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## **UPDATED Risk Assessment Table**

### **INTRODUCTION**

This document summarises in Counsel's Opinion on the Common Issues. By its very nature, it is simplistic and should not be relied upon in lieu of a careful reading of Counsel's Opinion. The legal arguments in this case are complex, with often several permutations of outcome. This risk assessment describes the main risk of each issue and the key risks faced. It does not exhaustively set out every permutation of outcome at the Common Issues Trial.

Where we have offered a view on the impact on Post Office, this is an initial view based on our working knowledge of the Post Office business. Our understanding of the Post Office business is not comprehensive and we have not sought to set out an exhaustive list of impacts. We also note that the Common Issues are not discrete topics and there will be interplay between them. Success or failure on some points may lead to success or failure in other areas. If multiple common issues are lost, they may have a compound effect greater than the risks identified below.

In preparing this risk assessment, we have not yet considered any mitigating actions that may be taken.

<b>Likelihood of Post Office losing a Common Issue / an Implied term being found against Post Office</b>		<b>Impact on Post Office if a Common Issue is decided in favour of the Claimants</b>	
<b>5</b>	Post Office is very likely to lose the issue / The proposed term is very likely to be implied.	<b>5</b>	A significant adverse impact on the business that could threaten its existence.
<b>4</b>	Post Office is more likely to lose than win the issue / proposed term will more likely than not be implied.	<b>4</b>	A major adverse impact on the business that will have considerable long-term commercial harm.
<b>3</b>	50/50	<b>3</b>	A material impact on the business that will cause some commercial detriment / increased costs.
<b>2</b>	Post Office is more likely to win than lose the issue / The proposed term will likely not be implied.	<b>2</b>	Some impact on the business but the additional burdens / costs will be manageable.
<b>1</b>	Post Office is very likely to win the issue / It is very unlikely that the proposed term will be implied.	<b>1</b>	Negligible impact on the business

## UPDATE

This Risk Analysis has been updated following the Common Issues Trial to provide the following additional information:

### 1. THE PREDICTED OUTCOME FROM THE COMMON ISSUES TRIAL

- This reflects the legal team's prediction of what the Judge might do on each Common Issue. It is no more than a prediction and should be relied on with caution.
- In general the legal team continue to believe that its assessment of the legal position, if determined in accordance with established legal principles, remains sound. This is reflected in the "Likelihood" column. This column is unchanged from the original risk assessment.
- During trial, the Judge indicated an interest in adopting unconventional approaches to some issues. He also expressed a willingness to adopt his own alternative outcomes, rather than choosing between the options presented to him by the parties. There is therefore an increased risk that he may depart from established legal principles, which in turn has led to a small increase in risk to Post Office on some issues. This is shown in the new "Predicted Outcome" column.

### 2. GUIDANCE ON POSSIBLE APPEAL POINTS

- Nearly all the Judge's legal findings on all Common Issues are theoretically capable of being appealed. The Judge will also make some findings of fact that underpin his decisions on the Common Issues. It is generally difficult to appeal the underlying factual findings.
- Whether an appeal should be lodged depends on a number of interlinked factors including the nature of the finding on each individual issue, the Judge's reasoning for that finding, the overall balance of findings for and against Post Office across all issues and the strategic advantages and disadvantages of lodging an appeal in this litigation. We can only provide advice on whether, if so and what, to appeal once we have the Judgment.
- The new "Appeal" column below indicates which issues are more important and therefore weigh in favour of Post Office lodging an appeal on that point. We have assessed the appeal importance (i) based on the assumption that the Judge makes a highly adverse finding against Post Office on that issue and (ii) from the perspective of maximising Post Office's legal position in the litigation. There may be other non-legal factors (eg. commercial cost, brand risk, etc) they may also weigh for or against appealing a point.

**3. KEY TO NEW ASSESMENTS**

Predicted outcome		Appeal importance if there is an adverse finding	
5	Post Office is very likely to lose the issue / The proposed term is very likely to be implied.	5	An appeal is essential
4	Post Office is more likely to lose than win the issue / proposed term will more likely than not be implied.	4	A successful appeal would highly benefit Post Office
3	50/50	3	A successful appeal would materially benefit Post Office but the merits need considering in the wider context of the litigation.
2	Post Office is more likely to win than lose the issue / The proposed term will likely not be implied.	2	Appeal only if already lodging an appeal on other points
1	Post Office is very likely to win the issue / It is very unlikely that the proposed term will be implied.	1	Minor issue unlikely to warrant an appeal



