

From: David Cavender [GRO]
To: Gideon Cohen <[GRO]>
Cc: Andrew Parsons [GRO], Amy Prime [GRO],
[GRO] Tom Beezer [GRO], Dave Panaech
[GRO]

Subject: Re: Recusal application steps [DRAFT]

Date: Sun, 17 Mar 2019 15:25:21 +0000

Importance: Normal

Inline-Images: image5851a0.PNG; image7471e7.PNG; image069b6d.PNG; image5851a0(1).PNG;
image069b6d(1).PNG

I think the way to finesse this is to say - a Judge with experience of complex financial disputes - possibly a Judge of the commercial court ? So indicative - not prescriptive ?

Best

D.

Sent from my iPhone

On 17 Mar 2019, at 14:52, Gideon Cohen <[GRO]> wrote:

We'll certainly have to stay it - I think beyond that it starts to look like we are trying to pick our judge, which may be very sensible (I agree a knock-about QBD judge would be mad), but optically wouldn't be great for the application...

I wonder if the best way to deal with the new judge is to suggest a more detailed way forward only if and when it looks like the wind is blowing our way on recusal?

Gideon Cohen
Barrister

One Essex Court
Temple
London EC4Y 9AR

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From: Andrew Parsons [GRO]
Sent: 17 March 2019 14:46
To: Gideon Cohen; Amy Prime; Tom Beezer; David Cavender
Cc: Dave Panaech
Subject: RE: Recusal application steps [DRAFT]

Gideon

I think we'll have to at least stay the Horizon Issues trial?

Do we want to specify the replacement Judge? Ie. to be selected by the President of the QBD? not to be a TCC judge? To be a Commercial Court judge? The last one might be too far, but quite frankly is the only option if you can't put it back in the TCC.

Could you imagine a knock-about QBD judge running this....?!!!!


A

Andrew Parsons
Partner
Womble Bond Dickinson (UK) LLP

d:

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From: Gideon Cohen 

Sent: 17 March 2019 14:31

To: Amy Prime; Tom Beezer; David Cavender

Cc: Andrew Parsons; Dave Panaech

Subject: RE: Recusal application steps [DRAFT] [WBUDK-AC.FID26896945]

To feed into this prep, first stab at a draft Order attached. Not sure there is any standard template for this sort of thing - all comments gratefully received.

One issue that I have dodged here, but which we will have to take a position on at some point, is whether we are saying that the Horizon trial will have to be restarted. Not sure what the alternative would be. I will have a further think about that, because this must have come up before, e.g. if a judge becomes ill or dies in the middle of a long trial.

Best

Gideon

Gideon Cohen

Barrister

One Essex Court
Temple
London EC4Y 9AR

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From: Amy Prime **GRO**
Sent: 15 March 2019 15:07
To: Gideon Cohen; Tom Beezer; David Cavender
Cc: Andrew Parsons; Dave Panaech
Subject: RE: Recusal application steps [DRAFT] [WBDUK-AC.FID26896945]

Tom, Gideon

Thanks and understood. We are starting work on this here now.

Many thanks
Amy

Amy Prime
Solicitor
Womble Bond Dickinson (UK) LLP
d:
m:
t:
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GRO

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From: Gideon Cohen **GRO**
Sent: 15 March 2019 14:42

To: Tom Beezer; David Cavender
Cc: Amy Prime; Andrew Parsons; Dave Panaech
Subject: RE: Recusal application steps [DRAFT] [WBDUK-AC.FID26896945]

Tom,

That is exactly my thinking too. We have picked out the 'greatest hits' for the Note to Lord Neuberger, but that was the product of a few hours of rushing through transcripts etc. We want to do a more thorough trawl, and then include all key refs in the statement. I agree that this part of the statement will not involve any analysis.

The parts of the statement in which we identify what the judge has said in this judgment, and point out the ways in which that is problematic either because (a) it prejudices future issues, or (b) it is so vitriolic as to display apparent bias, arguably do involve a modicum of analysis, in that we will want to identify where and how we say he has gone wrong. But that should be done with a very light touch - the Note should be a good starting point in that regard. Obviously the more detailed analysis, by reference to the authorities, will come in the skeleton argument.

In terms of timing, and as I indicated yesterday, my view is that we need to separate out the serving of the application and the hearing of the application.

