

2017

Protocol governing Second Sight's interaction with Freeths for the
purposes of the Claim

Freeths LLP ⁽¹⁾
Post Office Limited ⁽²⁾ and
Second Sight Support Services Limited ⁽³⁾

DATE**PARTIES**

- (1) Freeths LLP (Company No. OC304688) (in their capacity as solicitors for the Claimants) of 80 Mount Street, Nottingham, Nottinghamshire, United Kingdom, NG1 6HH (**Freeths**);
- (2) Post Office Limited (Company No. 02154540) of Finsbury Dials, 20 Finsbury Street, London, EC2Y 9AQ (**Post Office**); and
- (3) Second Sight Support Services Limited (Company No. 06844000) of 7 Canon Grove, Yarm, TS15 9XE (**Second Sight**).

BACKGROUND

- (A) A group litigation action has been brought by a number of former and current postmasters and others (**the Claimants**) against Post Office under Claim Number HQ16X01238 (**the Claim**). As part of the Claim, the Claimants wish to approach and seek information from Second Sight. The Claim is the subject of Group Litigation Order dated 22nd March 2017 (**the GLO**).
- (B) Post Office engaged Second Sight in June 2012 to investigate Horizon and the issues being raised by a number of Postmasters. Second Sight's work involved (1) an original inquiry investigating Horizon from a general perspective, which work concluded in July 2013; and (2) investigating the circumstances of individual complaints through the "Complaint Review and Mediation Scheme", which work concluded in July 2015.
- (C) Second Sight's engagement was recorded in a letter dated 1 July 2014 (**the First Engagement Letter**) which required Second Sight to maintain confidentiality (clause 6) and not to publicly discuss its work (clause 8) (**the Confidentiality Obligations**). The subsequent engagement letter dated 15 April 2015 (**the Second Engagement Letter**, together with the First Engagement Letter, **the Engagement Letters**) restated the Confidentiality Obligations.
- (D) In addition, non-disclosure agreements were entered into between Post Office and key personnel at Second Sight, including the NDAs between Ian Henderson dated 31 May 2012 and Ron Warmington dated 1 June 2012 (**the NDAs**). Second Sight also undertook and agreed in October 2012 that certain material was provided to them without waiver of privilege (**the Privilege Undertaking**).
- (E) Post Office and Second Sight obtained material from Postmasters that is or may be the subject of confidentiality obligations owed to those persons and/or covered by data protection law. None of the parties observing this Protocol thereby makes any admission or concession as to the scope or enforceability of such obligations arising thereunder or under the First Engagement Letter.
- (F) The purpose of this protocol is to maintain any such confidentiality or privilege in the material held by Second Sight, save as expressly otherwise provided in this Protocol. This protocol governs the agreed basis on which Post Office agrees that Freeths can access Second Sight and sets out the basis on which Second Sight is released from the Confidentiality Obligations, obligations under the NDA, and Privilege Undertakings so as to enable them to do so.

AGREED TERMS**1. DEFINITIONS**

- 1.1 Unless otherwise defined in this protocol, capitalised terms have the same meaning as they have in the Letter of Response from Bond Dickinson dated 28 July 2016.
- 1.2 "Document" means anything in which information of any description is recorded including but not limited to emails and other communications, word processed and electronic documents, and databases, as well as copies of Documents.

- 1.3 "Information" has its natural meaning and includes any knowledge communicated by Second Sight to Freeths (or anyone).

2. COMMENCEMENT AND DURATION

- 2.1 This protocol shall commence on the date when it has been signed by all the parties and shall continue until the end of the Claim unless terminated in accordance with clause 8.

3. ACCESS TO SECOND SIGHT AND RELEASE

- 3.1 Subject to the provisions of paragraphs 3.1.1 to 3.1.5, Post Office hereby releases Second Sight from the Confidentiality Obligations and obligations under the NDAs solely for the purposes of discussing with Freeths (and Counsel or Expert(s) engaged by Freeths) the work undertaken by Second Sight to the extent required for the purposes of the Claim.

- 3.1.1 Freeths shall not request and Second Sight must not provide Freeths with any Documents. Any requests for Documents must be addressed to Post Office's solicitors, Bond Dickinson LLP (**Bond Dickinson**).

- 3.1.2 The discussions shall only be between Freeths, Counsel or Expert(s) engaged by Freeths, Alan Bates and Ian Henderson and Ron Warrington of Second Sight.