## UPDATED RISK ASSESSMENT TABLE

	Issue	Likelihood	Impact	Comments on Likelihood and Impact	Predicted outcome	Comments on Predicted Outcome where assessment has changed.	Appeal importance
1.	<p><b>Relational Contract</b></p> <p>Was the contractual relationship between Post Office and Subpostmasters a "relational contract"?</p> <p>If so, this would mean that Post Office was subject to duties of good faith, fair dealing, transparency, co-operation, and trust and confidence?</p>	2	3	<p><b>Summary:</b> Counsel is satisfied overall that Post Office is likely to succeed on this issue.</p> <p><b>Detail:</b> There is some risk on this issue for Post Office due to:</p> <p>A) This area of law being in a state of development;</p> <p>B) The way each party is dependent on the close cooperation of the other, which puts a query over how the Subpostmaster relationship operates in practice;</p> <p>C) An imbalance of bargaining power and level of sophistication between Post Office and the Subpostmasters; and</p> <p>D) The SPMC and NTC having several characteristics of relational contracts, and the SPMC in particular not being particularly well drafted.</p> <p>If the court were to find that they <i>were</i> relational contracts, this does not necessarily mean that a "good faith term" should be automatically implied. Counsel's view is that it would be wrong to imply a term as to good faith into the SPMC and NTC.</p> <p>There is also a significant question mark over what good faith actually means. It could be limited to whether Post Office acts honestly or the meaning could be taken further to mean putting Subpostmaster's interests above Post Office's</p>	3	<p>The Judge expressed a high level of interest in the evolving area of law around "relational contracts".</p> <p>We think it likely, on balance, that the Judge will determine that the Subpostmaster Contracts were relational contracts but we do not expect him to imply the term as to good faith as pleaded by the Claimants, but he may imply a lesser duty (perhaps requiring nothing more than honesty).</p>	3



			<p>interests.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>Post Office will be required to carry out more checking of its decisions to make sure they align with the "relational contract", and will need to ensure its process adheres to that standard, which will require time and have a cost.</li> <li>Post Office may need to balance acting in own best interests against Subpostmaster's interests. This would fetter Post Office's ability to run and evolve the business in the way it sees fit.</li> </ul>		
2.	<p><b>Implied terms</b></p> <p>Which, if any, of the 21 terms proposed by the Claimants should be implied into the contracts between Post Office and Subpostmasters?</p>		<p><b>Summary:</b> There is a high threshold for the Claimants to reach to be able to imply terms into the contracts. There are some terms which are more risky than others.</p> <p><b>Detail:</b> The Claimants are attempting to imply 21 terms into the contract. They are grouped below in themes rather than setting out all 21 specific terms.</p> <p>To dissuade the court that the 21 implied terms need incorporating into the contracts, Post Office has admitted two implied terms, which in Counsel's opinion largely render the additional implied terms unnecessary (the Stirling v Maitland Term and the Necessary Cooperation Term).</p> <p>However, there are no guarantees about how the Managing Judge will address each and every implied term.</p> <p>As matters stand, there are some arguments on the implied terms which are finely balanced. For example, the court may think it a small step to agree to a mutual duty to maintain trust and confidence in a business to business, agency relationship.</p>	See detailed comments below on each implied term.	



				If some of the implied terms are accepted, these may have a practical effect on requiring Post Office to do things which are not currently required by the contracts.  <b>Impact:</b> See below.			
	<b>IMPLIED TERMS</b>						
3.	<b>Implied term (admitted):</b>  <b>Cooperation</b> Post Office and Subpostmasters would not take steps which would stop the other from complying with the contract.  Post Office and Subpostmasters would cooperate with the other as was necessary to enable the other to carry out their obligations as set out in the contract.	5	2	<b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>These terms apply a low threshold (eg. necessary cooperation) to all Post Office's activity in all areas that touch postmasters.</li> <li>We would expect Post Office to be meeting these standards in most areas but we do not have a holistic view of Post Office's business to say this with certainty.</li> <li>There two terms may have similar effect to some of the Claimants' implied terms eg. both will require Post Office to provide Subpostmasters with some degree of training.</li> </ul>	5		1
4.	<b>Implied term:</b> <b>Exercise of powers 1</b> [In relation to (i) contract variations and (ii) withholding Subpostmaster remuneration during suspension.]  Post Office would exercise any power (under the contracts or generally) honestly and only for the purpose the power was created to achieve.  Post Office will not exercise a power arbitrarily capriciously or irrationally.	5	2	<b>Note:</b> This issue has been split into two parts because it depends on which express terms are being considered.  Post Office has a high degree of freedom when deciding to (i) vary the Subpostmaster Contracts and (ii) withhold Subpostmaster remuneration during suspension. Counsel has advised that the Court is likely to place some restrictions on these discretionary powers, namely that these powers should not be used arbitrarily, capriciously or irrationally.  <b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>Post Office will need to pro-actively consider and document in every case whether remuneration should be withheld</li> </ul>	5		1



