

Strictly Private and Confidential

Exhibit WITN00740138

Subject to Legal Privilege – Prepared in Connection with Mediations

POST OFFICE LTD BOARD SUB COMMITTEE

Initial Complaint Review and Mediation Scheme

1. Purpose

The purpose of this paper is to:

- 1.1. provide the Committee with an update on Scheme progress; and
- 1.2. seek the agreement of the Committee to the course of action set out at paragraph 8 below.

2. Case progress and investigation findings

- 2.1. **Annex 1** sets out the detail about case progress and investigation findings. To date we have found no evidence, nor has any been advanced by either an Applicant or Second Sight of either faults with the Horizon system or unsafe convictions (on the latter point, every case investigated has been scrutinised by our external criminal lawyers), and no convictions have been appealed.

3. General progress/issues

- 3.1. Since last summer Post Office has followed the strategy, agreed with the Board, of operating within the Working Group Terms of Reference whilst taking a less submissive approach. This has, not unexpectedly, resulted in a concerted attempt by JFSA to apply pressure to Post Office to mediate all cases where Second Sight so recommend. Having failed to persuade the Chair of the Working Group that Second Sight alone should determine whether a case should be submitted for mediation, JFSA has enlisted the support of MPs and the media in an attempt to pressurise Post Office into mediating all cases.
- 3.2. The General Counsel and Communications and Corporate Affairs Director have provided regular, ad hoc updates for the Board on significant developments over recent weeks, but in summary:
 - i. Following discussions and written exchanges with Post Office, James Arbuthnot MP issued a press release and open letter to the CEO withdrawing his support, along with purportedly 140 other MPs, for the Scheme having lost faith in Post Office and its commitment to the Scheme (although the evidence suggests only a small number of MPs are actively speaking out against Post Office). The primary reason was Post Office's refusal to commit to mediate all cases where Second Sight recommends mediation. This sparked a limited degree of media interest which was anticipated and managed so that it did not generate widespread coverage or materially impact on business as usual activities. A full analysis of the PR position is at **Annex 2**.
 - ii. JFSA has engaged Edwin Coe LPP to explore legal options should the Scheme not resolve Applicants' complaints. Alan Bates, following an email from the General Counsel, subsequently confirmed JFSA's continuing commitment to the Scheme despite exploring legal options describing its position as 'hoping for the best but planning for the worst'.
- 3.3. The BBC's "The One Show" featured Post Office and the Scheme for two consecutive weeks in what was a clearly co-ordinated JFSA/James Arbuthnot

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inspired media campaign. In addition, James Arbuthnot secured a Westminster Hall adjournment debate about the Scheme and Post Office's alleged lack of commitment to it (and therefore resolving Applicants' complaints). The debate was attended by around 20 MPs, 14 of whom spoke, and received little media coverage other than The One Show.

- 3.4. There were a number of elements to the media and MPs' accusations about Post Office. However, the main allegations now appear to centre on allegations of "miscarriages of justice", accusations about the "unfairness" of the Subpostmaster contract (the statement made in Parliament - without foundation but apparently based on a comment from Second Sight – was that "a person would have to be an economic and legal illiterate to be willing to sign it, because it is so slanted in favour of the Post Office") and bad faith by Post Office and its Board. A summary of the legal advice provided to Post Office on the Subpostmaster contract is at **Annex 3**.

4. Analysis

- 4.1. Whilst Post Office is being accused of bad faith, the evidence suggests the opposite is true and that it is others involved in the Scheme who have acted in bad faith.
- 4.2. Post Office, in its role as Secretariat, has administered the Scheme efficiently and fairly and, as a party in each dispute, has acted in good faith, abiding by the obligations of confidentiality which binds all parties involved in the Working Group. Despite incurring direct financial costs to date of c£5m, and diverting resources away from Post Office's strategic priorities, the Scheme appears still not to have met the expectations of relevant stakeholders, or to have drawn a line under this issue in a way which might enable Post Office and Applicants to move forward.
- 4.3. This is not because of poor execution or lack of positive effort on the part of Post Office, but is instead reflective of the erroneous assumption which underpins the approach of Applicants and their supporters – that is, that Post Office is responsible, if not through Horizon then in other ways, for the difficulties they have experienced and/or the losses they have incurred. This has been exacerbated by the inappropriate and unjustified raising of expectations by Applicants' professional advisers, JFSA and MPs over what the Scheme can, and in their minds should, deliver in terms of significant compensation payments and/or Post Office support in efforts to have criminal convictions overturned.
- 4.4. Post Office brand has, in the process, sustained a degree of reputational damage. Even if the net volume of media interest has remained relatively low, negative public perception around this issue now exists and could, if left unchecked, have a negative commercial impact. Even in circumstances where Post Office might be free of its obligations of confidentiality and in a position to share more balanced factual information about the Scheme and the cases in it, the lazy but media-friendly David and Goliath characterisation of this story would likely retain much of its appeal, particularly for the small number of journalists who have focused attention, and their reputations, on insisting that there is a conspiracy at work against those in the Scheme.
- 4.5. Against this backdrop, it would be easy to forget that some real positives have emerged from this exercise.
- 4.6. Now all cases in the Scheme have been comprehensively re-investigated, Post Office can be satisfied that the real basis of the Applicants' complaints is not the

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reliability of the Horizon platform, but the Applicants' dissatisfaction with how Post Office engaged with them in their specific case. Further, there is still no evidence whatever of a systemic flaw in the Horizon system, which is critical to Post Office's entire operation across the network.

