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**From:** Robert Swannell [GRO]  
**Sent:** Tue 19/03/2019 9:08:37 AM (UTC)  
**To:** Russell, Mark - UKGI [GRO]  
**Subject:** Re: Post Office Litigation

Many thanks Mark.

With best wishes  
Robert

On 19 Mar 2019, at 08:52, Russell, Mark - UKGI [GRO] wrote:

Robert

I think this is self-explanatory.

Mark

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**From:** Watson, Richard - UKGI  
**Sent:** 19 March 2019 08:31  
**To:** Russell, Mark - UKGI [GRO]; Lambert, Lucie - UKGI  
[GRO]; Cooper, Tom - UKGI [GRO]  
**Subject:** Re: Post Office Litigation

Mark

In relation to the bullet about UKGI oversight I should have added that this is effected through Tom's role on the board sub committee with support from UKGI Legal via the litigation protocol. BEIS ministers, policy and legal have signed up to the confidentiality provisions of the Protocol and are forwarded the regular litigation updates we receive from POL

Richard

Sent from my BlackBerry — the most secure mobile device

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**From:** Richard.Watson [GRO]  
**Sent:** 18 March 2019 7:16 pm  
**To:** Mark.Russell [GRO]; Lucie.Lambert [GRO]; Tom.Cooper [GRO]  
**Subject:** RE: Post Office Litigation

Mark

Further to your below email and our discussion this morning you will recall the attached internal UKGI review into Magnox which includes, at pages 23 to the end, the "Lessons learnt".

I have extracted below the "lessons learnt during the litigation" section of that document and one of the "General lessons learnt" which relates to litigation. I have included in blue my initial comments in relation to the POL litigation against each of those lessons learnt. Tom will have some thoughts on my initial comments.

As we discussed this Group Litigation, which is being brought by over 500 claimants, is following a

carefully scheduled series of trials before the court considers issues about POL's liability towards individual claimants.

The headline is that as far as they are relevant I consider the lessons from the Magnox review have been learnt with this litigation. One of the issues the POL board is currently considering as a result of the adverse judgment in the first trial is the question of additional legal advice. The current intention is that they will keep with the current legal team to continue the group litigation but are getting additional legal advice in relation to the question of whether to appeal the recent judgment.

I am out tomorrow and Wednesday but will be picking up emails and of course happy to discuss.

## Lessons learnt during litigation

**Issue:** The NDA's handling of the legal challenge was not sufficiently scrutinised or challenged.

**Steps UKGI can take to mitigate / address the underlying failings which caused this issue going forward:**

- **Government should be made aware of and approve key steps in substantial litigation.** To ensure the appropriate level of challenge and oversight of any future large-scale litigation the NDA and other assets face in the future, UKGI should recommend that framework documents with assets require immediate notification of, and Government approval for, litigation above an identified threshold of "substantial" liability, set by reference to each asset's risk profile.

A FWD is in the process of being agreed with POL but we put in place a litigation protocol in relation to this Group litigation and POL have been sharing legally privileged information with UKGI Legal. HMG's position has consistently been that this litigation is an operational matter for POL.

- **Establish what oversight will be provided by UKGI and the relevant Government department.** At the outset of any substantial litigation involving an asset, UKGI should agree with the relevant Government department, and its lawyers, how oversight of the litigation will be provided.

POL have been sharing information with us under the protocol and Tom Cooper is on the Board sub-committee that has oversight of the litigation

- **When, prior to contract award, there is a strong likelihood of a serious challenge, or a challenge to a procurement has already been mounted, the decision to award the contract should be fully tested.** The asset's board should consider obtaining a second, external, legal opinion as a means of fully gauging risks ahead of a recommendation to the Secretary of State to award the contract.

Not applicable – the litigation does not involve a procurement challenge

- **Where a substantial legal challenge is mounted against an asset, UKGI should assure itself of the asset's internal legal capability.** NDA's in-house legal team was not sufficiently experienced or staffed for the ES litigation. UKGI insisted on additional internal resource after the judgment was rendered, but this should have been done earlier.

