

Message

From: Rodric Williams [GRO]
Sent: 22/05/2019 11:12:47
To: Massey, Kirsten [GRO]; Andrew Parsons [/o=Exchange-Org/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ad9ed344815e47e4aaa3c0e7e1740919-Andrew Pars]
CC: Ben Foat [GRO]; Watts, Alan [GRO]; Henderson, Tom [GRO]; Jonathan Gribben [/o=Exchange-Org/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ea64a893cedd463ea82d76a4b08032dd-Gribben, Jo]; Katie Simmonds [/o=Exchange-Org/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=38c83ff2d54f4e8daaaf51c32c82b3dd-Katie Simmo]
Subject: RE: Worden 3 - update and recommended action [WBDUK-AC.FID26896945]

Thanks both.

HSF advised the Subcommittee to adopt the proposed course of action on 20 May, and invited dissenting views by today.

Unless therefore we hear anything to the contrary by close of play today, I think WBD has instructions not to apply for permission for Worden 3, and can communicate that to Freeths ahead of tomorrow's Court hearing.

Agreed?

From: Massey, Kirsten [GRO]
Sent: 22 May 2019 11:09
To: andrew.parsons [GRO]
Cc: Ben Foat [GRO]; Watts, Alan [GRO]; Rodric Williams [GRO]; Henderson, Tom [GRO]; Jonathan Gribben [GRO]; Katie Simmonds [GRO]
Subject: Re: Worden 3 - update and recommended action [WBDUK-AC.FID26896945]

Thanks Andy.

Alan and I agree with your/Counsel's proposed course of action, but are happy to discuss if Post Office wishes to do so.

Kind regards
 Kirsten

On 22 May 2019, at 10:35, Andrew Parsons [GRO] wrote:

All

Further to the emails below, we have now reached the point where a decision is needed on whether to apply for permission to rely on Worden 3.

Update

I have attached the latest correspondence with Freeths. They are still refusing to offer any view on their approach to Worden 3. Their correspondence does however disingenuously suggest that Worden has not provided certain information to Coyne, when in fact Coyne said on a WP basis that he did not want this information. We will address this in our response.

There has also been no substantive progress between the experts. Attached is Worden's note of a call late last night with Coyne.

Advice on permission application

Counsel's view has not changed from the advice below – it is recommend that Post Office does not apply for permission. There is a real risk of criticism from the Claimants and the Court over this situation. However, we believe that not applying will attract less criticism and risk than making an application which would inevitably prompt an interlocutory hearing before the Horizon trial re-starts.

Next steps

Worden intends to send his report to the Court today. He will explain that the report was produced of his own volition and not prompted by Post Office. He will also explain that the report reflects his updated views and that he feels obliged to update the Court pursuant to the CPR. He is not going to be seeking directions from the Judge as we believe that this will look like a tactical game by Post Office.

If you agree that Post Office should not make an application for permission, then WBD should write to Freeths promptly to make this clear. It would be ideal to do this today just in case this is raised in Court tomorrow.

This will then leave the ball with the Claimants. They will need to decide whether to raise a complaint to the Judge, which presumably will be to seek some sort of direction that Post Office / Worden cannot rely on Worden 3. Alternatively, they may do nothing and wait to see if Worden raises Worden 3 when responding to questions in cross-examination and then complain to the Judge. There is also a possibility that the Judge may pro-actively do something, such as calling the parties in to discuss the matter. The path forward from here is unpredictable, but nevertheless we believe this to be better than Post Office prompting the debate now by making an application.

The best plausible outcome is that Worden 3 has life only as a document (rather than a formal expert report), that Worden is able to answer questions under cross-examination with no or minimal reference to it and we do not rely on it in closing submissions. Essentially, that Worden 3 drifts into anonymity.

Decision needed

I would be grateful for your instructions on whether or not to apply for permission for Worden 3. If you would like to speak to Counsel, please let me know – they are available all day.

Kind regards
Andy

Andrew Parsons


Partner
Womble Bond Dickinson (UK) LLP

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From: Watts, Alan  >

Sent: 16 May 2019 09:08

To: Andrew Parsons  >; Rodric Williams

 >; Massey, Kirsten  >; Henderson, Tom



Cc: Jonathan Gribben <[GRO]>; Katie Simmonds <[GRO]>
[GRO]>

Subject: RE: Worden 3 - update and recommended action [WBDUK-AC.FID26896945]

Andy

I accept that Step 1 is inevitable as despite your and Counsel's best efforts Worden doesn't appear to understand the issues with Worden 3 and has convinced himself that he needs to send it to the Court. Happy to have a call later with you and Counsel to discuss what we then do although the current plan does look like a sensible one albeit not without its risks.

