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FREETHS

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15 May 2019
Third Letter

Our Ref: JXH/1684/2113618/1/CO
Your Ref AP6/364065.1369

By Email: andrew.parsons GRO

Dear Sirs

POST OFFICE GROUP LITIGATION
CLAIMANTS' COSTS OF POST OFFICE'S RECUSAL APPLICATION

We write in response to your third letter of 13 May 2019 relating to the costs of your client's failed application to recuse the Managing Judge (the "**Recusal Application**").

For the reasons set out in some detail in this letter, your client's offer to pay our clients' costs summarily assessed in the sum of £190,000 is not accepted. We invite your client carefully to reconsider its position in the light of what is set out in this letter with a view to reaching a sensible compromise and avoiding any further unnecessary costs.

Costs incurred by our clients

Enclosed with this letter is the Claimants' updated Statement of Costs for the Recusal Application (in draft, not presently filed) of which your client has already had sight. It sets out our clients' incurred costs of the Recusal Application, together with their anticipated costs for the preparation of and attendance at the forthcoming 23 May 2019 hearing (to deal with recusal costs). The grand total of the updated Statement of Costs is **£394,938.60 (inc. VAT)**.

The Recusal Application was brought on multiple bases and was directed at some 110 separate passages of Judgment No. 3. It was inadequately particularised, and further particulars were only provided when a hearing requested by our clients to determine the matter was imminently in prospect. Responding to the application has required very extensive work to be carried out by our clients' legal team on an urgent basis between 21 March and 3 April 2019.

The scale of the task of opposing the application, urgent notice, complexity and seriousness of the matter are rightly reflected in the costs set out in the updated Statement of Costs.

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The costs incurred by our clients exceeded what was originally estimated in their Statement of Costs dated 1 April 2019, which was filed and served prior to the hearing of your client's application and which was slightly updated on 9 April 2019 to revise the figure on travel expenses. These previously filed Statements of Costs were based on estimated costs. We, together with our clients' costs consultants, have since reviewed our clients' actual, incurred costs and have updated the Statement of Costs accordingly, in addition to including our clients' anticipated costs for the 23 May hearing.

VAT is payable by your client on costs recovered by the Claimants. The vast majority of the Claimants are not VAT registered and, of those that are, we are proceeding on the basis that the costs of this litigation and the VAT thereon are not incurred for the purpose of the Claimants' respective businesses. The proceedings are being brought in the Claimants' personal capacities and/or the costs of the proceedings are not a legitimate business expense where VAT would be recoverable from HM Revenue and Customs. There are only 27 company claimants, not all of which are VAT registered; nor do all operate in connection with Post Office business. Therefore even if there are any VAT implications in respect of the company claimants (which we do not believe there are) such costs would only amount to a maximum of £3,202 VAT apportioned in respect of the Claimants' Recusal Application costs, and £744 VAT apportioned in respect of the Claimants' incurred Wasted Costs (these figures being a pro-rated percentage of the total VAT on each of the respective Statements of Costs enclosed with this letter).

Your client's offer has been made with reference to our clients' estimated Recusal Application costs. It represents around 50% of the costs in fact incurred by our clients. Your client's offer is inadequate whatever the basis of assessment, but for the following reasons our clients are confident that our clients would recover a substantially greater proportion of their costs.

Basis of assessment

As you are aware, our clients intend to seek an order for assessment of their costs on the indemnity basis. Your client's application was without merit and should never have been made. It is clear that your client has not approached the making of an offer in respect of our clients' costs on the basis that doubt will be resolved in our clients' favour on assessment. That is misguided, and compounds what is in any event a significant undervaluation of the likely recovery.

The Recusal Application involved serious allegations of judicial bias which were dismissed by the Court in the clearest possible terms. Despite their seriousness, the allegations were made on a deeply flawed basis. This has since been made abundantly clear by the Court of Appeal in the reasons it gave for refusing your client's application for permission to appeal.

As the Managing Judge has observed, the application was based upon critical passages in Judgment No. 3 that were "*taken entirely out of context*" and without regard to other passages expressly stating that no findings on breach, causation or loss were made. The Court of Appeal has endorsed that finding in full and described your client's approach in this respect to be "*particularly egregious*".

It was likewise observed by the Managing Judge that by its application your client sought to criticise as irrelevant numerous findings made on evidence that it either directly led, or arose out of its own cross examination. The Court further observed that the application was based upon criticism of findings it made as to the credit of Lead Claimants, despite their credit being attacked by your client.

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In its written reasons given on 10 May 2019, the Court of Appeal entirely agreed. It described the Managing Judge's findings and observations on these matters to be comprehensive and correct. Indeed, it went on to criticise your client's application (and the circumstances in which it was made and pursued) in the starkest possible terms.

Our clients reserve the right to refer to and rely upon the observations made by the Court of Appeal in full. But for present purposes, the Court of Appeal observed as follows: -

1. Your client made its application with "*…total disregard of what it actually said and did before and during the Common Issues sub-trial*". Much of the material your client criticised stemmed from its own case. The suggestion made that aspects of its own evidence were irrelevant was untenable (§21 to §25).
2. Your client's position with respect to the credit of witnesses was 'confused'. It had "*…all the hallmarks of a strategic decision which, as the Common Issues sub-trial went on, the PO had second thoughts about*" (§26).
3. The Managing Judge's unequivocal explanations that he was not making final conclusions on certain issues was a complete answer to the allegation of pre-judgment. Describing these as a 'mantra' was suggestive of bad faith on the part of the Court, or worse, an allegation of conscious misrepresentation, for which there was simply no basis (§33 to §36).
4. Your client's further attack on the Managing Judge's use of language in Judgment No. 3 was not a substantive ground for an application to recuse him at all (§42).
5. Ultimately, your client did not come close to demonstrating that the fair minded observer would conclude that there was a real possibility of bias; the application was "*fatally flawed*", never had any substance and was rightly rejected (§3, §9 and §50).

