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THE POST OFFICE GROUP LITIGATION

Claim Nos. HQ16X01238, HQ17X02637 & HQ17X04248

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

BETWEEN:

ALAN BATES & OTHERS

Claimants

-and-

POST OFFICE LIMITED

Defendant

NOTE ON ADMISSIBILITY OF EVIDENCE FOR THE COMMON ISSUES TRIAL

Introduction

1. The purpose of this Note is to consider the admissibility of witness evidence for the Common Issues Trial. The context is as follows:

   (1) In a Response to RFI dated 16 May 2017, the Claimants ("Cs") state that the matrix of fact on which they rely for the construction of the SPMC and the NTC is "*all pleaded facts*" (but then proceeded to give a non-exhaustive list of paragraphs in the Generic Particulars of Claim): see Answer 8.

   (2) In the Generic Defence & Counterclaim ("GDXC"), Post Office pleads various matters as matrix of fact for the construction of the SPMC and/or the NTC: see paras 76 to 80, 85 and 93 to 94.

   (3) The Common Issues Trial is limited to the determination of the Common Issues in the 6 Lead Claims. The Managing Judge has warned Cs that irrelevant (and so inadmissible) evidence may be struck out.[1] Cs appear to take a very broad approach as to the evidence that will be required at the Common Issues Trial. They have argued that the Court will require evidence as to how the contracts "*worked in practice*": see pages 58 and 61 of the transcript for the 5 June 2018 CMC ("5 June Transcript").

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[1] See page 59 of the transcript for the 5 June 2018 CMC.

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(4) There is a Joint Statement of Factual Matrix, but little of it is agreed. It has not assisted in resolving the parties' divergent approaches as to admissibility. Cs have included many facts that are, in our view, plainly inadmissible on issues of construction: see for example at para. 54 of the Joint Statement – "*The Defendant in fact sought recovery from the Claimants for apparent shortfalls*".

2. We note below, and emphasise at the outset, that the prospects of success in an application to strike out parts of Cs' evidence will be reduced if Post Office's evidence also contains inadmissible evidence. This may have a substantial impact.

The principles of admissibility for contractual interpretation

3. Many, but not all, of the Common Issues are issues of contractual interpretation. In relation to these issues:

(1) Evidence as to what was said during the course of negotiation is (generally) inadmissible: **Chartbrook v Persimmon Homes** [2009] 1 A.C. 1101 at [41]. Such evidence is, however, admissible to show that a fact asserted to be part of the background to the contract was known to the parties (or, in principle, that the fact was available to them).

(2) Any evidence as to what in fact occurred after the agreement was entered into will be inadmissible: see, for example, **Arnold v Britton** [2015] A.C. 1619 at [21] *per* Lord Neuberger.

(3) The Managing Judge has referred the parties to **Tartsinis v Navona Management Company** [2015] EWHC 57 (Comm) at [9] and [10] where Leggatt J (as he then was) said as follows:

> *9 The first* [distinctive feature of the rules of English law governing the interpretation of contracts] *is that, in deciding what a contract means, English law does not attempt to identify what the parties actually understood or intended the language used in the contract to mean. Instead, the law adopts an "objective" approach to interpretation. As Lord Hoffmann might have said, I do not think that the extent to which this is so is always sufficiently appreciated. It is not simply that a court, in interpreting a contract, has no window into the minds of the parties and must therefore necessarily draw inferences about what the parties were using the language of the contract to mean, adopting the standpoint of a reasonable observer. What the parties to the contract actually meant, or whether they had any pertinent subjective intention at all, is irrelevant to the task of interpretation. Rather, the court identifies the meaning of the language used by assuming that the parties were reasonable people using the language of the contract to express a common*

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> *intention. As Lord Wilberforce said in Reardon Smith Line Ltd v Hansen-Tangen (The "Diana Prosperity") [1976] 1 WLR 989 , 996:*
>
> > "When one speaks of the intention of the parties to the contract, one is speaking objectively … and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."
>
> *10 A second important feature of the applicable rules of English law is that evidence of what was said during the negotiation of the contract is not admissible for the purpose of interpretation. One reason for this is that such evidence is generally of no help in ascertaining the objective meaning of the document. Even where such evidence could potentially bear on that meaning, however, it is not admissible: see Chartbrook v Persimmon Homes [2009] 1 AC 1101 , 1120–1, para 41. Evidence of the subsequent conduct of the parties is also inadmissible to interpret a contract: see e.g. James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583.*

