

Claim Nos. HQ16XO1238, HQ17X02637 & HQ17X04248

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

The Post Office Group Litigation

MR JUSTICE FRASER

BETWEEN:

ALAN BATES & OTHERS

Claimants

– and –

POST OFFICE LIMITED

Defendant

POST OFFICE SUBMISSIONS IN RELATION TO THE FUJITSU CONTRACT

1. In the course of the Horizon Issues trial, reference was made to the contract between Post Office and Fujitsu (**the Fujitsu Contract**)¹.
2. An email from the Managing Judge's clerk dated 12 July 2019 and timed at 10:42 stated as follows:

Section F of the claimant's document handed up in Reply deals with KELs and provides references to the Post Office maintaining these were not in its control. As indicated at the end of the trial, the contract between Fujitsu and the Post Office is now available and in the trial bundle at F/1659.2. This appears on its face to be relevant to this point. The Judge invites submissions on this specific point (and this specific point only) from the parties, by reference to this contract...

3. These are Post Office's submissions on this point which can be summarised as follows:-
 - (1) As at July 2017, Post Office understood the KEL to be a relatively unimportant internal working document produced and used by Fujitsu to assist in the performance of some

¹ {F/1659.2}.

services under the contract. On that basis, the KEL would not properly have been characterised as a “*record...relating to the performance*” of Fujitsu’s services under the Fujitsu Contract and would thus not have been within Post Office’s control. But, on the facts now known to Post Office, it would not contend the KEL to be outside its control.

- (2) Once the relevance of the KEL had been identified, Post Office did not seek to resist disclosure of the KEL on the basis that it was not in its control, or at all. Instead, Post Office secured Fujitsu’s cooperation in downloading the content of the KEL in a usable format and agreed an order requiring its disclosure to Cs.
- (3) The disclosure of the KEL was not the subject of contention by the time the Horizon Issues Trial was directed.

Background

4. In the GPOC, Cs asserted that Fujitsu maintained a “Known Error Log” (**KEL**) relating to some or all of the following issues: a large number of software coding errors, bugs or defects which required fixes to be developed and implemented; data or data packet errors; a frequent need for Fujitsu to rebuild branch transaction data from backups, giving rise to further risk of error being introduced into the branch transaction records.² Cs further asserted that the KEL had been provided to Post Office but not disclosed.³
5. In response, Post Office pleaded that the KEL was not used by Post Office and was not in Post Office’s control.⁴ It went on to explain its then understanding as to what the KEL was. To the best of Post Office’s information and belief as at July 2017, the KEL was a knowledge base document used by Fujitsu which explained how to deal with, or work around, minor issues arising in Horizon that were not relevant to these proceedings.

² Paragraph 23 of the GPOC {C3/1/8}.

³ *Ibid.*

⁴ Paragraph 50(4) of the GDCC {C3/3/22}.

6. As noted in Post Office's written closing submissions,⁵ there was a debate in the early stages of these proceedings as to the relevance of the KEL and whether it would need to be disclosed. On 22 September 2017, Post Office sought to short circuit this debate by offering to allow Cs' IT expert to inspect it.⁶ Rather than preventing Cs from having access to the KEL, Post Office was seeking to allow Cs to form a view whether, having seen the KEL, they really wanted entries from it to be disclosed.⁷
7. In the light of this offer, by para 13(b) of the First CMC Order dated 27 October 2017⁸ Post Office was required to use reasonable endeavours to arrange for Cs' IT expert to inspect the KEL, which inspection took place on 28 November 2017.
8. In its EDQ of 6 December 2017, Post Office explained that:⁹

“A range of third parties provide support and services to Post Office and may hold documents which are relevant to this litigation. Whilst many of these documents are not within Post Office's control and therefore do not fall to be disclosed by it, in the interests of assisting the Claimant and the Court, Post Office sets out below a high level overview of these documents.

It should be noted that to assess whether documents held by third parties fall within Post Office's control will not be a straightforward task. It will require a close reading of the relevant contractual documents between Post Office and the relevant Third Party and precise identification of the documents or information in question. Post Office considers that this assessment is best done retrospectively, after a document or class of documents has been identified as being needed for this litigation. It may also be the case that some third parties (eg. Fujitsu) would be willing to voluntarily disclose some documents regardless of whose control they are under. It is therefore most cost effective and constructive to deal with issues of control on an iterative basis.”

