

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 Crown Office and Procurator Fiscal Service ('COPFS'). The police provide case papers to COPFS electronically and the decision to prosecute or otherwise is taken by legally qualified solicitors, known as the Procurator Fiscal and his or her Deputies ('PF'). The decision to prosecute is entirely reserved to the PF and those who have reported the crime (the 'complainer') has 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 complainer does not support a prosecution or no longer supports a prosecution.
2. Special Reporting Agencies (SRAs) may report crimes to the PF's office. There are over 200 SRAs, 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 as a SRA. The role of a SRA is that of a special-interest complainer. 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 SRAs 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 different 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, para.20).
5. **Case reviews – open cases.** Cases presently under prosecution were reviewed. All of these cases fell within our Type-A case class (save one), *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 but one are Type-A cases. Accordingly we do not conclude that the Type-A prosecutions are directly affected by the present difficulties (but see below, para.14). The one Type-B case is that of Gourlay – this will require disclosure of the HOL material and will also be adjourned as per paragraph 14 below so as to enable our expert witness to provide his report.
6. **Case reviews – concluded cases.** In all cases defendants had admitted wrong-doing 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** personnel 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 undoubted 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 in Policy Unit.	PM
Paul Beaton – PF in Policy Unit	PB

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 in summary cases which, in concert with the right to silence, permits the defence to ‘ambush’ the prosecution at trial. 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.10(i) above), if one piece may be unreliable then anything undermining this should be disclosed. In those circumstances the evidence may not qualify as independent reliable corroboration and 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* be enough to 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. It is to be noted that those Deputes concerned with ‘marking’ cases for charging were often inclined to dismiss cases for No Further Action (NFA) at the point of marking rather than return the case to the police/SRA (for which see para.2 above) with a request for further evidence-gathering. Whilst this does not appear to have occurred thus far in any POL Scottish case, the risk that it may occur remained very real.

Discussion

13. 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.
14. 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.
15. 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 law officers that the operational offices should seek 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.

Ministerial correspondence

16. With regard to the 'Ministerial correspondence' received by the Crown Office (Ministerial meaning either from a Member of Parliament, Member of the Scottish Parliament or addressed to the Law Officers), it was established that this related to a 2004 case against a Mrs Doran. The case concerned a loss of approximately £7000 and

it is noted by her husband in the correspondence that the case against her was found not proven (an acquittal). His wife insisted the Horizon system was at fault and so Mr Doran writes that his wife was wrongfully prosecuted by POL, given the now reported issues with Horizon. Mrs Doran has since passed away and Mr Doran writes that the prosecution played a role in the deterioration of her health. Crown Office has yet to draft a response, but is aware that POL/**bto** is available to offer a considered analysis of the facts to best inform their reply. This appears to be the first piece of correspondence relating to POL. **bto** has asked that the PF inform them of any further correspondence received and of the cases to which such correspondence relates.

Future charging

17. Discussion then turned to the issue of future charging. The charges presently recommended in Scotland do not mirror those used in England. Currently English POL prosecutions are either charged as theft, fraud or false accounting. Given that it is often difficult to prove money was in fact taken, the current practice in England is to charge theft and fraud/false accounting in the alternative, thereby inviting pleas of guilty to the fraud/false accounting charge. This practice usually avoids the ‘proof of taking’ issue, particularly where a defendant admits falsifying figures but asserts that they did so to cover an unexplained loss.
18. In Scotland the Crown prosecutes POL offences as “embezzlement”, a charge which requires proof of the taking (theft) of money. This approach almost always engages the difficulties outlined in the preceding paragraph. We suggested that, in appropriate cases, it may be better to libel (charge) a ‘fraudulent scheme’ (a similar charge to the English ‘false accounting’ but somewhat evidentially easier to prove). All present agreed that this approach to charging represented a better way of dealing with those circumstances where the issue of taking would prove, in evidential terms, somewhat more difficult. PM and PB indicated that they would advise those Deputes concerned with such matters that for future prosecutions they should liaise more closely with **bto** so as to ensure appropriate charges were laid.
19. The averment of charges is also very different from the English model and this topic represents an important consideration in POL prosecutions. Whereas in the English

jurisdiction charging is a matter of simply specifying the charge as a breach of a particular provision (*e.g.* “theft, contrary to s. 1 of the Theft Act 1968”) together with a very brief and general formulation of the facts behind the charge (*e.g.* “That on such-and-such a date X stole monies belonging to Post Office Ltd”), the Scottish model requires that the facts to be relied upon in proving the charge appear in the averment (in Scotland, ‘libel’) itself. The effect of this requirement is that a libel will contain a recitation of facts relied upon and which in general terms must be proved. Accordingly (and unlike the English model) a proper drafting of the libel may be time-consuming, require skill and subtlety and will be crucial to the successful prosecution of the case.

