UKGI00009308

From: Watson, Richard - UKGI[/O=HMT/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E8568E9D213F4097A7A65F3DA4F63CC1-WATSON, RICHARD (RWA]

Sent: Wed 20/03/2019 9:48:47 AM (UTC)

To: Evans, Gareth (BEIS)[GRO]; Cooper, Tom - UKGI[GRO]

Cc: Chisholm, Alex (BEIS)[GRO]; Kilgarriff, Patrick (Legal)[GRO]

Subject: Re: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

Thanks both

Kind regards

Richard

Sent from my BlackBerry — the most secure mobile device

From: Gareth.Evans[GRO]
Sent: 20 March 2019 9:46 am
To: Tom.Cooper[GRO]; Richard.Watson[GRO]
Cc: Alex.Chisholm[GRO]; patrick.kilgarriff[GRO]
Subject: RE: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

Richard

Yes. Clearly the Minister should be given an opportunity to understand POL's decision but it is for the Board to decide whether to apply for a recusal (or the variant described by Tom) guided by their officials and Counsel and there should not be a situation where the Board takes a decision subject to endorsement or otherwise by the Minister. This should be a decision that is taken by the Board, on the merits of the litigation advice

Gareth

Gareth Evans

Deputy Director – Industry, Investments and State Aid Team

BEIS Legal Advisers

Government Legal Department

LG Orchard 2, 1 Victoria Street, London SW1H 0ET
Tel: GRO | Mobile: GRO

GRO

www.gov.uk/gld

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From: Cooper, Tom - UKGI <GRO>
Sent: 20 March 2019 09:33

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To: Watson, Richard - UKGI <GRO>
Cc: Chisholm, Alex (BEIS) <GRO>; Kilgarriff, Patrick (Legal) <GRO>; Evans, Gareth (BEIS) <GRO>
Subject: Re: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

I have no intention of engineering such an outcome of the Board meeting.

Tom

Sent from my iPhone
On 20 Mar 2019, at 09:21, Watson, Richard - UKGI <GRO> wrote:

> All
>
> Are we agreed that we should not try to engineer a position today whereby if the board decides to proceed with recusal the Minister is given a chance to object i.e some sort of conditional board approval. As shareholder I don't consider she has the legal power to prevent this even if it was an appropriate thing for her to express a view on, which I think we agree it isn't but instead is properly a matter for the board.
>
> It is of course proper for the Minister to understand POL's decision and why their position might have changed since her call with the chair on the weekend. I understand that might be the subject of a call with the Minister later today
>
> Kind regards
>
> Richard
>
> Sent from my BlackBerry — the most secure mobile device
> **From:** Richard.Watson GRO
> **Sent:** 20 March 2019 8:04 am
> **To:** Tom.Cooper GRO
> **Cc:** Alex.Chisholm GRO; patrick.kilgarriff GRO; Gareth.Evans GRO
> **Subject:** Re: Fwd: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE
>
> Tom
>
> Thanks. Alex sums up my view perfectly. I am copying in Patrick and Gareth who I think share the same view
>
> Kind regards
>
> Richard
>
> Sent from my BlackBerry — the most secure mobile device
> **From:** Tom.Cooper GRO
> **Sent:** 20 March 2019 7:05 am
> **To:** Richard.Watson GRO
> **Cc:** Alex.Chisholm GRO
> **Subject:** Fwd: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

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Richard

I told Alex that you would agree with this but feel free to comment further

Tom

Sent from my iPhone
Begin forwarded message:

> **From:** "Chisholm, Alex (BEIS)" <GRO>
> **Date:** 19 March 2019 at 22:00:45 GMT
> **To:** "Cooper, Tom - UKGI" <GRO>
> **Subject: Re: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE**
>
> Fair comment? What does UKGI legal say?
>
> Get Outlook for iOS

From: Chisholm, Alex (BEIS) <GRO>
Sent: Tuesday, March 19, 2019 9:23 pm
To: Cooper, Tom - UKGI
Subject: Re: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

Very helpful.

I have now read all this legal advice.

Personally I find Justice Fraser in this case (as in the Magnox case) to be opinionated, exacting, and rather inclined to personalise matters. But not (to my layman's mind) obviously wrong or biased.

I also share the concern that a recusal attempt risks further antagonising him (if unsuccessful) and also positioning POL in public as aggressive and in denial about its shortcomings (which impression would be consistent with the judge's findings to date).

However my personal view of the case - formed from a rapid perusal of the judgement and all the legal commentary you kindly provided - does not matter as (a) I am not a lawyer and, anyway (b) the department is not controlling the case - that is properly a matter for POL and their advisors.

And I appreciate that POL have very properly decided this should be a matter for the Board to decide (ie not the Executive alone) and that they have sought the best external counsel (not just the current legal team) including from previously unengaged experts with unsurpassable credentials (former President of the Supreme Court).