The application needs to be served as soon as possible. This witness statement would be served at the same time, in support. There is obviously a balance to be struck - we want to be thorough and careful. But speed is imperative too - we must serve the application (and witness statement) next week, and preferably in the earlier part of the week. Hopefully Amy will find the Note a useful base for the bulk of the witness statement.

That is also the stage at which we should propose adjourning the Horizon trial (although inevitably that will not happen).

The timing of the hearing of the application is then somewhat out of our hands. We are obviously not going in ex parte, so there will have to be time for the parties to prepare and exchange skeleton arguments. Obviously we will push to get a hearing in as soon as possible, but speaking for myself, I do not think next week is a realistic prospect.

Best wishes

Gideon

Gideon Cohen
Barrister

One Essex Court
Temple
London EC4Y 9AR

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From: Tom Beezer **GRO**
Sent: 15 March 2019 14:28

To: Gideon Cohen; David Cavender
Cc: Amy Prime; Andrew Parsons; Dave Panaech
Subject: RE: Recusal application steps [DRAFT] [WBDUK-AC.FID26896945]

Gideon

Many thanks for your e mail.

Timing will be all important here ! When do you anticipate that we'll deploy the statement ?

If I am on your wavelength what needs to be collated is:

- in chrono' order, every time we have told Freeths or the Judge (in particular) info on our perceived scope of CIT and why his/their plan is wrong and the warnings given and answers received

- That will (I am told) go back to the dust-up over the GLO itself when some of these issues were predicted

- then through a load of correspondence with Freeths after that (to the extent those letters were shown to the Judge (??))

- and into the Strike Out application and evidence and transcripts from that outing

to set out each time scope of CIT was aired.

So it is not a witness statement with any analysis in really – it is just a vehicle to contain the "who said what to who & when" info' on scope of trial and admissibility of evidence around CIT.

Along the way (and I suppose mostly from the Strike Out in addition to CIT itself) we need to capture any snide or adverse comment made by the Judge and set that out too.

Are we thinking along the same lines ? Then that historic stuff needs to be married up to info from the CIT daily transcripts and the Judgment (largely done in DCQC note to LNQC).

As to who gives a statement, I am neutral. If it just needs to be one of us who say "I have seen documents that say X, Y, Z" then could be me. If it needs to be someone who was there (as I was not), then one of the others.

This is a large task and will require lots of trawling of electronic files. Amy will (I believe) be the centre of that web and get people searching and cutting and pasting into a chrono' order, and then you and Amy can make that into a witness statement if more is needed, but I doubt it will be – for as I say this is not about analysis – it is more a list of what has been said on relevant topics looking backwards.

Am I making sense.....??

t

Tom Beezer
Partner
Womble Bond Dickinson (UK) LLP

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From: Gideon Cohen [GRO]
Sent: 15 March 2019 13:01
To: David Cavender
Cc: Tom Beezer; Jane MacLeod [GRO]
Amy Prime; Andrew Parsons; Rodric Williams
[GRO]
Ben.Foat [GRO]; Dave Panaech
Subject: RE: Recusal application steps [DRAFT] [WBDUK-AC.FID26896945]

Just following up on this - while, as I noted below, I think the actual hearing of the application will not be as quick as originally planned (given the need for skeletons etc - NB there is a fair amount of law in this area), we should certainly get in the application (and propose an adjournment of the current trial) as soon as possible after we get instructions.

To that end, if possible we should start working up a supporting witness statement, including the material set out in our Note (as referred to by Lord Neuberger in his Note), and adding in anything else which is helpful. i.e. we should go through everything that was said, and set out in Orders, about the scope of this trial (including the various warnings we gave at the trial about its scope), and then list the various objectionable bits of the judgment (as handed down), which either (a) made findings of fact beyond the scope of the trial, or (b) expressed unnecessary vitriol. Is that something we can start working up? If so, who is best placed to do it? Let me know if it would be useful to discuss.

Best

Gideon

PS As soon as judgment is handed down, it would also be helpful to do a compare-write against the draft judgment.

Gideon Cohen
Barrister

One Essex Court
Temple
London EC4Y 9AR

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From: Gideon Cohen

Sent: 14 March 2019 19:09

To: David Cavender

Cc: Tom Beezer; Jane MacLeod

[REDACTED] GRO

Amy Prime; Andrew Parsons; Rodric Williams

[REDACTED] GRO

Ben.Foat

[REDACTED] GRO

; Dave Panaech

Subject: Re: Recusal application steps [DRAFT] [WBDUK-AC.FID26896945]

Only two comments. The first (perhaps unsurprisingly) is on point 6. I would suggest additionally instructing Stephanie Wood, who has been assisting for the last week and is now familiar with the case. I will try to clear my diary for next week, but even if I can do so there will be some very tight deadlines to meet.

