# 3

# What the *Bates* Case Suggested

Although we now know that POL lost or abandoned many cases, it was the *Bates* litigation that began the comprehensive deconstruction of POL's legal practices.

The *Bates* GLO[1] claim was brought by 555 claimants seeking damages for compensation for harm and losses caused by POL, including for wrongful prosecution. It was issued in 2017. In 2019, two substantial trials were conducted to progress the group action. The Common Issues Trial (CIT) looked at how POL's contract with the SPMs should be interpreted, and the Horizon Issues trial (HIT) examined Horizon's fitness for purpose. After two judgments devastating to POL's case and reputation, the case was settled.

The settlement itself is a source of controversy. The claimants were forced to settle when their litigation funding ran out. The group received a settlement of £57m, but approximately £46m of that amount went towards the costs associated with bringing the legal action, even though the funder and the claimant lawyers are reported to have accepted less in fees and costs than they were entitled to. Claimants entitled to the settlement also took less than they could have, allowing some of the money to be shared with those in the claimant group who were subject to convictions and had been excluded from the settlement.

[1] So-called because it was conducted under a Group Litigation Order.



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That settlement came shortly after the HIT judgment. That was a judgment that excoriated POL for their 'institutional obstinacy or refusal' to countenance the possibility Horizon was flawed, despite considerable evidence to the contrary. In Mr Justice Fraser's judgment:[2]

> This approach by the Post Office has amounted, in reality, to bare assertions and denials that ignore what has actually occurred, at least so far as the witnesses called before me in the Horizon Issues trial are concerned. It amounts to the 21st century equivalent of maintaining that the earth is flat.

The obstinacy and the inability to face, still less speak, the truth to the court and to POL's opponents is central to Fraser's assessment of their conduct.

## Excesses of Argument

Mr Justice Fraser made many criticisms of POL's 'attritional approach' to the litigation.[3] Arguments and applications were excessive, inconsistent, circular, and overly intricate. They obscured key issues, on occasion were 'wholly' incorrect legally, illogical, or factually inaccurate. They were absurdly 'one-sided' in their tactics, along the lines that 'any evidence that is unfavourable to the Post Office is not relevant' and

[2] *Bates* v *Post Office Limited* Judgment (No. 6) 'Horizon Issues' [2019] EWHC 3408 (*Bates No. 6*), para. 929.

[3] For a detailed analysis of this and subsequent sections describing lessons from the *Bates* case, see Richard Moorhead, Karen Nokes, and Rebecca Helm, 'Issues Arising in the Conduct of the Bates Litigation, Post Office Project: Working Paper 1' (University of Exeter, 2021).



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should be struck out. They resisted 'timely resolution', reopened settled issues, and challenged the judge's neutrality in ways designed to intimidate him.

## Misleading Submissions and Pleading

The case, as pleaded and argued, diverged from POL's own evidence in multiple ways. Some of the fundamentals of their case were contradicted by their witnesses and documents or lacked a basis in reality.[4] Counsel asserted facts (on their client's instructions) that were proven to be 'completely wrong', unsubstantiated, and 'unwittingly misleading'.[5] Fraud allegations were put to witnesses without supporting evidence, which is a potential breach of Bar rules.[6] Submissions on witnesses were 'bold', paid 'no attention to the actual evidence', and seemed to 'have their origin in a parallel world'.[7]

Pleadings on remote access were factually incorrect. The true position only emerged gradually during the HIT. Mr Justice Fraser thought Fujitsu might be the primary culprit, but we now know that the 2015 Swift report had warned the PO that its public positions on remote access were false. The Swift report was a report by a leading silk, Jonathan Swift KC (now Mr Justice Swift), and his colleague, Christopher

[4] *Bates* v *Post Office* Judgment No. 3 'Common Issues' [2019] EWHC 606 (QB) (*Bates No. 3*).

[5] *Bates No. 6*, paras 378, 379, 382, and 565.2.

[6] Bar Standards Board, 'BSB Handbook, Version 4.3', 21 May 2024 ('BSB Handbook') r.C9.2c, https://bit.ly/453AYaz.

[7] *Bates No. 3*, para. 138.