Their collective advice is that the judge has shown unfairness in his procedure as well as legal
errors in using post-contractual behaviours to inform his judgement of the nature of the contract itself. They also think that his many critical remarks about POL show bias. Further that this unfairness strikes so hard at the root of the case that it cannot be rectified other than by a recusal (voluntary or enforced) of the judge himself.

The advice properly recognises that a recusal attempt is a high bar and presents significant

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risks - I highlight the passages below.

"17. There are both legal and reputational risks of proceeding with the application for recusal. The legal risks (an unsuccessful application, which would further antagonise the Judge, and material costs) are described in the WBD paper.

18. However there are significant reputational and stakeholder risks and these need to be set against the legal benefits. Challenging a judge for bias – particularly in these circumstances, will be seen as very aggressive behaviour by Post Office and will play directly into the criticism that Post Office is oppressive in its behaviour towards postmasters and in its conduct of the case, and will be construed as running counter to the recent messaging following the judgment that 'we are listening'. It could potentially have much greater media coverage than the judgment; will be heavily criticised by the CWU and vocal postmaster bodies, and will drive further parliamentary activity from MPs of both parties."

The advice also assesses the chances of success as reasonable - and the costs and risks of not appealing as significant, especially as this first case rather over-shadows what will follow in the three following.

Proceeding with the appeal and recusal attempt risks identifying the organisation's leadership today with the negative historic behaviours of which POL stands accused. But it is not obviously mistaken or otherwise inappropriate.

The Board will want to reflect carefully on all these matters. For my part I am satisfied that the POL Board is the right body to do this; and that it has been properly advised.

The Department should maintain its clearly distinct and detached position, so that it is free and credible for dealing with the consequences as they unfold. Ministers may want to show appropriate concern about the criticisms and may express a desire for POL to act appropriately but should not comment substantively in ongoing litigation in which the department has a clear interest but no direct involvement.

Alex

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From: Cooper, Tom - UKGI <GRO>
Sent: Tuesday, March 19, 2019 7:11 pm
To: Chisholm, Alex (BEIS)
Subject: Fwd: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

Alex

Papers attached. We're told that Grabiner is more bullish than Neuberger. We're meeting him tomorrow.

We've asked if the advice is being firmed up before a decision is taken.

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POL has also now added Norton Rose to act as shadow and advise the Board. They are joining the Board meeting tomorrow.

I'll be off the train at around 8.

Tom

Sent from my iPhone
Begin forwarded message:

From: <GRO>
Date: 17 March 2019 at 22:55:01 GMT
To: <GRO>
Subject: Fwd: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

Will need your help with this

Tom

Sent from my iPhone
Begin forwarded message:

From: Thomas Cooper <GRO>
Date: 17 March 2019 at 22:42:30 GMT
To: "tom.cooper" <GRO> <GRO>
Subject: Fwd: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

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From: Jane MacLeod
Sent: Sunday, March 17, 2019 10:40:35 PM
To: Tim Parker; Ken McCall1; Carla Stent1; Thomas Cooper; Shirine Khoury-Haq; Tim.Franklin1
Cc: Alisdair Cameron; Paula Vennells; Veronica Branton
Subject: Recusal CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

All

As flagged last week, the judgment in the Common Issues Trial was handed down on Friday in substantially similar form to the embargoed draft. We must now turn to the questions as to what are our legal options, and how do we address the consequences of the judgment from an operational perspective?

Board Timetable
We have arranged 2 board calls this week (Monday at 5.15 pm

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and Wednesday at 12.30 pm) in addition to the scheduled Board meeting on 25 March. We propose that we discuss the 'recusal option' at the Board call tomorrow (Monday) evening, as there are adverse consequences if we delay. Wednesday had been proposed to discuss the operational impacts and mitigating plans, however if thought appropriate, this discussion could be addressed at the scheduled Board meeting next Monday.

Recusal
Attached are the following papers:

- Draft paper from me ('Recusal 2019-3-18') which recommends the recusal application and retained counsel;

- Lord Neuberger's preliminary advice ('4852_001.pdf') as to appeal and recusal received on Thursday 14 March; and

- Advice from WBD ('Post Office - Recusal Note'), which has been reviewed by David Cavendar QC and which Lord Grabiner has seen, and verbally endorsed.

The Counsel team, with which I concur, recommends bringing an application for recusal. As set out in the attached papers, this is not without risk. However there are equally, risks of not bringing the recusal application (as set out in both my and WBD's paper), and on balance my view is that the risks of not bringing the application for recusal (predominantly the risk of an adverse outcome in the current Horizon trial and the 'third trial' due to the Judge's decision that Post Office witnesses are 'unreliable') outweigh those of making the application, although this is a finely balanced consideration, and the Board may consider these risks differently.

Unfortunately Lord Grabiner has a prior commitment and cannot make the 5.15 board call tomorrow. At the time of writing I believe that Lord Neuberger QC will be available to dial in to the Board discussion, notwithstanding he is currently in South America.

I appreciate these are difficult decisions and the requirement for them to be made in a truncated timetable is not ideal . I am available during most of tomorrow (Monday) should anyone wish to discuss these ahead of the Board call.

Kind regards,

Jane

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