

# FREETHS

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15 June 2018

Our Ref: JXH/1684/2113618/1/SC  
Your Ref: AP6/364065.1369

Dear Sirs

## **POST OFFICE GROUP LITIGATION GENERAL COMMENTS ON POST OFFICE DISCLOSURE**

We write generally in respect of disclosure provided on behalf of your client, in relation to which there are a number of areas of concern.

We are conscious that there are numerous streams of correspondence relating to distinct aspects of disclosure. However, we take this opportunity to set out in a single letter a comprehensive overview of our observations concerning your client's disclosure in light of the draft Practice Direction, and the Agreed Protocol for the Exchange of Electronic Data, appended to the Second CMC Order dated 2 February 2018, both of which have been adopted by the parties and ordered by the Court. We are mindful that your client is due to give further disclosure, not least on 17 July in respect of the Horizon Issues trial, but none of our comments seek to impose burdens upon your client which would prevent it from giving disclosure as required.

In order to simplify the detail of this letter and the next steps, we have included at Schedule 1 an overview of the action points for your client in addressing the Claimants' concerns over its disclosure.

### **1. GENERAL COMMENTS REGARDING DISCLOSURE GIVEN TO DATE**

#### **1.1. Hard Copy Documents**

- 1.1.1. At various stages of disclosure your client was required to search for and disclose relevant hard copy documents. Based on the disclosure we have received from your client to date, it is difficult to ascertain whether you have conducted a review of any hard copy files.
- 1.1.2. It has come to our attention that POL should have had possession/control of various hard copy documents, which have not been disclosed. Some examples of these were highlighted in our response to your request pursuant to Part 19 of the Pilot Practice Direction/ CPR 31.14 (e.g. Mr

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Naushad Abdulla's business plan, which ought to have been disclosed pursuant to paragraph 4(a) of the First CMC Order dated 25 October 2017). Therefore please provide an explanation of the exercise which has been undertaken to identify appropriate hard copy documents for disclosure.

1.1.3. We refer to your third letter of 18 May 2018, which notes that the Defendant holds hard copy documents, stored in the Postal Museum. These records include historic branch accounting and operational documents. You state that it is not reasonable and proportionate to conduct a search of these documents, and therefore your client considers it has discharged its obligations under paragraph 10(b) of the Second CMC Order (dated 2 February 2018) read together with Schedule 2 of the Third CMC Order (dated 22 February 2018). You note that the "archiving of these boxes [of documents] has not been performed in such a way as to make them reasonably searchable". Please explain the archiving process which has been performed in respect of these so that we may better understand your position. Since preparing this letter, we have since received your second letter date 11 June 2018, which confirms that a large number of potentially relevant hard copy documents have been identified as being held at the Postal Museum, but have not yet been disclosed.

1.1.4. We are also aware of a number of hardcopy documents which were removed from Subpostmasters' branches by POL representatives (often during the course of an audit) and have not subsequently been disclosed; we believe that these ought to have been disclosed, if not pursuant to Stage 1 or Stage 2 disclosure, but as 'adverse' documents. We will be writing to you separately in respect of specific instances of this.

## 1.2. Duplication

1.2.1. Upon our review of the disclosure provided by Post Office, it has come to our attention that multiple documents have been disclosed in duplicate. By way of example: POL-30484 was disclosed in relation to Elizabeth Stockdale, 43 copies of this letter were disclosed. This is but one example of excessive duplication in your client's disclosure.

1.2.2. This has increased the overall time and therefore cost involved in reviewing your client's disclosure.

1.2.3. Paragraph 13.4 of the Pilot Practice Direction provides that there is no requirement to provide copy documents unless they contain amendments or modifications. Furthermore, in this case, duplicates should only be disclosed where one party has disclosed the same document as this goes to the Claimants' / Defendant's knowledge of certain events.

1.2.4. As such, in the interests of proportionality and saving costs please confirm what (if any) steps you have taken to avoid duplication in your client's disclosure and confirm that you will refrain from providing duplicate documents in subsequent tranches of disclosure.

