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# ADVICE ON SUGGESTED APPROACH TO CRIMINAL CASE MEDIATION

## Appeal proposal

1. On 31st July 2014, I held a conference call with Rodric Williams of POL and Gavin Matthews of Bond Dickinson on the approach suggested by Sir Anthony Hooper ("**AH**") to criminal cases falling within the mediation scheme.

2. As I understood it, AH had suggested that where an applicant in the mediation scheme had admitted a criminal offence (by a plea of guilty) POL should take one of three possible approaches to the issue of criminal appeal:

    1) POL should support an appeal
    2) POL should not oppose an appeal
    3) POL should oppose an appeal

3. In the course of the conference call I pointed out that by paragraph 5.14.1 to 5.14.3 of POL's "Settlement Policy" document (v.1.3, dated November 2013) POL's "standard approach" where, following investigation, grounds of appeal are identified is: (1) to suspend the mediation process (2) to disclose the information giving rise to the grounds for appeal and (3) to consider whether POL "will support or oppose any appeal". I have not been made aware of AH's reasoning for suggesting his approach but wondered whether it might have been based on these provisions of the Settlement Policy document.

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4. I am told that the Settlement Policy document has not been (and will not be) formally adopted by POL, and is confidential to POL, albeit POL has dealt with criminal cases in line with that process, so that if material is identified that affects the safety of the conviction, the process is suspended, the material is disclosed, and the applicant considers his position as regards any appeal. If the process that POL has been adopting within the mediation scheme is limited in this way then I see no problem with it. The problem arises with the notion that POL should consider its position on any future appeal.

5. The focus of our discussions on 31st July was around the practical utility of such an approach. The view I expressed was that I could not see any advantage to POL in adopting, far less being held to, a position on any criminal appeal during the mediation scheme. In fact, adopting such a course would be to court an unacceptable level of risk for the following reasons: -

   a) As I see it, the fact that a criminal case is entered into the scheme implies that there is or are, in broad terms, identifiable Horizon-related issues, which require investigation. Entry into the scheme does not necessarily imply that investigation has revealed any arguable grounds of appeal. Indeed, even if investigation identifies material that might give rise to grounds of appeal because it might impact on the safety of the conviction, and the material is disclosed, that does not mean that POL is then bound to adopt a position in advance of any such appeal, as appears to be suggested by the draftsman of paragraph 5.14.3 of the Settlement Policy document. In my opinion this provision (albeit it has not been officially adopted) unrealistically seeks to bind POL at far too early a stage in proceedings, and AH's proposal seeks to do the same.

   b) The only "new" information any applicant is likely to receive in the course of the process is POL's investigation report and Second Sight's report, both of which are narrowly based and not directed at any criminal appeal process. Thus, by way of example, there might have been undisclosed failings in Horizon at the time of the trial, from which evidence was obtained in support of the conviction, but the

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conviction is nevertheless "safe" because the applicant fully confessed his guilt or there is other evidence pointing to his guilt. It is therefore important to recognise that the information gathered for the purposes of the scheme is incomplete and does not address the real issue that the Court of Appeal (Criminal Division) would have to consider on an application for permission to appeal from the Crown Court, namely, the safety of the conviction looking at the whole of the evidence.

c) This leads me to another issue. If only those cases in which the applicant had admitted the offence (e.g. by a plea of guilty) have been admitted to the mediation scheme then the scope for successfully challenging the conviction on appeal is even less sure. The applicant's argument would have to be that had the new material been made available before he entered his plea of guilty then he would not have been advised to plead guilty and/or would not have done so. The appeal would therefore have to be based on the "fresh evidence" represented by the new material. But mounting a successful appeal based on fresh evidence following an unequivocal plea of guilty, albeit not impossible, is far from easy.

d) The mediation scheme is expressly not designed to be an appeal process. The mediation pack makes clear that POL has no power to reverse or overturn a criminal conviction but if new information comes to light that affects the safety of the conviction, then POL has a duty to inform the applicant, which he may then use to advance an appeal. The applicant however does not lose or abandon his rights because, armed with the investigation reports, he may consider with his advisers whether or not he has any application to seek to appeal his conviction out of time, and if so advised, may consider his grounds and later perfect them.

6. It is for these reasons POL should only ever consider its position once an applicant has considered the new material and has in fact launched a criminal appeal. There is in my judgment an unacceptable risk to POL in providing or

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being held to a position on criminal appeal at the early stage of mediation. An indication by POL at such an early stage based on limited information risks inviting an appeal. Also, at this stage the applicant will almost certainly not have even considered whether the new information gives rise to grounds of appeal let alone whether there are any grounds that are reasonably arguable.