4. Despite this, it appears that Cs wish to rely on evidence as to what in fact happened in the course of the contractual relationship for the purpose of interpreting the contracts. For example, Cs have argued that the Court has to see how the relationship worked in practice in order to understand submissions as to commercial sense and businesses efficacy: see page 61 of the 5 June Transcript. We consider that an argument to that effect will fail: anything that was not known to (or at least knowledge available to) a person in the position(s) of the parties at the time of contracting cannot be admissible matrix of fact. It would be irrelevant to the proper construction of the contracts if Cs could show that, in the light of events as they developed, it would have made better commercial sense for the parties to have agreed something different (or, which is the same thing, for the words of the contracts to mean something different).

5. There are several caveats to bear in mind when seeking to apply the strict rule as to admissibility.

6. First, if the contract is varied, the matrix of fact for the variation may include matters that post-date the original contract but pre-date (or are contemporaneous with) the variation. Cs may seek to bring in a lot of otherwise inadmissible evidence in reliance on the fact that the contracts were varied from time: see, for example, page 59 of the 5 June Transcript[2] and the recent amendment to para. 64 of the Sabir IPOC. As to this:

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[2] Mr Green QC refers to Post Office having made a concession that, to our knowledge, it has never made. Post Office would accept that the term that is varied may be interpreted by matrix of fact that is contemporaneous to the variation (as opposed to the original contract), but not that the whole contract is thrown open to interpretation by reference to post-contractual facts.

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(1) Factual matrix that post-dates entry into the contract but which pre-dates (or is contemporaneous with) a variation is admissible for the purpose of interpreting the varied term: see **Portsmouth City FC Ltd v Sellar Properties (Portsmouth) Ltd** [2004] EWCA Civ 760 at [47] *per* Chadwick LJ, with whom Maurice Kay LJ and Buckley J agreed. By parity of reasoning, this should apply also to any terms that are so closely related to the varied term that they can be said to form part of the subject matter of the variation. The "new" factual matrix is not admissible for the purposes of construing the rest of the contract.

(2) In the Individual Particulars of Claim and the Response to RFI dated 21 May 2018 (supplemented on 1 June 2018), Cs have failed to identify any variations to the contracts that might affect substantially the construction of any of the important contractual terms. We do not see how the variations that have been pleaded could justify reference to important additional matrix of fact for the purposes of construing the key provisions. Cs do not draw any connection between the variations that they plead and the construction of any of the terms in issue. A good example of this is the amended plea at para. 64 of the Sabir IPOC: Cs do not identify any term that is alleged to have been varied, and any variation to a term setting out Mr Sabir's remuneration would, on the face of it, have nothing to do with the points of interpretation and implication that are in issue.

(3) If Cs want to rely on any variation to bring in new (otherwise inadmissible) matrix of fact, they should identify the terms that were varied and the relevance of the new matrix material to the interpretation of the varied term and/or any other terms that (although unchanged) form part of the subject matter of the variation. They have not done this in their Individual Particulars of Claim, but it is possible that Cs may improve their case in this regard in the lead-up to the trial.

7. Second, Post Office is itself likely to wish to lead some evidence that is arguably inadmissible in accordance with the strict rule. Specifically:

(1) Post Office may wish to give some generic evidence as to the nature and quality of the training and support that it offered. This would, on a strict application of the test for admissibility, be inadmissible because the provision of training and support will necessarily post-date the contract. Strictly, it cannot be matrix of fact. Post Office can, however, argue that such evidence merely illustrates the kind of training and support that would have been anticipated at the time of contracting. For this reason, it may be useful to stress in the evidence the extent to which the training and support

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are industry standard or otherwise are consistent with what a reasonably well-informed prospective SPM would anticipate.