- 4.7. Moreover, the investigations have only identified a small number of cases in which Post Office could have done more to support individual Applicants (whether by being more timely in providing additional training, in responding to enquiries, or through other interventions), and even these do not suggest that Post Office acted unlawfully/outside of its legal rights. The investigations, and Post Office's responses to them, could therefore be used to paint a largely favourable picture of Post Office's commitment to properly engaging with the individuals running its network.

5. Challenges

- 5.1. As well as the challenges identified in the analysis above, the Working Group is not, in our view, operating in a way which supports the effective resolution of complaints because of the behaviour of its membership. Specifically:

- JFSA has:
 - sought to broaden the scope of the Scheme (notably to include the Subpostmaster contract), actively solicited media interest and mounted a political campaign to bring further pressure to bear on Post Office to change tack.
 - instructed a firm of solicitors, Edwin Coe LLP, to raise the temperature still further while ostensibly maintaining support for the Scheme. It appears that this support is conditional on the Scheme producing the results JFSA favours, results which the available evidence simply does not support.
 - declined to participate meaningfully in the business of the Working Group.
- Second Sight:
 - has not displayed the degree of impartiality Post Office would expect from independent advisers to the Working Group.
 - has recommended almost all cases for mediation, offering little evidence to support their recommendations other than concluding that mediation might offer the parties 'closure'.
 - are continuing to attempt to broaden the remit of the Scheme: most recently through a lengthy list of questions for Post Office to inform a further draft of their "Part Two" briefing report. This is an approach which closely reflects the wishes of JFSA and MPs.

- 5.2. Having been developed with the aim of attempting to resolve individual complaints about Horizon and associated issues, it seems clear that key stakeholders are now seeking to distort the Scheme to an extent which Post Office cannot tolerate. The evidence from recent events suggests that the Scheme will continue to be labelled as a sham by JFSA and MPs unless it produces a conclusion that Post Office (whether through Horizon or otherwise) is responsible for the difficulties and losses of Applicants and for wrongful convictions.

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- 5.3. In addition, the explicit threat of litigation now requires Post Office to consider whether disclosure of any further information should be undertaken in accordance with the Court's prescriptive rules, as opposed to the current voluntary, open basis in connection with an alternative dispute resolution scheme. This would be a fundamental departure from the existing Scheme arrangements.
- 5.4. As noted in previous advice, although Post Office would be seen by the man on the Clapham omnibus to have acted in good faith, it is clear that there will remain a small but vocal core of detractors who will not be persuaded.

6. Conclusion

- 6.1. In the circumstances set out in this paper, it is now difficult to see how the Scheme can achieve its objectives and properly function on its current path. Indeed Post Office now has the opportunity to alter the Scheme to something more realistic and proportionate to the issues raised in the complaints. What follows is a proposal and rationale for next steps.
- 6.2. An attempt to maintain the status quo will entail, inter alia:
 - i. the continuation of a process conducted in the public eye, with every unpopular decision of Post Office being questioned and/or challenged in the media and in Parliament, with obligations of confidentiality preventing Post Office from making any sort of effective rebuttal;
 - ii. the completion by Second Sight, likely to coincide with the run-up to the General Election, of their final Part Two report which, judging from their approach to date and the questions they have put to Post Office to inform its content, is near certain to place further unsubstantiated 'charges' at Post Office's door and broaden, quite unjustifiably, the lines of enquiry it will be expected to address;
 - iii. a substantial risk of increased scrutiny in Parliament, perhaps through the Business, Innovation and Skills Select Committee, bringing with it an inevitable increase in the involvement and concern of Ministers in respect of this issue, when we need the focus on other matters of commercial importance to Post Office;
 - iv. a lengthy process given that there remain around 100 cases in the Scheme, the process of moving cases through the Working Group, attempting to challenge recommendations of mediation by Second Sight no matter how unjustified and scheduling and conducting mediations is certain to take much of 2015;
 - v. pressure to allow new cases in to the Scheme, some of which are likely to be entirely opportunistic (there is already evidence of this happening);
 - vi. poor results in terms of public perception since mediation can only resolve those complaints in which the Applicant has both a legitimate claim and is prepared to settle on reasonable terms. There are few such cases in the Scheme with many including excessive and unrealistic claims for consequential loss which limits the likelihood of a resolution. Post Office will be accused of bad faith in respect of each 'failure' to reach a resolution which is satisfactory from an Applicant's point of view (and/or that of JFSA and the MPs). Post Office will not be able to respond to these accusations while respecting confidentiality; and

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- vii. no meaningful reduction in the risk that Applicants, individually or as a group, will resort to litigation to pursue their claims against Post Office.

