

From: Andrew Parsons <[REDACTED]>
To: Anthony de Garr Robinson <[REDACTED]>, Jonathan Gribben <[REDACTED]>, "Simon Henderson" ([REDACTED])
Cc: Katie Simmonds <[REDACTED]>
Subject: RE: Worden 3 - privileged [WBDUK-AC.FID26896945]
Date: Wed, 1 May 2019 09:00:46 +0000
Importance: Normal
Inline-Images: image001.png; image002.png; image003.png; imageeb0af6.PNG; image60304e.PNG; image8eccef.PNG

And it's good that RW has reached that view on his own. For the record, I've not mentioned this possibility to him or anything about our plans for Worden 3.

Should we ask him what directions he might seek? I can do that with an open question so that we are not leading him.

A

Andrew Parsons

Partner
Womble Bond Dickinson (UK) LLP

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m: [REDACTED]
t: [REDACTED]
e: [REDACTED]

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From: Anthony de Garr Robinson <[REDACTED]>
Sent: 01 May 2019 09:47
To: Jonathan Gribben <[REDACTED]>; Andrew Parsons <[REDACTED]>; Simon Henderson ([REDACTED])
Cc: Katie Simmonds <[REDACTED]>
Subject: RE: Worden 3 - privileged [WBDUK-AC.FID123887118]

Thanks, Jonny. That's an important part of the jigsaw which we need to know.

From: Jonathan Gribben <[REDACTED]>
Sent: 01 May 2019 09:46
To: Andrew Parsons <[REDACTED]>; Anthony de Garr Robinson <[REDACTED]>; Simon Henderson ([REDACTED])
([REDACTED]) <[REDACTED]>
Cc: Katie Simmonds <[REDACTED]>
Subject: RE: Worden 3 - privileged [WBDUK-AC.FID123887118]

Dear all,

When I spoke to Robert late yesterday afternoon he mentioned that he will probably ask the Court for directions under CPR 35 if PO don't make an application.

Kind regards

Jonny

Jonathan Gribben
Managing Associate
Womble Bond Dickinson (UK) LLP

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From: Andrew Parsons
Sent: 30 April 2019 19:50
To: Anthony de Garr Robinson; Simon Henderson ([REDACTED]) ([REDACTED])
Cc: Jonathan Gribben; Katie Simmonds
Subject: FW: Worden 3 - privileged [WBDUK-AC.FID26896945]

FYI. I'm going to be travelling / tied up tomorrow morning so needed to get this sent this evening. Sorry for not giving you chance to see a version 2, but you'll see at the end that I have left you scope to shout at me tomorrow!

A

Andrew Parsons

Partner
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From: Andrew Parsons

Sent: 30 April 2019 19:48

To: 'Rodric Williams' <[GRO]>

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

[GRO]

Subject: Worden 3 - privileged [WBDUK-AC.FID26896945]

Rodric

Please find below our advice on how to address Worden 3.

Background

I have not set out the full background that we discussed on our con call last Thursday, but in brief:

- RW wants to file a new report (latest draft attached) covering two points.
 - First, he wishes to put forward a new opinion and analysis that the level of remote access was very small. He was previously unable to offer this view. This analysis is built on a review of OCRs, OCPs and MSCs – the change control documents used by FJ – having filtered them to consider only C branches.
 - Second, he wants to put forward a new analysis to support his existing opinion that the level of bugs in Horizon is very small. This is through a review of Peaks and again filtered to only show C branches.

- Given RW's strong belief that Worden 3 was required, we have already notified the Court that this new work was being undertaken. A draft copy of RW's report has also been provided to Coyne on a without prejudice basis.
- The difficulty is that:
 - We do not like the Peak analysis. We consider that it risks devaluing RW's credibility as an expert rather than reinforcing his opinions.
 - Post Office do not have permission for this new report and therefore will need to apply to the Court for permission if it wants to rely on any part of it.

We have explained the above difficulties extensively to RW. He is however resolute that he has a duty to update the Court on this new work.

- There is a Court rule that requires an expert (via the lawyers) to update the Court if an expert has changed his opinion. We therefore have no choice but to update the Court on the new remote access opinion (though this does not necessarily need to be by way of a new report but it's difficult to see how else one could do it).
- The legal team however believe that the Peak analysis is not a new opinion, but reinforcement of an existing opinion. This has been explained to RW in detail but he disagrees and maintains that he has a personal duty to update the Court. If and when the Court is updated on the genuinely new remote access opinion, this does not mean that it will be admissible and an application will be required for Post Office to rely on it.
- Fraser J has already indicated that he would expect to see an application from Post Office if it wants to adduce new expert evidence.

Risks

The **key risk** is that the Court sees Worden 3, coupled with an application by Post Office, as a tactic by Post Office, rather than a report produced by Robert of his own volition. If that happens (i) Post Office may be criticised and (ii) RW's credibility may be tainted. Also, even if permission is refused, Green may still try to use Worden 3 as material for XX even though it is not admissible.