The second comment is a query as to whether the timetable can be abbreviated quite this aggressively. We should certainly put the application in as soon as we have instructions, but the application will be contested inter partes. Do we not need to build in time for skeletons etc? Apologies if this ground has already been traversed.

On 14 Mar 2019, at 18:28, David Cavender

[REDACTED] GRO

[REDACTED] GRO

wrote:

Tom,

Many thanks for this. This all looks very sensible and reflects our recent discussion.

Best,

David.

David Cavender Q.C.

<image001.jpg>

One Essex Court
Temple
London EC4Y 9AR

Direct dial:

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Sent: 14 March 2019 18:07
To: Jane MacLeod; GRO
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GRO David Cavender
GRO; Gideon
Cohen; GRO
Cc: Amy Prime; GRO
GRO Andrew Parsons; GRO
GRO Rodric Williams
GRO
GRO
Ben.Foat; GRO; Dave
Panaech; GRO
GRO
Subject: Recusal application steps [DRAFT] [WBDUK-AC.FID26896945]

All

My current view of steps to be taken in the recusal process (if triggered) are as follows (in time order so far as I can predict):

1) [Optional but recommended] POL (through WBD) engage with the QC who is likely to be instructed to make recusal application ASAP (if one is made) to get QC "warmed up" to application, arguments to be deployed and (potentially) to speak to POL Board if needed, as the person who would in fact be the mouthpiece of POL. Timing: Friday for choice of QC and delivery of papers.

2) Assuming a QC is to be "warmed up" David Cavender QC to brief on background as fully as possible. Timing: Friday.

3) POL to decide if it is to make a recusal application. Timing: By (say) Monday.

4) POL Board may wish to speak to Lord Neuberger as part of their decision making process. The Clerks at OEC have confirmed that is possible and have contact numbers for Lord Neuberger as needed. Please NOTE Lord Neuberger is not in South Africa as we had understood, but in South America (Argentina) which is currently 3 hours behind us.

5) As soon as decision to make application has been made (if that transpires) Freeths & Judge to be put on notice. Suggested "appropriate" notice period is one day (or more if decision made earlier than early next week). Freeths put on notice by letter from WBD (or possibly Counsel to Counsel) and the Judge by a note between the Clerks ? Timing: early next week once decision to proceed made.

6) Gideon (at OEC) to be instructed to be Junior to chosen QC. Timing: Friday, if "warm up" route followed.

7) QC & Gideon prepare Application Notice and Skeleton for recusal application. This work could start now if we follow the "warm up" route.

8) Application is made first half of next week at 10am during the Horizon trial. Thereafter there are variables:

a. Judge may agree. Unlikely but possible. HIT trial is adjourned there and then and POL appeals the CIT findings and (if successful) we re-list CIT & HIT.

b. Judge may pass matter to another judge to hear. Unlikely.

c. Judge refuses (likely) and POL takes that refusal to Court of Appeal asap. That could be same day (possible but unlikely) or at that same week at some point if CofA recognise urgency.

d. CofA may agree with recusal application. If so, POL appeals the CIT findings and (if successful) we re-list CIT & HIT.

e. CofA may refuse recusal application in which case HIT rolls on.

Please note in any scenario where HIT is adjourned then there will be possible increased costs consequences for Claimants that POL could bear if it is ultimately unsuccessful.

Possible outcomes of recusal application:

a) It is successful and HIT adjourned then appeal of CIT goes ahead and new judge is put in place for remaining aspects of trials.

b) It is unsuccessful (at first request and CofA) then it is likely that Fraser is cross but he is also aware the CIT appeal is progressing which includes the "procedural unfairness" assertion. Possible impact in that scenario is Fraser is more cautious as to behaviours to (possibly) POL's benefit.

c) The theoretical downside to a recusal application is that it fails and that Fraser remains the judge at Trial 3 which will require multiple findings of fact. Findings of fact are more tricky to appeal and this is a point to be cognisant of.

All comments on the above welcomed.

T

Tom Beezer
Partner
Womble Bond Dickinson (UK) LLP

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