(2) Post Office will wish to provide a more detailed account of the operations of the network and individual branches than would have been known to the Lead Claimants at the time of appointment. Post Office can defend this by arguing (a) that the information that it provides was known to it, Post Office, and was readily available to the Lead Claimants, such that it may be used as matrix of fact[3] and (b) drawing any precise line as to what the Lead Claimants can be taken to have known about the operations of the network and individual branches is difficult (and may vary from case-to-case), such that the fairest approach is for Post Office to give a relatively full account and for Cs to have an opportunity to argue which parts of that account may not be taken into account for the purposes of construction, in individual Lead Claims or generally. If this second argument is accepted, Post Office should be able to say that, with Cs' evidence, the line between admissible and inadmissible evidence is, at least generally, much easier to draw.

(3) Post Office will doubtless wish to adduce evidence as to the fact that SPMs, but not Post Office, had (or were able to have) first-hand knowledge of the transactions effected in the branch and were able to select and supervise assistants. This evidence should, however, be generic rather than specific to any particular SPM.

(4) More generally, there will likely be evidence that Post Office wishes to rely on that, although strictly inadmissible on points of construction, is useful evidence for the Common Issues Trial because, for example, it may (a) assist the Court in understanding the background and context in which the issues arise and/or (b) reduce or eliminate the prejudicial effect of evidence and/or argument put forward by Cs and/or assist in showing that implied terms alleged by Cs would be unreasonable and would not have been agreed by Post Office acting reasonably. It will require an individual assessment of evidence of this kind as to whether the advantages of seeking to adduce it outweigh the negative effects of doing so, which will include undermining the consistency (and persuasiveness) of Post Office's position on admissibility. It may be difficult to defend the admissibility of any detailed evidence

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[3] A fact may qualify as matrix where it was "*background knowledge which would have been available to the parties*": **Rainy Sky SA v Kookmin Bank** [2011] 1 WLR 2900 at [21]

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going to, for example, the risk of fraud that Post Office faces, but we understand the reasons for which Post Office will want to have that kind of material before the Court.

(5) Cs will no doubt complain that, in doing these things, Post Office is applying a different standard to its own evidence than it is applying to Cs' evidence. The Managing Judge may have some sympathy with this complaint, and Post Office's attempt to adduce evidence of this sort will undoubtedly make an application to strike out Cs' evidence more difficult. But if Post Office's "arguably inadmissible" evidence is kept within sensible bounds and it is drafted in such a way as to make its modest nature and purpose apparent, and if Cs' approach to their evidence is as wide and unprincipled as it seems likely to be, we expect that a strike out application would still be worth making.

8. Thirdly, there may be documents that post-date the contract but which reveal that a fact was known by (or available to) the parties at the time the contract was entered into. Such evidence could be admissible as proof of the pre-contractual position. We are not aware of any important examples of this kind of evidence.

9. Fourthly, there are issues in relation to which Cs may argue that the strict rule does not apply. This point is addressed further under the next heading.

Issues to which the strict rule as to admissibility may be argued not to apply

10. As noted above, not all the Common Issues are issues of contractual interpretation (or at least are not wholly issues of interpretation). Specifically:

(1) Common Issue 1 is whether the contracts were "relational contracts" in the sense in which that term is used in **Yam Seng Pte v International Trade Corp** [2013] 1 CLC 662 ("**Yam Seng**").

(2) Common Issues 2, 3 and 4 concern whether terms should be implied into the contracts.

(3) Common Issues 5 and 6 concern the application of the principle in **Interfoto Picture Library v Stiletto Visual Programmes** [1989] QB 433 ("**Interfoto**").

(4) Common Issue 7 relates to the Unfair Contract Terms Act 1977 ("UCTA").

(5) Common Issues 10 to 13 cover the duties of agency and accounting owed between the parties.

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(6) Common Issues 17 and 18 relate to the principle in **Autoclenz v Belcher** [2011] ICR 1157 ("**Autoclenz**") and the parties' "true agreement" as to termination.

