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KING SOLICITORS

BRIEFING NOTE

POST OFFICE LTD GENERAL COUNSEL

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	Tab
Counsels General Advice, 8 th July 2013	1
Draft reply to Criminal Cases Review Commission	2
Counsel's Advice re Expert Evidence (Dr. Gareth Jenkins)	3
Compensation for Miscarriages of Justice advice	4
Counsels Advice – "Disclosure - The Duty to Record and Retain Material"	5
Review Protocol for the Initial Sift and Full Review Process	6
Protocol for the Identification, Recording and Retention of Material which may be subject to Duties of Disclosure	7
Sample Full Review – R. v. Khayyam Ishaq	8
Meeting Report – Scotland	9
Prosecution Policy	10

History

1. Historically the Post Office was a division of the Royal Mail Group (RMG), however Post Office Ltd. (POL) was separated out of the RMG on the 1st April of 2012 and each became separate and unrelated organisations. Prior to separation it was RMG who conducted the prosecution of criminal offences committed by POL employees¹, sub-Postmasters² (SPMR's) or clerks,³ however post-separation POL assumed the role of prosecutor.
2. In general only three distinct offences are prosecuted by POL: Theft; False Accounting; and Fraud. Theft usually involves the direct appropriation of (usually) monies by those handling POL money. False Accounting; and Fraud may be viewed as different types of the same species; the falsification of records so as to hide lost or stolen funds. In these cases SPMR's will assert that the Horizon Online (HOL) system has thrown up unexplained losses or shortages and, in fear of repayment or loss of contract,⁴ they have falsified their accounts so as to hide the fact from POL.
3. The detection and successful prosecution of such offences is almost always dependent upon a proper analysis of HOL data and its effective presentation both to defence representatives and to the court. Accordingly it is imperative that the integrity and operation of HOL is demonstrably robust. To this end prosecutors have relied upon the statements of both POL Investigators and, where expert evidence is required, that of Fujitsu Services Ltd. In each case a formal statement (and testimony, if required) explaining HOL and those functions of HOL relevant to the particular prosecution is provided by the Lead Investigator. Where it is necessary to provide evidence and testimony dealing with the integrity of HOL and/or to explain technical aspects of the system and data, we have relied upon Dr. Gareth Jenkins, an expert witness provided by Fujitsu.
4. Defendants are entitled to challenge any and all prosecution evidence, including expert evidence, and in so doing they are entitled to see any material in the possession of the

¹ Those working in Crown Offices are employed by POL.

² Contracted to POL to provide Post Office services.

³ Employed by SPMRs and often family-members of SPMRs.

⁴ The contract requires the SPMR to repay any losses, howsoever incurred or by whom.

prosecutor⁵ which might assist them in that task. This is the foundation for the duty of disclosure placed upon the prosecution. In complying with the duty a prosecutor must consider whether he (POL) is in possession of, or has access to, any material which "...might reasonably be considered capable of undermining the case for the prosecution ...or of assisting the case for the accused..."⁶ The duty extends to examining any information of which the prosecutor becomes aware (and for these purposes this includes information which Post Office Ltd becomes aware of) so as to determine whether or not that test is met. The prosecutor must, at all times before the conclusion of the case, keep under review the question whether there is any information which must be provided to the defence.⁷ This duty is on-going even after conviction and sentence.

5. This duty of disclosure also extends to any expert instructed by the prosecution to provide expert statement and/or testimony. That duty is set out thus:

*"....an expert witness possessed of material which casts doubt upon his opinion is under a duty to disclose the fact to the solicitor instructing him, who in turn has a duty to disclose that material to the defence. The duty extends to anything which might arguably assist the defence. Moreover, it is a positive duty."*⁸

6. In the vast majority of cases prosecuted by RMG and latterly POL, HOL data represented the starting point for the investigation and provided the primary evidence against offenders. Very often in these cases a defendant would assert that losses were due to unexplained and false figures, transactions and balances in HOL and that accordingly they were innocent of any crime. In other cases defendants would say that, whilst they had taken no money from POL, they had falsified accounting records so as to hide or disguise otherwise inexplicable HOL data.

⁵ Or reasonably available to him

⁶ CPIA 1996, ss.3&7

⁷ Ibid, s.7A

⁸ *R. v. Ward*, supra. and see paras.6-9 above.

Second Sight

7. As the result of increasing concerns⁹ raised by SPMR's and others and relating to the reliability and functionality of HOL, including allegations that the system had malfunctioned or had produced unexplained false balances and other shortages, in 2012¹⁰ POL commissioned Second Sight Support Services Ltd. ("Second Sight") to enquire into the alleged problems. Second Sight's interim report was published on the 14th July 2013. They concluded that there were no system-wide problems with the HOL software but went on thus:¹¹

6.4 In the course of our extensive discussions with POL over the last 12 months, POL¹² has disclosed to Second Sight that, in 2011 and 2012, it had discovered "defects" in Horizon online that had impacted 76 branches.

6.5 The first defect....impacted 62 branches. It was discovered in September 2010.

6.6 The second defect.....affected 14 branches....and generated discrepancies....including ashortfall....and a surplus.....

