

IN CONFIDENCE - BRIEFING FOR CHIEF EXECUTIVE

Issue

1. Your forthcoming telephone conversation with James Arbuthnot MP (JA) to discuss his concerns about the Scheme.

Recommendation

2. That you reassert Post Office's (PO) support for the original aims of the Scheme and:
 - Give JA an opportunity to explain the nature of his concerns which he has indicated will likely call into question PO's good faith towards the Scheme;
 - Firmly rebut the charge, underlining the unusual lengths to which PO has gone to respond to the concerns of Justice for Subpostmasters Alliance (JFSA), MPs and Applicants to the Scheme;
 - Place on record PO's own concerns over the effect that JFSA's refusal to participate fully in the business of the Working Group, evident breaches of confidentiality in relation to its workings, and the inadequacy of Second Sight's case reviews is having on the credibility of the Scheme and the confidence placed in it by PO [and Sir Anthony Hooper];
 - Make clear that, while PO remains committed to a thorough investigation of the concerns raised by Applicants in each and every case, it cannot be expected to accept responsibility for matters in circumstances where there is no evidence that it is at fault; and
 - Indicate that, should those in whose interests the Scheme was principally established (JFSA and its members) no longer feel it is capable of meeting their needs, this is something upon which PO will need to reflect very carefully.
3. While the conversation also represents an opportunity to appeal to JA to bring pressure to bear on JFSA to engage with the Scheme constructively, it is not clear that doing so would have the desired effect or that, even if it did, that would necessarily be in PO's best long term interests.
4. A speaking note and question/answer brief from which you may wish to draw are at Annex A and B respectively.

Background/Argument

Case Profile and Cost

5. PO has been investigating Applicants' cases afresh for some 2 years. In the cases investigated to date, the accumulated evidence broadly points to 3 scenarios – cases in which losses have occurred through accounting and other errors by staff in the relevant branch, those in which errors have been exacerbated by false accounting, and those involving theft.
6. Over 90 investigations have been completed. An investigation in all 54 remaining cases is underway and this process will be completed on or by 22 December 2014.

7. The cost to PO of this process to date is £3.4 million. A further £4 million is currently forecast to be spent, producing a total of £7.4 million. As an absolute average, this means that each of the 136 cases in the Scheme will cost PO just shy of £55,000. These figures do not include any payments PO may make to Applicants in the Scheme.

The integrity of Horizon

8. In not one of the cases investigated so far has a fault with the Horizon system been established. That said, we are being extremely careful to avoid any sense of complacency and we will apply the same rigour in investigating the remaining cases as we have to date.

9. However, PO is entitled to take the view that in the absence of evidence to the contrary, the presumption must be that the system is working as it ought to. To start from a contrary position, whereby PO must prove the system's reliability, goes against both common sense and established practice. Bluntly, it is not PO's job to prove that Horizon did not cause the losses incurred by Applicants to the Scheme, but for Applicants to provide evidence that it did.

Current Challenges

10. Beyond the very significant resource impact that providing all Secretariat functions to the Scheme adds to what is already a major undertaking, PO faces a number of additional challenges:

- Breaches of confidentiality/media: PO has, at all times, been keen to ensure that the business of the independent Working Group should be confidential, not least given the sensitivity of much of the relevant material. That is in line with its terms of reference, agreed to by all parties, and highlighted as the only legally binding obligation on participants to its work. It has unfortunately become clear that that confidentiality has been breached. One example is the recent article in Private Eye which contained details of the Working Group's decision making process which it would be impossible for that publication to have guessed at correctly. Moreover, suggestions have been made, including by JA, that should PO not take a particular course of action, the media might be called upon presumably in an attempt to place it under some form of pressure. In the context of a Scheme which depends critically on the confidence participants (including PO) have in it, both of these developments are deeply damaging. PO maintains that, should any participant in the Working Group have an issue or concern they wish to raise, the proper forum for doing so must initially at least be the Working Group itself. That has not happened in this case which, quite apart from legitimate concerns over confidentiality, marks a lack of professional courtesy.
- JFSA's non-participation: JFSA have recently adopted a policy position not to comment on, discuss or otherwise participate in the examination of cases by the Working Group where Second Sight has deemed these suitable for mediation. They now leave meetings of the Working Group before these cases are discussed, depriving Sir Anthony Hooper and PO of the benefit of their input. Were this policy position confined to a limited number of cases, one might perhaps be able to contain its effects. However, since Second Sight have deemed well in excess of 95% of the cases they have reviewed as being suitable for mediation (as to which see below), JFSA's stance plainly undermines the role of the Working Group and the successful operation of the Scheme.

