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Message

From: Watts, Alan GRO
on behalf of Watts, Alan GRO
Sent: 15/05/2019 09:30:35
To: Thomas Cooper GRO
CC: Alisdair Cameron GRO ; Tim Parker GRO ; Ken McCall1 GRO ; Ben Foat GRO ; Massey, Kirsten GRO ; Veronica Branton GRO
Subject: RE: Legally privileged and confidential - GLO

My understanding is that in relation to his findings of fact the real complaint is that he would take once instance from one SPM and then make a broad finding as if it applied to all SPMs for example if he found that one SPM didn't get adequate training on Horizon rather than limiting it to that SPM his finding would be that training in relation to Horizon was inadequate. So even if there is a finding of fact that is correct there is still a complaint as to how he expressed it.

On the recusal light point if the CoA were with us on everything I don't think we would be prevented from asking for a consequential direction that the matter isn't referred back to Fraser even if it wasn't in the grounds of appeal.

What I am wrestling with at the moment is what goes in the grounds for the hearing before Fraser next week – if between that hearing and filing the grounds with the CoA we want to take things out we can do but what we can't do is add things back in – if we haven't asked Fraser for leave to appeal on something we can't then ask the CoA for it but conversely if we have asked Fraser we don't have to ask the CoA.

From: Thomas Cooper GRO
Sent: 15 May 2019 10:20
To: Watts, Alan
Cc: Alisdair Cameron; Tim Parker; Ken McCall1; Ben Foat; Massey, Kirsten; Veronica Branton
Subject: Re: Legally privileged and confidential - GLO

Trouble is recusal light could be the right thing to go for if Fraser actually got the facts badly wrong.

Our lack of real understanding of the facts is regrettable.

Tom

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From: Watts, Alan GRO

Sent: Wednesday, May 15, 2019 9:59 am

To: Thomas Cooper

Cc: Alisdair Cameron; Tim Parker; Ken McCall1; Ben Foat; Massey, Kirsten; Veronica Branton

Subject: Re: Legally privileged and confidential - GLO

Tom

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I think that is right save that I think Counsel's main motivation for wanting to keep the procedural unfairness in is to hang on to the hope that if the Court of Appeal is with us we could still ask for recusal light.

In relation to the factual findings I suspect that you are correct that some may well be right but others won't be - I'm not sure anyone has a clear idea at the moment because of the fact that there was no proper evidential investigation during the trial

On 14 May 2019, at 7:21 pm, Thomas Cooper GRO wrote:

> It looks like I won't be able to make the call tomorrow so am providing a few of thoughts.
>
> It seems to me the basic advice that we should try to keep our options open until we have anew QC who can provide a second (or approx 4th in this case) opinion must make sense.
>
> So presumably the main question is what do we do if we can't keep our options open and have to choose between arguing for procedural unfairness or not. On this issue, it seems to me that in the end it's whether the facts that Fraser found are true or not.
>
> We clearly have one point on which we know that Fraser was wrong - the question of whether Bates had a copy of the contract (at least we have very strong evidence in the form of the letter sent) . But I'm not aware of other instances which are clear cut or at least highly contestable - there may well be others. A number of us including Ken and myself have asked for a better understanding of the actual events and the facts at least from the Post Office perspective. So it's hard for me to form any view on the veracity of Fraser's findings. So I'm thinking about this as a decision tree based on whether Fraser got things mostly right or mostly wrong:
>
> 1. If Fraser's findings are substantially correct then it seems to me there's little point in arguing for procedural unfairness. We buy some time to argue about the facts but in substance Fraser was right and I don't see what we have to gain when in any case an appeal on the legal points will also buy time - and we seem to be on much stronger ground there. On the contrary, I think we have a lot to lose by arguing about whether we had a fair trial in relation to his findings when they are in any case true.
>
> 2. If Fraser's findings are substantially wrong then I think this breaks down into two questions:
>
> - if we do not argue procedural unfairness, does that disadvantage us in the appeal?

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- if the answer to the previous question is no then are there sufficient opportunities to present our evidence and correct Fraser's findings at a later stage?

So if the answers to the last 2 questions are no and yes, then it seems to me there is little to be gained by arguing procedural unfairness even though Fraser's findings are substantially wrong. Otherwise (if the answer to the first question is yes - or the answer to the second question is no), it seems to me we are probably making a mistake by not arguing for procedural unfairness.

