POL00038633

DRAFT 06/12/2013

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General Counsel

CC:

06/12/2013

Post Office Limited Board

Summary

This note updates the Board following their meeting of 27 November where the Board asked for an update on liability, insurance and prosecutions.

- Directors are **highly unlikely to be liable** unless they have acted maliciously or in bad faith. If a claim is brought against any Director Post Office Limited has insurance which may cover that claim.
- Prior to April 2012 **prosecutions were undertaken by Royal Mail Group** although administratively the court papers may show them being taken forward by the post office
- Post Office Limited has continued those prosecutions that had commenced prior to the pause after the publication of the Second Sight report.
- Once an expert witness has been identified for Horizon (expected by the end of February) there will be around 30 cases ready to prosecute.
- The Board will be invited to make a decision as to whether cases in general should be prosecuted as part of its wider consideration of POL's prosecution strategy.

Recommendation

2. The Board is asked to note the update and confirm it is content for the prosecutions and POCA confiscations to proceed.
3. Anything here on the status of the pause???

Liability for Individual Board Members

4. It is highly unlikely that any individual director would have any personal liability in connection with this review, unless they had acted in bad faith or maliciously.

5. In the unlikely event that an action is brought for breach of director's duties (which could only be by Post Office Limited or in very rare circumstances by the shareholder acting on behalf of the company) there is insurance in place to cover their liabilities. The policy provides cover 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.

Insurance

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6. There are three relevant insurance policies (full details in Annex B) to consider in this case:

- **Director & Officer 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 Limited.
- **Public Liability** covers injury or damage to Third Parties arising out of our actions.
- **Professional Indemnity** Professional Indemnity Insurance covers a breach of professional duty by Post Office Limited resulting in a third party loss.

7. 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 2nd Sight report.

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

Claims against the policies

9. 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

Previous Prosecutions

10. Prior to the split in April 2012 all prosecutions were undertaken by Royal Mail Group. After the split the Post Office undertook the prosecutions. However the board should be aware that the court papers prior to April 2012 may show the Post Office as the prosecuting authority rather than the Royal Mail group due to the administrative division of the case load across Royal Mail's business.

		County Court			Magistrates Court		
		Guilty	Not guilty	Discontinued	Guilty	Not guilty	Discontinued
2009	Q1	14		1	2		
	Q2	17					
	Q3	18			2		
	Q4	14	1		1		
2010	Q1	14			3		
	Q2	14	1		1		
	Q3	13	2				

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	Q4	15					
2011	Q1	12	1		2		
	Q2	7			1		
	Q3	13			1		
	Q4	4	1		3		
2012	Q1	9	2		2		
	Q2						
	Q3						
	Q4						

