

Message

From: Thomas Cooper [GRO]
on behalf of Thomas Cooper [GRO]
Sent: 08/05/2019 21:08:37
To: Watts, Alan [GRO]; Alisdair Cameron [GRO]; Tim Parker [GRO]
CC: Massey, Kirsten [GRO]; Henderson, Tom [GRO]
Subject: Re: Privileged & Confidential

Alan

Please could you provide a comprehensive explanation of which of the implied terms are covered by our interpretation of Necessary Cooperation. There are 3 areas outlined in your note but I think it's important for us to understand where there are actual differences of substance between POL and the claimants in relation to the contract.

In relation to the findings of fact, most of the most damaging findings are disputed on the basis of procedural unfairness. I'm assuming that doesn't necessarily mean the findings are wholly wrong - the key point is that POL wasn't able to present evidence.

As you know from my email to WBD, I was disappointed by the summaries that WBD provided which didn't seem to address the judge's adverse findings in a meaningful way. Have you been able to establish yourself the extent to which judge's findings are, in fact correct?

I think the issue for the Board is the utility and wisdom of disputing the judge's findings of fact which might in fact be true or substantially true.

Tom

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From: Watts, Alan <[GRO]>
Sent: Wednesday, May 8, 2019 7:59 pm
To: Thomas Cooper; Alisdair Cameron; Tim Parker
Cc: Massey, Kirsten; Henderson, Tom
Subject: RE: Privileged & Confidential

Al, Tom and Tim,

With apologies for it being slightly later than I hoped please find attached our paper for tomorrow morning's meeting together with attachments. We look forward to discussing with you in the morning. In addition if there is time after the discussion on the appeal and costs we would like 10-15 minutes just with the 3 of you to discuss a couple of other issues.

We look forward to seeing you in the morning.

Regards

Alan

From: Watts, Alan
Sent: 08 May 2019 08:20

To: 'Thomas Cooper'; Alisdair Cameron; Tim Parker
Cc: Massey, Kirsten; Henderson, Tom
Subject: RE: Privileged & Confidential

Tom,

Thank you for your email.

We agree that the points that you have raised are the key ones. In the time available on Thursday, we envisage that the discussion will primarily be focussed your points 1 and 2, albeit there may be some discussion of the other (related) points as needed. As I mentioned, for the purposes of Thursday's meeting, we will prepare a 1-2 pager summarising the key points. This will include further detail on your points 1 and 2, in particular how the Post Office's position is presented to the Court of Appeal and the proposed approach to alternative arguments.

On your point 3, we will consider this further with the legal team.

On your points 4 and 5, we asked WBD last week for a description of what has been said to date in settlement discussions so that we can give you some advice on next steps to achieve settlement. They are due to provide this to us during the course of this week. Whether Horizon is stayed or not, there will still be scope for the parties to at least agree an ADR process over summer, if not commence the process itself. As we have mentioned to you previously, we think the key information needed from the claimants in order properly to consider potential approaches to settlement is detail as to the alleged quantum of their claims. We'll come back to you on suggested next steps once we have considered the information from WBD.

On your point 6, we have already discussed with Ben Foat the need to have the litigation and the ongoing contractual review happen in tandem – we agree with your feeling. Although you may end up in a different place to where you are now after a Court of Appeal judgment, there will almost certainly be a need to make contractual changes in any event. We understand work is already in hand on this and will follow up with Ben on this.

Regards

Alan

From: Thomas Cooper [mailto:GRO]
Sent: 05 May 2019 10:33
To: Watts, Alan; Alisdair Cameron; Tim Parker
Cc: Massey, Kirsten; Henderson, Tom
Subject: Re: Privileged & Confidential

Alan

Thanks for this.

In terms of Friday, I'm hoping we can cover the following:

1. Facts in the lead cases relevant to the Appeal

I'd like to know how we are treating the facts in the lead cases and how they relate to the appeal. Based on discussions so far, they fall into the following categories:

- Facts relevant to the common issues trial (eg whether Bates received his contract):
 - facts where Fraser's findings are disputed (eg Bates contract)
 - facts which are not disputed
- Facts not relevant to the common issues trial

I think it would be helpful for us to understand which, if any, of Fraser's findings of fact should be disputed for this appeal and, more importantly, exactly which of his key findings we are accepting.

2. Legal arguments

The core of our position, if we're successful in arguing the contract isn't relational, seems to be that "reasonable cooperation" adequately covers most of the implied terms sought by the claimants. I'd like to understand how we would communicate that to the judge, claimants (and by extension current postmasters). Are we ourselves totally clear about what it means operationally, particularly in relation to disputed items?

I'm less clear about what position we're taking on the good faith concept and individual clauses in the alternative that the Court of Appeal finds that the contract is relational. How are we arguing this alternative in the Court of Appeal?

WBD previously circulated quite a helpful Excel spreadsheet with all the clauses subject to appeal set out and I wonder if something like that (although it's quite long and probably too detailed for GLO) could help us understand the two main scenarios above?