11. Each of these issues is considered briefly below.

12. First, the issue of whether the contracts were "relational contracts":

(1) **Legal Privilege**

(2) Nonetheless, the better view is that the "relational contract" issue is a matter of determining the scope and meaning of the parties' intended/expected relationship and is therefore so closely related to contractual interpretation that the same rules as to admissibility should apply. There are at least the following reasons to prefer this analysis:

(a) In both **Yam Seng** and **Al Nehayan v Kent** [2018] EWHC 333 (Comm), Leggatt LJ approached the issue as being capable of determination at the outset of the agreement and by reference to its terms and context, rather than asking how the agreement in fact operated.

(b) The focus of Leggatt LJ's analysis is on the parties' legitimate expectations and, in particular, the nature of performance that they would reasonably expect of each other. He does not focus on the nature or quality of the performance actually provided.

(c) The ultimate objective of Leggatt LJ's analysis is to justify the implication of a term (or terms) as to good faith. If, as set out below, the implication of terms is subject to the same admissibility rule as contractual interpretation, it should follow that determining whether a contract is relational (which is part of determining whether a term should be implied) takes place without regard to evidence as to the nature or quality of the performance actually provided.

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[4] In our view, however, it is clear from **Yam Seng** that the focus is on the parties' reasonable expectations at the time of contracting, which is consistent with the application of the strict rule.

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(d) **Legal Privilege**

13. Secondly, the Common Issues as to the implication of terms:

(1) As noted above, Cs will likely argue that the Court cannot assess the competing submissions as to commercial sense and/or business efficacy without regard to the facts of the contractual relationship in practice. This is wrong in relation to the construction of express terms – see above – but Cs may make the same argument in relation to the alleged necessity of implying terms, on the basis that the process of implication is not the same as the process of construction (which is true, so far as it goes: see **Marks and Spencer v BNP Paribas Securities Services Trust** [2016] AC 742 at [26] - [31] *per* Lord Neuberger[5]).

(2) In our view, that argument would also be wrong:

(a) In **Marks and Spencer**, Lord Neuberger described the implication of terms in fact as follows: "*...a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made*" (emphasis added), reflecting the rule of admissibility for the construction of express terms.[6] He went on to say, at [23], "*the question whether a term is to be implied is to be judged at the date the contract is made*". This is unsurprising given that the classic tests for implication – the "*so obvious as to go without saying*" and "*officious bystander*" tests – are necessarily applied at the time of negotiation / conclusion of the agreement.[7] It is therefore inappropriate to rely on hindsight and/or to fashion an implied to make the agreement fairer in light of post-contractual circumstances. This has been confirmed very recently by the Court of Appeal

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[5] Lords Sumption and Hodge JJSC agreed. Lord Carnwarth disagreed on this. Lord Clarke JSC took a middle path.

[6] On its face, this is perhaps narrower than the rule of admissibility for the purposes of construction of express terms, which permits evidence of facts that were *available* to the parties.

[7] See, e.g., Lewison, [6.09].

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in **Bou-Simon v BGC Brokers LP** [2018] EWCA Civ 1525 at [12] *per* Asplin LJ.[8] In our view, the answer is clear on the face of these binding authorities.

(b) Even putting the authorities aside, there are very strong reasons to apply this approach:

(i) The implication of terms forms part (albeit a special part with specific rules) of the composite exercise of determining the scope and meaning of the contract.[9] It would be strange and unprincipled for different rules of admissibility to apply to different parts of that composite exercise.

(ii) There is also a basic conceptual problem with the argument that post-contractual matrix of fact can be used to support the implication of a term. If an implied term only becomes necessary in lights of facts that occurred after the date of the contract, that term could logically only be implied from the date of those later facts. This is because, *ex hypothesi*, the implied term was <u>not</u> necessary before that date and so did not fall to be implied. In this circumstance, the contract would be varied at the date on which the new implied term fell to be implied. A claimant seeking to rely on post-contractual facts to imply a term is therefore seeking a variation of the contract, which is a different process to which a different test applies.

