

POST OFFICE LTD

MEETING REPORT – **4th September 2013 – bto Solicitors,
Edinburgh**

– **5th September – Procurator Fiscal,
Edinburgh**

4th September – 9.30am – bto offices, Edinburgh.

Simon Clarke – CK

Martin Smith – CK

Laura Irvine – bto

Lindsay MacNeill – bto.

1. **The Scottish prosecutorial system.** Unlike in England & Wales there are no private prosecutors; all such work is undertaken by the Procurator Fiscal's (PF) office. The police provide case papers to the PF's office and the decision to prosecute or otherwise is taken there – that decision is entirely reserved to the PF and those complaining of crime have no say in the matter. We are informed that this decision-making process extends to circumstances where the PF may determine to prosecute or continue a prosecution in circumstances where the complainant does not support a prosecution or no longer supports a prosecution.
2. Special Reporting Agencies (SRA's) may report crimes to the Procurator Fiscal's office. There are over 200 SRA's, in the main being government or quasi-government agencies such as the Benefits Agency; the Environment Dept; *etc.* POL fits into this framework and is regarded by the PF a SRA. The role of an SRA is that of a special-interest complainant. The SRA investigators collate evidence and forward a completed file to the PF for a decision as to prosecution – the PF makes his own decision based on the material provided by the SRA, his own policy and the Scottish rules of evidence. Many SRA's have their own legal and investigatory departments who act as agent to the SRA, liaising with the PF

and in many instances assisting with the investigation, collation and drafting processes.

3. Thus bto's role is dissimilar to that of CK in England & Wales. Within the Scottish prosecutorial system bto does not presently act as prosecutor nor are they presently POL's SRA agent: rather they advise POL on the evidential and procedural requirements of individual cases and on prosecution decisions.
4. Following our meeting with the PF (for which see below) it was determined that bto's role would have to be expanded to that of POL's SRA agent (again, see below).
5. **Case reviews – open cases.** Cases presently under prosecution were reviewed. All of these cases fell within our Type-A case class, *i.e.* they were all cases in which HOL had provided the information as to wrongdoing but was not the provider of primary evidence. In almost all of the cases the sub-postmaster/mistress had admitted to the taking of monies belonging to POL for their own unauthorised purposes (loans to others; supporting associated businesses *etc.*). A number of cases were to go to trial; all were again Type-A cases. Accordingly we do not conclude that these prosecutions are directly affected by the present difficulties (but see below, para.).
6. **Case reviews – concluded cases.** In all cases defendants had admitted wrongdoing and had entered guilty pleas. Again all were Type-A cases. Again we concluded that these cases remain unaffected by present difficulties, not least because of the nature and detail of admissions advanced by defendants.
7. **Work conducted by bto to date.** We considered the nature, extent and quality of the work undertaken by bto to date. We unhesitatingly conclude that they have accomplished everything required of them and to a high standard. The bto personal allocated to POL work are highly competent and well-qualified. Both are former PF deputies (*i.e.* prosecutors) and are well-experienced in the work of the PF's office. We conclude that their experience of prosecuting adds much to their POL brief and provides a valuable resource to POL, as do their undoubtedly contacts still working within the PF's office.

5th September – 9.30am – Office of the Procurator Fiscal, Edinburgh

Simon Clarke – CK.	SC
Martin Smith – CK.	MS
Laura Irvine – bto.	LI
Lindsay MacNeill – bto.	LMcN
Jarnail Singh – POL.	JS
Paul Miele – PF depute (policy).	PM
Paul Beaton – PF depute.	PB
(Procurator Fiscal – not present)	PF

8. PM informed the meeting that his role was to formulate a policy recommendation and to forward that to the Procurator Fiscal for his decision as to how POL cases were to be dealt with by the PF's office.
9. It was very plain from the outset that the PF's current position on POL prosecutions was that all such cases should be terminated. The concerns of the PF's office centred upon the notion that, where we were unable to prove that HOL was wholly reliable, any and all evidence derived therefrom would itself be unreliable and thus incapable of supporting the guilt of an accused person. In short, the PF was saying that he was not prepared to prosecute any case in which, were a POL witness to be asked in court "*Is this system reliable?*" his/her answer was anything other than an unqualified "Yes" And in present circumstances such an answer could not be advanced.
10. The PF's approach was seemingly dictated by a number of factors unique to the Scottish jurisdiction, the most important of which include: (i) the requirement that, save in certain circumstances (for which see below), a case may go forward only where there are at least two independent pieces of evidence in support of guilt (so-called corroboration); (ii) the absolute and inalienable right to silence, which unlike in English law may not be commented upon at trial; (iii) the absence of any requirement to provide the court and prosecution with a defence statement which,

in concert with the right to silence, permits the defence to ‘ambush’ the prosecution at trial (an approach long-since abolished in English law). The effect of these provisions is to produce a fundamentally different approach to disclosure in the Scottish system. Whilst under the English system disclosure is to a large extent guided by the defence response to allegations and likely plea (e.g. where there are admissions in *i/v etc*), in the Scottish system disclosure rules dictate that, even where the accused has made unequivocal admissions to auditors or in interview, disclosure relating to a corroborating fact occurs *ab initio*. This situation arises because in many cases the PF does not know what the defence is to be, so that where, as is often the case with POL prosecutions, the evidence against an accused is restricted to no more than a HOL-based indicator together with admissions, *i.e.* two pieces of independent evidence (see para.8(i) above), if one piece may be unreliable then it does not qualify as independent reliable corroboration and accordingly you will not meet the minimum requirement for at least two pieces of independent evidence.

11. Such a situation may however be ameliorated by the so-called Special Knowledge rule. This rule provides that, where an accused makes an admission to the auditor or in interview, if that admission contains some piece of information unique to the facts of the case and such as can only be known by the perpetrator of the crime, then this Special Knowledge evidence *may* remove the need to comply with the two pieces of independent evidence rule, or, if not removing the need for two pieces of evidence, the Special Knowledge meets the test as being one such piece of evidence.
12. This brief overview of the Scottish system provided the foundation for the discussion which followed. SC provided the meeting with a broad overview of the HOL difficulties (absent any direct or indirect reference to the role of GJ or Fujitsu). Importantly both PM and PB appreciated the distinction between the Type-A and Type-B cases and understood that each required a different decision-making process. They also accepted that there had not been, and was presently no Scottish case in which POL had relied upon expert-witness evidence in support of the integrity of HOL, indeed no accused person had sought to rely upon any suggested

HOL issue. PF and PM also accepted that all cases presently under prosecution were Type-A cases.

13. SC then outlined the proposed instruction of independent expert witnesses and the scope and depth of those expert's roles. PM indicated surprise at the seriousness and depth to which POL was prepared to go in dealing with the HOL issues and were clearly appreciative of the approach being taken. He suggested that the matters outlined went a long way towards meeting the PF's concerns as to both present and future prosecutions.

14. As a result of this new understanding on the part of PM and PB, PM agreed that his recommendation would be that each case be reviewed 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. Indeed matters went much further, for discussion then focussed on how the present prosecutions were to be advanced. Here PM and PB agreed to recommend to the PF that he seeks to adjourn all cases currently under prosecution for a period of between 6 to 8-months in order to permit POL to obtain the expert evidence in support of HOL and to use that evidence in those prosecutions. This recommendation amounts to a complete reversal of the PF's original position.