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Guidance Note 17 Litigation Risks: Key Issues for Shareholder Teams to Consider
Updated August 2023

1. INTRODUCTION

Actual or threatened litigation can pose significant risk to assets within UKGI's portfolio from a financial, resource and reputational perspective. If an asset mismanages the litigation or fails to properly consider the full spectrum of litigation risks, this can also have serious reputational consequences for UKGI given its shareholder representative role and the presence of our Shareholder NEDs on asset's boards. Accordingly, it is vital that Shareholder Teams (including Shareholder NEDs) and assets' boards are well sighted on and understand how to handle the risks relating to substantial litigation. It should also be noted that, taking into account UKGI's role as shareholder representative of assets, it cannot wholly delegate responsibility for monitoring litigation and challenging the approach being taken to the asset's board. The financial and reputational risks associated with substantial litigation ultimately sit with the relevant department and UKGI. Where Shareholder teams consider that such litigation poses significant risks to it and the Department, they must make themselves comfortable that the litigation is being handled adequately and appropriately and, if not, challenge the asset on its approach. In certain circumstances, such as those highlighted in the NDA Magnox and Post Office Horizon case studies (further considered below), a failure by an asset to appropriately grip a litigation may reach a "tipping point", which ultimately requires UKGI to take a more direct and interventionist role.

As part of our commitment to constantly develop our best practices and given our reflections on lessons to be learnt from the NDA Magnox contract (see [Sharing Excellence Seminar](#)) and Post Office Horizon issues, UKGI has developed an in-house perspective on how assets should report on litigation risk and how UKGI as the shareholder representative should engage with assets, particularly where substantial litigation risk is materialising. This guidance note aims to provide a high-level overview of our in-house approach and covers:

- (i) UKGI's expectation on how litigation risk should be reported to asset boards, UKGI and the relevant department;
- (ii) the importance of identifying what constitutes "substantial" disputes and claims, which will require focused engagement and monitoring from UKGI and the relevant shareholder department; and
- (iii) what increased engagement from UKGI should involve

UKGI Legal have gathered a lot of know-how in this area. UKGI Legal can be called upon to support Shareholder NEDs and Shareholder Teams take a more active role in challenging an asset on its conduct of substantial litigation. UKGI lawyers providing support to asset specific shareholder team should be sighted on litigation updates received by Shareholder Teams.

More generally, if there is a specific issue highlighted in this note, which Shareholder NEDs or Shareholders Teams wish to explore in more detail, we can assist.

2. REPORTING ON LITIGATION TO THE BOARD AND UKGI

Reporting into the Asset's Board

In order to be prepared to give strategic advice, approve a settlement, provide appropriate challenge or take other necessary action, it is important for asset boards to stay adequately informed about the litigation facing the company and the key risks associated with it. Shareholder Teams should expect boards to be briefed on any actual, threatened or reasonably contemplated claims and disputes, which may adversely

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affect the business on a regular basis (for example quarterly).¹ For substantial litigation or where litigation poses significant risks, UKGI would expect the asset's board to be updated as soon as practicably possible, after the asset is aware.

What should the board be seeing?

There is no one size fits all template for what good reporting into the Board looks like, however, where an asset is facing litigation, updates should seek to cover the following issues:

- A summary of the claim including (i) the parties (ii) the type of dispute (iii) key factual background and (iv) legal representatives;
- Quantum of the claim and/or what other remedies are being sought or matters are being determined;
- a general status update, for example the current stage of the litigation;
- a discussion of strategy and goals, including consideration of settlement;
- the expected process and timelines;
- an assessment of legal risk including (i) if the claim has not commenced, the likelihood of a claim being brought (ii) the prospects of success for the asset and (iii) where appropriate, the potential impact of the asset losing; and
- likely legal costs/budget information and next steps.

If assets are not providing litigation updates to their Boards this is a red flag that should be raised with the asset's Chair and executive team and in addition should be flagged to UKGI Legal.

Reporting to UKGI

Since 2018, following the Magnox lessons learnt exercise, a key governance principle is that UKGI expects its assets to regularly report into UKGI and the relevant department any active or threatened litigation to the relevant Shareholder Team from the early stages of litigation. This has been incorporated into the [Managing Public Money Framework Documents](#) which set out:

- a requirement that the asset shall provide a **quarterly update to the shareholder** on the existence of any active litigation and any threatened or reasonably anticipated litigation; and
- an acknowledgment by the parties of the **importance of ensuring legal risks are communicated appropriately to the shareholder** in a timely manner.

