

From: David Neuberger [GRO]
Sent: Sun 14/04/2019 9:57:44 PM (UTC)
To: Andrew Parsons [GRO]
Cc: Anthony Grabiner [GRO]; Owain Draper [GRO]; Gideon Cohen [GRO]; David Cavender [GRO]; Stephanie Wood [GRO]; Amy Prime [GRO]; Tom Beezer [GRO]; Rob Smith [GRO]
Subject: DEN 19 RE: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS [WBDUK-AC.FID26896945]

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:

- (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.

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 [GRO]
Sent: 14 April 2019 21:00
To: Andrew Parsons [GRO]
Cc: Owain Draper [GRO]; David Neuberger [GRO]; Gideon Cohen [GRO]; David Cavender [GRO]; Stephanie Wood [GRO]; Amy Prime [GRO]; Tom Beezer [GRO]; Rob Smith [GRO]
Subject: Re: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS [WBDUK-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

One Essex Court,

Temple,

London, EC4Y 9AR

Tel: [REDACTED] GRO

[REDACTED] GRO

On 14 Apr 2019, at 19:53, Andrew Parsons [REDACTED] 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

d: [REDACTED] GRO
m: [REDACTED] GRO
t: [REDACTED] GRO
e: [REDACTED] GRO

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<imagef13e68.PNG> <imagedaee7c.PNG>

From: Owain Draper [REDACTED] GRO

Sent: 14 April 2019 13:59

To: Andrew Parsons [GRO]; David Neuberger [GRO]; Gideon Cohen [GRO]; Anthony Grabiner [GRO]
Cc: David Cavender [GRO]; Stephanie Wood [GRO]; Amy Prime [GRO]; Tom Beezer [GRO]
Subject: Re: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS [WBDUK-AC.FID26896945]
Thanks, Andy.

The plan is to produce a shorter Grounds and to prepare a Skeleton Argument that takes from both the existing draft Grounds and the Written Closing.

We will have a better feel for the timing once I get properly into the drafting. I expect to have a good idea by the end of tomorrow.

Kind Regards,

Owain

Owain Draper

One Essex Court, Temple

EC4Y 9AR

Switchboard: [GRO]

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From: Andrew Parsons [GRO]
Date: Sunday, 14 April 2019 at 13:18
To: David Neuberger [GRO], Gideon Cohen [GRO], Anthony Grabiner [GRO]
Cc: Owain Draper [GRO], David Cavender [GRO], Stephanie Wood [GRO], Amy Prime [GRO], Tom Beezer [GRO]
Subject: RE: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS [WBDUK-AC.FID26896945]

Thank you David and Tony.

The plan laid out in your emails is helpful and clear. The challenge will be getting the client lined up with it. I will speak to the client and confirm asap as to whether they would like to speak / meet with you on Monday.

Although we will need to work through Post Office's governance processes to get decisions, the other key obstacle to progress is preparation of the Skeleton Argument for the main appeal. Do we have a target date for this? This is probably more a question for David Cavender, Gideon and / or Owain.

Once we have this target date, I can then work backwards to build a plan for how to get this signed off at PO. It may also help the C of A if we confirm that the main appeal will be lodged by a firm date.

Kind regards
Andy

Andrew Parsons
Partner
Womble Bond Dickinson (UK) LLP

d:
m:
t:
e:

+ [GRO]
[GRO]
+ [GRO]
[GRO]

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From: David Neuberger [GRO]
Sent: 14 April 2019 11:56
To: Andrew Parsons [GRO]; Gideon Cohen [GRO]; Anthony Grabiner [GRO]
Cc: Owain Draper [GRO]; David Cavender [GRO]; Stephanie Wood [GRO]; Amy Prime [GRO]; Tom Beezer [GRO]
Subject: RE: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS

Dear Andrew,

I confirm that I would be available to talk tomorrow: I shall be working at home in the morning until 12.30 and shall be in chambers from about 3.00 until about 5.30.

As Tony says, he and I have discussed the position, and we see things very much the same way.

An appeal on the common issues aspect raises points which are legally very significant and, I believe, commercially very important to the clients, and on which I believe that the judge has gone badly wrong in a number of ways. An appeal on recusal aspect raises what I appreciate is a particularly sensitive issue for the clients both tactically and in terms of possible public perception.