- Second Sight's reports: these reports are based on an independent review of all the material available to PO as a result both of its initial, and now fresh, investigation of each case. Second Sight almost invariably conclude that the question of responsibility for the losses in branch (i.e. whether the Applicant or the PO is responsible) is suitable for mediation. As noted above, none of the cases re-investigated to date have produced evidence of a fault with Horizon, or that PO was otherwise directly responsible for those losses. Legitimate questions over the adequacy of training provided by PO may arise in a tiny minority of cases and PO has already embarked on a review of its practice in this regard. In contrast, and in most cases, Second Sight appear simply to ignore the weight of evidence (or the totality of evidence) which points to a clear finding that the Applicant was responsible for the losses, preferring instead to leave the question open and recommend mediation. This is at its most egregious where Second Sight refuse to acknowledge the responsibility of Applicants even in cases where the Applicant has admitted to, and/or been convicted of, theft. In recent discussions with the Working Group Secretariat, Second Sight have indicated that they have been working on the basis that all cases would proceed ('be nodded through') to mediation by virtue of having been accepted into the Scheme and that this was all parties' understanding of the process (presumably including PO). Leaving aside the obvious question as to what Second Sight actually consider their role to be if a decision to mediate all cases had already been taken prior to the conclusion of their case reviews, this mistaken belief may be responsible for their near default finding of suitability for mediation. Needless to say, this represents a serious problem for PO.
- Expectations gap: the Scheme, originally designed to resolve concerns around the reliability and performance of Horizon, is in practice more often than not being used by Applicants as a vehicle for making very substantial claims against PO for losses it is alleged to have caused. While the case in which the Applicant is seeking £13 million may represent the extreme end of the spectrum, claims in excess of £1 million are common. In addition, and despite strenuous efforts to head the problem off, a number of Applicants with criminal convictions appear to consider the Scheme as being capable of providing them with an alternative platform from which to appeal those convictions. These wholly disproportionate claims (on any reading) and inappropriate/unrealistic expectations of the Scheme will only fuel the already pronounced sense of dissatisfaction, no matter how misdirected, felt by Applicants towards PO.
- The appropriateness of mediation: Second Sight's near default recommendation to mediate, even where there is no evidence to question the original finding that Applicants were responsible or liable for the losses in individual branches, inevitably places PO in a highly invidious position. Partly given their number, it is all too easy to characterise PO's view that these cases are not suitable for mediation as being self-serving and high-handed. However, in the absence of any evidence that it caused losses (in contrast to often substantial and/or conclusive evidence pointing to responsibility resting with the Applicant), it is manifestly right and reasonable for PO to adopt this view and act accordingly. To ignore the evidence in these cases would, in effect, be tantamount to asking PO to accept responsibility for events which simply did not take place. That perverse outcome would also have a hugely detrimental and significant downstream effect on the integrity of the PO Network as a whole in effectively sending a message that it pays, quite literally, to make wholly unsubstantiated or opportunistic claims that PO is responsible for losses suffered in branches up and down the country. In the vast majority of cases, PO would be quite happy to sit down and speak with Applicants to give them a further opportunity to speak to the PO directly and to explain, where it is possible to do so (false accounting by its nature frustrates this process), how losses

occurred. A conversation of this nature would be considerably more appropriate than mediation, not least since each mediation costs PO in the region of £34,000.

11. While not all of these issues need necessarily be raised in your conversation with JA, it is important to recognise that they are far from superficial or capable of a quick fix.

A silver lining ?

12. With that in mind, you may wish to consider whether, in the light of the concerns being expressed on all sides, this is the appropriate juncture for PO to look again privately at alternative ways to address, fairly and thoroughly, the concerns of Applicants to the Scheme. This would, naturally, be done on a contingency basis, with proposals being brought to the Board only if and when a reasonable judgment is made that the Scheme in its current form will not meet its original purpose or will only do so at disproportionate cost. While this thinking is not directly relevant to your conversation with JA, this advice would have been incomplete without recognising a development of this sort representing a credible future change of direction for PO.