				<p>during a period of suspension. This could lead to significant back-claims for withheld remuneration where this has not happened. Going forward this could be remedied with a process change to approve and document these decisions.</p> <ul style="list-style-type: none"> <li>It is consider unlikely that Post Office would vary the Subpostmaster Contracts without careful consideration and so this implied term should have negligible impact. More effort may be required to document these decisions in more detail.</li> </ul>			
5.	<p><b>Implied term:</b></p> <p><b>Exercise of powers 2</b></p> <p>[All other terms of the contracts]</p> <p>Post Office would exercise any power (under the contracts or generally) honestly and only for the purpose the power was created to achieve.</p> <p>Post Office will not exercise a power arbitrarily capriciously or irrationally.</p>	2	3	<p>Counsel is satisfied that Post Office's other powers under the Subpostmaster Contracts (eg. power to terminate) are unlikely to be fettered by these implied terms.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>If this implied term does apply to other powers under the contracts (eg. right to terminate) this may slow down decisions and actions (eg. delay suspensions) and therefore cause losses to increase in branches.</li> <li>It would give Subpostmasters wider grounds on which to challenge many decisions on Post Office.</li> <li>Post Office would need to document decisions better so to prove that they are not arbitrary or irrational. It should be noted that the threshold for irrationality is very high – a decision needs to be completely perverse for it to be classed as irrational. The greater risk is that the decision looks arbitrary or capricious because Post Office is not able to point to any audit trail on its decision making.</li> </ul>	2		1



6.	<b>Implied term:</b> <b>Quality of Horizon</b> Post Office would provide a system which was reasonably well suited to its designated purpose, including: A) error repency B) error prevention C) error detection/ identification D) a way to report errors to the Horizon user  The system should be able to deal with errors both at the: 1) data entry level; and 2) system level.  The system should be able to carry out: i) data processing; ii) carrying out the relevant transaction; and iii) reconciling transactions.  The system should also record any error issues as listed in points A – D above.	2	3	<b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>If Horizon meets these standards already, then this implied term will have minimal impact.</li> <li>If Horizon does not meet these standards, Post Office would need to liaise with Fujitsu as to whether changes to Horizon are possible and if so, the cost of implementing them.</li> <li>If changes to Horizon are made, Post Office may need to roll out a training programme to Horizon users.</li> </ul>	3	The Judge expressed a keen interest in the operation of Horizon even though Horizon related matters were reserved to a later trial. He may therefore be more willing to imply a term requiring Horizon and / or PO's accounting system to be adequate / fit for purpose.	4
7.	<b>Implied term:</b> <b>Communication of ability to alter branch data</b> Post Office would not hide from Subpostmasters its ability to: A) alter data remotely; or	2	2	<b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>This is probably a one off communication to Subpostmasters with some new internal training for staff. There may be some minor changes to day to day working at Post Office so to ensure that a consistent message is given about the functionality of Horizon.</li> </ul>	2		2



	B) alter transactions which fed into the calculation of the branch accounts.					
8.	<b>Implied term:</b> <b>Communication of problems in Horizon</b> Post Office would: A) communicate known problems, bugs or errors in or generated by Horizon; and B) not hide/ fail to tell Subpostmasters of known problems, bugs or errors in or generated by Horizon which might have financial or other implications for Subpostmasters	2	3	<b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>This would create an ongoing duty to inform Subpostmasters about problems in Horizon. Potentially this would extend to any bug, no matter how small. These communications would be onerous to prepare, taking considerable time and effort.</li> <li>Subpostmasters may have a reduced level of confidence in Horizon as a result of regular updates about issues – this could lead them to "blame the system".</li> <li>Post Office would need to take steps to understand the system more fully than it has had to previously. This could require obtaining technical advice on a frequent basis from Fujitsu, which would have a cost.</li> </ul>	2	3
9.	<b>Implied term:</b> <b>Communication of problems in branches</b> Post Office would communicate and not hide/ fail to tell Subpostmasters the extent to which other Subpostmasters were having: i) issues relating to Horizon; and ii) the generation of discrepancies and shortfalls.	2	3	<b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>The business would need to consider the structure, the frequency and level of detail of the communication, all of which would require additional effort and cost.</li> <li>Communication would have to be balanced against data protection and privacy issues.</li> <li>Subpostmasters may have a reduced level of confidence in Horizon as a result of regular updates about issues – this could lead them to "blame the system".</li> <li>It could increase the amount of time the business requires to deal with complaints about Horizon, discrepancies and shortfalls as</li> </ul>	2	3

