

From: Andrew Parsons <GRO>
To: 'Anthony de Garr Robinson' <GRO>, "Simon Henderson"
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Cc: Jonathan Gribben <GRO>, Katie Simmonds
<GRO>
Subject: FW: Worden 3 - update and recommended action
Date: Thu, 16 May 2019 08:28:39 +0000
Importance: Normal
Inline-Images: image001.png; image002.png; image003.png; imageaff704.PNG; imageba6b51.PNG;
imagef57203.PNG

FYI

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From: Watts, Alan <GRO>
Sent: 16 May 2019 09:08
To: Andrew Parsons <GRO>; Rodric Williams
<GRO>; Massey, Kirsten <GRO>; Henderson, Tom
<GRO>
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 [<mailto:> 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:

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.

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.

The ball is then with Freeths. If they are switched on, they will write asking us to make an application.

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.

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

Partner
Womble Bond Dickinson (UK) LLP

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