POL00022969

Message

From: Tom Beezer [tom.beezer GRO
Sent: 17/03/2019 10:47:23
To: Jane MacLeod [jane.macleod GRO]; Andrew Parsons [andrew.parsons GRO
CC: Rodric Williams [rodric.williams GRO]; Amy Prime [amy.prime GRO]
Subject: RE: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE. [WBDUK-AC.FID26896945]
Attachments: Post Office - Recusal Note (003)tb. 17.3.19.docx

Jane

A further version of the note attached. [**Amy**, please note this is not on Filesite – can you save "in".]

Points to note:

- There are some few sections in highlight. We need to take decisions over those. The highlight is really just a placeholder. We will be able to finalise those parts when I hear from Rob at OEC as to support from LGQC to recusal (or otherwise) and confirmation of call timings etc. I am in touch with Rob at OEC and when I hear back substantively I will revert to you. I know that Rob has already asked LGQC to respond today.

- **Your note 1**: I have deleted the "largely unfair" comment as it does not further the note generally and to get into a qualitative assessment of certain of the judicial quotes would be long and not help the Board in this circumstance. The quotes are what they are, and you'll see I have selected some into an Appendix "A". Whilst writing, I have got you selection of quotes. We can use yours or mine as "A". I don't mind which. Your call.

- **Your note 2**: I have deleted that first sentence about the effect of recusal. A debate as to what is struck out of the CIT Judgment or not is a side show as Bates et al have the CIT Judgment as it currently stands. It exists as a document in their hands already and if there is any judicial "strike through" (and I don't think there would be – in reality there would be replacement findings from the CofA) then where does that lead, as certain SPMs already have the offending CIT Judgment as it currently stands.

- **Your note 3**: done.

- **Your note 4**: agreed, it is really an appeal point not recusal but the sentence is helpful for the wider purposes of the note.

- **Your note 5**: I have deleted reference to comment in the Horizon trial as the real answer is we don't know. We are picking up signals, but that is subjective. There is no judgement yet that we can point to.

- **Your note 6**: I have clarified the text. I think the Judge would refuse to recuse himself and also refuse to adjourn the Horizon trial. That trial would press on whilst we rushed to the CofA.

Next Steps:

- As soon as I hear from OEC as to the chances of a view from LGQC today I'll let you know. Once we finalise the note (or even just the next iteration), I could send to OEC to see if we could get LGQC "OK" on the draft.
- We can look to finalise the note if you are happy.
- If LNQC is to be on a Board call on Monday should DCQC be on hand too as the central repository of facts and info to him? LNQC may wish that to occur anyway. In my speaking to Andy today (he calls me after I send e mails on this…) he reminds me how much I don't know about this matter. For example Andy reminds me that the comments we are making on Procedural Unfairness are wider than I had described – for example:
    - **1)** the Judge set up a whole process that was unfair in that the sequencing of trials has produced this situation, that is a *structural unfairness* point rather than a finding point and
    - **2)** that much of the judge's criticism of POL witnesses is based on their assumption that Horizon works and he (the Judge) says at times it does not, and at that point the Horizon trial had yet to even start.

The point here is that this a multi-faceted piece of litigation and LGQC/LNQC (and indeed me) will only have a certain scope of view, and LNQC may need to be supported on any call by DCQC.

Other comments:

- Andy tells me that Gideon did the BA Peter Smith recusal stuff. He was at the sharp end for BA on that.

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- Owen and LGQC are in the Supreme Court in some few weeks about a bias case. I learnt that today too – so LGQC must be fully up to speed on bias issues just now.

Kind regards
Tom

Tom Beezer
Partner
Womble Bond Dickinson (UK) LLP

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WOMBLE BOND DICKINSON

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From: Jane MacLeod [mailto:jane.macleod GRO]
Sent: 16 March 2019 18:14
To: Tom Beezer; Andrew Parsons
Cc: Rodric Williams; Amy Prime
Subject: RE: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE. [WBDUK-AC.FID26896945]

Tom

As discussed, I have made a number of comments and re-sequenced the draft paper – attached.

