

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
Subject: RE: Project Sparrow
Importance: High

Christa

Belinda has sent us the attached final draft of the Second Sight report and asked if we can get back to them tomorrow given Second Sight have "given them" 48 hours to comment. I suggest you use this version to review, rather than the one from Friday as it has got a bit longer. I said we would send our preliminary views generally and thoughts on the "contract section" of the report tomorrow. Belinda had also asked if we could also provide any other thoughts we have on the report more generally but I think more concluded views on that can sensibly wait until the next round of comments for which it appears from Belinda's email there will be another opportunity. What we say about point a) below I think necessarily draws on deficiencies with the report more generally anyway. **I THINK THAT THE POST OFFICE NEEDS TO SEND SOMETHING TO POSITION ITS OVERALL REACTION AND RESPONSE EVEN IF THE DETAIL COMES LATER. SEE ABOVE FOR THOUGHTS.**

By way of reminder, we have been asked to provide any views we have about a) what Post Office can do about the report e.g. to prevent its publication and b) what they can say, especially about section 2, to neutralise it, including what might be put in a draft letter to Second Sight in response to the report. I have copied **Paul** so he can see where our thinking is heading and for him to if necessary develop the relevant part of section b) (highlighted).

For context, Belinda said the gloves are now off and they do not wish to treat Second Sight kindly any longer. **SEE ABOVE – THE REAL QUESTION IS WHETHER TO SACK THEM.**

I suggest subject to your view and once you have provided any comments, I turn this email into an email to Post Office, asking whether they want our views in a more formal note and developed in any respects for the next round (I was told this would be an iterative process, so suspect whatever we send tomorrow will need to be changed/developed anyway).

(The email has turned out longer than I had planned so probably should go into a separate note).

Jonathan

a) What we might do about the report

Any steps taken need to be grounded by reference to the engagement terms (attached). These were executed on 1 July 2014.

PO have engaged SS to provide services (albeit not necessarily to prepare this report) so I see limited basis on which to challenge it aside from the engagement terms. For example, even if what is said in the report might be defamatory (I'm not suggesting either way whether it is), it is a confidential report which Second Sight will only be publishing to the Post Office and the Working Group, so there may be difficulties establishing a publication of the report by Second Sight in the relevant sense or causation by them of any loss. Further, launching a claim and/or seeking an injunction on the basis of defamation may also seem like a significant over-reaction and appear overly defensive. **I THINK THAT THEY SHOULD NOT BE THINKING SO DEFENSIVELY ABOUT THIS. MOREOVER, THEY SHOULD NOT GIVE ANY CREDENCE TO THE NOTION THAT THE REPORT WILL BE PUBLISHED. IT IS MARKED AS BEING CONFIDENTIAL. THE WORKING GROUP COULD AND SHOULD INSTRUCT SECOND SIGHT THAT THIS DOCUMENT REMAINS CONFIDENTIAL TO THE WORKING GROUP – ONLY – PENDING COMMENTS FROM**

THE WORKING GROUP. I ALSO THINK THAT THEY SHOULD NOT BE TREATING THIS AS POTENTIALLY DEFAMATORY – IT IS JUST WRONG AND A BAD PIECE OF WORK. IT SHOULD REFLECT WORSE ON SECOND SIGHT THAN IT DOES ON THE POST OFFICE AND THEY NEED TO TRY TO POSITION THE WORK IN THAT WAY.

Further, it is difficult to see how PO could obtain an injunction preventing publication on the basis of breach of the engagement terms. There is real scope for arguing that the report and/or significant parts of it fall outside SS's engagement. But there does not appear to be a positive obligation on SS not to prepare a report of this kind. Accordingly, for the reasons below, it seems to me PO's best approach is to make it clear to SS that this report is (well) beyond scope and on that basis threaten: **THEY SHOULD ISSUE SOME INSTRUCTIONS TO SECOND SIGHT. PARA 1.2 OF THE SCOPE OF SERVICES SECTION PROVIDES THAT SECOND SIGHT SHOULD ADVISE AS REQUESTED BY THE POST OFFICE OR THE WORKING GROUP. THE POST OFFICE NEEDS TO GET BACK TO THE SITUATION IN WHICH THEY TELL SECOND SIGHT WHAT TO DO. WE HAVE MADE THIS POINT TO THEM BEFORE, I KNOW. MOREOVER, THEY SHOULD EXPLAIN TO SECOND SIGHT AND THE WORKING GROUP WHY THIS REPORT WILL NOT HELP APPLICANTS – SEE ABOVE. SO THE REPORT SHOULD NOT GO TO APPLICANTS IN THIS FORM – IT IS INACCURATE AND UNHELPFUL.**

