

From: Andrew Parsons <GRO>
To: Jane MacLeod <GRO>
Cc: Rodric Williams <GRO>, Amy Prime <GRO>, Tom Beezer <GRO>

Subject: Common Issues Appeal - Summary of advice from Counsel [WBDUK-AC.FID26896945]

Date: Mon, 15 Apr 2019 08:35:51 +0100

Importance: Normal

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Jane

I've heard from Counsel again and summarise below the advice received over the weekend. I've also put at the bottom of this email, the main further emails that I received last night.

Counsel's view is that permission should be given by the Court on both appeals:

"I think it would be quite remarkable if the PO did not get permission to appeal on the common issues aspect (or at least most of the points we are proposing to raise on that aspect); it would be less surprising, but in my view wrong, if permission to appeal on the recusal aspect was refused." – Lord Neuberger.

The application for permission to appeal on the Common Issues judgment should be made direct to the Court of Appeal and not to Fraser J:

"There's no point in bothering to ask Fraser J for permission to appeal. He's bound to refuse it and these days we're entitled to go straight to the CofA." – Lord Grabiner

If the appeals do get permission and proceed in full, Counsel's view is that Post Office has good prospects of success:

"In summary:

- (i) On the common issues I think the PO has a strong, and in many aspects a very strong, case that the Judge went wrong in a number of significant respects, and*
- (ii) On the recusal issue, I remain of the view that the Judge should be recused on grounds of apparent bias."*

- Lord Neuberger

Counsel's view is that the two appeals should be heard together:

"I think it is incumbent on the client to appeal the Common Issues judgment. I believe it is wrongly decided. It contains a number of flawed errors of law. It also reveals the apparent bias concerns which are the subject of the recusal application. If, as I believe it will, the Court of Appeal takes the same view as I do about the poor quality of the legal analysis there is a good prospect of that conclusion reinforcing, in the eyes of the Court of Appeal, Post Office's bias arguments." – Lord Grabiner

On Friday we received the Order of Coulson LJ. Amongst other matters, this Order makes clear that until the main appeal is lodged it will not be taken into account when deciding on the recusal appeal. The Order leaves open the question of whether the main appeal will in fact be taken into account once it is lodged. As a result of this, Counsel advise that Post Office writes to the Court of Appeal as soon as possible to confirm that the main appeal will be lodged and to ask that the two appeals be heard together.

"If the client decides to appeal both judgments then the Listing Office should be advised in writing that both appeals concern the same trial/judgment and that Post Office and its legal advisers take the view that both matters should be dealt with together." – Lord Grabiner

"If we do not contact the CA beforehand, Coulson LJ is likely to determine the application for permission to appeal on the recusal issue soon after receiving the Claimant's submissions on that question" – Lord Neuberger

Consideration has been given to writing to the Court of Appeal now before Post Office has given instructions to proceed with the appeal. That letter would need to be in equivocal language as we do not have instructions and, as a result, that is not a recommended course of action.

"our letter contending that the two applications be considered together would carry significantly more weight if it was clear that we were seeking to appeal on the common issues" – Lord Neuberger

"I think that drafting the letter without clear instructions from the client would be a bit pointless." – Lord Grabiner

This therefore creates a time pressure because the deadline for the Claimants' submissions is 25 April 2019 and the Post Office board meeting is on 24 April 2019. But, as **Lord Neuberger** notes:

"We cannot assume that we have two weeks' grace because, for all we know, the Claimants may put in their submissions before, even well before, the two weeks [Coulson LJ] has given them are up"

In conclusion, Counsel's view is that for Post Office to maximise its prospects of success it needs to give the legal team instructions to proceed with the main appeal as soon as possible.

"So the PO should decide that it is going to appeal the common issues judgment asap" – **Lord Neuberger**

"I think that decision should be taken as soon as possible." – **Lord Grabiner**

Given the above, I don't believe that we need to speak to Counsel today, although they are available for a call at 5pm if needed. Their views are clear, although I appreciate that in practice getting instructions quickly may be difficult. The real question is how do we streamline the governance process to get clear instructions as soon as possible. If Post Office cannot do this before 25 April 2019 (or sooner) then it will need to accept the risk that the two appeals may move separately which would not be in its best interests.

As always, I'm around to discuss.

Kind regards
Andy

Dear Andrew,

There is not much I can add to Tony's recent email of 21:00 today so far as the prospects of success on any appeal are concerned. I believe that it is clear from his email, my email earlier today and my earlier communications that he and I are very much of the same opinion. In summary:

- (iii) On the common issues I think the PO has a strong, and in many aspects a very strong, case that the Judge went wrong in a number of significant respects, and
- (iv) On the recusal issue, I remain of the view that the Judge should be recused on grounds of apparent bias.