⁵ {A/8/377}.

⁶ {H/13}.

⁷ The KEL itself is on a proprietary database that could not, in itself, be provided in copy form. But it proved possible to extract its content.

⁸ {C7/7/6}.

⁹ {C9/1/44}.

9. The EDQ contained a description of the KEL.¹⁰ The description was provided by Fujitsu. It explained that the KEL was stored on a database and could not be easily downloaded. It also recorded that Cs' IT expert (Mr Coyne) had inspected the KEL at Fujitsu's offices (inspection took place on 28 November 2017). The EDQ shows that Post Office envisaged seeking to arrange for the KEL to be disclosed to Cs, whether or not it had a contractual right to do so.
10. The relevance of the KEL having been established, Post Office did not seek to resist disclosure of the KEL, whether on the ground that it was not in its control or at all. Indeed, Post Office secured Fujitsu's cooperation in downloading the content of the KEL in a usable format and agreed an order requiring its disclosure to Cs: see {C7/12/9}.

Construction of the Fujitsu Contract

11. It is well-established that working papers prepared by professionals for their own assistance in carrying out expert work on behalf of their clients are the property of the professional, not the client. For a recent example, see **Hanley v JC & A Solicitors** [2018] EWHC 2592 (QB) *per* Soole J at para 42 and the cases referred to therein.
12. The KEL consists of working papers of the sort contemplated by this line of authority, i.e. the entries are documents produced by Fujitsu in order to enable them to carry out their expert work for Post Office. The KEL is not a document produced at the request of Post Office or produced for delivery to Post Office as part of Fujitsu's responsibilities.
13. It follows that, unless the Fujitsu Contract provides for Post Office to have a right to possess the KEL or a right to inspect or take copies of it, the KEL is not within Post Office's control.
14. Clause 13.1 of the Fujitsu Contract¹¹ provides that:

¹⁰ {C9/1/46}.

¹¹ {F/1659.2/18}.

Fujitsu Services shall provide to Post Office one electronic copy of the Listed Documentation¹², Specially Written Documentation¹³ and Developed Documentation¹⁴ at no additional charge.

15. The relevant definitions are complex. But, tracing them through, it is clear but the documentation which is to be provided as a matter of course by Fujitsu to Post Office under this clause does not include the KEL. The KEL is not used by Post Office and, in the normal performance of the Fujitsu Contract, it was not made available to Post Office. It would be surprising if the situation were otherwise.
16. At the hearing on Day 22, Cs referred to Clause 25.8 of the Fujitsu Contract.¹⁵ Clause 25 is headed “*Audit*”¹⁶, and Clause 25.8 provides that:

In addition to its obligations under Clauses 25.2 and 25.3, Fujitsu Services shall provide the Court Case Support Services to Post Office in relation to prosecutions and other disputes (whether civil or criminal) with any third party including but not limited to any fraud, theft, breach of contract or impropriety (the “Court Case Support Services”). The Court Case Support Services shall include any matters whether they relate to Horizon, HNG-X or any other system provided by or on behalf of Fujitsu Services to

¹² Defined at {F/1659.2/162} as the “documents listed in paragraph 3 of Schedule B4.1 created prior to the Project HNG-X Commencement Date or created after that date and used solely in connection with the provision of Existing Services”

¹³ Defined at {F/1659.2/189} as the “original documentation developed by or on behalf of Fujitsu Services: (a) prior to the Project HNG-X Commencement Date or after that date and used solely in connection with the provision of Existing Services; and (b) pursuant to a Work Order for the solution build and test stage of the development process or lifecycle; and (c) in accordance with a design proposal or other specification produced in the solution specification stage of the development process or lifecycle, in relation to which Fujitsu Services was engaged under a Work Order, including, without limitation, software identified as Specially Written Software in the CCD entitled “Transfer Asset Register”(COM/MGT/REP/0001);”

¹⁴ Defined at {F/1659.2/137} as the “documentation, which is not Specially Written Documentation, produced by or on behalf of Fujitsu Services: (a) prior to the Project HNG-X Commencement Date or after that date and used solely in connection with the provision of Existing Services; and (b) under a Work Order for Development Services, such documentation having been; (i) specified as a deliverable for the Post Office in that Work Order; or (ii) requested by the Post Office as a deliverable and acknowledged and produced by Fujitsu Services for the Post Office on that basis in the course of Fujitsu Services' performance of professional services during the stages: strategic approval; start-up and feasibility; or requirements analysis, of the development process or lifecycle;

¹⁵ {F/1659.2/26}.

