
From: Anthony Grabiner [GRO]
Sent: Fri 21/06/2019 6:35:48 PM (UTC)
To: David Neuberger [GRO]
Cc: Helen Davies [GRO]
Subject: DEN 43 Re: Post Office

Helen/David,

As always David is more measured than me. I'm influenced by my belief that, unchecked, Coulson will do us down so that the clients have nothing to lose. For the reasons previously mentioned this is an obvious case for permission to appeal to be granted.

Tony

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

[GRO]

On 21 Jun 2019, at 13:24, David Neuberger <[GRO]> wrote:

Dear Helen,

This is a very uncomfortable can of worms which you been handed. Some important points of law are raised by a judgment (which almost certainly got some of them wrong) against which PTA should certainly be granted, but there is a real fear that it will be refused because the LJ in whose sole hands the question rests appears to have taken against the would-be appellant for a number of possible reasons - including (i) a view on the underlying merits, (ii) some professional/personal sympathy with the trial judge, (iii) a desire not to interrupt or undermine the effect of the subsequent trials, and (iv) the recusal application (for which I must take some responsibility).

None of those reasons, however justified or otherwise they may be in themselves, provide a proper basis for refusing PTA in my view. But the problem is that if PTA is refused, that is that. While it could be taken up with the MR (if only to point out the problem of having a single LJ conclusively decide on PTA without a hearing, or even, if as some think, there is something sinister going on, to make inquiries), it is unlikely to do the client any good.

So, what to do? One possible course, which I would not be particularly keen on, would be to write to the CA saying that the client feels that justice is at risk of not being done because the LJ before whom the PTA application has been placed has made (i) some unnecessary and unfounded adverse comments about the applicant in these proceedings already and (ii) some findings which are simply wrong in the client's view (namely that certain quasi-findings of fact made by the Judge were appropriate as relevant to the issues of interpretation). Such a letter may do more harm than good, but if it is sent, I think that it should probably also emphasise that we are not saying that these points are necessarily right (hence allocating them to the client), but that given that this is sudden death and a big case, justice should be seen to be done.

A safer, but significantly more restrained/ timid, course may be to make the points set out in the last sentence of para 1 and in paras 2-4 of Tony's email, and then say that in the light of those points no reasonable judge could have refused pta. In other words, make the points as strongly as one can that it would be quite wrong to refuse PTA - possibly supported by as many articles (normally I think on solicitors websites because academic articles take more time to be published) on the decision to show its importance - haven't checked recently: there may not be that many. I recall Herbert Smith and RPC.

Talking to Christopher and/or Liz seems sensible. They may have some better ideas: they are more up-to-date with the working of the CA; the paper-only PTA system as introduced after I left the CA: I am not sure I would have gone along with it, but maybe that's wisdom of hindsight.

Best,
David

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

From: Helen Davies <[redacted] GRO [redacted]>
Sent: 21 June 2019 10:49
To: Anthony Grabiner <[redacted] GRO [redacted]>
Cc: David Neuberger <[redacted]>
Subject: Re: Post Office

Dear Tony,

Many thanks for your email. I totally understand your sentiments.

I also totally agree with your four first points (which relate to the matters I have been asked to look at) and indeed are very much consistent with the approach taken in the Skeleton (and which will certainly survive the page cull).

The real issue as I see it is what is the best strategy to ensuring that the application is not dismissed by Coulson LJ on his own given the possibility that he is not assessing this on purely objective terms on its merits (as to which I understand your concerns). To that end I thought it might be useful to confidentially sound out some sound ex CA judges so am going to speak to Christopher and hopefully Liz. So aim to to that on Monday.

Any further thoughts David has of course very welcome.

Best wishes

Helen

Sent from my iPhone

> On 21 Jun 2019, at 09:35, Anthony Grabiner <[redacted] GRO [redacted]> wrote:

>

> Dear Helen,

>

> As I mentioned when we spoke David N and I have been discussing the developments in this case. We are both troubled by what has been happening and want to share our concerns with you. That said we have not been asked to advise on the current position so you must take your own course.

>

> 1. We believe the Fraser J judgment in the contract terms trial is plainly flawed. The implied terms analysis, including the supposed overarching good faith term, is very low grade. The decision, as a result, sets a dangerous precedent which needs to be scrutinised by the Court of Appeal.

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> 2. PO's case is obviously arguable - Chitty says it's more than arguable.

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> 3. The decision directly affects more than 10,000 contracts nationally.

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> 4. The decision as to the supposed existence and effect of so-called relational contracts has wide implications on the interpretation of long-term contracts as well as contracts terminable on notice. The Court of Appeal has not so far considered the existence, extent or effect of such contracts.

>

> 5. We believe the Fraser J refusal to recuse himself was plainly wrong as was his refusal to give permission to appeal that judgment and the substantive judgment. We believe Coulson LJ should have given permission on the recusal pta application and we are concerned that if the application for pta the substantive judgment is left to be decided exclusively by Coulson LJ he will, quite wrongly, reject it.

>

> 6. We are reluctant to conclude there has been some inappropriate communication between Fraser J and Coulson LJ. I'm rather more cynical than David on this troubling issue but the facts are worrying.

>

> 7. As I mentioned when we spoke what bothers us is that if Coulson LJ rejects the pta - and his recent decision to limit the length of the skeleton argument in support is all of a piece with the developing story and suggests he will reject it - there's no other mechanism in the rules for taking it further.

>
> 8. Against that backdrop my own view is that a letter should be written to the MR setting out the whole story and asking him to investigate the matter. That said I appreciate that I'm not acting and that before such a letter can be written it would be necessary for PO to give instructions to that effect.

>
> 9. I've CC'd David and he may have other views I've not addressed. In any event I apologise for intruding on your case and your thinking but I feel strongly that our legal system has so far performed very badly in this matter and if possible the errors should be corrected.

>
> Regards,

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> Tony

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

>
> **GRO**

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