

Bond Dickinson

Briefing note on the Criminal Cases Review Commission's (CCRC) investigation into historic criminal convictions of postmasters by Post Office Limited (POL)

1. BACKGROUND

- 1.1 POL was first contacted by the CCRC in July 2013 after the CCRC noticed press coverage about allegations of unsafe convictions by Post Office as a result of problems with Horizon. At this stage, the CCRC adopted nothing more than a watching brief and asked for a few basic documents. No review was opened at this stage.
- 1.2 In March 2015, a number of Claimants simultaneously asked the CCRC to review their cases. It is thought that some political pressure may also have been applied. This is when the CCRC formally opened its review and served s.17 notices (described further below) on Post Office seeking information about specific cases.
- 1.3 As of March 2017, the latest state of play is that there are 28 cases being reviewed (the **POL Cases**).
- 1.4 Of the 28 POL Cases being considered, 23 involve individuals who were applicants to Post Office's Complaint Review and Mediation scheme and 25 of the 28 are claimants in the Group Action.¹
- 1.5 The CCRC's investigation is still ongoing and the CCRC are currently instructing their own expert to provide a report, a process which we anticipate will take some time. It is still unclear as to when the CCRC is likely to reach decisions on whether any of the POL Cases should be referred back to the Court of Appeal.

2. THE CCRC'S FUNCTION

- 2.1 The CCRC is a statutory body with responsibility for investigating suspected miscarriages of justice.
- 2.2 Its principal role is investigating cases where people believe they have been wrongly convicted of a criminal offence or wrongly sentenced.
- 2.3 The CCRC has the power to refer cases to the Court of Appeal where:
 - 2.3.1 there is a real possibility the conviction would be overturned if it were referred²; and
 - 2.3.2 this real possibility arises from evidence or argument which was not put forward at trial or appeal (or there are exceptional circumstances); and
 - 2.3.3 the applicant has already appealed or applied unsuccessfully for permission to appeal (or there are exceptional circumstances).³
- 2.4 None of the convictions in the POL Cases were the subject of an appeal. Indeed, in all but one case, the convictions followed a guilty plea.
- 2.5 As per paragraph 2.3.3 above, typically the CCRC will not investigate cases where the defendant has not appealed in the normal way. Where there are exceptional circumstances, however, the CCRC can look at a case even though it was not appealed through the courts. This is the basis on which the CCRC are reviewing the POL Cases.

¹ The 3 CCRC cases involving individuals who are not claimants in the Group Action are Ishaq, McDonald and Shaheen.

² See section 13 of the Criminal Appeal Act 1995

³ See CCRC's guidance for legal representatives issued in August 2015

- 2.6 The CCRC have produced a memorandum on "exceptional circumstances"⁴. The memo makes clear that decisions to review or to refer "no appeal" cases are rare and a "no appeal" case will generally only be referred if not to do so would be contrary to the interests of justice. At paragraph 15, the CCRC note that there is no prescriptive list of exceptional circumstances.
- 2.7 It is on this "exceptional circumstances" basis that CCRC has premised its review. It has not explained what those circumstances are.

3. THE CCRC'S POWERS

- 3.1 In order that the CCRC can carry out its function, it has certain investigatory powers contained in the Criminal Appeal Act 1995 (the **Act**). Under section 17 of the Act, the CCRC can require a person, POL in this case, to produce a document or other material which may assist it in the exercise of its functions.
- 3.2 Under s.17(4) POL's duty to comply with its disclosure obligations under s.17 "*is not affected by any obligation of secrecy or other limitation on disclosure...which would otherwise prevent the production of the document or other material to the Commission or the giving of access to it to the Commission.*"
- 3.3 The fact that a document may be legally privileged, for example, is no bar to disclosure to the CCRC in response to a s.17 request.
- 3.4 Pursuant to section 25 of the Act, POL can notify the commission that material provided to it is not to be disclosed by the CCRC without POL's prior consent.
- 3.5 POL cannot withhold such consent unless (a) the person [POL] would have been prevented by any obligation of secrecy or other limitation on disclosure from disclosing the information to the Commission, and (b) it is reasonable for [POL] to withhold its consent to disclosure of the information by the Commission.
- 3.6 POL has given this s.25 notification to the CCRC in respect of all the material it has provided in the course of its investigation.

4. DOCUMENT COLLATION PROCESS

- 4.1 Criminal law firm Cartwright King have been instructed by Post Office to collate the responsive documents to each s.17 request received from the CCRC with oversight from Bond Dickinson LLP.
- 4.2 The s.17 notices have typically been widely worded to capture "*all documents and other materials, including all material which has been the subject of an application for public interest immunity, relating to [the convicted person]*". In some cases the notices specify that the scope of the request includes but is not limited to "*audit files, investigation files, prosecution files, internal and external reviews*".
- 4.3 Every time a s.17 notice has landed with POL, CK has been tasked with collating the responsive documents. CK has co-ordinated a search for hard copy and electronic documents within POL and Royal Mail Group (**RMG**) as many of the pre-separation files would be stored in RMG's archives. It has also undertaken searches of its own electronic and hard copy files where relevant (ie. where CK acted on a particular case and therefore holds case files).
- 4.4 CK provided POL with advice on disclosure and this was submitted to Rodric Williams on 31 March 2015.

