

STRICTLY PRIVATE & CONFIDENTIAL – SUBJECT TO LEGAL PRIVILEGE

**DRAFT SPEAKING NOTE FOR POST OFFICE MEETING WITH CRIMINAL
CASES REVIEW COMMISSION – 8 MAY 2015**

Attendees

Sally Berlin, Casework Director (CCRC)
Frazer Stuart, Legal Advisor (CCRC)
Amanda Pearce, Group Leader (CCRC)

Jane MacLeod, General Counsel (POL)
Rodric Williams, Solicitor, Corporate Services (POL)

Post Office Objectives

- Establish working dialogue with the CCRC
- Obtain better/shared understanding of the background to the s.17 CAA Notices
- Agree the approach to responding to s.17 CAA Notices
- [[Agree approach to media/publicity?]]

Meeting Agenda

1. Role of the CCRC and how it conducts its work

- 1.1 CCRC to provide
- 1.2 Possible POL questions:
 - Appeals / exceptional circumstances
 - [[Approach to media??]]
 - Do you need to investigate every one?
 - Other??

2. Background to the Complaint Review and Mediation Scheme

cf. “End of Term” Report

- 2.1 Post Office and the Network
 - Retailer selling Mails, Financial, Government and Telecoms products and services
 - UK's largest branch network – 11,500 branches; 8,000 agents (S/PMs)
 - o Not employees but handle PO money
 - o Duty to account under contract and common law (agency)
 - o Contractually “responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants”¹

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- Contractual rights to suspend contract pending investigationⁱⁱ
- Business practices have evolved over a long period of time
- Separated from RM in April 2012
 - Some parts of the businesses – inc. security – overlapped

2.2 PO uses the “Horizon” PoS accounting system to process and record transactions in every branch:

- Supplied by Fujitsu
- First introduced in 1995; current version (Horizon OnLine) introduced in 2010
- Currently >60,000 users processing 6 million transactions a day; 2 billion transactions a year
- 500,000 users since launch
- Key Principles:
 - exact record of counter transactions is made and kept in secure audit database
 - safeguards check for transaction data corruption and integrity
 - double entry book keeping validates items purchased match monies received
 - each item in the audit trail has a unique incrementing sequence number (to detect if any transitions records have been lost)
 - transaction records are ‘sealed’ using industry standard secure protocols
 - all audit records are kept in a segregated audit database

2.3 PO handles v. substantial sums of cash:

- £70 billion cash and £636 million coin every yearⁱⁱⁱ
- Horizon helps monitor cash levels in branches
- PMs state their branch account (for which they are liable) through Horizon
- Horizon may provide an evidential basis for a private prosecution (theft, false accounting, fraud) where cash shortfall is identified in a branch (section 6(1) of the Prosecution of Offences Act 1985)
 - in FY 2011-12 and 2012-13, approx. 12% of audits led to the suspension, approx. half of which led to termination, and approx. 2.5% led to criminal prosecution

2.4 Some PMs started attributing branch losses to Horizon

- Shoosmiths LB4As in 2011
- One case struck out on limitation grounds.
- No others pursued (despite repeated assertions that a group action will be commenced^{iv}).
- Early 2012 James Arbuthnot MP asks POL to look into it

2.5 In 2012 POL instructs Second Sight to look at some of the cases

- First report in July 2013 – “no systemic issues with Horizon”
- Felt there were issues with the way we dealt with individual PMs, i.e. how we use Horizon, as opposed to how Horizon works

