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## **UKGI Post Office Ltd. (POL) Shareholder Team – GLO Lessons Learnt**

### **Purpose**

This document has been produced by the UKGI POL Shareholder Team and cleared by UKGI Legal for the POL Lessons Learnt Portfolio Review (PR) session on 11 December 2020. It focuses on the period of time from the Common issues judgment in March 2019 – present regarding the actions taken by the UKGI Shareholder NED and Team on handling the POL Group Litigation Order (GLO), the fallout and lessons learned.

### **Context**

The incumbent UKGI Shareholder NED, Tom Cooper, joined the POL Board in March 2018. At this time, legal proceedings were underway having been served on POL in 2016 and a GLO made in 2017. A number of trials were proposed starting with the Common issues trial in November 2018 (to clarify the contractual obligations owed by POL and the Postmasters) and the Horizon issues trial in March 2019 (to establish the reliability of the Horizon IT system since its introduction in 1999). POL's legal strategy was to contest the GLO having (i) been advised for a number of years by Fujitsu that the system was reliable, (ii) the National Federation of Subpostmasters historically supporting its position, and (iii) received multiple pieces of legal advice supporting its case.

Ministers had been advised by UKGI/BEIS officials since c. 2010 that issues relating to Horizon and its relationship with postmasters were an operational matter for POL and to keep at arms-length. This was the public position however Ministers had been consulted at key stages in the past e.g bringing in forensic accountants Second Sight in 2012 and the previous Complaint & Mediation Scheme that ran between 2013 – 2015. This was the position held throughout the period up to and including the GLO.

In 2018 a BEIS POL Policy team was set up. Before this date there had been no dedicated policy team in BEIS, and all policy matters were dealt with by the UKGI Shareholder Team.

We took the lessons learned from UKGI's internal review into the NDA's Magnox failed procurement and in 2018:

- put a Litigation Protocol in place to enable sharing of information including legal advice
- requested a Merits Opinion from POL's lawyers relating to the Common Issues Trial which was reviewed by UKGI legal
- asked the Board to consider its settlement strategy and the pros and cons of settlement before the trials began
- asked the company to develop a contingency plan in case POL lost the case including considering its appeal strategy

In Autumn 2018, Tom and the POL Board had asked and was promised a change of approach by Paula Vennells (previous POL CEO). In practice there was no visible sign of change prior to the Common issues trial e.g POL Management did not engage fully with the contingency planning exercise in October 2018.

Judgment from the Common issues trial was handed down in March 2019. This was highly critical of POL and determined that the contract with postmasters was relational. This meant that POL had the burden of proving that shortfalls on the Horizon IT system were due to postmaster error/fraud. POL applied to both appeal the judgment and have the judge recused – both applications were ultimately unsuccessful and over Spring 2019 POL changed its legal team (incl. the exit of the POL General Counsel (GC) from the business) and developed a

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strategy to settle the case. Tom played a significant part in the change of the legal team. He did not participate in the decision to apply to have the judge recused.

After the first judgment there was a significant “step up” in engagement – both at an official and Ministerial level – that continues today, largely due to the severity of the criticism received by POL and the growing media/parliamentary pressure.

Paula Vennells left the business just before the first trial to take up a new role as Chair of an NHS Trust. A new CEO (Nick Read) was appointed in September 2019.

A successful mediation took place in November/December 2019 where POL agreed to settle the litigation by paying a total sum of £57.75 million (funded entirely by POL), together with an apology, other commitments aimed at strengthening the relationship with postmasters and an agreement to set up a scheme for non-GLO postmasters to have issues regarding shortfalls in Horizon investigated – the Historical Shortfall Scheme (HSS).

A judgment on the reliability of Horizon was handed down on 16 December 2019 and was again critical of POL.

Following the settlement, POL embarked on a major programme of organisational and cultural reform. There are currently 48 convicted postmasters, some of whom were part of the GLO, whose cases have been referred for appeal. This number will likely grow as there is a wider set of c. 900 postmasters that were convicted following prosecutions by POL. The issue continues to take up a significant amount of resource, both in POL incl. at Board level and in the Shareholder and Policy Teams.

## Topics

### *How the litigation was dealt with post-2019*

- The recusal application and appeals were unhelpful reputationally. However, the POL Board at the time felt that it had no other option but to seek these because of the legal advice it had received. It was right HMG did not take part in the decision because of wider considerations regarding HMG criticising/interfering with the independence of judiciary. While a second and third opinion was provided both the barristers involved came from the same set of chambers. On reflection, an opinion should have been sought from someone wholly separate from the existing legal team (LL1).
- UKGI had been expressing unhappiness about POL’s approach and pushing for change throughout 2018 however tangible results were only achieved after the first judgment was handed down.
- [REDACTED]
- Ministers and the senior officials were updated appropriately throughout e.g. through briefings, TBA notes to Private Office’s. UKGI and BEIS officials have received good feedback and similar approaches should be adopted for other issues. (LL2)

### *Any lessons from the settlement exercise*

- We believe UKGI handled the settlement exercise well and it provides a good template going forward. A cross-HMG working group was set up in good time with all key HMT/BEIS/UKGI officials present (including people with experience of previous settlements and the BEIS ARC Chair Nigel Boardman), deadlines were met, and

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approvals turned around quickly to enable POL to engage with the mediation successfully. (LL3)