One key piece of work is to pull out some of the more egregious comments that the Judge has made – most of the Board will not have read the judgment, so it's worth putting these in an Appendix. I'll pull out my 'favourites' tonight and send them through.

Very happy to discuss the changes/comments.

Kind regards,

Jane

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POL00022969

From: Tom Beezer [mailto:tom.beezer GRO
Sent: 16 March 2019 13:31
To: Jane MacLeod <jane.macleod GRO ; andrew.parsons <andrew.parsons GRO
Cc: Rodric Williams <rodric.williams GRO ; Amy Prime <amy.prime GRO m>
Subject: RE: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE. [WBDUK-AC.FID26896945]

Jane

I have now had more input & comment from DCQC and Andy.

I attach:

- a clean Word Doc' of the current draft of the note (you'll see one comment from Andy in highlight, so this is still draft), and
- a 'compare' PDF which shows at a glance the additions that have been made from the version of the draft note that I sent you earlier.

All comments welcomed. If you would like a version w/o the highlight question (or section questioned) then let me know.

Kind regards

Tom Beezer
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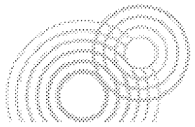

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From: Tom Beezer
Sent: 16 March 2019 11:03
To: 'Jane MacLeod'; Andrew Parsons
Cc: Rodric Williams; Amy Prime
Subject: RE: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE. [WBDUK-AC.FID26896945]

Jane

As you have an important call shortly I attach the note as it currently stands.

The draft note picks up some of your bullet points, but not all. It will need to be added to over the course of today (all comments gratefully received).

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I am tied up for an hour now but will be around this afternoon, just after 12.30.

I hope sending on the draft now is a helpful step.

t

From: Jane MacLeod [mailto:jane.macleod GRO
Sent: 16 March 2019 10:55
To: Tom Beezer; Andrew Parsons
Cc: Rodric Williams; Amy Prime
Subject: RE: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE. [WBDUK-AC.FID26896945]

Many thanks – I have a call at 12.15 with our Chairman, Al Cameron and our Minister Kelly Tolhurst (and others), although I don't believe recusal will be part of the discussion. I have been advised by the UKGI GC that 'government' will not express an opinion on recusal as they will not want the 'executive' to be seen to be criticising the 'judiciary'.

This will put more pressure on our Board, and the Chairman is acutely conscious that such an application will not sit well with the perception that PO is arrogant, whereas we are trying to edge towards 'contrition'.

That effect of that is that we need to be very clear what the risks will be of not proceeding with the application, which I imagine include:

- Impact on evidence given by PO witnesses (especially Angela) in the current Horizon trial, and the impact of that on our case;
- Extent to which this detracts from the 'procedural unfairness' grounds for appeal;
- Impact of delay - if we didn't bring the application 'now' and then decided that the Horizon judgement also demonstrated 'prejudice' – would we be able to use that also in an appeal on the Common Issues judgement (which almost certainly will be after the HIT judgment);
- Would result in (I assume?) only appeal grounds as being incorrect interpretation (and application) of the law. Although LNQC opinion seemed to suggest we had reasonably good grounds?

I'll look forward to receiving the draft, and will let you know if I need a call later today to discuss.

Kind regards,

Jane

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From: Tom Beezer [mailto:tom.beezer GRO
Sent: 16 March 2019 09:54
To: Jane MacLeod <jane.macleod GRO >; andrew.parsons <andrew.parsons GRO >
Cc: Rodric Williams <rodric.williams GRO >; Amy Prime <amy.prime GRO >
Subject: RE: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE. [WBDUK-AC.FID26896945]

Jane

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A short e mail as to timings. We will be sending you a draft "Board friendly" (I hope…) recusal note on or before lunchtime today.