## 1.3. Relevance

1.3.1. We note that a number of Lead Case specific documents have been disclosed by your client which fall outside the time frame when the Lead

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Claimants were in post as Subpostmasters. Therefore, a number of documents relate to previous or subsequent Subpostmasters at the applicable branch. Any such documents are highly unlikely to be relevant to the Common Issues trial and therefore, for the most part, ought not to have been disclosed. Again, reviewing these documents has unnecessarily increased the time and costs involved in reviewing your client's disclosure.

1.3.2. Additionally, we have identified several documents disclosed by your client that are Claimant specific, but which do not relate to any Lead or Potential Lead Claimant or their branches. For example, POL-30311 has been disclosed against Mr Mohammad Sabir (Claimant No. 157), but is a letter to the Subpostmaster of Cottingley Hall branch.

1.3.3. It has also come to our attention that your client's disclosure includes a number of open legal letters passing between our respective firms. For example, POL-32366, is a letter from your firm to ours regarding Ms Stockdale's termination; party-party correspondence should not be disclosed. Furthermore, this particular letter was disclosed 7 times.

1.3.4. Please ensure that going forwards all documents are carefully reviewed and assessed for relevance prior to disclosure.

## 1.4. Disclosure of Privileged documents

1.4.1. We have identified two instances, as set out in our second letter of 15 March 2018 and our second letter of 26 March 2018 where your client has (presumably) inadvertently disclosed documents which appear to be privileged.

1.4.2. As we have previously explained we have not reviewed these documents, however the exercise of identifying these documents, bringing them to your attention and liaising with our e-disclosure provider to have these documents removed has obviously caused us to spend more time and incur greater cost in the disclosure review exercise. We expect that given your approach to document review in the most recent tranches of disclosure (see our comments below), further privileged documents are likely to have been disclosed to us, which we will be obliged to spend time and cost in dealing with.

## 1.5. Altered 'Native' Documents

1.5.1. We have identified various instances whereby your client has disclosed email chains not in their original format. By way of example, the emails disclosed in POL-694 appear to have been copied and pasted into a document with the timestamps and original headers removed, therefore it is unclear whether the chain is complete.

1.5.2. If unaltered versions of the native files are available, please provide copies of these by return. In the event that unaltered versions of the native files are not available, please provide an explanation of the steps which have been taken to alter the natives and the basis for this.

## 1.6. Redaction

1.6.1. A number of documents have been disclosed that have been redacted. The effect of this has been in some cases to alter the metadata of the

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document and it is no longer clear what the original date of the document is. This has caused a number of issues in identifying a clear chronology of events for each lead claimants.

## 2. SHAREPOINT SITES

- 2.1. Pursuant to Schedule 1 of the Second CMC Order, your client was required to disclose all SharePoint sites referred to at Part 1 section 10 of its EDQ, together with those relating to the Agent Application Team, Contract Advisors, Relationship Manager and Recruitment Team. We refer to your letters of 26 February 2018 (fifth), 29 March 2018 (second), 6 April 2018 and 14 May 2018. Your letter dated 26 February 2018 confirmed that in relation to SharePoint sources *"these documents have all been reviewed for relevancy and those spreadsheets which are relevant to a Lead Claimant will be disclosed"*. In your letter of 29 March 2018, you identified 28 potentially relevant sites, and 76 that are *"unlikely to contain potentially relevant documents and therefore Post Office proposes not to extract these"*. You also provided a list of those that you proposed not to extract. Finally, there were 21 sites which Post Office was still reviewing. In your letter dated 6 April 2018 you provided an update on Post Office's review and provided a schedule of 78 SharePoint sites which is proposed to be extracted. However, it was entirely unclear to us which sites had since been included in this list, how they had been reviewed for relevance, and what those sites may hold (particularly those which were not being disclosed). We reasonably requested a composite list of all sites to be extracted or otherwise, in order that we could better understand the position.
- 2.2. We remind you that until 6 April 2018 your client had not completed its own review of the SharePoint sites in order to inform us which you considered should not be extracted, and it was only upon our request that you provided us with a composite list of sites to be extracted or otherwise.
- 2.3. This schedule was not provided until 24 April 2018. The schedule provided information in respect of over 500 SharePoint sites. We responded as soon as practicable thereafter on 10 May 2018 agreeing that a number of sites should not be extracted, in spite of what the Second CMC Order provided for and requested that a limited number of the sites that your client proposed not to extract, should in fact be disclosed. In your letter of 14 May 2018, you suggest that it was as a consequence of our clients' delay in responding to your previous letters that your client was unable to extract the extremely limited selection of SharePoint Sites, for disclosure on 18 May.
- 2.4. We appreciate that it may not have been possible to provide disclosure of the 15 SharePoint sites that we identified that we have requested sight of by the disclosure deadline of 18 May. However, there is no reason why this should nevertheless be provided as soon as possible now. Please provide an indication of when these SharePoint sites will be disclosed.