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- 2.6 PO was very concerned about the impact on criminal cases
- considered content of July 2013 report against the prosecutors' duty of continuing disclosure, in particular:
 - o references to "bugs"
 - o **knowledge of same [[ISHAQ MAY BE RELEVANT!!!!]]**
 - set up the "sift review" process
 - had the suitability of that approach reviewed by Leading Counsel Brian Altman QC
 - made disclosures as a consequence of those reviews
 - **[[received advice on whether to support any appeal if made following disclosure]]**
 - revisited approach to prosecutions (and agent engagement generally)
 - **[[suspended prosecutions (until greater clarity?)]]**
- 2.7 Leads to setting up the Scheme to resolve individual complaints about PM's experiences using Horizon
- A complaint review and mediation scheme, not a compensation scheme
 - First Step – articulate what it is that is supposed to be wrong with Horizon
 - Essential to know given the suggestions of miscarriage of justice
 - o if there's something wrong, we need to fix it!
- 2.8 Scheme is not a criminal case review
- Didn't exclude prosecution cases
 - o this would have excluded some of the higher profile cases; AND
 - o we wanted to understand what the complaints were to see if they were of substance
 - 150 applicants
 - o 44 involve a criminal conviction
 - o 17 of 19 s.17 Notice cases (cf. Case Crib Sheet)
 - Made plain from the outset:
 - o only the courts could overturn a conviction
 - o POL's continuing duty of disclosure
 - o applicants could use the materials produced^v
 - SS expressly accept it is not expert in criminal law and procedure^{vi}
 - o Concern SS's comments on process and practices in Part Two have entered public domain
 - o in particular that PO might not:
 - investigate claims (while acknowledging in individual reports that false accounting obfuscates the cause of a loss)
 - have the evidential foundation to bring a charge
 - o (to best of our knowledge) PO prosecutions follow the Code for Crown Prosecutors
 - this includes the Evidential Stage (sufficient evidence to provide a realistic prospect of conviction)

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- SS' provide lay opinion based on partial information (inexpert opinion based on unproven fact)
- BUT may encourage people to take action

2.9 Scheme Process

- Application Form and CQR (with paid-for professional support and SS assistance)
 - clear that many were seeking very substantial sums of money
- POIR (c. 10 to 20 pages plus up to 80 exhibits depending on age of case)
 - no challenge to the form or content of these
 - even endorsed by JFSA^{vii}
- SS CRR (inc. parties' comments on draft)
- Decision on mediation
 - is it reasonably likely to resolve the dispute?
 - only answerable once we'd looked at the complaint
- Until March 2015, all of this was visible to applicants, advisors, and the Scheme's Working Group (SS; JFSA; Tony Hooper). Certain MPs – J. Arbuthnot in particular- were also updated.
- Since March 2015, still visible to applicants, advisors, and SS, with MPs being offered meetings to discuss individual cases.

2.10 By December 2014, most POIR's finished and first mediations held

- Investigations show:
 - Complaints turned on the specific facts in their individual case
 - Nothing had been found to suggest Horizon was not working as it should
 - The most substantive complaints concerned levels of support
- Also clear that Post Office approaching compensation claims by reference to established legal principles

2.11 This is still the case now we have completed all POIRs

- SS investigations:
 - *"have shown that the majority of branch losses were caused by 'errors made at the counter'"*^{viii}
 - confirm that Horizon works^{ix}
 - recognise that deliberate false accounting prevents investigation into losses^x
- Even Alan Bates has conceded this^{xi}

2.12 Escalation of alternative avenues of challenge at this time

- Media releases from James Arbuthnot
- BBC Coverage (Today Show; One Show)
 - Much correspondence re accuracy and fairness of reporting
- Westminster Hall Debate on 17 December 2014
 - J. Arbuthnot called for CCRC action?^{xii}
- Business Innovation and Skills Select Committee hearing on 3 February 2015

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- Edwin Coe LLP press release “Subpostmasters go to Law” on 9 December 2014
- DSARs – 35 as at 8 May 2015
- CCRC applications – 20 as at 8 May 2015

3. Categories of Responsive Documents and Materials

cf. CK List of Documents; CCRC Disclosure Process documents

Note that documents:

- will be both hard and soft copy, inconsistently across the cases given their date range; and
- are likely to be sited in various formats and locations.

Materials requested (per s.17 Notices)

3.1 “Audit Files”/ “Investigation Files”

- Green File (Security File)

3.2 “Prosecution Files”

- Buff File (RMG Legal)
- Orange File (Cartwright King)

3.3 “Internal Reviews”

- “SIFT REVIEW” (cf. Brian Altman QC Advice)
 - o First Sift, Second Sift, Full Review
 - o Not every s.17 Notice case has been Sift Reviewed

3.4 “External Reviews”

- Complaint Review and Investigation Scheme documents

4. Delivery to CCRC of Documents and Materials

cf. CCRC Disclosure Process documents; Millnet brochure [[arriving 07.04.15]]

4.1 Method of delivery

- Lots of material - suggest “Data Room”
 - o Logon page (username; password)
 - o Workspace page (1x per case) listing files - CCRC to confirm
 - o List of file documents (individual control number; type; description)
 - o Review page (flags; comments etc)
- (Remote) Training and Tech Support available

4.2 Time frame

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- Upload electronic documents
- Scan hard copy documents
- 1 to 2 days to commence process
- 48 hours after upload before available on-line

4.3 Sequence of delivery – CCRC to confirm

- “Complete” case?
- Category of documents (may be easier given the variety of sources)?
- Sample?

