

IN THE MATTER OF THE POST OFFICE LIMITED
COMPLAINTS AND MEDIATION SCHEME

Instructions to Leading Counsel
to Advise in Consultation

Documents

1. Leading Counsel has herewith:
 - a) Recent correspondence between Paula Vennells and James Arbuthnot MP (letters of 28 November 2014 and 8 December 2014)
 - b) A press release issued by James Arbuthnot MP on 8 December 2014
 - c) Transcript of the Today Programme and Radio 5 Live broadcasts of 9 December 2014
 - d) Letter to the BBC from Cameron McKenna on behalf of POL dated 9 December 2014
 - e) POL's previous Instructions in this matter

Background

2. Leading Counsel is aware of the background to this matter and indeed advised POL generally in Consultation on 24 November 2014 and again by correspondence on 27 November 2014, on that occasion in respect of the wording of Paula Vennell's letter to Mr Arbuthnot of 28 November 2014.
3. As noted in the initial Instructions, it appeared to POL that it was likely that one of two scenarios would flow from POL's refusal to accept the MPs proposal that it pre-agree to mediate all cases in the Scheme, irrespective of their individual merits and specific circumstances:
 - MPs and JFSA would reluctantly (and quite possibly after looking for whatever lesser change they might achieve in POL's position) come to the conclusion that, while the Scheme is not producing the results they had expected it to, that it remains their only vehicle for engagement with POL other than resorting to litigation; or
 - MPs and JFSA would immediately reject the Scheme and refuse to take any further part in it.

Recent Developments

4. In the event, something close to the second of these two scenarios has materialised in that the relevant MPs, led by James Arbuthnot, have withdrawn their support for the Scheme and expressed a complete loss of confidence in the POL Board's determination to get to the bottom of the issues first raised with it in 2012. Mr Arbuthnot communicated this to POL by publishing both Paula Vennells' letter to him, and his in response, together with a press release on 8 December 2014.
5. However, this does fall somewhere short of scenario 2 in two respects. First, it is unclear what JFSA intend to do in the light of these developments. Second, it is clear that Mr Arbuthnot intends that this matter be pursued, though presumably through a different route, by Parliamentary colleagues. Indeed, he has gone as far as handing the baton to Kevan Jones MP (North Durham, Labour) while recusing himself from any further involvement on the basis of his loss of confidence in POL and his decision not to contest the next General Election.

Current thinking

6. Broadly speaking, these developments are welcomed by POL since they are the natural and predicted result of the strategy agreed by its Board in the Summer of 2013, namely to adhere strictly to the Scheme's Terms of Reference and to defend itself robustly, with decisions on mediation being based on our understanding of the legal position on responsibility/liability for the losses and a desire to control costs and timescales.

7. While POL has already taken the decision to take its time to consider its next move (and, insofar as possible, deprive the story of oxygen), it is clear that the current situation presents it with an opportunity to reassess the current arrangements which, quite apart from being extremely time-consuming, frustrating and costly, are unlikely to produce desired and/or fair outcomes, whether for Applicants or POL.

8. As Leading Counsel knows, POL nonetheless feels that there are certain steps it is both sensible and fair for it to see through, irrespective of the precise successor arrangements for the management of the Scheme. These are:

- to complete its (re-)investigation in each and every case. To date, POL has completed this in 127 cases and the balance of 23 will be completed on or by 22 December 2014; and
- where it is fair and reasonable to do so, to engage in discussions with individual applicants to resolve their complaints, including where appropriate through further explanation, negotiated payments, or the writing off of debts in the Applicant's favour.

Desired Outcome

9. However, while POL remains keen to act fairly, it is keen to capitalise as fully as possible on the opportunity Mr Arbuthnot's letter potentially provides it with and, in particular, wishes to be free of the apparatus currently supporting the Scheme, move its governance and management in-house and dissolve the Working Group. Leading Counsel will recall that the Working Group is already hampered in its work by the refusal of JFSA to discuss any case which is not automatically waived through to mediation.

10. POL is also keen to dispense with Second Sight's services at the earliest opportunity. We are mindful, however, that we may be constrained in doing so because of the potential need for them to complete their review of all cases and as a result of the Ministerial commitment given about their ongoing role in the process. While POL is prepared to entertain the possibility of a limited independent oversight element in the successor process to the Scheme (but is by no means wedded to it), its position in relation to the retention of Second Sight has hardened.

11. POL wishes to explore the options available to it for managing this departure from current arrangements in such a manner so as to minimise the risk of its decisions in this regard being the subject of a Judicial Review challenge. It also wishes to discuss the ramifications that a move away from current arrangement may have on any litigation of the claims underpinning the Applicants' cases in the Scheme, not least as to the determination of costs.

Media

12. Leading Counsel's attention is also drawn to the media and confidentiality aspects of this matter. In the initial Instructions, POL imagined (correctly) that either scenario would involve an attempt to use the media to paint POL in a poor light. It is also possible that attempts may yet be made to use Parliamentary Procedure (for instance Questions in the House) to the same end.

13. Leading Counsel will find, included with these Instructions, James Arbuthnot's press release of 8 December which he published alongside the correspondence between himself and Paula Vennells, as well as the transcripts of the Today Programme and Radio 5 Live broadcasts of 9 November. Leading Counsel will wish to note that BBC One will also broadcast a piece on this matter at 7pm on Wednesday, 10 December, as part of 'The One Show'.

14. POL is understandably concerned that substantial inaccuracies are being repeated in these various broadcasts and, moreover, that the obligation of confidentiality all Parties to the Scheme are under is being set aside as a matter of routine. POL has asked its external legal advisers, CMS Cameron McKenna, to send the BBC a letter to remind the BBC of the requirements of its own Editorial Guidelines, as well as OFCOM's Broadcast Code. A copy of that letter is included with these Instructions.

Questions

15. Leading Counsel is asked to advise as follows:

a) In the light of Leading Counsel's previous advice that the Scheme and the decisions taken in relation to it, as well as those taken in respect of individual cases, should more properly be seen as matters of private law and therefore unlikely to be susceptible to challenge by Judicial Review, does it follow that POL is largely unconstrained in this respect as to what it does next in relation to the Scheme;

b) Does Counsel share POL's preliminary view that the practical effect of Mr Arbuthnot's letter, exacerbating as it does an already difficult situation, could be said to be forcing POL to depart from current arrangements;

c) What is Leading Counsel's assessment of any residual JR risk and what advice might Leading Counsel have in relation to any steps POL might reasonably take to mitigate those;

d) Since POL expects that a number of Applicants with cases in the Scheme may now seek redress through the Courts, what is Leading Counsel's assessment of the impact, if any, of the decisions to move the Scheme in-house may have on that litigation, including on possible cost orders;

e) What, if anything, does Leading Counsel recommend that POL do in respect of the obvious breaches of confidence in this matter bearing in mind POL's wish to kill this 'story' as rapidly as possible;

f) How POL might best reply to Mr Arbuthnot informal terms, noting that POL's current view is that an extremely brief letter which simply acknowledges his, expresses disappointment, and records, but does not address, the fact of the inaccuracies in his letter may well suffice; and

e) More generally.