlikely outcome- and not one that is necessary. But, in the event that the Judge is recused a re-trial of such parts of the Horizon trial that have taken place – is likely. But the wasted costs will likely be costs in the action generally.

### 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 to mid-next week. 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 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.

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.

WOMBLE BOND DICKINSON

[16 March 2019]