

Minutes of an extraordinary meeting of the Legal Services Board (LSB) held by telephone conference on 18 January 2012

Date: 18 January 2012

Time: 8.30am to 9.30am

Venue: Victoria House, Southampton Row, London WC1B 4AD

Present: David Edmonds, Chairman (by telephone)
Chris Kenny, Chief Executive (in person)
Steve Green (by telephone)
Bill Moyes (by telephone)
Ed Nally (by telephone)
Barbara Saunders (by telephone)
Nicole Smith (by telephone)
Andrew Whittaker (by telephone)
David Wolfe (by telephone)

In attendance: Nick Glockling, Legal Director (in person)
Paul Greening, Regulatory Associate (in person)
Bruce Macmillan, General Counsel (telephone until 9am, then in person)
Julie Myers, Corporate Director (in person)
Crispin Passmore, Strategy Director (in person)
Holly Perry, Corporate Governance Manager (Minutes)

Welcome

1. The Chairman welcomed those present and in attendance to the meeting. There were no apologies for absence.

Item 1 – Paper (12) 01: BSB amendments to Cab Rank Rule

The Chairman invited Chris Kenny (Chief Executive) to introduce the item with an overview of the process. The BSB had submitted a rule change application that sought to make two substantive changes to the way the Cab Rank Rule operated. The changes would be approved automatically on 23 January unless a decision was made to the contrary. On the basis of executive analysis, internal legal advice and further external advice from Hogan Lovells and the views of NEDs consulted to date, the Chief Executive was minded to issue the BSB with a warning notice, but as this would be the first time that the LSB was having to decide actively whether to issue a warning notice, he was seeking the views of the full Board.

The key concerns in summary were: (a) the changes appeared inconsistent with the regulatory objectives and better regulation principles; (b) there appeared to be potential regulatory conflict arising from the binding contract terms and (c) there was insufficient relevant explanation and evidence provided to date to justify the stance the BSB was taking, in the LSB's view.

The Board noted that:

- the warning notice was not a decision to reject the application – in line with Schedule 4 of the Act, the issuing of a notice allowed the LSB to extend the decision period in order to further assess the application and to seek more targeted input, including from the OFT and both regulator and representative arms of the approved regulators, before reaching a final decision;
- discussions with BSB had been ongoing since receipt of the application at the end of October 2011. There had been regular feedback and engagement, including with BSB non-executives, to ensure LSB had dealt as promptly as practicable with the application and had been open about its concerns. However, the BSB had failed to articulate adequately the problem the rule changes were proposing to solve, and the level of input to date from BSB had not sufficiently addressed the criteria to which the LSB needed to have regard in making a decision. In particular, it appeared unclear why the regulator was involved in enshrining contractual terms and conditions as a regulatory arrangement which was mandatory in certain circumstances and which seemed prima facie to be both contrary to its Better Regulation duties and an activity that would be far more appropriate as guidance from a representative body. The fact that the terms appear discriminatory in effect between different parts of the profession and their clients was similarly a major concern;
- the BSB had been due to respond to the LSB with a number of clarifications in respect of the terms and conditions after the Christmas break however to date this had not been received¹;
- the rule change application was wholly stand-alone from the issue of the revisions to the whole Code of Conduct, changes to which the BSB was expected to submit to the LSB later in the year. LSB staff had spent considerable time at senior levels engaging on these wider issues with BSB. The Board would discuss relations generally with the BSB at its next meeting;
- on legal exposure, the Board noted that the scope for criticism that the LSB had neither approved nor rejected the rule changes was limited by the level of work done and engagement made with the BSB over the period since the application was made. The warning notice would make explicitly clear that the reason a decision was not possible related to a lack of evidence to support a decision either way, thereby creating a need to have more time to address the evidence gaps before making a decision. It was noted that there were also clear risks if the LSB failed to act and allowed the application to be approved by default given the substantial number of material issues raised by the application and which remained under discussion with BSB and unresolved at the date when it was necessary to

¹ The clarification from BSB on the terms and conditions was received later on 18 January and given preliminary consideration at the Conference with Counsel later that day. Its revised terms and explanatory notes have addressed only some of the concerns we raised and, in some cases, added to them by introducing more discriminatory effects.

- make the decision about whether to issue the warning notice;
- Final advice from Counsel (on the advice from Hogan Lovells on barristers' ability to contract and recover fees under current and proposed arrangements) was due later on 18 January and Board members would be notified of Counsel's advice raised materially new issues or ran contrary to the position discussed².

The Board:

- a. **endorsed the Chief Executive's initial view to issue a warning notice to the BSB in respect of its application to make alterations to the Cab Rank Rule, subject to the final assurances from Counsel to be sought later on 18 January³;**
- b. **noted the communications plan, which was to place a 'latest news' item on the LSB website in respect of the warning notice, which would make clear that the notice was not a final decision but a piece of regulatory business as usual;**
- c. **noted that MoJ would be briefed;**
- d. **noted that relations with the BSB would be discussed further at the 25 January meeting of the Board;**
- e. **invited the Chief Executive to proceed as proposed, in the light of its guidance and final input from Counsel.**

Any other business

There was no other business. The Chairman closed the meeting by thanking Board members for their contributions and for sparing the time to participate in the extraordinary meeting.

Date of next meeting

The Board would next meet on 25 January 2012. The venue would be LSB's offices at Victoria House, Southampton Row, London WC1B 4AD.

HP 18.01.12

Signed as an accurate record of the meeting

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Date

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² It did not.

³ Counsel's view was consistent with the Chief Executive's view on the need to issue a warning notice