

BRIEFING NOTE TO BIS Select Committee

CONFIDENTIAL – NOT FOR PUBLICATION

1. Introduction

1.1. The purpose of this Briefing Note is to provide Members of the BIS Select Committee with confidential information supporting my oral evidence to the Committee.

2. Access to the complete legal files

2.1. In my evidence to the Committee I referred to the need for Second Sight to have access to the complete, i.e. not redacted, legal files held by Post Office. Ms. Vennells also referred to Post Office's commitment to identifying "*Miscarriages of Justice*".

2.2. However, Post Office's true position on this point was set out in a letter from Post Office to Second Sight, dated 21 January 2015:

"Post Office does not accept that an analysis of the evidence in the Applicant's criminal case, whether served during the course of that case or not, is either within the scope of the mediation scheme or something which is within Second Sight's remit."

2.3. It would appear that concern about Second Sight investigating previous prosecutions by Post Office, is the real reason behind Post Office's continuing refusal to provide us with access to the complete legal files.

2.4. When Second Sight was first appointed by Post Office and Members of Parliament in July 2012, a number of undertakings were given by Post Office in order to satisfy MPs that Second Sight would be able to conduct a truly independent investigation into the matters of concern.

2.5. Those undertakings included the following:

- *Unrestricted access to documents held by Post Office (including documents subject to confidentiality and legal professional privilege);*
- *No limitation in the scope of work determined necessary by Second Sight.*

2.6. Those undertakings were reflected in the “*Raising Concerns with Horizon*” document signed by Post Office on 17 Dec 2012 and sent to the JFSA and Mediation Scheme Applicants. A key paragraph was:

“In order to carry out the Inquiry, Second Sight will be entitled to request information related to a concern from Post Office Limited, and if Post Office Limited holds that information, Post Office Limited will provide it to Second Sight.”

2.7. This statement was intended to accurately reflect the undertakings mentioned in Paragraph 2.5 above.

2.8. It would appear that many Subpostmasters and Applicants to the Mediation Scheme will have relied on that paragraph, when reporting matters to Second Sight. Post Office is clearly no longer meeting its commitment to provide Second Sight with the documents requested.

3. The importance of access to the complete legal files

3.1. In a small number of cases we have requested and been provided with access to the complete legal files. This was before the policy referred to in Paragraph 2.2 above, was adopted by Post Office.

3.2. The following represents anonymised extracts from a single complete legal file held by Post Office, regarding a case that has been accepted for Mediation. This case involved a charge of Theft that was withdrawn at trial. “REDACTED” represents the name of the former Subpostmaster.

a) On 17 May 2006 the Post Office Investigator reported:

“Having analysed the Horizon printouts and accounting documentation I was unable to find any evidence of theft or that the cash figures had been deliberately inflated.” (My emphasis)

And

“The prepared statement seems to intimate that she didn’t receive adequate training at the time and that the manuals were old and out of date. It also suggests that she didn’t receive any training in respect of other matters.

It also refers to an alleged £1,500 error, which doubled to £3,000 when attempts were made to correct it and another error of £750. No dates are supplied in respect of these alleged errors. It also suggests that ‘The Post Office systems are shambolic’ and details alleged problems encountered. It states that all staff use the same Horizon user name again citing lack of training as the reason for this.” (My emphasis)

In my opinion, this indicates that a charge of Theft would be likely to fail, because Post Office's own Investigator found no evidence to support such a charge. In addition, the admitted password sharing created a situation where it was not possible to link any loss or theft to a named individual, an essential element in proving a charge of Theft. No more detailed investigation was ever carried out by Post Office.

- b) On 26 June 2006 the Principal Lawyer of the Criminal Law Division of Royal Mail (the Prosecuting Authority on behalf of Post Office at the time) stated:

"In my opinion the evidence gave rise to offences of theft / false accounting"

- c) On 15 November 2007 the Principal Lawyer of the Criminal Law Division of Royal Mail advised:

"As you know there has been some discussion as to whether or not pleas to false accounting would be acceptable. I note this would be agreeable providing that REDACTED were to repay the full amount."

- d) REDACTED was subsequently charged with 1 count of Theft and 14 charges of False Accounting

- e) On 16 November 2007 the Principal Lawyer of the Criminal Law Division of Royal Mail stated:

"I have forwarded the memo to Counsel. I have informed him that whilst there is no outright objection to proceeding with False Accounting, there is a concern as to recovery of Money. We have to date been able to recover where False Accounting only is charged though on one or two cases the Defence will argue against. Whilst a plea to Theft would be preferable ,in the event of non-payment the intent would be to proceed to confiscation."

- f) The forwarded memo stated:

"I am never confident with False accounting charges in relation to recovery under POCA 2002 and the theft charge makes life so much easier. The defendant has General Criminal Conduct under the proposed charges and this would be so with just the false accounting however we have been challenged once before when proceeding to POCA where only false accounting was charged, and I would probably be more inclined to except Particular Criminal Conduct when dealing with confiscation in that scenario. I fully understand the balance of cost in court time against recovery and if the charge of theft was dropped for a guilty plea then I would still believe it appropriate to follow to confiscation..."

g) On 19 November 2007 REDACTED pleaded guilty to 14 counts of False Accounting. The Prosecution agreed to leave the count of Theft on file, providing prompt repayment of the losses by REDACTED was made.

A letter dated 19 November 2007 from the Principal Lawyer of the Criminal Law Division of Royal Mail stated:

"it has been made clear to the Defence that there must be some recognition that the Defendant had the money short of theft and that a plea on the basis that the loss was due to the computer not working properly will not be accepted." (My emphasis)

3.3. This new evidence causes me a number of concerns, all or most of which would appear to be in breach of the Crown Prosecution Service ("CPS") Guidance to Prosecutors, which Post Office and Royal Mail are required to comply with.

- a) The Prosecution knew that there was insufficient evidence to support a charge of Theft, but proceeded with it nonetheless.
- b) The offer by the Prosecution to remove the charge of Theft was used to put pressure on REDACTED to plead guilty to the False Accounting charges, even though the Prosecution knew that a charge of Theft was likely to fail.
- c) The threat of proceeding with a charge of Theft was used to put pressure on REDACTED to agree to pay the losses identified and to avoid a custodial sentence, normally associated with a charge of Theft in these circumstances.
- d) The threat of proceeding with a charge of Theft was primarily to assist in the recovery of losses, and not in the interest of Justice.
- e) The Prosecution insisted that as part of the agreement to drop the charge of Theft, that no mention of alleged problems with the Horizon computer system would be made.

4. Conclusion

4.1. The new facts that have come to light as a result of examining a single complete legal file, have identified a number of issues that indicate:

- a) Possible misconduct by a Prosecutor on behalf of Post Office; and
- b) A possible miscarriage of justice.

4.2. In my view, this analysis of a single complete legal file, has demonstrated the benefit of doing so; particularly bearing in mind the stated objective of Post Office to thoroughly investigate possible miscarriages of justice.

4.3. Second Sight will therefore, continue to press for access to the complete legal files and other documents that we believe are necessary for Second Sight to conduct an independent investigation into the matters of concern.

GRO

Ian R Henderson CCE, CISA, FCA 19 February 2015