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The Board of Directors
Equitable Members Action Group Ltd.

By email only

Dear Sirs

Sir John Chadwick's appointment

You have drawn my attention to the Guide to Judicial Conduct ("the Guide"), which was last updated in March 2008. You have asked me to consider whether Sir John Chadwick's appointment to advise the Treasury is incompatible with the Guide and, if so, what consequences may follow. The Guide reflects fundamental constitutional principles of judicial independence and impartiality and the separation of powers, which are elements of the rule of law. It is to these principles that regard must be had.

The Guide

The relevant parts of the Guide are as follows:

"2. Judicial Independence

2.1 Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. The judiciary, whether viewed as an entity or by its individual membership, is and must be seen to be, independent of the legislative and executive arms of government. The relationship between the judiciary and the other arms should be one of mutual respect, each recognising the proper role of the others. Judges should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence."

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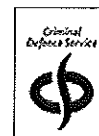
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“5.1 Propriety

5.1 (11) Subject to the proper performance of judicial duties, a judge may:

(11.3) serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge.”

“9. After retirement

9.1 The conditions of appointment to judicial office provide that judges accept appointment on the understanding that following the termination of their appointment they will not return to private practice as a barrister or a solicitor and will not provide services, on whatever basis, as an advocate in any court or tribunal in England and Wales or elsewhere, including any international court or tribunal, in return for remuneration of any kind, or offer or provide legal advice to any person. The terms of appointment accept that a former judge may provide services as an independent arbitrator/mediator and may receive remuneration for lectures, talks or articles.

9.2 Even in retirement a former judge may still be regarded by the general public as a representative of the judiciary and any activity that might tarnish the reputation of the judiciary should be avoided.” (emphasis added)

Background

The Guide sets out a well established position. In response to a consultation by the then Lord Chancellor Lord Falconer on return to practice by former judges, a Working Party of the Judges’ Council chaired by Lord Justice Gage reported in 2006. The Working Party recorded the strong opposition of the Judges’ Council to the proposal that retired judges should be allowed to return to practice. At paragraph 9(iii), the Working Party repeated the views of an earlier Working Party that

“It is universally agreed that members of the full-time judiciary should be precluded from returning to practice. If this were not so, it might be seen seriously to undermine judicial independence.”

At paragraph 10 Lord Justice Gage’s Working Party said:

“If return to practice becomes the norm or even something which was overly permitted or encouraged it would inevitably diminish the standing of the judiciary and seriously weaken its independence.”

At paragraph 11 it said:

“It is a matter of perception, as always so important to the maintenance of confidence in the standing and integrity of an institution. ... But if the public in general or litigants in particular know that judges may be returning to the legal marketplace, the perception of possible bias will be a constant threat. ... The track record of being a judge is commercially saleable, but should not be on the market. It has similarities with the saleability of being a former minister or senior civil servant, the exploitation of which has not enhanced the standing of the relevant arms of public service. The perception of bias will also arise where a litigant appears before a Judge who, say, three months after the conclusion of the case, joins the firm of solicitors which represented the litigant’s opponent party.”

At paragraph 13 the Working Party said:

“...return to practice means a return to the legal market, where work is done for reward for a cause and for a litigant. In that regard we would draw a sharp distinction between a return to arbitrate, to mediate, or to give expert evidence in a foreign court as to the law of England and Wales. Although all those tasks are routinely carried out by those in private legal practice, the tasks involved all require the exercise of independence, objectivity and authority, these being the hallmarks of a judge. It seems to us that the conduct of those tasks for reward by a former judge is quite different in character from a return to private legal practice.”

The Working Party concluded unanimously that the convention against returning to practice after retirement should be adhered to by all members of the judiciary. It was not persuaded that adequate safeguards or conditions could be put in place which would overcome the objections of principle to departing from that convention.

Notwithstanding those firm conclusions, the Lord Chancellor decided to press ahead with changes and in September 2006 embarked on a further consultation as to how they should be effected. The Judges’ Council convened a further Working Group, under the chairmanship of Lord Justice Pill, which reported in November 2006. This group endorsed the conclusions of the previous Working Party. It said that it was unfortunate that the Lord Chancellor had made “a policy decision entirely contrary to the views expressed by the judiciary” (2.6). At paragraph 4.1 it concluded that it was not in the public interest.

At 6.3 the Working Group agreed that if (contrary to the Council’s primary position) return to practice were allowed, there should be a bar on employment with any firm which had appeared before the judge in the preceding two years. The Group agreed with the reason given in the Government’s consultation document at 3(a), namely that this would provide additional assurance against the small risk “of actual or perceived conflict of interest, were suspicions to arise that a judge had

decided a case with an eye to his or her future employment prospects with, say, a party or a party's legal representative."

In November 2007 the Lord Chancellor published his response to the consultation, indicating that he was "minded not to pursue the policy of allowing former salaried judges to return to legal practice." The practice remains in place and it is reflected in the most recent issue of the Guide.