5. Points of contact

CCRC nominated Gregg Cooke, Casework Administrator

- Is this still correct?

6. Public statements

6.1 Part Two Report

- POL requests keep confidential under s.25 CAA
- Significant recent publicity (BBC, Daily Mail, Computer Weekly)
- POL continues to assert s.25 protection over Part Two (and all other documentation), notwithstanding others’ breaches of confidentiality

6.2 CCRC comment in Computer Weekly

- Disappointed to see the comment
- What is the CCRC’s custom and practice?
- POL concerned about press coverage, in partic.
inaccurate/sensational reporting
 - o Significant work done with the media about the Scheme
 - o Need to given the number of users (incl. multiples, WHSmith etc)
and significant trading partners (DWP; Bank of Ireland; Royal
Mail Group plc etc)
- Do not wish to try these cases in the media

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END NOTES

ⁱ Section 12, Clause 12 of the standard SPM Contract:

12. The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay.

ⁱⁱ Section 19, Clause 4 of the standard SPM Contract:

A Subpostmaster may be suspended from office at any time if that course is considered desirable in the interest of Post Office Ltd in consequence of his: (a) being arrested, (b) having civil or criminal proceedings brought or made against him, (c) where irregularities or misconduct at the Post Office® branch(es) where he holds appointment(s) have been established to the satisfaction of Post Office Ltd, or are admitted, or are suspected and are being investigated. (emphasis added)

ⁱⁱⁱ Dept. for Business, Innovation & Skills, “Securing the Post Office Network in the Digital Age”, November 2010

^{iv} e.g. Edwin Coe LLP Press Release “Subpostmasters go to law”, 9 December 2014; Daily Mail, “Decent Lives Destroyed by the Post Office, 25 April 2015

^v Extract from Initial Mediation Scheme Pack:

What if my case involves a completed criminal prosecution or conviction?

You may put your case through the Scheme even if you have already received a Police caution or have been subject to a criminal prosecution or conviction.

However, Post Office does not have the power to reverse or overturn any criminal conviction – only the Criminal Courts have this power.

If at any stage during the Scheme, new information comes to light that might reasonably be considered capable of undermining the case for a prosecution or of assisting the case for the defence, Post Office has a duty to notify you and your defence lawyers. You may then choose whether to use that new information to appeal your conviction or sentence.

^{vi} Second Sight were engaged to “act with the skill and care expected of qualified and experienced accountants; it is acknowledged that matters relating to 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” (Second Sight Engagement Letter dated 1 July 2013).

^{vii} Extract from Oral Evidence taken before the Business, Innovation And Skills Committee “Post Office Mediation” Hearing, 3 February 2015 (emphasis added):

Q29 Paul Blomfield: That wasn’t my question. My question was how effective do you think the working group has been in overseeing the mediation process.

.....

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Kay Linnell: The reason the working group is not as fast at pushing this scheme through to mediation as it was, is because some of the goalposts have been moved by the Post Office. When we originally started the scheme—this is what was advocated to members at a training session in Birmingham in the summer of 2013—the presumption was that once they were accepted in the scheme, they would go through to mediation fairly quickly, having raised their issues, allowed the Post Office to investigate and respond, and Second Sight to do an overview recommending it go forward or trying to fish out the bad apples. The reason that has not happened is because the Post Office had done a very thorough job of investigation—albeit half, I would say, of a report I have seen, so they cannot find the records to tell anybody what happened, because it is too old.

viii Para 3.12, Second Sight “Briefing Report - Part Two”, 9 April 2015

ix Extract from Oral Evidence taken before the Business, Innovation And Skills Committee “Post Office Mediation” Hearing, 3 February 2015 (emphasis added):

Q52 Chair: A previous panellist identified, shall we say, potentially antiquated infrastructure and the difficulties you have just outlined. From your perspective, how meaningful is that in terms of the system’s efficiency?