In the light of the foregoing, your client's offer falls far short of the likely proportion of our clients' costs that will be recovered on assessment.

Given this, it would assist our client to know whether your client intends to oppose our client's application for an order that costs be assessed on the indemnity basis and, if so, the basis upon which it will do so notwithstanding the findings made in Judgment No. 4 and by the Court of Appeal that take the making of this application (and conduct of it) far outside of the norm.

Wasted costs

As you are aware, on 23 May our clients will seek to recover the full costs to which they have been put, including the significant costs occasioned by the making of the application ("**Wasted Costs**"). This will include all additional costs incurred by reason of adjournment of the Horizon Issues Trial which was sought by your client by its Recusal Application and caused only by the making of it.

The circumstances in which your client's application was made were also deeply unsatisfactory. It was issued without any warning two weeks after the Horizon Trial had commenced and only after your client had taken the opportunity to hear our client's factual witnesses, and call seven of its own. This has been the subject of criticism by the Court forming the basis for its decision on waiver.

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It has also been criticised by the Court of Appeal as at best discourteous and at worst betraying a singular lack of openness on the part of the PO and their advisors. The Court of Appeal likewise accepted that your client did not make the application as soon as it should have done, and found that it pursued it in a scattergun fashion, developing its criticisms as it went.

The disruption to this litigation that the application has caused has been profound. That our commercially funded clients have been significantly prejudiced is beyond sensible dispute. This must at all times have been obvious to your client. The Court of Appeal has accepted as at least understandable that our clients take the view that the application must have been in part intended to have that effect.

Any order given by the Court should compensate our clients for their Wasted Costs to the fullest extent possible. The full extent cannot presently be known; however, certain Wasted Costs have already been incurred by our clients solely by reason of the making of the Recusal Application. We enclose with this letter a second, additional Statement of Costs setting these out – up to and including 30 April 2019 they total **£91,785.60 inc VAT**.

We stress that this identifies costs that are presently known to have been incurred by our clients up to and including 30 April 2019. It does not include further Wasted Costs (including disbursements) that will continue to accrue. These are likely to include further costs resulting from the adjournment, any increased costs associated with procedural disruption to the Further Issues Trial and consequential directions that have to be given to restore orders that have been stayed.

At the hearing on 23 May 2019, our clients will seek an order that their Wasted Costs be the Claimants' costs in any event (deferring assessment until after conclusion of the Horizon Trial). They will seek an interim payment on account in the total sum set out in the Statement of Costs enclosed.

We ask that your client confirms whether, and if so in what sum, it is willing to offer to pay the sum that will be sought by way of an interim payment.

Summary assessment

We agree that our clients' costs of the Recusal Application itself should be assessed summarily, and note your client's preference that this course be adopted, given the hearing of the Recusal Application was confined to one day.

However, your client's view that our clients' costs are 'excessive' is misplaced and not a proper basis for making of an order for detailed assessment. Summary assessment is required by PD44 CPR §9.2(b). There is no good reason to depart from that rule.

In the event costs are not agreed, our clients will oppose any suggestion that our clients should be further kept out of funds by an order for detailed assessment. In the unlikely event such an order is granted, our clients will seek an interim payment on account of such costs in the full sum that your client has offered, there being no apparent dispute as to the recoverability of that sum.

Offers in respect of costs

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In spite of all of the above, understandably in the circumstances, our clients wish to avoid or minimise any additional costs they may be put to by reason of your client's application.

In respect of the costs of the Recusal Application itself, our clients offer to accept payment of **£283,463.04** which is inclusive of interest and VAT. The sum offered is 80% of the Claimants' incurred costs of the recusal application and does not include the Claimants' anticipated costs for the 23 May 2019 hearing.

In respect of our clients' Wasted Costs, our clients offer to accept an interim payment on account of **£73,428.48** which is inclusive of interest and VAT. The sum offered is 80% of the Claimants' incurred Wasted Costs. This offer is in respect of the interim payment on account only and is subject to further such Wasted Costs, the extent of which is not yet known, being costs in the case.

The offers set out above will expire upon the commencement of the hearing on 23 May 2019.

Next steps

In view of the limited time now available before the hearing on 23 May 2019, we ask that (a) you provide your response to the points raised above by return, and (b) that your client carefully reconsider the offer it has made and consider the offers the Claimants have made in this letter with a view to reaching a compromise on a sensible basis.

We would be grateful to receive your client's revised offer having regard to the considerations set out above by **4pm on 17 May 2019**.

Our clients will have no hesitation in bringing the terms of this letter to the attention of the Court pursuant to CPR 44.2(4)(c) in the event that costs are not agreed. Our clients will in that event seek their costs in full together with the further costs associated of seeking that order on 23 May 2019, again to be assessed on the indemnity basis.

Yours faithfully

GRO

Freeths LLP
Please respond by e-mail where possible

Enclosures:

1. Claimants' updated Statement of Costs for the Recusal Application (in draft, not presently filed)
2. Claimants Statement of Costs in respect of Wasted Costs (in draft, not presently filed)