				more issues may be questioned.			
10.	<b>Implied term:</b> <b>Reasonable skill and care</b> Post Office would supply its support services to Subpostmasters (eg. back-office accounting, the Helpline, training, etc.) with reasonable skill and care. Post Office would take reasonable care in: A) performing its functions; and/or B) exercising its functions within the relationship especially where the functions could affect the: 1) accounts 2) business 3) health and 4) reputation of the Subpostmasters	3	2	<b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>We do not have a holistic view of Post Office's business to provide an exhaustive comment, but those parts of the business we have studied have generally operated with reasonable skill and care.</li> <li>Any areas requiring improvement would incur costs of change.</li> <li>At present, any failure to exercise reasonable skill and care is a commercial problem only. If this term is implied, each failure is a breach of contract that could lead to claims by Subpostmasters for any losses caused to them.</li> </ul>	3		3



11.	<b>Implied term:</b> <b>Relationship</b> Post Office would not take steps which would undermine the relationship of trust and confidence between it and the Subpostmasters.	2	4	<b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>Post Office would need more safeguards in place to evidence that it was not taking steps which undermine the relationship.</li> <li>Post Office would have to balance acting in own best interests against Subpostmasters' interests. This may fetter Post Office's ability to run and evolve the business in the way it sees fit.</li> </ul>	2		4
12.	<b>Implied term:</b> <b>Shortfalls</b> Post Office would: A) produce, keep and maintain accurate records of all transactions carried out using Horizon; B) be able to explain all relevant transactions; and C) use the records to explain any shortfalls.  Post Office would co-operate in trying to: A) identify the possible or likely causes of any shortfalls without any input from the Subpostmasters and/or B) work out whether or not there was any shortfall by carrying out a formal investigation C) prove as a result of the investigation that the shortfall was properly attributed to the Subpostmaster under the contract. Post Office would not seek recovery of any	2	5	<b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>This would reverse the current responsibilities between Post Office and Subpostmasters in relation to losses.</li> <li>Post Office would need to put processes in place to enable it to explain all transactions and shortfalls.</li> <li>This would make recovery of losses in branches very difficult if not impossible in many cases.</li> <li>This may give rise to significant historic claims by Subpostmasters to recover money paid to Post Office in respect of losses in branches.</li> </ul>	2		5



	<p>shortfalls from the Subpostmasters unless and until:</p> <p>A) it had complied with its duties (which include the duties in the implied terms);</p> <p>B) it had shown that the shortfall was a genuine loss to Post Office</p>						
13.	<p><b>Implied term:</b></p> <p><b>Communication of information about shortfalls</b></p> <p>Post Office would fully and honestly tell Subpostmasters in general about the possible causes of shortfalls.</p>	2	3	<p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>The business would need to consider the structure, the frequency and level of detail of the communication. This could be quite onerous given the size of the network.</li> <li>Communication would have to be balanced against data protection and privacy issues.</li> <li>Subpostmasters may have a reduced level of confidence in Post Office as a result of regular updates about issues.</li> <li>It could increase the amount of time the business requires to deal with complaints about Horizon, discrepancies and shortfalls as more issues would be questioned.</li> </ul>	2		3
14.	<p><b>Implied term:</b></p> <p><b>Training</b></p> <p>Post Office would provide adequate training and support.</p> <p>Post Office would especially provide adequate training and support where:</p> <p>A) new working practices were introduced;</p> <p>B) new systems were introduced; or</p> <p>C) where Subpostmasters were required</p>	4	3	<p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>If Post Office already provides adequate training and support, these additional terms will have minimal impact. It should be noted that the admitted term of "necessary cooperation" will likely require Post Office to provide adequate training and support.</li> <li>If more is required from Post Office, this could require more trainers and training sessions, a greater amount of more detailed training material, consideration of the form of training and a way to track whether the</li> </ul>	4		2