Ian Henderson: Failures are inevitable with that infrastructure. In general, Horizon has a robust recovery mechanism to cope with those failures. The cases we have looked at are primarily the 150 applications to the mediation scheme. They have shown that when there has been an unusual combination of circumstances—they are relatively rare, and I would emphasise the point made previously that, most of the time, Horizon works well—such as power and telephone communication failures, errors being made at the counter or some of the other errors that we have now highlighted and that we will report on in our next report, it is how the Post Office has responded to those that has contributed to the problem. This is partly about a lack of training, partly about a lack of support and, in particular, about a lack of investigation.

....

Q114 Paul Blomfield: The Second Sight interim report, which broadly endorsed the Horizon system, nevertheless identified some potential bugs and flaws that, in some cases, could create errors. Why do you think it is appropriate to use information from that system, given those potential errors, which suggest that it could be unreliable, as evidence to pursue sanctions against individuals?

Ian Henderson: The short answer is that the core system—the software, for want of a better word—works well most of the time. Like any large system, it occasionally generates errors. Our concern is the response by Post Office to supporting sub-postmasters when they face those problems. Yes, there is a helpline facility, and, yes, training is provided, but there is no formal investigative support. Under the contract, sub-postmasters are not entitled to investigative support when they say, “Look, we’ve got this discrepancy. I don’t understand how it happened.” They are left largely to their own resources, supported by the helpline and so on, to get to the bottom of those problems. As we have seen time and again, they have failed to do that. In some cases, Post Office has refused to provide information to them on the grounds of cost—this comes back to the contract with Fujitsu. They say, “It is too expensive. It is outside the terms of our service level agreement. We cannot provide you with the detailed information that Post Office holds.” It is not prepared to disclose that information to sub-postmasters, even though,

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under the contract, it has a legal obligation to make good those losses. It is matters such as that that we are looking into.

^x For example para 5.3, Draft Second Sight - Case Review Report Case Ref. M081, 25 April 2015:

“We recognise that, whenever a Subpostmaster falsifies figures to conceal losses, Post Office is prevented from seeing, and therefore also prevented from reacting to, those losses. It follows that, although false accounting can never be the initial cause of a loss, it can exacerbate the impact of the initial loss by preventing its detection and mitigation. False accounting can therefore turn potentially remediable accounting or transaction errors into actual losses and can also prevent the correction of the practices and procedures that generated those losses in the first place. In that context, the Applicant must bear some of the responsibility for this branch's losses.”

^{xi} Extract from Oral Evidence taken before the Business, Innovation And Skills Committee “Post Office Mediation” Hearing, 3 February 2015 (emphasis added):

Q24 Mike Crockart: How much of that—people finding out about it and the number growing—is, as George outlined—

Alan Bates: Jumping on the bandwagon?

Mike Crockart: People saying, “Oh, I had a problem; it must be to do with the Horizon system.”?

Alan Bates: The whole point of the scheme—it is not purely the software that we are talking about. Everyone seems to homing in on the computer system. It is about the support package that works with it. It is the training and the lack of investigation. The Post Office never investigate cases if a sub-postmaster has an issue. If they raise that they have a problem, they suddenly get landed on by Post Office’s audit and, more than likely, they will be thrown out or even charged afterwards. That is what has gone on in the past. I think they are trying to change it these days, but I do not know how successful because two or three new people a week call me, and these are serving sub-postmasters having problems as well. There are ongoing issues.

^{xii} Hansard, 17 Dec 2014 : Column 533WH:

Mr Arbuthnot: My hon. Friend makes an interesting, worthwhile point. I hope that Second Sight will indeed have a role to play. It is meant to be independent: that is how my hon. Friend the Minister described it in last year’s statement. I hope that its approach to documents will be equally independent. I hope that the Minister is able to assure us of that. There may be a role for the Select Committee on Business, Innovation and Skills. I am pleased that its Chairman, the hon. Member for West Bromwich West (Mr Bailey) has been in his place today. There should be an investigation by the Criminal Cases Review Commission off its own bat, and even those who have pleaded guilty should be able to take advantage of such an investigation. There will be a role for the courts. I think, therefore, that there will need to be a fund to help sub-postmasters in those actions. It would be good to think that the Post Office itself could, of its own accord, modify its own behaviour. I wish I did think that, but I do not.