- 1) not to pay for it or at least those parts of it most clearly out of scope;
- 2) no longer to co-operate with Second Sight at all; and/or
- 3) to terminate their engagement on 30 days' notice in accordance with cl 4.1 of the engagement terms. **THESE ARE ALL SLIGHTLY DIFFERENT POINTS I THINK. AS NOTED ABOVE, THE POST OFFICE SHOULD TELL SECOND SIGHT WHAT TO DO IN RELATION TO THE REPORT. IT SHOULD NOT NEED TO THREATEN IN THAT RESPECT – SECOND SIGHT SHOULD BE ACTING ON INSTRUCTIONS. AS NOTED ABOVE, IT WOULD HELP CONSIDERABLY IF THE CHAIRMAN OF THE WORKING GROUP WOULD GET BEHIND THIS AND AGREE. THE QUESTION OF PAYMENT/COOPERATION ETC ALL GOES TO WHETHER SECOND SIGHT SHOULD BE TERMINATED WHICH IS A DIFFERENT ISSUE.**

Threatening to abandon the scheme may be a further option of last resort but I think on the basis PO have recently decided to continue with the scheme, and given the reasons for doing so, this is not realistic. **AND THIS GIVES CREDENCE TO THE NOTION THAT SECOND SIGHT HAVE COME UP WITH GOOD POINTS WHICH ARE DAMAGING TO THE POST OFFICE. IN FACT THEY HAVE JUST DONE A RUBBISH JOB. THE BAD JOB DONE BY SECOND SIGHT DOES NOT MEAN THAT THE WHOLE SCHEME FALLS AWAY. THE POST OFFICE NEED TO GET SECOND SIGHT UNDER CONTROL – I KNOW THAT I HAVE MADE THIS POINT ALREADY.**

Key provisions of the engagement terms

Cl 2.1 – the Scheme has been set up to resolve Subpostmasters' concerns about "Horizon and associated issues".

Cl 2.2 – SS is a member of the Working Group whose role it is to oversee the Scheme and assist investigating individual complaints. **NB I READ THIS AS IT IS THE ROLE OF THE WORKING GROUP AND NOT SECOND SIGHT ALONE.**

Cl 2.3 – PO has engaged SS to provide Services to the Working Group in relation to the Scheme. **ABSOLUTELY – THE CART IS BEFORE THE HORSE AT PRESENT.**

Para 1 of Sch 1 (Scope of Services) – this defines the Services SS are engaged to provide. These are serving as a Member of the Working Group, advising, as requested by PO or the Working Group, on the format style and content of documents submitted by PO and/or Subpostmaster during the Scheme, investigating specific complaints raised by each Subpostmaster and assisting with reasonable requests made by the Working Group or Post Office. The Services do not expressly mention the preparation of "thematic reports" such as this one. **NO BUT WE NEED TO WORK OUT HOW THIS REPORT CAME INTO EXISTENCE. IS THE POST OFFICE SURPRISED AND UPSET BECAUSE THE REPORT EXISTS AT ALL (I RATHER DOUBT IT) OR BECAUSE THE CONTENTS ARE SO INACCURATE AND UNHELPFUL?**

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

Para 4 of Sch 1 – SS 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. **I WOULD STEER CLEAR FROM TRYING TO ALLEGE BIAS AND FOCUS ON THE INCOMPETENCE OF SECOND SIGHT INSTEAD. EASIER AND MORE PALATABLE FOR ALL CONCERNED.**

Para 5.1 of Sch 1 – in providing the Services, SS 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. **I KNOW THAT THE CRIMINAL**

LAW IS EXPRESSLY PROVIDED FOR BUT SECOND SIGHT ARE NOT LAWYERS IN ANY RESPECT AND SHOULD NOT BE COMMENTING ON LEGAL CONCLUSIONS.

