
From: David Neuberger [GRO]
Sent: Fri 24/05/2019 4:38:32 PM (UTC)
To: David Cavender [GRO]; Anthony Grabiner [GRO]
Cc: andrew.parsons [GRO]; Rob Smith [GRO]
Subject: DEN 40 RE: Post Office

Dear all,

I haven't seen Fraser J's reasons, but I regard his refusal of PTA as quite wrong but not entirely unsurprising. Maybe his reasons are to do with case management (getting on with the case), but, if so, I think they are misguided, as my recollection is that a party is entitled to get PTA if he has an arguable case, and I regard the PO as having an eminently arguable, indeed a very strong, case - at least in respect of most of the points it wishes to run. In any event, the ramifications of his judgment both for 11,000 or so contracts and for the world of potentially relational contracts is very significant.

I do not regard his refusal as sinister: it is almost equally regrettable to say this, but his refusal strikes me (subject to seeing his reasons) as consistent with his misguided views on the law as manifested in his main judgment.

As to where we go now, I have some preliminary views.

If the PTA application comes before Coulson LJ and he refuses permission, then I fully understand that the conspiracy theory would gain real traction in some quarters.

I think it is very difficult to steer a PTA application away from or towards a particular LJ and there is a real risk that someone in the CA office will pick up the fact that Coulson LJ has already looked at this mega-judgment and it would be a sensible allocation of judge-time to send it to him (and I accept that it is not inconceivable that Fraser J will mention the PTA to Coulson LJ who could take the matter into his own hands: not improper, but not what I would have done or encouraged). Coulson LJ has already taken against us, but that does not mean that he would refuse our PTA application: indeed, it should be irrelevant. It would be brave (as Sir Humphrey would say) to submit a letter saying that we would prefer it to be considered by a different LJ, who had not already criticised us - and possibly adding had been in the same chambers as the Judge.

Subject to having further thoughts over the weekend, I think that in those circumstances we should take the course that DC suggests of asking for it to be considered by 2/3 LJs. And it would have the advantage (for what it is worth so far as the PO is concerned) that if for instance the PTA application went to Coulson LJ who refused to send it to 2/3 LJs and then refused PTA, it might give some extra heft to any complaint we made if we decided to take it further.

I had written this when DC's email pinged in. It raises quite an ingenious point, and I find it hard to advise whether we should raise the point. On the one hand, it may backfire as it would be pretty obvious that we were trying to steer away from Coulson LJ and the bias cases are not very helpful where the basis of the bias allegation is that the judge concerned made adverse findings on a point/points on which he was properly called on to rule (the big difference from Fraser J). And we may have to show it to the Claimants who might then press for Coulson LJ to deal with it - and if that is seen to be an unseemly quarrel it could be said that we started it (playground stuff). And it may even cause the CA office to put it in front of Coulson LJ for his view, which could rebound. Or if he sees our letter it may even persuade Coulson LJ that he shouldn't deal with the PTA application. On the other hand, it may persuade the CA Office to send it off to another judge for a quiet life, or they may show it eg to the MR or V-P of the CA, who maybe would agree - or not.

Two thoughts about making the application to the CA. First, there might be something to be said for a very short resume explaining (i) the basic points in the appeal (showing that an appeal would be a lot more simple than it might look from his judgment and our PTA application which reflects his judgment) and (ii) why the points raised are important 11,000 PO contracts and generally. I know it is all in the application/grounds, but I think that a distillation may help - and we can justify it on the basis that Fraser J didn't need to see it as he was on top of the facts and issues).

Secondly, I know that there have been some comments on the decision. One from HSF (who admittedly are now involved) and one from RPC (written by my son-in-law - entirely independently from me - he doesn't know of my involvement, but raised it with me because he thought it was a "rather surprising" decision with "far-reaching" consequences). If there is a lot of commentary out there it would be worth getting the CA to look at it as it underlines the importance of the case. If there are any respected organisations who could write in support of PTA being given (as happens in some Supreme Court PTAs - eg Pharmaceutical Trade groups supporting some appeals on the ground of

important points for the industry) that could help too.

Best wishes,
David

-----Original Message-----

From: David Cavender <[GRO]>

Sent: 24 May 2019 16:36

To: Anthony Grabiner <[GRO]>

Cc: David Neuberger <[GRO]>; andrew.parsons@[GRO] Rob Smith <[GRO]>

Subject: Re: Post Office

All,

I agree with all of this.

Another thought following my chat with Andy Parsons today- when he floated another approach with me.