As Tony says, I consider that the two aspects are, at least potentially, connected, and, for that reason, as well as on the individual merits of each of the two aspects, permission to appeal should in my view be given on both aspects. However, it would be perfectly possible to appeal on the common issues and not on the recusal – and indeed vice versa. I think that 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.

As to Tony's point 4, I think that there is a danger that our justified belief, and consequent sense of grievance, that the Judge has gone badly wrong may have made us over-suspicious of some sort of inappropriate collusion between the Judge and the CA. It would be perfectly proper, indeed sensible, for the Judge to have warned the CA of a possible forthcoming application which someone should look at urgently, although I cannot of course rule out the possibility that more was said (but even if it was, that is not by any means necessarily sinister). Coulson LJ is the LJ responsible for civil procedure, so it is not very surprising that the application ended up before him. The fact that he made an instant decision with regard to a stay is also unsurprising because that was urgent, and the fact that he has asked for the claimant's response is a pretty good indication that he is considering the application on its merits, as one would expect. My one point of concern is that he has ruled in effect that the common issues and recusal application are separate: again, at least on the face of it, that is a perfectly rational view, although it is questionable whether he should have expressed a firm view on that without raising it with us (but I have not seen our application, so that may be unfair). At any rate, I think that that is a point which we should challenge in the reasonably near future if we are proceeding with the recusal aspect.

Yours sincerely,
David Neuberger

From: Andrew Parsons <[GRO]>
Sent: 13 April 2019 08:50
To: Gideon Cohen <[GRO]>; Anthony Grabiner <[GRO]>
Cc: Owain Draper <[GRO]>; David Cavender <[GRO]>; Stephanie Wood <[GRO]>; Amy Prime <[GRO]>; Tom Beezer <[GRO]>
David Neuberger <[GRO]>
Subject: Re: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS

Tony. Thank you for your email.

I agree with the proposed strategy and flag a few further points to consider below.

1. Jane MacLeod, General Counsel at Post Office, has asked whether it is worth us speaking to the Cs about whether they want the appeals heard together or separately. I can see pros (eg. cost saving) and cons (eg. better chance to oppose permission on the recusal) for them taking either approach but if they do support the appeals moving together that would, I presume, put more pressure on the C of A.

2. There is some reluctance inside PO to putting the appeals together and skipping over Fraser J for permission on the main appeal. They are keen to avoid any step that looks aggressive or heavy handed. I believe that we should be able to persuade them on both points, but we would need instructions before taking either step.

With the above in mind, are you and David Neuberger (copied) around on Monday to discuss this with Jane and me? If so, please let me know what time would suit you and whether a call or meeting is easier.

David Cavender - you are welcome to join us but I appreciate you are on holiday.

Kind regards
Andy

From: Anthony Grabiner
Sent: Friday 12 April, 17:50
Subject: Re: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS
To: Gideon Cohen
Cc: Owain Draper, Andrew Parsons, David Cavender, Stephanie Wood, Amy Prime, Tom Beezer, David Neuberger

Dear all,

I've been following the emails and have discussed them with David Neuberger.

1. The order made by Coulson LJ means that we have some breathing space because it asks for a response from the other side on 25/4.
2. We think a letter should go from our solicitors to the CofA listing office asking the Court to take into account the fact that an appeal application is being prepared in respect of the Common Issues judgment and that the Court should deal with both matters together.
3. The preparation of the grounds of that appeal and the production of the supporting skeleton argument is extremely urgent and needs to be done ASAP. 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.
4. We share the concerns expressed in the flurry of emails. It looks as if Fraser J has been speaking either to the listing office or even to Coulson LJ. Otherwise it would be a remarkable coincidence that of all the LJ's presented with the papers they ended up by chance in front of the former TCC Judge although this is not a TCC case. I've asked Owain to dig out the references from the transcripts of the recusal arguments and the judgment day because my recollection is that Fraser J said on both occasions that the CofA was expecting an appeal application. Owain will circulate the extracts.
5. If we make no progress we will have to consider communicating with the listing office and the Master of the Rolls as to what has been going on here. In principle conversations about the merits as between the first instance Judge and the Lord Justice who ends up ruling on the leave to appeal point would, I think, be most inappropriate but that's a serious allegation to be making. Also we couldn't take that step without a detailed discussion with and instructions from Post Office. This is a very delicate matter.
6. David N and I plan to meet on Sunday to draft a suitable letter to be addressed to the listing office on Monday.
7. All suggestions welcome either on the contents of the draft or the suggested strategy.

