

From: Swil, Jonathan
Sent: 06 August 2014 18:51
To: Band, Christa
Subject: RE: Project Sparrow
Attachments: LEGALLY PRIVILEGED AND CONFIDENTIAL Second Sight mediation briefing repo....docx

Christa

I should have mentioned that Belinda sent me the attached responses to the contract section, which their contract management team prepared. Some of the points overlap with ours but I have not reviewed it in detail or sought to draw much from it at this stage.

Jonathan

From: Swil, Jonathan
Sent: 06 August 2014 18:47
To: Band, Christa
Subject: RE: Project Sparrow
Importance: High

Christa

The italics I sent you earlier.

Jonathan

I have spoken with Belinda. My suggested comments to PO are set out below. But a few key points to improve our understanding of the background:

- The Working Group have agreed to the preparation of this report and PO effectively had no choice. It arose because SS said they did not have the time/resources to deal with and properly investigate all of the issues in detail in each case so said they would prepare a "thematic" report which will be submitted by cross-reference as part of their assessment of each Applicant's case (unsurprisingly, the JFSA is keen for the preparation of this type of report), together with, presumably, a more cursory assessment of the facts of each case.

- The WG chairman has been taking a "judicial" approach to issues PO has come to him with i.e. he is remaining arms length and feels the time has come and gone where PO could and if it wanted to should have dealt with SS so PO now needs to live with them (although apparently off the record he has said he thinks SS's work is rubbish). Belinda didn't seem particularly confident, therefore, that he could be approached with any expectation that he would be supportive of taking a particularly tough line with SS or generally be on side.

- Accordingly, the response to this report needs to be to its content, not the fact it has been prepared at all. Also, while we can (and I have below) say ideally in ordinary circumstances you would sack SS, that is not an option – the PO Board has taken the view based on advice that because of the Minister's public statements committing to using SS, they are stuck with them (apparently come what may).

- Belinda agreed with the points I relayed (as per your and my call/emails and my call with Paul) and was grateful that she could go to the CEO this afternoon with a plan to respond robustly, and make some of the key points I discussed with her, but says that there are limits to how robust they can be because of the issues above.

- Unfortunately, the report (in whatever final form it takes) may go to Applicants as Belinda thinks it unlikely they will convince the WG to prevent the report going to them. The options as she sees it is either to achieve sufficient amendments that PO can live with it or prepare their own detailed response. If the latter, she thinks the detailed response will be sent to each Applicant when the SS "package" of documents (their two thematic reports, i.e. Part 1 and this Part 2, and draft case-specific report) is sent to the Applicant pre-mediation. The WG and Chairman will not

be able to stop PO putting its view forward in that detailed response at that point, because PO are formally entitled to respond to SS's assessment of each case.

- SS had called for comments within 24 hours and Belinda pushed back and said they'd get an initial response in 48. She agrees a more detailed considered response should go later (such as she indicated, above) but wants to send a private shot across their bow now.

Dear Belinda and Rodric

We have considered Second Sight's draft thematic report – part two. As discussed with Belinda, we set out some general, preliminary observations about the report and Post Office's relationship with Second Sight. We also set out some more detailed preliminary comments on the report's content, focussing, as requested, in particular on the section concerning the Subpostmaster contract.

- We note at the outset that the report reflects a broader concern about Second Sight's role within the Scheme and its relationship with Post Office. Pursuant to the engagement letter dated 1 July 2014 (the **'Engagement Terms'**), Second Sight are engaged by Post Office and are paid by Post Office to provide services to the Working Group and Post Office in respect of the Scheme. Ideally, therefore, they would only perform work when and as required and directed by Post Office or the Working Group. Given how poor the standard of the report is (as discussed below), and Second Sight's track record in this regard, we think now might be an appropriate time to take as much control over Second Sight's role within the Scheme as possible. For example, ordinarily, it would not be for Second Sight to dictate the timeframes in which responses to their reports should be received. Indeed, in the ordinary course, in our view, the work generated by Second Sight to date, and even just this report alone, would justify the termination of their engagement. But we appreciate that there are other considerations in this case - such as pressure on and from the Working Group not to be seen to delay the application assessment process any longer and public commitments given to persist with Second Sight - which mean Post Office does not feel it has the flexibility it perhaps should to direct Second Sight or to take more serious steps. We think, however, that Post Office should now seriously consider taking whatever further steps it sensibly can to "rein" them in.