14. As regards the principle in **Interfoto**, the question is one of incorporation of terms (or, to similar effect, preventing one party relying on an onerous or usual term of which insufficient notice was given). It relates inherently to the time of entry into the contract, and the term must be capable of analysis as at that date, i.e. before any facts of performance or breach are known in order to determine what, if any, special notice must be given before the term is incorporated (or can be relied upon). If the term fails the **Interfoto** test, it was never incorporated (or was only incorporated subject to a bar on reliance). It follows that post-contractual evidence is inadmissible for the same reasons as the strict rule applies to issues of interpretation and because evidence of facts that were not known or capable of anticipation at the time of the contract cannot logically affect the amount of notice that ought to have been given.

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[8] Hickinbottom and Singh LJJ agreed.

[9] This sentence reflects the reasoning of Lord Neuberger at [26] to [27] in **Marks and Spencer**.

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15. As regards the application of UCTA 1977, section 11(1) sets out the test for reasonableness as follows: "*the term shall have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made*" (emphasis added). Evidence as to how the contractual relationship worked in practice is accordingly irrelevant to the test of reasonableness under UCTA and is inadmissible.

16. The situation is less obvious for Common Issues 10 to 13, all of which relate the duties of agency and accounting owed between the parties. The issues are as follows:

> *(10) Was Post Office the agent of Subpostmasters for the limited purposes at GPOC paragraphs 82 and 83?*
>
> *(11) If so, was the Defendant thereby required to comply any or all of the obligations at GPOC paragraph 84?*
>
> *(12) Was the extent and effect of the agency of Subpostmasters to Post Office such that the principles of agency alleged at Defence 91 and 93(2) and (3) applied as Post Office contends?*
>
> *(13) Did Subpostmasters bear the burden of proving that any Branch Trading Statement account they signed and/or returned to Post Office was incorrect?*

17. In our view, the correct analysis is as follows:

    (1) Cs' contention that Post Office was the agent of SPMs (for any purpose) cannot succeed unless it is shown that (a) Post Office agreed to act as agent and/or (b) Post Office undertook one or more of the characteristic roles of an agent. As set out in the Individual Defences,[10] our view is that there is no pleaded case that could justify either conclusion. We can therefore argue that evidence that does not aim at proving either of these things does not become admissible at the Common Issues Trial because of the contention that Post Office was an agent of SPMs. If the Managing Judge is persuaded of our position on the law, it should follow that the evidence from Cs on this issue should be quite focussed if it is to be admissible.

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[10] See, for instance, paras 95 to 98 of the Bates Defence.

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(2) The two factual questions identified above should, for the most part, be capable of determination by reference to, at most,[11] the high-level nature of the relationship between the parties (i.e. a contractual relationship governed by detailed express terms) and any important (and general) practices that arose over time that might demonstrate the assumption of an agency role, rather than by reference to the facts of individual cases. It would be very surprising for Post Office to have become an agent to some but not all SPMs, this depending in each case on the precise facts of the individual relationship. Generic evidence is likely to be admissible where it addresses the differing positions of the parties in terms of access to information relevant to the account.

(3) Nonetheless, it would be difficult to argue that any evidence of post-contractual conduct in an individual case will necessarily be inadmissible. It is, in principle, open to a Lead Claimant to show by evidence that, after the date on which his SPMC or NTC was agreed, Post Office agreed to act as his agent (by word or conduct) and/or undertook one of the characteristic roles of agent in his specific case. We think evidence of this kind would be hard to attack on the basis of admissibility.

(4) As regards the SPM's duties as agent, including the duty to account and the accompanying principles (most relevantly, the burden of proof under Common Issue 13), the situation is nuanced:

(a) Post Office's case is that the obligation to account and the related principles arise from the express terms of the contract, including the SPM's agreement to act as agent and an accounting party (with the ordinary common law duties that follow from these statuses). Those points do not require any factual evidence specific to the Lead Claimants, as they rely on the interpretation of the contract and legal argument.

(b) However, Cs argue that the principles on which Post Office relies are not applicable to the kind of accounting at issue in these proceedings, and it is in issue on the individual pleadings whether or not the accounting relationship between the parties was "traditional": see, for example, para. 101(3) of the Bates Individual Defence. This is a matter on which evidence could, in principle, assist in characterising the accounting relationship, including by

[11] Post Office can of course argue that the agreement alleged by Cs should not be found because it would contradict the express terms agreed between the parties and cannot have been agreed.