The strong objections of the Judges' Council were based on the principles of judicial independence and integrity, the separation of powers and the rule of law. This is an area in which appearances matter, even where there is no actual bias or lack of independence. What is important, therefore, is not simply a question of compatibility with the Guide. The important issue is the constitutional principle which the Guide expresses.

Sir John Chadwick's role

I have considered whether Sir John Chadwick's role is compatible with the terms of the Guide and the principles which it embodies.

The Chief Secretary said in her statement to the Commons on 15 January 2009: "We have also asked former Lord Justice of the Court of Appeal, the Rt Hon Sir John Chadwick to look at the information and to advise us..." Elsewhere the statement also refers to Sir John providing advice.

The Executive Summary of the Command Paper stipulates that "The Government has invited the Rt Hon Sir John Chadwick to advise the Government on the matters relevant to disproportionate impact suffered by current and former Equitable Life policyholders." At 5.33 the paper says:

"With the benefit of Sir John's advice, and taking account of the position of the public finances, and practical considerations, the Government will introduce a fair payment scheme for policyholders."

The Terms of Reference indicate that

"Sir John Chadwick ("Sir John") is appointed by HM Treasury to advise on matters arising from the Government's response to the Parliamentary Ombudsman's investigation into the prudential regulation of the Equitable Life Assurance Society."

The response also makes clear that he is under no obligation to receive representations from any third party, although he may do so if he considers it necessary. The Government itself, however, reserves the right to make representations to him on the question of the effect of the Equitable's conduct on the loss suffered by policyholders.

There is no obligation on the Government to disclose Sir John's advice to anyone or to act on it. However, Angela Eagle told the Commons on 27 January 2009 that:

“We hope that he [Sir John] will give us interim reports. We want the information to be shared as it is generated. As his work reveals the nature and extent of the practical issues before us, we will put in place a parallel system to ensure that delivery is as quick as possible.”

It is also noteworthy that his instructions are to accept only those findings which the Government has accepted and only to the extent accepted by the Government (see further below).

Compliance

It appears from the passages from the Government’s response which I have cited that Sir John has been retained to give advice to the Government. That is prima facie incompatible with the terms of the Guide and the convention to which the Judges’ Council has referred, unless the appointment comes within any recognised exception. There is an exception where a judge or retired judge accepts an appointment to:

“...serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge”.

The Government may seek to argue that Sir John is serving as a ‘one-man commission’, exercising independence, objectivity and authority. It may refer to its having considered whether to give him statutory backing (paragraph 5.29 of the response). Such an argument would be based more on semantics than substance and I consider it would be difficult to make out.

It is interesting to compare Sir John’s terms of reference with the terms of reference of independent inquiries. The following terms, relating to the Penrose inquiry, illustrate the point:

“To enquire into the circumstances leading to the current situation of the Equitable Life Assurance Society, taking account of relevant life market background; to identify any lessons to be learnt for the conduct, administration and regulation of life assurance business; and to give a report thereon to Treasury Ministers.”

By contrast Sir John Chadwick’s terms of reference provide that “Sir John will advise HM Treasury...”

The terms of reference make clear that Sir John is providing legal advice to the Government. He is not part of a commission or advisory body. He is not instructed to prepare a report, which may be presented to Parliament itself and then form the subject of debate. Instead he is asked to “advise as quickly as he is able, including providing interim updates and conclusions on a continuing basis so that work can progress on the practical issues in parallel without waiting unnecessarily for all

his work to be concluded.” There is no provision for publication of his advice, although the Government has told the Commons that it will “share” any interim reports he may prepare as they are generated. It appears, however, that his advice will be implemented (if accepted) without debate in Parliament. It is not envisaged that he should make new findings, gather new evidence. He may even decide not to entertain representations (although he is not precluded from doing so).

I conclude that is not a case in which Sir John has been asked to “to arbitrate, to mediate, or to give expert evidence in a foreign court as to the law of England and Wales” (in the words of Lord Justice Gage’s Working Party). The Government may argue that what it is asking of him to do is an “exercise of independence, objectivity and authority” in providing his advice. However, he has been asked to advise the Government on how to implement *its own* proposed ex gratia payment arrangements in response only to those limited parts of an independent report which the Government has accepted. His terms of reference also limit the scope of the injustice which the Government says it accepts within bounds narrower than that found by the Ombudsman.

There are additional features which are particularly relevant to consideration of this appointment.

First, this is a matter of considerable political controversy. The Government is aware that there has been much debate over the Equitable Life and much pressure on it to accept this highly critical report and its expensive recommendations. Controversially, it has rejected many of the findings, and Sir John is instructed to advise only in respect of the consequences of those findings which it has accepted.

