

From: Owain Draper <[GRO]>
To: Anthony de Garr Robinson <[GRO]>, 'Andrew Parsons' <[GRO]>
Cc: Katie Simmonds <[GRO]>, Jonathan Gribben <[GRO]>
Subject: Re: Worden 3 [WBDUK-AC.FID123887118]
Date: Mon, 8 Apr 2019 11:32:34 +0000
Importance: Normal
Attachments: ICI_v_Merit.pdf
Inline-Images: image001.png; image002.png; image003.png

Dear All,

I have been unable to find anything on para. 2.5 specifically, save that that the Guidance to Experts is slightly broader: it refers to the situation where “experts change their opinion”, rather than referring to material changes.

My view is as follows:

- (1) I don't think finding further evidence to support an existing opinion would fall within para. 2.5 (at least not usually). I don't think RW's opinion has actually changed to the extent necessary to trigger para. 2.5. But he disagrees.
- (2) I doubt that RW's change of opinion would justify reliance on a further expert report. I think permission may well be refused. The logical consequence of this is that he will not be permitted to give oral evidence on the same material: see CPR, 35.5.
- (3) However, I think it is pretty clear that RW should communicate with JC as soon as possible: see ICI v Merit at paras 157-160 for Fraser J getting very angry where an expert conducted new work without telling the other expert. We have to work hard to ensure that JC is not somehow left behind (just in case the new evidence does get in).

I do not think we can stop RW doing what he wants to do, even though it may well mean the court refusing permission and getting angry. We have already told him that we do not think the further analysis changes much or is even within a Horizon Issue.

Best,

Owain

Owain Draper

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From: Anthony de Garr Robinson <[REDACTED]>
Date: Monday, 8 April 2019 at 11:15
To: 'Andrew Parsons' <[REDACTED]>
Cc: Katie Simmonds <[REDACTED]>, Jonathan Gribben <[REDACTED]>
<[REDACTED]>, Owain Draper <[REDACTED]>
Subject: RE: Worden 3 [WBDUK-AC.FID123887118]

Dear Andy,

I'm not surprised. I imagine that, if we serve a Worden 3, the claimants will claim that we are acting tactically – they may even link it to our recusal application (but for that application, there would not have been time for RW to wrestle with these questions etc).

There is no problem-free way of addressing this issue. Even if we tell him not to, RW takes the view that as an independent expert he is obliged to tell the parties and the court that his view has changed on material matters. I've asked Owain (to whom I have copied this email) whether the exercises that RW has (half) done and the conclusions to which he thinks they lead count as changes of view requiring the parties and the court to be told pursuant to para 2.5 of PD35. If they do, the matter is out of our hands, and the question becomes whether the parties and the court should be told via a supplemental report or in a more subtle way, maybe via meetings between the experts and joint statements following those meetings. But even if they don't, RW will discuss these things when taxed in cross examination, and the fact that he is only doing so then will create its own problems, both for him and for us. I suspect that the "change of view" question isn't clear either way, which makes our situation even more awkward. I doubt that RW would agree to say nothing in that situation, even if we instructed him to, and I also doubt that we would feel safe in giving such an instruction.

It seems to me that his ever-expanding views as to the number of Horizon bugs which were branch-affecting do count as changes of view, but that could probably be addressed in the course of the expert meeting that the experts have agreed to have anyway.

I share the instinct not to say anything until judgment in the recusal application, but as I think Owain pointed out at our con with RW on Friday, if the parties and the court are to be told of RW's changes of view, this needs to be done sooner rather than later. Putting the point another way, the later we leave it, the easier it will be for the claimants to portray it as tactical.

Best wishes,

Tony

From: Andrew Parsons <[REDACTED]>
Sent: 07 April 2019 21:16
To: Anthony de Garr Robinson <[REDACTED]>
Cc: Katie Simmonds <[REDACTED]>; Jonathan Gribben <[REDACTED]>
uk.com>
Subject: Worden 3 [WBDUK-AC.FID123887118]

Tony

Worden 3 has gone down like a lead balloon at PO. I will work through the problem tomorrow. The one firm instruction I have is that nothing should happen on this until after the recusal outcome on Tuesday. PO (Rodric) wants to understand the lie of the land before making decisions.

A

Andrew Parsons
Partner
Womble Bond Dickinson (UK) LLP

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