¹⁶ {F/1659.2/25}.

Post Office, its agents or its subcontractors (including Post Office Service Integrator and any Tower Contractor). Fujitsu Services shall provide the Court Case Support Services within the timeframes required by Post Office or the relevant court or other authority. (emphasis added)

17. Clause 25.9 of the Fujitsu Contract further provides that:¹⁷

Without prejudice to Clause 25.3, the Court Case Support Services shall comprise:

25.9.1 the provision of copy reports;

25.9.2 the provision of data (including transaction data, event logs, helpdesk call logs, non-polled data and remuneration data) where such data is held by or in the control of Fujitsu Services;

25.9.3 the compilation of data (including transaction data, event logs, helpdesk call logs, non-polled data and remuneration data);

25.9.4 the interpretation of data (including transaction data, event logs, helpdesk call logs, non-polled data and remuneration data);

25.9.5 the provision of technical reports regarding technical aspects of any system whether Horizon, HNG-X or otherwise);

25.9.6 live witness evidence at Court if any of the information provided (including without limitation that provided pursuant to Clauses 25.9.1 to 25.9.5) is challenged to the extent to which Fujitsu Services provided said information; and

25.9.7 the right of access to Records, including but not limited to information, reports and data, held by or in the control of Fujitsu Services, and the assistance of Fujitsu Services' personnel with appropriate knowledge of the applicable Records (to the extent any such personnel remain employed or contracted to Fujitsu Services) for any independent experts and/or legal advisors instructed by Post Office and/or any

¹⁷ {F/1659.2/27}.

other claimant(s) or defendant(s) and the Prosecution in any mediation, arbitration tribunal, court case or dispute in which Post Office is involved in relation to the Horizon and HNG-X or any other system provided by or on behalf of Fujitsu Services to Post Office. (emphasis added)

18. Only the last of these sub-sub-sections could arguably extend to the KEL. The others refer to relatively narrow classes of information and documentation. Clause 25.9.7 is, by contrast, broader in that it provides for a right of access to “Records”.
19. The Fujitsu Contract defines “Records” as “*the full and accurate records relating to the performance of the Services*”.¹⁸ The definition is largely circular, as it uses the word “records” to define “Records”. It does, however, focus attention on the words “*relating to the performance of the Services*”.
20. “Services” are defined as including “*HNG-X Services*”.¹⁹ These include “*Operational Services*”,²⁰ which in turn are stated to include “*in the period up to 31 March 2015, the Services referred to in Table A of Schedule B3.1*”.²¹ The Services listed in Schedule B3.1 Table A²² include: Service Desk Service – defined as 1st and 2nd level support (item 1), Third Line Software Support (item 9), and Application Support Service (Fourth Line) (item 14).
21. Tracing the definitions results in the following: “Records” includes “*full and accurate records relating to the performance of*” 2nd and 3rd line support.
22. Applying this to the KEL:
 - (1) The KEL was produced in the course of performing 2nd and 3rd line support and was used for the purposes of such support.

¹⁸ {F/1659.2/181}.

¹⁹ {F/1659.2/ 187}.

²⁰ {F/1659.2/155}.

²¹ {F/1659.2/169}.

²² {F/1659.2/337}.

- (2) The question is whether the KEL is properly characterised as a “*record...relating to the performance*” of such services. If it is, Post Office had a right to access it under Clause 25.9.7.
23. There are sound arguments to support the conclusion that the KEL is not properly so characterised:
- (1) The KEL is an internal Fujitsu working document that is not used by the 1st line National Business Support Centre operated by Post Office. It is not provided to Post Office in the ordinary course. As noted above, a client does not ordinarily have access to such working documents. It is not a “*record*” in the sense of providing evidence of performance of the services. It would be unusual for the contract to grant access to all documents merely having something to do with the performance of the services (e.g. handwritten notes made by a staff member in the course of performing a task that forms part of the provision of the services).
- (2) Where the parties to the Fujitsu Contract intended to refer to documents produced by Fujitsu in the course of providing services under the Fujitsu Contract, they did so in clear terms: see the references to “*all relevant records produced by Fujitsu Services in the course of performing the HNG-X Services [or the Operational Services]*” in Clauses 43.19 and 43.23 (emphasis added).²³
- (3) It seems clear, therefore, that the Fujitsu Contract uses the words “*produced ... in the course of performing*” services to denote a difference class of documents from that denoted by the words “*relating to*”.
- (4) The latter category is narrower than the former category – it requires a closer or more direct relationship between the document and the performance of the services. This construction is supported by Schedule D5, which contains detailed provisions fleshing out Post Office’s audit rights.²⁴ In connection with Post Office’s rights in Clause 25

²³ {F/1659.2/75} and {F/1659.2/766}.