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Knight. Jane Macleod – POL's General Counsel at the time of the *Bates* litigation, and therefore formally responsible for it – had advised on the Swift Review report.[8]

## Secrecy and Evidence Destruction

Mr Justice Fraser condemned the PO's secrecy, excessive redaction of documents, and handling of privilege and data protection. He suspected internal suppression of material. SPMs were barred from retaining records, and those taking over PO branches after the SPMs were fired were ordered 'to destroy all paperwork'. A Second Sight witness, who had begun investigating Horizon in 2012, was contractually restricted in what he could say, potentially compromising the evidence he could give.[9]

## Disclosure Problems

Both sides faced disclosure issues, but criticism of the PO and Fujitsu was severe. Mr Justice Fraser found POL's behaviour was 'the antithesis of cooperation' required under the rules.[10] They resisted disclosure with illogical and unsupportable arguments, and falsely claimed key documents didn't exist or were irrelevant. Late disclosure of over 2,000 documents was, he said, unjustifiable. Critical records were withheld, and lawyers provided inaccurate and misleading information

[8] 'Jane Macleod Witness Statement, WITN10010100', 30 April 2024, https://bit.ly/3L2bEef.

[9] *Bates No. 6*, para. 199. [10] *Bates No. 6*, para. 625.



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(including, in particular, about the crucial Key Error Logs, KELs). Solicitor Andy Parson's witness statement explaining what had gone wrong with one disclosure failure was 'extraordinarily opaque' and 'puzzling'.[11] Fraser noted Fujitsu's role, citing a crucial spreadsheet disclosed just before trial, saying the PO's own legal team could not have known about it, whereas evidence subsequently suggested some in POL legal did or ought to have known.

## Evasive, Unreliable, or Misleading Evidence

Fraser found several POL witnesses and witness statements misleading or otherwise unreliable. Their evidence was 'slanted more towards public relations consumption rather than factual accuracy'.[12] It said what they wanted to say had happened rather than what had actually happened. Witnesses lacked first-hand knowledge of actual events and systems, omitted key facts, and relied on incorrect information from others, including, in particular, a Fujitsu engineer called Gareth Jenkins. Oral evidence not infrequently contradicted written statements or omitted critical details. Statements contained things the witness had 'no knowledge [of] whatsoever'; documents they had never seen; and plainly incorrect data, 'almost all of' which came from others.

Angela Van Den Bogerd, POL's most senior witness, was perceived as being entrenched and partisan, and provided misleading evidence in the CIT.[13] After these criticisms, her

[11] *Bates No. 6*, para. 619.
[12] *Bates No. 6*, para. 375.
[13] E.g. *Bates No. 3*, 418.



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testimony improved in the second trial but was still heavily criticised.

Fraser's analysis suggests witness statements were either badly prepared or deliberately slanted. Of Angela Van Den Bogerd's, for instance, Fraser said 'Either the team of ten people assisting her with her evidence had the aim of producing entirely one-sided evidence in chief, or they were unaware of all the documents relied upon by the claimants. Either alternative is highly regrettable.'[14] His comment seems to suggest that either incompetence or impropriety was at work here.

POL's independent expert, Dr Worden, used flawed methodology, circular reasoning, and biased assumptions. He relied on tainted evidence from Mr Jenkins, whose full involvement in the provision of information to Worden was 'simply hidden'.[15] Mr Jenkins played a key role in the evidence presented by several witnesses before Fraser, but he was not called to testify himself. This meant he could not be cross-examined. Fraser and POL's opponents questioned this decision, with POL later justifying it by citing concerns about keeping the number of witnesses manageable, and that they were 'concerned that the Horizon Issues trial could become an investigation of his role in this and other criminal cases'.[16] They did not disclose why they were so concerned about this.

Mr Jenkins is a central figure in the PO story. Although a Fujitsu employee who worked on Horizon, he was relied on as an expert witness in criminal cases. What was not revealed in

[14] *Bates No. 6*, para. 251. [15] *Bates No. 6*, para. 880.
[16] *Bates No. 6*, paras 77 and 510.



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*Bates* was that Jenkins was regarded by POL's own lawyers as a tainted witness.[17] The lawyers in *Bates* knew this, and it was this reason, hinted at, perhaps, in the concern I have just noted but not candidly disclosed, that was their reason for not calling him. There is also evidence that the claimants' lawyers were given a false explanation for not calling Jenkins.[18]

When leading counsel for POL at the time tells leading counsel to the inquiry that saying that they wanted to avoid the Horizon Issues trial becoming an investigation of Jenkins role in criminal cases signals the problem sufficiently to the judge so as not to be misleading, Jason Beer KC sounds incredulous:[19]

> MR BEER: Really? You think that signals quite clearly?
> ANTHONY ROBINSON: Yes, I do.
> MR BEER: Is that really what you're saying?

