
From: Andrew Parsons [GRO]
Sent: Thur 11/04/2019 8:37:39 AM (UTC)
To: Gideon Cohen [GRO]; Tom Beezer [GRO]; Amy Prime [GRO]; Anthony Grabine [GRO]; David Neuberger [GRO]; Owain Draper [GRO]; David Cavender [GRO]
Subject: DEN 15 Re: Scope of recusal appeal

David

Thanks. I have forwarded this whole email chain to the client so that they are fully aware of the position.

Andy

From: David Cavender
Sent: Thursday 11 April, 09:25
Subject: RE: Scope of recusal appeal
To: Gideon Cohen, Andrew Parsons, Tom Beezer, Amy Prime, Anthony Grabiner, David Neuberger, Owain Draper

Andy,

I also agree. Just so we are clear, the result of this is that the relief sought on the Recusal appeal is *simply* the removal of the Judge and the re-start of the Horizon trial before another Judge. The Common Issues judgment remains intact with all its terrible findings. The Appeal will then be the *only way* of seeking to get those findings quashed. As you will know that is not a normal situation or the normal role for the Court of Appeal on an appeal.

That said, in the event that the Judge is recused on the basis of making a large number of findings outside the Common Issues and without full disclosure or witness evidence – any replacement Judge hearing the subsequent trials is unlikely to feel particularly tied to those findings.

But I just wanted everyone to be on the same page and understand the decision being made. Hence my call with Gideon and his helpful email setting out our conclusions.

Best,

D.

David Cavender Q.C.



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From: Gideon Cohen

Sent: 10 April 2019 20:18

To: Andrew Parsons GRO >; Tom Beezer GRO >;

Amy Prime GRO >; Anthony Grabiner GRO >; David

Neuberger GRO >; Owain Draper GRO >

Cc: David Cavender GRO >

Subject: RE: Scope of recusal appeal

Thanks Andy - completely agree.

Gideon Cohen
Barrister

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From: Andrew Parsons GRO

Sent: 10 April 2019 20:17

To: Tom Beezer; Amy Prime; Anthony Grabiner; David Neuberger; Owain Draper; Gideon Cohen

Cc: David Cavender

Subject: Re: Scope of recusal appeal

Thanks Gideon.

We will proceed on the narrower basis.

There will always be a temptation to reach for more, especially when the Common Issues Judgment presents so many opportunities to do so. My instructions from Post Office are however clear: they want the appeals to be focused on only absolutely key issues. The focus of the recusal appeal is getting Fraser off the case as you say below.

Kind regards
Andy

From: Gideon Cohen

Sent: Wednesday 10 April, 19:23

Subject: Scope of recusal appeal

To: Andrew Parsons, Tom Beezer, Amy Prime, Anthony Grabiner, David Neuberger, Owain Draper

Cc: David Cavender

All,

This is just to update you on a conversation David Cavender and I had this afternoon about the scope of the recusal appeal.

We could broaden the appeal to say that the entire Common Issues Judgment should be struck down on the grounds of bias. Arguably, as Green QC picked up, the logic of the second limb of our application (that the Judge was gratuitously hostile) is that the Common Issues Judgment itself was the product of bias (as well as prejudging the outcome of future trials, and thereby creating a risk of bias prospectively). We therefore could, as part of the recusal appeal, attack the Common Issues Judgment itself.

We do not think that is a good idea. It might well give the Court of Appeal pause if they thought allowing the appeal would necessitate rerunning the Common Issues trial.

To deal with that problem, we could use the recusal appeal to attack the judgment on bias, whilst saying that the findings on contractual formation and notice could remain untouched. The difficulty is that there is no principled reason to leave some findings in place, whilst getting rid of the others. The advantage of attacking the Common Issues judgment in this way is that it gives us another route to get rid of the Judge's findings (in addition to the main appeal). If we do not dislodge the Judge's findings, there is a risk that the recusal application succeeds, but on a basis which still leaves certain damaging findings in place for the new Judge to be bound by/ rely upon.

However, on balance, we do not think it is a good idea to broaden the appeal in this way. The main goal must be to get the Judge off the case, and anything that distracts from that is not worthwhile.

We did, though, want to flag this risk - that by not attacking the findings themselves on the ground of bias they could outlive Fraser J's participation in this case.

If I have missed anything out, no doubt David will say so.

Best wishes

Gideon

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Partner
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