

**From:** Simon Henderson  
**To:** Jonathan Gribben  
**Cc:** Katie Simmonds <  
**Subject:** RE: KEL analysis  
**Date:** Thu, 15 Nov 2018 09:31:04 +0000

GRO

**Importance:** Normal

**Inline-Images:** image001.png; image002.png; image003.png

---

Yes that would be sensible

Simon

---

**From:** Jonathan Gribben [GRO]  
**Sent:** 15 November 2018 09:27  
**To:** Simon Henderson <  
**Cc:** Katie Simmonds <  
**Subject:** RE: KEL analysis

GRO

Simon,

Thank you for this. Are you happy for me to share it with FJ and for us to work off this version during the call?

Kind regards

Jonny

**Jonathan Gribben**  
Managing Associate  
Womble Bond Dickinson (UK) LLP

d:  
m:  
t:  
e:

GRO

[Stay informed: sign up to our e-alerts](#)



[womblebond dickinson.com](http://womblebond dickinson.com)



---

**From:** Simon Henderson [GRO]  
**Sent:** 14 November 2018 19:13  
**To:** Jonathan Gribben; Anthony de Garr Robinson  
**Cc:** Andrew Parsons; Katie Simmonds  
**Subject:** RE: KEL analysis [WBUDK-AC.FID27032497]

Jonny

Please find attached the table to be attached to Steve's statement with comments from both Tony and me (they all appear under my name because I have incorporated Tony's comments).

There are various points of detail which I hope can be picked up.

There are also some bigger picture points:

We think the key thing is to be clear about all those KELs where there was no impact on the branch accounts. Sometimes this is clear, sometimes the draft is a bit wishy-washy about this. We need to tighten this up

If there was some impact, or we think there might have been, we need to be clear about whether the various Horizon countermeasures (as Robert calls them) would have picked them up. Again, the approach here is a little inconsistent and I think this is a key point: it is not our case that Horizon is perfect but it is our case that it effectively flagged up the vast majority of its own errors and we need to bring that across

Also, if there was impact, we need if possible to say how it was followed up, and that it was followed up with all those affected by it i.e. to meet the point that PO just let losses lie where they fell and treated SPMs as being at fault when, with diligence, PO should have known that was not the case.

Realistically we will not be able to address every point we have raised, but I would really like to get a tighter version out which takes a workmanlike and consistent approach to these issues.

There is also an important issue on item 12 where a Balancing Transaction is referred to: we need to make sure this is not cutting across the evidence we have already given on this and to address it if it does.

Our comments tail off somewhat towards the end since we were anxious to get this over to you asap: but I think you will get the flavour of our concerns.

Best

Simon

---

**From:** Jonathan Gribben [GRO]  
**Sent:** 14 November 2018 13:55  
**To:** Anthony de Garr Robinson [GRO]; Simon Henderson  
**Cc:** Andrew Parsons [GRO]; Katie Simmonds [GRO]  
**Subject:** RE: KEL analysis [WBDUK-AC.FID27032497]

Dear Tony and Simon,

It looks like FJ are free to go through this at 4:00pm. Does that work for you or would tomorrow morning be better?

Kind regards

Jonny

**Jonathan Gribben**

Managing Associate  
Womble Bond Dickinson (UK) LLP

d:   
m:  
t:  
e:

[Stay informed: sign up to our e-alerts](#)



[womblebond dickinson.com](http://womblebond dickinson.com)



**From:** Jonathan Gribben  
**Sent:** 14 November 2018 10:31  
**To:** 'Anthony de Garr Robinson'; 'Simon Henderson'  
**Cc:** Andrew Parsons; Katie Simmonds  
**Subject:** RE: KEL analysis [WBDUK-AC.FID27032497]

Dear Tony and Simon,

Thank you for this. The table has been produced as a direct result of us asking FJ (we produced the table and asked FJ to complete the blank columns). No new documents have come to light while producing it.