Out of scope work THERE ARE TWO POINTS HERE: FIRST DOES THE SCOPE OF WORK POINT MEAN THAT THE REPORT CAN BE RESTRICTED? I WOULD NOT GET TOO UPSET ABOUT THE SCOPE OF WORK – THEY HAVE DONE IT AND THE POST OFFICE NOW NEEDS TO DEAL WITH IT. WE CAN'T BAN IT JUST BECAUSE WE SAY THAT IT IS BEYOND THE SCOPE OF THE WORK AS SET OUT IN THE ENGAGEMENT LETTER. SECONDLY DOES THE REPORT STRAY INTO AREAS IN WHICH SECOND SIGHT ARE NOT QUALIFIED TO HAVE A VIEW? YES – THE LAW AND THIS POINT SHOULD BE MADE BECAUSE THE REPORT IS SIMPLY WRONG IN THE RELEVANT RESPECTS AND THE POST OFFICE WILL NOT ACCEPT THE CONCLUSIONS.

On the basis of the observations in section b) below (there may well be others), the report or at least significant parts of it is not within the scope of the Services SS have agreed to provide under the engagement terms. In particular:

- The preparation of a thematic report itself is not expressly within the terms of para 1, Sch 1 [although Post Office will need to confirm whether the report has nevertheless been requested by it or the Working Group]. A thematic report does not address or seek to resolve specific complaints raised by each Subpostmaster (as contemplated by cll 2.1-2.3 and para 1 of Sch 1).
- Several sections of the report are not about “concerns with Horizon or associated issues” at all (see cll 2.1-2.3).
- Substantial parts of the report contain assertions and conclusions without much or any factual basis or reasoning and in some cases are merely speculative. They are therefore not based on the facts and evidence available, contrary to para 4 of Sch 1.
- Certain sections arguably betray a bias against PO (contrary to para 4 of Sch 1).
- Sections concerning the Subpostmaster contract and criminal matters in particular (although there are others) are not within the expertise of qualified experienced accountants and in the latter case are, indeed, expressly out of scope (contrary to para 5.1 of Sch 1).

b) What we might say about the report

Section 2 - the contract

2.3: SS say that the contract transfers several financial and other risks to Subpostmasters who may not have understood or appreciated the risks, particularly if they failed to seek independent legal advice before taking up their post.

1) Freedom of contract means Subpostmasters could choose not to enter the contract if not happy with the terms. 2) PO [presumably – **to be confirmed**] did not prevent them seeking legal advice before entering it. 3) Risk allocation is typical of and reasonably expected in contractual arrangements of this kind, such as, by analogy, franchises, particularly where the oversight of and accounting for revenue and costs generated through the Subpostmaster network is solely or largely within Subpostmasters' control. **[Paul to develop]** 4) Thousands (and the vast majority) of Subpostmasters do not complain about the allocation of risk and have been signing up to it for two decades. 5) The fairness of the risk allocation under the contract is not the subject of any specific complaint **[PO to confirm]** 6) SS are not qualified to comment on the contract.

2.5: SS are of the opinion that the contract is biased in favour of PO. SS have not seen any evidence that PO advises or requires Subpostmasters to seek independent legal advice. **WE NEED TO THINK ABOUT THIS ISSUE A BIT MORE BUT MY INITIAL CONCLUSION IS THAT WE SHOULD ASK SECOND SIGHT WHAT THEY MEAN BY BIASED. IT IS NOT A CONCEPT KNOWN TO THE LAW OF CONTRACT. I HAVE COMMENTED ABOVE ON THE NEED NOT TO BE TOO DEFENSIVE ABOUT THIS. I REALISE THAT THERE IS A TENSION IN SAYING: THEY ARE NOT QUALIFIED TO HAVE A VIEW ON THE LAW AND THEN ASKING THEM FOR FURTHER DETAILS BEHIND THEIR CONCLUSIONS BUT THEY HALF MAKE POINTS WITHOUT DRAWING THEM OUT TO THEIR LOGICAL END. ARE THEY SAYING THAT A LAWYER WOULD HAVE ADVISED AGAINST ENTERING INTO THE CONTRACT? WHY?**