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comparison with other accounting relationships. We consider that Post Office and Cs can each legitimately adduce evidence on this fairly broad issue.

(c) It is therefore likely that Cs would be permitted to lead some evidence to show how the accounting relationship operated, including as to the differences between that relationship as it was in fact and what Cs refer to as "traditional accounting". Post Office will argue that such evidence should be kept under careful control and should not stray into evidence of breach – the fact, if established, that Post Office breached any duties owed to Subpostmasters is logically irrelevant to the proper characterisation of the accounting relationship (although it may affect the application of the accounting principles to any particular case[12]). The evidence should focus on the proper operation of the accounting relationship as set out in the contract and related documents, rather than any SPM's specific experience of that relationship (which might be wholly unrepresentative).

(d) In practice, given that fairly fine distinctions are being drawn here, may well prove hard to exclude evidence as to the nature of the accounting relationship generally, unless that evidence clearly relates to allegations of breach.

18. Legal Privilege

[12] See, for instance, para. 100 of the Bates Defence.

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Legal Privilege

Application to the evidence that Cs may wish to rely on

19. In the Individual Particulars of Claim, Cs plead various matters that are, on the face of it, irrelevant to the Common Issues. Evidence of those matters would appear to be inadmissible. Mr Abdulla, for example, pleads the following facts evidence of which is very likely to be inadmissible:

    (1) The training provided to him was insufficiently detailed and did not cover various matters (paras 23, 25, 26 and 28).

    (2) He requested, but was not provided, help with balancing (para. 29).

    (3) The Helpline was (in summary) not very helpful (paras 36 to 39).

    (4) Post Office did not inform him that other Subpostmasters were experiencing similar problems with apparent shortfalls (para. 40).

    (5) His ability to train assistants was limited as a result of the inadequacy of his own training (para. 33).

    (6) Post Office introduced and withdrew products. Post Office refused a request to install an ATM at his branch (paras 34 to 35).

    (7) He experienced shortfalls (paras 41 to 45).

    (8) His branch was audited, and he was suspended (paras 48 to 52).

    (9) Post Office summarily terminated his appointment and thereafter pursued him in relation to a shortfall (paras 53 to 58). Note that some of this may be admissible in relation to the **Autoclenz** issue (although it is difficult to see how it could assist Cs in this regard).

20. The other Lead Claimants all plead similar matters. Much of it, if pursued in evidence, will be fairly easy to identify and clearly inadmissible.

21. Mr Bates and, to a lesser extent, other Lead Claimants plead correspondence with Post Office in relation to shortfalls. Mr Bates will almost certainly want to rely on the correspondence that he exchanged with Post Office, especially given that Cs plead, as part

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of the "true agreement" a restriction on the right to terminate that is aimed at his case specifically: see para. 70.4 of the Amended Generic Particulars of Claim. As to this:

(1) The correspondence is obviously inadmissible on issues of contractual interpretation and implied terms.

(2) It is likely to provide weak but probably admissible evidence in relation to the **Autoclenz** issues. But the position here is curious: if Post Office terminated Mr Bates' appointment in response to his correspondence, this would seem to provide evidence that the parties did not agree, as part of the alleged "true agreement", that Post Office would not terminate SPMs for such a reason. It would, if anything, undermine Cs' case. It is difficult to predict how Cs will pursue the point in evidence and submissions.

22. It also seems likely that the Lead Claimants will try to rely on information that was not known (or available) to them at the time of contracting. Cs may, for example, want to provide evidence in relation to any details of the relationship between Post Office and Fujitsu that they consider strengthens the overall narrative that they advance. A similar position may arise in relation to any specifics of the operation of Horizon and the bugs and flaws that have been detected. Any such evidence will likely be admissible.

23. The Lead Claimants also plead various matters that are likely to be, in whole or in part, inadmissible but in relation to which drawing the line between admissible and inadmissible evidence may be difficult.