## 3. SECOND SIGHT DOCUMENTS

- 3.1. The disclosure given by POL of Second Sight documents amounted to some 28,263. There are a number of concerns with this disclosure;

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- 3.1.1. Having conducted an initial electronic check of those documents we note that this comprises 22,728 individual documents. Therefore, the disclosure provided by your client contained 5,535 duplicated documents.
- 3.1.2. We believe that some documents may be missing from this disclosure. Second Sight recalls that around 35,000 documents were returned to Post Office following the termination of the mediation scheme, therefore, on the face of it, there are nearly 13,000 documents (taking into account the duplicates mentioned above and not readable documents mentioned below) missing from this category of disclosure. We do not believe that 13,000 documents can be privileged.
- 3.1.3. Furthermore, your client produced a list of 162 "*not readable*" documents that you have "*not been able to access or are not in an intelligible format, for example .XML files... as such, disclosure of these documents has not been provided*". We understand from Second Sight that the XML files are, by and large, the filtered transaction data for various Subpostmasters. There is no reason that these should not be disclosed. Finally, it is clear from the titles of a number of the other documents that they are not privileged, and therefore should be disclosed whether you are able to access those documents or not, the Claimants' expert will be in a position to do so. By way of example, "Horizon & Horizon Online", "Service Description Summary", "Physical Platform Design", "HNG-X Build and Release Guide". Please therefore provide an explanation of the process adopted by your client to provide the documents for disclosure, and provide disclosure of the balance of the documents missing from this category.

## 4. KNOWN ERROR LOG DISCLOSURE IN HTML FORMAT

- 4.1. Your client proposed to disclose the KLE in HTML format. We explained that we would need to confirm this with the Claimants' expert and whether this was a suitable format. Notwithstanding our request (in our letter of 26 March 2018) for an example of the KEL in HTML format, you declined to provide this but instead gave disclosure of the complete KEL in HTML format.
- 4.2. We are liaising with our expert to determine whether provision of information presents any difficulties, we will write to you again in due course in the event that an alternative file format is required.

## 5. TRANSACTION DATA

- 5.1. Your client was ordered to disclose up to 400 months of transaction data in respect of the Potential Lead Cases, pursuant to paragraph 4(a)(iv) of the First CMC Order. Your client proposed to disclose this in filtered form, as set out in your third letter dated 22 November 2017, and you explained that to disclose the unfiltered data would not be reasonable and proportionate, and that the filtered data "*is still extensive and will provide the information necessary for the purpose of this litigation*". We expressed the need for the true raw unfiltered data to provide our expert with the full picture. It

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was only after the parties held a conference call with Fujitsu on 1 March 2018 that we discovered that there is a third, further category of unfiltered data and therefore we requested disclosure of this in our letter dated 26 March 2016. Your client responded to this letter in its second letter of 1 May 2018, in which it revealed that there are in fact four categories of data. Presumably, in terms of the first three categories (filtered, unfiltered and raw) of data, each becomes a truer, more complete version of the preceding category. The fourth category of data (paragraph 2.2.4. of your second letter of 1 May 2018) is identified as "*data in addition to the Category 3 data stored in Horizon*". In that letter you proposed that "*disclosure of...further data... should be addressed once the parties' experts have had an opportunity to review the data provided to date*". Our clients' expert is in the process of considering the Category 2 transaction data disclosed by your client on 1 May 2018 and we will revert shortly with our clients' position regarding the Category 3 and additional data. However, we would anticipate that this data will be required.

- 5.2. We understand that Second Sight was provided with the ARQ data for a number of the claimants. We assume that this will fall within the 13,000 Second Sight documents that have not been disclosed (detailed above). Please provide the ARQ data for each of the lead cases, for the corresponding months that the 'unfiltered' transaction data has been provided.