Although the focus in my mind here needs to be on the 3 key issues (liability clause; what evidence is needed to prove a loss; and termination) I found the WBD spreadsheet helpful in identifying some clauses where I think there's a real decision for us to take about POL's position. To pick one example - payments during suspension. The existing clause (not only does a suspended postmaster not get paid while suspended but he/she has to bear the cost of the branch being run by someone else) seems very hard to defend, particularly if the postmaster is subsequently reinstated. A document like that would help identify those issues and decisions about exactly what position POL is taking.

3. Lead case outcomes

At some point soon it would be good to get your assessment of the lead cases and what the likely liability might be for POL, if any, in those cases.

4. Mediation/settlement discussions

At our last GLO meeting there was a suggestion from various parts of the legal team that there might be settlement discussions over the summer. Given that Fraser has stayed the Horizon trial and we may not see him again if he's recused, presumably he will not be forcing the parties into a mediation discussion over the summer. So how does mediation get set up - if at all over the coming months?

5. Liability estimates

In the last papers for GLO there were some indicative liability numbers. It would be helpful to understand how they have been put together and whether they include anything for the consequences that the current case might have on the CCRC.

6. Ongoing contractual relationships

It seems to me we could be moving to a world where postmasters might have different contractual status depending on the size and types of business they are doing:

- larger organisations (eg multiples like WH Smith)
- small operators working on their own or with a small number of employees (eg single branch in postmaster owned convenience store)
- individual postmasters who are self-employed or potentially have worker or employment status

While theoretically a separate exercise from the court case, my feeling is they are closely linked. While the answers to these questions are not just about the court case and are also complex, I think we do need to set up a process and set a timetable to start understanding the options and the implications.

Tying this in with 4 above, I'm still looking for some kind of big picture overview of the various strands to this case and how we can expect this all to play out.

Tom

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From: Watts, Alan <[GRO]>

Sent: Friday, May 3, 2019 1:54 pm

To: Alisdair Cameron; Thomas Cooper; Tim Parker

Cc: Massey, Kirsten; Henderson, Tom

Subject: Privileged & Confidential

Al, Tom and Tim

Please find attached a checklist of work undertaken this week and known actions for next week. There are a few points to note:

1. Common Issues appeal hearing 16 May

As agreed we're applying for permission to appeal before Fraser J on 16 May. Simultaneous exchange of skeletons for that hearing has been ordered to take place on 14 May. This skeleton will not contain our Court of Appeal Grounds of Appeal, or the more detailed submissions we intend to file with the Court of Appeal. Instead the Fraser J skeleton will be relatively high level, setting out in more summary terms the points we intend to appeal. We do not envisage that the GLO Sub-Committee will need to review the skeleton itself, as we will be agreeing the broad approach to the appeal (which will be reflected in the skeleton) at our meeting next week.

The claimants have asked us to provide them with our Court of Appeal Grounds of Appeal so that they know what to expect at the Fraser J hearing – their concern being that if they don't know what we're appealing until 14 May they won't really have time to prepare for the hearing on the 16th. We're not minded to share the Court of Appeal Grounds of Appeal as (a) we're not required to do this; (b) it is a working document that will be further refined after the Fraser J hearing. Instead we will offer to share our Fraser J skeleton with them on 13 May, one day earlier than required – a sequential exchange of skeletons (which is quite common) to alleviate their concerns that they won't have preparation time.

I assume this approach is fine with you but please let me know if you disagree.

2. The Common Issues appeal

The main item for next week is the GLO Sub-Committee meeting on 9 May 2019. At that meeting we will need the Sub-Committee to agree to the approach we plan to take with the Common Issues appeal. There will be no need to approve the Court of Appeal Grounds of Appeal document in this meeting, as we have some time before that needs to be finalised and filed with the Court of Appeal in early June. Instead, we need to agree our approach to the Common Issues appeal in general.

We have now reviewed the Grounds of Appeal and attended a lengthy meeting with the legal team to discuss. We believe that we are all broadly agreed as to the approach to be taken in the appeal – and our focus is likely to be more on how the Post Office's position is presented to the Court of Appeal, rather than the scope of the appeal itself. In particular, we think that it will be important to highlight the implied terms that the Post Office agreed before Fraser J, to show that the Post Office is acting reasonably and not seeking to avoid obvious obligations, but is equally not able (and does not think that it is necessary) to accept the extensive terms and obligation of good faith implied by Fraser J. We can discuss this further when we meet next week.

In addition, as promised attached is WBD's crib sheet summarising the issues under appeal. We're not sure how useful this document is going to be to the Sub-Committee so we will supplement this with a 1-2 pager for next week's meeting, outlining the points for discussion and decision.

3. Counsel team

We haven't included this in the action list but we are considering the constitution of the Counsel team for the recusal appeal and the Common Issues appeal. Who does what may depend on whether those two appeals are conjoined. We have some names in mind and are making confidential enquiries of availability. For present purposes it makes sense for David to do the 16 May hearing. We anticipate making recommendations shortly after that hearing.

Please let me know if it would be helpful to discuss.

Regards

Alan

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