

From: "Parsons, Andrew" <[GRO]>
To: "Prime, Amy" <[GRO]>
Subject: FW: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]
Date: Wed, 27 Jul 2016 10:38:07 +0000
Importance: Normal
Attachments: Review_of_Post_Office_Ltd_Criminal_Prosecutions_-_Brian_Altman_QC_-_July_2016.pdf
Inline-Images: image001.jpg; image002.jpg; image003.jpg

Amy – can you add a "Legal Advice" folder to the data room and put this in it.

Ta
A

Andrew Parsons
Partner

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From: Brian Altman [mailto:[GRO]]
Sent: 26 July 2016 13:13
To: Parsons, Andrew
Cc: Prime, Amy; Porter, Tom; Matthews, Gavin
Subject: Re: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Thank you Andy.

Herewith final review document.

I've changed the date to today's date to ensure that there's no confusion between drafts, and have made a couple of other tweaks in it by adding "adopts and applies" where I deal with POL's adoption of the Code.

I also changed the paragraph number in one footnote that referred back to the paragraph where I dealt with offering no evidence: formerly para 104, now 105.

I'll await further instructions on BTs after August.

Brian

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From: Parsons, Andrew GRO >
Sent: 26 July 2016 12:36
To: Brian Altman
Cc: Prime, Amy; Porter, Tom; Matthews, Gavin
Subject: RE: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Brian

Thanks.

Understood on the clarification point.

On the balancing transaction point – we will in due course be seeking your views on this. Deloitte is reviewing the technical aspects of the balancing transaction process and their report is due in August. We'll then be in touch about getting your further input. In light of this, I don't believe that your introductory paras need changing.

I'm happy with your proposed wording on the group litigation.

Kind regards
Andy

Andrew Parsons
Partner

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From: Brian Altman [<mailto:> GRO]
Sent: 26 July 2016 12:24
To: Parsons, Andrew
Cc: Prime, Amy; Porter, Tom; Matthews, Gavin
Subject: Re: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Dear Andy

Thank you for your email. There is no pattern at all to POL's approach to cases (I'd be surprised if there were), hence my conclusion at para 202 of the review and my emphasis during my review of the use by POL of independent counsel.

Clarification issue

My section on abuse of process relates only to the criminal process. Bear in mind it was only during my review that I became aware of the fact and terms of the group claim. So my observations when first written did not have in mind the civil litigation. Against that background, my purpose in saying what I did at my para

22 was to observe that the mere fact that a prosecutor does not follow/misapplies relevant guidance or policy is no ground to conclude there has been an abuse of the process. After all it may just be because the individual is not good at his job or is negligent or simply made a decision no other reasonable prosecutor would have made.

However, by way of important contradistinction, a wholesale, institutional policy to avoid the Code (which POL at all times and for all purposes otherwise adopts and applies) to charge substantive offences like theft where there is absolutely no basis to do so, only to secure pleas to "lesser" charges would not only amount to a deliberate policy of disapplication of the Code (which POL otherwise adopts and applies) but also would amount to a manipulative policy to misuse the criminal justice system to POL's own ends. That was the distinction I was seeking to make. This would not be a failure properly to select appropriate charges; this would be a deliberate policy to select inappropriate charges.

You ask whether it is alright to say in the LOR that POL is not legally bound by the Code without creating a risk of an abuse of the process. I assume by this you mean the risk of abuse in future criminal prosecutions? If so, in light of what I've said above, the simple answer is 'yes'.

At your para 5.53 of the LOR you make the point, based on authority, that POL is not legally bound by the Code. But the fact is POL does adopt and apply it in all its prosecution decisions. If you wish to nail the point, and assuming you've not done so elsewhere in the LOR, it might be wise to add that although not legally bound by it, POL has adopted and does apply the Code to its charging decisions. The real point is that there was no wholesale policy to disapply the Code as and when it suited POL's own ends, which is the central allegation.

Request issue

I did not know that the Swift/Knight review had been shut down.

May I ask does that mean I will not be asked to review the balancing transactions issue as was recommended (see my paras 2-17)? If so, do I need to re-write the introductory section about that? If so, should I ignore it completely or include it, as it is, only to say it's no longer required (if that's correct)?

I'm a little confused so would welcome your thoughts on it asap and before final sign-off.