In the same vein, we also suggest re-approaching the Chairman of the Working Group to seek his support to help control Second Sight. Again, we appreciate this may be difficult to achieve in practice given the position the Chairman has taken to date, but suggest it may well be worth another attempt, in light of the quality of this report and the harm it might cause to Post Office's position if published to Applicants in its current form and the prospect of the present difficulties with Second Sight persisting in future.

- The report is well below the standard we would expect of a firm of "experienced accountants" engaged to prepare an independent, evidence-based report. As with Second Sight's previous work-product, the report largely fails to draw conclusions from any of the issues which it identifies and seeks to explore, and those conclusions it does draw do not appear to be based on any facts or evidence available to Second Sight. It also opines on issues and facts on which Second Sight are not qualified to opine, or are not reasonably within their remit i.e. because they are not sufficiently connected with Horizon. Plainly, the report does not serve Post Office's interest. From a wider perspective and perhaps more importantly, the report does nothing to advance the Applicants' positions either or assist the satisfactory operation of the Scheme. It will create even more unrealistic expectations and make settlement or other resolution of claims even harder. This point should be made clear to the Working Group, and the Chairman in particular, in order to ensure that to those whose opinions matter, if and to the extent it is not finalised in an acceptable form, the report reflects much more poorly on Second Sight than it does on Post Office.
- We think that in replying to Second Sight initially, the Post Office should stress, if possible, that the report is not sent to any Applicant unless and until the Post Office has approved it. We understand that nonetheless, the Working Group may allow the report to be sent to each Applicant as part of the package of documents they receive after Second Sight assess their case. In that case, it goes without saying that Post Office should make every effort to have the report sufficiently amended such that it is in a more acceptable form. If the report is not finalised in a form acceptable to Post Office, we understand Post Office intends to prepare a document responding in detail to the report which will be sent to Applicants at the same time as the report. We agree with that approach.
- In order to respond properly to the report, we suggest Post Office first deal with points in the report which are based more soundly in fact and which appear (at least on their face) to be the more reasonable areas of complaint – e.g. the operation of ATMs or sale of lottery tickets after hours. We suggest if a reasonable explanation cannot be given for these points in the first instance, Post Office should volunteer to do more work itself to determine the facts behind these issues.

Section 2 of the report – the Subpostmasters’ contract

To give context to Second Sight’s commentary on the Subpostmasters’ contract (the “**Contract**”), and the report generally, we have identified the following key provisions of the Engagement Terms.

Clause 2.1 – the Scheme has been set up to resolve Subpostmasters’ concerns about “Horizon and associated issues”.

Clause 2.2 – Second Sight is a member of the Working Group whose role it is to oversee the Scheme and assist investigating individual complaints.

Clause 2.3 – Post Office has engaged Second Sight to provide Services to the Working Group in relation to the Scheme.

Para 1 of Sch 1 (Scope of Services) – this defines the Services Second Sight are engaged to provide. These are: serving as a Member of the Working Group, advising, as requested by Post Office or the Working Group, on the format style and content of documents submitted by Post Office and/or Subpostmasters during the Scheme, investigating specific complaints raised by each Subpostmaster and assisting with reasonable requests made by the Working Group or Post Office.

Para 2 of Sch 1 – Second Sight must conduct the Services in furtherance of the objectives of the Scheme as set out by the Working Group.

Para 4 of Sch 1 – Second Sight is to act independently in providing the Services and assessments or opinions it gives shall be without bias and based on the facts and evidence available.

Para 5.1 of Sch 1 – in providing the Services, Second Sight shall act with the skill and care of qualified experienced accountants and it is acknowledged that matters relating to criminal law and procedure are outside SS’s scope of expertise and accordingly SS shall not be required to give an opinion in relation to such matters.