Regards

Alan

From: Andrew Parsons [GRO]
Sent: 16 May 2019 08:58
To: Rodric Williams; Watts, Alan; Massey, Kirsten; Henderson, Tom
Cc: Jonathan Gribben; Katie Simmonds
Subject: Worden 3 - update and recommended action [WBDUK-AC.FID26896945]

All

As mentioned on our call on Monday, please find below an update on Worden 3.

In summary, the plan is for Worden to send his report on an open basis to Coyne (not the Court) today. As discussed previously, this step is inevitable and we cannot stop it happening. The next step will be a final decision on whether to make an application for permission to rely on Worden 3. We have a few more days to make that decision.

Update

The latest correspondence with Freeths is attached. This has not materially moved the position forward - Freeths have not provided a clear indication of their intentions. The ball is currently back in Freeths' court and we await their next letter.

As between the experts, Worden spoke to Coyne briefly yesterday afternoon. This has been the only substantive contact despite Worden chasing Coyne. Coyne has not done any material work on the report. He indicated that he would look at it over the weekend and was open to considering a joint statement. However, Coyne is on holiday for a week from Wednesday so the window is closing fast on the experts making any progress.

Permission application

Freeths' letter focuses on Worden 3 being outside the scope of the Horizon Issues. They say that the reliance on a Claimant based analysis is not permitted as the Horizon Issues are about Horizon in general and not about Claimants. We have counter-arguments to this point, not least that the Cs have put up Claimants as witnesses.

Counsel's concern is that substantial parts of Worden 1 and Worden 2 also undertake analyses related to Claimants. For example, Worden has assessed the extent of bugs by reference to the Cs having suffered £18.7m in shortfalls. If Worden 3 is rejected as being out of scope, this could set a precedent that has the consequential effect of making key parts of Worden 1 and Worden 2 potentially out of scope.

Counsel believes that Post Office has a better chance of defeating this argument (or the Judge just ignoring it) if it is addressed in closing submissions against the context of all the evidence, including the Claimants' own evidence. Given Freeths' correspondence, an application for permission will almost certainly cause this debate to be had with the Judge before the trial resumes.

Although Counsel still believes that the "remote access" analysis of Worden 3 is valuable, the consequence of an adverse finding that parts of Worden's evidence is out of scope is so great that it outweighs the benefit of Worden 3. For this reason, our advice is that Post Office should not make an application for permission to rely on Worden 3.

Suggested plan

Even if Post Office does not make an application for permission, Worden feels he has an obligation (para 2.5 PD35) to update the Court on Worden 3. We are not going to dissuade him from this. The report therefore needs to be sent on an open basis to the Cs and subsequently to the Court.

This then leaves the status of Worden 3 in an odd state. If asked about remote access or robustness in cross-examination (which is likely), Worden will need to make reference to Worden 3 as it reflects his views. It is difficult to predict how the Court and the Cs will respond to this. It is a very unusual state of affairs, and there is a substantial risk of criticism from the Judge. The alternative is to make an application for permission in the ordinary way but, for the reasons set out above, that is not recommended. We also continue to believe that such an application will more likely fail than succeed (see our previous advice).

Despite all this, there remains an outside chance that Coyne may engage with Worden 3 over the weekend. Any form of engagement is useful because it dampens down the argument that Coyne did not have time to consider it. We would therefore like to keep this opportunity open until next Wednesday when Coyne goes on holiday. Against that we need to weigh the possibility that Freeths are just running out the clock to the trial, thus increasing the force with which they can say they have been prejudiced.

In light of these considerations, our suggested plan is:

1. Worden send Worden 3 to Coyne today on an open basis. This is inevitably going to happen at some point and we see little benefit in delaying this. In his covering email, Worden makes clear that he intends to send Worden 3 to the Court not before next Wednesday. He says nothing about whether Post Office intends to seek permission.
2. Post Office says nothing for now. If we say now that Post Office is not applying for permission, Coyne will stop work and there will be no chance of any progress between the experts.
3. The ball is then with Freeths. If they are switched on, they will write asking us to make an application.
4. Post Office should then play for time until Wednesday. The pressure will mount on Coyne to engage before he goes on holiday and with Worden 3 out there on an open basis without a response.
5. On Wednesday next week, Worden 3 is sent to the Court and WBD writes to Freeths to confirm that Post Office is not making an application.

Decisions needed

Step 1 above is inevitable and so unless anyone objects I intend to proceed with this today.

I will then set up a call with Counsel to discuss (i) the question on whether to make an application and (ii) the rest of the suggested plan above.

As always, happy to discuss.

Kind regards
Andy

Andrew Parsons

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