	to provide new services.			<p>training provided had been properly instilled into the audience aimed at.</p> <ul style="list-style-type: none"> <li>The impact would be further increased if this training was also required for Subpostmaster assistants.</li> <li>Additional in-house training may be needed to ensure face to face contacts are giving Subpostmasters consistent advice.</li> </ul>			
<b>END OF IMPLIED TERMS</b>							
15.	<b>Supply of Goods and Services Act 1982</b>  Did Post Office supply Horizon, the Helpline and/or training/materials to Subpostmasters (i) as services under "relevant contracts for the supply of services" and (ii) in the course of its business, such that there was an implied term requiring Post Office to carry out any such services with reasonable care and skill, pursuant to section 13 of the Supply of Goods and Services Act 1982?	2	3	<p><b>Summary:</b> The Claimants have failed to identify the relevant provisions in the contracts which show that the parties have agreed, in exchange for something else (such as a fee), to provide a service to and for the benefit of the Subpostmaster. This therefore weakens the Claimants' position on this point.</p> <p><b>Detail:</b> Contracts will only fall within the Supply of Goods and Services Act if they involve one party selling a service to another party.</p> <p>The key question is whether Post Office had a contractual obligation to provide Horizon, the Helpline and training as "services".</p> <p>The Claimants have not identified any specific contractual provision in which they say Post Office assumed an obligation to provide a service. However, there is scope for an argument on this point.</p> <p>The key concern is with the NTC, in which there is a possible provision that the Claimants could say means that Post Office had an obligation to provide the Helpline.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>Post Office is probably already complying with the implied term in many areas of its</li> </ul>	2		3



				<p>business. If Post Office was required to act beyond its current practice, it would need to assess the impact of any decisions regarding the "services" when making any changes to the provision of "services" or the content of the services.</p> <ul style="list-style-type: none"> <li>Post Office would face issues if it was under an <u>obligation</u> to provide the "services" if there was an outage with Horizon or if access to the training/materials or the Helpline was unavailable due to a glitch, as Post Office would be liable for making sure Subpostmasters had access to these services.</li> </ul>			
16.	<p><b>Onerous, unusual or unfair terms</b></p> <p>Were any or all of the express terms in the GPOC paragraphs listed below onerous and unusual, so they would be deemed unenforceable unless Post Office brought them fairly and reasonably to the Subpostmasters' attention?</p>	3	3	<p><b>Summary:</b> It is unlikely any clause will be classed as "unfair" so long as Post Office has provided the Subpostmaster with a copy of the contract before they entered into it.</p> <p>It will be a more difficult argument if the Subpostmaster did not have chance to consider the terms before signing.</p> <p>If the terms are found to be "unusual or onerous", Post Office will need to show that it brought these terms to the Subpostmaster's attention, if it wants to rely on those terms. Some problematic terms include the right to suspend, to suspend without pay and to terminate on 3 months' notice.</p> <p>Whether this is an issue for Post Office will mostly be on a fact specific basis for each Subpostmaster, as generally the practice seemed to be that contracts were provided to Subpostmaster before the agreements were entered into.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>If terms are "unusual or onerous", they would be unenforceable against</li> </ul>	3		3



				<p>Subpostmaster. If this applied to business critical terms such as termination, suspension and loss recovery then this would have a critical impact on the relationship with Subpostmasters, albeit likely limited to those Subpostmasters who never saw their full contract terms before becoming a Subpostmaster.</p> <ul style="list-style-type: none"> <li>• Going forward, Post Office needs to improve its contract origination processes, with clear evidence of Subpostmasters being given access to, and time to understand, their contract terms.</li> </ul>			
17.	<p><b>Liability for Losses</b></p> <p>What is the proper construction of section 12, clause 12 of the SPMC?</p> <p>Clause 12 states "<i>The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay.</i>"</p> <p>What is the proper construction of Part 2, paragraph 4.1 of the NTC?</p> <p>Para 4.1 states: "<i>The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (howsoever this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise, or as a result of any breach of the Agreement by the Operator) except for losses arising from the criminal act of a third party (other than Personnel) which the Operator could not have prevented or mitigated by following [Post Office's] security</i></p>	2	5	<p><b>Summary:</b> Post Office is likely to succeed on the major issues arising out of the construction of these clauses.</p> <p>See also the comments above in relation to implied terms regarding shortfalls.</p> <p><b>IT IS STRONGLY RECOMMENDED THAT COUNSEL'S OPINION IS CAREFULLY REVIEWED ON THIS TOPIC AS THIS IS THE CRITICAL QUESTION IN THIS LITIGATION. IT IS COMPLEX, WITH SEVERAL PERMUTATIONS OF POSSIBLE OUTCOMES.</b></p> <p>The major challenge on these clauses is whether for a "loss" to be recoverable it needs to be a real financial loss to Post Office or whether it can be an accounting loss in a branch accounts. The difficulty with the former is that Post Office would need to track the loss in a branch accounts and show how that loss caused it real financial detriment. This would require a significant forensic accounting exercise, tracing a loss through all Post Office's back-office accounting systems.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>• Losing this point would make it very difficult for Post Office to recover losses without significant effort and detailed investigation</li> </ul>	2		5



