Mr Chris Shaw  
Clerk of the Business, Innovation and Skills Committee  
House of Commons  
London  
SW1H 9NB

By Email (shawc@parliament.co.uk)  
26 May 2016

Dear Mr Shaw

Bhs - Oral Evidence Session – 23 May 2016

Further to our discussions and correspondence in advance of the oral evidence session on 23 May 2016, in particular in relation to the topic of legal professional privilege, I am writing to:

- provide the Committees with the date of Linklaters’ instruction on the Bhs sale (paragraph 1);
- make some comments in relation to Mr Field’s questioning of Mr Clay of this firm at that oral evidence session (paragraphs 2 to 19); and
- respond to inappropriate statements attributed to Mr Field in a Legal Week article published on 25 May 2016 (paragraphs 20 to 23).

I respectfully request that you provide a copy of this letter to the members of the Committees and request them to take this letter into account in their consideration of the evidence obtained in the course of their respective inquiries.

The date of Linklaters’ instruction

1 Mr Clay’s evidence was that Linklaters’ mandate as seller’s deal counsel was to prepare and negotiate the legal documentation to give effect to the commercial deal with the specific purchaser that had already been chosen by our client. Certain matters were excluded from our mandate, including pensions law advice [Q389 & Q405]. This evidence is consistent with our engagement letter, a redacted copy of which I provided to you on 19 May 2016. Unlike some of the other advisers before the Committees on 23 May 2016, Mr Clay was not asked when Linklaters was instructed as deal counsel for the sale of Bhs. It may be helpful to the Committees to know that Mr Clay has confirmed that this was on 12 February 2015.
Mr Field's questioning of Mr Clay

2 In his questioning of Mr Clay, Mr Field suggested that Linklaters "failed so sadly" in relation to a "due diligence process" on the purchaser of Bhs and that Linklaters had failed to discover "the most obvious thing" about Mr Chappell (which I understand to have been a reference to the fact of his bankruptcy). Mr Field went on to question whether this meant that clients should not instruct Linklaters [Q410 & Q411].

3 With respect, these comments were completely unjustified. The short points are that (as explained in more detail below) the Arcadia Group was well aware of Mr Chappell's bankruptcy months before Linklaters was even instructed and Linklaters fully discharged its obligations to its client as seller's deal counsel.

4 Given the serious nature of these criticisms of Linklaters, I address them more fully at paragraphs 5 to 19 below.

Legal professional privilege

5 In advance of the oral evidence session on 23 May 2016, you and I discussed, and corresponded on, the issue of legal professional privilege. I explained that, against a background of a number of ongoing investigations in relation to Bhs related matters, our client was exercising its right to assert legal professional privilege in relation to oral evidence given to the Committees by witnesses, including Mr Clay.

6 Our analysis in relation to legal professional privilege in summary is as follows:

6.1 Legal professional privilege is a narrower concept than confidentiality. Our client has not asserted client confidentiality as a reason to prevent any witness from giving any evidence to the Committees.

6.2 Legal professional privilege relates, in particular (for present purposes), to confidential communications between a client and its lawyers and to documents which reproduce or evidence such communications.

6.3 It is a fundamental obligation of a solicitor to respect the legal professional privilege of the client. The privilege belongs to the client, not the solicitor. It is a question for the client whether to waive it.

6.4 The client's right to legal professional privilege is a fundamental right long established in the common law.

6.5 Parliament is subject to the obligations of the United Kingdom under the European Convention on Human Rights. Under the Convention, legal professional privilege is a fundamental right which can be invaded only in exceptional circumstances. It cannot amount to an "exceptional circumstance" that a House of Commons Select Committee wishes to know the contents of legal advice.

7 I explained to you in advance of the oral evidence session on 23 May 2016 that:

7.1 it followed from the above legal analysis that, without intending any disrespect whatsoever to the Committees, Mr Clay was obliged to comply with our client's instructions by declining to respond to any question put to him by a Committee member which invited the disclosure of privileged information;
given Mr Clay’s role as a lawyer acting on the sale of Bhs, there was a good chance that legal professional privilege would mean that he would have to decline to respond to some of the Committees’ questions, and

specifically, our client’s right to legal professional privilege would constrain Mr Clay’s ability to disclose in the oral evidence session information about his client communications (including instructions from the client to give legal advice or to perform specific tasks) and (in most cases) details of the specific work that Linklaters conducted in the course of its retainer.

In response, you explained to me that the Committees had discussed the challenges faced by witnesses because of legal professional privilege and had resolved to be mindful and respectful of that privilege and not to press witnesses who declined in good faith to respond to questions on the basis of legal professional privilege. You confirmed this to me in writing.

You also explained that Mr Field would refer to the issue of legal professional privilege in his opening remarks at the oral evidence session. Mr Field’s opening remarks included the following [Q198]:

“We recognise, however, that the lawyers among you in particular may have obligations to your clients in terms of not disclosing information that is subject to legal professional privilege. We understand that Taveta and Arcadia have opted not to waive legal professional privilege in relation to advice provided to them.”

You also explained to me in advance of the oral evidence session that, although the Committees understood that Mr Clay could not give evidence as to his actual instructions from, or communications with, our client, it would be helpful if he could explain to the Committees the typical role and responsibilities of a seller’s deal counsel.