7. The risk to POL is obvious: in general terms, once a criminal appeal is fully developed (as opposed to complaint in the mediation scheme) the circumstances may change. So POL may find itself prematurely supporting an appeal when upon mature reflection the written grounds of appeal show it ought not to have done so or it may oppose an appeal when events prove it was ill judged to have done so. The middle course of not opposing any appeal (while not supporting it) is a subtle halfway measure of not making concessions to an applicant for appeal and adds little.

8. A further important consideration is that each case is different and therefore a case-specific approach is of necessity wise, but by taking a position too early on individual cases with too little information POL risks inconsistency among like cases and accordingly may attract criticism.

**False accounting proposal**

9. Additionally, I am asked to consider a further recent proposal that AH has made (set out in Andy Parsons' email of 29th August): that POL could mediate a case where there has been a conviction for false accounting in order to determine liability for an underlying loss. The suggestion appears to be that POL and the applicant could discuss the root cause of, and responsibility for, a loss leading in some cases to a negotiated settlement of that issue without upsetting the safety of the conviction.

10. During a conference call of 16th July 2014, I was asked to consider two written Advices from Cartwright King dated 9th and 15th July 2014 on the topic of meditating criminal cases: I did not disagree with Cartwright King's advice in which they continued to maintain a wholesale objection to the admission of all

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criminal cases to the scheme; indeed I had expressed the opinion some months previously that it was a high-risk strategy to admit any criminal case to the mediation scheme. However, I understood that time had moved on and a practical solution had to be found to deal with those criminal cases that were now within the mediation scheme.

11. On 16th July, I considered therefore that there was less risk in admitting to the mediation scheme cases, in which the applicant had admitted his guilt by pleading guilty or as a pre-condition to being cautioned, which, as I recall discovering, embraced the vast majority of the current cases within the scheme. Misra and Banks are conviction cases, which have also been accepted into the scheme.

12. Given there are only two conviction cases within the scheme, I expect that the practical effect of AH's proposal is that mediation will in reality be restricted to those cases of false accounting where the applicant had admitted his guilt. If so, then consistent with my advice on 16th July, there would be less risk in relative terms to mediating such cases than in the case of conviction cases (not least because the applicant has admitted guilt when he could have contested it) but inevitably there is always some risk in having a free discussion between an applicant and POL around facts that gave rise to the applicant pleading guilty. However, I question what is to be gained by determining liability for the underlying loss when the applicant has admitted his guilt.

13. Moreover, I should emphasise that the advice I gave around finding a practical solution to the problem POL was now faced with was provided *without* drawing any distinction between the precise nature of the offence. Clearly, AH sees a substantive difference between cases of false accounting as against fraud or theft. But as is observed in Andy Parsons' email, false accounting may be committed to conceal a loss but an offence of false accounting may be committed without any provable loss. Does this mean that an offence of false accounting without loss would not fall within the new proposal because there was no liability to determine and consequently nothing to mediate? I am unclear.

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14. Indeed, there may be certain types of fraud that are committed and charged without actual loss (e.g. fraud by false representation, where the only intention required to be proved is that the offender intends to make a gain for oneself or to cause another loss or to expose another to the risk of loss); there may be certain types of theft committed and charged without proof of any actual loss or the precise amount of loss (e.g. theft of cheques which are "choses in action" or theft of property the precise value of which is incapable of exact quantification).

15. I query whether the proposal is just a new means of achieving a negotiated settlement between POL and applicants by a new and different route, and, more importantly, whether, once accepted, it would be suggested as a logical extension of it that the scheme ought also to embrace certain cases of theft and fraud in order to "determine liability for an underlying loss" where it was appropriate to do so.

16. There are other foreseeably difficult issues. First, if POL were to accept the proposal, it would bear the burden of scrutinising with care whether each and every case of false accounting was amenable to determining who was liable for the underlying loss. AH's proposal would require POL to determine whether there had been a determinable loss. Second, such a course would necessarily involve a re-examination of POL's case at court, and any mitigation that was advanced on the applicant's behalf (assuming the proposal is limited to cases where responsibility was admitted), as well as the sentence. This will involve consideration and re-examination of whether in each such case POL successfully made a confiscation application under POCA, or sought compensation or other financial ancillary orders against the applicant. If it did then surely the liability for the loss has been determined. How meddling with such a case in the course of mediation would not potentially upset the conviction as well as the sentence and any orders arising from it, I am also unclear.

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17. Discussion about liability for underlying loss is, in my view, fraught with potential problems. I do not see the point of it, and what it can achieve, other than to provide an applicant with a false sense of hope or expectation that POL might accept whole or part liability for the loss, and settle. If nothing else, it would give the applicant an opportunity to seek to undermine and find flaws with POL's original case, the monetary applications it made on sentence, as well as in the court's orders, in an uncontrolled environment, which in my opinion, is not something POL should engage with.

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