

Message

From: Zoe Brauer [Zoe.Brauer@postoffice.co.uk] **GRO**
Sent: 25/11/2019 11:28:40
To: Ben Foat [Ben.Foat@postoffice.co.uk] **GRO**; Rodric Williams [rodric.williams@postoffice.co.uk] **GRO**
CC: Ainslie Cranwell [Ainslie.Cranwell@postoffice.co.uk] **GRO**; Andrew Parsons [andrew.parsons@postoffice.co.uk] **GRO**; Emanuel, Catherine [Catherine.Emanuel@postoffice.co.uk] **GRO**; Amy Prime [amy.prime@postoffice.co.uk] **GRO**; Sherrill Taggart [Sherrill.Taggart@postoffice.co.uk] **GRO**
Subject: RE: GLO - Adverse comments in PTA Judgment

Hi Ben,

Julie is holding the pen (at her request) with Tim Perkins on the first draft of a further developed version of Andy's table capturing the key operational changes made to date and where gaps exist in light of the outcome on appeal. They will have this to me asap later today for review and to finalise.

I note your request that this be a 1-2 page document for walk in.

Kind regards,
Zoe



Zoe Brauer
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From: Ben Foat
Sent: 25 November 2019 09:16
To: Rodric Williams <rodric.williams@postoffice.co.uk> **GRO**; Zoe Brauer <Zoe.Brauer@postoffice.co.uk> **GRO**
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Subject: RE: GLO - Adverse comments in PTA Judgment

Thanks all – I really appreciate your hard work.

Zoe – where are we up to on the operational workstream and the timetables for necessary changes?



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From: Rodric Williams

Sent: 25 November 2019 09:10

To: Ben Foat <Ben.Foat@GRO>

Cc: Ainslie Cranwell <Ainslie.Cranwell@GRO> andrew.parsons <andrew.parsons@GRO>, Emanuel, Catherine <Catherine.Emanuel@GRO> Amy Prime <amy.prime@GRO>

Subject: GLO - Adverse comments in PTA Judgment

Ben – please see below the responses to the 6 points of criticism you identified in Lord Justice Coulson’s Judgment on permission to Appeal, as raised in our conference call on Friday afternoon. Please let us know if you need anything further.

Rod

Para 6 - The PO have made their further application to this court without taking on board any of the points made by the judge in that judgment [being his reasons for not giving permission to appeal].

- The appeal was lodged before Fraser gave his reasons for refusing permission to appeal (because there is a hard 21 day deadline for appeals and Fraser's reasons were not ready within this time despite us chasing his clerk for those reasons). PO's appeal could not therefore have taken Fraser's reasons into account.
- Coulson then ordered that PO's skeleton be reduced to 50 pages. By this time PO had Fraser's reasons and the appeal was amended to drop one of the grounds (restrictions on termination for repudiatory breach) in light of those reasons.
- Given the tight page limit, there was very limited scope to address all Fraser's reasons but it was still directly referenced 14 times.

Para 7 - Another aspect of the PO's litigation strategy which works against them now is their desire to take every point, regardless of quality or consequences. That was regularly apparent during the trial, where the judge correctly labelled their approach as “attritional”. The same approach was still in evidence on the application for permission to appeal.

- After Fraser J's refusal to give permission, the appeal was substantially narrowed in scope to remove all factual appeals and to focus only on important legal points.
- In relation to the legal points, advice was taken from Lord Neuberger (ex-President of the Supreme Court) on whether Post Office should make any concessions in light of the CIJ. He advised against this because it would undermine the cohesion of PO's case as a whole. Points that could have been conceded were highlighted to and discussed with the Board Subco (with Lord Neuberger attending the Subco meeting).

Para 8 - The most obvious example is the PO's anxiety to state what they do not like about a particular proposal from the SPMs or the consequential finding by the judge, without providing any practical alternative.

Para 47 - the arguments now advanced endeavour to descend into the detail which the PO refused to grapple with at the time of the trial.

- Post Office put forward 35 pages of written submissions at the CI trial on why each implied term was unnecessary, often because there were already available practical alternatives. For example, the implied term restricting suspension to where Post Office had a reasonable and proper cause was not necessary because the express suspension provisions already set out the practical circumstances in which suspension could happen.
- Post Office set out in writing months before the trial where it believed the implied terms were already catered for in the contracts or by other implied terms.
- Further, the test for an implied term is necessity (as both Fraser and Coulson accepted) not reasonableness or practicality. Our argument was that the term was not necessary; it would have been inconsistent to put forward an alternative.

Para 11 - Yet this application is founded on the premise that the nation's most trusted brand was not obliged to treat their SPMs with good faith, and instead entitled to treat them in capricious or arbitrary ways which would not be unfamiliar to a mid-Victorian factory-owner (the PO's right to terminate contracts arbitrarily, and the SPMs

alleged strict liability to the PO for errors made by the PO's own computer system, being just two of many examples).

- Good faith is a legal concept and means something different to what this would mean in commercial terms.
- PO accepted that it would not act arbitrarily at the outset of the trial, but it opposed the broad and onerous "good faith" term proposed by the Claimants. Their interpretation of good faith goes far beyond what a reasonable commercial person would expect (eg. a wide obligation to positively disclose information to SPMs unbounded by time or relevance).

Para 12 - None of this is a criticism of Ms Davies QC who was not involved in the trial or the application for permission to appeal to the judge in May, and who argued the points at the oral application for PTA with real skill and tenacity. But because of all that had gone before, she always had something of an uphill struggle.

- HDQC advised on the scope the appeal and settled the appeal documents. Her name is on the appeal documents that were before Coulson.

What is the state of law now that we have two contradictory decisions in our case and the case of Sheffield?

- Coulson has re-interpreted Fraser's judgment to bring it closer to orthodox legal principles so that it no longer directly contradicts Sheffield. He has read Fraser's judgment as implying good faith because it is necessary rather than automatically flowing from the contracts being relational.



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