In his extended ruling Coulson LJ goes beyond the recusal grounds and makes negative comments that impact on the unfairness grounds.

If, as presently, the appeal on the common issues includes those unfairness grounds - could we write to the M/R in advance and ask him, in the interests of justice to give the task of deciding permission on the Common Issues to another LJ or three ? On the basis that Coulson LJ has already expressed views on this topic ?

Best

D.

Sent from my iPhone

> On 24 May 2019, at 15:45, Anthony Grabiner <[GRO]> wrote:

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> Dear all,

>

> I understand Fraser J rejected the permission application but I don't know more than that, eg what was said etc.

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> I must say I think that is extraordinary and is obviously wrong. If anything it merely confirms his bias. He is determined to ensure this matter doesn't get before the Court of Appeal.

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> This leads to my real concern which is that the permission application to the Court of Appeal might, once again, be dealt with by Coulson LJ on paper. Under the current rules there would be no mechanism for further complaint, eg by way of an application for an oral hearing. I've never heard of it being done but if ever there was a case which would call for a complaint to be made to the LCJ/MR it is this one. There would be a strong inference of impropriety/injustice.

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> Is there any way of knowing which LJ the application would come to? If we knew in advance that it was going to Coulson it would be easier to apply directly to the LCJ/MR beforehand. It will be procedurally more difficult to do that after Coulson has ruled.

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> In the circumstances I agree with David Cavender that we should be asking for a two/three judge consideration of the application. I'm afraid this is developing into a horror story of Kafkaesque proportions.

>

> Regards,

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> Tony

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> Lord Grabiner QC

> One Essex Court,

> Temple,

> London, EC4Y 9AR

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[GRO]

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> On 8 May 2019, at 22:17, David Neuberger <[redacted] GRO [redacted]> wrote:

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> Dear Andrew,

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> Yes, that entirely reflected my view when Tony and I talked. On looking at the draft skeleton again, the high level executive summary may be already included in paras 15-23, but it is not entirely clear to the reader that paras 15-18 are concerned with Section C challenges (until one gets to para 19, and it is not immediately clear that paras 21-23 are an outline of the Section D and E challenges. I suggest that para 15 explains the three heads of challenge and goes on to say that paras 16-19 (now 15-18) summarise the case on the Section C challenge, and paras 20-22 (ex 20-23) the Section D and E challenges. As to the contents of those paragraphs, I wonder whether it is worth specifically mentioning in what is now para the fact that if the category of relational contracts exists, it is clear that they must be long-term contracts, and these were contracts freely determinable by either party on three/six months notice. (incidentally in what is now para 16 is it right to say that PO was "criticised" for relying on Chitty?).

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> When it comes to summaries, after what is now para 29, I think we should include a new paragraph summarising our grounds as to why the judge was wrong (i) paras 30-58, (ii) paras 59-74, (iii) paras 75-96, in each case perhaps highlighting one or two of our most telling points

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> I have a few comments on the draft Notice of Appeal and they are on the attachment to this email. It is also a long document, but I can well see why.

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> With best wishes,
> David

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> -----Original Message-----

> From: Anthony Grabiner <[redacted] GRO [redacted]>
> Sent: 08 May 2019 19:57
> To: andrew.parsons <[redacted] GRO [redacted]>
> Cc: David Neuberger <[redacted] GRO [redacted]>, David Cavender <[redacted] GRO [redacted]>; Rob Smith <[redacted] GRO [redacted]>

> Subject: Post Office

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> Dear Andrew,

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> I've been through the draft skeleton and I've discussed it with David N.

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> It's a very long document but that's a reflection of the length of the judgment, the large number of points that need to be addressed and the poor quality of the judgment. It's more difficult to deal on an appeal with a bad judgment than a good one.

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> David and I think the draft covers the points. We do not think that concessions should be made, eg on the implied terms, because, as previously advised, we think the co-operation and Stirling v Maitland implications are effective and would be readily implied in this case without the need to manufacture further terms which is what the Judge in his wisdom has done.

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> We wonder if it might be possible to incorporate a high level executive summary for the benefit of the CofA reading the document. It's always useful to give them a guide as to where the document is going and what the key points are.

>
> We haven't addressed the bits of grammar and typos which should be sorted out before the draft is finalised.

>
> Regards,

>
> Tony

>
> Lord Grabiner QC
> One Essex Court
> Temple
> London, EC4Y 9AR

> [redacted] GRO [redacted]

> **GRO**

> <Post Office. draft groundsFINALDRAFT+DEN.docx>