Immediate needs

13. Returning to the here and now of your conversation with JA, it is plainly difficult to know exactly what may transpire. The suggestion would be to keep the conversation out of the detail and seek to refocus his mind on the big picture of the situation:

- There is a strong sense that the starting point for people involved in this process is that PO and the Horizon system are or somehow simply must be at fault
- That does not do them any credit – fair-minded people keep an open mind and do not rush to judgment
- Post Office has gone to extraordinary lengths to address the concerns of Applicants, the JFSA and MPs, and has devoted considerable resources in doing so in the face of significant business challenges and competing priorities
- It has, at all times, acted fairly, responsibly and maintained the confidentiality of the process to maximise the chances of the Scheme's success
- It is far from clear what those who are now critical of PO's handling of this issue would have us do

14. You may consider that, given the obvious sensitivity of the discussion as well as the possibility of JA seeking to explore the detail of certain cases and our response to them, it would be helpful for Chris Aujard or Rod Williams to be available.

Patrick Bourke
26/10/14

ANNEX A

CONFIDENTIAL - PV conversation with JA

Getting off on the right foot – we want to appeal to the statesman in him/explain why we are acting in good faith but not give ground.

- I understand you wanted to raise concerns about the way on which the Scheme is progressing and, as ever, I am ready to try to address them
- In doing so, I do just want to underline that I consider it extremely important that all parties approach these issues in a fair minded and balanced way - I am sure you would agree
- [You have held public office and also, I am sure, in your role as Chair of the Defence Committee understand that there are two sides to every story and each side can make a compelling case
- So you will know from your own experience that ill/partially-informed public debate while enquiries and investigations are continuing can undermine the process and outcomes]

Post Office approach to Scheme

- PO has gone to very great lengths to respond to the concerns of Justice for Subpostmasters Alliance (JFSA), MPs and Applicants to the Scheme and I am sure that you would acknowledge that
- We have now completed our investigation over 90 cases. Cumulatively these reports run to over 1000 pages and reviewed almost 2000 evidence documents
- Individual reports can be from 5 to 30 pages with anything between 5 and 80 documents provided to each applicant (depending on the age of the case)
- Happy to confirm that Post Office remains committed to investigating all cases within the Scheme, treating every case on its merits and playing a full and constructive part in the business of the WG
- It is costly and resource intensive but we are determined to persist so that we can say that we have thoroughly investigated the concerns raised by the applicant – we have even provided funding for applicants to engage an adviser to articulate their claims.
- I am not sure we could have done much more

Limits

- Of the cases we have thoroughly investigated to date, not one of them shows that Horizon is responsible for the losses incurred in those branches
- But we are categorically not being complacent about this and the remaining 50 or so cases will be also comprehensively investigated – it is in both Applicants' and PO's interest that they should be
- However, and while PO remains committed to a thorough investigation of the concerns raised by Applicants in each and every case, it does not follow that PO should act against its own interests

- In particular, it cannot be expected to accept responsibility for matters in circumstances where there is no evidence that it is at fault - I am sure that you would agree that this is a reasonable stance for us to take
- If not, I am unclear what it is precisely you feel that PO ought to be doing?
- I suspect that JFSA may be frustrated that after 2 ½ years Second Sight have not unearthed evidence of the problems with Horizon they thought existed - I think that frustrates Second Sight too. I understand that may give them handling difficulties.
- Frankly I am concerned applicants may have had their expectations built up to expect large sums in compensation. But this is not, and never has been a compensation Scheme.

PO's own concerns

- It is a matter of concern to me that JFSA have adopted a policy of not participating in the business of the Working Group where Second Sight have deemed a case suitable for mediation
- This deprives PO (and Sir Anthony Hooper) of the opportunity to discuss, with JFSA, the detail of pretty much all cases since Second Sight have only deemed 1 case to date as being unsuitable for mediation
- JFSA failure to engage fully with the business of the Working Group is clearly likely to undermine the Scheme
- In addition, it is unfortunate that other Members of the Working Group appear to have chosen not to respect the confidentiality of the process we all agreed to and sought to raise their concerns with external audiences, without the courtesy of bringing these issues to the attention of the Working Group and Sir Anthony
- In line with the commitments it made, PO has gone to great lengths to preserve the confidentiality of the Scheme and avoided providing the media with any comment - it is entitled to expect other participants to honour theirs - that they have not done so it regrettable
- The reason we have resisted media approaches is that playing matters publicly which will be at the heart of mediation discussions will undermine the ability to reach a solution.

Food for thought

- In circumstances where PO has demonstrably gone the extra mile in addressing the concerns you and others had, I am obviously disappointed to learn of your concerns
- However, I am clear that PO has, at every stage of the process, acted in good faith in taking forward the work of the Scheme and I must reject any suggestion to the contrary
- Naturally, if those in whose interests the Scheme was principally established no longer feel it is capable of meeting their needs, this is something upon which I will need to reflect very carefully.