As for the extra paragraph you've asked me to include, I'm happy to do so, but with a few tweaks (also using my conventions). Are you happy with:

"Since receiving these instructions, a group civil claim has been filed against POL in which allegations have been made that are related to the same subject matter as was reviewed by Messrs Swift QC and Knight. The review commissioned by Mr Parker has subsequently been brought to a close, and POL is actively defending the civil claim. I have, however, been instructed to continue with the work requested by Mr Williams for the purpose of assisting POL's defence of the civil proceedings."

As soon as I hear from you, I'll revise the draft and re-submit it.

Best wishes,

Brian

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From: Parsons, Andrew [REDACTED] GRO
Sent: 26 July 2016 11:18
To: Brian Altman
Cc: Prime, Amy; Porter, Tom; Matthews, Gavin
Subject: RE: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Brian

Thank you. It is striking quite how differently each prosecution was conducted and this makes it very difficult to see any pattern that would suggest a policy of improperly prosecuting postmasters.

Before I send this to Post Office, I have one point of clarification and one request.

Point of clarification: Paragraph 22

In our Letter of Response we have said that POL is not bound by the Code, and therefore not bound by the sufficiency of evidence and public interest tests. Nevertheless, we say, Post Office is not entitled to conduct a malicious prosecution, meaning a prosecution must be based on "reasonable and probable cause" and have a legitimate (non-malicious) purpose.

My reading of paragraph 22 is that not following the Code is not, in itself, grounds for an abuse of process. The abuse comes when proceeding with a prosecution without sufficient evidence (regardless of whether that threshold of evidence is judged against the standards of the Code or the standards of malicious prosecution).

The distinction is clearer when considering the motivation for a prosecution. On face value, the threshold for malicious prosecution appears lower than the threshold for the Code ie. the Code requires a public interest motivation whereas malicious prosecution simply requires a motivation that is not malicious.

My point of clarification is: are we ok to say in the Letter of Response that POL is not bound by the Code (whilst maintaining that there was sufficient evidence and a legitimate reason for each prosecution) without creating a risk of an abuse of process argument?

Request

Initially, Rodric commissioned your work off the back of Tim Parker's review. That review has now been closed down and the work streams (ie. your report, the work by Deloitte, etc.) are now being conducted to support the defence of the Group Action. Would you mind adding a paragraph to this effect?

I ask because if your review is for the purpose of assisting with the civil litigation, it attracts litigation privilege. Litigation privilege in civil claims is wider than legal advice privilege and would cover any internal discussions at Post Office about your advice (such discussions would arguably not be covered by Legal Advice privilege).

I have proposed some possible wording below that could be slotted in after paragraph 7 – please feel free to re-phrase as you see fit:

"Since receiving these instructions, a civil claim has been filed against Post Office making allegations that are related to the same subject matter as the recommendations identified by Messrs Swift QC and Knight. The review of Mr Parker has subsequently been brought to a close and Post Office are actively defending the civil claim. I have however been instructed to continue with the work requested by Mr Williams for the purpose of assisting Post Office's defence of the civil proceedings."

Kind regards
Andy

Andrew Parsons
Partner

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From: Brian Altman [<mailto:> GRO]
Sent: 25 July 2016 11:48
To: Parsons, Andrew; Matthews, Gavin
Cc: Prime, Amy; Porter, Tom
Subject: Re: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Dear Andy

Please find attached the final theft/false accounting review document. If you think there is anything in it that requires change or correction, please do let me know as soon as you are able, and I'll happily revise it and re-submit the review document.

Many thanks.

Best wishes,

Brian

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From: Parsons, Andrew <GRO>
Sent: 22 July 2016 13:47
To: Brian Altman
Cc: Prime, Amy; Porter, Tom
Subject: RE: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Yes of course.

A

Andrew Parsons
Partner
Bond Dickinson LLP
Tel: GRO

From: [Brian Altman](#)
Sent: 22/07/2016 13:33
To: [Parsons, Andrew](#)
Cc: [Prime, Amy](#); [Porter, Tom](#)
Subject: Re: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Andy

Thank you.

Last thing: will it be alright to deliver my review document to you on Monday which is the date Paul first asked me to work towards?

Brian

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From: Parsons, Andrew GRO >
Sent: 22 July 2016 12:50
To: Brian Altman
Cc: Prime, Amy; Porter, Tom
Subject: RE: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Brian

Thank you (and for your other comments on the LOR). Very helpful.

I'm not particularly worried about releasing the investigation guidelines - their content is pretty benign. I just wanted to make sure that we were not waiving some form of privilege. In this regard, your advice is just what was needed.