## 6. HORIZON TECHNICAL DOCUMENTS

- 6.1. We refer to our request for documents made on 23 March 2018. These documents were provided by POL on 10 April 2018, subject to some comments noted in your third letter of the same date and your further letter of 1 May 2018.
- 6.2. We have no alternative but to rely on your confirmation that no further documents are to be disclosed. However, in respect of document NB/LLD/111 please confirm that there is no physical file which could be disclosed, whether apparently blank or otherwise.

## 7. DISCLOSURE OF SPREADSHEETS

- 7.1. We note that in your letter of 7 March 2018, you state that Post Office identified over 44,000 spreadsheets together with unresponsive family documents totalling 250,000 documents. You note that you excluded these from your search in the absence of finding any suitable resolution to exclude false positives from these search results.
- 7.2. You have adopted the same approach in your client's disclosure given on 18 May 2018, where you say 53,589 spreadsheets were identified as a result of keyword searches of custodian email accounts and 32,812 identified from a search of SharePoint sites. None of these have been disclosed.
- 7.3. Without having sight of these documents we do not have the means to challenge your assessment of which documents may or may not be relevant. However, if the false positives are all of a similar nature, we request that you provide a representative sample of the documents which have been excluded so that we may assess the potential relevance of these and know whether it may be proportionate for these documents to be disclosed.

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## 8. HORIZON TECHNICAL DOCUMENTS & FUJITSU CONTRACT

- 8.1. Your client has disclosed 112,272 documents in respect of this stage of disclosure. Other than in the cases where you have expressly stated that documents have not been reviewed, please confirm whether these documents have been manually reviewed prior to disclosure.
- 8.2. Documents which 'may' be privileged
  - 8.2.1. Your approach in respect of these documents is wholly unacceptable.
  - 8.2.2. The Schedule attached to your letter of 17 May 2018 includes broad-ranging search terms which would be likely to identify documents which are not subject to privilege. We set out below some search terms which we are particularly concerned by:
    - 8.2.2.1. "false accounting"
    - 8.2.2.2. "High Court"
    - 8.2.2.3. "criminal law"
    - 8.2.2.4. "Legal proceeding\*"
    - 8.2.2.5. "prosecution"
    - 8.2.2.6. "solicitor"
  - 8.2.3. Many of the above terms appear as part of direct correspondence between POL and the Claimant group. It is highly unlikely that a high proportion of the 10,758 responsive documents will attract privilege.
  - 8.2.4. It is not appropriate, in a case such as this, to suggest that reviewing circa 10,000 documents is disproportionate and we remind you of the Judge's comments in the recent hearing that such a volume of documents is not necessarily material in a case of this size. Such a review is essential to ensure that vital documents are not withheld from disclosure.
  - 8.2.5. Please review the circa 10,000 keyword responsive documents and provide to us all which fall within the scope of your disclosure obligations and are not subject to privilege.
- 8.3. Dimensions documents
  - 8.3.1. You have declined to provide disclosure of 2,311 documents which you say were encrypted or non-searchable.
  - 8.3.2. Please explain what, if any, steps you have taken to remove the encryption on these documents. The Claimants' expert will be in a position to unencrypt those documents so we propose that they are disclosed in their current format in any event.

## 9. STAGE 2 DISCLOSURE – LEAD CLAIMANT DISCLOSURE

- 9.1. **Email Accounts**
  - 9.1.1. Please see above comments regarding disclosure of spreadsheets.
  - 9.1.2. You state that you have been unable to extract the email accounts of 11 of 51 custodians. We are particularly concerned that you have not been able to extract data for Gerry Hayes, Idris Jones, Ki Barnes, Mike Wakley, Mike Wiatrowicz and Tony Biolchi as these individuals are directly involved in some of the Lead Claimants' cases.

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9.1.3. Please explain what has happened to the data for these custodians and if it has been destroyed, provide details of when this data was destroyed.

9.1.4. We note your comment that POL does not *believe* that Ki Barnes was a Post Office employee. Please confirm your client's position. Notwithstanding Ms Barnes' specific position within the Post Office organisation, it is apparent that she received instructions from Post Office and reported back following attendance at Alan Bates' branch. Therefore it would seem appropriate to provide any emails still within your client's control which relate to Ms Barnes' attendance at Alan Bates' branch.

