

From: Jonathan Gribben <[REDACTED] GRO>
To: Anthony de Garr Robinson <[REDACTED] GRO>, 'Simon Henderson' <[REDACTED] GRO>
Cc: Andrew Parsons <[REDACTED] GRO>, Katie Simmonds <[REDACTED] GRO>
Subject: RE: KEL analysis [WBDUK-AC.FID27032497]
Date: Mon, 12 Nov 2018 19:23:08 +0000
Importance: Normal
Inline-Images: image5e445d.PNG; image32f668.PNG; image73de03.PNG; image001.png; image002.png; image003.png

Dear Tony and Simon,

Thank you for your email.

The analysis is being carried out for the dominant purpose of the litigation. Taking the Coyne KELs as an example, we've produced a table which sets out Coyne's analysis and asked Fujitsu to provide their own analysis in response. We are going through the process of polishing what FJ have provided and want to assert privilege over all but the final draft.

Andy wondered if it would make a difference if we annexed the table to the statement, rather than exhibiting it?

We note the risk involved with using Gareth as a witness and we are limiting Gareth's involvement as much as possible, but he is Fujitsu's go-to person for many of our questions. If Torstein or Steve covered the bugs they would still need to speak to Gareth (Torstein less so).

Kind regards

Jonny

Jonathan Gribben
Managing Associate
Womble Bond Dickinson (UK) LLP

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From: Anthony de Garr Robinson <[REDACTED] GRO>
Sent: 12 November 2018 14:00
To: 'Simon Henderson'; Jonathan Gribben
Cc: Andrew Parsons; Katie Simmonds
Subject: RE: KEL analysis [WBDUK-AC.FID27032497]

Dear Jonny,

I agree with Simon's views below. Two questions arise in my mind, though.

First, I would like to understand whether there is any particular category information in which you would like to retain privilege. If we are adducing evidence of any analysis undertaken of any data available, I don't see how it would be possible to assert privilege either in what the analysis involved (what assumptions were made, what judgments were formed, what calculations were done, etc) or on the information/data on which it was based. If we want to rely on the conclusions of the analysis, we have to be open about its elements; otherwise, the claimants would not be able to challenge it, which would not be fair to them. But is there some specific category of information you want to protect which they might not need in order to be able to challenge it? If so, let us know what it is.

Second, I see that Gareth Jenkins is part of the team doing the analysis. We all know the reasons why we have decided not to have Jenkins as a witness. They are also reasons for not having him as a source of evidence – i.e. as a source of information for our witnesses and/or as a person providing analyses on which our witnesses will rely. Where he is acting as a source the Claimants will know this and they will waste no time in arguing (1) the fact that we have not called such a natural witness demonstrates that he is not a reliable witness, (2) we recognise this fact and want to protect him from any cross examination and (3) if he is not a reliable witness, he can't be a reliable source of evidence, either and (4) as the claimants are being prevented from cross examining him the information he provides to other witnesses is even less reliable than a witness statement from him would be. This argument will undermine the evidential value of any witness statements that are based on information that Jenkins has provided.

It follows that we should limit Jenkins' involvement as a source of evidence as much as possible, essentially to those areas where there is no alternative source of information. However, the man seems to be popping up on ever technical question – as a source of information for Torstein Godeseth and now as a member of a team providing analysis for Steve Parker. I appreciate his unique position and that there may be some areas where we have no alternative but to use him as a source of information. But are we sure that we are limiting his involvement as much as possible? I entirely recognise the need to be realistic about the sort of evidence we can get from Fujitsu in the time available to us. But I need to make clear the risk we could be running of adducing evidence which turns out not to be very useful to us.

On the same theme, I see from your email of 9:52 am that Steve Parker will not be covering the known bugs in his witness statement. You say that Godeseth is better placed to deal with those bugs, but my understanding is that he has no personal knowledge of the bugs or the processes by which they were identified, investigated and fixed: this was not his department. In his last statement, he seems to be doing little more than repeating information provided by others (others such as Jenkins). The claimants may choose not to challenge this evidence, but if they challenge it I'm unclear how Godeseth will be able to defend it. Again, I recognise the need to be realistic but also need to make clear the risk involved.

Best wishes,

Tony

From: Simon Henderson <[REDACTED]>
Sent: 12 November 2018 10:04
To: 'Jonathan Gribben' <[REDACTED]>; Anthony de Garr Robinson <[REDACTED]>
Cc: Andrew Parsons <[REDACTED]>; Katie Simmonds <[REDACTED]>
Subject: RE: KEL analysis [WBDUK-AC.FID27032497]

Jonny

I haven't had a chance to discuss this with Tony but my view is that the overall approach i.e. recording that he has asked his team to do the work, is fine but that it is very likely that privilege (if indeed there is any privilege) will be waived. This is an exercise which a third party witness is saying he has asked his team to perform i.e. it is not something which, at least on the fact of the ws, PO's lawyers have asked for – and even if they have, by including the output of that exercise in a ws, I think any privilege e.g. in how the exercise was carried out, is likely to be waived. It certainly cannot be assumed that we can pick and choose what we present (since that could plainly be misleading) and more generally I think it will have to be assumed that the way in which the investigation is carried out and the detail of its findings, will be disclosable.

Best

Simon

From: Jonathan Gribben <[REDACTED]>
Sent: 12 November 2018 09:47
To: Anthony de Garr Robinson <[REDACTED]>; Simon Henderson <[REDACTED]>
Cc: Andrew Parsons <[REDACTED]>; Katie Simmonds <[REDACTED]>
Subject: KEL analysis [WBDUK-AC.FID27032497]

Dear Tony and Simon,

As you know Fujitsu are in the process of analysing: (1) the KELs referred to in Coyne's report; and (2) Robert's sample of 50 KELs.

The analysis is being carried out by several people in Steve Parker's team plus Gareth Jenkins. It would not have been possible for Steve to review all of the KELs himself in the time available and by his own admission he has been in management since 2010 so his technical knowledge is not as it once was.

Our plan is to introduce the analysis in Steve's statement by saying something like "*I have asked my team to analyse certain KELs and their output is at [page X].*" We'd be grateful for your thoughts on that approach and, in particular, whether there is any risk of privilege over how the analysis was carried out being waived?

Kind regards

Jonny

Jonathan Gribben
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