	<i>procedures or by taking reasonable care. Any deficiencies in stocks of products and/or resulting shortfall in the money payable to [Post Office] must be made good by the Operator without delay so that, in the case of any shortfall, [Post Office] is paid the full amount when due in accordance with the Manual."</i>			<p>into every loss in every branch.</p> <ul style="list-style-type: none"> <li>It also has the effect of shifting the burden of proof onto Post Office to show the root cause of the loss. In many cases, this will be impossible to discharge.</li> <li>It may give rise to substantial claims for repayment of losses to Subpostmasters dating back many years.</li> </ul>			
18.	<p><b>Post Office as Agent</b></p> <p><u>Post Office as agent</u></p> <p>Was Post Office the agent of Subpostmasters for the limited purposes at GPOC paragraphs 82 and 83?</p> <p>If so, was Post Office required to comply any or all of the obligations at GPOC paragraph 84, which include that Post Office would:</p> <p>a) properly and accurately to effect, execute, record, and/or maintain and keep records of all transactions which the Claimants initiated using Horizon or for which the Claimants were potentially responsible;</p> <p>b) to render and make available to the Claimant accounts (in accordance with paragraph 84 (a); and/or</p> <p>c) a where the Defendant alleged shortfalls to be attributed to the Claimants, to comply with the duties the Claimants have said they are owed in relation to Horizon.</p>	1	5	<p><b>Summary:</b> The contracts make it clear that Subpostmasters are agents of Post Office, not the other way around.</p> <p>Counsel considers that it will be a steep challenge for the Claimants to succeed on this Agency issue, as it will be difficult for them to reverse the relationship so that the Post Office subordinates its interests to the Subpostmasters' interests.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>This would reverse the current responsibilities between Post Office and Subpostmasters, making recovery of losses from Subpostmaster very difficult if not impossible.</li> <li>See other comments above.</li> </ul>	1		5
19.	<p><b>Subpostmaster as Agent</b></p> <p>Was the extent and effect of the agency of Subpostmasters to Post Office such that the</p>	2	3	<p><b>Summary:</b> Counsel's overall opinion is that Post Office is likely to win on this argument, that Subpostmasters owed duties to Post Office, that they were bound by their accounts and that if they made false accounts,</p>	3	The Judge expressed deep interest in the mechanics of how a Subpostmaster submits	4