## 9.2. SharePoint Sites

9.2.1. We note that you have encountered technical difficulties in exporting 8 SharePoint sites. It is disappointing that this was not brought to our attention before the date on which the data was due to be provided. We expect that you will continue to attempt to resolve this matter and keep us updated as to your progress with this, with a view to providing disclosure as soon as possible. Please confirm.

## 9.3. N, L and T Drives

9.3.1. It is noted that you have sought an extension only on the date when disclosure of this data was due to be given (18 May 2018). Any extension required should be sought in advance of the relevant deadline.

9.3.2. Notwithstanding that in your second letter of 18 May 2018 you informed us that the N, L and T drives would be provided by 25 May 2018; the documents were not provided by the date indicated. On 25 May 2018 you wrote to us again confirming that the drives were not yet ready to be provided to us, but did not provide an estimate of when they would be provided. Please confirm as a matter of urgency.

## 10. GAPS IN DISCLOSURE

10.1. We will write to you separately seeking disclosure of documents that we have identified as falling within the previous orders for disclosure, and which we believe have not been disclosed.

## 11. TECHNICAL ISSUES WITH DISCLOSURE

11.1. In around November 2017, the parties agreed protocol for electronic disclosure (which was subsequently ordered by the Court). However, it is apparent that notwithstanding that these proposals were agreed by your client, your client has not consistently complied with that protocol. This issue has previously been raised directly with your e-disclosure provider (Advanced Discovery) by ours (Elevate).

11.2. Your client's approach to disclosure has created a number of technical difficulties for our clients. By way of example, we have set out below a number of difficulties encountered by Elevate:

11.2.1. **Inconsistent naming of disclosure fields:** the protocol agreed between the parties set out the data fields which should be provided in each disclosure list, and notes how these should be named. Please ensure that



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- going forward, naming conventions, consistent with the protocol are adopted.
- 11.2.2. **Date fields:** on a number of occasions your client's disclosure list has included the words 'redacted' in the date field. This caused the whole load file to fail and required remedial action to be taken by Elevate. The protocol specifies that the date field should only include "DD/MM/YY HH:MM".
  - 11.2.3. **Claimant numbers:** in your client's disclosure list and load file there have been a number of inconsistencies in terms of recording claimant numbers. For example, Alan Bates' claimant number is cited as both '19' and '019' this obviously creates difficulties when searching. Please adopt a consistent approach going forwards without additional '0's in the claimant number fields, as provided in the parties' protocol.
  - 11.2.4. **Multiple Claimant numbers:** some documents have been disclosed against multiple claimants. However, there are inconsistencies as to whether these are listed using commas or semi-colons. This created serious difficulties in sorting the load files and disclosure lists. Around half a day of work was required to be undertaken by Elevate, to remedy this issue. Please ensure that semi-colons are not used in future disclosure lists.
- 11.3. Please confirm that the technical issues highlighted above will be rectified for the next and all future rounds of disclosure and that your client will fully comply with the protocol agreed between the parties.

## 12. ADVERSE DOCUMENTS

- 12.1. As you are aware, the parties are obliged to disclose adverse documents under the Draft Practice Direction at 3.1(2). We are concerned that a number of adverse documents have not been disclosed. By way of example, in relation to document POL-0029195 (the Helen Rose Report) and the email attaching the same (document POL-9100) both of which were disclosed by your client in the Second Sight Documents (and are enclosed with this letter). The attachments to this report do not appear to have been disclosed, in particular, a number of emails and extracts of emails that have been specifically referenced. Please provide disclosure of the attachments and all documents referred to in the Helen Rose Report.
- 12.2. Please also confirm what steps your client has taken to highlight and disclose adverse documents known to it, and how your firm is applying your duty to disclose such documents. In the event that you/your client becomes aware of any further adverse documents, please disclose them. This is in reference to comments within the Helen Rose Report in which it states "*we're all aware of the integrity of Horizon issues*". This indicates that further documents have led Ms Rose to make such an assertion.

Where requested, please provide responses to the matters covered in this letter by **4pm on 28 June 2018**.

