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GRO

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The Directors,  
Post Office Limited

### PROJECT SPARROW - UPDATE

Set out below is a high level update on the matters raised by the Board at its meeting on 27 November 2013. More detailed information is provided in the annexes to this note.

1. Directors are **highly unlikely to be personally liable** in respect of past prosecutions unless a court determines that they have acted maliciously or in bad faith, which is very hard to envisage. In any event the D&O policy provides cover of up to £60 million and has a £25,000 excess for claims by the company but no excess for claims brought against individual directors. It is also retrospective. (See Annex B). Whether or not the policy will respond in relation to a claim will depend on the circumstances of the claim. However, we have notified our brokers of the circumstances which may give rise to a claim.
2. Work to quantify the aggregate realistic worst case quantum of loss from cases in the mediation scheme is still ongoing (as referred to in the update note of 29 November). This work is dependant in part on the supporting information Subpostmasters are providing in relation to their claims.
3. In the meantime Bond Dickinson have provided a note setting out their assessment of the most likely "heads of liability" should a conviction turn out to be improper. Although there are common themes, in their view the basis on which a claim could be made, and the quantum of loss that could be successfully claimed, depends entirely on the facts of the particular case. They suggest the current tariff for basic damages for malicious prosecution starts at £2000 with £10,000 being a guideline for prosecutions continuing for up to 2 years. (The advice is attached).
4. Prior to 1 April 2012 the investigations into improper conduct were done by a Post Office team within the Royal Mail organisational structure. However for court purposes the summons initiating the criminal proceedings (relating to Subpostmasters) were issued by magistrates courts in the name of Post Office Limited. It would therefore appear that legal liability for improper convictions (should there be any) would lie with Post Office Limited, though (weak) arguments could no doubt be made, that organisationally employees were acting on instructions of Royal Mail Group and therefore liability would lie with Royal Mail Group. The Master Services Agreement has been reviewed but appears to be silent on this point. Annex C sets out previous prosecution data by date.
5. When Second Sight published its report in July 2013 there were 18 prosecutions "in flight" - ie prosecutions where a summons had been issued and the matter was, at

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that point in time, proceeding through the court process. It should be noted that these “in flight” cases also include those where a conviction has been obtained and the Post Office is seeking to recover losses from the Subpostmaster through the criminal courts by the use of orders made under the Proceeds of Crime Act. (In practice recovering losses may take some time as defendants can apply to the court for an extension to any court ordered timetable. Our practice following the Second Sight report has been not to oppose any applications for extension).

6. There are three outstanding “in flight” cases which have not yet reached trial. However, as a practical matter, it is unlikely that any of these three cases will proceed to trial as Counsel’s considered view is that it may not be in the public interest to do so. (By way of background, any decision not to take a case through to trial should be taken in accordance with the pre agreed prosecution policy and the CPS prosecutors code, both of which allow a prosecution case to be discontinued when it is not in the public interest). The progress of these cases is being closely monitored and the communications team have been briefed.
7. No new summonses have been issued since the Second Sight report, nor will they be until future policy in this regard is determined.
8. Post Office investigative teams have continued to investigate allegations of improper conduct by Subpostmasters and these teams have taken forward approximately 30 cases to the point at which a summons could be issued. However Counsel’s advice is that it would not be appropriate to proceed without first obtaining the opinion of an independent expert witness in relation to the integrity of Horizon system. Such an opinion is necessary to rebut any challenges mounted by the defence.
9. An independent expert witness has been identified but not formally instructed. Whether it is sensible to instruct such a witness is in part dependant on the Board’s approach to future prosecutions.

The Board will be invited in the New Year to make a decision on the extent to which it wishes Post Office Limited to continue to exercise prosecutorial powers as part of Post Office Limited’s wider strategy regarding engagement with, and controls in respect of, Subpostmasters.

As mentioned last week it is our intention to provide the Board with information on a proactive basis moving forward.

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## **Annex A – Directors’ duties**

Post Office Limited's directors are subject to various personal duties including the duties to:

- act in accordance with the company’s constitution and for a proper purpose;
- promote the success of the company;
- exercise independent judgement;
- exercise reasonable care, skill and diligence.

