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From: Andrew Parsons[GRO]

Sent: Sun 12/05/2019 3:53:58 PM (UTC)

To: Ben Foat[GRO]; Rodric Williams[GRO]; Watts, Alan[GRO]; Massey, Kirsten[GRO]; Henderson, Tom[GRO]; Mark Underwood1[GRO]; Patrick Bourke[GRO]

Cc: Tom Beezer[GRO]; Amy Prime[GRO]

Subject: Recusal appeal judgment [WBDUK-AC.FID26896945]

Attachment: _DOC_155751309(1)_DRAFT Recusal Appeal Briefing 12 May 2019.DOCX

All

Please find attached a draft briefing note on the recusal appeal judgment. This has been produced with the input of Lords Grabiner and Neuberger and has been approved by David Cavender.

Alan / Kirsten / Tom – would you like to review first? All comments welcomed. I have nevertheless copied Ben and Rodric so that they can see the progress made so far.

I have also copied below extracts from various emails I have exchanged with Counsel over the weekend. These extracts set out the views of Lords Grabiner and Neuberger in their own words. David Cavender's views are largely captured in the draft note.

Ben – you suggested a call at 8:30 tomorrow morning. That time works for me. The immediate question on which we need an urgent decision is whether to provide the draft grounds of appeal to Freeths at lunchtime tomorrow, which was our original plan. Or, do we hold them back so that they can be reviewed again in light of the recusal judgment? I have asked Counsel for their views on this before tomorrow morning.

Kind regards
Andy

Dear Andrew,

In addition to your emails, David's email and your draft note, I read the Coulson LJ judgment yesterday evening, and decided to digest it overnight and re-read it this morning, before replying.

In terms of substance, there is little I can add to what Tony and David have said, except that I do not think that anything untoward will have taken place between Coulson LJ and Fraser J. Nonetheless, given that judges are humans, it would be unrealistic not to acknowledge that there is a risk of an appellate judge being subconsciously affected by his relationship with a trial judge when considering an appeal/application to appeal against the trial judge, especially when the appeal relates to the latter's conduct. Much depends on the individual judge: inevitably, I would have more confidence in the natural impartiality of some judges than others.

The clients will naturally feel both disheartened by the judgment and bemused by the fact that the view taken by an appeal court judge is entirely inconsistent with that of their legal advisers.

As to being disheartened, the main appeal (on interpretation) is unaffected by the Coulson LJ judgment, at least in any direct sense. In case the Coulson LJ judgment is thought to be relevant to the main appeal, my experience over 45 years shows that successive setbacks in litigation come in two categories: (i) those which should make you realise that you are on the wrong track, and (ii) those which should stiffen your resolve. It is of course normally easy when it is all over to identify which category you were in, but harder to do this when one is in the middle of the litigation. Having said that, on the main interpretation issues, I remain firmly of the view that we are a category (ii) case. The issues actually decided by Fraser J involve applying what I regard as well-established principles of law, and in that connection I think he has gone seriously wrong. The reasons for my view are all to be found in the recently prepared

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grounds of appeal and skeleton argument.

As to being bemused, when it comes to the recusal appeal we are in a more nuanced area of judgement, and there is, I acknowledge, at least in principle, a greater risk of this being a category (i) case. That was my main reason for leaving it to stew overnight. Having done that, I remain of the opinion that Fraser J should have been recused, despite the fact that Coulson LJ and Fraser J disagree: neither their reasons nor their identity has caused me to change my view.

So far as our approach to the PTA on interpretation is concerned, I have little to add to what David has said in his email. I am more neutral on the 3 LJ issue (as it can be said to suggest that this is a difficult PTA application to resolve) but, particularly as Coulson LJ may be the sole judge and if he refuses PTA it might be difficult to explain why we did not ask for 3 LJs, I do not disagree with David. It may be academic anyway, as we are, I believe, asking Fraser J first.

Subject to two points, I think that our PTA grounds and skeleton do not require any significant amendments (although I haven't gone through them specifically to check).

First, I think we have to remove the full reference to recusal. We could still include some limited reference to it, but that may be a mistake. It needs thinking about. Although somewhat artful, it might be better to drop recusal for the moment, with a view to resurrecting it later – even at the hearing of the appeal if things are going well.

Secondly, there is a real risk that, if we retain our procedural unfairness grounds, they will be refused for the sort of grounds that were mentioned (to my mind, intemperately and unfairly) by Coulson LJ. It can fairly be said that as a matter of logic, we lose nothing by including them - at worst, they are removed. But I suppose that, particularly if the tribunal was Fraser J or Coulson LJ, it could prejudice a court considering the PTA.

Subject to the points made above, there is nothing more I have to say about your draft note.

Best wishes,
David Neuberger

Dear Andrew,

I agree with this note. I'm afraid the clients have been very poorly served by our legal system. I believe the Fraser J judgment is deeply flawed. It's wrong in law and reveals an obvious apparent bias against Post Office in all the respects we are familiar with. I do not believe Fraser J could approach any of the remaining cases with an open and impartial mind because he has obviously pre-judged key matters which are yet to be tried.

I am also disappointed and very unimpressed with the Coulson LJ judgment on the recusal appeal. It's a very superficial analysis and demonstrably bad. I am reluctant to conclude that this has all been cooked up between Fraser J and Coulson LJ as former Chambers' colleagues but the process we have been through is not a happy one and there are grounds for suspecting that there have been inappropriate communications between them.

I'm sure the clients are both puzzled and concerned by their experience in this litigation so far. All I can say is that none of the judgments we have so far seen persuade me that the advice which has thus far been given to Post Office is wrong or in any way misguided.

Regards,

Tony
Lord Grabiner QC

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