In practice of course, I imagine Fraser didn't get everything wrong and some of his findings are correct. In that case, there's a further judgement to make about whether his incorrect findings are sufficient in volume and/or magnitude to make arguing procedural unfairness worthwhile.

Alan can comment on whether this is a useful way of looking at things, but I thought it would be helpful to set out how this issue appears to me at the moment.

Tom

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From: Watts, Alan GRO

Sent: Tuesday, May 14, 2019 4:34 pm

To: Alisdair Cameron; Thomas Cooper; Tim Parker; Ken McCall1; Ben Foat

Cc: Massey, Kirsten; Veronica Branton

Subject: RE: Legally privileged and confidential - GLO

Al

We will prepare the table as requested. I think it is more nuanced than saying we don't support the direction. We certainly support the dropping of "recusal light" the only question is whether we can in a light touch way maintain some of the procedural irregularities at least for the hearing before Fraser in order to leave that option open for the application to the Court of Appeal. To be fair having now looked further at the details behind the procedural irregularities point you can see why both Fraser and Coulson thought it was the PO trying to have its cake and eat it and so we are certainly not saying we should just carry on as before, but rather can we maintain the position in some way to leave the option open in case Helen is able to persuade us that we should continue to pursue it in some shape or form.

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I will make sure I am available to discuss tomorrow whenever is convenient.

Regards

Alan

From: Alisdair Cameron GRO
Sent: 14 May 2019 15:04
To: Watts, Alan; Thomas Cooper; Tim Parker; Ken McCall1; Ben Foat
Cc: Massey, Kirsten; Veronica Branton
Subject: RE: Legally privileged and confidential - GLO

Alan, thank you for the honesty and clarity of the challenge, once you have had the time to reflect on yesterday's conversation. As you no longer support the direction, we need to work through it. I have copied Veronica to get a call in for as many of us can make it – the best time might be tomorrow pm or evening: Tim and I are together for a Ministerial meeting. It probably can't be later than that.

To help us prepare for that meeting, a summary table would be appreciated, listing at a high level the grounds of appeal under three scenarios: the original appeal as set out by counsel; the stripped down version agreed yesterday; and your recommended option.

Give me a call if that needs varying.

Kind regards Al

Al Cameron
Interim Chief Executive

20 Finsbury Street
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EC2Y 9AQ

GRO

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From: Watts, Alan GRO

Sent: 14 May 2019 14:03

To: Thomas Cooper GRO; Tim Parker GRO; Ken McCall1 GRO; Alisdair Cameron GRO; Ben Foat GRO

Cc: Massey, Kirsten GRO

Subject: RE: Legally privileged and confidential - GLO

All,

We have received a revised grounds of appeal and skeleton from DCQC which we are currently working through. However in the meantime I set out below his covering email:

"1. Following yesterday's telephone meeting (at which the PO Board sub-committee dealing with the Group Litigation decided to excise from the Common Issues appeal all issues that were not "strictly necessary" as part of the appeal against the construction of the terms of the contracts) I attach marked up copies of the amended Grounds of Appeal and the "baby" skeleton in support of the application for permission.

2. As instructed, these have all the ingredients of procedural unfairness and findings of fact removed. We have also removed the recusal light direction – which I agree is best removed in the current circumstances. At the end of the day the client must have the final say and we will of course support that and do our level best to achieve the optimum result for any client – particularly one like PO who has been sorely let down by the legal system and is understandably shaken by it.

3. Nonetheless, it would be wrong for me to attach these documents, on that basis, without formally expressing my views (largely set out in our subsequent call with HSF) that whilst the client's instinctive view (following receipt of Coulson LJ's refusal on the recusal appeal) is perfectly understandable – this approach, of not challenging the procedural unfairness or perverse findings of fact, will be damaging to PO's case and is one which is high likely to result in them having to pay a significantly larger sum to settle this case. I say this for a number of reasons:

(1) The complaints we make are right – and nothing Coulson LJ says persuades me otherwise - and the Court of Appeal when they actually get to look at the detail will likely agree. This will in and of itself

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undermine the Judge in their eyes and make them treat his other findings on the law with less respect. It will also give us a good chance of removing him for the future. We should not give up now just because a single Judge of the Court of Appeal (and his friend) on a cursory review agrees with Fraser J. In this Lord Neuberger agrees. I think it would be useful if the client saw his analysis of the two types of case he identifies and his careful thinking on this. Such a view, from someone of his calibre, should not be lightly dismissed.

