



NOTES FROM HORIZON ISSUES DISCLOSURE - KEL - CONFERENCE CALL - 2019.10.02

Attendance

Catherine Emanuel - HSF

Alex Lerner – HSF

Kate Emanuel - HSF

Rodric Williams - Post Office

Amy Prime - WBD

Andy Parsons - WBD

Lucy Bremner - WBD

Simon Henderson – 4pumpcourt.com (Junior Counsel)

Tony Robinson – Counsel

NOTES

1. How do we go back – damage limitation?
2. Timing – Bug 16 missing submissions tomorrow at 4pm – Do something before this.

9 extra paragraphs added to bug 16 submissions – not anticipated that they will have much to say on this, haven't had anything substantial to say before.

The merit is in the lateness, not the substance.

The Judge only knows there has been a late disclosure, he knows nothing else.
3. The tone in Freeths correspondence is annoyingly effective (open questions, constructive, haven't gone headless like late submissions – setting themselves up to go either way and no basis of accusing them as taking aggressive line)
4. Latest letter – three main points:
 1. Peaks and KELS – some refer to KELS we haven't disclosed .
 2. There are new bugs – bad karma – appeared in the trial, needs to be managed. Facts we relied on were wrong. Some bugs arose from design of system – what is the significance of this? Post Office concern about data.
 3. Modest question: Are we to understand that PO has not considered if KELS should be disclosed by Claimants?
5. Legal obligations: Disclose all adverse documents. All these documents seem adverse. The difficult question is who's knowledge is relevant (PO Or Fijitsu).
6. Problem – we PO are enclosing some adverse docs that we had no knowledge of.

7. Paul Smith – got 12 knowledge based articles at beginning of Sep – this was the first time he saw them – he said one or two related to issues that he was aware existed, but he wasn't aware of the documents – question - so are you then required to search for the documents?
8. Which individual in the PO counts as 'knowledge in the PO'?
9. There was a period of time before September when Paul Smith knew there was issues and that there were documents, but he wouldn't have had awareness of what those documents were – however he could have speculated.
10. Even when there is knowledge of adverse documents, there is still no duty or obligation to search for a document – we could take the Ostrich approach.
11. Good news is that the Claimants' don't contend that these docs should have been enclosed earlier.
12. Problem is there are draft KELS we didn't know existed.
13. We have probably got a sensible explanation for most of these, we have never pretended we disclosed everything.
14. Always been clear on date parameters
15. We can go one of two ways: Defend ourselves or agree and hold our hands up – volunteer all the info now. Don't throw anyone under the bus act with integrity.
16. We have to answer truthfully
17. Are we arguably in breach of the order in relation to disclosure of the KELS because we didn't disclose previous versions of the KELS. Don't think so because of error log – previous iterations were not part of the error log.
18. We have been proceeding that the EDQ was correct which says there is no other doc. No reason for Freeths to make the enquiry as took us at face value.
19. Are all of these docs adverse docs – no they are not.
20. BIG PROBLEM: We are not in breach in terms of late disclosure – say something simple about extra bugs that experts didn't look at. Everybody knew there was a cut-off point at the time of the trial, the Jan, Feb, March bugs were not in any supplementary reports or cross examination of experts, so there was an understanding. In our response to the letter we need to say something coherent and reliable to make that point.
21. KEL problem – we could be passive and answer question in unhelpful way and hope it doesn't come out – but let's not do that. We need to be transparent and honest here.
22. Take the bull by horns and say look this has happened and this is what we are going to do about it now that we know.
23. So, how do we approach this,.....critical questions: Do we ourselves go and talk about EDQ and make a point? Do we throw Fijitsu under the bus? Tony view to yes make a clean breast of it.
24. It's damaging to throw Fijitsu under the bus because they are important to our case. We may be forced to anyway but if not we shouldn't because it would make everyone on our side look dishonest – this would damage the entire future of this case. For example the fraud case they are bringing against us about remote access – we had a similar problem where we had to blame Fijitsu saying they told us X and we didn't know any better, so we have already criticised Fijitsu about the reliability of their info. The fact they are unreliable is an important part of our case, but also they are an extension of us, we are relying on them so we have some accountability in the

eyes of the opposition. If they can't trust our extended team then why trust us. It's better to not play the blame game unless we have to.

