

FREETHS

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17 March 2017
Second Letter

Our Ref: JXH/1684/2113618/1
Your Ref: AP6/364065.1369

Dear Sirs,

BATES & OTHERS -V- POST OFFICE LTD
Claim No: HQ16X01238
SECOND SIGHT

We write in response to your letter of Friday, 10 March 2017, in which you responded to our letters of 24 February 2017 and 6 March 2017, regarding access to information from Second Sight and related documents.

For a number of reasons, we do not accept your characterisation of the correspondence between us so far. In particular, your revised protocol, which you are again asking us to agree, did not meet our previously expressed concerns. Your letter of 10 March 2017 baldly states that “*the revised protocol [sent on 30 November 2016] has been rejected with no reason provided as to why it is not suitable*”. That is not true. Paragraph 23 of our letter of 15 December 2016 stated:

23. We do not accept your revised Protocol. We acknowledge you have made amendments to the document in light of points made in our Letter of Reply, but fundamentally we do not agree that we as a firm should be party to any type of contractual obligation of this nature, and significantly your proposals in relation to the restriction in relation to matters which shall not be discussed remains unchanged. These restrictions are entirely unreasonable for the reasons set out at paragraph 218.5 of our Letter of Reply. There is no reason why any material other than genuinely privileged material should be excluded.

Furthermore, we refer to paragraphs 100 to 112 of the second witness statement of Mr Hartley (dated 12 January 2017) which summarises the correspondence regarding access to information from Second Sight. At paragraphs 100 and 111, Mr Hartley states as follows:

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110. *On 13 October 2016, Post Office proposed, and enclosed, a tripartite protocol (“SSP1”) which would set out the terms of access by the Claimants to Second Sight. However, that protocol was unworkable, as expressed by the Claimants’ Letter of Reply at paragraphs 218-219 and accordingly the Claimants again proposed a straightforward release by Post Office (other than in respect of privileged material) and asked for Post Office’s cooperation.*

111. *Post Office’s response to this on 30 November 2016 [JLH2/43-49], was to propose a revised Protocol (“SSP2”). However, as the Claimants expressed on [15] December 2016, there remained fundamental problems with Post Office’s proposal, and significantly, the restrictions in relation to matters which Post Office had required not to be discussed remained unchanged. This included at clause 3.1.3(b), an exclusion in respect of “information concerning any actual or contemplated civil proceedings and any information relating to investigation, internal decisions of Post Office or other steps taken by Post Office in relation to these proceedings”, which is incredibly broad and obviously unreasonable. Such information should only be excluded to the extent that it is privileged, as Post Office’s conduct in relation to this issue clearly falls within the scope of these proceedings.*

Our letter to you on 24 February 2017 was clearly aimed at obtaining relevant information prior to finalising the Generic Particulars of Claim, by facilitating such access as your client would allow to information from Second Sight and relevant documents from your client. We asked for a reply by 1 March 2017, in circumstances where the date for service of the finalised Generic Particulars of Claim is 23 March 2017.

Your reply of Friday, 10 March 2017, is not only late but proceeds on the tendentious basis set out above. This is extremely unhelpful, particularly in the circumstances.

We specifically asked you to identify what categories of information your client will authorise Second Sight to discuss with us (in advance of service of the Generic Particulars of Claim) and referred expressly to the comments of Master Fontaine as to the need for mutual co-operation between the parties.

You have offered nothing in your letter – other than the revised protocol, which we have addressed above. It appears to us that your client is seeking to leverage its information advantage to try to get our clients to enter into an agreement that no party on an equal footing would ever consider consenting to.

We specifically addressed an obviously relevant category of documents to which privilege would not attach and which we considered to be likely to be uncontroversial between the parties, namely, documents generated by or for the Working Group in the Mediation Scheme (on p.2 of our letter). Your refusal even to provide these documents is particularly unhelpful.

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For the record, we also have serious doubts as to the reality of your proposed review of documents returned by Second Sight. You state that such a review will take at least 2 months and cost “*at least £100,000*”. This is very surprising, not least since Bond Dickinson have acted throughout and will doubtless have been alive to issues of privilege during that period. If privileged material was provided (e.g. in prosecution files) those particular files would be readily identifiable to any solicitor without reviewing all 35,844 documents and without spending the round figure of £100,000 or any figure of that order. In the spirit of cooperation, please provide us with a copy of the index or list of files that comprise the 35,844 documents, which may enable us to narrow the scope of documents which may cost-effectively be produced at this stage.