Table 1 Royal Mail and Post Office prosecutions by quarter

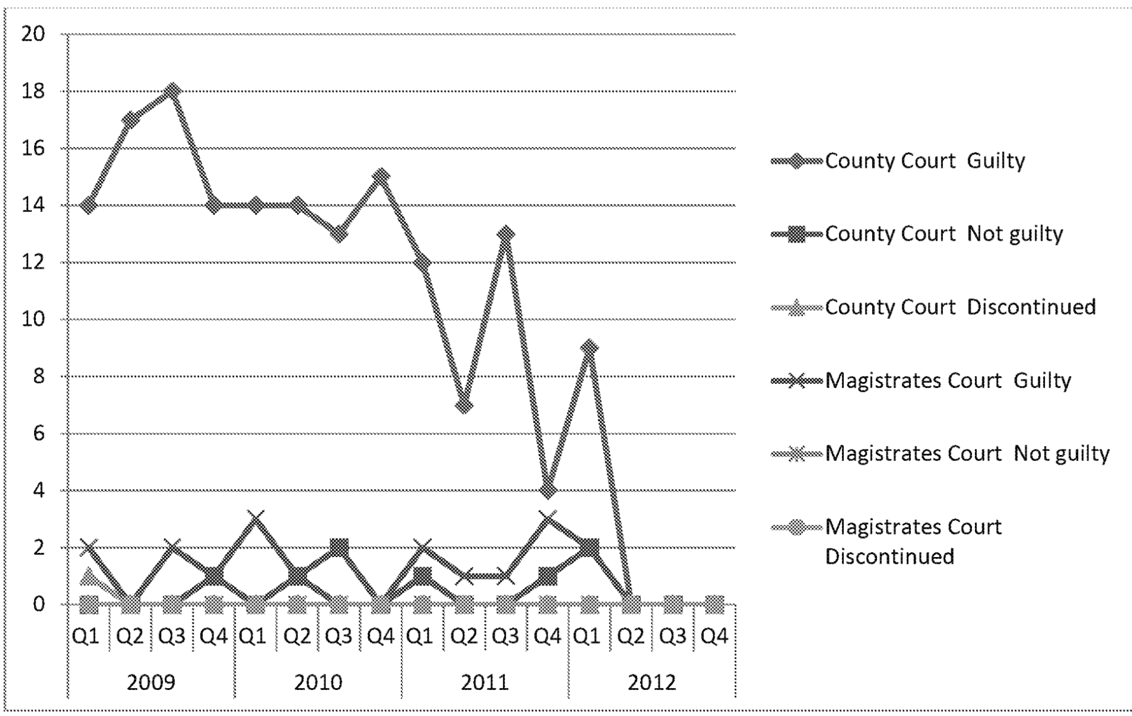

Figure 1 Prosecution outcomes by quarter

DN why do prosecutions tail off so markedly??

Current Prosecutions

11. The Current cases being taken forward by Post Office Limited are set out below:

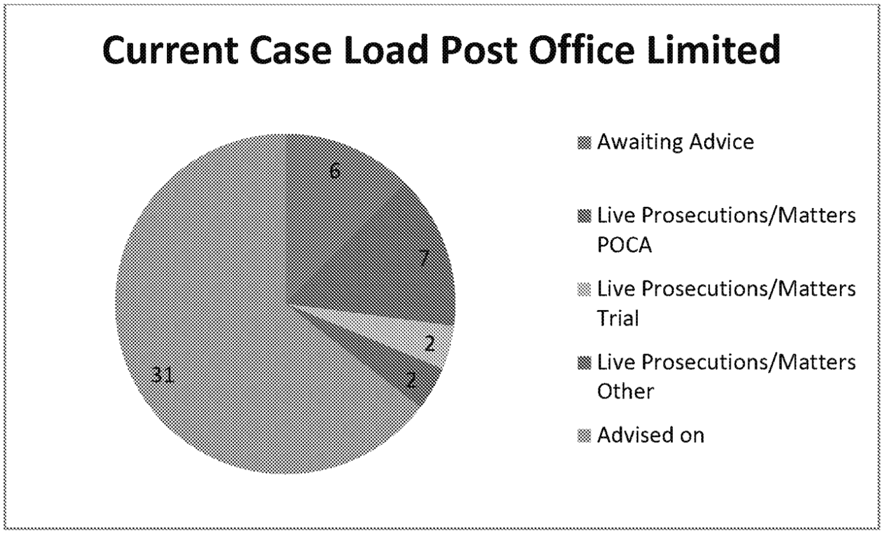

Figure 2 Current case load

POCA

12. The POCA cases are being taken forward to a judicially set timetable following a guilty plea/verdict. Post Office Limited could apply for a delay in these cases, and has done in the case of a mediation scheme applicant. However the reputational impact of taking this approach more broadly is deemed too great in terms of the precedent.

Awaiting advice cases

13. All of these cases are ready to summon except for the outstanding issue of an expert opinion on the Horizon system.

Expert Witness

14. A potential expert witness has been identified and we have met with the supplier and are in the process of agreeing a scope for the opinion with the supplier Fujitsu. Our current estimate is that the opinion will be ready by the end of February at the earliest

15. Before the expert witness opinion is provided we will revert to the board with detail .

Clearance

16. This paper has been cleared by Post Office Legal and Belinda Crowe.

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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

There are three relevant insurance policies to consider in this case:

- **Director & Officer 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 for Post Office Limited. 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. It should be noted that the policy covers claims against individuals not Post Office
- 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.
- **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 PO for "stress" arising out of this matter could be classed as a third party "injury"
- **Professional Indemnity** Professional Indemnity Insurance covers a breach of professional duty by Post Office Limited 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.