(2) If we do not have any grounds before the court on procedural unfairness then there is no way that we can even make submissions to the effect that the case should not be returned to Fraser J. This means that trials 3 and 4 will be before him and which, save where his ingenuity cannot construct it, he will likely make sure that PO will lose. If Mr.Abdulla is a honest and truthful witness then PO stands little chance of fighting in the trenches on any of the individual cases. This means, in effect, that PO will no longer have any realistic strategy which involves taking the results of the Common Issues trial and the Horizon trial to trials on breach. In effect, this means that PO will have no choice but to settle. The Claimants will know this and drive a hard bargain. This will result in PO paying much more than it ought to settle these claims – as it will not have a realistic alternative. This puts PO in a very weak position.

(3) Furthermore the criticisms of Post Office will go unchallenged – with the consequence that an order of indemnity costs (which relies on such grounds) becomes significantly more likely.

(4) Furthermore, the criticisms of Post Office witnesses will go unchallenged – with the consequence that if they give evidence in future trials their credibility will be set to naught.

4. On the downside, I consider:

(1) that applying to 3 LJ's to consider the papers whilst unusual is justifiable in these circumstances- and the fact of making the application mitigates, to an extent, the risk of the Court of Appeal refusing permission on the Common Issues.

(2) That whilst it might annoy Coulson LJ that some of the points he has dismissed arise again under the procedural unfairness banner – he cannot be particularly surprised as we alerted this to him earlier when making submissions about hearing the two applications together. This point (and the overlap) would need to be dealt with in the skeleton argument in support carefully and sympathetically. Further, I really do not think that Coulson LJ would be so unprofessional as to refuse permission on the legal /construction/good faith grounds because we had also added in procedural unfairness. I say this

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generally – but more particularly given the degree of interest shown in the Judgment by others- including other Judges. Furthermore, to decide the points under the "procedural unfairness" banner will require him to consider the detail much more closely – he will not be able to hide behind impressionistic formula as to what an impartial 3rd party might or might not have thought.

5. On the question of whether the skeleton argument (absent grounds of appeal) is sufficient my experience is that when you have a complex matter and particularly where there is a delay such as this that the court might well expect draft grounds. In other cases where permission applications follow on the heels of the handing down the rules clearly do not anticipate grounds being provided – or time for them to be formulated properly. That said, I cannot find any rule or practice direction that requires draft grounds to be provided in any case. The email from the Judge today just referred to sequential skeleton arguments- no mention of draft grounds. The nearest the rule comes to grounds - is when dealing with an adjournment from the day the decision is handed down- it mentions that might be necessary, "...to enable the parties to formulate their grounds of appeal and their submissions in support" (Notes to 52.3.6 – White Book page 1778 sub-para.(e). (emphasis added)). Whilst I would be comfortable making the application on the basis of the skeleton alone – for the reasons mentioned on the phone yesterday morning this could be criticised by the Claimants and the Judge. I am more content with the position having expanded the skeleton slightly (and ironically with the procedural unfairness/factual findings removed) – but there remains an obvious risk of trenchant criticism of which the client now is understandably growing tired.

6. That said, the prize, namely of preventing Fraser J getting hold of the full grounds of appeal early –and writing a further judgment seeking to justify and slightly alter/supplement his conclusions, is considerable. And keep in mind our joint views that it is very likely that he is going to refuse permission anyway – with the outside chance of permission on good faith – but only on a narrow (and useless) basis."

We think that we may have persuaded him that we don't need to serve the draft grounds in advance of next week's hearing but rather just the skeleton. There is clearly a risk that Fraser may criticise us for not doing so (and the other side will no doubt encourage him to do so) but I think we should live with that as it is, in my view, more important to keep our powder dry and not give Fraser and/or the other side more notice of the detailed grounds of the appeal than we have to especially where we plan for Helen Davies QC to review them and probably conduct the appeal itself. She may well have her own views on how they should be presented. With that in mind (and notwithstanding the discussion yesterday) we are looking to see whether there is still some way to keep the procedural irregularities door open to at least

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give us the chance to get her views on it. If she thinks the right thing to do is drop it then we can obviously do so and if our position between the hearing before Fraser and filing the grounds of appeal changes then that will be understandable particularly if we have a new counsel team.

