

Witness Name: Lord Grabiner KC

Statement No.: WITN10640100

Dated: 03/05/2024

POST OFFICE HORIZON IT INQUIRY

FIRST WITNESS STATEMENT OF LORD GRABINER KC

I, Lord Grabiner KC, will say as follows:

1. In summary, my professional background is that I was called to the Bar in 1968. In 1969, after completing my pupillage, I became a tenant at One Essex Court in The Temple from where I still practice. I took Silk in 1981. I have been Head of Chambers since 1994. For several years I was a Recorder of the Crown Court and a Deputy High Court Judge eligible to sit in the Chancery Division and the Commercial Court.
2. I was first instructed in the **Bates** case on 15 March 2019 to read the papers and to get up to speed. PO, I was told, had not yet decided to make the recusal application and wanted me to be ready to make the application if that decision was made. I was to liaise with David Cavender QC and Gideon Cohen, both

members of my Chambers, who had acted for PO in the Common Issues trial which had just concluded [WITN10650106].

3. Prior to being instructed I had no knowledge of the GLO Proceedings.
4. Prior to 18 March 2019 I had no communications with POL employees or directors.
5. I have been asked to explain what information I relied on when I gave my initial comments by e-mail and advised in conference on 18 March 2019. I was provided with a copy of the 29 page "Note on background to possible recusal application" dated 13 March 2019 prepared by Messrs Cavender and Cohen [POL00023097]; a copy of Lord Neuberger's "Observations on Recusal Application" dated 14 March 2019 [POL00025910 pp1-8] and the judgment of Fraser J in the Common Issues trial. I must also have been provided with the trial transcripts, copies of orders which had been made and judgments given at the pre-trial interlocutory hearings; as well as witness statements etc. I also spent time with Messrs Cavender and Cohen who were able to direct my reading and generally to educate me which was necessary given the time pressure and their background knowledge.
6. I also spoke to and exchanged emails with Lord Neuberger and solicitors from WBD before 18 March: emails 16 March timed 11.58 [WITN10650106] and 12.15 [WITN10650106], 16.18 [WITN10640101]; 17 March timed 9.46 [WBON0000671], 10.59 [POL00268521], 1.18pm [WITN10640102], 13.52

[POL00023787 pp 2 & 3], 16.44 **[POL00023787]**, 16.58 **[WITN10650104]**, 19.26 **[WITN10650103]**, 19.33 **[POL00023787 pp 1 & 2]**, 20.42 **[WITN10650104]**. I have no particular recollection of the individual conversations with Lord Neuberger at this time but I believe the email exchanges accurately record our respective views and the substance of the conversations we had.

7. I have been asked to give a detailed account of the 18 and 20 March 2019 conferences, and to comment on the accuracy of the attendance notes of those conferences. I have been provided with the 3 notes of those conferences **[POL00022886; POL00269774; POL00274041]**, and the 28 March email exchange between Jane MacLeod and Tom Beezer **[POL00274040]** which confirms my recollection that none of these attendance notes were provided to me and, for that reason, were not signed off by me.
8. I do not have any independent recollection of either of those conferences. I believe the notes accurately record the advice I gave and I cannot usefully add to the notes **[POL00269774 and POL00274041]**. I am sure I would have emphasised the significance of the advice given by Lord Neuberger as the distinguished retired President of the Supreme Court.
9. I am asked whether I advised that there was “a duty on Post Office to seek recusal” and, if so, to explain the basis of that advice. I confirm that I gave that advice: it is accurately recorded in **[POL00022886; POL00274041; and POL00269774]**.

10. The facts were that Lord Neuberger (prior to my involvement) in his note of 14 March 2019 entitled "Observations on Recusal Application" **[POL00025910 at para 19, see also paras 12-25 especially paras 20 and 23]** had already advised that "the PO has little option but to seek to get the Judge to recuse himself at this stage." I need not repeat the points made in that note but I agreed with it and, independently, reached the same conclusion once I had digested the materials presented to me. I should make it plain, though I hope the point is obvious, that I would not have made the recusal application unless I was personally satisfied that it was a proper one to make.

11. I should emphasise one point: like Lord Neuberger, I took the view that if the recusal application was not then made, PO would likely be held to have waived any rights to complain about apparent bias if it had allowed the Horizon trial to proceed without asserting its objection. Thus, in the event of an appeal to the Court of Appeal with a complaint to the effect that the Judge had demonstrated apparent bias in his Common Issues judgment, the Court of Appeal would have been bound to conclude that PO could and should have applied for the Judge to recuse himself and that the failure to apply at the time would have rendered the complaint unarguable in the Court of Appeal. The same point is recorded in Richard Watson's email to Jane MacLeod and others dated 19 March 2019 **[POL00022883]** although I do not believe I saw this at the time.