ANNEX 2

Q & A

Q: By allowing applications into the scheme you set a clear expectation that they would be mediated. If Second Sight say the case is suitable for mediation why are Post Office not just agreeing to that?

The Scheme ToRs say (not published and confidential):

The role of the Working Group is *"To review at each stage Applicants' cases that may not be suitable for the Scheme and to decide whether and/or how those cases may proceed"*.

The Scheme must provide a mechanism to investigate **proportionately and effectively** an Applicant's concerns.

Where appropriate, the Scheme must offer a reasonable forum, by way of **mediation or through direct discussions**, for an Applicant and Post Office to seek a resolution of that Applicant's **legitimate concerns**.

The Scheme will be funded predominantly by Post **Office and must therefore ensure value for money for taxpayers**.

The Scheme published documentation (Page 8 Q&A)says:

" the WG may consider that some cases are not suitable for mediation..."

JFSA and Post Office each have a vote on whether a case is suitable the Chair has a casting vote.

It was never envisaged or stated that all cases would automatically pass to mediation. The Chair has agreed that – he ruled on the fact that the WG has a role to play in deciding whether a case is suitable for mediation.

PO never suggested any eligible case at any stage, accepting all for investigation even where there appeared to be little substance to the cases. WE have investigated everything.

It is disappointing that JFSA have chosen not to assist the Chair are choosing not to take part in the majority of the discussions.

We look at every case on its merits. Where we think a case is suitable for mediation we will mediate.

Mediation is a consensual process and designed to get agreement and compromise. It would be wrong for PO to mediate where neither the applicant, PO nor Second Sight have found evidence to suggest that Horizon was at fault or POL was responsible for any losses. That is not a matter for compromise.

Q: This is about giving closure and a chance to be heard to people who have been through a terrible time. Why are you denying them that?

Every case is thoroughly investigated and Applicants are given a full report. PO is prepared to discuss and explain why the losses occurred if the applicant would like that but that is not mediation. We have done so in a number of cases and resolved them prior to mediation.

However, despite the lack of evidence, some applicants are making claims running to several million pounds against the Post Office, suggesting they are looking for more than "closure" and that the gap in expectations is too great for mediation to be effective.

Post Office cannot and will not accept responsibility for losses when there is no evidence that we were responsible.

Q: Even where the Working Group has agreed that a case should be mediated, Post Office has chosen not to mediate (in at least 2 cases). Why?

We continue to look at each case on its merits. There are instances where PO considers it is inappropriate for a case to be mediated despite the decision of the Working Group.

Mediation is a consensual process and it is open to either party not to take part – including the applicant.

Q: Are you refusing to mediate all criminal cases?

We are considering every case on its merits.

However mediation cannot overturn a conviction and if an applicant considers their prosecution unsafe they need to appeal that.

To date we have seen nothing in the cases we have investigated that suggests any conviction is unsafe. If we did we would make the appropriate disclosure. We take our responsibilities in that regard very seriously.

Q: Why is Post Office deploying a team of lawyers to every meeting. It's unnecessary and suggests Post Office is hostile to mediation.

Post Office's input to the Scheme properly sits within the responsibilities of our General Counsel. This does not imply a legalistic approach or any hostility to mediation. The Post Office's representation on the Working Group is drawn from senior staff, some but not all of whom are lawyers.

The fact that PO, and the Chair for that matter, is asking Second Sight to provide evidence to support a conclusion that that PO may be responsible for the loss does not mean that we are being legalistic.

Q: I have heard that the Chair is treating the Working Group like a Courtroom. Is there anything you can do to change his approach?

It is disappointing that confidentiality around the Working Group's meetings appears to be being broken – PO has taken great pains not to do that.

If WG members are concerned about the way the Scheme is working and the WG business is being managed that is a matter for the Group in the first instance.

I should stress that Sir Anthony was nominated by JFSA and his appointment approved by all members of the Working Group.

Although I do not wish to break confidentiality but I understand from my team that Sir Anthony has been painstakingly fair and that all parties, including Post Office, have come under some forensic questioning to justify their position on cases.

Q: JFSA and Second Sight are losing faith in POL and the whole process. They may walk away. What would you do then?

Post Office entered in to this Scheme in good faith. It was designed collaboratively with JFSA and Second Sight. It would be wrong of me to intervene if some members are not happy with the outcomes.

Having designed a formal and independent structure for dealing with these complaints I need to let that run its course.