WBON0000682

From: Tom Beezer <GRO>
To: Jane MacLeod <GRO>
Cc: Andrew Parsons <GRO>, Rodric Williams <GRO>, "Ben.Foat GRO Amy Prime GRO, Dave Panaech GRO
Subject: RE: recusal [WBDUK-AC.FID26896945]
Date: Wed, 20 Mar 2019 10:15:25 +0000
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Jane

As requested, Counsel team response below:

Dear Tom,

This proposal does not work. Indeed, if made, this application would make matters (even worse). Even if PO decide not to seek to recuse Fraser J I would advise strongly against the proposed course. I say this for the following reasons:

(1) The immediate (and likely irreversible) prejudice PO are suffering is the effects of the apparent bias Fraser J showed in the CIT upon his current handling of the Horizon issues trial. There is also the future prejudice of him handling the breach trial in November 2019.

(2) The only way of seeking to deal with the prejudice is to seek his recusal on an urgent basis.

(3) Seeking to appear before him indicating that PO is going to appeal against his CIT judgment on grounds of procedural unfairness – will assuredly not result in him adjourning the Horizon trial. He will not do so because the unfairness in the CIT trial itself does not infect the Horizon trial. It is the apparent bias of Fraser J that infects the Horizon trial. The only remedy for that is recusal.

(4) If, on this proposal, Fraser J's refusal to adjourn the Horizon trial is then appealed to the Court of Appeal – they would assuredly not adjourn that trial and would not recuse him- because there would not application before them to do so.

(5) Furthermore, an appeal against a refusal to recuse is much more likely to come on as an urgent appeal – than an appeal against the refusal of a judge to adjourn a trial on the basis that he showed procedural unfairness in an earlier trial between the same parties. Indeed the latter appeal is very likely to come on after the Horizon trial is completed and the Judgment handed down. This fact would make it more unlikely the Court of Appeal would intervene.

(6) And, if all this comes to pass (as it most assuredly would) is the proposal that then PO applies to the judge to recuse himself ? And then appeal him if he does not ? This make no sense- and would all come too late to be effective to deal with the prejudice in (1). Indeed, this course of action would look very much as if PO were seeking to delay matters and behave badly- in the manner presently charged by the Judge.

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(7) If there are good grounds for a recusal (and clearly there are) and good prospects of success (as advised) then the Court of Appeal would expect PO to apply to the Judge to recuse himself and then appeal him if he did not. There is no middle ground here.

Best,

D.

David Cavender Q.C.

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From: Jane MacLeod [mailto: GRO
Sent: 20 March 2019 07:14
To: Tom Beezer
Cc: Andrew Parsons; Rodric Williams
Subject: recusal

Tom

I have been asked to see whether an approach along the following lines (as an alternative to recusal) would be possible procedurally:

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"1. inform the judge that the company is appealing on the law and unfair procedure

2. ask the judge to stop the Horizon trial until the outcome of the appeal is determined on the grounds that if the unfairness claim is upheld it would also put the fairness of the Horizon trial at risk

3. If the judge refuses 2, seek and order from a higher court to the same effect and ask the judge at least to stop the Horizon trial until such an order can be obtained (or not)

If the remedy in 3 is sought but isn't obtained we will at least have tested the relevance and implications of unfairness issues on the second trial. And effectively a higher court will have told us that any unfairness in the first trial would not impact the Horizon trial (obviously contrary to POL's view).

If the remedy in 3 doesn't exist in law then recusal would be an alternative at that point. It seems to me the judge's refusal to agree to 2 would support a recusal application as he would be unwilling to accept that if unfairness took place in the first trial the nature of it would necessarily affect the conduct and fairness of the Horizon trial - a view which logically suggests bias as it is absurd."

Could we please test this with the Counsel team? It may have the outcome that the judge is asked to recuse himself, but not necessarily. And seems to assume that we could get an appeal quite quickly, which must be uncertain. I'm also not sure that the logic in 2. holds up, and 3 means arguing procedural unfairness without (necessarily) arguing mis-application of the law etc.

Thanks,

Jane

Jane MacLeod

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Group Director Legal, Risk & Governance

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