

Message

From: Jane MacLeod [GRO]
on behalf of Jane MacLeod [GRO]
Sent: 03/04/2019 20:08:04
To: Tim Parker [GRO]; Ken McCall1 [GRO]; Carla Stent1 [GRO]; Thomas Cooper [GRO]; Tim.Franklin1 [GRO]; Shirine Khoury-Haq [GRO]
CC: Alisdair Cameron [GRO]; Paula Vennells [GRO]; Veronica Branton [GRO]
Subject: Post Office Group Litigation - Update on Recusal Application SUBJECT TO LEGAL PRIVILEGE - DO NOT FORWARD

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Post Office's application that Mr Justice Fraser recuse himself as the Managing Judge in the Post Office Group Litigation was heard earlier today. I have summarised below the key arguments presented for both sides, however the outcome was that the Judge has reserved judgment until at least lunchtime on Tuesday 9th April. The Court will provide an update on the timing for delivery of the judgment at some point on Monday 8 April 2019.

The hearing was well attended with journalists, claimants and a number of other 'interested' spectators. The CWU also staged a protest outside the entry to the Court building. Representatives of Fujitsu, the UKGI legal team, and Norton Rose Fulbright were also in attendance.

Our Counsel, Lord Grabiner QC opened and identified the test for recusal as whether the "fair-minded informed observer" would conclude there was a real possibility that the Judge was biased against Post Office, and had prematurely closed his mind on issues that are yet to be tried.

Lord Grabiner argued that this test clearly was satisfied, given the numerous extracts in the Common Issues Judgment (which were addressed at length) where the Judge:

- made findings against Post Office on matters which were not relevant to the Common Issues or which are to be determined in later trials;
- made such findings by reference to irrelevant and partial evidence;
- engaged in one-sided, prejudicial speculation about what Post Office may or may not have done;
- described Post Office and its witnesses in highly critical terms, often on matters irrelevant to the Common Issues.

Lord Grabiner also addressed the occasions in the Common Issues Judgment where the Judge claimed not to be making premature findings, stating that the "fair minded informed observer" would see through those and conclude that the Judge had pre-judged the issues against Post Office given the lengthy and detailed analysis undertaken and the strident language used in the Judgment.

For the Claimants, Patrick Green QC did not challenge Post Office's case that the Common Issues Judgment reflects the Judge's concluded findings. Instead, he argued that the Judge was entitled to make those findings as part and parcel of his judicial function given that the scope of the Common Issues trial had been extended by:

- the Judge's refusal to strike out before trial evidence on issues Post Office considered irrelevant to the Common Issues;
- Post Office's decision at trial to lead evidence and cross-examine on some of those issues;
- special (but undefined) considerations that should apply to group litigation.

In reply, concluding the arguments on the application, Lord Grabiner asserted that:

- Post Office had maintained a consistent case on relevance in the lead up to and throughout the trial;
- the scope of the Common Issues had not been expanded even if Post Office had occasionally dealt with irrelevant material; and
- there was no authority for the proposition that different rules apply to group litigation.

The application will ultimately turn on whether the Judge believes he was entitled to make the statements he did in the Common Issues Judgment. The Judge did not give any indication during the hearing on how he will approach the application, but has retired to consider and write his judgment on the application, which will not be delivered before Tuesday 9th. We have also proposed that at that time the Court should address issues relating to the current adjournment of the Horizon trial and, if relevant, the request for appointment of a replacement judge.

As ever, I am happy to answer questions. I will let you know the timing for the handing down of the judgment once we hear from the Court on Monday.

Kind regards,

Jane

Jane MacLeod
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GRO