

## High Court critical of approach to evidence in Post Office litigation (Bates v Post Office)

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**Dispute Resolution analysis:** In the final judgment of this long-running group litigation, the court found numerous issues with the Post Office's Horizon IT system and ruled in favour of the subpostmasters and subpostmistresses. The overarching point that emerges is the importance of advancing a realistic case, supported by properly considered and careful expert and factual witness evidence. Patrick Green QC, Kathleen Donnelly, Ognjen Miletic and Reanne MacKenzie, all barristers at Henderson Chambers, consider the 'Horizon Issues' trial.

*Bates and others v Post Office Ltd (Judgment No 6 'Horizon Issues')* [\[2019\] EWHC 3408 \(QB\)](#)

### What are the practical implications of this case?

The practical implications of what is largely a judgment on the facts essentially concern the approach that parties should take to:

- expert evidence
- factual evidence, and
- litigation generally

*Bates v Post Office (Judgment No 6)* marks the final judgment in the Post Office group litigation and is the outcome of the Horizon Issues trial, in which the court determined 15 issues in relation to the Post Office's Horizon IT System.

This latest trial followed the trial of common issues (concerning the legal relationships, including implied obligations of good faith: *Judgment No 3* [\[2019\] EWHC 606 \(QB\)](#), [\[2019\] All ER \(D\) 100 \(Mar\)](#)) and was interrupted by the Post Office's widely reported and unsuccessful recusal application (resulting in *Judgment No 4* [\[2019\] EWHC 871 \(QB\)](#)), which sets out principles on recusal—see News Analysis: Guideline case on recusal applications (*Bates v Post Office Ltd*)

The overarching point that emerges is the importance of advancing a realistic case, supported by properly considered and careful expert and factual witness evidence.

### What was the background?

Over many years, the Post Office had asserted that Horizon was 'robust', often in answer to complaints about it from subpostmasters and subpostmistresses (SPMs), and the extent to which discrepancies in branch accounts could arise without fault was the central issue in the trial. The Horizon system was created, administered and monitored by Fujitsu, while the Post Office operated its own policies and procedures in dealing with apparent discrepancies and concerns raised by SPMs.

In short, the Post Office's case was that the Horizon system was robust and reliable such that any shortfalls that it showed on an SPM account were real shortfalls that the Post Office was entitled to claim back as a debt from the SPMs. This was essentially their position when they brought proceedings against SPMs in the criminal and civil courts—and as explained to the Select Committee before Parliament.

This was also the position the Post Office's expert sought to maintain at trial.

In contrast, the claimants consistently stated that problems with Horizon resulted in showing shortfalls on their system, which were not real shortfalls at all but were caused by bugs, errors or defects or some other problem with the Horizon system or the way in which they were trained to operate it.

Both parties instructed an expert. A number of the answers to the Horizon Issues were in fact agreed between both experts before the trial commenced but the central dispute remained.

### What did the court decide?

The court found that Horizon in the period 2000–2010 was ‘not remotely robust’—from the period 2010–2015 it was ‘slightly more robust’—and from 2017 has been ‘more robust’.

The striking features of the case, from which the practical implications above flow, were as follows:

- first, the Post Office was driven to submit that, where its own internal documents recognised shortcomings in Horizon, they were wrong
- second, the Post Office did not call a particular Fujitsu witness, who had obviously been at the centre of events and had clearly been the source of evidence given by other witnesses
- third, the Post Office was effectively forced to disavow the evidence of the key factual witness from Fujitsu, which it had itself called
- fourth, the court not only preferred the evidence of the claimants’ expert, but found that the Post Office’s expert was not independent and consistently failed to accept any evidence that contradicted that of the Post Office’s witnesses of fact: the Post Office’s expert took a partisan view of the evidence

As to the importance of adducing factual evidence at trial that will form the basis of any submissions to be made in closing, the judge was critical of the Post Office’s attempt to use submissions (and instructions to counsel) as a means to circumvent the requirement to adduce evidence of the matters on which they intended to rely, in support of their own case or in answer to the claimants’ evidence.

As an important footnote to the care that parties should take in preparing their factual evidence in both civil and criminal proceedings, when handing down the judgment, the judge stated that he was so concerned with the matters that came to light during the trial and the veracity of evidence provided by some of the Fujitsu witnesses in prior proceedings, such as the Post Office criminal cases against SPMs, that he had decided to refer the papers in the case to the Director of Public Prosecutions, who could take a view about whether further steps should be taken.

Judgment No 6 provides the following practical guidance:

- parties should not adopt evidence that ‘demonstrates a simple institutional obstinacy or refusal to consider any possible alternatives to their view of Horizon, which was maintained regardless of the weight of factual evidence to the contrary’
- evidence tendered by parties should not amount to ‘bare assertions and denials that ignore what has actually occurred’
- as regards factual evidence provided ‘on instruction’ in oral submissions

‘Sometimes, depending upon the nature of the subject matter, such an approach is understandable or unavoidable, and may be unobjectionable. It is not therefore sensible to state that this should never be done in any conceivable circumstance in any trial. However, on important points that have been dealt with by a particular witness in their evidence of fact, it is not a suitable device to adopt.’

- the judge further stated:

'Submissions should not contain evidence, or positive evidential assertions, that are not present in the evidence served in the trial. This is a fundamental point[...]Blurring (or ignoring) the lines between submission and evidence is entirely unhelpful. Evidence is something that comes from a witness (lay or expert) and which the opposing side is entitled to test by way of cross-examination. It is not appropriate for detailed factual assertions to be made in closing submissions that are not directly referable to evidence in the case. There is no way such factual assertions can be tested—if they come in closing submissions, there is no way that the opposing party can deal with those assertions in their own evidence, or even put relevant points to witnesses for the other party in cross-examination.'

## Court details

- Court: High Court (Queen's Bench Division)
- Judge: The Hon Mr Justice Fraser
- Date of judgment: 16 December 2019

Patrick Green QC, Kathleen Donnelly, Ognjen Miletic and Reanne MacKenzie appeared for the claimants at the Horizon Issues trial. This team, along with Henry Warwick (also of Henderson Chambers), have successfully acted for the claimants throughout the group litigation, which has now been concluded by a settlement agreement in the claimants' favour.

*Interviewed by Kate Beaumont.*

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