*Assessment of alternatives to litigation*

- The POL Board did consider settling ahead of the litigation however the question was on what basis would POL and the claimants settle.
- The facts of the case between POL and the claimants were in complete dispute so it was felt that a court judgment was needed before any settlement could be considered. This was the view of BEIS/UKGI in that a judgment would at least provide definitive answers and either vindicate POL or, as it turned out, the claimants (which would provide a basis for compensation and settlement).
- The upside is that arguably the GLO has achieved a positive outcome, although at considerably reputational and financial cost – POL is changing organisationally and culturally for the better and postmasters are now firmly at the forefront of the company's considerations.
- Regarding POL's culture, this was a key driver that led to the GLO, but it is recognised that it is one of the hardest issues to address, particularly where positions are entrenched, so will take time to improve.
- It was clear that as a result of the court judgments, further litigation (and potentially another GLO) was highly likely. POL attempted to mitigate this through the Historical Shortfall Scheme that was agreed during the mediation discussions, however there was little time to assess the potential costs and it has now transpired that these were vastly underestimated.
- Lesson – Advice should be obtained at regular intervals about settlement strategy including assessments of financial implications based on a variety of assumptions and covering best to worst cases. (LL4)

*UKGI and BEIS policy team working*

- The introduction of the BES POL policy team has been a positive change by the Department. Both teams work well together and are collaborative.
- There remains an issue regarding resource given the increased workload, particularly on litigation related activities.
- There is an open question as to whether the "operational matter" for POL approach that officials advised was, in hindsight, the right way to go. Understanding when an issue is/is not an operational matter for UKGI's assets is vital but for something of this magnitude it may be that there should not have been the distinction. It is recognised that the distinction is more relevant from a departmental comms perspective. This is something that could have been revisited sooner regarding litigation developments (LL5).
- UKGI leadership has also been updated regularly e.g. through discussions with UKGI's leadership, ExCo updates and Board sessions.

*Capability of UKGI team*

- The UKGI Shareholder Team is a mix of civil service and corporate finance backgrounds which has been useful and needed for GLO handling.
- UKGI Legal has also been heavily involved in recent years. On similar issues going forward, it may be useful to have access to strategic legal support for major decisions and if this cannot be sourced through the asset (or it is thought this may be unreliable), UKGI should consider obtaining its own advice through consultancy. (LL6)

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- As a side note, it can be helpful to have fresh perspective in the team, particularly at senior level, from people not associated with previous decisions. When one of these moments is recognised, the team and Exco should reflect if it would be helpful to change UKGI board members and/or team members to achieve this.

*Access to POL information*

- A Litigation Protocol was agreed prior to the Common Issues Trial. Access to POL information was sufficient.
- The UKGI GC has a regular weekly catch up with the POL GC. UKGI keeping regular contact through this forum is in our view helpful in respect of information transparency and expectations.

*Board and Executive team strengths and weaknesses*

- The decision to change POL's GC and legal team after the Common issue judgment was significant. Without this, we are of the view that a settlement would not have been reached. The POL GC incidentally left the business as a "good leaver" i.e with full bonus and exit payment entitlements – this was not a decision that was brought to the POL RemCo and was a governance failure by POL. Senior leader exits should always come to RemCo.
- Since then the new CEO and largely new executive team (bar the CFO) have taken a new approach to handling the fallout from the GLO.
- Encouraged by the Shareholder NED, the POL Board has looked into cases now in significant detail e.g. in relation to the convicted claimants there have been case-by-case examinations by the Board which would not have happened previously.

*Others points to raise*

- Over the time period in question the oversight role that BEIS has on POL, via UKGI, is much stronger than in previous years. As well as the BEIS POL Policy team the governance arrangements put in place by UKGI are stronger. For example:
  - Quarterly Updates (since March 2019) go to the BEIS Perm Sec;
  - Quarterly Shareholder Meetings have been conducted since November 2019;
  - A POL Framework Document (March 2020) is now in place.
- As a level of assurance that POL were not spending investment funding from HMG on the GLO, the BEIS Perm Sec in early 2019 also wrote to the POL CEO.
- On appraisals of Ministerial appointments (POL Chair, CEO and CFO), handling of the GLO and its fallout are now included e.g in the annual Chair's Letter and when considering bonuses (see below).
- Over Summer 2019 the BEIS Perm Sec at the time stepped in regarding POL's proposed bonus payments. Due to POL's handling of the GLO, the BEIS Perm Sec requested that bonus payments be reduced. This was handled by UKGI.
- UKGI has in general taken a more much robust approach in our interactions with POL e.g we have withheld investment funding payments twice in recent years due to inadequate reporting of change spend.

**Lessons Learned**

LL1 – UKGI should consider whether second opinions should be sought, especially for significant decisions e.g. recusal applications, and getting an opinion from lawyers wholly separate from the existing legal team.

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LL2 – Open, honest and regular reporting of litigation developments was well received by BEIS Ministers and senior officials. Detailed but digestible briefing and regular TBA notes are particularly useful and should be continued going forward.

LL3 – The process proposed by UKGI for the settlement exercise is a good template for how further exercises could be undertaken in future.

LL4 – Advice should be obtained at regular intervals about settlement strategy including assessments of financial implications based on a variety of assumptions and covering best to worst cases.

LL5 – Officials should consider whether, in light of the reputational impact issues like the GLO could have on the Department's reputation, maintaining the "operational matter for the company" approach is appropriate and should actively consider the question at regular intervals in future.

LL6 – On similar legal issues going forward, it may be useful to have access to strategic legal support for major decisions and if this cannot be sourced through the asset (or it is thought this may be unreliable), UKGI should consider obtaining its own advice through consultancy.