12. It was my view, based on everything I had read and what I had heard from the counsel team and from Lord Neuberger, that PO realistically had no choice but to invite Fraser J. to recuse himself. I was satisfied that the apparent bias complaint

was well founded and properly arguable. Indeed, I took the view that it was a strong case.

13. If the application was not made my expectation was that in the subsequent trial it would be difficult if not impossible for the Judge to ignore or put aside some of the key conclusions he had reached in the Common Issues trial. In my view the judgment covered issues which went well beyond the matters of contractual construction and interpretation posited by the pre-trial case management arrangements. Moreover, my understanding from the counsel team was that the evidence provided and PO's disclosure for that trial had not been focused on the Horizon issues which were to be the subject of the second trial. In my view the Judge had reached some strong conclusions, many of which were trenchantly expressed, such that it seemed to me, applying the objective test provided for by the governing caselaw, that it would be difficult if not impossible for him to keep an open mind in the later trials.

14. It is not appropriate for me to get into the detail of the recusal debate but if that is necessary, the arguments are fully set out in the skeleton argument we used for the application. The transcript accurately records the detailed submissions I made in support of the application.

15. I should also draw attention to the contemporaneous documents and email correspondence which confirms the summary above: Lord Neuberger's 14 March Note **[POL00025910]**, especially paragraphs 7, 8, 10, 12, 13, 15, 16, 17, 18, 19, 20 and 23 (where the important point is made that if PO did not make the recusal

application it would risk being "held to have waived its rights, or at least to have weakened its position on the recusal issue, if it sits on its hands and lets the present trial [Horizon] proceed without making its objection clear.").

16. See also: counsels' note of advice of 13 March **[POL00023097]**; the email exchange of 17 March timed 16.44 and 19.33 **[POL00023787 pp 1 & 2]**; the email chain of 18 March between me and Lord Neuberger timed 15.29, 16.11, 16.42, 18.36, 18.41, and 18.49 **[WITN10650106]**; Richard Watson's email to Jane Macleod of 19 March timed 4.37 **[POL00022883]**; email Lord Neuberger to me of 20 March timed 13.12 and my reply timed 14.38 of the same date **[WITN10640103]**; my email to the solicitors and the counsel team including Lord Neuberger of 10 April timed 15.58 **[POL00023956]**; my email of 14 April to others including Lord Neuberger timed 21.00 **[WITN10650119]**; and his reply of the same date timed 22.58 **[WITN10650119]**; Lord Neuberger's email to others including me of 14 April timed at 11.56 **[POL00023208]**.

17. I am asked to provide an account of all communications relating to the recusal application between me and POL, including lawyers, between the 18 March conference and the conference call with the POL board on 20 March. In order to answer this question I have read the email traffic in the period 18-20 March 2019 to refresh my memory. I do not have any independent recollection but I am confident that the emails accurately capture the conversations I had and the points which were then agreed/discussed.

18. In summary the emails show: first, that my advice to PO was that the Judge would likely refuse to recuse himself [**POL00022883 email Jane MacLeod to Richard Watson and others 19 March 2019 timed at 20.00 and POL00022883 email Tom Beezer to Jane MacLeod and others 20 March 2019 timed at 6.47 bottom two lines; WITN10650109 e-mail from Lord Neuberger to me 22 March timed 22.49**]. That said both Lord Neuberger and I thought the case was strong and that if PO failed in front of the Judge there was, as Lord Neuberger put it, a "good chance of ultimately removing him". This was, of course, a reference to the possibility of a different decision in the Court of Appeal.

19. Secondly, PO were very concerned about their position as a public body asking the Judge to recuse himself. They were also concerned about further alienating the Judge in the event of him refusing to stand down. Lord Neuberger and I took the view that in the circumstances they had no choice and that their failure to make the application would put them in a worse position if the matter reached the Court of Appeal.

20. The references in respect of the two previous paragraphs are: [**the email chain WITN10650106, in particular my email to Lord Neuberger of 18 March timed 15.29; his response timed 16.11; my reply timed 16.42; his reply to me timed 18.36; my response timed 18.41 and his short concluding email on the chain also timed 18.41**]. There is also a short email chain passing between Lord Neuberger and me dated 20 March 2019. At 04.24 I advised Lord Neuberger that I had a call scheduled with PO that day when they would decide how to proceed. At 13.12 Lord Neuberger in his reply said "I hope that they do not bottle it ... the

argument for having a go at recusal is very strong." My reply timed 11.27, and Lord Neuberger's response timed 14.38, which ends the chain, says: "We've been instructed to proceed. I don't think the clients had any choice but they were reluctant to take such a serious step" [WITN10640103]. In his email 20 March 2019 timed 14.55 [WITN10650107] addressed to our Clerk which was copied to me, Lord Neuberger said: "I think that they [PO] have made the right decision."