## The Recusal Application Made by Lord Grabiner

Mr Justice Fraser's draft judgment in the CIT indicating POL had lost badly led POL to consider an appeal and, perhaps less

[17] Brian Altman KC, '"General Review" of PO Prosecutions POL00006581', 15 October 2013, para. 148, https://bit.ly/48SNKdf; 'Transcript – Brian Altman', 8 May 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-8-may-2024.

[18] Richard Moorhead, 'The Secrets Peril', https://richardmoorhead.substack.com/p/the-secrets-peril; 'Transcript – Anthony Robinson', 11 June 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-11-june-2024.

[19] 'Transcript – Anthony Robinson', 11 June 2024 (*ADG Robinson Transcript*).



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orthodoxly, a recusal application to try and remove the judge midway through the HIT. Probably coincidentally, by the time the application was made, the HIT was also going badly: a witness was revealing a clear and damaging picture of remote access.

Lord Grabiner QC led the unsuccessful recusal bid, which they lost and sought to appeal. In rejecting their request for leave on the papers, Coulson LJ dismissed the recusal application they had made as 'misconceived', 'egregious', and 'wholly unjustified', criticising its misrepresentation of the case and poor timing.[20] Grabiner stating midway through the original recusal hearing that POL had taken advice from a 'very senior person', Coulson said, may have been designed to intimidate the judge.

If the recusal application had succeeded, the *Hamilton* case and extended inquiry powers may not have materialised. The scandal would have abated and possibly disappeared.

The 'very senior person' was Lord Neuberger, former president of the Supreme Court and a member of the same chambers as POL's counsel team (Lord Grabiner was head of chambers). Neuberger and Grabiner advised that a recusal application had good prospects of success. They did so, it seems, based on the draft judgment and a note from their colleagues who had handled the trial. Lord Grabiner agreed at the inquiry that the note was an 'advocate's document'[21] from his colleagues in chambers who had lost that first trial.

[20] Nick Wallis, 'Fraser J Is Going Nowhere', www.postofficetrial.com/2019/05/j-fraser-is-going-nowhere.html.

[21] 'Transcript – Lord Antony Grabiner KC', 11 June 2024, https://bit.ly/4aO4apB.



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The Bar regards itself as capable of advising independently in cases involving other members of their chambers and Lords Grabiner and Neuberger maintain their advice was proper and correct.[22] The main question focused on by the inquiry was the suggestion that Lord Grabiner appeared to advise POL's board that they had a duty to try to recuse the judge in *Bates*. Grabiner told the inquiry he didn't mean a *legal* duty. It was 'a piece of advice given by a lawyer to a Board of directors as to how he thinks, as the adviser, they should proceed, and it was firmly expressed'.[23] That the board decided by a vote suggests the board perceived they had some choice. POL subsequently submitted to the inquiry that 'when presented with the clear advice of two such eminent barristers (one the ex-President of the Supreme Court), realistically it would be unfair to criticise POL for accepting it'.[24]

## Some Perspective on *Bates*

Fraser's judgment is best understood as a criticism of the handling of the case rather than a definitive criticism of the lawyers involved. He tends to blame POL and Fujitsu for most problems, with some carefully expressed implicit concern

[22] Grabiner Transcript (see n.51); Lord Neuberger, 'Witness Statement of Lord Neuberger of Abbotsbury to the PO Horizon IT Inquiry WITN10650100', https://bit.ly/3N22Vt2.

[23] Grabiner Transcript (see n.51).

[24] POL Legal Team, 'In the Matter of the Post Office Horizon IT Inquiry, Closing Submissions: Phases 5,6 & 7, On Behalf of Post Office Limited, SUBS0000064' ('POL Final Submissions'), 9 December 2024, para. 253, https://bit.ly/48STu6J.



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about the lawyering on occasion. As has already been noted, some of those concerns have been crystallised by subsequent developments in the *Hamilton* case and the inquiry.

Before coming on to look at the other stages of the scandal, we should note some of POL's general submissions to the inquiry.

A general point is that they suggest the *Bates* strategy was not attritional but perhaps, in hindsight, 'bullish'.[25] Some tactics they were criticised for were founded on the advice of their counsel, whom they greatly relied on. Strategy was 'heavily influenced by the counsel team, upon whom POL reasonably relied and some of whose advice was trenchant'.[26] Indeed, Rodric Williams was said to have been asked to brief the barristers, 'not to character assassinate the judge', as lead counsel had already gone 'a bit too far', even though 'we have repeatedly been through this issue before and Im [sic] not sure why it does not land with the counsel team'.[27] POL also reported that even after the failed recusal application, the lawyers they had instructed did not believe they needed to change strategy.[28]

POL replaced their solicitors and counsel after the HIT to adjust their approach when they settled the case.

