

Legally privileged and confidential advice

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TERMINATION OF SECOND SIGHT

EXECUTIVE SUMMARY

- SS' engagement can be terminated by Post Office without restriction on 30 days' written notice.
- On balance we consider that Post Office can direct SS to do no more work during this notice period. Even if we are wrong, the consequence will only be a damages claim against POL by SS for 30 days lost pay.
- During the notice period, SS are entitled to act on the instructions of the Working Group. We therefore recommend that Post Office simultaneously disbands the Working Group on termination of SS so to prevent the Working Group giving counter-instructions to SS during the notice period.
- SS is required to keep secret, and to return or destroy **upon demand**, all documents and material which incorporate Confidential Information – this is widely defined and we consider it will cover most information held by SS.
- Post Office could therefore demand the return of Confidential Information at the same time as giving termination notice. If complied with, this would have the practical effect of stopping any further work by SS. In practice, we would expect SS to resist handing over information.
- SS are legally restricted from publicising their findings about Horizon without Post Office's consent, but the practical reality is that SS will never warn POL that they are intending to do this and so Post Office will have little opportunity to enforce this legal right.

CONTRACT TERMINATION

The contract between POL and SS is governed by the Engagement Letter dated 1 July 2014 (**EL**) and a Side Letter (**SL**) dated 1 July 2014.

Who is the contract with? Is the Working Group (WG) a contracting party?

The contract is between SS and POL. WG is not a contracting party and has no rights to enforce its provisions for the following reasons:

- It is stated that the EL "*and its schedules will form the basis of [SS's] engagement by [POL] to provide Services to the [WG] in relation to the Scheme*".¹
- The only parties who have signed the EL are POL and SS. Neither is expressed to be signing as an agent or on behalf of anyone else.
- The EL states that "*the parties agree that the terms of this agreement are not enforceable by any third party under the Contracts (Rights of Third Parties) Act 1999*".² This means that the WG cannot look to enforce any terms of the EL which benefit the WG (including the provision of Services which is said to be for the WG).
- Finally, the WG has no legal personality and so, at common law, cannot enter into contracts.

¹ Section 2.3 EL. Paragraph 4 of the Scope of Services Schedule also refers to POL "engaging" SS.

² Section 9.3 EL.

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How can SS's contract be terminated?

The provision of the Services³ can be terminated on 30 days' written notice to SS provided by either POL or the WG, or by 30 days' written notice from SS to POL.⁴

There are no terms in the EL requiring POL to consult with the WG or for the written notice to be a joint notice. Accordingly, POL may terminate SS's contract independently of the WG.

POL could also terminate if there is fundamental breach of contract by SS. Whether such a breach has occurred is outside this advice. However, given the clear ability to terminate on 30 days' notice we would recommend using this route.

SS' position during the notice period

Under the EL, SS is required to continue providing the Services until the end of the 30 day notice period and is entitled to be paid for any work done.

There is however no converse obligation on Post Office to keep asking SS to do work during the notice period or at any other time.

SS may try to argue that they have a right to continue to work during the 30 day notice period. We consider that this argument would be difficult for SS to advance. First, the terms of the EL simply do not provide for this. Second, effectively SS would be arguing that there was a minimum guaranteed volume of work due to them when no such guarantee was ever given. Third, SS are paid on an hourly rate so their pay is not conditional on the completion of any work.

One complicating factor is that the Services include SS "*assisting with any reasonable requests made by the Working Group and / or Post Office*"⁵. Although the Working Group has no legal standing to enforce the EL, decisions of the Working Group can nevertheless influence SS' work. If during the notice period the Working Group were to direct SS to complete some work (within the scope of the Services), then SS would be entitled to complete this work and expect payment.

To avoid this situation, we would therefore recommend that in tandem with the termination of SS, the Working Group is also disbanded so that it cannot give any directions to SS.⁶ This will then enable Post Office to direct SS to immediately cease all work.