The full text can be found in the Template Framework Documents for the most common forms of arm's length bodies (found [here](#)) for example see section 15 of the Template Framework Document for Public Corporations. .

In practice, assets are unlikely to prepare reports to UKGI specifically and in practice reporting on litigation will occur via board packs (rather than separate briefings) which Shareholder NEDs and Shareholder Teams should carefully review. Shareholder Teams should be aware of and satisfied with the frequency of litigation reporting and be able to explain how the asset is meeting this key governance principle. In Portfolio Reviews, Shareholder Teams are required to confirm assets are providing quarterly litigation updates and in what form.

¹ The role of the General Counsel is important in this context (see [GN6](#)).

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3. IDENTIFYING SUBSTANTIAL CLAIMS AND DISPUTES

As part of the follow up to the active requirement of the quarterly litigation reporting envisaged above, the relevant UKGI Shareholder Team must, in conjunction with the Shareholder NED and the Board/executive team of the asset, determine which matters where litigation is active, threatened or reasonably anticipated ("claims and disputes") are to be considered **substantial**. This will require active monitoring by the Shareholder Team and regular dialogue with the asset and keeping UKGI Legal updated as appropriate.

What will be considered "substantial" will vary for each asset. This could be primarily by reference to the amount of money potentially at stake – maybe expressed as a percentage of revenue or profit – but should also cover other matters of high sensitivity (e.g. harassment, discrimination or whistleblowing claims) or circumstances where the claim or dispute could have wider implications for the asset's business model, operations or reputation. For example, one of our assets recently had litigation that fell into the "substantial" category which only had a value of a few million pounds but the repercussions of an adverse outcome would have increased the asset's exposure to similar litigation tenfold. Shareholder Teams should also examine the risks of a particular claim or dispute from the Government's perspective - for example certain reputational or repercussions risks to Government may not be flagged as substantial by the asset and will require a discussion between the Shareholder Team and the asset to scrutinise the implications of such a risk in determining whether a claim or dispute is "substantial". Where Shareholder teams are unclear if a claim or dispute is "substantial" they should seek assistance from UKGI legal.

4. UKGI ENGAGEMENT OF SUBSTANTIAL CLAIMS OR DISPUTES

Once a claim or dispute has been categorised as "**substantial**" shareholder teams must notify UKGI Legal as soon as possible so that measures can be implemented to ensure appropriate engagement by UKGI/ the shareholder of such claim or dispute. Building on the lessons learned in relation to the Magnox litigation and re-learned in relation to the Post Office litigation the key considerations and measures that shareholder teams should implement are as follows:

- (a) Establish allocation of roles between UKGI and 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. UKGI should proactively engage with the department and consider responsibility for matters including reporting to ministers, what decision making processes should be in place and how to coordinate engagement with the asset and in what form.
- (b) Implementing a litigation protocol:** Where sharing legal advice, assets may raise concerns around the protection of legal professional privilege. UKGI legal is experienced in advising and handling such concerns and we have agreed litigation protocols to facilitate the sharing of legal advice. These are designed to provide assurance to the asset as to UKGI's (as shareholder representative) common interest in the litigation, to record agreement as to the protection of privilege and confidentiality, and to outline what information the asset should be sharing with UKGI and the relevant timeframes. The requirement to enter into a litigation protocol where substantial litigation is being contemplated will not be new to the asset given that our Framework Documents expressly set this out. For reference the MPM Framework Documents states that, "*in respect of each substantial piece of litigation involving [the asset], the parties will agree a litigation protocol which will include specific provisions to ensure appropriate and timely reporting on the status of the litigation and the protection of legally privileged information transmitted to the shareholder*

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*to facilitate this.*² Furthermore, whilst such a protocol is being agreed, the parties are required to ensure that:

- material developments in the litigation are communicated to the shareholder in an appropriate and timely manner;
- legally privileged documents and information are clearly marked as such;
- individual employees handling the legally privileged documents are familiar with principles to which they must adhere to protect legal privilege; and
- circulation of privileged information within government occurs only as necessary.

Not all of our assets will have previously entered into such a protocol previously and UKGI Legal can assist in liaising with the asset to ensure a suitable form of protocol is put in place.

