

From: David Neuberger [GRO]
To: Andrew Parsons [GRO]
Cc: Anthony Grabiner [GRO]; David Cavender [GRO]; Gideon Cohen [GRO]; Owain Draper [GRO]; Tom Beezer [GRO]; Amy Prime [GRO]
Subject: RE: Group Litigation - recusal application - legally privileged and highly confidential
Date: Sun, 12 May 2019 10:03:47 +0000
Importance: Normal

Dear Andrew,

In addition to your emails, David's email and your draft note, I read the Coulson LJ judgment yesterday evening, and decided to digest it overnight and re-read it this morning, before replying.

In terms of substance, there is little I can add to what Tony and David have said, except that I do not think that anything untoward will have taken place between Coulson LJ and Fraser J. Nonetheless, given that judges are humans, it would be unrealistic not to acknowledge that there is a risk of an appellate judge being subconsciously affected by his relationship with a trial judge when considering an appeal/application to appeal against the trial judge, especially when the appeal relates to the latter's conduct. Much depends on the individual judge: inevitably, I would have more confidence in the natural impartiality of some judges than others.

The clients will naturally feel both disheartened by the judgment and bemused by the fact that the view taken by an appeal court judge is entirely inconsistent with that of their legal advisers.

As to being disheartened, the main appeal (on interpretation) is unaffected by the Coulson LJ judgment, at least in any direct sense. In case the Coulson LJ judgment is thought to be relevant to the main appeal, my experience over 45 years shows that successive setbacks in litigation come in two categories: (i) those which should make you realise that you are on the wrong track, and (ii) those which should stiffen your resolve. It is of course normally easy when it is all over to identify which category you were in, but harder to do this when one is in the middle of the litigation. Having said that, on the main interpretation issues, I remain firmly of the view that we are a category (ii) case. The issues actually decided by Fraser J involve applying what I regard as well-established principles of law, and in that connection I think he has gone seriously wrong. The reasons for my view are all to be found in the recently prepared grounds of appeal and skeleton argument.

As to being bemused, when it comes to the recusal appeal we are in a more nuanced area of judgement, and there is, I acknowledge, at least in principle, a greater risk of this being a category (i) case. That was my main reason for leaving it to stew overnight. Having done that, I remain of the opinion that Fraser J should have been recused, despite the fact that Coulson LJ and Fraser J disagree: neither their reasons nor their identity has caused me to change my view.

So far as our approach to the PTA on interpretation is concerned, I have little to add to what David has said in his email. I am more neutral on the 3 LJ issue (as it can be said to suggest that this is a difficult PTA application to resolve) but, particularly as Coulson LJ may be the sole judge and if he refuses PTA it might be difficult to explain why we did not ask for 3 LJs, I do not disagree with David. It may be academic anyway, as we are, I believe, asking Fraser J first.

Subject to two points, I think that our PTA grounds and skeleton do not require any significant amendments (although I haven't gone through them specifically to check).

First, I think we have to remove the full reference to recusal. We could still include some limited reference to it, but that may be a mistake. It needs thinking about. Although somewhat artful, it might be better to drop recusal for the moment, with a view to resurrecting it later – even at the hearing of the appeal if things are going well.

Secondly, there is a real risk that, if we retain our procedural unfairness grounds, they will be refused for the sort of grounds that were mentioned (to my mind, intemperately and unfairly) by Coulson LJ. It can fairly be said that as a matter of logic, we lose nothing by including them – at worst, they are removed. But I suppose that, particularly if the tribunal was Fraser J or Coulson LJ, it could prejudice a court considering the PTA.

Subject to the points made above, there is nothing more I have to say about your draft note.

Best wishes,

David Neuberger

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From: Anthony Grabiner [GRO]
Sent: 12 May 2019 09:53
To: Andrew Parsons [GRO]
Cc: David Cavender [GRO]; David Neuberger [GRO]; Gideon Cohen [GRO]; Owain Draper [GRO]; Tom Beezer [GRO]; Amy Prime [GRO]
Subject: Re: Group Litigation - recusal application - legally privileged and highly confidential

Dear Andrew,

I agree with this note. I'm afraid the clients have been very poorly served by our legal system. I believe the Fraser J judgment is deeply flawed. It's wrong in law and reveals an obvious apparent bias against Post Office in all the respects we are familiar with. I do not believe Fraser J could approach any of the remaining cases with an open and impartial mind because he has obviously pre-judged key matters which are yet to be tried.