As a general comment, we do not think that the Post Office should be overly defensive about the contract. There are several good reasons why it is reasonable and, indeed, typical of contracts of its kind and why concerns raised by Second Sight as to its “fairness” are groundless. In particular, the following could be said in response to what Second Sight say in section 2:

- 1 Second Sight, as a firm of accountants, are not qualified to opine on legal matters, including issues concerning the “fairness” of the Contract or any criminal matters. Nor have they been engaged under the Engagement Terms to do so, especially as such matters are not reasonably related (or related at all) to issues “concerning Horizon and any associated issues”. Accordingly, any assertions they make or conclusions they draw on this issue necessarily carry little or no weight.
- 2 The Contract is essentially an arms-length, commercial transaction. The concept of freedom of contract means that Subpostmasters can, ultimately, choose whether or not to enter the Contract if they are not happy with its terms. Post Office should confirm whether they are aware that there are any instances of Subpostmasters somehow being prevented from seeking legal advice before becoming Subpostmasters. No doubt this is unlikely and if true, a rare exception.
- 3 We understand that a body representing Subpostmasters, the NFSP, negotiated the terms of the Contract on behalf of Subpostmasters. Indeed, in a network of several thousand Subpostmasters, it is reasonable to expect the contract to have been negotiated in that way. It would be impractical and potentially unfair to expect certain Subpostmasters for the Contract to be negotiated on an individual basis by each Subpostmaster before he becomes a Subpostmaster.
- 4 The risk allocation under the Contract is typical of and reasonably expected in contractual arrangements of this kind. It is a contract of agency. Agents (Subpostmasters), by definition, have custody and/or control over the principal’s (Post Office’s) assets and interests and are engaged by the Principal in order to protect, safeguard and further the principal’s interests on his behalf. In this case, Subpostmasters are necessarily responsible for ensuring the safe-keeping and proper accounting for the revenue generated for Post Office throughout the Subpostmaster network. Accordingly, the risk allocation in the Contract properly reflects the role the Subpostmaster plays, including the level of his control and responsibility for and trust placed in him by Post Office with respect to Post Office’s assets. That allocation is in any event reflected in the general law e.g. in the form of the equitable duty of an agent to account to his principal.

- 5 Thousands (and the vast majority) of Subpostmasters have not complained about the allocation of risk under the Contract and have been signing up to it for two decades. The issues raised by Second Sight represent the views of a very small, self-selecting proportion of Subpostmasters, if they represent the views of any at all.
- 6 Unless Second Sight can substantiate any instance in which an Applicant's entry into the Contract was the subject of any undue influence, unconscionable conduct on the part of Post Office or any other "unfair" circumstances, then the concepts of fairness or bias are legally meaningless in this context. Further, Second Sight should be asked to explain what they mean by "bias" in this context, or for that matter, what they mean when they say that appropriate risk mitigation measures may not have been implemented by the Subpostmasters. It is not clear to us what they mean by these things.
- 7 The "fairness" or otherwise of the risk allocation under the contract is, we assume, not the subject of any specific complaint within the Scheme. If that is the case, it is not a matter which falls for consideration in the Scheme or in any work-product Second Sight should be preparing.
- 8 Post Office should investigate Second Sight's allegations as to the terms of the Contract not being brought to the attention of Subpostmasters adequately or at all. Second Sight refer to an "Acknowledgment of Appointment" letter. Post Office should confirm the process for signing up Subpostmasters to the Contract and where possible refer and explain in their response to Second Sight all steps that are taken, including the acknowledgement letter, to bring the terms to their attention before they commence their role.

The report generally

As discussed with Belinda, we suggest that a detailed response to the report should be prepared in due course after full consideration and investigation of the relevant factual issues it seeks to raise. We are not able in the time available to set out a comprehensive commentary on the report, nor do we have access to the facts to do so, but make these brief observations at this juncture. We do not suggest these points be shared with Second Sight at this stage, i.e. while they are unallied to substantive responses to the factual points Second Sight raise.

a) The report in several instances refers to "Subpostmasters" generally rather than "Applicants". It fails to draw conclusions in many places, thus leaving unhelpful ambiguous and speculative assertions on which readers are then left to draw their own conclusions. It lacks examples or statistics to substantiate the largely speculative conclusions it does draw. These matters suggest to us and would suggest to any reasonable reader, that the report is not intended to reflect only the specific subject matter of complaints made in the Scheme and that Second Sight have a wider agenda. They also suggest the report is largely not or not adequately based in fact and the available evidence, as the Engagement Terms require.

b) As mentioned, the report refers to several matters outside the expertise of "qualified experienced accountants" or matters which are expressly out of scope. See e.g. section 2, references to high street banks' usage of ATMs (3.5), opinion as to "system design error" with respect to automatic transaction reversals in Horizon (10.3), criminal issues such as sections 13 (Pensions and Allowances) and 22 (Post Office investigations).

c) The report refers to matters that have little or nothing to do with the subject matter of the Scheme – i.e. Applicants' concerns with the functioning of Horizon and associated issues. See e.g. the contract commentary in section 2, ATMs (section 3), Motor Vehicle Licences and the misprinting of bar codes (section 4), cash and stock remittances (section 11), Post Office's data retention policy (section 14), cash withdrawals accidentally processed as deposits and other counter errors (section 16).