I hope that works for you.

One of us will send over the draft in a short while.

t

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WOMBLE BOND DICKINSON

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From: Jane MacLeod [mailto:jane.macleod GRO
Sent: 15 March 2019 15:34
To: Tom Beezer; Andrew Parsons
Cc: Rodric Williams
Subject: FW: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE.
Importance: High

Tom, Andy

As discussed, set out below is the email I sent this morning to the Chairman and Tom Cooper setting out the proposal for the recusal application. We are setting up a board call for 5pm Monday, and I will need to issue a 'plain English' paper to the Board over the weekend to get them familiarised with the issue. In particular that will need to address:

- Why we are considering a recusal application
- What the application (if successful) will achieve
- Risks of not proceeding
- Prospects of success: what advice have we received, who from (LNQC but given speed with which it was produced - is it fully considered?; Will LGQC have read in sufficiently by then to also be able to offer an opinion? 'why we should believe them?')
- risks
- Process & timing

In addition, the following Monday (25th) we have a scheduled Board meeting and I will need to be able to brief in more detail on an appeal, recognising that it will still be a work in progress. However as we don't have another scheduled

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Board until end May, it is likely that we will need the Board to endorse the appeal strategy at end March, with a further approval meeting/call once the appeal grounds are finalised and we can assess 'risk'.

As mentioned I think that as part of the initial Appeal discussion, the board will want to understand the scale of the financial risk of:

(a) not appealing (and therefore how many existing & historic contracts will be affected by the judgement?)
(b) appealing and losing (same as above?)
(c) appealing and winning – restores contracts to pre-judgement position

Recognising in each case that the consequences apply not just to the claimant group but to all postmasters on those contracts types, and potentially, all those on other contract types but who have substantially the same provisions.

I will task one of my team to start looking at the modelling to support the legal analysis.

Kind regards,

Jane

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From: Jane MacLeod
Sent: 15 March 2019 08:19
To: Tim Parker <Tim.Parker GRO >; Thomas Cooper <tom.cooper1 GRO >
Cc: Alisdair Cameron <alisdair.cameron GRO >
Subject: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE.
Importance: High

Dear Tim and Tom

As flagged on the board call on Tuesday, we have sought further advice on appeals and as to whether we have grounds to request the judge to recuse himself on the grounds of bias.

Advice
We sought advice from Lord Neuberger who stepped down last year as the President of the Supreme Court (and as such was the highest judge in the U.K.). We sought his views as to whether the draft judgement demonstrated the following grounds for appeal:

- Whether the Judge has correctly interpreted and applied the law as to construction of a document or application of a principle of law;
- Whether there are grounds to argue that findings have been made as a result of serious procedural irregularity (which goes to the admission of, and reliance on, among other issues, inadmissible evidence), and
- (most urgently) Whether Mr Justice Fraser demonstrated grounds on which we could apply for him to recuse himself.

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The test for recusal is 'whether the fair-minded and informed observer, having considered the facts, would conclude there is a real possibility that the [Judge] was biased'.

Attached is Lord Neuberger's preliminary advice (Please note, in paragraph 11 he refers to 'the Note' – this is a note put together by David Cavendar QC summarising the key extracts of the judgement and trial transcript) . As you will see, in paragraph 5 Lord Neuberger states that although he has only looked at the issues very cursorily, "at least some of them raise quite significant points on which the PO has a reasonable case, and at least on the face of it, some points on which the PO has a pretty strong case."

Further however, he suggests (para 19) that if we wish to rely on the ground of procedural unfairness at an appeal, then 'PO has little option but to seek to get the Judge to recuse himself at this stage" and in para 20 that if we fail to act promptly during the Horizon trial we "risk being held to have waived [our] rights, or at least weakened our position on the recusal issue."

Timing

I have set out below the proposed process and timetable. This suggests that we should make the decision urgently - preferably not later than Monday with a view to making the application early to mid next week.