7. A way forward

- 7.1. January brings a number of important dates and activities in relation to the Scheme. We are taking a number of steps to mitigate the recent activities of JFSA and the media including:
 - i. providing a robust response to allegations in the media including writing to BBC lawyers where appropriate and engaging at senior levels with programme editors;
 - ii. writing to individual MPs who participated in the Westminster Hall debate to offer a meeting to discuss their, constituent's cases, with consent and generally discuss the Post Office position; and
 - iii. compiling a 'dossier' addressing the general accusations made against Post Office in the Westminster Hall debate which the Minister can be invited to table in Parliament.
- 7.2. Post Office responded to Second Sight's questions to inform their Part Two report on 7 January 2015, to be followed by a meeting on 9 January 2015 with relevant Post Office staff to discuss the issues raised in more detail. We plan to decline to respond to around a third of their 110 questions/requests for information as they are either out of scope of the Scheme or disproportionately wide 'fishing' requests with no direct reference to complaints in the Scheme.
- 7.3. The Scheme Working Group meets on 14 January 2015. This provides Post Office with an opportunity to make a final attempt to get the Scheme 'back on track' by seeking to gain acceptance of and adherence to:
 - i. the scheme and its processes as originally designed (by all);
 - ii. the Scheme's proper scope (Horizon and associated issues only);
 - iii. the need to respect obligations of confidentiality and actively to promote this to individual applicants; and
 - iv. (crucially) the principle that evidence must drive its recommendations and conclusions.
- 7.4. Post Office will also use the next meeting to clarify JFSA's intentions in relation to the instruction of Edwin Coe LLP (which we consider to be, at this stage, generally an exercise to exert pressure rather than, at this stage, a real litigation threat (see **Annex 4**). However we understand from JFSA's website that they plan to hold a meeting on 18 January 2015, primarily for Scheme Applicants. The meeting is described as being to report back in detail about recent events and to agree options for a way forward including "what it would mean if we opted to follow a legal route and how that might work".
- 7.5. However, our assessment is that getting the Scheme 'back on track' is unlikely. There would appear to be very little to be gained from a JFSA/MP perspective in participating in the Scheme on these balanced terms since it will not produce the pre-determined outcomes they seek. However, providing this final opportunity to address these issues sensibly will further demonstrate Post Office's genuine attempts to resolve Applicants' complaints.

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- 7.6. Importantly, it will also help manage and mitigate the risks of negative publicity and Judicial Review of the decisions Post Office makes about the future of the Scheme. The risk of a successful public law challenge has already been assessed as being low – recent legal advice suggests that this step will likely reduce it still further. A summary analysis of the Judicial Review risk is at **Annex 5** (which aligns with previous advice given to the Board last summer).
- 7.7. We have now been informed, as expected, that the same BBC team which made the One Show film is now planning a programme, for BBC Inside Out, on 19 January – the day after JFSA's planned meeting. We will continue to monitor and manage the media as we have to date.

8. Recommendation

- 8.1 The Committee is invited to note the immediate steps we are taking as in paragraph 7.1 and 7.2 above.
- 8.2 The Committee is further invited to agree that we:
- i. use the next meeting of the Working Group as a last attempt to set the Scheme back on track as set out in paragraph 7.3 to 7.4 above;
 - ii. write to JFSA after their meeting on 18 January to ask them to confirm their intentions as regards litigation; and
 - iii. draw up contingency plans to bring the Scheme in-house in the event that the steps set out above do not get the Scheme back on track which:
 - would move the governance and management of the Scheme in-house (dissolving the Working Group and/or ending Second Sight's current role);
 - would include a letter or statement which could be made public setting out the rationale for Post Office's decision to bring the Scheme in-house;
 - might include the retention of an independent oversight function in the interests of transparency and public confidence (not necessarily by Second Sight);
 - provide for discussions or, where appropriate, mediations with individual Applicants, where it is fair and reasonable to do so in order to try to resolve their complaints; and
 - preparing our own report of the Scheme so far and our findings as a document which could be provided to Applicants (as our response to Part Two was for mediation) and at the end of the Scheme be published as a formal report of the Scheme.
- 8.3 We will revert to the Committee with a detailed proposal (informed by legal advice) for bringing the Scheme in-house if, as anticipated, we do not get a satisfactory result from the steps set out above.

Chris Aujard/Mark Davies
8 January 2015