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ROYAL COURTS OF JUSTICE

LONDON, WC2A 2LL

01-405 7641 Extn 3201

29 July 1980

The Rt Hon David Howell MP
Secretary of State for Energy
Thames House South
Millbank
LONDON S W 1

Dear David,

DISPOSAL OF BGC ASSETS

I have seen your letter of 24 July to Keith Joseph, and am writing to give the legal advice now required in connection with a forced sale of Wytch Farm.

2. The proposal for disposing of BGC assets which E(DL) on 24 June agreed should be put to me (item 1 Conclusion (3) of the minutes) was of course quite different from the one now under review, and I thought it best not to give any legal advice until the issues to be put to E had been clarified following your discussions with the Chairman of BGC.
3. This turns out to have been fortunate because I do not think that the anxieties which E(DL) has expressed have any foundation in the context of what is now being considered, namely a sale of the Wytch Farm asset by direction under section 7(2) of the Gas Act 1972. On the basis that BGC oil assets might be disposed of by means of the setting up and floatation of a company, E(DL) was, I think, concerned that the advice I gave at the end of last year about the BP share sales might be relevant and could be a constraint.
4. However, in the new circumstances I do not think my earlier advice is pertinent. It can be discounted for the following reasons -
 - (1) we are not concerned, as in the case of BP, with liability for non-disclosure or false or misleading statements in a prospectus for the issue of shares, where particular rules apply;
 - (2) in any event HMG would not be the vendor, as it was in the case of the BP shares; and
 - (3) we are not at this stage concerned, as we were in the case of the BP sale, with specific fiscal policies which when announced could have an effect on the value of oil assets.

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5. The issue for consideration here is a different one. It is whether it would be safe for you to issue a direction under section 7(2) of the 1972 Act to compel BGC to sell Wytch Farm towards the end of this financial year, given that HMG may then be forming policies for changes in tax that may affect its value. Or, put another way, whether having issued that direction you are under some legal duty to inform BGC or intending purchasers or both of any such factor so it can be taken into account in fixing the price.
6. I think the answer to this is almost certainly "no". Of course the law recognises a liability for failing to disclose relevant facts, but this depends on the existence of a contractual or fiduciary relationship with those affected, and you would not be in that position since you would not be the vendor of the asset nor would the fact that you had acted under section 7(2) create such a relationship.
7. I have also considered the possibility that a section 7(2) direction might itself be attacked on grounds that it had been issued in bad faith, in the knowledge that the price of Wytch Farm could be affected for the worse by particular tax changes.
8. But it is common knowledge that HMG reviews taxation prior to the Budget, and those who are in the market for particular assets must be taken to be aware of this. Moreover, I think the courts would be extremely reluctant to upset the principle of confidentiality of Budget decisions in favour of one or more purchasers of Wytch Farm; there is a doctrine which the law recognises that HMG cannot be fettered in the formation and carrying out of its policies in the general interest, within the framework of the law it has passed, and that principle must apply here.
9. In any case, it is doubtful whether - at the time the directions would have to be issued - there would be any information specific enough to be disclosed to the market.
10. My conclusion on balance is that there is little chance that a purchaser of Wytch Farm would succeed in legal proceedings against you alleging that non-disclosure of relevant facts had caused him to pay more for the asset than it was worth.
11. It might of course be argued that there is an element of impropriety in a decision to compel a sale without disclosure in these circumstances. Although it is not principally a matter for me, I do not think there is much in that argument, for much the same reasons as those given in 8 above in relation to liability.



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12. The position would of course be quite different if you gave specific undertakings to BGC or the market that there would be no fiscal changes which would have an adverse effect on the value of Wytch Farm.

13. It may well be that you would be asked for such undertakings if you acted under section 7(2), but the response would be entirely a matter of policy. However, the practical considerations are plain. Any undertaking actually given, unless it was to the effect that no adverse tax changes were planned, would be likely to depress the price or reduce the chances of a sale; it could even result in purchasers postponing their decision on whether to buy until after the Budget speech. But my instinct is that it would be unthinkable to make a prior announcement which would breach the Budget secrecy rule - although a decision on these lines could reduce interest to an extent not justified by the Budget changes actually in contemplation. But it follows from what I have said that a refusal to give any undertaking could not of itself give rise to any legal liability.

14. I have not touched in this advice on the questions raised in my letters of 8 and 14 June last to you - namely whether there is adequate power under the 1972 Act as it now stands to force a sale of Wytch Farm by means of a section 7(2) direction. I adhere to the opinion I expressed last year on this, namely that you may be able to form a view favourable to the disposal without amending the 1972 Act, but I shall be able to advise you further if you decide to proceed and the statutory consultations are completed.

15. This is copied to the Prime Minister, all members of E and E(DL) and Sir Robert Armstrong.

Yours etc.
Michael

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30 JUL 1980