If we are wrong in the above analysis, then POL's instruction to SS to immediately cease work will be a breach of contract. The consequence of this breach would be a damages claim by SS for the value of the lost work (ie. one month's pay).

³ The EL does not include a specific provision for terminating the contract as a whole, but since the Services is the essence of the contract, and since the notice period for terminating the Services is specified, we consider that the same notice provision for terminating the contract as a whole is reasonable notice.

⁴ Section 4.1 EL.

⁵ Scope of Services Schedule, paragraph 1.4.

⁶ Under the Working Group Terms of Reference (7.3.3) for the Working Group to make a valid decision, the meeting must be quorate, with at least one person from each party being in attendance. By refusing to attend meetings of the Working Group, Post Office would effectively prevent the WG from passing a valid instruction to SS. This may be an alternative to formally disbanning the WG.

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CONTROL OF INFORMATION

Confidential Information

Under the EL⁷, SS must *"upon demand procure the destruction and/or return to [POL] of all copies of any documents and material held by [SS] and/or SS Personnel which incorporate any Confidential Information (except such documents or material that [SS] is required by law to retain)"*.

SS must also only use the Confidential Information for the Services and must keep the Confidential Information secret.

"Confidential Information"⁸ is widely defined to include the following types of information:

- all confidential information belonging to POL.
- all information about the Scheme, and
- all information in relation to the Services.

In each case, Confidential Information includes that *"which has been, is now or is at any time after the date of [the EL] disclosed or made available by [POL], its representatives or a third party to [SS], its Representatives or any other person at the request of [SS] but shall not include information which is accessible from public sources other than as a result of disclosure in breach of this letter by [SS] or its Representatives"*.

Since the obligation extends to all information in these categories which already has been, or is at any time disclosed to SS, this includes information disclosed before the start of the Scheme.

In practical terms, we consider that Confidential Information would cover, amongst other things:

- Any POL legal files held by SS
- Any "Rudkin" emails sent to SS
- All information about the Working Group
- All information about Applicants and their cases
- Any contractual or relationship information

This definition does not itself include documentation produced by SS as a result of viewing the Confidential Information. However, SS's obligation to destroy or return documents on demand extends to documents or material that *"incorporates"* Confidential Information. This arguably includes SS's Part II report, or at least large swathes of it since it is entirely based on Confidential Information.

Challenges

On the face of the EL, POL has the right to demand that SS immediately destroys or returns Confidential Information. In practice, this may be more complicated:

- First, SS may simply refuse to hand over the information. POL would then need a Court Order to compel SS to handover the information.
- If POL demands the return of Confidential Information, SS refuse but POL do not seek a Court Order, it could be said that POL has tacitly consented to SS keeping the information.

⁷ EL, clause 6.

⁸ EL, clause 3.1

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- As noted above, if SS argue they have a right to work during the notice period, they may also say that they have a right to access Confidential Information during the notice period otherwise they could not complete this work. This issue comes into sharp focus if the WG were to direct SS to do some work during the notice period – hence our above recommendation to disband the Working Group on termination of SS.

Practical steps

In practical terms, POL should demand that SS destroy or return the confidential information in writing. It would then be prudent to have SS sign a written confirmation that this has been done and/or to audit them to investigate whether this has been done.

POST TERMINATION STATEMENTS BY SS

Post-termination there is a risk that SS might keep some Confidential Information and/or attempt to publicise some of their findings without POL's consent.

The clause on publicity, which survives termination, requires SS⁹ "*not to...publicly discuss the Scheme, its Fees or its Services (including but not limited to any discussions with, in or through any media company, news agency, journalist, public forum or meeting or social media) during or after its engagement and involvement in the Scheme*".¹⁰

Generally speaking, SS is therefore prohibited from publicising its findings. However, the reality is that should SS decide to do this (i) POL will likely have no notice that this is happening and (ii) it is impossible to make confidential something already leaked. These legal rights offer therefore little practical protection should SS decide to release a statement.

Bond Dickinson LLP

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⁹ SS must procure that its personnel also comply.

¹⁰ EL, sections 8.1 and 8.2.