1) See response in respect of 2.3 above. 2) This is mere speculation based not on fact, or by reference to any knowledge or understanding by SS of any industry standard or common expectation. 3) Subpostmasters are in no better or worse position to take legal advice prior to their engagement than any comparable person in their position such as a prospective employee, franchisee, agent for hire etc. No reason why PO should be obliged to advise them or require them to do so. 4) Unless SS 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 PO or any other “unfair”

circumstances, then points 1) and 2) in respect of section 2.3 above apply and this is a legally and commercially meaningless assertion. It is suggestive of bias *against* PO by SS.

2.6: SS say there is a risk that appropriate risk mitigation measures may not have been implemented by the Subpostmasters and that Subpostmasters have no choice but to bear the “risk” . **WHAT RISK MITIGATION MEASURES ARE THEY TALKING ABOUT?**

1) The risk as to mitigation measures is, appropriately for the reasons above, the Subpostmasters' to bear under the contract, so the first part of this comment is of no consequence and it is not clear what conclusion (relevant to SS's engagement or otherwise) can be drawn from it. 2) It is not clear what “risks” SS refer to in the latter part of this paragraph.

2.8: SS comment on the POID criminal investigation process.

- Commentary on criminal processes is expressly out of scope.

2.10/2.11/2.12 : SS say they have been told by “many Subpostmasters” that they were not given a copy of the contract until long after they had committed to purchase their sub-post office or long after they had started working or at all [**Post Office to comment on this allegation.**]; that they have seen no example of any Subpostmaster signing the contract, as opposed to the practice of signing the “Acknowledgement of Appointment” letter; and that Post Office has not retained “in many cases” evidence of the provision of the contract (and of any document having been signed by Subpostmasters).

1) Referring here to many Subpostmasters rather than “Applicants” suggests SS are implying their commentary applies to the Subpostmaster population generally. They are not qualified to make such an implication nor is it within the scope of their engagement, as they are expressly engaged only to deal with complaints to the Scheme. 2) Specific numbers and examples should be given rather than vague assertions 3) SS are, again, not qualified to speculate about the significance or otherwise of the contract not being signed (even if that allegation is correct). Indeed, they offer no conclusions in this regard. Contracts do not need to be signed to demonstrate that they are legally binding or even that their terms have come to the attention of the parties before the parties are said to be bound by them, particularly where an alternative practice such as the “Acknowledgement of Appointment” letter is alleged by SS to be used by PO.

YES BUT I DO THINK THAT THE POST OFFICE NEEDS AN ANSWER TO THIS. IS THE CONTRACT AVAILABLE ON LINE? IS THEIR PROCEDURE TO MAKE SURE THAT EVERYONE HAS IT? WHAT CAN WE SAY ABOUT PEOPLE HAVING ACCESS TO THE TERMS?

The report generally

1) The report refers to “Subpostmasters” generally rather than “Applicants”. See e.g. 2.10, 3.19, 6.3, 21.1.

2) The report relies on bare assertion and lacks examples or statistics, is speculative, and draws unreasoned conclusions. See e.g. 2.3, 2.5, 13.2, 15.2, 16.1, 17.2, 17.4, 19.4, 20.1, 20.3. **YES BUT SEE ABOVE, I THINK THAT WE NEED ANSWERS ON THE SUBSTANTIVE POINTS.**

3) The report refers to 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).

4) 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).

These issues indicate or at least may give the impression that the report, contrary to the requirements of Second Sight's engagement terms:

- a) is not intended to reflect only the content of Applications to the Scheme
- b) is not based in fact and on the available evidence
- c) has been prepared by a firm not qualified to draw some or many of the conclusions it seeks to and therefore is beyond its expertise and
- d) is biased against PO.