<p>principles of agency applied as Post Office argues?</p> <p>Did Subpostmasters, as agents, bear the burden of proving that any Branch Trading Statement account they signed and/or returned to Post Office was incorrect?</p>	<p>they are also bound by them.</p> <p><b>Detail:</b> It is clear that Subpostmasters are agents of Post Office. There is more scope for argument about what agency duties apply to Subpostmasters. Post Office asserts that the following agency duties apply.</p> <p>(a) As its agents, Subpostmasters owed fiduciary duties to Post Office and a duty to account to Post Office;</p> <p>(b) Where an agent renders an account to his or her principal, he is bound by that account unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account that he should be permitted to correct; and</p> <p>(c) Where an agent deliberately renders a false account to his or her principal, in relation to the matters covered by that account the court should make all presumptions of fact against that Subpostmasters as are consistent with the other facts as proven or admitted.</p> <p>Counsel does not consider that the Claimants' arguments, even if they had any real substance, could lead to the total exclusion of the principles Post Office relies on as listed above. It will be more difficult to apply the general principles on a case specific circumstances where a Subpostmaster has submitted an account which he/she has said is in dispute or has sought to qualify his/her approval in any way.</p> <p>It may be possible on a case by case basis for a Subpostmaster to show the accounts were inaccurate or that he/she was not responsible for the shortfall.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>• Losing this point would make recovery of losses more difficult as Post Office could no longer rely on the above assumptions.</li> <li>• Post Office would have to prove that Branch Trading Statements were correct before/ after they were signed off by a Subpostmaster</li> </ul>	<p>their accounts. He may therefore agree that Subpostmasters are agents and bound by ordinary agency principles (as submitted by PO) but caveat that by saying that the application of those principles to any particular case is highly fact specific.</p>
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				<p>which would limit Post Office's ability to recover losses.</p> <ul style="list-style-type: none"> <li>A new process may need to be introduced for signing off the accounts where the outcome of disputed shortfalls have not been concluded.</li> </ul>			
20.	<p><b>Suspension</b></p> <p>On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled to suspend pursuant to SPMC Section 19, clause 4 and Part 2, paragraph 15.1 NTC?</p> <p><b>Note: the Claimants also seek an implied term in relation to Suspension.</b></p> <p>Post Office would not to suspend Claimants:</p> <p>A) without reasonable and proper cause; and/or</p> <p>B) when Post Office had breached its duties to the Subpostmasters.</p>	4	2	<p><b>Summary:</b> There is a real risk that the court will find that there is an implied term that Post Office would only suspend a Subpostmaster where there was a <u>reasonable basis</u> for suspension on one of more of the grounds listed in the express clauses.</p> <p><b>Detail:</b> The Claimants say these clauses act in a more limited way than the way Post Office has historically applied them. They seek to limit the circumstances in which Post Office can suspend Subpostmaster.</p> <p>For the most part, Counsel thinks the Claimants arguments are weak. However, there is a risk that the court could instead decide that although it will not imply a "reasonable basis" for the suspension, it may instead treat the right to suspend as a <u>discretion</u> which cannot be exercised arbitrarily, irrationally or capriciously by Post Office.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>Post Office could still suspend but may need to take more care before exercising the right to suspend.</li> <li>Ability to make quick decisions could be hindered.</li> <li>Concern for Post Office's reputation if it is required to keep a questionable postmasters in their position whilst investigations are carried out.</li> <li>Risk to assets whilst decisions made and documented.</li> </ul>	4		2



21.	<p><b>Summary Termination</b></p> <p>On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled summarily to terminate?</p> <p><b>Note: the Claimants also seek an implied term in relation to summary termination.</b></p> <p>Post Office would not terminate contracts:</p> <p>A) without reasonable and proper cause; and/or</p> <p>B) when Post Office had breached its duties to the Subpostmasters.</p>	1	2	<p><b>Summary:</b> Counsel considers it unlikely that the Claimants will be able to persuade the court to apply the limitations they propose on Post Office's power to terminate, either by way of an implied term or as a matter of construction.</p> <p><b>Detail:</b> The Claimants are seeking to limit the circumstances in which Post Office can end their agreement with a Subpostmaster without giving any notice period where the Subpostmaster is in breach.</p> <p>Counsel does not think the Claimants are likely to persuade the court of their version of how this power should, in their view, operate.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>Post Office could not terminate when it had committed even a trivial breach of contract. This would allow many Subpostmasters to contest the validity of their terminations.</li> </ul>	1		3
22.	<p><b>Termination on Notice</b></p> <p>On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled to terminate on notice, without cause?</p> <p><b>Note: the Claimants also seek an implied term in relation to termination on notice.</b></p> <p>Post Office would not terminate contracts:</p> <p>A) without reasonable and proper cause; and/or</p> <p>B) when Post Office had breached its duties to the Subpostmasters.</p>	2	3	<p><b>Summary:</b> On the face of it there is no legal reason why the 3 (SPMC) and 6 month (NTC) notice periods should be construed any differently than as they are set out in the contract, as the words are plain and clear.</p> <p><b>Detail:</b> Counsel does not consider that the court will read in a requirement, as requested by the Claimants, that Post Office must "<i>conscientiously consider what period of notice to give</i>".</p> <p>However, Counsel is concerned with the 3 month notice period in the SPMC, as this is a very short notice period for agreements of this kind. The Judge may have some sympathy with the Claimants on this point and may seek to moderate the contract in some way on this point eg. by extending the notice period.</p> <p>Counsel is less concerned with the 6 month NTC notice period.</p>	2		5



