



POSTMASTER LITIGATION SUBCOMMITTEE

Minutes of a meeting of the Postmaster Litigation Subcommittee held on 24 April 2019

Present:

Tim Parker (by telephone)
Tom Cooper
Alisdair Cameron

In attendance:

Lord Neuberger
David Cavender, QC
Andrew Parsons (Womble Bond Dickinson)
Kirsten Massey (Herbert Smith Freehills)
Alan Watts (Herbert Smith Freehills)
Ben Foat (Legal Director)
Rodric Williams (Head of Legal)
Veronica Branton (Head of Secretariat)

Apologies were received from Ken McCall, Senior Independent Director.

Alan Watts provided a summary of the key points from his paper.

Questions and points raised:

- it appeared to be that the appeal on the Common Issues judgment was stronger and more likely to succeed than the appeal on the recusal. Could co-joining the appeals taint our chances of success in seeking leave to appeal the judgment?
- a pause in litigation over the summer could be helpful as we considered settlement options
- there appeared to be significant advantages to not rushing work on the Common Issues appeal. We needed to focus on winning the key points that were important to the operation of the business.

David Cavender QC explained that we had minimal control over when the appeals would be heard but they were likely to be heard together if the appeal on the Common Issues judgment was filed swiftly. He saw the recusal of the Judge as the only way of protecting against adverse findings in the Horizon trial. The functioning of the computer system was at the centre of the dispute. If a finding from the Horizon trial was that the system was not robust it would undermine our position in all of the cases brought against us. The subsequent trials were linked to fact and it was very difficult to appeal on findings of fact. However, that did not take away from the importance of the appeal on the Common Issues judgment. If we were going to co-join the appeals at the permissions stage careful thought would be required on how to do this. DC thought there was a greater degree of overlap between the common issues and recusal appeals than Alan Watts' advice suggested. A separate ground of appeal was on the overriding procedural unfairness and the proposal that the case should not be returned to the Judge for trials 3 and 4 ("recusal light").

DC's view was that if we did not proceed swiftly we would lose the recusal appeal; he did not think that a compromise approach would work and we should be asking for the applications to appeal to be considered by three Leading Judges. The Horizon trial was critical. A draft Skeleton Argument setting out many of the grounds for appeal had already been produced. DC saw advantage in both appeals being heard together because it would show the overlap between the two appeals. Kirsten Massey noted that a counter argument to this was that if the appeals were heard together the CoA might refuse the recusal appeal because the appeal on the Common Issues judgment would allow a number of the same issues to be considered.



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Questions and points raised:

- what were the risks of co-joining the appeals and did we have the resources to submit the documentation required in time? DC reported that the resources required to deliver the documentation were available
- what risks would we face if we lost both appeal applications?

The Subcommittee requested Lord Neuberger's view of the situation and the options available.

Lord Neuberger reported that judges had been recused previously; he largely agreed with the position set out by DC. Both cases were likely to be heard together unless the court decided that the recusal should be dealt with quickly. It was more likely that the Horizon trial would continue if the two appeals were not considered together.

The matter was not black and white, but Lord Neuberger thought that when hearing the two appeals together the judges were more likely to give leave to appeal on all points raised in relation to the Common Issues judgment in order not to constrain the Court of Appeal (CoA). The recusal application was very different in some respects to the Common Issues appeal but there was still a fair degree of overlap.

If Lord Justice Coulson rejected the leave to appeal for recusal and the appeal on the Common Issues judgment found a number of points in our favour the CoA might then have a different view on recusing the Judge. Lord Fraser would have informed the CoA that an appeal was due to be lodged.

Lord Neuberger thought we were likely to obtain permission to appeal the recusal on grounds of apparent bias as the threshold for appeal was not very high. It would be very unusual not to give leave to appeal on the Common Issues judgment. Lord Neuberger thought that Lord Justice Coulson was likely to view matters in this light; on balance he thought it better for both appeals to be submitted together.

Questions and points raised:

- that we needed to take a decision but the case was not clear cut
- that we had little control on when and how the appeal cases would be heard. Further work was needed to determine the grounds for appeal sufficiently well. In addition, Ministers needed to be briefed properly on the issues. Seeking a settlement could be time consuming so a long appeal could be advantageous. It might, therefore, be better to have the hearings separated and we should not co-join the appeals if that gave us no scope to separate the hearings.

Following detailed discussion, the Subcommittee **AGREED**:

- that the appeals for recusal and on the Common Issues judgment should not be co-joined
- we should write to Lord Justice Coulson to advise that we would be submitting the grounds to seek leave to appeal the Common Issues judgment on 16 May 2019
- a meeting would be arranged in the week beginning 29 April to consider the grounds for appeal.