

PRIVILEGED AND CONFIDENTIAL



POST OFFICE GROUP ACTION

BRIEFING NOTE - PRIVILEGE

1. EXECUTIVE SUMMARY

1.1 The key parties in the litigation are:

1.1.1 Post Office Limited (**Post Office**) – the Defendant in the Claim and our client.

1.1.2 Subpostmasters (**SPMR**) – the Claimants in the Claim, represented by Freeths LLP.

You may also see references to Second Sight Services Limited (**Second Sight**) and Fujitsu.

Second Sight are a firm of forensic accountants who were engaged by Post Office from early 2012 to May 2015 to carry out an independent review into Horizon (Post Office's electronic point of sale IT system which is used by SPMRs in their branches), including investigating individual complaints via a mediation scheme. Fujitsu developed the Horizon system which is at the centre of this Claim.

1.2 Before starting the review, you will need to:

1.2.1 Familiarise yourself with the rules of privilege (civil and criminal);

1.2.2 Become comfortable with the Relativity review platform; and

1.2.3 Become comfortable with your role within the review process for the purpose of proofing and preparing witness statements, when to make a decision and when to escalate the issue/ask a question.

2. WHAT IS PRIVILEGE?

2.1 In the simplest of terms, privilege entitles a party to withhold evidence from production to a third party or the court. This evidence may be either written or oral.

2.2 There are two key types of privilege, civil and criminal. Civil privilege can be split into:

2.2.1 Legal advice privilege (confidential communications between lawyers and their clients made for the purpose of seeking or giving legal advice); and

2.2.2 Litigation privilege (confidential communications between lawyers and their clients, or the lawyer or client and a third party, which come into existence for the dominant purpose of being used in connection with actual or pending litigation).

2.3 To put this into context, the following documents are privileged:

2.3.1 Any legal advice.

2.3.2 Any document discussing legal advice.

2.3.3 Documents prepared or sent by a lawyer. However, any document sent by a lawyer of one party to the other party is unlikely to be privileged where made in open correspondence and not marked "without prejudice".

2.3.4 Any document prepared by a non-lawyer for the purpose of seeking legal advice (i.e. gathering information in advance of receiving legal advice).

- 2.3.5 Any document regarding this litigation (i.e. since claim form filed on 11 April 2016).
- 2.3.6 Any Post Office document discussing the current dispute before this litigation began.
- 2.3.7 Any document internal to Post Office created as part of Project Sparrow (although note many documents will be external as they have been shared with Second Sight).
- 2.4 Other key points to note:
 - 2.4.1 A privileged document attached to an email may remain privileged no matter how many times it is forwarded. However, each forwarding email may not, in itself, be privileged (save for the references to the privileged attachments).
 - 2.4.2 Likewise, a document may, in rare circumstances, contain some privileged material and some non-privileged material.
 - 2.4.3 The usual approach in these circumstances is to redact the privileged material. Where you think a document may be partly privileged:
 - (a) Mark the document as partly privileged; and
 - (b) Use the redact tool to redact the bits that you think may be privileged.
- 2.5 If you have any questions about privilege or are unsure about any of the concepts, please read Schedules 1 and 2 attached to this brief.
- 2.6 **Civil Privilege**
 - 2.6.1 In further detail, civil privilege includes:
 - (a) **Legal advice privilege:** this will apply to confidential communications / documents between Post Office and its lawyers (including in-house lawyers) which have come into existence for the purpose of giving/receiving legal advice.
 - (b) It will also cover documents which "evidence" or discuss such legal advice or which were made by a non-lawyer in preparation for obtaining legal advice.
 - (c) **Litigation privilege:** this will apply to confidential communications / documents between Post Office and its lawyers (including in-house lawyers) or between either of them and a third party which have been produced for the dominant purpose of litigation that is either pending, reasonably contemplated or existing.
 - (i) The most obvious example of this form of privilege is a document regarding the Claim itself. However, where a document is sent from Post Office (or its lawyers) to the Claimants (or their lawyers) in connection with litigation that is not marked "without prejudice" it is unlikely to be privileged.
 - (ii) Similarly, documents that have clearly been exchanged between the parties (such as documents filed at Court) in the course of litigation will generally not be privileged. However, draft documents that have not been exchanged in that exact form will likely be privileged.
 - (iii) Documents which were produced for the purposes of the mediation scheme were by definition not produced for the purposes of litigation and therefore will not be subject to litigation privilege. They may still be privileged under legal advice or criminal privilege, depending on the circumstances.

2.7 Criminal Privilege

- 2.7.1 Similar rules apply in the context of criminal litigation. As a number of the Claimants were subject to criminal proceedings, you may come across documents that are potentially privileged under criminal law. Such privileged documents will include:
- (a) Documents (including correspondence) between Post Office and its lawyers (including in-house lawyers) for the purposes of obtaining (criminal) legal advice, such as advices/opinions from lawyers on merits, charging, evidence, process, etc. in a criminal context.
 - (b) Correspondence seeking or providing such advice will also be privileged, as will summaries or reports of such advice.

2.8 Lawyers

- 2.9 "Lawyer" in the privilege context, means both in-house lawyers and external law firms. To date a large team of lawyers has been working on this matter/dispute and on the mediation scheme including:
- 2.9.1 Post Office's external lawyers: Womble Bond Dickinson (aka Bond Dickinson / Bond Pearce) including Andrew Parsons, Chris Darvill, Elisa Lukas, Amy Prime, Kate Steel, Paula Bartlett, Garry Pike, Claire Best, Alva Leigh-Doyle and Stephen Dilly.
 - 2.9.2 Post Office's other law firms: Cartwright King (criminal advice), DAC Beachcroft, CMS, Hugh James and BTO.
 - 2.9.3 Post Office's in-house lawyers include Jane MacLeod, Jessica Madron, Rodric Williams, Jarnail Singh, Mandy Talbot, Rebekah Mantle, Emily Springford and Helen Watson.

3. WHAT DO YOU NEED TO KEEP AN EYE OUT FOR?

- 3.1 Post Office's documents are stored on Relativity. When you review the documents:
- 3.1.1 Mark any unreadable documents as "Not Readable Report". Please first try to view the document in both Viewer and Native mode.
 - 3.1.2 "Adverse documents" include those which contain information or comments which are damaging to Post Office's case and/or reputation or relate directly to an issue in dispute. For any documents you consider to be "Adverse", please use the Comments box in Relativity to summarise why they are damaging, giving paragraph/page numbers where possible. **[SEE SEPARATE NOTE]**
 - 3.1.3 Review each document for privilege and mark appropriately. Privilege includes legal advice privilege, litigation privilege and criminal privilege. Where only part of a document is privileged, please use the Comments box in Relativity to indicate which parts are privileged and should be redacted.
- 3.2 As part of your searches into the documents, you may come across documents which are privileged under civil or criminal law. These will need to be "disclosed" to Freeths but they will not be permitted to "inspect" them, i.e. they will be notified of the documents' existence but they will not get to see copies of the documents.
- 3.3 Please mark privileged documents as either "Privileged", "Part Privileged – To Be Redacted", "Not Sure" or "Not Privileged".

4. REPORTING BACK

- 4.1 The precise rules of privilege are complex. If you are unsure about civil privilege, please consult the detailed note at Schedule 1. If you are unsure about criminal privilege, please consult the detailed note at Schedule 2. If you are still unsure about whether or not a document is privileged, please flag this with your Supervising Solicitor.