(c) Provision of legal and expert advice and adequate access to it: It is important that the asset's board, Shareholder Team and UKGI legal are sighted on the detailed legal advice the asset is receiving on the merits and overall strategy of any substantial litigation. Whilst assets may seek to summarise what their external lawyers have advised on merits, this is not a replacement for being able to review and challenge the more detailed analysis the asset has been provided first hand. Where the asset has received significant expert opinions, for example on the quantum of a potential claim, it may also be necessary for UKGI to receive and scrutinise such advice. It will also be important for UKGI to be able to put specific questions and request briefings from external lawyers and experts directly. A recurring theme in litigation that has surprise outcomes in our assets has stemmed from the asset's board and correspondingly the Shareholder Team and Department being provided with summary advice that downplayed legal risks or provided an incomplete picture. Establishing a framework of transparent information sharing in respect of litigation as the 'second nature' approach in respect of substantial litigation is critical.

(d) Asset's legal capability: From the early stages of litigation Shareholder Teams should critically assess, as far as possible, the quality and capability of an assets in house legal team. UKGI legal have considerable experience of issues arising in the Magnox and POL case studies, including circumstances where in house legal teams are insufficiently resourced, inexperienced in handling complex litigation or have developed entrenched views (for example, as a result of the fatigue effect of litigation resulting in the asset adopting a "hive mindset") which impact on government's understanding of the risks and UKGI's ability to provide constructive challenge. Developing a strong relationship with the General Counsel is important as well as ensuring they provide sufficient direct information on the litigation for example asking them to input or attend at Quarterly Shareholder Meetings or input into other briefings the Shareholder Team may request.

(e) Litigation strategy and mitigation of legal risk: Litigation is inherently uncertain with a broad range of risks. UKGI should work with the asset to assure itself that it is implementing a robust litigation strategy informed by proper contingency planning and an understanding of the various possible outcomes (financial, operational, reputational) based on a range of scenarios (worst to best). Any litigation strategy needs to consider settlement options (for more information on the key issues around settlement and the procedures that need to be followed, please refer to the separate Settlement Guidance Note which can be found [here](#)). UKGI should encourage assets to obtain a merits opinion from external counsel at an early stage and for it opine on the basis government legal risk ratings (UKGI legal can provide further guidance on this).

² See for example section 15.2 of the [Template framework document: public corporations](#)

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(f) Obtaining multiple legal opinions: In significant litigation, UKGI (via the Shareholder NED or Shareholder Team) should usually insist that the asset consider more than one external legal opinion to ensure that legal advice and identified risks are thoroughly tested. This could include obtaining a second opinion from a claimant friendly counsel to provide balance. A second opinion will be particularly important where the Shareholder NED or Shareholder Team consider that an asset's legal team has become entrenched in its views and a second perspective would help the Board and Shareholder Team test whether the litigation strategy remains agile and capable of reacting to unexpected outcomes.

In certain circumstances it may be necessary to input into instructions to Counsel being engaged to provide second opinions to ensure all risks are properly considered, particularly where it appears that the asset's legal team have become entrenched in their views. It may also, or alternatively, be appropriate to encourage the asset's board to employ its own litigation expert or advisor to help the board provide robust challenge to the asset's legal team.

UKGI has recent examples of where it has encouraged assets to obtain second opinions, for example by successfully asking the Chair of an asset to reconsider whether the legal advice received by the Board was sufficient in scope and in another circumstance, requesting (via the relevant Director General in a Department) that a Board seek a second opinion to ascertain whether settlement should be considered. *UKGI Legal can be engaged to help the Shareholder team and Shareholder NED consider options.*

(g) Choice of legal adviser: In substantial litigation cases, UKGI must be involved in an asset's decisions on when to consult or engage new lawyers (and potentially expert witnesses or other advisors) particularly where refreshed thinking on a course of action needed (for example if there is a change in the merits, an application or hearing is lost or there are other matters, which call into doubt the quality of the legal advice, expert opinion and support the asset is receiving). UKGI Shareholder Teams (together with the Shareholder NED) must consider periodically whether an asset's legal team composition remains effective and appropriate at relevant points in the conduct of litigation, to allow them to flag to the asset if they think testing the status quo is necessary.

To provide additional context, please see at Annex A lessons learned during the litigation from the Magnox dispute, which may assist Shareholder Teams with better understanding the level of oversight required with respect to substantial claims and disputes. Shareholder Teams should also refer to UKGI's written opening statement to the Post Office Horizon Inquiry of October 2022 ([link](#)), which provides our preliminary reflections (see paragraphs 224 to 229 of the opening statement) and lessons learned (see paragraphs 252 to 255 of the opening statement) on the handling of the group litigation claim brought by subpostmasters against Post Office.

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Annex A

Extract from UKGI Internal report into the Magnox contract/Litigation

Lessons during the 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.
- **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.
- **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.
- **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.
- **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".
- **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 are put and their authors appear before the asset's board so that the board is able to take strategic decisions with proper calibration of legal risk.
- **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.

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- **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.