POL have a General Counsel who is company secretary and attends the board. They have an in house and external legal team responsible for the conduct of the litigation being brought against them, including two QC's and several junior counsel

- **In substantial cases, challenging the board on an asset's choice of legal advisers is**

**key.** In this instance, Burges Salmon was in place for two competitions and was also instructed to defend the ES litigation. There are clear risks and potential conflicts of interest in permitting the law firm that designed and assured the evaluation process to advise on how to respond to a legal challenge on the competition. UKGI should also encourage – consistent with best practice for FTSE 100 companies – all assets to regularly change external lawyers, to reduce the risk of “group think”.

I understand POL’s external lawyers were retained specifically for this litigation.

- **Where the stakes are high, source more than one external legal opinion.** UKGI should insist that the asset consider more than one external legal opinion to ensure that legal advice and identified risks are thoroughly tested. Further, it should ensure that any opinions and their authors appear put before the asset’s board so that the board is able to take strategic decisions with proper calibration of legal risk.

The board have received direct advice from the external lawyers and the QC has also attended a meeting of the board sub-committee with oversight of the litigation. POL’s General Counsel also attends the board.

- **Legal strategy and mitigation of risk must be challenged.** Throughout, the NDA Executive Team portrayed the litigation as a “try-on” and entirely without merit. However, litigation is universally recognised to be uncertain, and even a small risk of a very significant set-back requires mitigation. UKGI should ensure a full discussion of the legal strategy to ensure risk mitigation has been fully considered.

There are 4 trials scheduled for this group litigation. The external lawyers have provided advice on risks and impacts and POL intend to develop a mediation strategy with the intention of exploring mediation after the end of the second trial (May 2019). The legal advice has consistently been that POL’s arguments on contract construction are the stronger ones but that will now have to be revisited in the light of the judge’s findings, which are largely unfavourable to POL

- **Attending the hearing.** Going forward, where hearings of important cases take place, UKGI should attend the hearing to gauge risk for itself. If a hearing goes badly, there is an opportunity, ahead of judgment, to settle.

I attended the opening and closing speeches of the first trial. The trial in itself lasted 4 weeks. As this is part of a 4 trial process with no decisions being made on liability to individual claimants the position is not analogous to a one-off procurement or JR challenge.

## General lessons learnt

- Where large legal risks are involved, UKGI should **ensure that an asset’s board has direct access to legal advice and to the in-house legal team. Legal advice should not be relayed to the board by the executive team, as it was in this case.** Misunderstanding/misconstruing legal advice was a material factor which explained why the NDA Board was slow to respond in both the litigation and the consolidation. Ensuring that an asset’s board is provided with the opportunity to discuss and challenge legal risk directly with a General Counsel would mitigate this risk, as would ensuring that the General Counsel reports directly to the CEO.

POL have a General Counsel who is company secretary and attends the board. They have an in house and external legal team responsible for the conduct of the litigation being brought against them, including two QC’s and several junior counsel. The board have received direct advice from the external lawyers and one QC has also attended a meeting of the board sub-committee with oversight of the litigation

Kind regards

Richard

Richard Watson | General Counsel  
**UK Government Investments**

1 Victoria Street | London | SW1H 0ET

T: [REDACTED] **GRO**

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**From:** Russell, Mark - UKGI

**Sent:** 16 March 2019 07:34

**To:** Watson, Richard - UKGI [REDACTED] **GRO**; Lambert, Lucie - UKGI

[REDACTED] **GRO**; Cooper, Tom - UKGI [REDACTED] **GRO**

**Subject:** Fwd: Post Office Litigation

Richard

I think the key legal lesson of Magnox was that important legal matters were escalated to the board and that the board received direct legal advice. I presume this happened here.

There was also a lesson about getting alternative legal advice when necessary. I don't know if this is relevant? Would the Post Office have behaved differently, legally, if they had known this would be the judgement?

Were there any other lessons?

Mark

Begin forwarded message:

**From:** Robert Swannell [REDACTED] **GRO**

**Date:** 15 March 2019 at 21:24:45 GMT

**To:** "Russell, Mark - UKGI" [REDACTED] **GRO**

**Subject:** Re: Post Office Litigation

Many thanks Mark.

That doesn't look at all good.