Kind regards
Andy

Andrew Parsons
Partner

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From: Brian Altman [mailto:GRO]
Sent: 22 July 2016 10:50
To: Parsons, Andrew
Cc: Prime, Amy; Porter, Tom
Subject: Re: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Andy

I have realised you didn't call me about this yesterday. I am available for a chat today if you wish. It may help however if I set out some thoughts here for you:

1. I do not think that investigation guidelines can attract privilege (advice or litigation) for the simple reason that these are not communications between a client and his lawyer made under conditions of confidentiality for the purposes of enabling the client to seek, or the lawyer to give, legal advice or assistance in a relevant legal context, or advice or assistance given in the context of litigation.
2. If CK gave advice about "privilege" attaching to "investigative techniques" then I suspect they may have been speaking about public interest immunity (PII). It was for this reason I asked for the source of the advice.
3. In the criminal environment, disclosure is subject to the single test in s.3 of the CPIA which I set out for you in my email this morning on the topic of the LOR. If the material doesn't pass the test then it is not disclosable (subject to application being made by the defence and the judge ruling upon it).
4. If in civil litigation the test for disclosure is also, in effect, relevance/materiality to the issues in the case, then challenging the relevance/materiality of such guidelines may, I suppose, be one way, *pro tem*, of withholding disclosure of them.
5. I am unsure if I have read the investigation guidelines you are referring to; it is possible I read them a long time ago when advising about such guidelines in one of my 2013 review documents. Either way I'd be surprised if in the criminal arena, if relevant and *prima facie* disclosable, they would be regarded as so sensitive as to indicate that could be withheld from disclosure on grounds they reveal matters relating to an important public interest, namely, POL's security team's investigative techniques.
6. At all events, I seriously doubt that POL could make a PII application in such circumstances as the first question that arises is whether a private prosecutor can invoke public interest immunity. I'd be interested to know if POL has ever made a PII application in any case. Be that as it may, the issue is really whether the material is so sensitive that disclosure would damage a public interest.

I am sorry that this will not assist you in holding off a disclosure request for now by claiming privilege. But I hope that my other thoughts about it may do so, such as asserting (if it is correct to do so in the civil arena) that the guidelines are not material to any known or anticipated issue in the case.

Brian

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From: Parsons, Andrew <[REDACTED]>
Sent: 18 July 2016 18:16
To: Brian Altman
Cc: Prime, Amy; Porter, Tom
Subject: RE: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Brian

Apologies – forgot one point.

We've been asked to disclose "Post Office's investigation guidelines" which we presume to be a reference to any investigation guidelines followed by the Security Team when looking into suspected criminal activity. I recall someone (probably CK) saying that information about investigative techniques are generally privileged.

We are not obliged to give disclosure of documents at this stage. If the above understanding is broadly applicable, my preferred approach would be to say that documents of this type might be be privileged and therefore we are not disclosing them.

If you have 5 minutes at some point this week, please could we discuss whether such documents might be covered by privilege?

Kind regards
Andy

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From: Brian Altman [mailto:[REDACTED]]
Sent: 18 July 2016 17:26
To: Parsons, Andrew
Cc: Prime, Amy
Subject: Re: Letter of Response to the Group Litigation - subject to litigation privilege [BD-4A.FID26859284]

Will do

Sent from my iPhone

On 18 Jul 2016, at 17:23, Parsons, Andrew <[REDACTED]> wrote:

Brian

As mentioned previously, would you mind reviewing our draft Letter of Response (**LOR**) that we have prepared for the Group Litigation with the postmasters?

The LOR is long, so please do not review the whole thing. We have highlighted below all the references to prosecutions or criminal law matters – please could you review these sections?

- 5(F): Factual Allegations: criminal investigations and prosecutions (paragraphs 5.48 to 5.79)
- 6(D): Misfeasance in public office (paragraphs 6.30 to 6.32)
- 6(E): Malicious Prosecution (paragraphs 6.33 to 6.42)

- 8(B): Barred claims: criminal cases (paragraphs 8.8 to 8.12)
- Schedule 4: Section 8: False accounting (8.1 – 8.6)

Some of these sections mention factual matters that are not within your knowledge so we're not asking for your sign off of these sections. I should however be grateful if you could flag whether we've misstated any of the criminal law concepts. All other comments of course welcomed.

Just in case you need it, I've attached the Letter of Claim to which our letter responds. No need to review the LOC but you've got it just in case.

If possible, comments / amendments by the end of this week would be appreciated.

Kind regards
Andy

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Partner

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<28.04.16 - Letter of Claim (8).pdf>