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SLAUGHTER AND MAY

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FAX TRANSMISSION

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Our reference JRT

Writer's telephone **GRO**

From Jeff Triggs

To David Sibbick, DTI, London

Receiving fax number

Copy to Stuart Sweetman, POCL, London

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GROHorizon

Privileged - in contemplation of litigation

As agreed with Paul Rich this evening, I attach a suggested reply to Keith Todd's letter to Stephen Byers. It is very much designed to be consistent with our recommended litigation strategy which I am currently summarising for Steve Robson and which we will be discussing at KEB first thing tomorrow morning.

To enable you to put the draft reply into context, however, that termination strategy broadly involves the following elements:-

- (a) there is a considerable risk that if we were to seek to terminate the Related Agreements today we would be held not to have a right to do so (as a result of having effectively waived our earlier right);
- (b) the result of that is that we could be treated as having terminated "for convenience" with the result that the public sector parties could be held liable for around £350 million in compensation;
- (c) if we were to hold Pathway strictly to the terms of the Related Agreements there is every chance that they would be forced to down tools;

A list of the partners and their professional qualifications is available for inspection at the above address.
The partners are either solicitors or registered foreign lawyers.

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- (d) if they did down tools we would be able to argue that we had an immediate right to terminate as a result of their repudiatory breach of contract (i.e. by downing tools).

None of this of course guarantees that we would win any resulting litigation. That would depend on who was responsible for the fact that Pathway was unable to continue and there would be a messy argument depending very much on the factual events which have taken place over the last few months. I do think, however, that our case is stronger if we terminate on the grounds of Pathway ceasing work on the programme rather than on the grounds of their breach eighteen months ago, which we have arguably waived by continuing with the programme.

I should also add that Keith Todd's contention - that in reality the Government has simply changed its mind about wanting the Benefit Payment Card - is getting more and more difficult to refute. The more BA presses to halt work on the card, the stronger Keith Todd's argument becomes and the greater the risk becomes that he will succeed in arguing that there has been termination for convenience.

I hope that helps to put the draft reply into context. The paper on termination will follow soon. Please call me if you have any queries. My home number is **GRO** but I expect to be in the office **GRO** most of the night.

Regards,

GRO

J R Triggs

[DRAFT LETTER FROM STEPHEN BYERS TO KEITH TODD]

Dear [Keith]

Without Prejudice

Horizon

Many thanks for your letter of [yesterday].

As you know, the Related Agreements required completion of operational trial to take place by November, 1997 and for the system to be rolled out shortly thereafter. Substantial delays have occurred to that timetable. The public sector parties have reserved all rights against Pathway in respect of its failure to meet that timetable.

Notwithstanding your breach we have together been exploring alternative ways of proceeding with the project in the light of the delays that have been suffered. Option B1 was one of these, but it proved too costly for the public sector.

I note your proposed timetable. However, in respect of your third and fifth bullet points, I need to make it clear that the Government has made no decision to scrap the Benefit Payment Card. If the current without prejudice negotiations fail to reach an acceptable alternative solution then the public sector parties will continue with the Related Agreements (including the basis of charging set out in them) and will expect Pathway in turn to comply with its obligations under them. Should Pathway cease work on the Benefit Payment Card this would be regarded as a further breach of contract.

As for your final paragraph, all parties have been in agreement that the recent negotiations have been on a without prejudice footing and on the basis that should they fail to produce a satisfactory alternative, then the Related Agreements would continue to apply. If you wish to bring the Related Agreements to a conclusion, then this will be a new development on which we will need to take appropriate advice. We would not expect you to issue a press announcement about this without the prior approval of the public sector parties, in accordance with the agreed terms.

Yours sincerely,