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**Subject:** Legal Advice on Approach to Mediating Scheme Applications - DO NOT FORWARD - SUBJECT TO PRIVILEGE

**Date:** Mon, 15 Sep 2014 11:52:17 +0000

**Importance:** Normal

**Attachments:** ADVICE\_ON\_SUGGESTED\_APPROACH\_TO\_CRIMINAL\_CASE\_MEDIATION.PDF

**Embedded:** unnamed

**Inline-Images:** image003.png; image004.png; image005.png; image006.png; image007.gif; image008.gif; image009.png; image010.jpg

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All,

I attach:

- Brian Altman QC's advice on Sir Anthony Hooper's proposals for mediating criminal cases; and
- Stephen Hocking from DACBeachcroft's advice on the Judicial Review risk in communicating an approach which could exclude a significant number of cases from mediation.

In short:

- Brian's advice is that we should not engage with either of Tony's proposals, given the inherent risk in having a free discussion about the facts which gave rise to a conviction; and
- Stephen has "no difficulty in [POL] declining mediation in both the conviction and the consequential loss cases."

## CRIMINAL CASES

Brian's advice addresses Sir Anthony Hooper's proposals for mediating criminal cases to determine:

1. whether POL will support, not oppose or oppose an appeal against a conviction ("Appeal Proposal"); and/or
2. liability for the loss where the Applicant was convicted for false accounting ("False Accounting Proposal").

### 1. Appeal Proposal

Adopting a position on a criminal appeal as part of the Scheme "would be to court an unacceptable level of risk":

- the Scheme is expressly not an appeal process, and entry into it was not predicated on having arguable grounds for appeal;
- the Scheme focuses only on Horizon-related issues, whereas an appeal is concerned with all of the evidence (incl. confessions or any other evidence pointing to guilt);
- POL should only consider its position on a criminal appeal once the Applicant has considered the material generated in connection with the Scheme, and actually launched an appeal; and
- POL's position may change as an appeal develops, opening it up to criticism of acting inconsistently on individual cases and across similar cases.

### 2. False Accounting Proposal

- Brian does not see a substantive difference between false accounting and fraud or theft - each can be prosecuted with or without provable loss;
- Thus all cases could be mediated to "determine liability for a provable loss";
- The proposal would require POL to review POL's case at court, as well as whether liability for the loss can now be determined;
- A discussion around liability for the loss enables the applicant to try to undermine - in an uncontrolled environment - the original case and any subsequent Court orders (e.g. under POCA);

- Mediating may only give an applicant false hope that POL might accept some responsibility and settle.

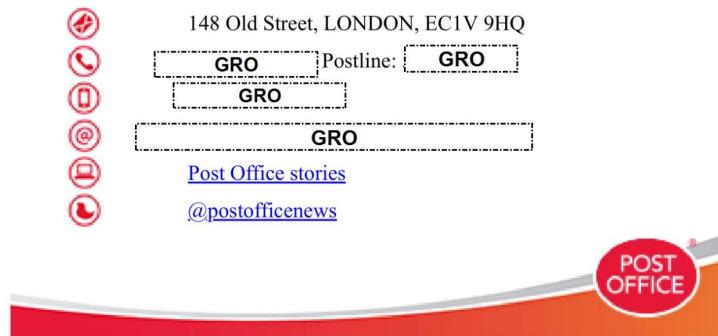
### **JUDICIAL REVIEW**

- We should not refer to POL being “government owned” or to using “tax payer money” as this could imply we are governed by public law. The point about rational use of money holds equally true for POL as a private company.
- A Court claim cannot be brought which denies the state of affairs established by another Court’s judgment or the grounds on which that judgment is based (e.g. as set out in the indictment).
- On the criminal cases, this point of law enables us rationally:
  - o to have an absolute rule refusing to mediate criminal conviction cases where no new evidence comes to light; and
  - o to adopt a policy (to be applied in all but the most exceptional cases) to defer to court processes where new evidence challenges a judgment or the grounds on which it is based.
- On the consequential loss claims:
  - o POL should make its position on consequential loss clear to the applicant;
  - o POL can then fairly refuse to mediate because “mediation cannot hope to be successful with an absurd number on the table”;
  - o i.e. POL is taking a rational, preliminary step to mediation, rather than baldly refusing to mediate.

Please let me know if you require anything further.

Kind regards, Rod

Rodric Williams I Litigation Lawyer



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