As to the procedural aspect, I would add that:

- (i) (a) If we do not contact the CA beforehand, Coulson LJ is likely to determine the application for permission to appeal on the recusal issue soon after receiving the Claimant's submissions on that question, and

(b) We cannot assume that we have two weeks' grace because, for all we know, the Claimants may put in their submissions before, even well before, the two weeks he has given them are up;

- (ii) (a) Accordingly, if we want to make the point that the recusal application for permission to appeal should not be determined separately from the common issues application for permission to appeal, we should write to that effect promptly, and

(b) So the PO should decide that it is going to appeal the common issues judgment asap, as our letter contending that the two applications be considered together would carry significantly more weight if it was clear that we were seeking to appeal on the common issues (and even better if it included our application for permission to appeal on the common issues, though that may be ambitious).

If you want to include me in the 5 pm telephone call that would be fine with me.

Yours sincerely,

David Neuberger

From: Anthony Grabiner <[REDACTED]>
Sent: 14 April 2019 21:00
To: Andrew Parsons <[REDACTED]>
Cc: Owain Draper <[REDACTED]>; David Neuberger <[REDACTED]>; Gideon Cohen <[REDACTED]>; David Cavender <[REDACTED]>; Stephanie Wood <[REDACTED]>; Amy Prime <[REDACTED]>; Tom Beezer <[REDACTED]>; Rob Smith <[REDACTED]>
Subject: Re: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS [WB DUK-AC.FID26896945]

Dear Andrew,

In this email I will try to put the points as concisely as possible. Hopefully this will be enough to enable the client to come to a concluded view. If we get to that point the drafting of a suitable letter to the Listing Office should be straightforward. I think that drafting the letter without clear instructions from the client would be a bit pointless

1. I think it is incumbent on the client to appeal the Common Issues judgment. I believe it is wrongly decided. It contains a number of flawed errors of law. It also reveals the apparent bias concerns which are the subject of the recusal application. If, as I believe it will, the Court of Appeal takes the same view as I do about the poor quality of the legal analysis there is a good prospect of that conclusion reinforcing, in the eyes of the Court of Appeal, Post Office's bias arguments. If the Common Issues judgment is not appealed the approach adopted in it will simply be applied in full by Fraser J to the Horizon trial and the future trials and Post Office, in all probability, will lose all the cases. I am not au fait with the Issues in the other trials so this last point would need to be discussed fully with David C and Anthony DGR.

2. If the client decides to appeal both judgments then the Listing Office should be advised in writing that both appeals concern the same trial/judgment and that Post Office and its legal advisers take the view that both matters should be dealt with together.

3. My own view is that the client should pursue the recusal appeal because I believe this is a case of apparent bias. I believe that is also the view of all the counsel team but they can speak for themselves. The decision whether or not to pursue this appeal is a matter for the client. I think that decision should be taken as soon as possible.

Regards,

Tony

Lord Grabiner QC
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On 14 Apr 2019, at 19:53, Andrew Parsons <GRO> wrote:

All

I've spoken to the client. In order to move forward with the proposed plan of writing to the listing office this week, the client needs clarity on exactly what is to be communicated. Please could someone on the Counsel team prepare a draft letter for consideration?

The difficulty for Post Office is that its shareholder (ie. the government) wants approval of the decision on whether to appeal and, if so, what and how to appeal. That limits what we can say to the Court until that approval is given, which is not likely to happen for at least two weeks. A letter that has conditional and caveated language ("PO expects to appeal" rather than "PO will appeal") is more likely to get approved but of course carries less weight, and so there may be a tension between what we would like to say and what the client can approve at this stage.

Please could you therefore prepare two letters: one that is written as the legal team would like and a second one that is limited to what is necessary and in non-committal language. I suspect the second one may be unsatisfactory for our purposes but we can then present both options to the client for their instructions. Of course if there is a way to achieve all objectives in one letter then that would be perfect! Owain / Gideon – I suspect one of you will be holding the pen, so please do feel free to call me to discuss before drafting anything if that would help.

Please can we also pencil in a call for 5pm tomorrow for 30 minutes if that fits everyone's diaries? I will circulate conference call details. This will be with the Counsel team, Jane MacLeod and me to discuss the letter. It would be good to have the draft letter(s) in advance of the call.

Kind regards

Andy

Andrew Parsons

Partner
Womble Bond Dickinson (UK) LLP

Andrew Parsons

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