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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 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. We have also instructed Lord Grabiner QC who would appear in any application for recusal, and he has reviewed this paper and will be available to discuss the proposed recusal application with the Board on the call at 5.15 pm on Monday 18th March.

Basis for Why would Post Office seeking 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.

Most critically, if the Judge is prejudiced against Post Office and remains the Judge presiding over the proceedings then there is a real risk that Post Office will not get a fair hearing on the issues arising in the trial process from now on.

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. These criticisms are, in our view, largely unfair. 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 never [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 our case on Horizon immediately on the back-foot.

There must be a real risk that unless this 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.

Commented [JM1]: This implies that we think some of them are fair?

As we have already seen with the Common Issues 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, we were 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 [], are 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 is 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'.

While applications for recusal are not frequent, they more 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. In [describe British Airways caseeg the judge was asked to recuse himself as British Airways had recently lost his luggage on a flight and in Court he persisted in asking Counsel acting for British Airways what had happened to his bags etc and that was held by the Court of Appeal to be sufficient to conclude that there was a real possibility that he was biased against British Airways and should be recused.....]

[what else should we say?]

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, 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, and Hhe 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 Judgment would be struck down. 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 further plausible outcome of the recusal application (if successful) together with an appeal of CIT Judgment could be a full re-trial of the CIT, effectively starting again before a new Judge. We consider this unlikely as 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 (and is apparently continuing to behave in the current Horizon Issues trial) – evidence ? 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 an adversarial process.] That bias is reasonably obvious in the manner that he has behaved and the findings that he has made.

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 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 CIT].

Having been briefed by Mr Cavender and read the CIT 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. [Lord Grabiner has reviewed the relevant papers and will be able to discuss the proposal and his view of it at the Board]

Commented [JM2]: Can we reword this paragraph? We are making a couple of different points:
 • Is the effect of recusal that those sections of the judgment that demonstrate bias would be struck out, or is this a consequence of the (wider) appeal?
 • If we think a full re-hearing is unlikely, then let's phrase it that way
 • Depending on timing, Horizon trial would be suspended. Is there any other option to a re-hearing – if not, then this becomes automatic?

Commented [JM3]: Can we re-position this along the line that: the 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.

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.

The Judge has also 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. These criticisms are, in our view, largely unfair. 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 never 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 our case on Horizon immediately on the back-foot.

There must be a real risk that unless this opportunity is taken to remove the Judge, he 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. It can then expect adverse and draconian findings going forward 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 CIT Judgment, could have a 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 CIT 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.

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. It is of course a matter for Post Office to determine the extent to which it now wishes to try to protect its staff from criticism. [Jane — this point may be better made verbally so we can remove it.]

Commented [JM4]: Are these recusal issues or appeal points?

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. 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 Issues trial is delayed (we estimate up to £2m). However, the more likely scenario is that the Horizon Issues 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 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 may-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.

Commented [JM5]: We will need more than the few throw away lines that I'm aware of, to demonstrate that this is a real risk ...

Commented [JM6]: This doesn't make sense – why wouldn't it be delayed?

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 to-mid-next 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.

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.

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

[16 March 2019]