Provided a director makes fair and reasoned decisions in good faith, s/he is unlikely to breach these duties. If a director takes a decision in bad faith or maliciously, this could create personal liabilities, e.g. for:

- malicious prosecution against an SPMR;
- breach of the Data Protection Act in misusing personal / Horizon data;
- inducing a breach of contract between POL and an SPMR.

The duties are owed to the company, ie Post Office Limited, and can only be enforced by Post Office Limited. In rare circumstances, these duties can be enforced by a shareholder (i.e. BIS) acting on behalf of Post Office Limited (a “derivative action”). These duties cannot be directly enforced by others, e.g. employees, contractors and/or SPMRs.

Directors should be careful when externally commenting on specific SPMRs / cases as they can be held personally liable for any defamatory comments.

There are no personal consequences for a director under criminal law if Post Office Limited has failed to make adequate disclosure in any criminal proceedings as no director has directly and personally led the disclosure process.

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## **Annex B Insurance policy background**

Following a review of our insurance policies with our broker, Miller, we have formally notified insurers for our Directors and Officers Liability, Professional Indemnity and Public Liability policies. They have also all received a copy of the Second Sight report.

All the insurers have noted the contents of the report. There is no further comment from insurers, though this is expected because there are no claims or notifications at this stage.

With regards to the extent of Insurance cover that may be available under our policies. Please note the following:

### **Professional Indemnity (PI)**

Professional Indemnity Insurance covers a breach of professional duty by Post Office resulting in a third party loss. This policy covers Civil Liability, Defence Costs and Expenses, Libel and Slander (committed by Post Office or any person employed by Post Office), Breach or Infringement of copyright/Intellectual property rights. This carries a £250k excess each and every claim. Whilst Post Office was part of Royal Mail group it had no PI cover and the cover purchased last year was to specifically cover our Government Services contract which may make a claim difficult.

Another point to note is that having any notification successfully accepted under our PI policy is that of first awareness. The Second Sight report identifies that the problems with the Horizon system and the resultant issues with the sub-postmasters had occurred prior to the inception date of the PI policy and therefore, under its strictest terms, any claims arising from this "known" issue would be excluded from cover

### **Public Liability (PL)**

Public Liability covers injury or damage to Third Parties arising out of or actions. This policy also carries an excess of £250k per claim. We have notified our Public Liability Insurers as a claim against Post Office for "stress" arising out of this matter could be classed as a third party "injury"

### **Directors of Officers Liability (D&O)**

Directors and Officers Liability provides full cover for Post Office directors and officers where they are sued as a result of a wrongful act resulting from something that they are alleged to have done while acting as a manager of Post Office. In addition the policy will respond if there is an investigation into an act that they are alleged to have committed, or where they are required to attend an investigation into the affairs of the company. This policy is a joint and severable contract between Insurers and each individual who is insured, which means that any individual has the ability to make a claim under the policy, with or without the agreement of Post Office Limited or Royal Mail Group. Please note that the policy covers claims against individuals not Post Office.

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So for the D&O policy to apply individuals would have to be named in any claims. However there could be some recoverable investigation costs. (If an official body decided to investigate Post Office, then the costs for a director attending that enquiry should be covered).

With regards to mediation, this is unlikely to be covered as it isn't either a claim against an individual or an investigation.

#### **General points across all policies**

If any claim were successful, under the terms of our policies, Insurers would potentially be able to subrogate against Fujitsu for their outlay. Furthermore Insurers would want to be fully involved in mediation and may not accept our mediation outcome

For one excess to apply we need to prove that there is one root cause.

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**Annex C – Prosecution numbers by date**

	Crown Court			Magistrates Court	
		Guilty	Not guilty	Guilty	Not guilty
2009	Q1	14	0	2	0
	Q2	17	0	0	0
	Q3	18	0	2	0
	Q4	14	1	1	0
2010	Q1	14	0	3	0
	Q2	14	1	1	0
	Q3	13	2	0	0
	Q4	15	0	0	0
2011	Q1	12	1	2	0
	Q2	7	0	1	0
	Q3	13	0	1	0
	Q4	4	1	3	0
2012	Q1	9	2	2	0
	Q2	15	1	4	0
	Q3	7	0	0	0
	Q4	1	0	0	0
2013	Q1	4	0	1	0
	Q2	8	0	1	0
	Q3				
	Q4				

These figures are initial management information and are subject to further verification.