Second, it is a matter of constitutional importance. Once again, the Government has rejected a detailed and carefully reasoned report of the Ombudsman, preferring its own conclusions to hers. This matter is controversial in relation to separation of powers between the Executive and Parliament, whose officer the Ombudsman is.

The extent of this controversy can be seen from the Ombudsman’s Memorandum to the Public Administration Select Committee (PASC). At paragraph 30 she sets out her view that (a) the Government’s response provides insufficient support for the rejection of her findings; and (b) it also fails to address the basis on which she came to several of her findings when it rejects those findings. Paragraphs 31 - 36 explain in detail her criticisms of the Government’s alternative remedy, on which Sir John Chadwick has been asked to advise.

In her oral evidence to PASC on 29 January 2009, the Ombudsman made clear in her opening remarks that she was not persuaded that the Government has given cogent reasons for rejection of her findings of maladministration and injustice. She was also extremely critical of that part of the Government’s response which seeks to limit compensation by reference to a principle that the public purse should not normally meet the cost of regulatory failure. Moreover, she reserved particular criticism for the second bullet point in Sir John’s Terms of Reference:

"The last thing I want to say is what I believe is a complete red herring in the Government's response, and that is the task which Sir John Chadwick has been given to assess the proportion of losses which can be attributed to the maladministration accepted by the Government, the actions of Equitable Life and its advisers. As far as the injustice or, if you like, losses, which I have identified in my report is concerned, assigning relative culpability between maladministration and the actions of others is unnecessary. The remedy I recommended was for injustice resulting from maladministration and not for anything else. Relative loss, as I explained in my report, already excludes other causes and the Society cannot be held responsible for the failures of the regulators. I can help Sir John with that part of his task. The answer is that none of the injustice which I have found can be attributed to the actions of Equitable and its advisers; they were not the subject of my investigation."

Sir John is precluded from expressing an opinion on any of these issues, since his terms of reference require him to:

"Accept as correct and be able to consider all of the Ombudsman's findings of both maladministration and injustice in so far as those findings are accepted by the Government, but disregard findings which are not accepted".

Thirdly, controversy as to the relationship between the Ombudsman and the Government has very recently been before the courts, so that the judicial arm of government has also been involved. Following his retirement, Sir John Chadwick himself wrote the leading judgment upon this very issue. The Government cannot have been unaware that its rejection of the Ombudsman's report might lead to litigation (as its rejection of the occupational pensions report did). Sir John Chadwick's engagement as part of the Government's response might suggest to observers that he has in some measure endorsed that response as being in accordance with the terms of the judgment which he gave in the *Bradley* case. Even if that is not his position in fact, that might be the appearance.

Moreover, it is to be noted that the Government was a party to the dispute - on which Sir John adjudicated - about the very issue which will arise in any challenge to the Government's response. It is hard to imagine that a judge who had determined an issue between two non-government parties would, after retirement, accept an appointment to advise one party on a controversial issue related to that on which the judge had been called upon to rule. Such an approach would tend to undermine the appearance of judicial independence and impartiality. It involves the appropriation of judicial authority, potentially for the benefit of one party against its opponents.

Conclusions

For the reasons set out above, I conclude that Sir John Chadwick's acceptance of instructions to advise the Government is incompatible with the terms of the Guide and, more significantly, with the fundamental constitutional principles of judicial independence and the separation of powers which it reflects. These are aspects of the rule of law in a democratic society. The "existing constitutional principle of the rule of law" is expressly recognised (if such recognition were considered necessary) by section 1 of the Constitutional Reform Act 2005. Section 3 of the same Act recognises the principle of judicial independence. Section 3(1) provides that:

"The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary."

If, therefore, the appointment of Sir John Chadwick would undermine judicial independence, a Minister making such an appointment would not be upholding the continued independence of the judiciary.

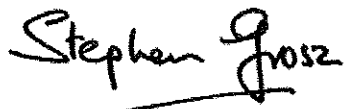
Secondly, in the absence of express legislative power, a Minister cannot act in a way which is contrary to fundamental constitutional rights. It is possible to argue that this extends to the abrogation of fundamental constitutional principle, such as judicial independence.

Thirdly, the Lord Chancellor has recently consulted on, and decided to retain, the prohibition on retired judges providing legal advice to any person. The decision to instruct Sir John appears to contradict the Lord Chancellor's decision. It may be argued that it is irrational and/or in breach of a legitimate expectation, and in consequence an abuse of power, for the Government to appoint Sir John Chadwick to advise it in such a matter as this.

Next steps

I suggest that this advice be drawn to the attention of the Minister responsible, now the Economic Secretary to the Treasury Ian Pearson MP. I suggest that it also be sent to the Lord Chancellor. It would be sensible to copy the correspondence to the Lord Chief Justice and courteous to copy it to Sir John Chadwick. The covering letters must make clear that the contents of this advice are not intended to impugn Sir John's personal or professional integrity.

Yours sincerely



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