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Post Office Group Litigation

DRAFT Briefing on the recusal appeal judgment

This note has been approved by David Cavender QC and been prepared with the input of Lord Grabiner and Lord Neuberger.

1. Summary of the Court of Appeal's findings and Post Office's position

The Court of Appeal has refused Post Office's application for permission to appeal Mr Justice Fraser's decision not to recuse himself.

Background

Post Office's application to recuse Fraser J was on the basis that he had improperly pre-judged a number of issues and that a fair minded observer would consider those pre-judgments to present a real possibility of bias. Post Office did not allege that Fraser J was actually biased against Post Office.

In the Common Issues Judgment, Fraser J made a number of findings of fact that, Post Office say, were not needed for the resolution of the Common Issues. These facts nearly all related to events that happened after a postmaster entered into his/her contract with Post Office, which included matters relating to the operation of Horizon, investigations into losses in branches and the recovery of shortfalls from postmasters. Post Office's legal position was and remains that such post-contractual matters are inadmissible at law when resolving questions of contractual interpretation and the implication of terms; a principle that the Claimants and the Judge accepted as correct.

In making these findings, Post Office said that Fraser J had pre-judged the outcome on these post-contractual matters when his decision on those matters should have been reserved for later trials. Moreover, Fraser J made these findings based on incomplete disclosure and witness evidence, because Post Office had not adduced evidence on these topics due to such evidence being inadmissible.

Before making this application advice was sought from David Cavender QC (Counsel who conducted the Common Issues trial) as well as new Counsel, Lords Grabiner and Neuberger. The advice was that Post Office had a reasonable to strong prospect of success of recusing Mr Justice Fraser. It was advised that he was unlikely to recuse himself when dealing with the primary application and that an appeal would be required.

Fraser J refused the application on 9 April 2019. An appeal was lodged on 11 April 2019.

Court of Appeal's decision

The reasons given by the Court of Appeal for refusing the application were largely the same as those given by Fraser J so they are dealt with together below. For the four main reasons below, the Court of Appeal held that there was "*no prospect*" that a fair minded observer would consider there to be a real possibility of bias.

First, the Court of Appeal said that the Common Issues judgment needed to be read as a whole when considering whether a fair minded observer would conclude that there was a real

possibility of bias. Post Office's position however was not that the whole judgment demonstrated a real possibility of bias, but that the findings on post-contractual issues without full evidence showed that Fraser J has pre-judged those issues and so there was a real possibility of bias when those matters came to be determined in later trials. The Court of Appeal judgment does not address this point.

Second, the Court of Appeal asserted that because Post Office was "*partially successful*" on some of the Common Issues, Fraser J could not be seen as biased by a fair minded observer. Counsel believe that this is obviously wrong. In fact, the minor issues that Post Office won were small and not reflective of a "*partially successful*" label. In any event, being successful on a small number of issues does not preclude the appearance of bias in making unnecessary and inadmissible findings on a number post-contractual matters.

Third, in the Common Issues judgment Fraser J attempted to qualify that his post-contractual findings were not findings are all. He applied this qualification to some but not all of his post-contractual findings. Post Office's position was that this "mantra" did not stop the findings having force: they were either judicial findings or not and Fraser J accepted that they were binding findings. The Court of Appeal however found that the qualifications applied by Fraser J were sufficient to mean that a fair minded observer would not consider the issues to have been pre-judged. Counsel consider this to be the weakest part of the Court of Appeal's judgment in that no attempt was made to review each of the findings or the force of the qualification on each of them, whereas Post Office's application went through these in detail.

Fourth, the Court of Appeal found that post-contractual matters can sometimes be "*a relevant and admissible aid to construction*". No further explanation is provided for this statement, nor is any attempt made to explain why each of the post-contractual findings made by Fraser J was admissible. Based on this general statement, the Court of Appeal found it was proper for Fraser J to make post-contractual findings. This view is then buttressed by saying that Post Office cross-examined on post-contractual matters and thus put these points into issue. This part of the Court of Appeal's judgment is most worrying because the inadmissibility of post-contractual matters is a key theme in the appeal of the Common Issues judgment itself. That concern is compounded by the unexplained view that post-contractual material can be relevant (which the legal team is at a loss to understand) and the misconceived idea that by cross-examining on a point, an inadmissible point can somehow become admissible at law.