We look forward to hearing what progress you have made regarding the decryption of the hard drive and repeat our disappointment that such progress has not been made earlier given the obvious relevance of the documents on it for the purposes of disclosure, or at least many of them. In the Schedule of 25 August 2016 (at point 25 in the Schedule), we specifically asked you who encrypted the hard drive and what steps are necessary to de-encrypt it. We also asked “*Please confirm that you are taking appropriate steps in this respect.*” It is disappointing that you are only now, in March 2017, in discussions about this. Please also confirm the date upon which the hard drive was encrypted, or, if you are unable to confirm the exact date, please confirm more generally if it had been encrypted before, or at the point of, it being sent to Second Sight for their review. Subject to the timing of the encryption, please confirm whether Second Sight were required to un-encrypt the hard drive, in which case would it not be straightforward to seek their assistance to access it now?

Against this very unsatisfactory background, we invite you to agree that we may discuss the following topics with Second Sight and provide the following categories of documents without any further delay:

Topics - for discussion with Second Sight

- 1) System architecture;
- 2) The installation and implementation of Horizon, and Horizon Online, and the variation between, and capability of, the two;
- 3) Horizon updates, modifications and software versions since installation
- 4) Transaction corrections;
- 5) The functionality and capability of Post Office helpline and the technical helpline operated by Fujitsu;
- 6) Hardware problems;
- 7) The Management Information System or Services and ability of the Horizon system to report on reconciliation;

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- 8) Errors, bugs, fixes, issues and 'peaks' including, but not limited to, those three known errors in the system listed in Schedule 6 of your letter dated 28 July 2016 (Calendar Square / Falkirk, payments mismatch, Suspense Account Bug);
- 9) The 'known error log' document(s);
- 10) The extent of error repellency in the Horizon system;
- 11) The reduced reboot clause in Schedule B4.4 of Post Office's agreement with Fujitsu;
- 12) Post Office's access to transaction information and its agreement with Fujitsu in respect of provision of such information.

In the event that you are only prepared to agree to some of the topics requested, please do so rather than agreeing to nothing.

Categories of Documents to be provided

1. **Horizon documents:** Schedule of Horizon updates, modifications and software versions since installation, and the issues which each of the versions addresses. You stated in your letter dated 13 October 2016 that some of these documents may be held by third parties. You will no doubt be aware that if they are Post Office generated or owned documentation, these are within the remit of your client's disclosure obligations.
2. **Post Office documents:** Post Office internal notes, memoranda, correspondence, emails and briefing documents regarding errors, bugs or problems in Horizon, which Post Office had identified as being a cause or potential cause of discrepancies or shortfalls in branch accounts or transactions.
3. **Helpline documents:** Helpline logs in relation to the following claimants:
 - Mr Haji Nadeem Abbas Choudry
 - Mrs Oyeteju Adedayo
 - Miss Dionne Andre

We originally made this request in relation to all of the Claimants. You stated in your letter dated 28 July 2016 that we would be able to obtain these documents from our clients, but that if we required further documents, then you would consider such a request. We have now refined our request such that it only relates to three Claimants, in the first instance. Please provide your client's copies of these documents.

4. **Known Error Log:** The 'Known Error Log' kept by Fujitsu – you stated in your letter dated 13 October 2016, that the Claims particularised concern errors with the Core Audit Log. As you are aware, at the very latest upon receipt of the Draft Generic Particulars of Claim on 1 December 2016 (ie, after the date of your letter), the claims are not limited to errors with the Core Audit Log, therefore, please provide a copy of this document which you have confirmed exists.

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5. **2011-12 Horizon defects documents:** Documents relating Post Office's discovery in 2011 and 2012, of "defects" in Horizon online that had impacted 76 branches, as Post Office disclosed to Second Sight.

6. **2008 Fujitsu and Post Office emails:** Email correspondence between Fujitsu and Post Office in 2008, as requested by Second Sight (following the decryption of the hard-drive referred to above.)

7. **Emails disclosed to Second Sight:** Copies of the email data supplied by Post Office to Second Sight in May 2013 (referred to at paragraph 50 of the Executive Summary to Post Office document entitled "Complaint Review and Mediation Scheme" (following the decryption of the hard-drive, referred to above)

8. **Documents referred to in your draft protocol:** Copies of the following documents referred to and defined in your draft protocol of 19 October 2016:

- the First Engagement Letter dated 1 July 2014;
- The Second Engagement Letters dated 15 April 2015;
- The Non Disclosure Agreements between Ian Henderson dated 31 May 2012 and Ron Warmington dated 1 June 2012; and
- The Side Letter dated 1 July 2014

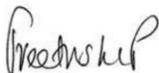
In the event that you are only prepared to provide only some of the documents requested, please do so rather than providing nothing.

Please provide:

- (a) the confirmation sought above in relation to access to Second Sight by return;
- (b) documents above by no later than 4pm 21 March 2017 (save those encrypted, if still unavailable); and
- (c) an update as to the position on decryption of the hard drive, also by 4pm 21 March 2017.

The obvious relevance of this information to drafting of the Generic Particulars of Claim has been drawn to your attention on a number of occasions. We will refer to this correspondence in the event that it is necessary to do so, both as to any consequential applications or amendments and on the issue of costs.

Yours faithfully



Freeths LLP