⁴ <http://www.ccrc.gov.uk/wp-content/uploads/2015/01/Exceptional-Circumstances.pdf>

HARD COPY DOCUMENTS

4.5 It was established that hard copy documents should be searched for by Post Office and RMG's legal teams, the Security teams at POL and RMG, and by CK themselves in those instances where they hold case files. Mediation scheme documents were provided by Bond Dickinson.

4.6 In broad terms, the hard copy documents which have been located (reflected on the tracker document at Appendix 1) fall into the following categories:

- Post Office Green File – Security file containing documents including the case file event log, the "offender report/case summary, a typed interview summary, any legal or management advice, any relevant statements or evidence.
- RMG Green File – Security file as above
- RMG buff file – for prosecutions managed by RMG Legal – including, for example, correspondence, emails, telephone notes, memos, evidence, schedules.
- CK Orange case file – this file contained advice to RMG/POL, documents including the indictment, statements, interviews, case summary, defence statement / expert reports, pre-sentence reports, hearing reports, correspondence, and counsel's brief/instructions.
- CK sift review documents – CK reviewed a no of cases prosecuted by POL/RMG to determine whether post-conviction disclosure should be made in those cases.

4.7 Where available on any given case, these hard copy documents have been collated by CK and uploaded onto a data room to which the CCRC have access.

ELECTRONIC DOCUMENTS

4.8 POL identified early in the process that relevant electronic information could potentially be held by POL, RMG, CK and Bond Dickinson LLP (in the context of the Complaint Review and Mediation Scheme).

4.9 POL and RMG also held tapes and CDs containing responsive information. Where these were located, their contents were uploaded onto the CCRC data room.

4.10 The electronic documents located broadly fall into the following categories:

- Electronic documents held by Post Office's Security Team;
- Electronic documents held by Post Office Legal;
- Electronic documents held by RMG's Security Team on their Electronic Filing Cabinet;
- CK's electronic case files;
- Bond Dickinson's electronic mediation files (CQR/POIR/Draft CRR/ responses to draft CRR / final CRR).

4.11 The huge volume of electronic data collected from Post Office, RMG, CK and Bond Dickinson (approximately 123GB in total) was uploaded to a version of the data room to which Bond Dickinson only have access. Given the scale of the data collected, discussions were held between POL and the CCRC about filtering the documents appropriately so as to facilitate a targeted and proportionate review by the CCRC.

4.12 With this in mind, the CCRC requested that the POL Security files be filtered in relation to each individual case, to include documents containing the defendant's surname within a particular

timeframe starting 3 years before the date of conviction and ending on the date of conviction itself.

- 4.13 This filtering process was first carried out in April 2016 and we are in the process of arranging with POL an updated filtering exercise to cover those cases where s.17 notices post-date April 2016.
- 4.14 Similarly, we are considering the extent to which further data extraction is necessary in relation to CK's electronic files.

5. ADVICE

- 5.1 Post Office has sought legal advice on various points throughout the CCRC investigation process both from Bond Dickinson and from Brian Altman QC. For the purposes of this note, we have highlighted two recent pieces of advice which may be of interest: (1) what strategy should Post Office adopt to bring the CCRC's review to as prompt an end as possible and (2) in the context of the CCRC's recent push to instruct an expert, what is the legal position regarding onward disclosure of material supplied to the CCRC to any expert they instruct?

- 5.2 We have summarised each of these pieces of advice in turn below.

ADVICE ON STRATEGY

- 5.3 We met with Rodric Williams and Brian Altman QC in November 2016 to discuss whether Post Office could take any steps to bring the CCRC's review to as swift a conclusion as possible. BAQC's advice was that it would be better to let the review take its course. If the CCRC had a sense POL was trying to apply any pressure, they would not take kindly to that.
- 5.4 We also discussed the potential disclosure of three categories of documents to the CCRC: (1) the Deloitte Report (2) BAQC's own (largely positive) advice to Post Office on a selection of cases being reviewed by the CCRC; and (3) civil litigation correspondence.
- 5.5 It was agreed that while there were some potential negative side effects in the short term, there was a longer term benefit of leading the CCRC to the Deloitte Report. Because POL is being accused of concealment in the context of the Group Litigation, BAQC advised that it makes sense to guard against a situation where this document was kept under wraps now and then comes to light at a later stage, which would inevitably look bad. It was agreed that POL would flag the existence of the draft Deloitte report to the CCRC and insist on a s.17 request with a s.25 assurance in respect of consent to further disclosure.
- 5.6 BAQC advised, and POL agreed, that there was no benefit in disclosing BAQC's report. It is a privileged document and while he gave a clean bill of health, it contains some slight criticisms of POL.
- 5.7 Similarly, it was decided that there was no benefit to be gained for POL by handing over the Freeths/BD civil litigation correspondence. BAQC advised that the CCRC may be befuddled by the wide allegations made by Freeths and consider they need to widen the breadth of their s.17 notices as a consequence.