21. I am asked to say what my impressions were of matters that were important to PO and my instructing solicitors when deciding whether to appeal the Common Issues judgment, and whether to make the recusal application. I am also asked if I was aware of any divergence of views between employees of POL or members of the board. My recollection is that PO was taken by surprise by the conclusions reached by Fraser J in the Common Issues judgment. In my email of 18 March 2019 timed 15.29 addressed to Lord Neuberger and others [WITN10650106] I said that I had just met with Tom Beezer and Jane MacLeod (the General Counsel at PO). She had told me "the judgment came as a bolt from the blue for the clients because there was no expectation that the Judge had formed such a negative view of the PO."

22. The rest of that email and other contemporary ones suggest that the PO board would regard a recusal application as a drastic step to take, not least because of PO's position as a public body. No doubt for that reason PO was concerned to have reliable legal advice to support any board decision whether to appeal the judgment and/or to make the recusal application.

23. As to appealing the judgment, my memory is that the focus of attention was the deficient legal analysis in the judgment, especially in relation to implied terms, the overarching good faith point, so-called relational contracts and the interpretation of the termination provisions. These issues were addressed by the counsel team and by Lord Neuberger: they were not primarily my concern because my responsibility concerned the recusal issue.

24. As to the recusal application, and as recorded in my email to Lord Neuberger and others on 18 March timed 15.29 [WITN10650106], Jane MacLeod told me "Her concern is that the board may not have the stomach for a fight because asking a Judge to recuse himself is a drastic step. PO is Government owned and there are board members who are nervous of the publicity consequences."

25. I do not have any knowledge or any memory of any "divergence of views" as between employees of PO or its board members, as to whether or not (a) the Common Issues judgment should be appealed; and (b) the recusal application should be made.

26. I am asked to summarise any communications I had with POL/its lawyers between the conclusion of the 20 March conference and 3 April, the hearing date of the recusal application. In this period, I was engaged in the preparation of my speaking note for the application. The transcript of the hearing reveals the final content of my preparation. You have helpfully provided my email exchange with Lord Neuberger dated 22 March 2019 [WITN10650109] which shows, although I had forgotten this, that I shared a draft of my speaking note with him timed 19.26.

In his reply timed 22.49, Lord Neuberger made some suggestions for improving the note which I then took into account in the next draft.

27. I have no document and no memory of any other relevant communications in this period.

28. I am asked whether I was instructed by POL to refer to a judicial figure or other senior person having considered the recusal application. The short answer to this question is no. That said, I should explain the context and why I made that comment.

29. The material facts are that on Friday, 8 March 2019 Fraser J. distributed a draft of his Common Issues judgment. The Horizon trial began on the following Monday, 11 March. The final version of the Common Issues judgment was delivered on 15 March. The recusal application was made by notice on 21 March 2019.

30. At the conclusion of his submissions in response to the recusal application I had made on behalf of PO, counsel for the claimants was invited by Fraser J to comment on what the Judge called "delay" in the making of the recusal application, **transcript pp 175 line 9 - 177 line 25 especially at p 176 line 11 - p 177 line 13 [POL00112150]**. The point had not been mentioned by Fraser J. during my application remarks.

31. It was therefore a new point which I felt needed to be addressed and I did so at the very start of my reply submissions; **transcript pp 180 line 4 - 181 line 13.**

32. I submitted that the delay was "tiny" and that the immediate commencement of the Horizon trial had been set by Fraser J's pre-trial directions. By way of explanation for the suggested delay I was concerned to get across to the Judge that the recusal application had been given very careful thought before PO had decided to move forward with it. I explained that the decision had been taken at board level; that I had come newly into the case and had to get up to speed. I also made the point, summarised at the beginning of paragraph 28 above. I wanted the Judge to know that the decision had inevitably taken a few days and that it had been made only after it had been given very serious consideration, including at the legal advice level.

33. My remark was made exclusively in the context of meeting the point about delay upon which the Judge had invited my opponent to comment. The suggestion that I was in some way threatening the Judge - a point made by Coulson LJ **para 48 of his 9 May 2019 ruling [POL00023207]** when dismissing on paper PO's application for permission to appeal Fraser J's recusal judgment - is baseless. That suggestion was certainly not made to me by Fraser J. Coulson LJ's observation was gratuitous, inaccurate and inappropriate.

