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File Note of meeting - POL and Second Sight Wednesday 4th March 2015 at 1pm

Present:

Jane MacLeod	(JM)	POL General Counsel
Belinda Crowe	(BC)	POL and Scheme Secretariat
Ian Henderson	(IH)	Second Sight
Chris Holyoak	(CH)	Second Sight

The suggested agenda for the meeting was set out by IH by email to JM on 27 Feb 2015 as:

1. Jane's letter to Second Sight of 24 February re M103
2. Our acceSecond Sight to the complete legal files relating to prosecution cases
3. AcceSecond Sight to the NSF files of POL employees at Bracknell in 2008
4. Suspense Accounts (may be resolved in meeting with Alisdair)

It was agreed that the suspense accounts item had been dealt with at the proceeding meeting with Al Cameron which JM had also attended.

JM's letter to Second Sight of 24 February re M103

1. IH said that he had found the letter genuinely helpful. It had highlighted points Second Sight had not dealt with as thoroughly as they might have done although those points would have been addressed as part of the usual process (i.e. when POL responded to the draft CRR). However, the letter raised a number of points of principle and it would be useful to discuss POL and Second Sight's respective positions which he was confident could be resolved.

2. Second Sight consider it a necessary to look in more detail at the prosecution process, the steps that have led to prosecutions and the extent to which evidence has been obtained to support charges because of the totality of that in terms of the impact on the applicant – e.g:
    - suspension without pay and without access to records
    - the fact that it could take years for a case to get to court.

3. IH said Second Sight needs to be satisfied that POL has acted properly, whether the decision to suspend, with a view to prosecution, was reasonable in all the circumstances and look at the standard of evidence relating to the prosecution. In some cases Second Sight are not seeing the correct standard of evidence and therefore have reached a tentative conclusion of 'prosecutor misconduct'. Their initial view is that:
    - prosecutions are being brought based on the ability to recover loss rather than in the interests of justice – e.g. that theft charges are being dropped in favour of false accounting
    - there may not have really been sufficient evidence of theft and therefore the theft charge may only have been brought as a negotiating tool so that spmrs would plead guilty to false accounting
    - the evidence may not comply with relevant guidance in terms of standards of evidence

4. IH acknowledged the point in JM's letter that theft and false accounting where part of the same [statute] and carried equal penalties but having looked a two or three cases it seemed that the outcomes in terms of sentences handed down for theft were [harsher] and theft seemed to be treated more seriously. He accepted, however, that this may be because of sentencing guidelines.

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5. Having seen some applicants' representations that theft charges were dropped at trial and no evidence offered maybe two years later Second Sight considers POL needs to help Second Sight reach a conclusion on these matters by providing full access to legal files where they consider there has been prosecutor misconduct.

6. JM pointed out that matters relating to criminal law and procedure are outside the scope of the Scheme and Second Sight's Terms of Engagement and asked whether IH agreed. IH responded that whilst he agreed that prosecution policy at a 'high level' was outside the brief, the engagement letter did not relate to matters of prosecution procedure in individual cases where clearly the prosecution element forms a significant part of the complaint. He saw this as being a distinction between policy and facts. Second Sight could look at matters from an evidential point of view– that is what prosecution evidence was there and what were the consequences of POL's approach to prosecution. In that regard POL may have been acting improperly as a prosecutor and Second Sight feel it is necessary to form a view on that.

7. JM stated that Second Sight's Letter of Engagement specifically related to matters of criminal law and procedure and drew IH's attention to the letter which said, under scope of services,
" In providing the Services, Second Sight shall:
act with the skill and care expected of qualified and experienced accountants; it is acknowledged that matters relating criminal law and procedure are outside Second Sight's scope of expertise and accordingly shall not be required to give an opinion in relation to such matters;"

8. JM explained that on reading this section she had originally thought it had been included as a form of 'protection' for Second Sight so that they were not required to comment on matters outside of the scope of the Scheme and their expertise. Further, she said that neither the Letter of Engagement, the Terms of Reference of the Scheme or the Working Group require Second Sight to comment on matters of prosecutions or criminal law and procedure so it is not clear why they are doing so.

9. JM went on to highlight her very specific concerns as being:

    - by looking at criminal law and procedure how are Second Sight able to satisfy key stakeholders that as accountants rather than criminal lawyers with the requisite expertise that their opinions on these matters are ones on which applicants may rely, and
    - Second Sight have previously suggested a lack of [sophistication] on the part of applicants' understanding (e.g. in relation to not understanding the terms of their own contract). Therefore how can stakeholders be satisfied that applicants will not rely opinions Second Sight are presenting and assume them to be expert opinions when they are not.