ADVICE ON DISCLOSURE OF MATERIAL TO (AND BY) THE CCRC'S EXPERT

- 5.8 As noted above, the CCRC are in the process of instructing an expert to look at the technical issues raised in the POL Cases.
- 5.9 Bond Dickinson was asked in January 2017 to advise on the extent to which POL could control disclosure of information to and by the CCRC's expert (and how we might amend the CCRC's standard expert engagement terms to help achieve this).

5.10 There is a very helpful formal memorandum on disclosure produced by the CCRC which pulls together the relevant principles from statute and case law (http://ccrc.wpengine.com/wp-content/uploads/2015/03/Disclosure-by-the-Commission.FM_.pdf)

5.11 Paragraphs 59-60 of the CCRC's guidance document on disclosure read as follows:

59. Experts and those instructed by the Commission to carry out any inquiry or investigation should be given such information as is necessary to enable them to discharge their duties.

60. It may be appropriate to obtain formal undertakings from experts that material will not be disclosed by them.

5.12 Given that paragraph 60 refers to "formal undertakings", we tweaked the wording in the CCRC's standard terms of engagement to its expert to reflect this. We also inserted a term requiring written permission from Post Office to onward disclosure.

5.13 The CCRC accepted all of POL's proposed amendments to the expert engagement terms.

How far POL can protect the disclosure by the CCRC of information contained in expert reports to applicants/third parties?

5.14 As noted above, everything that POL has provided to the CCRC has been provided with a s.25 notification that the material should not be disclosed without POL's consent (albeit to withhold consent there must be an obligation of secrecy/other limitation on disclosure AND it must be reasonable).

5.15 However, paragraph 2 of the guidance memo on disclosure notes that the statutory controls operate in parallel with the requirement in *Hickey*⁵ that the CCRC must disclose information "if it would assist the applicant to make his best possible case".

5.16 The next question is how these two parallel principles interact. Interestingly, one of the factors relevant to reasonableness is whether in withholding consent, POL would be preventing the CCRC from complying with the principles in *Hickey*. POL cannot, it seems, necessarily rely on its s.25 protection where the information would assist the applicant to make his best possible case.

5.17 In addition, expert reports are dealt with specifically in the CCRC's memo. Paragraph 48 states "*expert reports will generally be disclosed in full. It will be acceptable for the CCRC to disclose a summary or the gist of an expert's report if doing so satisfies the interests of fairness.*"

5.18 There is also a separate CCRC formal memo called "Experts – Selection and Instruction" which deals with disclosure of expert reports. Paragraph 11 states "*[any] expert report which the Commission has obtained is usually disclosed with the Commission's Statement of Reasons, unless there are particular circumstances that dictate earlier disclosure or (exceptionally) non-disclosure.*"

5.19 Under the *Hickey* principle, information can be withheld from disclosure for various reasons, the most relevant of which for our purposes is irrelevance. Depending on the facts, POL may be able to argue, for instance, that a particular document / part of the expert report would not assist the applicant to make his best possible case as it is irrelevant and therefore should be redacted.

5.20 The headline point here is that POL has limited control and, indeed, it only has that control up to a point. The best POL can do is flag to the CCRC that it reserves its right to make representations on any parts of the expert report it thinks can be legitimately withheld, or if POL believes disclosure of a summary of the gist would be fair, and agree a process for making such representations.

5.21 Encouragingly, the CCRC have given POL assurances that there would be no reason for experts to make any direct disclosures to applicants and the CCRC would seek Post Office's consent, in

⁵ *Hickey & Others* [1995] 1 All ER 489

line with s.25 to any onward disclosure. To the extent the expert reproduced any POL material in his report, the CCRC confirmed they would be willing to consider representations to redact or summarise material, noting however that under s.25 of the Act, consent to disclosure cannot be unreasonably withheld.⁶

What is the position in respect of onward disclosure of the expert's report by an applicant?

5.22 Once an applicant receives an expert report from the CCRC, the expert/CCRC have no control over further disclosure of that document. This much is made expressly clear in the CCRC's terms of engagement with its expert.

Bond Dickinson LLP

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⁶ Email from Amanda Pearce to Rodric Williams at POL dated 18 January 2017