6.7 POL was unaware of this defect until, a year later after its first occurrence in 2011, it re-occurred.....

6.8 POL's initial investigations in 2012 failed to reveal the system defect and, because the cause could not be identified, the amount was written off.

⁹ Often by those alleged to have stolen or defrauded Post Office Ltd. of monies.

¹⁰ Prior to the commissioning of the Second Sight Report a number of complainants had prevailed upon their Members of Parliament to raise the issue of HOL's integrity in the House.

¹¹ Second Sight's interim report published 8/7/2013, paras. indicated.

¹² In fact this disclosure was made by Dr. Gareth Jenkins of Fujitsu Services Ltd.

The Helen Rose, or Lepton P.O. Report

8. Shortly after the publication a further report, now referred to as the Helen Rose, or Lepton P.O. Report, came to light. This report was based upon a series of email passing between Helen Rose, a POL Security Fraud Analyst and Dr. Gareth Jenkins a member of the Fujitsu team. The emails appear to have been sent/received over the period 30th January 2013 to 13th February 2013. The essence of the contact is a ‘question-and-answer’ process between Helen Rose and Dr. Jenkins in circumstances where Helen Rose was enquiring into an apparent HOL issue at the Lepton SPSO. That issue was resolved: the importance of the report however was this: it was rather suggestive of the proposition that Dr. Jenkins then knew of other Horizon issues related to events which occurred in January and February of 2013. The effect (if not the substance) of the report was to cast a further shadow over both HOL and those who had asserted its reliability in court documents and in court.

Consequences of Second Sight and Helen Rose

9. Notwithstanding the fact that Dr. Jenkins was, both in his expert witness statements and to the court, attesting to the integrity of HOL, he knew at the time that HOL had defects affecting the accounting function. In particular Dr. Jenkins had been aware that one such defect might remain unresolved until a systems change planned for October 2013.
10. Dr. Jenkins failure to mention the HOL defects in his expert witness statements or to POL and POL prosecutors rendered his written statements inaccurate and misleading. That failure amounted to a breach of Dr. Jenkins’ duty to inform the defence and the court (and POL) of those matters – see paragraph 6 above. This was an important and far-reaching failure the consequences of which are only now beginning to crystallise. Of primary importance was the fact that, had POL been possessed of this material during the currency of any particular prosecution, it would have undoubtedly been disclosable to the defence pursuant to POL’s duty of disclosure.
11. Because a defendant is entitled to challenge any prosecution material, where (s)he asserts HOL failings as the source of any loss or shortage, (s)he would have been

entitled to the disclosure of the material known to Dr. Jenkins. Thus in any case where a prosecution relied upon HOL data as a primary source of evidence and the defendant was convicted¹³, the non-disclosure of this material has the potential to render a conviction unsafe.

Chronology: post second Sight Interim Report.

12. Cartwright King first became aware of the issue of bugs within HOL on 27th June 2013 and just prior to the commencement of the trial of R. v. Balvinder Samra, a SPMR alleged to have removed money from PO Card Accounts operated by elderly and vulnerable customers. We were instructed that a report commissioned from Second Sight by Post Office Ltd. and as yet unpublished, indicated that HOL may not be 'bug' free, and that at least one of the 'bugs' produced false-balance figures. Given that all of the data supporting this prosecution originated from HOL and other HOL-interfaced systems, we postponed the Samra trial.
13. Following the postponement of the Samra trial POL instructed prosecuting solicitors to commence a review of all POL prosecutions back to 1st January 2010 so as to determine whether or not any particular defendant's conviction might have been rendered unsafe by the non-disclosure of material revealed by Second Sight and Helen Rose but not disclosed by Dr. Jenkins. Much thought was given to the selection of the start-date, including such factors as proportionality; resourcing; transparency; and POL reputation. The view was taken that all of these considerations militated in favour of a date close to the initial HOL migration date of 2010.

The Review process

14. The purpose of the Review process was defined as being to identify those cases where, had we been possessed of the Second Sight and Helen Rose reports during the currency of the prosecution, would we have then been required to disclose some or all of that material to the defence. We deliberately set a very low threshold for applying this test: if the material *might* have been disclosable then we would provide the Reports to the defendant so that he could consider whether or not to appeal against his

¹³ Either by trial or by guilty plea.

conviction. This test, and indeed the entire process, was directed towards the duty of any prosecutor to provide to a defendant any disclosable material.

15. The process adopted was thus: all of the cases were subjected to a 'sift' review in which those identified as being 'risk' cases were separated out and subjected to a 'Full Review' The sift review was conducted by a qualified criminal solicitor and entailed the reviewer reading the case papers, identifying the issues and considering whether or not HOL was an issue. Sift Reviewers were required to have relevant criminal experience; in addition they received training in both POL prosecution practice and disclosure prior to commencing work on the Sift process.
16. Full Reviews were (and are) conducted by senior counsel experienced in prosecuting and defending criminal cases and disclosure issues. In each 'Full Review' case a full and detailed report was undertaken, considering every aspect of the case and reaching conclusions about POL's exposure. Where it was determined, again by a very low threshold test, that disclosure ought now to be made, the reports were disclosed to the defendant's representatives.
17. To date, 301 cases have been subject to a 'sift' review. The breakdown is as follows::

Statistics as at 16.10.13	Initial Sifts	Second Sifts	Fully Reviewed	Disclosure Advised	Disclosure Provided
To date	301 ¹⁴	58	35	15 ¹⁵	10 ¹⁶

¹⁴ 19 cases subject to the 'sift' review process are Scotland and Northern Ireland cases. Out of those 19 cases, 7 were identified as requiring a 'full review' (all Scottish cases). These cases have been discussed directly with the Procurator Fiscal.

