POL00258011

From: Rodric Williams GRO

Sent: Tue 16/10/2018 2:04:14 AM (UTC)

To: Andrew Parsons GRO Mark Underwood GRO Jane MacLeod GRO

Cc: Dave Panaech GRO; Victoria Brooks GRO Amy Prime GRO Ben Foat GRO

Subject: RE: Strike out application - SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD

Attachment: Bates v The Post Office - Judgment No..2 strike out application 15 Oct 1....doc

All (now also including Ben Foat),

I set out below my legal summary of the attached judgment, the (admittedly few) positives it contains, the concerns it raises, and next steps, the most pressing for me being stakeholder communications.

Is it possible to schedule a call which includes Comms, as soon as possible on Tuesday to agree how best to take matters forward? I'd like UKGI to hear about the judgment from us, but don't want to get out in front of Wednesday's meeting with the Minister....

The Judgment

The core legal findings of the judgment are, as Andy reported, that:

- the Managing Judge decided the application on case management grounds for which he has considerable discretion and very limited scope for appeal;
- he used that discretion to sidestep the law on admissibility and instead set a very high threshold for strike out, i.e. that the Claimants' evidence could never be relevant to the case;
- the threshold was not met for any of the Claimants' evidence given the number of Common Issues, the "considerable legal analysis" each will require, and what our case on those issues is.

We therefore lost the application and can expect the Claimants to be awarded their costs when that question is dealt with on the first day of trial.

Positives

There are some legal positives in the judgment. As well as the key affirmation that the Common Issues Trial will not rule on Horizon and "breach" issues (to which most of the Claimants' disputed evidence goes), the Managing Judge intimated that the Claimants are up against orthodox legal principles when advancing their case, e.g.:

- on the important question of construction of terms of the postmaster contract:
  - The Managing Judge stated that "[c]*ontractual orthodoxy in terms of construing the contract requires knowledge common to the parties to be considered*".
  - This would make irrelevant much of the evidence we sought to strike out when the Court comes to determine what the terms of the postmaster contracts actually mean.
  - To circumvent this, the Claimants rely on a case concerning Manchester United-branded fragrances, the application of which looks questionable ("*If – and it is a very considerable 'if', given the stage at which this Group Litigation is at – the claimants are right about this aspect of their case....*").

  [see Judgment para.31]
- The Managing Judge is confident that he will act properly in this regard, expressly acknowledging that he can be appealed if he does not ("*However, should I in the fullness of time make findings on the Common Issues by taking into account matters irrelevant in law (and hence inadmissible) on some of those Common Issues, there is a remedy available* [i.e. an appeal]", Judgment para.53).
- on agency issues, which include whether an agent will be bound by their account unless they show error, the

POL00258011

Managing Judge noted that the Claimants were relying on "older cases" (which had not been raised prior to the hearing), for which there would "*doubtless be a great deal of legal argument on both sides as to how, if at all, such principles are now to be approached…*" (Judgment para.37).

Negative Perception

Of much greater concern is the overall tenor of the judgment, which is negative about the way we have conducted the case and includes intimations that we are:

- not acting cooperatively and constructively in trying to resolve this litigation; and
- impugning the court and it processes by making an application for improper purposes.

This is not only extremely disappointing given the approach we have adopted, but also at odds with comments the Managing Judge has made during various procedural hearings over the past year. Nevertheless, the judgment stands and we will therefore need to work to rectify matters.

Next Steps

I see there being two immediate work streams:

1. *Trial Preparation*

I want to hear how David Cavender QC is proposing to respond to the challenges the judgment raises to our case, both in terms of its merits and how it can be presented. Andy - do you have a time frame for this?

2. *Stakeholder Communications*

We designed our Information Sharing Protocol with UKGI so that there would be "no surprises". They should therefore hear about the judgment from us rather than any other source, and as soon as possible given how quickly word of the judgment could travel.

I would therefore like to get a briefing over to UKGI's lawyers tomorrow, whether by phone, email or combination of both.

I would be happy to email the judgment to UKGI with a summary of the good and bad points as outlined above, preceding it with a phone call given that they are likely to see this as bad news, but I'm conscious that the meeting between Paula, Al, Jane and Mark D and our Minister and other government representatives is on Wednesday, and I don't want to do anything that gets in front of that.

Are we able to schedule a call tomorrow with Comms to agree the way forward?

Thanks, Rod

From: Rodric Williams
Sent: 15 October 2018 20:09
To: Andrew Parsons [GRO]; Mark Underwood [GRO]; Jane MacLeod [GRO]
Cc: Dave Panaech [GRO]; Victoria Brooks [GRO]; Amy Prime [GRO]
Subject: RE: Strike out application [WBDUK-AC.FID26896945]

All,

POL00258011

I am reading this now and have spoken to Andy. I'll send my comments later this evening.

I have however instructed Andy to ask counsel to again revisit their merits opinion, essentially "war gaming" it in the context of a judge who has formed a view that Post Office acts in a high-handed/oppressive manner towards its agents.

Rod

From: Andrew Parsons [mailto: GRO
Sent: 15 October 2018 19:03
To: Rodric Williams <GRO>; Mark Underwood <GRO>; Jane MacLeod <GRO>
Cc: Dave Panaech <GRO> Victoria Brooks <GRO>; Amy Prime <GRO>
Subject: Strike out application [WBDUK-AC.FID26896945]

Rodric, Mark, Jane

Please find attached the strike out application judgment. Its not good news – Fraser refused to strike out the Cs evidence.

- The Judge has approached this as a case management issue, rather than a trial issue. As a case management issue, the Judge adopted the test that he cannot strike out evidence unless the evidence can "*never be relevant*" to the issues at trial (para 22). This is a very high bar to clear and so he found that the Claimants' evidence must remain live in the proceedings (para 53).
- However, he acknowledges that just because the evidence remains in the Common Issues Trial does not mean that it is relevant to the Common Issues – he says that that question will be the subject of detailed debate at the trial (para 25).
- He carefully avoids deciding whether the evidence is actually relevant to any of the Common Issues, but expressly makes clear that he will not be making any findings on the Horizon Issues or issues of breach (para 52). This last point appears to be a contradiction in this judgment – if he does not intend to make any findings on breach then how can large parts of the Claimants' evidence be relevant?
- As a side note, Fraser also criticises both sides for "aggressive litigation tactics" (paras13 – 16). This section is at odds with his comments at the other hearings in the run up to the strike out application in which he invited a strike out application.

In substance, we do not believe that this Judgment moves Post Office backward or forward from its position before the strike out application, but we are going to give this further careful consideration overnight.

The more worrying part of the Judgment is the final para where he refers to Post Office's termination correspondence to Alan Bates back in 2003, calling it "*undoubtedly aggressive and generally dismissive*". It is one thing to criticise the lawyers as being aggressive (that criticism, although never welcomed, is a risk in all litigation) but it does not directly affect the Judge's substantive view of the case. It is a different thing altogether if correspondence about Post Office's conduct of a termination 15 years ago is starting to seep into his thinking.

David, Tony and I will be in touch tomorrow with further advice on how to proceed.

Kind regards
Andy

Andrew Parsons
Partner
Womble Bond Dickinson (UK) LLP

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