10. JM expanded on this by saying that in her experience (and IH had said he had previously appeared as an expert witness) an expert would normally only offer an opinion where competent to do so. IH agreed and assured her that Second Sight were not expressing an opinion on these matters, simply reporting facts. This has always been Second Sight's position - trying to steer clear of opinions on criminal law and procedure but would comment on matters of fact.

11. JM drew IH's attention to the draft CRR for M103 and read out paragraph 4.21.

    *"There is however, in our **opinion**, nothing within this Disclosure which points to the existence of any evidence, in the possession of POL at that time, which would suggest*

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that the Applicant was guilty of theft, and we have seen no evidence, provided by POL subsequently, which would suggest otherwise. We are drawn to the ***conclusion*** *…."*

12. JM said that contrary to what IH had just said the paragraph clearly and explicitly set out an opinion, and the conclusion, in the absence of facts, was also an opinion.

13. IH acknowledged that the paragraph "goes too far", that the drafting as it stands is inappropriate and confirmed and Second Sight will substantially redraft the CRR to acknowledge JM's points.

14. CH commented that Second Sight was holding back the completion of some CRRs pending the resolution of the matter of provision of legal files to try to avoid this situation.

15. JM returned to what Second Sight had referred to as examples of 'prosecutor misconduct' – a very serious allegation – and asked IH again how Second Sight could satisfy stakeholders that they are qualified to make those judgements.

16. IH acknowledged that Second Sight are not the arbiters on these matters but at most they can say is that in their opinion this is something which needs to be considered.

17. JM said that this in itself is an opinion Second Sight are not qualified to give. She asked IH the value of setting out such opinions in reports which are issued only to the applicants, their advisors and the mediators and copied to the Working Group, none of whom are in a position to do anything with that opinion. Put another way it is not a matter appropriate for consideration at mediation as none of the participants are in a position or qualified to take a view on it or act on it.

18. IH said that the most Second Sight, mediation or the Working Group could do is consider the fact that if the applicant has said that POL withdrew a charge of theft and Second Sight could not find evidence to support a charge of theft.

19. JM asked again how Second Sight could establish their credentials to test whether the evidence was sufficient to bring a charge. IH responded that he has been an 'expert witness' in court cases and has been required to consider evidence in in those circumstances. JM pointed out that she understood the role of expert witness but that was not how Second Sight were acting here. They were commenting on the sufficiency of evidence to support a charge whereas the expertise in relation to such matters lies with the courts. It is not for Second Sight to subsequently suggest that that evidence on which the court based a conviction was in some way deficient. She asked how such opinions were helpful, especially when Second Sight has neither the authority or jurisdiction to make them and further are neither qualified nor tasked to do so.

20. JM also expressed concern about scope creep in terms of Second Sight extending their enquiries into matters of criminal law. IH considered that it was appropriate for them to highlight matters of fact, distinguishing that from an opinion – and answering the question "is the evidence sufficient to support the charge?"

21. JM stressed again that this is an opinion on a matter that can only be determined by the courts and not Second Sight's role. IH argued that in many cases the courts did not have the opportunity to consider whether the evidence supported a charge of theft because POL withdrew the charge when the applicant pleaded guilty to false accounting – so the evidence was never tested.

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22. JM explained that POL was required to meet the evidence requirement in the code of conduct for prosecutors when bringing a charge. Further POL did not advise the defendant how to plead – the defendant always had an opportunity to take legal advice. She again posed the questions - how is it helpful, how is it Second Sight's responsibility and how are Second Sight qualified to make such judgements about sufficiency of evidence? IH reiterated that full access to POL's legal advice would assist them.

23. JM asked whether Second Sight had seen the legal advice provided to the defendants by their defence lawyers. IH confirmed this was often not available but they are looking at the evidence presented by POL. JM suggested that would be a one-sided exercise for Second Sight to see only POL legal advice and for Second Sight to consider this in the absence of any advice the defendant had received in relation to the charges against them.

24. JM explained the criminal law process. POL gather's its evidence and considers, in light of that evidence, which charge(s) to bring. The evidence available informs the charge and POL must apply the evidence test and assure itself that the evidence standard is met for each charge it brings. The defendant is presented with the evidence when charged. They then take their own legal advice – their lawyer will advise them and take instruction on how they wish to proceed. That advice and the instruction taken must be put in writing to the defendant. On instruction, if the defendant is charged with theft and false accounting, their lawyer may approach POL to say that the defendant will plead guilty of, for example, false accounting, but not guilty to theft. JM stressed it is the defendant's lawyer who approaches POL lawyers, not the other way round. Under those circumstances POL *may* decide either not to offer evidence or to withdraw the charge of theft. In considering this POL needs to consider whether proceeding with a theft charge as well as false accounting *could* leave it open to criticism by the courts for pursuing for a charge of theft on a not guilty plea when it could secure a conviction for false accounting on a not guilty plea. However the fact that in such circumstances POL may not present evidence of theft does not mean it does not have sufficient evidence, nor that the evidence it has does not meet the evidential test as set out in the prosecutors code. IH confirmed he had not fully understood this and stressed that he would need to revisit the wording used in relation to prosecution cases in light of JM's comments and ensure inaccuracies were corrected.

