

Guideline case on recusal applications (*Bates v Post Office Ltd*)

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Dispute Resolution analysis: Patrick Green QC, Kathleen Donnelly, Henry Warwick, Ognjen Miletic and Reanne MacKenzie, all barristers at Henderson Chambers and counsel for the claimants, examine *Bates and others v Post Office Ltd (No 4)*, which concerns making or facing a recusal application.

Bates and others v Post Office Ltd (No 4—Recusal Application) [\[2019\] EWHC 871 \(QB\)](#)

What are the practical implications of this case?

This is a guideline case on recusal applications, how to make them, the relevant legal test and waiver. Anyone facing, making, or even *thinking* about making a recusal application would be wise to read this case. *Bates and others v Post Office Ltd* may be particularly relevant in group actions where the managing judge has knowledge of the litigation as a whole and is likely (and entitled) to bring that knowledge to bear on his or her judicial assessment in determining any issue in the proceedings.

The recusal application was particularly unusual in that it was essentially confined to the contents of the judgment handed down after the first substantive trial in these proceedings (the common issues judgment).

The common issues judgment itself deals with a number of interesting issues, including:

- relational contracts
- implied terms
- incorporation of onerous and unusual terms
- the [Unfair Contract Terms Act 1977 \(UCTA 1977\)](#), and
- agency

Undoubtedly, practitioners may wish to read the common issues judgment for those purposes.

What was the background?

This is a well-publicised group action in which over 550 current or former sub-postmasters and sub-postmistresses (SPMs) are suing the Post Office in relation to its treatment of them, particularly in relation to alleged losses which were blamed on them after they were shown on the Post Office's 'Horizon' computer system. Many had their contracts suspended or terminated by reason of these apparent and unexplained shortfalls and a large number were prosecuted for false accounting—they say unfairly. The Criminal Cases Review Commission is presently reviewing over 30 such cases.

The litigation has been structured into a series of staged sub-trials. The parties are currently in the second staged trial, focused on the Horizon computer system and relevant expert evidence (the Horizon issues trial).

The chronology of resulting judgments are as follows:

- judgment No 2—strike out (in October 2018) where the managing judge rejected the Post Office's application to strike out large parts of the claimants' evidence
- judgment No 3—common issues trial (in March 2019)
- judgment No 4—recusal (in April 2019)
- the Court of Appeal (Coulson LJ) refused the Post Office permission to appeal judgment No 4 and gave detailed reasons (in May 2019)

The common issues judgment was handed down on 15 March 2019 (*Bates & Ors v Post Office Ltd* [\[2019\] EWHC 606 \(QB\)](#), [\[2019\] All ER \(D\) 100 \(Mar\)](#)). It was an illuminating decision which gave invaluable guidance on:

- relational contracts
- implied terms
- incorporation
- [UCTA 1977](#), and
- agency

On 8 March 2019, an embargoed copy of the common issues judgment was sent in draft to the parties. On 11 March 2019, the Horizon issues trial commenced. On 18 March 2019, the cross-examination of the Post Office's witnesses began.

On 21 March 2019, the Post Office, without prior warning to either the claimants or the court, issued an application for Fraser J to recuse himself on the basis of apparent bias (the recusal application).

The parties came back from the lunch adjournment and Fraser J, having just learned of the application, halted the Horizon issues trial. One witness was still under oath, so it was decided to allow his evidence to finish before the trial was adjourned pending the outcome of the recusal application.

The basis of the Post Office's application was in three parts, all based on the common issues judgment. It was said in the witness statement in support of the application that the common issues judgment demonstrated a clear impression that the judge had not behaved impartially and could not behave impartially going forward because:

- the managing judge had made findings or observations on a range of irrelevant matters, which fell to be determined at later trials in the litigation
- the common issues judgment contained a great deal of 'critical invective' directed at the Post Office, none of which was relevant to the determination of the common issues
- the common issues judgment contained harsh criticisms of the Post Office's witnesses on issues irrelevant to the determination of the common issues

The Post Office failed to identify a single paragraph of the common issues judgment on which it sought to rely. Accordingly, the court ordered that the Post Office provide fuller particulars. A subsequent witness statement was provided setting out which paragraphs of the common issues judgment were expressly relied upon. The hearing of the recusal application took place on 3 April 2019. The recusal judgment was handed down on 9 April 2019.

What did the court decide?

The judge dismissed the application on two grounds. Firstly, he held that there was no apparent bias. Alternatively, he held that in any event the Post Office had waived the right to make the application by electing to positively engage in the Horizon issues trial for two weeks (including by cross-examining the claimants' witnesses of fact and calling the majority of their witnesses).

The judge set out his reasoning in 77 pages, spanning over 300 paragraphs, which was made necessary by the fact that the Post Office relied on no less than 109 paragraphs (or isolated parts of paragraphs, as the judge observed) and put in issue almost every aspect of the way that the common issues trial had been conducted, particularly on the part of the Post Office itself.

Essentially, after a thorough review of the relevant authorities (paras [77], [265]–[267], [274], [285] of judgment No 4) the judge held that:

- what the Post Office's submissions amounted to was that a fair-minded and informed observer would only read some of judgment No 3 and not take into account all of it, including its result
- the fair-minded and informed observer was entitled to read judgment No 3 as a whole, and would understand the history of the proceedings as a whole, including the ways in which the parties actually presented their cases at trial
- in any event, the delay by the Post Office (it had waited almost two weeks after receiving the draft judgment before issuing the instant application) and the continued conducting of the Horizon issues trial, which included dealing with nearly all of the fact evidence, constituted an unequivocal waiver of any right

it might have had to ask the judge to abandon the Horizon issues trial and recuse himself from further involvement as the managing judge. The judge was clear that rather than actively participating in the Horizon issues trial, the Post Office could and should have asked for a short adjournment on the first day of the Horizon issues trial or at the very least on the first day on which the Post Office's witnesses were due to be cross-examined

The Post Office were refused permission to appeal the recusal judgment on 10 May 2019. What happened and what is the impact?