24. First, taking Mr Abdulla for example, he pleads that Post Office did not inform him that he had any contractual responsibility to train assistants (paras 31 to 32). Evidence of this kind could, if drafted carefully, be admissible in relation to **Interfoto** and UCTA, insofar as it touches upon the notice that he had of the terms as to responsibility for assistants. Where evidence relates to things said or done after the contract was entered into, it will only be inadmissible if it sheds light on the pre-contractual position: for example, if an SPM acknowledged a particular responsibility without query or complaint soon after entering into the contract, this might provide some evidence that the SPM had adequate notice of the responsibility before signing the contract.

25. Second, to take an example from Mr Bates, he pleads that Post Office "*gave* [him] *the impression that Subpostmasters were or would be "working in partnership" with the Defendant*" (para. 4). It may depend precisely how this kind of point is put in evidence

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whether or not it will be admissible. Evidence as to Mr Bates' subjective intention and understanding is inadmissible, as is evidence as to the course of the negotiation; but, in general terms, evidence as to what was said and done in the appointment process may be relevant to some of the issues as to notice under **Interfoto** and UCTA. It may well prove difficult to strike out any part of the account given of the appointment process, unless it is drafted in a very unsophisticated way and, for example, refers expressly to a subjective intention.

26. Third, Ms Stockdale pleads various "investments" (some of which are not investments in any real sense) that she contends she made in the parties' relationship (para. 26). Several of the actual investments that she made were post-contractual and inadmissible on points of interpretation. It may be that the Court will take a more liberal view of this kind of material, given that it does not go to breach and might be considered general narrative of the relationship.

27. The Lead Claimants plead various other matters that, although having nothing to do with the appointment process, are relevant to one or more Common Issues:

    (1) Mr Bates refers at para. 27 of his IPOC a letter dated 9 April 2002 in relation to the network reinvention programme for outgoing SPMs. Evidence in relation to the scheme (and similar schemes) will be admissible in relation to the **Autoclenz** issue.

    (2) Mr Bates pleads at para. 39 his use of the "Capture" accounting system prior to the introduction of Horizon. It is possible, depending on Post Office's knowledge as to the earlier systems in use, that the characteristics of the off-the-shelf accounting systems may be relevant to some of the issues of contractual interpretation (at least for Lead Claimants who operated both before and after the introduction of Horizon). This is not a point that we have considered in detail, and we may need to revisit it once we have seen how these matters are put in evidence.

    (3) Mr Bates and others plead that they were unable themselves to identify the causes of apparent shortfalls: see para. 52 of the Bates IPOC. If drafted carefully so as to relate to the inherent limitations on the information available to SPMs (rather than being specific to any difficulties encountered by the Lead Claimant and/or any failings on the part of the Post Office), evidence of this kind is capable of being admissible in relation to various Common Issues (notably, the construction of section 12, clause 12 of the SPMC and the agency issues). Admissibility is likely to depend on the extent to

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which the evidence goes beyond that which was known by (or reasonably available to) the parties at the time of contracting.

28. Overall, the likely position is as follows:

(1) It may be fairly easy to identify parts of Cs' evidence that recount details of a Lead Claimant's experience as SPM from the date of his or her appointment and which are inadmissible. This will typically include, as most relevant:

(a) accounts as to the quality and breadth of training and support;

(b) general narrative as to the Lead Claimant's experience of running the branch where this largely takes the form of an account of alleged failings on the part of Post Office and irrelevant information as to their own personal circumstances and difficulties;

(c) accounts of shortfalls, their investigation and any other problems in the operation of the branch;

(d) complaints in relation to Post Office's introduction and withdrawal of products and services;

(e) complaints as to the Lead Claimant's suspension and the events that followed termination.

(2) By contrast, while some of the evidence given on the following topics is likely to be inadmissible, parts of it will be admissible, and drawing the dividing line may prove difficult, and probably impossible on a strike out application:

(a) accounts of the process of appointment and the steps leading up to it, likely including the Lead Claimant's subjective intentions and understanding (which are strictly inadmissible on most issues);

(b) accounts of things said and done by Post Office staff at or around the time of appointment, much of which may well be inadmissible on most or all issues;

(c) narrative as to the inherent limitations on an SPM's access to information and, in particular, ability to identify and explain the possible causes of apparent shortfalls, much of which is likely to be admissible;

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(d)

(e)

Legal Privilege