25. IH said that in some cases he has looked at he has not seen or been satisfied that there was sufficient evidence to support the charge against the applicant. JM referred IH to the introductory paragraph at the beginning of Second Sight's CRRs which says:

> '*The Terms of Reference for Second Sight as set by the Mediation Working Group for this work are as follows:*
>
> *To investigate the specific complaints raised by each Subpostmaster who has been accepted into the Scheme with the aim of providing:*
>
> *i. an assessment of points of common ground between POL and that Subpostmaster;*
>
> *ii. an assessment of points of disagreement between POL and that Subpostmaster;*
>
> *iii. where there is disagreement, a logical and fully evidenced opinion on the merits of that Subpostmaster's complaint where it is possible to do so;*

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iv. a summary of any points on which it is not possible to offer a fully evidenced opinion due to a lack of evidence/information;…'

26. JM stated that, contrary to this, a number of the conclusions in M103 and indeed other CRRs in relation to matters of criminal law (and other matters) are based on supposition, are not evidenced based and in her view go beyond Second Sight's brief. Further in doing so Second Sight are representing that they have competence where they do not and are therefore potentially misleading the applicant.

27. IH agreed that Second Sight should avoid this and address JM's concerns. They have put other cases on hold and would want to address legitimate concerns. IH accepted that Second Sight's reports should be evidence based. This had been the basis for requesting access to the legal files – so they can report on the totality of the evidence. JM stressed that IH has still not explained how Second Sight has the expertise to make that assessment - it is a matter for the courts. JM and IH agreed to leave the matter of M103 and turn to the matter of the provision of legal files more generally.

Legal Files

28. IH explained that going back to when their work first started the previous GC (and Paula and Alice) were happy for Second Sight to have access to full legal files. That policy subsequently changed with the new GC.

29. JM explained that Second Sight were engaged initially for a different task than the one they are engaged for now. The initial task was to undertake an investigation for POL and produce a report for POL. POL did not waive privilege and POL could control how the information was used to ensure that Second Sight did not inadvertently put POL in a position where privilege was waived. The access under the initial work enabled Second Sight to get a broad overview. However Second Sight's role changed with the creation of the Scheme and is as set out in the Letter of Engagement). Second Sight are now producing individual reports for applicants. This is outside POL's control and POL therefore loses control of privilege on any documents it provides. It therefore followed that Second Sight could not use any privileged information and therefore JM struggled to see what purpose would be achieved by the provision of such information.

30. She pointed out that the information POL was making available and used was that which was available to the defendant and the courts. This was the position agreed by the Working Group – she had been present for the most recent Working Group discussion on this and heard the Chair say quite specifically that Second Sight were entitled to see those documents which were available to the defence and the courts. IH responded that the Chair had previously said that it was a matter for POL as to whether it waived privilege. JM noted that was simply a statement of fact and that was the point under discussion.

31. IH suggested that he be allowed to review full legal files and report to POL on a confidential basis. JM responded that she considered that such an arrangement would compromise Second Sight's independence, it was the role of the defence lawyers and courts to review evidence and that Second Sight were not qualified, as forensic accountants, to undertake such a review for the reasons she had already stated therefore she could see no purpose in such an exercise. Further, each case was specific to its individual facts and Second Sight could not draw any general conclusions from those facts.

32. IH confirmed again that Second Sight did not intend to comment on criminal procedure but needed to be able to assess the evidence available on a case specific basis to be

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able to form a view on whether it was sufficient. JM said that the information being provided would allow Second Sight to see the evidence provided to the defendant and the court on which POL's case was based. JM asked IH again what his credentials were as a forensic accountant to comment on the sufficiency of evidence.

33. IH maintained that Second Sight's report(s) would benefit from the totality of the information and they had "lost out" since December 2012 when some full legal files had been made available. He acknowledged that it would add a layer of complexity to have access to information which could not be used but thought that POL would welcome the assurance that there was nothing which would cast doubt on the safety of a conviction.

34. JM pointed out that POL had an enduring duty to disclose any information which would undermine its case or assist the case of the defence if it came across such information. Its investigation process for the Scheme was designed with that in mind. That disclosure relates to all prosecutions, not just those cases in the Scheme.

35. CH reminded JM of Paula Vennell's evidence to the Select Committee where she acknowledged that POL needed to know if there had been miscarriages of justice. CH asked how she could satisfy herself on this point if Second Sight were not able to review the legal files and provide that assurance.