Although the remote access analysis is imperfect, on balance we believe that it helps Post Office's case. The risk in the remote access analysis is that it assumes that nearly all remote access is carefully documented and yet we are aware of a number of instances of remote access where there appears to be no corresponding change control document. Even with this limitation, which is revealed in Worden 3, we still believe that this new opinion has merit in showing that remote access occurred only on a tiny scale. If we can show that the frequency of remote access was very small, then it is very difficult for the Cs to argue that it undermined the reliability of Horizon. Moreover, and as is consistent with the approach which RW has taken in his first two reports, RW has effectively catered for this risk by making assumptions which strongly favour the Claimants.

Options

Do nothing – this would put Post Office in breach of the Court rules for failing to update the Court on RW's changed opinion.

Update the Court – WBD sends Worden 3 to the Court as required by the Court rules but does nothing else. We believe that this would likely prompt the Judge to ask Post Office to make an application or else it cannot rely on the report. The Court may also see this as Post Office being unhelpful, because it leaves open the obvious question of whether Post Office wants permission to adduce further evidence or not.

RW updates the Court and asks for directions – again we believe that the Judge would ask Post Office to make an application or else it cannot rely on the report. Having RW write directly to the Court is a double edged strategy:

- It could make it look as if RW is acting independently of Post Office and thus insulate Post Office from some criticism.
- Given that we would have to help RW write the letter, it could make it look like Post Office is pulling RW's strings and triggers the key risk outlined above. We think this outcome is more likely.

Apply for permission to only rely on the remote access part of the report. See below.

Apply for permission to rely on the full report – given that we believe that the Peak analysis is bad for Post Office, there is little to commend this over option 4 above other than that it requires less explanation.

Post Office sends Worden 3 to the Court but clearly states that it is not seeking permission. This would expose RW to difficult questions in XX as to why his work is not supported by his own client.

In summary, Option 1 is not viable and Options 2 and 3 come with a real risk of back-firing and looking like a stunt. That leaves Options 4 / 5 and 6.

Options 4 and 5: application for permission

If Post Office makes an application for permission to rely on some or all of Worden 3, we expect the Cs to oppose permission on the following grounds:

- The report is late.
- Coyne does not have the time / funding to produce a counter-report so allowing Worden 3 would give Post Office an unfair advantage. This is particularly a factor for the Peak analysis which requires a review of more and longer documents.
- This is an oppressive tactic by Post Office to run up costs through more interlocutory hearings.

- A report based on Cs branches is outside the scope of the Horizon Issues as those issues relate to Horizon in general.

If made promptly, the application does have some merit. There would arguably be sufficient time for Coyne to produce a counter-report and his lack of funding is a problem for the Cs (although I suspect that funding may miraculously become available if pushed and the Cs may be very reluctant to admit that they have a funding pressure). However, given Fraser's adverse stance to Post Office, we believe that he will, on balance, dismiss the application.

For the sake of completeness, I note the obvious point that only applying to rely on half the report (Option 4) is an unusual thing to do. It will lead to lots of forensic questions of Worden in XX about why his client could not support his whole report, although we could present this as Post Office looking to minimise the impact on the Cs by only relying on that part of Worden 3 that is truly new and different.

An equally obvious point is that if the application fails, Post Office will be liable for the Cs costs. Based on past experience, this could be £100k - £200k + VAT.

Recommendation

This comes down to a question of whether the benefit of the new remote access analysis (if admitted as evidence) is worth the downside of making an application that more likely than not will fail. Those downsides are:

Cost

Distraction of the legal team from other Horizon trial preparation.

Criticism from the Judge of Post Office's conduct of the litigation.

By a very fine margin, I just about favour making an application for permission on only the remote access part of Worden 3. However, before committing to do so, we should try to flush out the Cs position. Cs response may help clarify the risks:

- We may learn more about whether Coyne has the ability / time / funding to produce a counter-report; this being a key argument against Post Office getting permission.
- If Cs adopt a firmer objection to the Peak analysis (because it is not a genuinely new opinion) than the remote access analysis, this may provide cover for Post Office to only apply for permission on the remote access section of the report.
- If Cs stridently oppose all parts of Worden 3, it may look as if the Cs are trying to silence the genuinely held views of Post Office's expert. If we can position the Cs as trying to shut out important evidence, this may improve the merits of the application.

I have attached a draft letter for your consideration.

In conclusion, RW has placed Post Office in a difficult position. He is acting properly in discharging what he considers to be his duty to the Court and his remote access analysis is useful. However, the path forward is treacherous and likely to lead to some amount of criticism of Post Office. The objective however has to be avoid any suggestion of

gamesmanship by Post Office. We must also avoid delaying action on this as that will only increase the possible prejudice suffered by the Cs. Ultimately, Post Office and RW has a duty to update the Court on RW's new opinions so we have to do something and I believe the above step-by-step approach is the best option.

I have discussed the above at length with Counsel. They have seen and commented on an earlier draft of this email but I have sent you this final version without their input so that you have it in good time before our meeting tomorrow. I will copy this to Counsel now and I'm sure they will say tomorrow if they disagree!

Kind regards

Andy

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