				<b>Impact (WBD):</b> <ul style="list-style-type: none"> <li>Post Office could not terminate when it had committed even a trivial breach of contract. This would allow many Subpostmasters to contest the validity of their terminations.</li> <li>The Claimant's proposed implied term would prevent Post Office from terminating on notice unless a Subpostmaster was in breach of contract. This would limit Post Office's ability to restructure its business by moving on agents who were no longer financially viable or in line with future business requirements.</li> </ul>		
23.	<b>Termination – Minimum 12 Months' Notice</b>  Do the express written terms of the SPMC and NTC between Post Office and Subpostmasters represent the true agreement between the parties, as to termination (in this regard, the Claimants rely on Autoclenz v Belcher [2011] UKSC 41)?  If not, was the "true agreement" between the parties as alleged at GPOC, para. 71?  Paragraph 71 alleges that the "true agreement" was that termination had to be on reasonable notice (which was never less than 12 months).	1	3	<b>Summary:</b> This is the Claimants' alternative formulation for its arguments in relation to termination rights. In essence, the Claimants are saying that the standard Subpostmaster Contracts are a sham and should be ignored. Instead, Post Office should not be able to terminate on less than 12 months' notice.  Counsel thinks Post Office will win this point. Counsel's view is that Post Office is likely to succeed on the true agreement issue because:  a) the Autoclenz principle is of limited application as the dispute does not focus on employment status; b) the Subpostmaster contracts are "ordinary" or "commercial" agreements, made business to business and so the Autoclenz principle shouldn't apply; c) the Claimants haven't stated any new express terms on termination; d) there is no conduct to suggest that the "true agreement" is what the Claimants allege; e) it is difficult to see how the Claimants can argue on the one hand that the termination provisions do not	1	5



			<p>represent the "true agreement", but the rest of the contract does.</p> <p><b>Impact (WBD):</b></p> <ul style="list-style-type: none"> <li>See comments above in relation to Summary Termination and Termination on Notice.</li> </ul>			
24.	<p><b>Compensation for loss of office</b></p> <p>On a proper construction of the SPMC and NTC, where Post Office lawfully and validly terminated a Subpostmaster's engagement, on notice or without notice for cause, was the Subpostmaster entitled to any compensation for loss of office or wrongful termination?</p>	1	<p>From the latest Individual Particulars of Claim, this issue no longer arises.</p>	n/a		
25.	<p><b>Compensation for loss of office</b></p> <p>On a proper construction of the SPMC and NTC, in what, if any, circumstances are Subpostmaster's breach of contract claims for loss of business, loss of profit and consequential losses (including reduced profit from linked retail premises) limited to such losses as would not have been suffered if Post Office had given the notice of termination provided for in those contracts?</p>	1	<p>From the latest Individual Particulars of Claim, this issue no longer arises.</p>	n/a		
26.	<p><b>Subsequent appointments</b></p> <p>On a proper construction of the SPMC and NTC, what if any restrictions were there on Post Office's discretion as to whether or not to appoint as a Subpostmaster the prospective purchaser of a Subpostmasters' business?</p>	1	<p>There is no construction issue here. Instead the Claimants will try on rely on the implied terms addressed above.</p>	n/a		



27.	<p><b>Assistants</b></p> <p>Did SPMC section 15, clause 7.1; NTC, Part 2, clauses 2.3 and 2.5 and/or any of the implied terms contended for by the parties and found by the Court purport to confer a benefit on Assistants for the purposes of section 1 of the Contracts (Rights of Third Parties) Act, and if so which of these terms did so?</p> <p>What was the responsibility of Subpostmasters under the SPMC and the NTC for the training of their Assistants?</p>	3	<p><b>3</b></p> <p><b>Summary:</b> There is some risk that assistants may have directly enforceable rights against Post Office in relation to training.</p> <p>Post Office accepts that it was required to provide Subpostmasters with training materials which allowed them to train their assistants, but its insists that assistants are trained by Subpostmasters. It denies that it had any duty to train assistants or that assistants could directly enforce such rights against Post Office.</p> <p>Counsel's view is that Post Office is unlikely to be required to train assistants and that this duty rests with the Subpostmaster.</p> <p><b>Impact:</b></p> <ul style="list-style-type: none"> <li>Significant additional costs would need to be incurred to train all assistants in the network.</li> </ul>	2	<p>The Claimants did not press this argument at trial and largely accepted that Subpostmasters are responsible for their staff. We therefore believe that Post Office's chances of success have improved on this point.</p>	4
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