

**POSTMASTER GROUP ACTION
CONFIDENTIAL AND LEGALLY PRIVILEGED**

Bond Dickinson

DECISION 1: *Does Post Office address in detail the "bugs" in Horizon identified by Second Sight?*

SUMMARY:

Three known "bugs" are referenced in the current draft of the Letter of Response (Falkirk / Payments Mismatch / Suspense Account). The logic behind mentioning those bugs specifically is that they were identified by Second Sight in their reports.

There are, however, other known bugs which are not mentioned in the Letter of Response (for example, recent issues with Transaction Corrections and Outreach Branches).

ADVANTAGES:

- Providing detail on the known "bugs" has the appearance of transparency and sends the message that POL has nothing to hide.
- We ensure we can tell a positive story about these "bugs" on our terms, describing the processes we have to detect, investigate and resolve them.

DISADVANTAGES:

- The more information we provide, the more lines of questioning we may face from Freeths about bugs (eg. please provide a list of all known bugs etc.).
- The information could be spun to feed a story that "Post Office now admits bugs in Horizon".
- It is likely that during the litigation further "bugs" will come to light and not mentioning them now may appear to look like Post Office concealed other issues / will cause a drip feeding of this issue, keeping it alive for longer.

RECOMMENDATION:

- We confront the issue of "bugs" head on by providing details of the 3 bugs identified by Second Sight while making clear that it is not an exhaustive list. Transparency on this point helps dispel the myths around systemic problems in Horizon.

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DECISION 2: Does Post Office attack Second Sight's credibility / expertise in order to undermine their reports?

SUMMARY:

In the current draft of the Letter of Response, we describe the ways in which Second Sight have fallen short both in terms of the quality of their work and their unilateral decisions to stray from the scope of their instructions into matters of criminal law on which they have no expertise.

However, we also seek to rely on Second Sight's conclusion in its interim report – never subsequently revised – that they found no systemic flaw in Horizon.

ADVANTAGES:

- Freeths are seeking to argue that Second Sight's Part II report is good evidence of wrongdoing. However, the Part II Report repeatedly arrives at conclusions which are unsupported by evidence. By undermining Second Sight, we undermine the credibility of their conclusions.
- We force Freeths to properly evidence their claims rather than simply relying on Second Sight's reports.
- Although Post Office has an internal view on the quality of Second Sight's work, this view has never been made public and Post Office has historically shied away from criticising Second Sight in correspondence. From a public / third party perspective, Second Sight may still be viewed as a very credible source of information.
- At some point, we will have to address the deficiencies in Second Sight's work. Criticising Second Sight from the outset would put a marker down for the litigation and ensure that Post Office's position is consistent throughout.

DISADVANTAGES:

- Attacking Second Sight may prompt the question: "why did POL appoint them / keep them on?"
- We want to rely on Second Sight's conclusion in its interim report dated July 2013 that it found no systemic flaw in Horizon. By undermining the quality of Second Sight's work, we risk calling into question the reliability of this crucial finding (which they never expressly reversed in the course of the Scheme).

RECOMMENDATION:

- Criticise Second Sight but in a measured way - namely for the lack of evidence supporting their conclusions in the Part II report and their position on criminal law matters.

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DECISION 3: Does Post Office release Second Sight from their confidentiality obligations and allow them to speak to Freeths?**SUMMARY:**

At paragraph 11.2 of the Letter of Claim, Freeths ask for confirmation that Post Office has no objection to Second Sight providing information to Freeths for the purposes of the proceedings. Second Sight is however bound by confidentiality obligations to Post Office so cannot do this without Post Office consent.

Note: Freeths could in due course obtain a Court order to supersede the confidentiality restrictions.

ADVANTAGES:

- Not releasing Second Sight will look like we are suppressing information. This will play badly in Court and may be in the media.
- Speaking to Second Sight may assist Freeths in furthering their understanding of the factual background to the claims which should, in turn, make them confront those inconvenient facts in many of the claimants' cases (eg. false accounting, evidence of human error, mismanagement and so on).

DISADVANTAGES:

- Historically, Second Sight have had access to Post Office's privileged legal files. Although the documents should have been returned to Post Office and all copies at Second Sight destroyed, Second Sight still has some of this information in their heads. There is a risk that Second Sight might inadvertently waive privilege by disclosing information to Freeths.
- Second Sight may – conversely with the advantage outlined above – obscure Freeths' understanding of the facts and encourage them to pursue time-wasting lines of enquiry.
- If the claimants can support a claim as one being something Second Sight has raised with them, it serves to dignify or add substance to pure speculation.

RECOMMENDATION:

- The best outcome would be to avoid SS speaking to Freeths without Post Office being accused of suppressing information. To try to achieve this outcome, the recommendation is to avoid a direct answer at this stage but rather ask Freeths to confirm:
 - Whether Freeths intend to call SS as a factual or expert witness (and if not, why do they need to speak to them)?
 - Their proposals for dealing with the privileged information conundrum.

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DECISION 4: *Does Post Office lodge counterclaims against Claimants who have outstanding debts?*

SUMMARY:

There are 29 claimants who owe outstanding debts to Post Office, with the total cumulative debt at just under £1m. Approximately £300k has been "written off" by Post Office already so the total outstanding debt on Post Office's books is just under £700k.

