

Slaughter and May 11-12-1998 17:33  
TO: GRO M REGO COMPANY: POST OFFICE COUNTERS

PAGE 1/3

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## SLAUGHTER AND MAY

35 Basinghall Street, London, EC2V 5DB - Telephone GRO

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## FAX TRANSMISSION

Date 23rd November, 1998 DEC 11 17:18 Document Number CA983450.165  
In reply please quote JRT Total pages (inc this)  
From Jeff Triggs Writer's telephone  
To Ross Newby, Treasury Receiving fax number  
Sarah Mullen, Treasury  
Copy to Mena Rego, Post Office Counters Limited, London

GRO

Horizon

Mena Rego has asked me to forward to you the attached, principally for the message in the final paragraph about the time of the essence notice leading to termination.

Regards,

GRO

Jeff Triggs

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PAGE 1/2

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Date 23rd November, 1998  
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From Jeff Triggs  
To Robert Ricks, Treasury Solicitor  
Copy to Mena Rego, Post Office Counters Limited, London  
Jonathan Evans, Post Office Counters Limited, London  
Catherine Churchard, Post Office Legal Services, Croydon  
David Sibbick, Director Post DTI  
Ross Newby, Treasury  
Sarah Mullen, Treasury

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Horizon - Termination

Thank you for copying to me the Solicitor General's advice. Although I do not agree that the POCL approach is necessarily slower than the DSS approach I would hope that all are now agreed that it is safer.

I do think that we should all aim to bring this legal debate to a close and I would not like to be responsible for prolonging it. That is why I do not propose to comment in detail on the Solicitor General's advice. However, there is one aspect of his advice which I believe it is crucial to clarify in the interests of both public sector parties.

It was generally agreed in conference that perhaps the worst of all worlds would be to give a time of the essence notice which sets an unreasonable period and thereby enables Pathway successfully to sue for anticipatory breach of contract. That would be an unforgivable error. I therefore agree entirely with paragraph 16 of the Solicitor General's advice.

However, I think the reasoning in paragraph 17 is dangerously misconceived. It seems to suggest that because the Authorities are entitled to terminate by giving twelve months

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Slaughter and May 11-12-1998 17:32 PAGE 2/2 RightFAX  
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2

23rd November, 1998

notice this means that a time of the essence notice giving Pathway less time than it needs to achieve Operational Trial might be reasonable.

That is misconceived in two respects. First, the period of twelve months is a notice period for termination for convenience. It has no relevance to what is a reasonable time to complete Operational Trial. Secondly, termination for convenience requires twelve months notice plus the payment of a specified amount by way of compensation. Currently the relevant formula would require a payment to Pathway of an amount up to almost £400 million. The fact that the Authorities can terminate on twelve months notice if they pay Pathway £400 million should not be used as an argument for saying that a period shorter than what is required is a reasonable period.

In fact, I understand that the current date which both Pathway and the Authorities think is the most likely date for completion of Operational Trial is 30th September, 1999.

The "POCL approach" (on current information) is therefore that a time of the essence notice expiring on 1st October, 1999 should be served. For the avoidance of doubt, a decision to serve a time of the essence notice with a shorter period would not represent the POCL approach.

I should add that it would be quite reasonable, in the circumstances, for ministers to conclude that the time of the essence route is the most appropriate even if it is ministers' unequivocal wish to terminate. That conclusion rests on an assessment of the likelihood of Pathway failing to meet the deadline. Although I quite understand that the Solicitor General does not feel able to comment on this question, POCL believes it to be highly unlikely that Pathway will complete Operational Trial by that date if all currently proposed concessions are withdrawn. In other words there is every likelihood that the time of the essence notice will lead to termination.

Please feel free to give this letter such further circulation as you consider necessary.

Yours sincerely,

**GRO**

Jeff Triggs

Slaughter and May 11-12-1998 12:01  
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PAGE 1/2

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London

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Jonathan Evans, Post Office Counters Limited, London

Catherine Churchard, Post Office Legal Services,  
Croydon

GRO

Horizon - Termination Options

Thank you for your call this afternoon reporting on certain discussions at the working group meeting.

As you know, there are a number of different termination options. We believe the best is likely to be to serve a time of the essence notice of a reasonable period. One particularly bad option would be to give a time of the essence notice which was not reasonable because it required operational trial to be completed in a time period which we all know is impossible, or highly unlikely. Accordingly, serving a time of the essence notice expiring in July when we all know that operational trial is highly unlikely to be completed before 30th September would be an extraordinarily foolhardy thing to do (and would be contrary to the advice of counsel to the Law Officers).

Indeed I would even prefer to pursue the somewhat discredited schedule C5 route rather than serve an invalid time of the essence notice.

What is more, given the view that it is unlikely that Pathway will continue working on

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PAGE 2/2

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CA983450.024

2

23rd November, 1998

the programme throughout the period there really is very little, if anything, to be gained by stipulating July rather than October.

Regards,

**GRO**

Jeff Triggs

11/12

Copied:- Sandra.  
Ken  
Keith

11/12 '98 12:01

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P02