25. So, we need to write a very civilised letter, i.e. how awful this has happened! This is what we are going to do about it.....
26. Don't mention EDQ.
27. Most dangerous thing is if it gradually comes out, we have to be straight.
28. Are these known adverse documents? We can't really say yes or no but the reality is the entire trial was about the KELS and KEL register etc. The fact that the KELS may not all be known adverse documents is pretty optimistic, the likelihood is there would be some adverse findings – so it is uncomfortable to use this point in defence.
29. If EDQ hadn't said that and given the politics (disclose only what is necessary).
30. Nature of a KEL is if you read the whole thing you have the whole story – so need earlier versions to understand the bigger picture.
31. If we decide to grapple with the EDQ question then we can talk about it, we are not obliged but we feel we should and that the Judge should be told.
32. Definitely don't fumble through this, and don't argue the content for damage limitation. Just make a statement that we haven't had a chance to look through these yet, we don't know the details until we can get the documents and share them which we are working on right now but we are telling you at the earliest opportunity that they exist.
33. Does Statement of truth attach to EDQ – Yes
34. Do we have a formal obligation to correct something that we know to be wrong, does everything else follow from that? We may want to pick it up.
35. CPR 22.1 1G– the white book
36. Say "We need to behave like conscientious professionals who want to do the right thing, even though we are under no obligation, but we are anxious not to give you any impression we are holding something back so we would like to voluntarily tell the Judge."
37. Would we have disclosed these docs if we knew – yes, and our proof of this is to look at past approaches – this behaviour would be consistent with what we have done before. We don't have to go that far though, we can hold back. A year ago we had no understanding of KELS, advise that we are happy to give the final version but not previous – let them demand it.
38. We are assuming earlier versions of the KEL would be innocuous against final version – can we establish if this is the case? If we can the seriousness of this is less enormous.
39. Our best position goes back to that we didn't know about these.
40. We need to quickly tell them about this – in theory the judgement could appear tomorrow – we need to tell them of this fact quickly. We haven't got the luxury of investigating before we notify them. The documents are what they , just disclose them
41. When you discover documents you need to find a sensible and pragmatic solution – we have not yet had time to investigate but we should notify them ASAP.
42. Draft letter:

Don't start by saying we agreejust say we note that you agree – then use their actual language 'the documents should have been disclosed significantly earlier than they were'

In early paragraphs say something about suggestion that there are whole new bugs.

Paragraph 1: Last sentence, delete therefore. Say the peak was provided to you.

Paragraph 1: Making a valid point but not in the right way – redraft it in a way that reads as less defensive.

Previously disclosed KELs – need a much bigger section.

Paragraph 2: Start paragraph two by answering the exact question they have asked about KELs.

Then talk about how awful it is and we understand and we are going to disclose everything now and you should be able to review and we are going to tell the judge.

However practically submitting them might be a problem, we need to check with Fijitsu about timescales. Also Freeths might charge us for time to review. We should just see what they say about that.

43. Be seen to be doing all the right things.
44. Fijitsu should pick up costs.
45.
 1. Get position square with Claimants and Court.
 2. Then figure out cost recovery etc.
46. Formulate the letter about what we are going to do and say we will refine details later.
47. Tom Beezer: There will be technical challenges to get the drafts out of the system – so it is the case at the moment that no one can get them, so these documents are only theoretical. Play down the hysteria, amplify the slight disappointment with Fijitsu, ask Freeths if they want to look at draft historic KELs, don't make the assumption they will. It's not we haven't reviewed them, we actually can't yet because the code doesn't exist to extract them yet.
48. Tom Beezer: Good point – they had their expert there and they had their hands on the system, were these historic ELS available to the experts then? Find out Amy. Was it plausible that if the expert wanted to look back through drafts he could have done?
49. Amy made a good point – it isn't all the KELs we are interested in, we can pull out the important ones.
50. How big a difference is there between versions of KELs?
51. We need to put resource into investigating content of the documents – fearful of making the mistake of relying on what Fijitsu said before, we are taking a risk by relying on them again. We need to have a suspicious mind-set before we start offering assurances to the other side.
52. We just need to say we want to work with you and the Courts to investigate this mistake.
53. Come clean, allocate responsibility, be professionals and do what we can to fix it
54. We should give them an option – everything or just the KELs that were subject of trials – leave it up to them and don't assume we know what they want.
55. Paragraph 3: Flow chart – don't understand – side step the issue, if you take the view that it's not a disclosable then we apologise.
56. Use present tense?

57. Letter draft and sign off: Andy/Amy/Council.

Deadline: Strategy needs signing off ; Kate HSF.

ACTIONS & NEXT STEPS

- Amy draft letter and send to Counsel to check.
- Counsel to check draft.
- Amy instruct Mathew Lenton at Fijitsu to start retrieving undisclosed documents NOW.