²⁴ {F/1659.2/787}.

to audit Fujitsu's compliance with the Fujitsu Contract,²⁵ para 4.1 of Schedule D5 provides that:

Fujitsu Services shall provide Post Office's Agents with access to such additional material as may be reasonably required to support the Records. Such access shall include access to:

4.1.1 premises;

4.1.2 facilities;

4.1.3 services;

4.1.4 documentation;

4.1.5 information (magnetic or otherwise);

4.1.6 staff;

4.1.7 procedures; and

4.1.8 timesheets and other data used directly as a basis for charging (emphasis added)

- (5) The Fujitsu Contract explicitly recognises that, in the course of performing its services, Fujitsu may produce “*documentation*” which does not amount to “*Records*” but which “*support the Records*”. In other words, the defined term “*Records*” does not encompass all the documents generated by Fujitsu in the course of performing the Fujitsu Contract, but only some of them. Consistently with this, Fujitsu is not required to deliver the most recent versions of relevant “*Records*” on termination of the Fujitsu Contract, but is required instead to deliver the most recent versions of internal documentation “*which are used for support of*” the relevant services: see Row 5 of

²⁵ This important limitation is provided for in para 1.1.1 of Schedule D5 {F/1659.2/788}.

Annex 2 (“General Exit Plan”) of Schedule E (“Termination and the Exit Plan”) to the Fujitsu Contract.²⁶

24. It is submitted that, on its true construction, the term “*Records*” respects the well-established principle referred to in para 11 above. The term comprises (1) documents which are themselves deliverables under the Fujitsu Contract and (2) documents whose production is required for the performance of the “*Services*” (as opposed to all documents that may be prepared or used in the course of providing the services). It does not include working papers prepared by Fujitsu for its own assistance in carrying out its services.

Application of Clause 25.9.7 to the KEL

25. It follows from the above analysis that the question of whether the KEL falls within Clause 25.9.7 (such that Post Office had a right to access it and so “control” under the CPR) turns on the application of the distinction set out in para. 24 above. As to this:
- (1) On Post Office’s understanding of the KEL’s content and purpose as at July 2017, it did not qualify as a “*Record*”. It was understood to be a working document produced and used by Fujitsu to help it perform some services under the contract.
 - (2) On the facts now known, Post Office does not dispute that the KEL meets the test set out in para 24 above. It is required for the provision of the support services and so would be a “*Record*” in the sense of Clause 25.9.7. Post Office would not now contend the KEL to be outside its control.
26. It should be noted that, irrespective of Post Office’s rights to demand documentation, at the relevant time substantial categories of documents (including the KEL) were in Fujitsu’s physical possession. Post Office was neither author nor keeper of such documents and it did not have direct knowledge of where and how such documents were stored, what were their precise contents and how they were used. Further, Post Office could not in practice have

²⁶ {F/1659.2/857}.

obtained the KEL without Fujitsu devising a means to extract its content (as was done to provide disclosure to Cs {H/41}).

27. The position as to disclosure of KELs (i.e. extracts from the KEL) is set out in paragraphs 1147 to 1149 of Post Office's Closing Submissions.²⁷ In summary, although the KEL was the subject of contention in the early part of these proceedings, in September 2017 an offer was made to Mr Coyne to inspect the KEL;²⁸ following Mr Coyne's inspection of the KEL on 28 November 2017 it was agreed that the KEL should be disclosed; and the disclosure was given on 9 May 2018, once a technical solution to the extraction problem had been produced by Fujitsu. The disclosure of the KEL was not the subject of contention by the time the Horizon Issues trial was directed.

Anthony de Garr Robinson Q.C.

Simon Henderson

Owain Draper

31 July 2019

²⁷ {A/6/377}.

²⁸ {H/13}.