The Court of Appeal's judgment criticises Post Office's application in strident terms. It calls the original application and appeal "*scattergun*", "*fatally flawed*" and "*untenable*". The bar for appeals is low: a real prospect of success. For permission to appeal to be refused, the single Lord Justice reviewing the papers must therefore take a firm position but the language used here is unnecessarily provocative.

Further action on recusal

There is no right to appeal or challenge a refusal to grant permission to appeal. The recusal application has therefore reached its conclusion.

2. Effect on the Common Issues appeal

The outcome of the recusal appeal is disappointing. We are greatly concerned by the poor quality of the Court of Appeal's judgment and in particular its cursory views on the fourth ground above in relation to the admissibility of post-contractual facts.

The single Lord Justice in the Court of Appeal hearing the recusal application was Lord Justice Coulson. Coulson LJ was a former colleague of Fraser J in the Technology &

Construction Court. Coulson LJ was the former head of the TCC and Fraser J is his successor. At the handing down hearing before Fraser J, he noted that he had informed the Court of Appeal that the recusal appeal was coming before Post Office had even lodged the appeal. With great hesitancy, we note that we and Counsel cannot shake the feeling that Coulson LJ was subconsciously looking to protect Fraser J. We have no evidence to support this view and so nothing can be said directly about it. But given that we cannot eliminate this risk, and the Coulson J's comments on the admissibility of post-contractual matters, it would be preferable that any application for permission to appeal the Common Issues is not heard by Coulson LJ alone. Counsel therefore advises that consideration be given to requesting that any application for permission be determined by three Lord Justices. This is an unusual course of action and one that should be discussed further before the Common Issues appeal is lodged with the Court of Appeal.

The other point for consideration is whether to pursue the procedural unfairness ground of the Common Issues appeal given that it traverses much of the same subject matter as the recusal appeal. It might be said that given Coulson LJ has rejected the recusal appeal in the manner he has that the procedural unfairness ground should be withdrawn from the Common Issues appeal. However, the test being applied to those same post-contractual facts in each appeal is different and so the same outcome is not inevitable. Further, it remains a key strand of the Common Issues appeal that post-contractual material is inadmissible and that relying on that material was the root cause for Fraser J going wrong on a number of the Common Issues. Counsel's view is that the procedural unfairness aspect of the Common Issues appeal should be maintained. To withdraw it would weaken the legal grounds of appeal on construction, good faith and implied terms.

3. Implications for the current litigation timetable

Now that the recusal application is concluded, the Horizon trial will resume on 4 June as already scheduled. There are two weeks of expert evidence to be heard at the start of June and then two days of closing submissions at the start of July.

Also, there is a hearing scheduled for 16 May before Fraser J for permission to appeal the Common Issues judgment and another hearing on 23 May to deal with the costs of the Common Issues trial and the recusal application. Both of these should go ahead as planned however we have recently become aware that the Court may have made a listing error requiring these hearings to be re-scheduled.

4. Costs consequences of the recusal appeal being refused

In the Court of Appeal, the normal rule is that the Respondents (here the Claimants) are not entitled to their costs even if permission is refused. It is up to the Claimants to apply for their costs but that would be unusual, and in any event we would expect their costs to be small given that they only lodged one very short written submission.

In relation to the original recusal application before Fraser J, the Court has already ordered that Post Office pay the Claimants' costs of that application, which is the ordinary costs ordered made when an application is lost. The Claimants are seeking £352k for their costs. They have also recently stated (on a without prejudice basis) that they will be seeking a further £91k for additional costs incurred by the delay to the Horizon Issues trial. All these questions will be addressed at the hearing scheduled for 23 May and we will be providing separate advice on how Post Office might manage this hearing.