I am also disappointed and very unimpressed with the Coulson LJ judgment on the recusal appeal. It's a very superficial analysis and demonstrably bad. I am reluctant to conclude that this has all been cooked up between Fraser J and Coulson LJ as former Chambers' colleagues but the process we have been through is not a happy one and there are grounds for suspecting that there have been inappropriate communications between them.

I'm sure the clients are both puzzled and concerned by their experience in this litigation so far. All I can say is that none of the judgments we have so far seen persuade me that the advice which has thus far been given to Post Office is wrong or in any way misguided.

Regards,

Tony

Lord Grabiner QC

One Essex Court,

Temple,

London, EC4Y 9AR

Tel [GRO]

Mob [GRO]

On 11 May 2019, at 21:46, Andrew Parsons [GRO] wrote:

All

Further to below, please find attached a first draft of a note to the client. All comments welcomed.

David C – ideally I would like to put your name on this note so that PO know that you have inputted (do feel free to change anything) and I would also like to get this to PO by tomorrow evening.

Kind regards
Andy

From: Andrew Parsons [GRO]
Sent: 11 May 2019 15:21
To: David Cavender [GRO]; Anthony Grabiner [GRO]; David Neuberger

[REDACTED]; Gideon Cohen [REDACTED] Owain Draper [REDACTED]
Cc: Tom Beezer [REDACTED]; Amy Prime [REDACTED]
Subject: Fwd: Group Litigation - recusal application - legally privileged and highly confidential

All

See below - requests for advice from the client. I think that David's email earlier today largely addresses points 1 and 2 but I'd welcome any other input.

In the meantime, I'll prepare a draft note answering the questions below and incorporating David's views. I'll circulate that tonight for comments.

Thank you and sorry this is landing over a weekend.

Kind regards

Andy

From: Ben Foat

Sent: Saturday 11 May, 15:00

Subject: Group Litigation - recusal application - legally privileged and highly confidential

To: Watts, Alan, Massey, Kirsten, Henderson, Tom, Andrew Parsons, Tom Beezer, Amy Prime, Rodric Williams, Mark Underwood1, Patrick Bourke

Cc: Alisdair Cameron, Diane Blanchard, Veronica Branton, Owen Woodley, Debbie.K Smith, Mohinder Kang, Rob Houghton, Mark R Davies

All

As you will know by now, we received the Court of Appeal's judgment in relation to Post Office's recusal application earlier today.

Post Office has not been successful in appealing against the trial judge's decision not to recuse himself. The judgment is critical of Post Office's application and permission to appeal the trial judge's recusal decision. At this stage there is little media activity but that may change over the weekend.

There are a number of steps that need to be worked through over this weekend:

1. A summary of the Court of Appeal's findings and our position (which can be adapted for various purposes) [HSF/WBD];
2. Further consideration of our approach to the substantive appeal given the number of statements which Lord Justice Coulson has made about the approach taken by Post Office in respect of the Common Issues trial. The Board subcommittee has approved the appeal approach last week but we need to advise the Board subcommittee whether this judgment should cause us to reconsider our approach or otherwise has any impact to the substantive appeal (not just the basis of the appeal ie the points of law; but the approach and tone) and provide (if any) recommendations to change; [HSF/WBD]
3. Implications to the current timetable including the existing Horizon trial which will resume on 4 June (ie this would continue) and also the hearing on Thursday 16 May (given the claimant's application for a delay); [HSF/WBD]
4. Costs consequences of this appeal; [WBD]
5. Comms statement (including internal comms position); [Patrick Bourke]
6. Updating the draft board paper which has already been prepared but will now need to be updated on the position, setting out the implications, and clarifying timetable and next steps (ie as above). [Mark Underwood/ Ben Foat to liaise with HSF/WBD]

Could the above points be progressed over the weekend. I will reach out to you individually over the weekend but may I suggest a call at 8.30 on Monday to discuss actions. Meeting invite and dial in details will be circulated.

WBD – could you ensure that the Counsel team provide the necessary support here given 1 and 2 and the short timeframe to file the relevant documents for the substantive appeal.

Apologies for the urgency but given the materiality of the issue we need to support the business. Thank you for your support in advance.

If you want to discuss or have any questions, please contact me either on email here or my personal mobile is [REDACTED].

Kind regards
Ben

<image001.png>
Ben Foat

Legal Director

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Highly Commended for 'Excellence In-house' at the Law Society Excellence Awards 2018

Mobile number:

GRO

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Andrew Parsons
Partner
Womble Bond Dickinson (UK) LLP

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GRO

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