¹⁵ Disclosure was advised in the case of Thomas Brown but not made as the case was discontinued

¹⁶ Disclosure has been advised in Hutchings and Robinson but not yet made as the disclosure letter is with BAQC for approval. Disclosure will be required in the cases of King & Jewson and Williams (Persis) if these defendants are charged.

18. Where the Full Review required that we do so, we have disclosed the Second Sight Interim Report and the Helen Rose Report to a small number of convicted defendants. We do not consider that all who have received this disclosure will launch an appeal – the cases against them were in any event strong and, whilst the material was properly disclosable, it remains only one factor amongst many. Thus far no convicted defendant has sought the leave of the Court of Appeal to challenge his conviction, however this may change.
19. We are also in the process of undertaking a ‘second sift’ review. This entails senior counsel reviewing all ‘sift’ reviews to ensure uniformity of approach and correctness of the original reviewer’s decision.

The Future

20. Systems are now either in place or being put into place so as to ensure that POL’s duties as a prosecutor are fully complied with in all respects. In particular we have drafted, and POL has adopted, a process for the Identification, Recording and Retention of Material which may be subject to Duties of Disclosure.
21. We were also instructed to, and have, drafted a Prosecution Policy. This document sets out in detail the way in which POL will deal with those alleged to have committed offences against POL. The Policy is consistent with those operated by other large prosecutors.¹⁷ This document, like all such documents, will be published so that all may see what they can expect from POL in the future.
22. The benefits of these new systems include the demonstrable auditability and transparency of POL’s revised criminal litigation function.
23. On the 8th July 2013 we advised POL that there ought in future to be at least one degree of separation between any expert witness called in support of a POL prosecution and POL/Fujitsu. Accordingly POL instructed Cartwright King to identify

¹⁷ E.g. Crown Prosecution Service; HM Revenue & Customs; The Environment Agency; Department for Work & Pensions; The Office of Fair Trading; The Serious Fraud Office etc.

an alternative expert with the appropriate knowledge of HOL to provide such evidence. That new expert would deal both with those cases presently under prosecution and any future HOL-reliant prosecutions. We have identified two; Professor Kramer and Dr. Dulay, both in tenure at Imperial College, London, as the ideal candidates for this role. Both have agreed to take on this work.

Scotland

24. At the beginning of September, POL was informed that the Procurator Fiscal for Scotland (PF) had determined all POL prosecutions in Scotland should be terminated. He had arrived at this decision on the basis that, as POL were then unable to prove that HOL was wholly reliable, he was not in a position to seek the conviction of any defendant on potentially unreliable evidence. POL's main concern here was that of the intention to stop ALL cases and not just those which relied upon HOL-based evidence. Such a step would have raised a considerable public relations storm for POL.

25. CK senior counsel Simon Clarke and senior Solicitor Martin Smith were asked by POL to attend upon the PF and to see if anything could be done to dissuade him from his stated course. Jarnail Singh attended for POL. Having heard from CK and JS, the PF agreed that, rather than discontinue every case, he would now review each case separately and a decision taken on the facts of individual cases. This amounted to a departure from his starting point that all POL prosecutions were to be terminated. In addition the PF agreed to adjourn every case for 6-months to allow POL to instruct a new, independent expert.

Discontinued Cases

26. Following review, a number of HOL-reliant cases were discontinued, not least because we sought to limit POL's exposure.

Present state of affairs

27. We believe that we are nearing the end of the Review process, certainly in relation to HOL cases going back to January 2010. We are certainly more confident now that the

number of potential wrongful convictions is in single figures and that the Court of Appeal is likely to overturn only one or two of those convictions, if any.

Current & on-going prosecutions

28. Prosecutions are presently subject to moratorium pending the appointment of a replacement expert.

Documents

29. We include in this Briefing the following documents:

- i. Counsels General Advice, 8th July 2013
- ii. Draft reply to Criminal Cases Review Commission
- iii. Counsel's Advice re Expert Evidence (Dr. Gareth Jenkins)
- iv. Compensation for Miscarriages of Justice advice
- v. Counsels Advice – "Disclosure - The Duty to Record and Retain Material"
- vi. Review Protocol for the Initial Sift and Full Review Process
- vii. Protocol for the Identification, Recording and Retention of Material which may be subject to Duties of Disclosure
- viii. Sample Full review – R. v. Khayyam Ishaq
- ix. Meeting Report – Scotland
- x. Draft Scope for computer experts.
- xi. Prosecution Policy.

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16th October 2013