POL00124439

From: "Hocking, Stephen" GRO
Sent: Tue 09/09/2014 3:24:59 PM (UTC)
To: Rodric Williams GRO
Subject: RE: Escalation points for WG [BD-4A.FID20472253]
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Rodric

Many thanks for this.

To begin with the estoppel point, the point is that where there is a judgement of a competent court, the parties to that judgement are estopped from denying both the state of affairs established by the judgement (in your cases, that the former SPMR is a convicted thief or has a conviction for false accounting) but also the grounds on which the judgement was based. In the case of a criminal trial that would be the indictment, as it is the indictment that set out the case to which the defendant either pleaded guilty or was convicted. Of course, POL is not a party to criminal proceedings, so rather than a strict cause of action estoppel this would be of a case of a collateral attack on a previous judicial decision being held to be an abuse of process (Hunter v Chief Constable of West Midlands– HL [1981] 3 All ER 727 establishes that the rule exists, but says we ought not to label it issue estoppel as such. This was a case in which members of the Birmingham Six brought a civil action against the police to establish that confessions which has been ruled admissible at their criminal trial had been obtained from them by police mistreatment. The rule that this sort of claim cannot be pursued in this way is still good law, even if subsequent investigations make it all too probable that the confessions were indeed obtained after being beaten up by the police.)

In our cases, a SMPR would be prevented from bringing any civil action against POL (or anyone else) which included a collateral attack either on the conviction or on any necessary element of it. Of course, that does not have to mean that a case positively cannot be mediated as a matter of law: part of the point of mediation is not to be bound by all of the strict rules that govern court proceedings. But if a court would not even hear the claim, let alone find for the claimant, can POL really be held to have undertaken to do more? Any award by POL would be completely gratuitous. And if POL doesn't mediate, what remedy could a SMPR have, given that there can be no loss?

That brings me on to the proposals generally, because the same point is made below about ex gratia payments. Before the text or some distillation of it goes public, I wonder if we could remove the reference to being a government owned company and so unable to make ex gratia payments? That might imply we accepted we were governed by public law. I think the point is a good one regardless of ownership, even in a limited company a company officer ought not to authorise a gratuitous payment from company funds. Could we also replace the reference to taxpayers money with company money?

From the public law perspective I have no difficulty in our declining mediation in both the conviction and the

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consequential loss cases. In conviction cases I think we can have an absolute rule based on the abuse of process point, and on the understanding that if the initial investigation had suggested the conviction might be unsafe we would release that information to the SPMR and wait to let an appeal if any take its course. (I should say that where new and relevant material comes to light it is possible to argue that the abuse of process point falls away. The Birmingham six did eventually receive compensation. So perhaps we had better have an absolute rule where no new evidence comes to light, and a policy which we apply in all but exceptional cases to defer to the court process where new evidence does come to light. I am not sure what an exceptional case might be, given that you would think a SMPR would be even more keen to have his or her criminal record expunged than to get compensation from POL, and so if they do not apply to have their conviction reviewed what does that suggest about their guilt. Maybe where the SPMR's state of health makes it unreasonable to undergo a court process?)

In the consequential loss cases I think to be rational the rule can't be absolute, but as we discussed on the phone we can fairly take the position that the mediation cannot hope to be successful with an absurd number on the table. If there is any PL risk in this it might be in proceeding to mediation rather than not, as that might be argued to be an acceptance that the consequential loss would at least be considered. (BTW the book I was struggling to remember that recommended refusing to negotiate until an unacceptable opening bid was revoked was Thinking, Fast and Slow by <http://en.wikipedia.org/wiki/Daniel_Kahneman> Daniel Kahneman and the chapter on anchoring). Maybe we would not characterise this as a refusal to mediate (unlike the criminal conviction cases, it's not that our minds are closed to the possibility of discussion in all circumstances) but rather as a preliminary step in the mediation without which the mediation fails pre-first base. After making the position clear on consequential loss I see no PL risk in refusing to discuss any claim that advances such a claim: as we discussed, if POL is wrong in its view on consequential lose I would have expected that to be a part 7 matter rather than a JR in any case. (It's obviously not a public law issue.)

I hope this is what you needed

Stephen Hocking
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DD GRO
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P Think of the environment. Do you need to print this email?

From: Rodric Williams GRO
Sent: 05 September 2014 18:15
To: Hocking, Stephen
Subject: FW: Escalation points for WG [BD-4A.FID20472253]

Stephen,

Thank you for your time on the telephone yesterday, which (as ever) was very helpful.

As we discussed, we are getting to a stage in the Investigation and Mediation Scheme where we want to “set out our stall” on how we would like to approach certain classes of Scheme application. These approaches are set out in the email below from Andy Parsons of Bond Dickinson. We would like you to please advise on whether a decision to pursue those

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approaches could give rise to an application for judicial review. We would like your advice to inform the position we take at a meeting of the Working Group overseeing the Scheme on 16 September 2014.

You will see that Andy's email refers to POL having taken advice on mediating "criminal cases" from senior counsel. I attach a copy of that advice, which has been provided to POL by former First Senior Treasury Counsel Brian Altman QC.

You will also see that Andy's email refers to "Tony's test for mediation". This refers to the test articulated by the Working Group's Chairman, Sir Anthony Hooper, as to whether or not he thinks a claim is suitable for mediation. He first articulated his "test" on 24 June 2014 in connection with case "M054", but – despite POL's objections – it has subsequently been amended. In case it assists you, I attach the following documents which show the development of this "test":

* Original test for M054;
* POL submission not to change that test;
* Tony Hooper's decision on the new test.