34. I am asked to describe any further communications between me/POL/its lawyers regarding the judgment on the recusal application. In particular, I am asked to focus on or around 14 April vis-à-vis Lord Neuberger; and meetings/discussions on 15 and 23 April. The correspondence of 12-14 April **[POL00023208]** shows that Lord Neuberger and I were discussing developments, that we shared the same views and that our views were, in turn, shared with Andrew Parsons, Jane

MacLeod and others. The emails speak for themselves and I have no additional memory I can usefully add. A search of my own emails has produced a short chain, all dated 14 April, passing between Lord Neuberger, Andrew Parsons and me, timed 19.53, 21.00 and 22.58 [WITN10650119]. Again, the content is self-explanatory: it confirms that Lord Neuberger and I were at one on the advice to PO which is summarised by me in the second of those emails timed 21.00.

35. I have read the emails in [WITN10650128] but I have no memory of a meeting on 15 April or the discussion/call on 23 April to which the question refers. In his e-mail of 22 April 2019 timed 16.45 [WITN10650128], Lord Neuberger made some observations concerning a possible appeal to the Court of Appeal, against the Common Issues judgment. My e-mail of the same date, timed 19.59 shows that I was following the e-mails, but I have no recollection of being asked to express a view on the point.

36. Aside from my preparation of this response to the Rule 9 Request, I have been asked whether I have had any further involvement with the **Bates** litigation, or in respect of issues relating to bugs, errors and defects in Horizon. The answer to that question is that I have had no such involvement.

37. I have been asked if I have anything to add to what I have said above, in particular in relation to PO's strategy in the **Bates** litigation (including its decisions concerning whether to appeal the Common Issues judgment and whether to make the recusal application). I believe that there is nothing I can usefully add to the points already made. I have no memory of any divergence of views between

the legal representatives and/or members of the PO board on those matters. I believe the contemporaneous e-mail traffic to which I have drawn attention in this statement, fairly reflects my belief and understanding at the time.

38. I am not aware of anything else which I think should be drawn to the attention of the Chair of the Inquiry.

Statement of Truth

I believe the content of this statement to be true.

Signed:

GRO

Dated:

3 .v. 2024

<u>No.</u>	<u>URN</u>	<u>Document Description</u>	<u>Control Number</u>
1.	WITN10650106	E-mail David Neuberger to Anthony Grabiner and others	WITN10650106
2.	POL00023097	Counsels' Note re possible recusal application.	POL-0019576
3.	POL00025910	Lord Neuberger Note of advice re observations on recusal application.	POL-0022389
4.	WITN10640101	E-mail from Lord Neuberger to counsel.	WITN10640101
5.	WBON0000671	Email from Tom Beezer to Rob Smith re: Recusal application	WBD_000541.000001
6.	POL00268521	E-mail from Tom Beezer to Jane MacLeod	POL-BSFF-0106584
7.	WITN10640102	Solicitors to my clerk.	WITN10640102
8.	POL00023787	E-mails from Tom Beezer to Rodric Williams re short-update	POL-0020266
9.	WITN10650104	E-mails between Lord Neuberger and Anthony Grabiner.	WITN10650104
10.	WITN10650103	E-mail from Lord Neuberger.	WITN10650103
11.	POL00022886	Notes of conferences with Lord Grabiner QC – 18 March 2019	POL-0019365
12.	POL00269774	Note of conferences on 18 March 2019 and 20 March 2019 with Lord Grabiner QC	POL-BSFF-0107837
13.	POL00274041	Update Note of Post Office Board Dial-In Attended by Lord Grabiner of 20 March 2019	POL-BSFF-0112104
14.	POL00274040	E-mail from Toom Beezer to Jane MacLeod re Post Office.	POL-BSFF-0112103
15.	POL00022883	E-mail from Tom Beezer to Jane MacLeod	POL-0019362
16.	WITN10640103	E-mails between Lord Neuberger and Anthony Grabiner	WITN10640103
17.	POL00023956	E-mail chain between Jane MacLeod and others re Recusal judgement	POL-0020435
18.	POL00023208	E-mail chain from Andrew Parsons to Jane MacLeod re Appeal	POL-0019687
19.	WITN10650109	E-mail from Anthony Grabiner to David Neuberger re:	WITN10650109

		Speaking note	
20.	WITN10650128	E-mails between solicitors and Lord Neuberger.	WITN10650128
21.	WITN10650107	E-mail from Lord Neuberger to clerk and others.	WITN10650107
22.	POL00112150	Transcript of recusal hearing.	POL-0109706
23.	POL00023207	Coulson LJ judgment re Permission to appeal.	POL-0019686
24.	WITN10650119	E-mail chain from Lord Neuberger to Anthony Grabiner and others.	WITN10650119