Risks

The risks with seeking for the Judge to recuse himself are:

a) The application is successful and the Horizon Trial is adjourned (and probably has to be re-heard by another judge); we proceed with an appeal on the Common Issues Trial (timing to be determined) and a new judge is put in place for remaining aspects of trials.
b) The application is unsuccessful (at first request and in the Court of Appeal) then it is likely that the judge is further antagonised, however he will be aware that the Common Issues appeal is progressing which includes the "procedural unfairness" assertion. Possible impact in that scenario is the Judge is more cautious as to behaviours to (possibly) POL's benefit.
c) The theoretical downside to a recusal application is that it fails and that Fraser remains the judge at Trial 3 which will require multiple findings of fact which are more tricky to appeal.

We should also not proceed with this course of action unless we are prepared to appeal a decision by him not to recuse himself.

In the meantime I propose today to brief a further senior silk today (probably Lord Grabiner) to act on the recusal application. Should the Board decide not to proceed, then we can withdraw the instructions; however as he will need reading in time, this parallel track will minimise delay.

Next steps

Tim, this is clearly a board decision and we would need to give the Board time to consider the options, however we would like to convene a call over the weekend or on Monday at the latest to discuss this proposal. Lord Neuberger is available for a conference call to discuss his views, although he is in Argentina, so there are some time considerations. Once he has read in, and assuming he agrees with Lord Neuberger, I expect Lord Grabiner would also be available for a call.

Tom, you have previously counselled us that any appeal should be discussed with the shareholder - please advise how we progress this as amateur of urgency?

Would we be able to talk today to consider the way forward?

Kind regards,

Jane

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LITIGATION PROCESS & TIMETABLE FOR RECUSAL APPLICATION

1) POL engage with the QC who is likely to be instructed to make recusal application ASAP (if one is made) to get QC "*warmed up*" to application, arguments to be deployed and (potentially) to speak to POL Board if needed, as the person who would in fact be the mouthpiece of POL. **Timing:** Friday for choice of QC and delivery of papers.

2) Assuming a QC is to be "*warmed up*" David Cavender QC to brief on background as fully as possible. **Timing:** Friday.

3) POL to decide if it is to make a recusal application. **Timing:** By (say) Monday.

4) POL Board may wish to speak to Lord Neuberger as part of their decision making process. The Clerks at OEC have confirmed that is possible and have contact numbers for Lord Neuberger as needed. **Please NOTE** Lord Neuberger is in South America (Argentina).

5) As soon as decision to make application has been made (if that transpires) Freeths & Judge to be put on notice. Suggested "appropriate" notice period is one day (or more if decision made earlier than early next week). Freeths put on notice by letter from WBD (or possibly Counsel to Counsel) and the Judge by a note between the Clerks ? **Timing:** early next week once decision to proceed made.

6) Gideon Cohen (at One ESSex Court and already part of the Counsel team) to be instructed to be Junior to chosen QC. **Timing:** Friday, if "warm up" route followed.

7) QC & Gideon prepare Application Notice and Skeleton for recusal application. This work could **start now** if we follow the "warm up" route.

8) Application is made first half of next week at 10am during the Horizon trial. Thereafter there are variables:

   a. Judge may agree. Unlikely but possible. HIT trial is adjourned there and then and POL appeals the CIT findings and (if successful) we re-list CIT & HIT.
   b. Judge may pass matter to another judge to hear. Unlikely.
   c. Judge refuses (likely) and POL takes that refusal to Court of Appeal asap. That could be same day (possible but unlikely) or at that same week at some point if CofA recognise urgency.
   d. CofA may agree with recusal application. If so, POL appeals the CIT findings and (if successful) we re-list HIT.
   e. CofA may refuse recusal application in which case HIT rolls on.

Please note in any scenario where HIT is adjourned then there will be possible increased costs consequences for Claimants that POL could bear if it is ultimately unsuccessful.

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