We will need to consider if we properly applied the lessons on Magnox litigation to the conduct of this litigation? If there are further lessons we should definitely learn them. Presumably litigation of this magnitude and importance would be discussed at the POL Board and I assume there may also be some implication for POL financing?

Let's pick up next week.

**IRRELEVANT**

With best wishes

Robert

On 15 Mar 2019, at 20:11, Russell, Mark - UKGI <GRO> wrote:

FYI

There are some Magnox parallels, not least that the judge is the same!

**IRRELEVANT**

Mark

Mark Russell

UK Government Investments

GRO

Begin forwarded message:

**From:** "Watson, Richard - UKGI" <GRO>  
**Date:** 15 March 2019 at 19:09:30 GMT  
**To:** "Russell, Mark - UKGI" <GRO>  
**Cc:** "Cooper, Tom - UKGI" <GRO>  
**Subject:** Post Office Litigation

Mark

You asked for some information about today's judgment in the Post Office Group Litigation. Apologies for the delay but I have only recently come from a ministerial briefing.

### Background

Since 2017 the Post Office has been defending a Group Litigation claim brought by approximately 560 mainly former sub-postmasters. The issues in the claim have been known about for many years and go back to the 1990's when Post Office introduced its Horizon accounting system. At a very high level the sub-postmasters claim they have been wrongly held responsible for branch losses.

The conduct of the Group Litigation has been broken down into 4 separate trials, with each representing a building block towards an outcome on the ultimate question of whether there has been a breach of contract and if so any liability to the sub-postmasters, as follows:

- a. The proper interpretation of the contract between sub-postmasters and the Post Office;
- b. The reliability of the Horizon, the electronic point of sale system used in post offices;
- c. The parties to proceedings who are eligible to claim; and
- d. The liability, if any, for breach of contract (as interpreted in trial a) above.



The judgment handed down today concerns the first of these individual trials, and nothing beyond it. It does not, therefore, address any questions of breach or liability for any such breach. The second of these trials, focusing on the operation and reliability of the Horizon system, began on Monday, 11 March, and is expected to conclude in early May. The rest of the litigation is expected to continue well into 2020

### **Today's judgment**

The principal legal finding is that the contract is relational and not a normal agency contract as the Post Office were contending. As consequence, it contains a number of significant obligations on Post Office including:

- Post Office bears the onus to prove that there has been a loss and that it was caused through the fault of a postmaster or his assistant.
- Post Office must be able to demonstrate that they carried out a reasonable and fair investigation into the loss as to the cause and reason for any alleged shortfall and whether it was properly attributable to the postmaster.
- The branch trading statement currently in use cannot be relied on as an 'account' where there are matters in dispute.
- While the right to suspend postmasters remains, certain process changes will be required, including a requirement to pay any postmaster who is suspended.
- On the right to terminate contracts, Post Office have a duty to consider the appropriate notice period in each case; and cannot act arbitrarily or capriciously.

Beyond the legal findings, the judge is exceedingly critical of the Post Office, expressing himself in unusually strong language. He was critical about the handling of the case, and finds the Post Office's conduct in its dealings with the Claimant sub-postmasters to be have been oppressive. He also considered its operations lacking in transparency, and its procedures and processes haphazard.

### **Post Office's position**

This is a very difficult verdict for the Post Office, both culturally, and operationally. They have stated to BEIS that their unrelenting focus will be on recognising the impact of this judgment, in both its legal and cultural dimensions, and working tirelessly to improve the services they provide their sub-postmasters, and address the perception of Post Office behaviour identified by the judgment. Internally they are considering possible grounds of appeal

### **Risks to UKGI**

UKGI and ShEx have had a shareholder role in Post Office for many years. UKGI and BEIS have not had any role in approving the litigation strategy or the matters giving rise to the litigation. They are all operational matters for Post Office. We are in a different position from, for example, our role in the NDA. Undoubtedly there will be pressure on HMG as owner of the Post Office to ensure it improves, and through our shareholder role we will be able to monitor and raise appropriate challenge. The litigation is an opportunity for these long standing complaints to be properly considered by an independent tribunal and to bring finality.

Kind regards

Richard

Richard Watson | General Counsel  
**UK Government Investments**

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