Please find attached the latest version of the table and the text that we are proposing to insert into Steve's statement. We are also working on the high-level map below to help us complete the wording introducing the table (key points are whether the issue was a software issue and whether it had a financial impact)/.

We are sending the table to FJ now too (you'll see that there are some queries for them to address). I suspect that there will be a call to run through their comments. It may be worth one or both of you joining that call to discuss any comments that you may have with FJ. Grateful for your thoughts.

Kind regards

Jonny

KEL	Cause of issue	Financial impact	Summary / additional comments
1	Payment Mismatch		
2	Software	None	

3	Potential unknown system problem	None	
4	Software - Dalmellington	Should be obvious to PM, financial impact possible, could be resolved by TC	
5	Software	Temporary impact	
6	Software	Temporary impact	
7			
8	Reference Data	None	SSK
9	Human error (POL)	Should be obvious to PM, financial impact possible, could be resolved by TC	<ul style="list-style-type: none"> <li>Better explanation requested by Andy</li> <li>SSK</li> </ul>
10	Potential unknown system problem	None	
11	Reference data	None	
12	Human error (branch)	Should be obvious to PM, could be resolved by POL issuing a balancing transaction	<ul style="list-style-type: none"> <li>Flagged by Andy, in particular in relation to the detail surrounding the balancing transaction and process – have updated with details from our call with Fujitsu.</li> <li>Even if done locally, would appear in the audit trail. If the process was being followed, injected at the data centre and authorised - however done would have ended up in the audit trail. Data centre now in Belfast moved in 2009</li> </ul>
13		None	<ul style="list-style-type: none"> <li>Better explanation requested by Andy</li> <li>SSK</li> </ul>
14	Human error or software	None	
15	Human error or software	None	
16	Human error (branch)	Financial impact caused by user error in branch	Andy has suggested we include a better first explanation and then use this for the later references
17	Human error (branch)	None	Better explanation requested by Andy of the failure to recover the transaction
18		None	
19	Reference Data	None	
20	Software	Should be obvious to PM, financial impact possible, could be resolved by TC	Better explanation requested by Andy to explain why SPMR not needing to pay
21	Potential software but not able to replicate	None	
22	Potential software but not able to replicate		<p>Andy concerned RE this KEL and asked for a better explanation</p> <p>GJ has referred us to his comments on the £ KELs however none appear relevant</p>
23	Reference Data	None	
24	Potential software but not able to replicate	Potential	Andy concerned RE this KEL being serious and asked for a better explanation – I've included as much as I could from our call with Fujitsu
25	Hardware	None	
26	Customer card	None suggested	
27	Hardware	None suggested	
28	Hardware	None	Better explanation requested by Andy
29	Reference Data	None	
30	Communications failure	Rectified by FJ reconciliation and . or TC so no impact expected	
31	Payment Mismatch	None	
32	Withdrawn products	None suggested	Related to testing issue that was resolved, however, need to expand further as there were 2 relevant live instances
33	Payment Mismatch	None	
34	Software	Potential small occurrences	



35	Software	Potential small occurrences	
36	Human error (branch)	Yes, caused by user error and PM expected to be liable	
37	Software - Dalmellington	Should be obvious to PM, financial impact possible, could be resolved by TC	
38	Test	None	
39	Hardware	None	
40	Software	None (if correct recovery process followed)	<p>Andy asked us to check that this isn't the Phantom Transaction cited by Setpal Singh</p> <p>FJ confirmed:</p> <p>First raised in 2000 and last updated in Jan 2004</p> <p>"'Phantom sales' reported by users but items can only be added to the sales stack if the screen or keyboard were generating key sequences so implication that there was a hardware issue so it was swapped out.</p> <p>If items were added to the sales stack then these were presumably more likely to be 'simple' items, such as a stamp, rather than complex multi-step transactions. If these 'simple' items were settled without the user knowing then when they came to balancing they would physically hold more of these items than the system expected. A stock adjustment of these items would then effectively cancel out any 'phantom' sales of these items."</p>
41	Unknown	None	
42	Software	Should be obvious to PM, financial impact possible, could be resolved by TC	
43	Software	Potential	Better explanation requested by Andy
44		None	
45		None	
46		None	
47	Reference Data	Yes, caused by user error and PM expected to be liable	
48	Reference Data	None	
49	Local Suspense Account		
50	Software	<p>None (if correct recovery process followed)</p> <p>If not followed, TC can be issued</p>	
51	Back-end POL reports	None	
52		None	
53	Coding error	None suggested	
54	Payment Mismatch		
55		None suggested	

