

POST OFFICE LIMITED

ADVICE ON DISCLOSURE ISSUES ARISING OUT OF THE CCRC AND SEPERATE CIVIL PROCEEDINGS

Background

1. Post Office Limited (POL) is presently engaged in litigation on two fronts: it faces a class-action in the civil courts, brought by a number of disgruntled former sub-postmasters and concerning their contracts with POL; and it is engaged with the Criminal Cases Review Commission (the "Commission") in respect of convictions obtained by POL on charges of theft, fraud and false accounting committed against POL. There is a substantial degree of 'crossover' between the two fronts, largely because many of the civil claimants were the subject of convictions now being considered by the Commission.

Overview

The Civil Arena

2. The Overriding Objective (R.1 CPR) requires the full and frank disclosure of material between parties both voluntarily and at an early stage in the proceedings, although there is no requirement to disclose documents or material which is subject to Legal Professional Privilege.
3. Having said that I am essentially a criminal practitioner, so that should specific advice be required relating to disclosure in civil proceedings then the advice of a civil practitioner should be sought. That being said, I am nevertheless able to advise on the specific topic relating to the interplay between the requirements of the Commission as against the general civil disclosure principles.

The Commission

4. Section 17 of the Criminal Appeal Act 1995 empowers the Commission to require any person serving in a public body (here, POL) to produce any document or other material in its possession or under its control and which the Commission believes may assist it in the exercise of any of its functions. It is important here to note that section includes:

“.....documents and other material.....obtained or created during any investigation or proceedings relating to the case in relation to which the Commission’s function is being or may be exercised.....or any other case which may be in any way connected with that case.....”

5. The Commission may require the production of material which would ordinarily be protected by privilege. Section 25 of the 1995 Act provides that a public body from which information has been obtained under s.17 may notify the Commission that disclosure by the Commission to a third party should not be made without the consent of the originating body, in this case POL, and that the Commission must not disclose such material.
6. Thus all material required by the Commission must be produced to them, although POL may require the Commission not to disclose certain material to a third party.

Advice

7. Within the confines of the Commission’s purview, issues of disclosure are no longer the concern of POL, but are solely for the Commission to determine. Accordingly POL must provide to the Commission all material in its possession and required by the Commission under s.17 of the 1995 Act to be produced and may not withhold material on the ground that it is or may be subject to Legal Professional Privilege.

-
8. With respect to material which is subject to Legal Professional Privilege, POL should identify that material to the Commission and require the Commission not to disclose it.
 9. Issues relating to disclosure within the civil arena remain the responsibility of POL. The following points should be noted:
 - i) Where POL has disclosed material within the Civil arena, they may not then withhold permission from the Commission to disclose.
 - ii) POL is not required to seek the permission of the Commission before making any disclosure within the Civil process. It is to be noted however that any material which falls to be disclosed by POL within the Civil process will inevitably be material which ought to have been provided to the Commission in compliance with a s.17 request – see paragraph 4 above.
 - iii) Material which is the subject of Legal Professional Privilege may be dealt with in the usual terms applicable to such documents.
 - iv) Material which did not meet the test for disclosure within the criminal process, because it neither undermined the prosecution case nor could it have reasonably been expected to assist that of the defence, is on the face it disclosable within the Civil arena so long as the material meets the applicable test: *i.e.* because it adversely affects POL's case in the Civil proceedings, or adversely affects another party's

case, or because it supports another party's case (CPR R.31.6).

10. I now turn to the proper identification of material which will be subject to Legal Professional privilege so that it should be described in the Disclosure Statement as such. The following documents are privileged:

- Documents (including correspondence) between POL and their lawyers for the purposes of obtaining legal advice, *e.g.*
 - Advices and opinions written or provided by lawyers on the Merits, Charging, Evidence, process *etc* of any criminal investigation or prosecution, whether those lawyers be internal or external to POL;
 - Any correspondence or other communication seeking any such advice or opinion;
 - Any correspondence internal to POL and communicating or seeking any such advice, whether from an internal lawyer or from outside lawyers;
 - Any, notes, recordings *etc.* of any conference, conversation or other communication where the subject matter considered related to a criminal investigation or prosecution.

11. The identification of such material should be a relatively straightforward process – the question “*Was a lawyer involved in the production of the advice etc. or the relevant communication?*” being sufficient to determine the issue in most instances. Were the answer to this question to be “Yes” then the document, communication *etc.* may well be subject to privilege.

12. For the avoidance of doubt the following material WILL be subject to privilege:

- Advices on Charging
- Advices on Evidence
- Advices on Disclosure
- Any other advice provided by CK and other lawyers to POL in respect of any criminal investigation and/or prosecution
- Any letter, email or other communication seeking any of the above
- Instructions to Counsel (to advise, prosecute *etc.*)
- Advices *etc.* provided by CK and other lawyers to POL in respect of the Case Review Process conducted following the publication of the Second Sight report (but NOTE that the report itself is not subject to privilege).

Simon Clarke
Senior Counsel, Cartwright King Solicitors

20 December 2017