

MEMO

To: Jarnail Singh, Head of Crime, Post Office Ltd.
Martin Smith, Cartwright King
From: BTO Solicitors



Background

We have been asked to prepare a briefing note to update you on the current position with Post Office Ltd prosecutions in Scotland and on the disclosure obligation which falls on COPFS Scotland. COPFS has asked us to answer three questions which will help them take the most informed approach to the issues raised in the Second Sight Report and the Helen Rose Report.

We have set out a brief overview of some key aspects of Scots Criminal Law which may assist with understanding the Scottish position.

Prosecutions in Scotland

The Crown Office and Procurator Fiscal Service ("COPFS" or "the Crown")

COPFS is Scotland's only prosecution service and virtually all prosecutions in the Scottish Criminal Courts are brought by COPFS. All reporting agencies, including Police Scotland and Post Office Ltd, must report criminal matters to COPFS and it decides if a prosecution will go ahead, based on two factors:

- (1) Whether there is a sufficiency of evidence; and
- (2) Whether a prosecution is in the public interest.

The Procurators Fiscal who make such decisions are legally qualified prosecutors who work in specialist units and in offices around Scotland. Where necessary, they direct the police and other reporting agencies in the investigation of crime.

Corroboration

In Scotland, a sufficiency of evidence requires corroboration which means that before anyone can be convicted of a criminal charge there must be at least two different and independent sources of evidence to prove the *facta probanda* or crucial facts of the case. This means that an admission of guilt by the accused, unless it is an admission which includes special knowledge which could only be known by the perpetrator of the specific offence, is insufficient evidence to allow proceedings to be brought in Scotland. The admission must be corroborated by another source of evidence which supports or confirms it. To prove a case, the Crown must present credible and reliable evidence from two independent sources that a crime was committed and that the accused was the perpetrator.

Absolute Right to Silence

Another key difference in Scots Law is that there is an absolute right to silence as no adverse inference may be drawn at any stage in criminal proceedings from a decision made by the accused to say nothing when questioned about involvement in an offence.

Defence Statements

In Scotland, the obligation to lodge a defence statement applies only in solemn cases¹, those on indictment for trial before a jury, which can be in the sheriff court of the High Court of Justiciary. Even in those cases, recent case law² has confirmed that the defence are not required to put forward a positive defence and may simply give a bland denial of the offence. However, the legislation has not been tested to the extent of clarifying whether an appeal might be successful on a non-disclosure point if information had not been disclosed which was not requested or may not have seemed relevant on the basis of the defence statement.

Principles of Revelation and Disclosure

The statutory disclosure provisions in Scotland are in their infancy and are set out in part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 which came into force on 6 June 2011. Prior to that time the disclosure obligation on the Crown was enshrined in common law and was not terribly sophisticated. We expect that any appeals in relation to convictions prior to 6 June 2011 would apply the common law provisions. The statutory provisions refer to the requirement to disclose 'relevant information' which is information which appears to have some bearing on the investigation of an offence or person, or the surrounding circumstances, unless it is incapable of having any impact on the case.

The material which is 'revealed' by the reporting agency is then split into material and non-material information. Material information is any information which is likely to form part of the evidence which is to be led by COPFS, or which would materially weaken or undermine the evidence that is likely to be led by COPFS or strengthen the accused's case.

Material information is then split into sensitive and non-sensitive information. Sensitive information is information where disclosure would cause a risk of serious injury or death, obstructing or preventing the prevention, detection, investigation or prosecution of crime; or causing serious prejudice to the public interest.

The duty on COPFS to disclose relevant information which is not material only exists in solemn (serious cases) and is limited to non-sensitive material.

The duty to disclose covers appeals as well. There is also a duty on COPFS to review and where appropriate disclose any information of which it becomes aware after conviction or an unsuccessful appeal. If an appeal takes place on the basis that information was not disclosed, then the test is whether there is a reasonable possibility that there would have been a different verdict if the information had been disclosed.

The final decision on whether to disclose rests with COPFS.

Current Crown Position

We have liaised with the Policy Unit in Crown Office (COPFS headquarters) to identify cases in the system which may be affected by Horizon issues (see Appendix A), and have kept the Policy Unit up to date with matters as they progress in England and Wales. We also provided both reports as requested. COPFS do not know about any additional Horizon issues which may have arisen recently.

¹ s.70A, Criminal Procedure (Scotland) Act 1995

² *Barclay v HM Advocate* [2012] HCJAC 47

There is only one case in which proceedings have commenced, and it is due to call for trial in October 2013. There are a limited number of cases waiting for a decision to be taken by a Procurator Fiscal. There is another case reported by the Police relating to a fraud in Stranraer which was not on the list sent to Cartwright King as prepared by Robert Dailly. The Policy Unit is now aware of the existence case.

We understand that COPFS has received Ministerial correspondence expressing concern about the conviction of a constituent for offences committed while appointed as a sub-postmaster. We are not aware of the name of this case but it must relate to a closed case. The correspondence, in addition to the wider Post Office Ltd issues, is being considered by a Senior Procurator Fiscal Depute, Paul Miele, in the Crown Office Policy Unit.

In cases where correspondence is received from a Minister on behalf of his constituent, a minute is prepared for consideration by the Law Officers. The Lord Advocate is the most senior Law Officer and a Minister in the Scottish Government, and is appointed, along with his deputy, the Solicitor General, by the Queen on the recommendation of the First Minister, with the agreement of the Scottish Parliament. We understand that the minute will be submitted to the Law Officers with a view to issuing an operational memo to advise Procurators Fiscal how to deal with cases affected and co-ordinating the COPFS-wide approach.

We were contacted by Mr Miele on 28 August 2013 in relation to this correspondence and he indicated his thinking on the wider disclosure issues. His view is that it appears that every case involves Horizon to identify the fraud and even with an admission from the accused, as Horizon provides the evidence which supports or confirms that money is missing. Therefore his view is that the Reports will be relevant and material in relation to every prosecution which relies on, or has relied upon Horizon as a source of evidence. Any operational memo produced by the Policy Unit would also be passed to the Appeal Unit in Crown Office to assess the impact of the issues on closed cases.

Mr Miele has recognised that there may be some cases where disclosure is not necessary but has asked for some assistance in relation to this matter and it is hoped that the expert report which we understand that the Post Office is seeking to instruct will assist here.

Mr Miele asked the following questions:

1. Has Post Office Ltd. or its appointed prosecutors discontinued cases, or halted any ongoing prosecutions by adjournment or desertion because of issues with Horizon?
2. If so, were the decisions to discontinue taken on the basis of the Second Sight and Helen Rose Reports?
3. What is the updated position is with the provision of an independent expert and if that expert will be required to review Scottish cases.