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## MEMORANDUM

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cc: Joe Ashton, POCL  
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George McCorkell, BA  
Dave Miller, Horizon  
Ron Powell, DSS  
David Sibbick, DTI

FROM: Hamish Sandison, Partner, Bird & Bird *HS*

DATE: 29 July 1998

RE: Horizon Project - Legal Implications of Partial or Total  
Cancellation of the BA/POCL Automation Project

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## Introduction

1. I have been asked to summarise my previous advice as the Joint Programme Lawyer on the legal implications of either:

- (a) cancelling the Benefit Payment Card ("BPC") element of the project (Option 2 in the Treasury-led Working Group Report); or
- (b) cancelling the entire project (Option 3).

You will find a more detailed explanation of this advice in my earlier memoranda.

Can the DSS cancel unilaterally?

2. The Horizon project actually consists of three "Related Agreements:"

- the Authorities' Agreement - between the DSS, POCL and ICL Pathway;
- the DSS Agreement - between the DSS and ICL Pathway; and
- the POCL Agreement - between POCL and ICL Pathway.

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Thus, the two public sector contracting authorities must act jointly to cancel the entire project (Option 3); the DSS cannot pursue this option on its own.

3. However, in my opinion (although POCL's lawyers do not agree), the DSS *can* terminate the DSS Agreement unilaterally, whereupon it is free to withdraw from all of its rights and obligations under the Authorities' Agreement. This would result in the cancellation of the BPC element of the project (Option 2).

4. In addition, I must note that there are two commercial contracts between the DSS and POCL which govern the provision of benefit encashment services at Post Office counters. POCL's lawyers take the view (and DSS lawyers agree) that, under one of these commercial contracts, the DSS may not cancel the Related Agreements with ICL Pathway without POCL's consent. As the Joint Programme Lawyer, I am not privy to these commercial contracts, but it seems obvious to me that any question of POCL exercising a right of consent over DSS action in relation to its contract with ICL Pathway is fundamentally a political rather than a legal matter.

**Does the DSS have grounds to cancel?**

5. The grounds for cancellation are precisely the same under Options 2 and 3. They include termination for convenience (with compensation up to £129m payable by the DSS to ICL Pathway and up to £205m payable by POCL to ICL Pathway) and termination for ICL Pathway's breach (with compensation up to £200m payable by ICL Pathway to the DSS and POCL in aggregate).

6. Termination for ICL Pathway's breach is clearly the preferred route for the DSS under Options 2 or 3. Equally, ICL Pathway will assert that any purported termination for its breach is in reality a termination for convenience, and will claim compensation from the DSS accordingly. The DSS must therefore be able to substantiate its claim of breach by ICL Pathway, and must not take any action by word or deed to support an argument that it is really terminating for convenience, e.g., because it thinks that ACT is a cheaper way of paying benefits than the BPC.

7. On balance, I believe that there is sufficient evidence to justify termination on the basis of ICL Pathway's breach.

8. ICL Pathway admittedly failed to complete Operational Trial by the contractual due date of 21 November 1997. Under the Authorities' Agreement, if Operational Trial has still not been completed at the end of a 13 week cure period, either or both of the contracting authorities may give notice of termination of their respective contracts with immediate effect. The DSS will be in a position to terminate because of ICL Pathway's failure by August 12th. (POCL consider themselves to be in that position already, but I am doubtful of their view.)

9. However, the fact that ICL Pathway has failed to complete Operational Trial by the contractual due date does not of course mean that it is liable for breach of contract or that the contracting authorities are entitled to terminate. On the contrary, ICL Pathway will

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argue that the DSS and POCL are responsible for the delays, and it will vigorously contest any attempted termination.

10. To verify its belief that ICL Pathway was in breach, the BA/POCL Programme on my advice commissioned an independent report earlier this year by Project Mentors Limited. This found that ICL Pathway was responsible for the delays culminating in its failure to meet the 21 November 1997 due date, and that the contracting authorities had not caused or materially contributed to those delays. This report carries a health warning: it was based only on access to people and documents on the government side and did not include access to ICL Pathway's staff or documentation. That said, it provides strong and independent support for the government's position.

11. Of course, any litigation with ICL Pathway will be lengthy, uncertain and messy, and the DSS must expect all of its shortcomings to be fully aired in hostile legal proceedings. For that reason, a negotiated termination which avoids litigation is clearly the preferred route to achieving Options 2 or 3. Nevertheless, I remain satisfied that the DSS is entitled on the evidence available to terminate because of ICL Pathway's breach.

#### Other legal implications

12. I have also considered the public procurement law implications of Options 2 and 3. There is agreement between the government lawyers involved that complete termination presents no procurement law issue. As regards partial termination, the Treasury Solicitor thinks that this might be viewed as a "descoping" of the contracts with ICL Pathway and that other potential suppliers might object. For the reasons explained previously in much greater detail, I think that this view is too cautious (and DSS lawyers agree), and I remain satisfied that partial termination on the basis of ICL Pathway's breach does not raise a procurement law issue.

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