36. JM explained that POL can satisfy itself on two counts:
    a. the original allegations were that there were systemic problems with Horizon. No such evidence has been found.
    b. each individual case has been reinvestigated and reviewed, including cases involving criminal convictions with a view of considering whether any disclosure was required. So far no cases have been appealed and no information has come to light which in the view of specialist criminal lawyers who have reviewed every single case which casts doubt on a conviction.

37. IH said he had been told that the investigation team did not have access to legal files (he did not say where this information came from). BC stated the investigation team had had access to any available information they needed to investigate the allegations, including legal files. IH acknowledged he had not been aware of this. JM pointed out that the investigation team were not lawyers and therefore their role had not been to review the legal files in every case. However each case had been reviewed by lawyers. IH said that he understood that Bond Dickinson had been involved in the investigations but they did not retain criminal lawyers. JM explained that as well as BD POL's specialist criminal lawyers had also reviewed each case and in doing so considered whether anything had come to light which engaged POL's duties of disclosure in relation to the cases in the Scheme and any other cases POL had prosecuted. IH said he was unaware of that.

38. IH maintained he would still like to see the files asked that JM consider whether he could go through a few complete legal files with a member of JM's team and then if anything arose of interest they could have a further discussion about how best to proceed. JM said she would consider the points IH had made and come back to him.

Access to 2008 emails

39. JM asked IH for the background to the request. IH replied that Mr Rudkin had made an affidavit in which he said he had witnessed staff in a basement in Bracknell accessing and changing live branch data. The best evidence to prove whether he had seen what he claimed would be contemporaneous evidence from mid/late 2008. It was known which POL employees were working in Bracknell at the time (there were ten) and POL

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agreed to provide their 2008 emails. POL had explained that for technological reasons 2009/2008 emails would be more difficult to obtain because they were on a legacy system but POL would request them and see what could be provided. In the event what had been provided had not covered the period in question.

40. JM asked whether the same issue had arisen in other cases. IH responded that it had not explicitly. It was Mr Rudkin who had raised the specific point about unauthorised access to live data from Bracknell but in about 30% of applicants raised issues relating to 'mysterious' transactions they did not recognise.

41. JM explained that Mr Rudkin's case had been investigated, POL had completed the POIR and the case had been passed for mediation therefore she questioned why the emails were now necessary. IH responded that Second Sight had identified unauthorised remote access as one of their thematic issues and therefore needed the emails to be able to address the matter in their Part Two report.

42. JM referred IH to Spot Review 5 which dealt with this case in detail. IH said that the Spot Reviews were never completed - although Second Sight published this Spot Review with their Interim Report they were not 'static'.

43. JM asked IH why he did not consider Mr Rolfe's statement to be adequate in addressing the issue of unauthorised access from the Bracknell basement. IH explained that Mr Rolfe could not remember Mr Rudkin's visit. JM acknowledged that but pointed out that the statement specifically addressed whether live branch data could be tampered with from the office in Bracknell and made it clear that it could not. She asked why IH would prefer Mr Rudkin's statement to that of Mr Rolfe. IH said that he was left with a conflict of evidence that he has to resolve and only if he could see that there was nothing in the contemporaneous emails relating to remote access the matter would be resolved.

44. JM asked IH specifically what he would be looking for in a set of emails. He responded that he would be looking for information about the specific meeting Mr Rudkin claimed he had attended (although he acknowledged that POL had not disputed that Mr Rudkin was in Bracknell when he claimed to have been) and information about a project relating to foreign currency which was the purpose of Mr Rudkin's visit.

45. JM asked what questions IH sought to answer. IH replied that he wanted exactly what he had asked for - the lotus notes (or equivalent) files for the employees identified to have been working in Bracknell at that time. IH said he had the necessary relevant forensic tools and could search a large amount of email data in less than a day.

46. JM asked again what exactly IH wanted to know and what search criteria/protocols he proposed to use in his search. She said that if IH undertook similar exercises for the courts (as he claimed) he would be familiar with the standard arrangements for such discovery exercises whereby the parties would agree the search protocols in advance.

47. IH said that the information already provided had identified nothing useful and that other stakeholders would be satisfied with nothing less than a full search of the emails requested. JM pointed out that she had to satisfy herself as to her other obligations in relation to data protection and employees before making any information available. For example she would want to review information prior to passing it to Second Sight to ensure it did not contain personal or other information which should not be passed outside POL. Whilst she did not see that as a barrier she needs to narrow the scope of the search to make sure that it is relevant and proportionate.

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48. JM said that an exercise was underway to try to see what email data was available and IH agreed to reflect on the search criteria. They agreed to discuss the matter further when POL had been able to identify what email data could be located and IH had considered the search criteria/protocols.

    The meeting ended at 2pm.