---

**From:** Anthony de Garr Robinson [GRO]  
**Sent:** 13 November 2018 11:37  
**To:** Jonathan Gribben; 'Simon Henderson'  
**Cc:** Andrew Parsons; Katie Simmonds  
**Subject:** RE: KEL analysis [WBDUK-AC.FID27032497]

Dear Jonny

Thanks for this which Simon and I have discussed after I asked Simon to research some of the legal principles. Simon has largely drafted this email, which sets out our joint thoughts.

We think that how this issue has been managed (i.e. how the request to create the table came to be made) is key. If the FJ witness has taken it upon himself to ask his team to draw up the table, then it is difficult to see how any privilege attaches. However, if the table has been produced as a direct result of WBD requesting FJ (a third party and not WBD's client), then that would be a request for a document to be produced for the dominant purpose of litigation – and so privileged. Litigation privilege potentially applies both to lawyer-third party communications and to client-third party communications (see Thanki @ 3.14).

This privilege should extend to discarded drafts etc. See Thanki at 3.28:

“The main practical scope today for a “materials for the brief” or a “materials for evidence” category of litigation privilege would be preparatory documents generated by the client which do not embody communications with third parties (such as a client's working notes or internal documentary communications within a corporation for the purposes of litigation, but which do not pass between a third party and the client or a third party and the lawyer). For example, an external or in-house lawyer might ask employees to prepare draft proofs for the purposes of prospective litigation; if for whatever reason these proofs are not actually sent to the lawyers or to someone within the organization who could be classified as the client, there is no question that they would be privileged if satisfying the dominant purpose test. Likewise, if they had come into existence for the dominant purpose of use in litigation, there is no doubt that the preparatory material in issue in *Three Rivers 5* would have attracted litigation privilege.<sup>64</sup> As the Court of Appeal held in *Three Rivers 5*:

*It is clear on the authorities that documents emanating from or prepared by third parties or employees of a party are covered by the principle of 'litigation privilege' if prepared with the dominant purpose of use in existing or contemplated litigation.”*

We think that should be sufficient to cover drafts and working documents which were prepared for the purposes of this exercise.

However, that is not the end of the matter. First, there is no privilege in the underlying data or facts which are being investigated here i.e. the actual KELs etc or data relating to those KELs. So if the investigation revealed, for example, some KELs or data which are plainly relevant to the disputes (e.g. because they evidence losses to branch accounts) then that material would become disclosable in our view. Further, the exercise is akin to the preparation of expert evidence (ultimately it is for Robert's benefit we think) and the witness could legitimately be asked about how he (albeit at the request of WBD) went about preparing this

analysis. We therefore think that WBD/ FJ must be very clear about the scope of the exercise and to ensure that they are fully aware who carried it out, and what was revealed in the course of it.

A key point is that even though the information is set out in a table and looks complete, the claimants will be entitled to test it – amongst other things by asking how and by what processes the information was arrived at, what data/documents were used as a source of information, what assumptions were made and what calculations were done on what figures etc, and maybe even what corrections needed to be made to get them right. Also, the underlying data/documents would be disclosable and we should assume the claimants will demand disclosure.

We cannot see that the way in which the table is presented (e.g. in an appendix) would make a difference. The witness would still be saying that (i) he has procured the preparation of that evidence and (ii) he wants it to be accepted as part of his evidence.