Coulson LJ refused the Post Office's application for permission to appeal, giving detailed reasons spanning over 51 paragraphs. He was highly critical of the Post Office and stated that the application was 'without substance' and made clear that the explanation for the length of his reasons was 'only because of the volume and nature of the criticisms which have been made, and the importance of the group litigation to both parties'.

Striking aspects of those reasons included:

- Coulson LJ agreed that there remained a distinct flavour of the Post Office wanting the case decided all one way in its favour
- Coulson LJ highlighted the importance of adopting a realistic approach where a managing judge is presiding over a series of sub-trials (for the convenience of the parties and their advisors). Fraser J heard many weeks of evidence in the common issues trial and produced a judgment of over 1,000 paragraphs. Policing boundaries between the sub-trials was not his main focus; resolving the myriad issues between the parties was. Coulson LJ agreed that the common issues judgment must be read as a whole when applying the test for apparent bias
- Coulson LJ was clear that whereas the Post Office had based their application on individual sentences, the fair-minded observer would place every sentence in its correct context, i.e. would take paragraphs in full and in context, which would include any caveats. As the recusal application failed to do this, it was 'fatally flawed'. Indeed, setting out such sentences outside of their proper context, particularly where the sentence immediately preceding or following it provided such context, was said to be 'particularly egregious'
- the law on apparent bias was correctly stated by Fraser J and the Post Office did not challenge judgment No 4 on the basis that Fraser J had erred in law or identified the wrong legal principles. The only issue was whether Fraser J had erred in applying those principles to the particulars of the recusal application
- as regards the first basis of the Post Office's recusal application—namely that the managing judge made irrelevant or unnecessary findings of fact—this failed for two reasons:
 - firstly, the managing judge himself explained (at paras [140]–[179], [235]–[245] of judgment No 4) why the specific finding of fact in question was made and which wider argument it went to
 - secondly, the Post Office's application represented a 'total disregard of what it actually said and did' at the common issues trial. Indeed, Coulson LJ said that the attempts by the Post Office to describe the common issues trial in its skeleton argument for permission as a simple set of clearly defined issues was a 'significant misrepresentation' not only of the issues themselves but also of the way the Post Office had in fact run its case
- Coulson LJ noted that much of the material the Post Office sought to rely on in its recusal application in fact stemmed from its own case and its own evidence. That the Post Office was now trying to assert that much of this was irrelevant and relied upon it as showing apparent bias was 'untenable'
- as regards the second basis for the Post Office's application—namely that the managing judge pre-judged issues that form the basis of future sub-trials—this was also rejected by Coulson LJ. The managing judge included myriad caveats in the common issues judgment making it expressly clear that he was not making findings on breach, causation or loss and he was clear that just because he accepted the evidence of a witness, it did not mean he would accept the evidence of that same witness at any later trial. The submission by the Post Office that this was a 'mantra' was described as 'surprising' in that

it reversed the ordinary burden of proof and in fact suggested that the managing judge was guilty of conscious misrepresentation. Coulson LJ found there was no basis for such a submission. It was further held that including appropriate caveats and qualifications was precisely what the managing judge was required to do in accordance with the law

- as regards the third basis of the Post Office's recusal application—namely critical invective against the Post Office and/or its witnesses—this was labelled a 'curious complaint' by Coulson LJ. He held that the managing judge was entitled to make critical findings as regards specific witnesses or lines of argument—this is part and parcel of the job of a judge. The Post Office's complaint was one of semantics at its highest and had no prospect of success
- while immaterial to his decision as he refused permission based on the substantive grounds put forward by the Post Office, for the sake of completeness, Coulson LJ did consider waiver, including the manner and timing in which the recusal application was made. Coulson LJ considered that the recusal application had been made in a way that was 'at best discourteous' and 'at worst, it betrayed a singular lack of openness on the part of the Post Office and its advisors'. Indeed, Coulson LJ held that the comment by the Post Office that one of the reasons for the delay was said to be because of consideration of the application by an unnamed 'judicial figure or barrister' referred to as 'another very senior person' was presumably made 'in terrorem' and should not have been made without a proper explanation of its relevance
- finally, Coulson LJ concluded that the recusal application never had any substance and was rightly rejected. Without making any finding, he stated that he at least understood the claimants' submission that the recusal application and the permission to appeal application were made in an attempt to de-rail the litigation as a whole

If the Post Office was hoping for a more favourable view from the Court of Appeal, those hopes were misplaced. Two overall points emerge:

- in group litigation where there will be staged sub-trials, each issue in each sub-trial will not be treated as hermetically sealed. The court will take a realistic approach in carrying out its intended function of managing and resolving the litigation. It may sound obvious, but how the parties conduct their case at trial, including what they cross-examine on, lead evidence on and say in closing submissions will all form part of the normal judicial assessment. A party cannot reverse engineer its case after the event
- any party considering a recusal application, especially one based on apparent bias, is best served by being as open with the court as possible, in particular by giving proper and courteous notice. A party in group litigation must be careful, if there are staged sub-trials, not to actively participate in the litigation while holding the recusal application up their sleeve. Recusal applications are extremely serious. They are not a tactic to be strategically deployed by a losing party

The Horizon Issues Trial continues.

Interviewed by Kate Beaumont.

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