

FREETHS

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13 September 2017

Third letter

Our Ref: JXH/1684/2113618/1

By email only

Dear Sirs

BATES & OTHERS v POST OFFICE LIMITED – GROUP ACTION CLAIM NO: HQ16X01238 INSPECTION OF KNOWN ERROR LOGS

We write in relation to the Known Error Logs and further to our letter of 6 July 2017, our second letter of 3 August 2017 and your second letter dated 1 September 2017.

Summary

We first requested sight of the Known Error Logs in our Letter of Claim dated 28 April 2016 and have repeatedly requested them since, including in our letter of 6 July 2017, in which we identified this as an urgent matter, stressing that the Known Error Logs were necessary for our clients' Reply. They are obviously of central relevance.

The reasons for your client's refusal to provide the Known Error Logs have changed from time to time. We do not accept any of those reasons as good reasons.

Your client referred to the Known Error Logs at paragraph 50(4) of its Defence, served on 18 July 2017. Our client may therefore inspect that document: CPR 31.14(1)(a). We formally requested inspection of the Known Error Logs, in our letter of 3 August 2017, on this basis and referred you expressly to CPR 31.14(1)(a).

You have not responded to that request, despite addressing the Known Error Logs in your letter of 1 September 2017. In any event, the content of your letter would not justify Post Office's refusal to

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allow inspection of such plainly important documents. The Claimants obviously need access to the electronic documents recording errors in Horizon, which we understand to be the Known Error Logs.

We now require Post Office to provide inspection of the Known Error Logs, failing which we will issue an application for an order that you do so, without further reference to you.

Please confirm by 5pm on Friday, 15 September 2017, that Post Office will provide inspection of the Known Error Logs by 5pm on Friday, 22 September 2017.

A. Recent Correspondence

For convenience, we briefly summarise the most recent correspondence to which we have referred above.

1. 6 July 2017 – On 6 July 2017, in anticipation of service of the Generic Defence and the CMC listed on 19 October 2017, we wrote to you proposing sensible directions for the CMC and highlighting the “*urgent matter of disclosure of the Known Error Log(s)*”. We stated that the case obviously involved whether there were errors associated with Horizon that impacted upon branches, as well as what Post Office knew of them; the refusal to provide the Known Error Log to the Claimants prevented them from setting out any detailed particulars of bugs, errors or defects in the Generic Particulars of Claim. We emphasised that we needed to be in a position to give these issues careful consideration well in advance of the CMC, and in any event when considering our clients’ Reply. We invited provision of the Known Error Logs with your client’s Generic Defence on 18 July 2017.
2. 18 July 2017 – On 18 July 2017, we were served with Post Office’s Generic Defence. The Known Error Logs were not provided. Paragraph 50(4) of the Generic Defence expressly referred to the Known Error Log in the following terms:

“It is admitted that Fujitsu maintain a “Known Error Log”. This is not used by Post Office and nor is it in Post Office’s control. To the best of Post Office’s information and belief, the Known Error Log is a knowledge base document used by Fujitsu which explains how to deal with, or work around, minor issues that can sometimes arise in Horizon for which (often because of their triviality) system-wide fixes that have not been developed and implemented. It is not a record of software coding errors or bugs for which system-wide fixes have been developed and implemented. To the best of Post Office’s knowledge and belief, there is no issue in the Known Error Log that could affect the accuracy of a branch’s accounts or the secure transmission and storage of data.” [emphasis added]

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3. 3 August 2017 – As noted in the Summary above, we wrote to you and specifically requested inspection of the Known Error Log pursuant to CPR 31.14(1)(a) on the basis that the Known Error Logs were mentioned in Post Office's Defence. We also made the point that the Schedule 1 to your letter of 13 October 2016 stated that a review of the Known Error Log had been undertaken (by Fujitsu, apparently at Post Office's behest) –directly contradicting the pleading in the Generic Defence, as to control.
4. 1 September 2017 – Your final correspondence on this issue failed to acknowledge or engage with the request in our letter of 3 August 2017 and changed tack yet again, now asserting:

“Access to the Known Error Log (KEL) can also be considered as part of these wider disclosure issues. The KEL is not a document, but a live and proprietary database with approximately 4,000 entries. Since the KEL is a constantly rolling document, the current version in use has evolved over time and may not reflect the version in place at time (sic) which is relevant to the Claimants' claims. Providing “disclosure” of it is therefore not easy to do and prone to being a disproportionately expensive exercise if not handled carefully. Addressing whether and, if so, how your client should have access to the KEL therefore needs to be considered in the context of any wider directions that are made.”
[emphasis added]

B. Post Office's Objections

We address below the objections which we now understand Post Office to rely upon.

Not a Document

Your contention that “*The KEL is not a document*” is unsustainable and obviously wrong for two reasons:

1. First, CPR 31.4 expressly provides that “*In this Part – ‘document’ means anything in which information of any description is recorded.*”
2. You have repeatedly referred to the Known Error Logs as being a document in correspondence (e.g. in the letter of 1 September above) and have pleaded that “*the Known Error Log is a knowledge base document*”: Defence, paragraph 50(4), above.

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Not in Post Office's Control

As we set out in our letter of 3 August 2017, it is clear from Schedule 1 to your letter of 13 October 2016 that the Known Error Logs are in Post Office's control. You have not responded to that. Indeed, your letter of 1 September 2017, that you are no longer advancing this argument.

CPR 31.8(2) provides that: *"a party has or has had a document in his control if –*

- (a) it is or was in his physical possession;*
- (b) he has or has had a right to possession of it; or*
- (c) he has or has had a right to inspect or take copies of it."*

We have sought express confirmation from you, by Requests 30 to 33 in our Request for Further Information, that Post Office has, at the very least, a contractual entitlement to data derived from the known error log. We regard it as inconceivable that Post Office does not have any contractual rights to obtain or inspect the Known Error Logs or data derived therefrom.

Difficult and disproportionate disclosure

Paragraph 1.5 of your 1 September 2017 letter states contends that there is a great difficulty in disclosing the Known Error Log in a relevant form given that the current version *"has evolved over time"* and *"has approximately 4,000 entries"*. You have been expressly on notice of your duty to preserve documents since our letter of 16 December 2015 and, given the sensitivity and seriousness of the issues raised in the Mediation Scheme, we would have expected you to have preserved all relevant documents from that time in any event.

More specifically, the Known Error Log was a document which we specifically requested in our Letter of Claim and have consistently pursued thereafter. We also consider it significant that in your letter to us on 6 May 2016, you stressed the need *"to ensure that all metadata in any electronic documents are preserved"* and asked us to confirm that we had *"advised [our] clients on a method of making mirror copies of documents that preserves the metadata"*.

At present we do not believe that there should be any difficulty in providing inspection, as required by the CPR, such as would justify the objection which Post Office advances. It is inconceivable that there is no sensible and proportionate way in which inspection can be given in usable form.

C. Conclusion

Our client is entitled to inspection of the Known Error Log.

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Please confirm **by 5pm on Friday, 15 September 2017**, that Post Office will provide inspection of the Known Error Logs **by 5pm on Friday, 22 September 2017**, failing which we will issue an application under CPR 31.14 for inspection.

Yours faithfully

GRO

Freeths LLP
Please respond by e-mail where possible

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