Mr Clay did indeed give evidence about the typical role and responsibilities of a seller’s deal counsel. He said:

11.1.1 “It is not our responsibility, our duty, or indeed our practice to do customer due diligence on other people’s customers” [Q405];

11.1.2 “Businessmen do not employ deal lawyers to vet the business acumen of their counterparties” [Q406]; and

11.1.3 “I have explained that our duty in relation to those matters that I have described does not extend to inquiries about other people’s customers.” [Q410]

Mr Clay further explained that, in this particular case, he “did something that was, in my experience, unusual by asking another firm of solicitors what customer due diligence they had done.” [Q407 & Q410]. Mr Clay explained [Q407] that this was a reference to his call with Olswang on 10 March 2015. That call, between lawyers acting for the seller and purchaser, was not a client communication and was not subject to legal professional privilege. As Lord Grabiner stated in his evidence, in making this call Mr Clay “was actually going beyond what one would normally do in that sort of situation.” [Q495]

I provided you with a copy of Mr Clay’s handwritten note of this call (together with a typed transcript of it) on 19 May 2016. The Committees did not take Mr Clay to this note in questioning.

No adverse inferences

It is well established in law that it would be inconsistent with privilege existing as a fundamental right to draw any adverse inference from an assertion of privilege against the party asserting the
privilege. Moreover, as set out above, the privilege here belongs to our client, not to Linklaters, and it is not a right that Linklaters can waive. Indeed, this was recognised by Mr Field in his opening remarks at the oral evidence session reproduced at paragraph 9 above.

15 As well as being entirely inconsistent with Mr Clay’s evidence referred to at paragraph 11 above as to the typical role and responsibilities of a seller’s deal counsel, Mr Field’s criticisms of Linklaters (set out at paragraph 2 above) appear to have been primarily based on two assumptions that he made. These are that Linklaters:

15.1.1 told its client that “this was a good person to sell to” [Q409]; and

15.1.2 had not “discovered the most obvious thing about this person”, which I understand to have been a reference to the fact of Mr Chappell’s bankruptcy [Q409 & Q410].

16 Mr Clay was not asked whether he had told our client that “this was a good person to sell to”. If he had been asked that question, his ability to respond would have been constrained by our client’s right of legal professional privilege. There would, however, with respect, be no proper basis for the Committees to infer, without any evidence to support the inference, that Mr Clay advised our client that the purchaser “was a good person to sell to”.

17 Mr Clay was also not asked whether prior to the sale of Bhs he had discussed with our client Mr Chappell’s bankruptcy. Again, his ability to respond to that question would have been constrained by our client’s right of legal professional privilege. But again there would, with respect, be no proper basis for the Committees to infer, without any evidence to support the inference, that Linklaters had been unaware of Mr Chappell’s bankruptcy.

18 In any event, as the Committees will have noted, Mr Gutman subsequently explained in his evidence that Goldman Sachs had observed to the Arcadia Group as early as December 2014 [Q427] that the purchaser “did not have retail experience” and “had a history of bankruptcy” [Q421] (the latter point being a fact which Mr Field assumed was “what the lawyers could not find – that he was a bankrupt” [Q422]). As noted at 1 above, Linklaters was not instructed until 12 February 2015.

19 The Committees will also have noted that Mr Budge, Ms Hague and Mr Harris confirmed in their evidence that the Arcadia Group had been aware that Mr Chappell had been a bankrupt [Q530, Q551 & Q552].

Legal Week article published on 25 May 2016

20 The Legal Week article published on 25 May 2016 was headed “MP accuses Linklaters and Nabarro partners of ‘cover up’ over BHS sale”. It stated that “Field spoke to Legal Week ahead of Olswang’s appearance before the committees this morning” and included the following statements:

20.1 “Linklaters and Nabarro partners have been criticised for “covering up” details of the advice they provided on the sale of BHS prior to its collapse, by Labour MP and chair of the Work and Pensions Select Committee Frank Field.”

20.2 “Speaking to Legal Week following Monday’s hearing, Field expressed his frustration at what he saw as a lack of detail in the partners’ responses to questions. Field said: “I just think it’s too easy to claim privilege. It’s just laziness and a cover up.””

20.3 “He added: “Fee income seems to muddle peoples’ memories.” The Labour MP went on to say that he had requested details of the fees the firms received for advising on the deal.”
Leaving aside the "laziness" remark, these statements, on any view, accuse Mr Clay of the dishonest concealment of evidence from the Committees in return for payment. The Legal Week journalist who wrote the article has informed Linklaters that Mr Field made the statements attributed to him on the evening of 24 May 2016.

The statements attributed to Mr Field are, to say the least, inappropriate.

In fact we are confident that they are actionable in that they are highly defamatory, untrue and not protected by parliamentary privilege. That said, we have no intention of taking the matter further, other than respectfully requesting the Committees to disregard the published statements in their consideration of the evidence obtained in the inquiries. In this regard, I would highlight the explanation of legal professional privilege and the background of our discussions and correspondence about it in advance of the oral evidence session (set out at paragraphs 5 to 13 above), as well as the following points:

Mr Clay attended the oral evidence session voluntarily and sought to assist the Committees in their respective inquiries honestly and to the best of his ability.

Only one question [Q472] put to Mr Clay was not answered by him on the basis that it invited the disclosure of legally privileged information. This question invited Mr Clay to describe instructions given to him by our client. Any such instructions are subject to our client’s right of legal professional privilege and Mr Clay was simply not entitled to respond. His response, set out below, was entirely appropriate:

“You can see I have been helpful with what I have given. I have been as open as I can. In terms of discussions with my client and the advice I have given to my client, that is something I am not able to disclose for reasons of privilege. If I may, there was a question earlier about privilege. Privilege is a fundamental legal right, long established in the common law and long established by the European Convention on Human Rights. Given all the other investigations that are going on at the moment, it is completely appropriate that our client should exercise that legal right that he has.”

I regret having to write in these terms, but I trust that the Committees will understand why I feel it necessary to do so.

Yours sincerely

Andrew Hughes
Partner