- 3.1.3 Subject to paragraph 3.1.5, the topics for initial discussion with Second Sight (the **Initial Topics**) pursuant to this protocol (and as agreed by Bond Dickinson's letter dated 21st March 2017) shall be as follows:

- System architecture;
- The installation and implementation of Horizon, and Horizon Online, and the variation between, and capability of, the two;
- Horizon updates, modifications and software versions since installation
- Transaction corrections;
- The functionality and capability of Post Office helpline and the technical helpline operated by Fujitsu;
- Hardware problems;
- The Management Information System or Services and ability of the Horizon system to report on reconciliation;
- Errors, bugs, fixes, issues and 'peaks' including, but not limited to, those three known errors in the system listed in Schedule 6 of Bond Dickinson's letter dated 28 July 2016 (Calendar Square / Falkirk, payments mismatch, Suspense Account Bug);
- The 'known error log' document(s);
- The extent of error repency in the Horizon system;
- The reduced reboot clause in Schedule B4.4 of Post Office's agreement with Fujitsu; and

- Post Office's access to transaction information and its agreement with Fujitsu in respect of provision of such information.

3.1.4 The parties agree to co-operate in identifying and agreeing further relevant topics for discussions to be permitted under this protocol.

3.1.5 Notwithstanding any other paragraph in this protocol, Freeths and Second Sight shall not discuss the following categories of Information unless Bond Dickinson's prior written consent is obtained:

- (a) Information concerning any actual or contemplated criminal prosecutions conducted by either Post Office, Royal Mail, the Procurator Fiscal or Public Prosecution Service for Northern Ireland and any information relating to the security investigations, internal decisions of Post Office or other steps taken by Post Office in relation to these prosecutions;
- (b) Information concerning any actual or contemplated civil proceedings and any information relating to the investigations, internal decisions of Post Office or other steps taken by Post Office in relation to these proceedings;
- (c) Information which relates to postmasters who are not Claimants;
- or
- (d) any information which is (and/or Second Sight believes may be) privileged.

3.1.6 In the event that it is unclear to Freeths whether information would fall within the above categories, Bond Dickinson's clarification should be sought prior to the information being discussed. Post Office will ensure that Bond Dickinson provide reasonable cooperation in relation to providing such clarification.

3.2 For the avoidance of doubt, Second Sight is also released, to the extent necessary and only for the purposes of this protocol, from their obligations in the First Engagement Letter that they would not act for former or current subpostmasters against Post Office.

4. USE OF INFORMATION

4.1 The information provided by Second Sight to Freeths shall be kept confidential and shall not be used otherwise than for the purpose of the Claim and the Claimants and Freeths shall treat the information as if it had been derived from documents disclosed pursuant to standard disclosure (that is to say, subject to the restrictions in CPR 31.22).

4.2 This clause 4 shall also apply to any documents provided by Second Sight to Freeths in breach of this protocol.

5. PRIVILEGED MATERIALS

5.1 If Second Sight or Freeths become aware that documents or information have been handled in a way not in compliance with this protocol, Bond Dickinson should be informed immediately.

5.2 If, contrary to and in breach of its obligations hereunder, Second Sight provides or supplies documents and/or privileged documents or information to Freeths:

5.2.1 this shall not amount to a waiver of the privilege which subsists in any documents or information in which privilege shall apply; and

5.2.2 Post Office reserves its position to prevent privileged documents or information being relied upon or adduced as evidence in Court.

6. SECOND SIGHT'S COSTS

- 6.1 Post Office is not responsible for any fees, costs or expenses incurred or charged by Second Sight in connection with this protocol.

7. DATA PROTECTION

- 7.1 In relation to any personal data passed from Second Sight to Freeths, Second Sight and Freeths shall each be acting as data controllers in their own right.

8. TERMINATION

- 8.1 In the event that Freeths or Second Sight breach the terms of this protocol by (including but not limited to):

- 8.1.1 Freeths requesting or Second Sight providing Documents;
- 8.1.2 Freeths requesting or Second Sight providing Information which falls within the categories set out in clause 3.1.53.1.5 above; or
- 8.1.3 Freeths or the Claimants using the Information other than in accordance with clause 4 above;

then Post Office may terminate this protocol with immediate effect by giving written notice to Freeths and Second Sight.

- 8.2 In the event that this protocol is terminated:

- 8.2.1 the permissions and releases provided in clause 3 above will cease to have effect and any discussions between Second Sight and Freeths will stop;
- 8.2.2 the obligations under clauses 4 and 5 will remain in force insofar as they relate to Information and Documents provided prior to termination; and
- 8.2.3 clause 6 will remain in force.

9. RESOLUTION OF ISSUES ARISING UNDER THIS PROTOCOL

- 9.1 Any issues, disputes or matters for resolution or determination relating to this protocol shall be referred to the Managing Judge or the Managing Master nominated to manage the GLO.

10. GENERAL

- 10.1 This protocol shall not have contractual force other than between Post Office and Second Sight to the extent necessary for this protocol to be effective.
- 10.2 Any variation of this protocol shall be in writing and signed by each party.

Signed by , James Hartley, partner, for and on behalf of Freeths LLP

GRO

Date 29/8/17

Signed by [name] for and on behalf of Post Office
Limited

GRO

Authorised Signatory

Date 21/8/17.

Signed by [name] for and on behalf of Second
Sight Services Limited

GRO

[name]

Date

Managing Director
1st September 2017