POL reserved their strongest criticism for Womble Bond Dickinson (WBD) solicitor Andy Parsons. He became involved in early 2013 when instructed to advise on letters

[25] POL Final Submissions (see n.54), para. 250.
[26] POL Final Submissions (see n.54), para. 252.
[27] POL Final Submissions (see n.54), para. 252.
[28] POL Final Submissions (see n.54), para. 254.



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before claim from SPMs about Horizon. Rather pointedly, Parsons is described by POL as 'a 5 years PQE associate at WBD' who advised:[29]

> [on disclosure] despite the fact that he 'didn't understand the nature of the error in hardly any detail', and advised on crucial wording in correspondence based on his understanding that it was normal for lawyers to 'soften wording'. He made 'recommendations' to POL on his own initiative without instructions or without the 'level of thought' required to understand the impact on disclosure in other matters.
>
> 237. He remained POL's main external legal adviser in civil matters to POL until 2019 during which period he played a substantial role in shaping POL's strategy in relation to key responses to the emerging scandal (including the response to [Second Sight's interim report] and the [Independent Mediation Scheme])

By May 2016 he was a partner and[30]

> had principal responsibility for the conduct of POL's defence in the GLO . . . [D]espite having no previous experience of group litigation [Andy Parsons] in turn delegated a number of tasks to a colleague, Amy Prime ('APr'), including the instruction of [Brian Altman KC] in relation to the criminal appeals', and liaising with POL to provide background to the pleading in the GLO. At this time APr was less than one year PQE.

[29] POL Final Submissions (see n.54), para. 236.
[30] POL Final Submissions (see n.54), para. 237.



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They accept they should have been more careful in who they instructed and how they were supervised, but seem to want to suggest that Parsons rather than Jane Macleod (General Counsel) or Rodric Williams (the main in-house lawyer liaising on matters at this time) was responsible for much of the legal work from 2013 onwards:

> 238. It was obviously a mistake for POL to rely on such an inexperienced legal adviser in [Parsons], and, in turn, for him in turn to rely on such a junior colleague, in a matter of such significance to POL. . . . It is now clear (and ought to have been clear to POL at the time) that [Andy Parsons] had neither the experience nor the judgement to provide POL with the depth of advice that the GLO required. Moreover, his involvement from a very junior stage of his career appears to have led [Andy Parsons] to overidentify with his client in litigation and to lose his ability clearly to assess issues of disclosure, evidence, strategy and costs. As a result, POL was deprived of legal advice which was truly objective.

For example, they say POL had not instructed a hard-line approach to disclosure, but Parsons advised on an approach 'designed to avoid or delay disclosure of relevant information'.[31] Advice he is said to have given on disclosure that 'if it's not written down it's not disclosable' was '(at best) naïve as to how non-lawyers would understand it'.[32] Parsons disputes giving this advice.

[31] POL Final Submissions (see n.54), para. 239.
[32] POL Final Submissions (see n.54), para. 239.



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An email from his newly qualified assistant solicitor, Amy Prime,[33] that Mr Parsons helped draft suggested suppressing relevant and, at the time, WBD advised, disclosable material.[34] POL accepted Rodric Williams should have challenged that but did not.[35] Parsons's advice to not disclose 14,000 KELs (Known Error Logs) to avoid uncovering material that would point to other bugs is also highlighted. He is said to have drafted letters without detailed instructions, removed admissions from letters, and failed to include crucial (and so material) information when updating POL.[36] He regularly strayed into territory beyond his competence, criminal law in particular.[37] POL say he explained Gareth Jenkins's involvement in *Bates* to the inquiry in a way inconsistent with Mr Justice Fraser's conclusions in *Bates* and the evidence before the inquiry.[38] Mr Parsons maintained in his inquiry evidence that his decisions were taken in the proper defence of his client's rights in hard-fought commercial litigation.[39]

[33] She was supervised by Andrew Parsons, who made suggestions to be added to the text of the email before it was sent.

[34] 'POL00038852 – Email from Amy Prime to Rodric Williams, Andrew Parsons and Others RE: Disclosure of Security Investigations Guidelines', 10 May 2016, https://bit.ly/48REExg.

[35] POL Final Submissions (see n.54), para. 239b.

[36] POL Final Submissions (see n.54), para. 240.

[37] POL Final Submissions (see n.54), para. 242.

[38] POL Final Submissions (see n.54), para. 243.

[39] Andrew Parsons Transcript, 13 June 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-13-june-2024; Parsons Transcript, 14 June 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-14-june-2024.



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