Regards,

Tony

Lord Grabiner QC

One Essex Court,

Temple,

London, EC4Y 9AR

Tel **GRO**

Mob **GRO**

On 12 Apr 2019, at 16:44, Gideon Cohen

GRO

GRO >> wrote:

Must be the same one. Not sure there is anything we can do about it now, though. Even assuming that his approach to the appeal will be guided strictly by legal principle.

On 12 Apr 2019, at 18:39, Owain Draper

GRO

GRO >> wrote:

If there is only one Peter Coulson, we should get our hands on Coulson on Construction Adjudication. It has a

chapter on bias.

From: Andrew Parsons

GRO

GRO

Date: Friday, 12 April 2019 at 16:19

To: Gideon Cohen

GRO

GRO >>>, David Cavender

GRO

GRO

Cc: Anthony Grabiner

GRO

GRO >>>, Owain Draper

GRO

GRO >>>, Stephanie Wood

GRO

GRO >, Amy Prime

GRO

GRO

>>>, Tom Beezer

GRO

GRO

Subject: RE: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS

I agree.

Can we also think about our plan for submitting draft grounds of appeal on the main appeal in light of para 2?

This now doesn't seem possible.

A

Andrew Parsons

Partner

Womble Bond Dickinson (UK) LLP

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From: Gideon Cohen

GRO

Sent: 12 April 2019 16:10

To: David Cavender

GRO
GRO

Cc: Andrew Parsons

GRO

GRO
Grabiner

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GRO
>>>>; Owain Draper

GRO
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GRO
>>>>; Stephanie Wood

GRO
GRO
GRO
>>>>; Amy Prime

GRO
GRO
GRO
>>>>; Tom Beezer
GRO

Subject: Re: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS [WBDUK-AC.FID123887118]

I'd think the chances of us not getting permission just went from negligible to rather high.

> On 12 Apr 2019, at 18:04, David Cavender

GRO
GRO
>>> wrote:

>
> Yes !
>
> It looks very much like this is what Fraser J set up in advance - with his mate the former head of the TCC - unless you believe in co-incidences. This is very bad news.
>
> Best
>
> D.
>
>

Andrew Parsons
Partner
Womble Bond Dickinson (UK) LLP

d:
m:
t:
e:

GRO
GRO
GRO
GRO

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Sent from my iPhone

>

>> On 12 Apr 2019, at 16:01, Gideon Cohen

GRO

GRO

>> wrote:

>>>

>>> Does this indicate that Coulson will decide the permission application? Ex-construction lawyer, TCC judge...

>>>

>>>> On 12 Apr 2019, at 17:45, Andrew Parsons

GRO

GRO

GRO

>>>> wrote:

>>>>

>>>> FYI

>>>>

>>>>

>>>>

>>>> Andrew Parsons

>>>> Partner

>>>> Womble Bond Dickinson (UK) LLP

>>>>

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>>>> t: [02071883000](tel:02071883000)

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>>>> -----Original Message-----

>>>> From: Civil Appeals - Associates

GRO

>>>> Sent: 12 April 2019 15:25

>>>> To: Andrew Parsons

GRO

GRO

>>>> Cc: james.hartley@wbd.co.uk

GRO

GRO

GRO

GRO

>>>> Subject: A1/2019/0855 POST OFFICE LIMITED V BATES AND OTHERS

>>>> Importance: High

>>>>

>>>>

>>>> Good Afternoon

>>>>

>>>> Please see attached order for your attention

>>>>

>>>> Kind Regards

>>>>

>>>> Ann-Marie Smith

>>>> Associates' Office

>>>> Civil Appeals Office Room E311

>>>> Royal Court of Justice

>>>> Strand

>>>> London

>>>> WC2A 2LL

>>>> DX [REDACTED] GRO

>>>> Tel: [REDACTED] GRO

>>>> Fax: [REDACTED]

>>>>

[civilappeals.associates@\[REDACTED\]](mailto:civilappeals.associates@[REDACTED]) GRO

[REDACTED] GRO

>>>>

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