Please let me know if you would like to review a complete suite of the documents on which a decision to mediate a case is based (Applicant's "Case Questionnaire", POL's responsive "Investigation Report", and Second Sight's "Case Review Report"). These can be provided for case M054, or any other particular type of case (e.g. one in which substantial consequential losses are claimed and/or a conviction is in issue).

Finally, you mentioned that you had encountered an estoppel argument which might help bolster a decision not to mediate cases which had been determined by the Courts. I would be very grateful if you could please set that out for us.

Please let me know if you need anything further.

Kind regards, Rodric

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From: Belinda Crowe
Sent: 04 September 2014 07:08
To: Parsons, Andrew
Cc: David Oliver; Rodric Williams; Belinda Crowe
Subject: Re: Escalation points for WG [BD-4A.FID20472253]

Thanks Andy

Copying Rod who may be able to assess JR risk from conversations/advice already received. Otherwise could we check with Counsel please?

David, subject to Rod's view - these will need to be worked through with Chris next week as they will form our position in relation to specific case discussions at the face to face on 15 September.

Best wishes

Belinda Crowe

On 2 Sep 2014, at 14:25, "Parsons, Andrew" GRO wrote:

Belinda

As discussed last week, please find below the escalation points for if we want to start making Post Office's position on mediation more clear to the WG. I would make these points in roughly the order below (starting with the most defensible and moving towards the more controversial).

One point to note – I haven't assessed the JR risk of taking the above actions. My JR knowledge is basic so it may be better to go back to Beachcrofts on this question rather than me bringing in a new JR lawyer from BD.

1. Mediating criminal cases of theft and fraud

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· Where an Applicant has admitted theft or fraud, the cause of the loss in the branch is clear.

· Unless there is a material change of circumstances that make the conviction unsafe, there is nothing to discuss at mediation.

· POL has taken very senior legal advice - discussing a criminal conviction for theft / fraud at mediation risks the safety of that conviction and therefore the case should not be mediated.

· If a conviction is in doubt, the appropriate course of action is for the Applicant to appeal through the Courts. Post Office may support, not oppose or oppose any appeal depending on the circumstances.

· ACTION - Post Office to make a clear, on the record, statement to the WG that it will not usually mediate criminal cases involving theft or fraud but always subject to a case-by-case review.

2. Mediating cases of false accounting

· Where an Applicant has admitted false accounting, the cause of the loss in the branch will never be known as the false accounting will hide the losses.

· It is therefore impossible to have an informed discussion at mediation about the loss in a branch as key evidence was destroyed by the Applicant's false accounting.

· It is also a well-established common law principle that an agent (like a Subpostmaster) is liable to pay to his principal (being Post Office) any sum declared in his accounts. The Applicant is therefore liable to pay Post Office the cash sum declared in his accounts regardless of the cause of any underlying loss.

· Like above, POL has taken very senior legal advice - discussing a criminal conviction for false accounting at mediation risks the safety of that conviction and therefore the case should not be mediated.

· If a conviction is in doubt, the appropriate course of action is for the Applicant to appeal through the Courts. Post Office may support, not oppose or oppose any appeal depending on the circumstances.

· ACTION - Post Office to make a clear, on the record, statement to the WG that it will not usually mediate criminal cases involving false accounting but always subject to a case-by-case review.

3. Mediating cases where an Applicant has been cautioned

· There is no legal distinction between a caution, a guilty plea and conviction at full trial. All three amount to a complete admission of an offence.

· The same points made above therefore apply equally to caution cases.

· ACTION - Post Office to make a clear, on the record, statement to the WG that it will not usually mediate criminal cases where there is a caution but always subject to a case-by-case review.

4. Dealing with Consequential Losses

· Applicants have claimed unsustainably high consequential losses.

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· A large proportion of the losses claimed would be irrecoverable if claimed through the Courts (eg. Post Office is not liable for salary claims beyond 3 months as SPMR contracts can always be terminated on 3 months' notice).

· Post Office, as a government owned company, cannot make ex gratia payments. Post Office will only pay Con Loss where there is a material legal risk to POL.

· Post Office is concerned that some professional advisors (and maybe JFSA) have been inappropriately encouraging Applicants to claim very high but irrecoverable losses.

· ACTION – Post Office put WG on notice that POL will be making it's con loss position clear to Applicants and advisors in CRR responses, mediation statements and potentially direct to PAs).

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5. Declining to mediate those cases where Post Office does not consider there to be a reasonable prospect of resolution regardless of the decision of the Working Group.

· Post Office exercises its right as a party not to mediate and makes clear the points it made in relation to the mediation test (i.e. vfm, tax payers money etc.

· ACTION – Post Office to make it clear to WG, on the basis of the first relevant case, that it cannot and will not mediate cases where there is not, in its view, a reasonable prospect of resolution.

6. Feedback from CEDR on why cases are not settling / Adequacy of Tony's test for mediation - on a slower track

· Get feedback from CEDR on why cases not settling (eg. high Con Loss claims; lack of information in old cases; etc.) when more cases have been mediated.

· Highlight that Tony's test is letting through cases that have no hope of settling. This is raising expectations of Applicants and wasting money.

· ACTION – Request that Tony revises his test for mediation.

Kind regards

Andy

Andrew Parsons

Senior Associate

for and on behalf of Bond Dickinson LLP

<http://www.bondickinson.com/> <image001.jpg>

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