

Message

From: Alisdair Cameron [GRO]
on behalf of Alisdair Cameron <[GRO]>
Sent: 15/03/2019 10:49:21
To: Thomas Cooper [GRO]; Jane MacLeod [GRO]; Tim Parker [GRO]
Subject: RE: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE.

Thanks Tom and I completely share the instinctive reactions. However, the essence of the advice as I read it is that this is a decision that is urgent and if we don't make it urgently then we will have made the decision not to do it. And the advice also set out that that may be damaging to PO, putting us in a position where we have effectively accepted the Judge's approach. I think there are strong arguments both ways but keen to make sure we make a decision rather than letting time make it for us. Thanks Al



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[GRO]

From: Thomas Cooper <[GRO]>
Sent: 15 March 2019 08:42
To: Jane MacLeod <[GRO]>; Tim Parker <[GRO]>
Cc: Alisdair Cameron <[GRO]>
Subject: Re: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE.

Jane

I'm free until noon and then late afternoon.

A couple of immediate reactions to your email:

- I'm very comfortable with an appeal based on everything I've heard. Clearly that's a very high level comment and there will be a lot of detail to work through but no doubt you'll convince us it has legal but also tactical merit

- I am much less comfortable with the idea of going after the judge and seeking recusal. I don't see how we can reach a view on that by Monday nor how we can sensibly take a decision like that based on a cursory reading by Neuberger. I haven't read his note yet. This is something where we need 100% certainty of success and the record in that department hasn't been good so far. For what it's worth I know that Lord Justice Fraser is respected in BEIS even though he has ruled against us on previous occasions - although that obviously doesn't mean he is right or has been fair in this case.

Tom

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From: Jane MacLeod <GRO>
Sent: Friday, March 15, 2019 8:19 am
To: Tim Parker; Thomas Cooper
Cc: Alisdair Cameron
Subject: URGENT: Litigation Options - CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE.

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.

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 a matter 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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