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Yours faithfully

**GRO**

**Freeths LLP**

Please respond by e-mail where possible

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## Schedule 1

Paragraph reference	Issue	Action Required
1.1.2.	Hard copy documents - generally	Please provide an explanation of the steps taken by the defendant to identify appropriate hard copy records/ documents.
1.1.3.	Hard copy documents – Postal museum archiving	Please provide an explanation of the archiving processes adopted by Post Office.
1.2.4.	Duplication	Please confirm the steps taken by Post Office to avoid the disclosure of excessive duplicates.
1.3.4.	Relevance	<p>(1) Please ensure that going forwards all documents are carefully reviewed and assessed for relevance, prior to disclosure.</p> <p>(2) Please ensure that open legal correspondence is not included within your disclosure.</p>
1.4	Privileged documents	Please confirm that privileged documents will be removed from future disclosure provided.
1.5.2.	Altered Documents 'Native'	<p>(1) Provide unaltered native files; if these are not available</p> <p>(2) Please provide an explanation of the steps taken to alter the natives and the basis for doing so.</p>
1.6.1.	Redaction	Please provide the redacted documents with their original metadata information, and confirm that redactions will not alter the metadata for future disclosure
2.4.	SharePoint Sites	<p>Please provide requested SharePoint site data.</p> <p>In the meantime, please indicate by return, when you expect to be in a position to provide this.</p>
3.3.	Second Sight Documents	<p>(1) Please explain the process adopted by Post Office to provide the documents for disclosure.</p> <p>(2) Please provide disclosure of the balance of the Second Sight documents (circa 13,000 documents)</p>
5.2	Transaction and Event Data	Please provide the ARQ data for each of the Lead Cases

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6.2.	Horizon Technical Documents	In respect of document NB/LLD/111 please confirm that there is no physical file which could be disclosed, whether apparently blank or otherwise.
7.3	Disclosure of Spreadsheets	Please provide a representative sample of the documents, which have been excluded from your client's disclosure.
8.1.	Horizon Technical Documents & Fujitsu Contract	Please confirm the extent to which these documents have been manually reviewed.
8.2.	Horizon Technical Documents & Fujitsu Contract – 'privileged' documents	Review the circa 10,000 keyword responsive documents and provide to us all that fall within the scope of your disclosure obligations.
8.3.2.	Horizon Technical Documents & Fujitsu Contract – 'privileged' documents – Dimensions Documents	Please confirm what, if any, steps you have taken to remove the encryption on the documents (2,311) and provide disclosure of those documents.
9.1.3.	Stage 2 Disclosure – Lead Claimant Disclosure – Email Accounts	<p>Please explain what has happened to data for the following custodians:</p> <ol style="list-style-type: none"> <li>1. Gerry Hayes;</li> <li>2. Idris Jones;</li> <li>3. Ki Barnes;</li> <li>4. Mike Wakely;</li> <li>5. Mike Wiatrowicz; and</li> <li>6. Tony Biolchi.</li> </ol> <p>If data has been destroyed for these custodians, provide details of when this data was destroyed.</p>
9.1.4.	Stage 2 Disclosure – Lead Claimant Disclosure – Email Accounts	Please confirm your client's position regarding the position of Ki Barnes.
9.2.1	Stage 2 Disclosure – Lead Claimant Disclosure – SharePoint Sites	Please confirm Post Office's progress in extracting the outstanding SharePoint sites.
9.3.2.	Stage 2 Disclosure – Lead Claimant Disclosure – N, L and T Drives	Please confirm <u>as a matter of urgency</u> when we can expect to receive disclosure of the N, L and T Drives.



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11	Technical issues	Please confirm that the technical issues identified will be rectified and the agreed protocol will be complied with for the next and all future rounds of disclosure
12	Adverse documents	<ul style="list-style-type: none"><li>(1) Please provide all attachments and documents referred to in the Helen Rose Report</li><li>(2) Please confirm the steps that your client has taken to highlight and disclose adverse documents known to it and how your firm is applying its duty to disclose such documents</li><li>(3) In the event that you/your client becomes aware of any further adverse documents, please disclose them, in particular in relation to Helen Rose's comment "we're all aware of the integrity of Horizon issues".</li></ul>