From: Band, Christa
Sent: 05 August 2014 23:05
To: Swil, Jonathan
Cc: McNicholl, Paul
Subject: RE: Project Sparrow

What an incredible mess.

A few preliminary thoughts from me:

1. The Post Office needs to regain control of the situation. They engaged and pay Second Sight. I don't see what the tearing hurry is – it is not for Second Sight to give the Post Office 48 hours to respond –or indeed any period

of time. The Post Office should thank them for the draft and say that they shall respond when they have had time to consider it.

2. It is good to see that the draft is marked "Not approved by POL" and that it is confidential to those involved in the processing of an Applicant's claim. I think that in replying to Second Sight initially the Post Office should stress that the report is not to go to any Applicant unless and until the Post Office has approved it.

3. The real issue here is not whether the Post Office is sensitive about the report or not – a lot of it is nonsense – the point is that it will not help Applicants at all. It will create unrealistic expectations and make settlement or other resolution of claims much harder. The Working Group must realise that.

4. The Post Office urgently needs the help and support of the Chairman of the Working Group. He needs to recognise that this is now out of control and help to calm things down and get them back on track. If he can't or won't do this then there is a more serious problem which we should discuss.

5. The Post Office needs to tackle first the points which could be said to be "real" – the operation of ATMs etc. It needs either a substantive answer or to volunteer to do more work itself to determine the facts behind these issues. I don't think that it is appropriate simply to rely on the allocation of risks in the contract to deal with these points – there must be an answer: are there problems with the sale of lottery tickets after hours or not?

6. I don't think that the Post Office should be too defensive about the contract – though Paul will have a view on this. The contract is the contract, it is not negotiated each time someone signs up, they take on a business and should work out for themselves whether they need legal advice before signing up and should be able to determine whether they understand the terms they are being asked to agree to. As I understand it, the allocation of risks is standard in contracts such as these – though there may not be a direct parallel – again Paul would know best. I think that if the Post Office comes across as very apologetic for the terms it is likely to lead to more difficulties. It should have some confidence in its position.

7. The Report is again very unhelpful in that it fails to draw conclusions from any of the issues which it identifies and seeks to explore. The Post Office's response is to rely on the allocation of risks in the contract and the Second Sight report is deficient and unhelpful in that it leaves this issue hanging. They are very critical of the contract – are they saying it is unenforceable in the relevant respects? If so, they are in no position to voice this view – they lack the skills, the Post Office will not agree and Second Sight are simply wrong. It seems to me that it would be helpful for all concerned if Second Sight's and the Post Office's position in relation to this were flushed out.

8. Second Sight have clearly adopted a position far removed from what you would expect of an independent expert. But I am not sure what has gone wrong. Has the Post Office upset them? Do they see themselves as guardians of subpostmasters' interests just because they can? Is there a political undertone? I don't quite know how things have got to where they are but it might be helpful to have a little more insight into this as it is relevant to working out how this can all be brought back on track.

9. The engagement letter is odd. Why is it just over a month old when Second Sight have been working for much longer? Was there an earlier version? I have commented below on some of the points which you make about the engagement letter.

10. The Post Office needs to work out whether to sack Second Sight. I can't see this getting much better but there is a major political dimension to whether they sack Second Sight. They need the chairman of the working group properly signed up to what happens next. In any "ordinary" circumstances, Second Sight would be sacked right now. I would also not get them to do any more work but simply pay them for the next 30 days at the average charge for 30 days work in the life of the contract to date (they started work before the engagement letter but I assume that the terms were the same).

11. We also need some clarity over exactly who asked Second Sight to produce the report under consideration – was it the Working Group? Have they gone beyond the instructions?

Further comments in relation to yours are included in the text below.

Happy to discuss – I may not be in London tomorrow though I am working and can talk as required.

Christa

From: Swil, Jonathan
Sent: 05 August 2014 20:58
To: Band, Christa
Cc: McNicholl, Paul