

POST OFFICE LTD

ADVICE

1. We are asked to suggest the text of a letter to Sir Anthony Hooper setting out why POL feels unable to agree that convicted applicants, or those convicted of false accounting, ought to be admitted into the mediation process.
2. So that it is clear, we see no difference at all between those convicted of false accounting and those convicted of theft or fraud and we do not accept Sir Anthony Hooper's apparent distinction between offences of false accounting on the one hand, and theft or fraud on the other. All are offences which entail the commission of specific acts of dishonesty and all are (in this context) offences committed against POL and POL's assets. For Sir Anthony to suggest that, because an offence of false accounting could have been founded upon a pre-existing but unidentified Horizon fault such that the culpability of the offender is reduced because there may be no real loss, takes matters no further and indeed misses the point. False accounting is charged where, by reason of the false accounting trail created by the offence, it is impossible to quantify the actual loss if indeed there be one. The same is true of fraud and the only difference here between those two offences and theft is that, in those offences the real loss is (usually) quantifiable and certainly provable.
3. Further, we draw no distinction between those convicted by guilty plea and after trial, and those cautioned for an offence where the caution represents (as it must) an admission to the misconduct complained of.

4. We propose the following:

“It is POL’s considered view that no Applicant who has admitted, or been convicted of, a criminal offence committed against POL, should be allowed to progress to a mediation hearing. We are concerned that to admit such an Applicant to a hearing would be to both send the wrong message to Applicants and others and to expose POL to unacceptable risk.

We are already concerned that the very fact of entry into the Scheme may have been taken as an indication that POL is at least prepared to concede that the prosecution may have been misconceived. We are unable to make such a concession, not least because we would not wish to engender in an Applicant any false hope or expectation that such a concession is made, or that entry into the Scheme may yield some positive result where none is possible. That expectation may extend beyond the Mediation process and engender a false hope that a successful appeal against conviction might follow – I would point out that in every case the available evidence has been considered and nothing has been identified which could be said to render the conviction unsafe.

We are also concerned that, by permitting the hearing of one convicted Applicant’s case, we may be setting a precedent which others would wish to follow, where necessarily they could not. This is particularly true of those charged with fraud as opposed to false accounting – in many cases the facts were similar, cash was being declared as being on the premises when it was not.

We are further troubled by the possible implications which may arise once an Applicant has had his or her hearing. We consider that there emerges a clear potential for the launching of appeal proceedings in circumstances where there should be none. The suggestion that the identification of some fault or root cause in the Horizon system in order to determine liability for an underlying loss might permit a mediated settlement with those convicted of false accounting outside of, or exclusive from, the criminal legal process is in our view plainly misconceived. No proper distinction may be drawn between those convicted of false accounting and other offences and no convicted person may be properly prevented from applying to appeal against a conviction by any

confidentiality or “without prejudice” clause in a mediation or arbitration scheme – the sanctity of the criminal process is, at least in that sense, absolute.

The suggestion that a distinction may be drawn between offences of fraud, false accounting and theft for these purposes is a wholly artificial distinction, for all are offences of dishonesty, committed against POL and in circumstances where financial probity and honesty are essential prerequisites. The only real difference lies in the prosecutor’s ability or otherwise to prove an identifiable loss; in cases of fraud and false accounting such a loss is often unidentifiable, usually by reason of the very false accounting or fraud complained of, because those acts themselves make it impossible to establish any meaningful audit trail.

In any event, in order to attempt an outcome whereby a mediated settlement, based upon an assertion of some identified root cause within Horizon, POL would have to re-examine in each Application POL’s case at court, any mitigation advanced on the applicant’s behalf and the sentence imposed. Further, any ancillary orders (e.g. compensation; confiscation) would also have to be subject to the same detailed reconsideration. There exist a number of substantial constraints to this process, both by reason of the ages of some cases and the consequent limited availability of information and papers. Further complications arise because a number of applications contain, at best, significant misrepresentations as to law and asserted fact, and in some cases, manifest lies. Finally on this point, the logistics and expenditure required to complete such an exercise would be not inconsiderable and clearly outweigh any possible benefit, which we do not in any event consider there to be.

In terms of likely appeals arising out of a Mediation settlement, we are of the firm view that such an exercise would be an exercise in futility, for as you will be aware, the Court of Appeal are concerned only with whether, upon all the evidence presented, a conviction may be safe. Evidence of a guilty plea, tendered by a defendant with the benefit of legal advice and in full knowledge of the consequences, would be clear evidence of guilt notwithstanding that there may have been an unidentified Horizon fault.

There are in our view further reason for not admitting criminal Applicants to progress to mediation hearings, all of which weigh heavily upon POL. The potential for adverse publicity, generated by the mediating of criminal Applications and particularly where some concession, agreement or payment is made by POL, is inestimable. Similarly, a settlement which granted some concession in one case might well give rise to a substantial assessment and disclosure exercise in relation to other (mediation and non-mediation) cases prosecuted by POL (and before them, the Royal Mail Group), for as prosecutors, POL's disclosure duties within the criminal law arena are manifest and clear.

Returning for the moment to the apparent distinction between false accounting on the one hand and fraud and theft on the other, given the nature of those offences and the obvious similarities in factual basis' of some cases, it would be difficult if not impossible to justify the admission to hearing of only one type of offender to the exclusion of others. [Query whether this might give rise to grounds for Judicial Review?] In any event, the argument, false hope and adverse publicity likely to be generated by such an approach, not least from JFSA, Parliament and the media cannot in our view justify this false distinction.

Having considered these matters at some length we have come to the conclusion that we should not permit any criminal applicants to go forward to mediation hearings. That is not to say however that no alternative approach is available. We have considered whether an alternative process may hold some benefit to all concerned and have concluded that a process involving the holding of a face-to-face meeting with the criminal applicant, so as to permit POL to explain their findings in circumstances where it is made clear that no compromise is being offered, may well achieve a just resolution. Such a process involves no false expectation yet still gives the Applicant the opportunity to air their grievances in a formal setting, to receive a considered response to that grievance and thereby to achieve a degree of 'closure'.

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We therefore commend the approach outlined immediately above as the best method of achieving a just and equitable outcome for all concerned, without engendering any false hope and the launching of misconceived appeals.”

SC.
2014

19th December