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Subject: Grounds of Appeal against CIT
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Dear Tom,

I have seen your recent email to the clerks regarding future actions.

One future action that has not been mentioned - that I have been quietly working on, is the grounds of appeal against the CIT – which is quite a task given how much he has got wrong !

Although we have until after the time scheduled for the Horizon trial to apply to the Court of Appeal for permission, my sense is that it would be extremely useful to have an early draft of the (main) grounds of appeal to show the Court of Appeal on the appeal against refusal of the recusal – as it will be helpful so we can explain to them the nature and extent of the intended appeal against CIT.

My thinking is as follows. Faced with a recusal application the Court of Appeal may be concerned not to rubbish the whole of the completed (and expensive) CIT process (Horizon trial will already be undermined). If they can be assured (assisted by a draft grounds of appeal) that we would *not* be seeking a retrial – but a significant re-write of the CIT judgment- they may be less hostile. A draft grounds of appeal would show:

-) That the appeal is mainly on points of law.
-) That certain of the irrelevant findings of fact/observations are sought to be quashed – very unusual but possible.
-) That the appeal on fact is otherwise limited.

That said – the appeal against CIT will likely be up to 5 days. They may shy at the extent of the task – although putting the law right is what they are there to do. The alternative is to have a two week trial in front of a clever Commercial Court Judge who would make light work of this – thoughts ?

In doing the drafting it has also occurred to me that tactically given the situation they are now in - PO might want to consider accepting implied term (t) (or a slight variety on it) ie. that PO have a duty of reasonable

care when its dealing with matters associated with the accounting process with SPM's. This would be on the basis that it is "necessary." This coupled with the Agreed Implied terms of "necessary co-operation" should give the Court of Appeal a degree of comfort to deal with the problems highlighted by the Judge.

I thought I would mention this now so that people could start thinking about it. It would also focus yet further attention on the extent that *other* implied terms were "necessary".

Best,

D.

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