bto as POL’s SRA agent

20. It was clear to us that **bto’s** role as described in paragraph 3 above would have to change to something more akin to that of CK’s role in England and Wales. This means that **bto** will now ensure that any case presented to the PF’s office for prosecution was evidentially sufficient in the terms set out above. PM and PB indicated that the expansion of **bto’s** role to that of POL’s SRA agent would not only be welcomed, but was central to the prosecuting decision and process. Indeed PM and PB identified a number of SRA’s whom the PF considered did not conduct of their functions as SRA satisfactorily and who consequentially had files ‘marked’ NFA all too regularly.

21. It seemed to us therefore that that **bto** will, in addition to their present advisory function, be required to:

- Liaise much more closely with investigators so as to ensure that an investigation is well-focused on the relevant issues, as is presently done in England and Wales by CK;
- play a greater role in advising upon and collating witness statements and other evidence;
- prepare the file for presentation to the PF, ensuring that there is a sufficiency of evidence such as to avoid a NFA response;
- draft the appropriate libel (see para.19 above);
- present the file for ‘marking’

- provide the PF with any expert evidence in support of HOL reliability and integrity;
- obtain and provide to the PF all such disclosure material as he may require in the discharge of his disclosure duties;
- liaise with the PF throughout the prosecution process, advising and assisting the prosecuting Depute, particularly on matters such as background knowledge, expert evidence, witness availability and POL policy;
- Advise POL on all prosecution-related matters and in particular those attendant upon issues of disclosure within the Scottish jurisdiction. Here **bto** will liaise with CK so as to ensure that **bto** are fully aware of all relevant material.
- Advise and act upon all matters ancillary to POL prosecutions in Scotland.

22. Having concluded the meeting with the Procurator Fiscal's office a further discussion ensued between those representing POL, CK and **bto**. CK will provide **bto** with any advice, assistance and training they may require in their future conduct of the POL prosecuting brief. In particular CK will:

- provide HOL expert witness support;
- provide disclosure support and material and act as clearing agent for disclosure issues, thereby tying-in with CK's disclosure functions as agreed with POL;
- assist in the annual review of **bto** cases;
- provide any other expertise and support as **bto** may seek.

SUMMARY

23. This Note may be summarised thus:

Review – 4th September 2013

- All but one of the cases presently being investigated or prosecuted is a Type-A case. None of the Type-A cases provides any cause for concern regarding HOL issues. The single Type-B case under prosecution is based primarily of HOL evidence. This case, as are the Type-A cases, is to be

adjourned pending the provision of a POL expert witness statement dealing with HOL.

- All concluded cases were Type-A cases and no disclosure is required.
- **bto** is well-suited to act as POL's SRA agents in Scotland – they have the necessary breadth of expertise, experience and quality of personnel to undertake the expanded role required and have thus far have accomplished everything required of them and to a high standard. They are well-regarded by COPFS and their contacts within COPFS provides POL's Scottish prosecuting function with a valuable resource.

COPFS meeting – 5th September 2013

- The Crown Office and Procurator Fiscal Service (COPFS) prosecutes all criminal allegations in Scotland.
- The charging decision (or not) is exclusively that of COPFS.
- Special Reporting Agencies may report crimes to the PF's office.
- POL is a Special Reporting Agency; **bto** is to be regarded as POL's SRA agent in Scotland.
- Whilst COPFS policy officer PM will recommend to the Law Officers that the current position on POL prosecutions, that all such cases should be terminated, should change. He will recommend that each case be reviewed separately and a decision taken on the facts of individual cases.
- PM further agreed to recommend to the Law Officers that the operational offices should seek 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, that all POL prosecutions were to be terminated.
- In future prosecutions, more consideration will be given by the PF to the charging decision and the appropriateness of charges in particular cases.
- **bto** will, in addition to their present advisory function, expand their role to that of POL Special Reporting Agency agent to COPFS.
- The PF's office will, so long as POL/**bto** acts properly and sufficiently as SRA and agent, liaise with **bto** in individual cases, act upon proper **bto** recommendations and cooperate with **bto** in the prosecution process.
- **Bto** and CK will liaise and cooperate in POL prosecutions.

Simon Clarke
Martin Smith