Best regards,

Tony

---

**From:** Jonathan Gribben <[REDACTED] GRO>  
**Sent:** 12 November 2018 19:23  
**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]

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



[Stay informed: sign up to our e-alerts](#)



[womblebond dickinson.com](http://womblebond dickinson.com)



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

GRO

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 [WBODUK-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**  
Managing Associate  
Womble Bond Dickinson (UK) LLP



[Stay informed: sign up to our e-alerts](#)



[womblebond Dickinson.com](http://womblebond Dickinson.com)



**Please consider the environment! Do you need to print this email?**

The information in this e-mail and any attachments is confidential and may be legally privileged and protected by law. [shenderson](#) <[redacted]> only is authorised to access this e-mail and any attachments. If you are not [shenderson](#) <[redacted]> please notify [jonathan.gribben](#) <[redacted]> as soon as possible and delete any copies. Unauthorised use, dissemination, distribution, publication or copying of this communication or attachments is prohibited and may be unlawful. Information about how we use personal data is in our [Privacy Policy](#) on our website.

Any files attached to this e-mail will have been checked by us with virus detection software before transmission. Womble Bond Dickinson (UK) LLP accepts no liability for any loss or damage which may be caused by software viruses and you should carry out your own virus checks before opening any attachment.

Content of this email which does not relate to the official business of Womble Bond Dickinson (UK) LLP, is neither given nor endorsed by it.

This email is sent by Womble Bond Dickinson (UK) LLP which is a limited liability partnership registered in England and Wales under number OC317661. Our registered office is 4 More London Riverside, London, SE1 2AU, where a list of members' names is open to inspection. We use the term partner to refer to a member of the LLP, or an employee or consultant who is of equivalent standing. Our VAT registration number is GB123393627.

Womble Bond Dickinson (UK) LLP is a member of Womble Bond Dickinson (International) Limited, which consists of independent and autonomous law firms providing services in the US, the UK, and elsewhere around the world. Each Womble Bond Dickinson entity is a separate legal entity and is not responsible for the acts or omissions of, nor can bind or obligate, another Womble Bond Dickinson entity. Womble Bond Dickinson (International) Limited does not practice law. Please see

[www.womblebond Dickinson.com/legal](http://www.womblebond Dickinson.com/legal) notices for further details.

Womble Bond Dickinson (UK) LLP is authorised and regulated by the Solicitors Regulation Authority.

**Simon Henderson**  
4 Pump Court, Temple, London, EC4Y 7AN | [www.4pumpcourt.com](http://www.4pumpcourt.com)

T:  | [View Profile](#)

Follow us on twitter [@4PumpCourt](#)  
Connect with us on [LinkedIn](#)

Pump Court International | [www.pumpcourtinternational.com](http://www.pumpcourtinternational.com)

---

**Terms of Work:** Barristers at 4 Pump Court carry out services on 4 Pump Court Terms, which are available on our website, unless otherwise agreed in writing. | [View Terms](#)

**Privacy:** Your attention is drawn to our Privacy Notice in relation to any personal data that we may obtain and/or otherwise process about you. | [View Privacy Notice](#)

**Notice of Confidentiality and Privilege:** This email (including attachments) is confidential to the addressee, and may be subject to legal professional privilege. If you are not the addressee, you must not copy, distribute or otherwise use it or any information contained in this email. Please delete it, and destroy all copies

---

---

This email has been scanned by the Symantec Email Security.cloud service.  
For more information please visit <http://www.symanteccloud.com>

---

---

This email has been scanned by the Symantec Email Security.cloud service.  
For more information please visit <http://www.symanteccloud.com>

---

---

This email has been scanned by the Symantec Email Security.cloud service.  
For more information please visit <http://www.symanteccloud.com>

---

---

This email has been scanned by the Symantec Email Security.cloud service.  
For more information please visit <http://www.symanteccloud.com>

---