

NCN: [2018] EWHC 2528 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Thursday, 26 July 2018

BEFORE:

MR JUSTICE ANDREW BAKER

BETWEEN:

BARRY HEWES

Claimant

- and -

TANNA & ORS

Defendant

MR DONOVAN QC appeared on behalf of the Claimant

MR D MYHILL appeared on behalf of the Third Defendant, Dr Tanna

JUDGMENT
(As Approved)

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1. MR JUSTICE ANDREW BAKER: You heard where I got to on the matter on the papers; it is not for me to know or to seek to second-guess the precise logic that was in Sir Alastair's mind in feeling that he preferred to refer the two applications for an oral hearing together rather than, it may be, consider permission as things stood. Whether that means it did not seem to him as clear a case, at least for permission, as I have to say it seems to me, I do not know, but the fact is procedurally that is how matters have arrived with me.
2. In the circumstances, it is not I think appropriate for me to say more than effectively I have already provisionally said during the argument, albeit in relatively firm terms, as to the merits of all of this. It seems to me that there are on any view powerful arguments to be put forward that need a full and fair outing on an appeal hearing in support of the claimant's proposed appeal.
3. I think I will say that I am in that regard influenced in particular by the fact that Master Cook, to be fair to him, went out of his way to say on the other matter that was argued below, namely causation, that he would not have given summary judgment by reference to that issue, so that the appeal is very starkly focused on this question of the appropriate approach to, and in this case assessment of, an expert report, as I have put it, pre-emptively served by one party to the litigation and on the basis of it an application asserted that the case should be disposed of, without allowing the remaining processes envisaged by the case management order to be followed through.
4. As I say, it seems to me that there is a real prospect that, after full argument, a different view will be taken by a judge on appeal from the view taken by Master Cook on both those aspects. I say that even if Mr Myhill's response to my, it might be said, more technical possible thought (as to whether there was even permission for Dr Russell's report to be relied on below) is held to be correct.
5. In the round, it does seem to me that there are at least powerful arguments to be put here that need a full outing.
6. In those circumstances, there is a real interplay between the arguments on the substance of the appeal as it stands, considerations of what somebody in the claimant's position faced with this application could reasonably have been expected to do or to anticipate the need to do to seek to fend off that application, on the other hand, and then on the third hand (if there is such a thing) the considerations that come into play as regards the admission of the new evidence.
7. Whilst I could attempt an argument about those and the disposal of the application to admit the new evidence by reference to those considerations, since I do not need to resolve those aspects for the purposes of deciding whether to grant permission to appeal, it is then better for them to be considered in the round in the light of the argument on the appeal.
8. I envisage, although it will be a matter for whoever now hears the appeal, that it may be one of those cases where the parties, if this can work, may wish to give consideration essentially to arguing the appeal by in each of their cases respectively

presenting their arguments as they would present them without the additional evidence, and then demonstrating where the additional evidence, if allowed, would fit in so that the court can see that in the round. As I say, you will be in the hands of whoever takes the appeal. They may come in and say, having read what you have put in in writing, that they wish to take a view at the outset of the hearing on the additional evidence and deal with that first. That has to be a matter for whichever judge takes the appeal.

9. So permission to appeal is granted.

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This transcript has been approved by the Judge