ADVANTAGES:

- It would be inconsistent with Post Office's defence if we did not pursue the counterclaims - if Post Office's legal position is correct then, on face value, the debts are due to Post Office.
- It puts Post Office on the front foot and sends a message to the claimants/Freeths that Post Office is confident in its position.
- The counterclaims can be used as a bargaining chip in any settlement discussions with the relevant claimants.
- Post Office may recover some of the debts if the counterclaims are successful.

DISADVANTAGES:

- There will be a Court fee of £10,000 associated with counterclaims – although substantial, the cost is worth the benefit delivered.
- Ups the ante – it may cause an aggressive reaction from Freeths / postmasters and allegations that Post Office is acting oppressively.

RECOMMENDATION:

- Counterclaims should be brought against Claimants with debts where there are fair legal grounds to do so.

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DECISION 5: Does Post Office agree not to assert any Official Secrets Act obligations against the Claimants?

SUMMARY:

The subpostmaster contract contains a clause that prohibits subpostmasters from making disclosures of Post Office information in the context of the Official Secrets Act (**OSA**).

At paragraph 184 of the Letter of Claim, Freeths ask for an assurance from Post Office that *“no claimant, witness or other person who may provide assistance in relation to this litigation (eg. an ex- Fujitsu employee) will be subject to any allegation, claim or proceedings for breach of the Official Secrets Act, breach of contract relating to disclosure of any information or document or any claim on any other basis arising out of their use or disclosure of documents in or related to this litigation.”*

The subpostmaster contract goes further than the Act in providing that no postmaster may without permission make disclosures of any information or document obtained in the course of their work (as opposed to banning the disclosure of the specific categories of information protected by the OSA).

The wording of this section of the contract is confusing and somewhat archaic. From our enquiries of long serving staff at Post Office, nobody has ever heard of Post Office enforcing these provisions or can recall their underlying purpose.

ADVANTAGES:

- Giving Freeths the assurance they seek avoids wasting time on an irrelevant side point.
- Avoids further scrutiny of unhelpful / confused sections of the subpostmaster contract which do not paint Post Office in a good light.
- Seems like a concession when, in fact, Post Office has no intention of enforcing any OSA obligations anyway.

DISADVANTAGES:

- Given that we cannot find any practical or commercial advantage of these provisions to Post Office, we cannot see any disadvantage in confirming Post Office will not enforce these provisions.

RECOMMENDATION:

- Give the assurance that Post Office will not enforce these provisions in relation to the Group Action.

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DECISION 6: *Does Post Office engage in further mediation?*

SUMMARY:

Freeths have confirmed their clients are broadly prepared to mediate at any stage of the proceedings.

Of the 91 claimants, 70 participated in the Mediation Scheme. Post Office agreed to mediate with 43 of those 70. A total of 25 claimants were refused mediation on the grounds that mediation had no prospect of success, 22 of these having been convicted of a criminal offence. In relation to the remaining 2 cases of the 70, the Working Group refused to authorise mediation in one case (Banks) and the other claimant (Choudry) did not respond to any correspondence so his case was closed before reaching the mediation stage.

ADVANTAGES:

- By agreeing to a further mediation, Post Office looks reasonable – unreasonable behaviour, in particular unreasonably refusing mediation, can be penalised by the Court in costs.
- Mediation has the potential to settle cases early.
- Post Office has not yet mediated the non-Scheme cases and, once their claims are properly particularised, some of these cases may be suitable for mediation.

DISADVANTAGES:

- Indicating an interest in mediation will encourage Freeths to think that there is money available for a settlement.
- Post Office has already gone through mediation with many of the claimants so there is little to be gained by repeating the exercise for these claimants.
- At present the claims are poorly particularised and so mediation is unlikely to lead to a settlement.
- Some of the claimants are subject to criminal convictions and Post Office cannot settle with these claimants without significant risk of making those convictions unsafe.

RECOMMENDATION:

- Politely refuse mediation at this stage but say we will keep the position under review.
- Make clear however that Post Office will not settle under any circumstances with convicted postmasters.

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DECISION 7: Does Post Office explain that part of Post Office's motivation for bringing prosecutions is a desire to recover money?

SUMMARY:

Freeths argue in the Letter of Claim (at paragraph 104) that there have been "*numerous instances in which criminal charges, such as theft, were brought in circumstances where it appears that [Post Office's] primary motivation was a desire to recover financial losses*".

Freeths say that this private interest in the consequences of the prosecution created an actual or potential conflict of interest such as to encourage Post Office to circumvent checks and balances in the application of the tests under the Code for Crown Prosecutors (**the Code**).

We are aware that in some parts of Post Office there is perhaps a tacit view that prosecutions do come with the advantage of allowing losses to be recovered.

ADVANTAGES:

- By addressing this issue head on, we avoid any suggestion that we are trying to conceal this point and can downplay its significance as we control the message.
- This approach punctures the atmosphere of suspicion that Freeths are trying to create by saying Post Office is posing as an independent prosecutor when it actually has its own skin in the game.

DISADVANTAGES:

- The idea that Post Office prosecutes to recover money will be unattractive in Court (even if its significance is minimised).
- Freeths are alleging malicious prosecution. A key defence is to show that Post Office acted with a proper purpose. It is unclear at law whether a motivation to recover money would be considered a proper purpose.

RECOMMENDATION:

- Do not address this point at this stage but wait to see if Freeths pursue the malicious prosecution claim further.