The aim is to work on the skeleton today and then circulate with a view to having a call tomorrow (if necessary) with Al and any others that want to and can join to make a final decision so we are ready in plenty of time before Friday's deadline (which is the date Fraser has ordered us to serve the skeleton by). If anyone wants to discuss in the meantime please feel free to get in touch.

Regards

Alan

From: Thomas Cooper GRO
Sent: 13 May 2019 13:20
To: Tim Parker; Ken McCall1; Alisdair Cameron; Watts, Alan; Ben Foat
Subject: Re: Legally privileged and confidential - GLO

Tim

I'm in agreement as well.

Tom

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From: Tim Parker GRO
Sent: Monday, May 13, 2019 11:40 am
To: Ken McCall1; Alisdair Cameron; Thomas Cooper; Watts, Alan; Ben Foat
Subject: Re: Legally privileged and confidential - GLO

Al, I am in agreement that we need a different QC to lead the appeal, and also your conclusions about where to go now, so I don't think we need a call at this stage, unless Tom feels differently.

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Best

Tim

Tim Parker

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From: Ken McCall1 GRO

Sent: Monday, May 13, 2019 10:35 am

To: Alisdair Cameron; Tim Parker; Thomas Cooper; Watts, Alan; Ben Foat

Subject: Re: Legally privileged and confidential - GLO

Al

Many thanks for your update email

I am in agreement with your line of thinking and indeed looking at another QC to front

From Wednesday onwards I will be in the US but still fully contactable by email

Best regards

Ken

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From: Alisdair Cameron GRO

Sent: Monday, May 13, 2019 9:51 am

To: Tim Parker; Thomas Cooper; Ken McCall1; Watts, Alan; Ben Foat

Subject: Legally privileged and confidential - GLO

Following the news at the weekend we met this morning. I have set out below the outcomes of that conversation. If the sub-committee wants to have a call arranged, please let me know. Kind regards Al

1. Mr Coulson has supported the logic of Mr Fraser's position and denied our appeal on the recusal.
2. The recusal argument is finished.
3. Our appeal on the common issues will go ahead.
4. We will see Mr Fraser this morning to support the claimamts' request to delay the appeal hearing to 23rd so they have more time to prepare. We do need to adjust our position post the Coulson findings and will be seeking to share grounds for appeal this Thursday, giving the Claimants a week to prepare. Mr Fraser could demand more urgency – we originally said today - which would make life difficult but it would be odd if we didn't want to consider Mr Coulson's judgement….
5. Assuming Mr Fraser turns the appeal down, it may well be Mr Coulson who would adjudicate whether we can appeal on the common issues trial. He might also be the presiding judge if an appeal went ahead. We can and are likely to ask for three judges to decide on whether we can appeal: this is unusual but within our rights and not considered controversial. However, it is unclear how that decision would be made and it may still be Mr Coulson….While the legal teams are all convinced that the legal interpretations are so new and important that we will be able to appeal, I am anxious.
6. We are therefore re-writing the common issues appeal now to strip out any "recusal lite" argument and to minimise the findings of fact only to those things that directly

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support one of the contractual interpretation arguments, to give ourselves the best opportunity to be heard and to demonstrate to Mr Coulson that we have listened.

7. This is against the advice of David Cavender who is advising us to stick to our guns. He does not feel like the right person to be fronting the appeal, which HS are reviewing – depending on the timetable, another QC may front it with his support or there could be a complete handover over time.
8. We are briefly communicating with our senior leadership team but in the absence of any media coverage do not plan to communicate further.
9. Our immediate focus, which we will discuss at May Board, will be how we best prepare for a very bad Horizon verdict, which is inevitable, both because the recual failed and because our witnesses did badly in court before the pause. Our job is to reassure Postmasters to carry on, business as usual, by demonstrating that Horizon works today, communicating a more transparent process for managing new differences and separately for managing historical claims. We are currently planning to announce this before the judgement.
10. We are also working on how we put together a settlement team and process for after the Horizon trail.

Al Cameron
Interim Chief Executive

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GRO

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