

POST OFFICE LIMITED
Board Litigation Sub-Committee

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Postmaster Litigation

Meeting date: 24 April 2019

Executive Summary

CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE

Context


1. As the Committee is aware, the judgment in the Common Issues Trial was handed down on 15 March 2019 and found against Post Office in a number of material respects. An application was made to the Judge – Sir Peter Fraser, to recuse himself on the grounds of apparent bias which was heard on 3 April 2019 and rejected on 9 April 2019. The Application to the Court of Appeal to allow an appeal from that decision was filed on Thursday 10 April 2019 (the “Recusal Appeal”).
2. The Committee is now requested to consider: whether an appeal should be made against the decision in the Common Issues judgment itself (the “Common Issues Appeal”); if so, the scope of the Common Issues Appeal; and whether Post Office should seek to have the Common Issues and Recusal Appeals heard together.

Questions

- What was the strategy behind the litigation and is that still appropriate?
- Are there grounds on which the Common issues judgment could be appealed?
- What is the timing and process for making the Common Issues Appeal?
- Are there any aspects of the Common Issues judgment that Post Office should accept?
- What are the risks and benefits of hearing the appeals together or separately?

Conclusion

3. The Post Office legal team (which for the purposes of this note means collectively Post Office legal, Womble Bond Dickinson and Counsel) recommend:
 - appealing the Common Issues judgment;
 - that the scope of the Common Issues Appeal focus on rejecting a legal duty of good faith and therefore also the consequential terms implied into the postmaster contracts by the Common Issues judgment. In addition, the Common Issues Appeal should also appeal certain findings of fact extraneous to the Common Issues. The rationale for this recommendation is set out in paragraphs 21 to 26; and
 - that Post Office seek to have the Common Issues Appeal heard together with the already filed Recusal Appeal. The rationale for this is set out in paragraphs 41 to 44.

4. There are significant risks attached to any litigation, and the risks in relation to these recommendations are also discussed in the relevant sections. Decisions made by the Managing Judge to date have been very critical of Post Office and as a result, there is considerable concern around the tone of Post Office's defence. These concerns are understood by the external Counsel team. The tone of the legal strategy is however more relevant to the interaction with the Managing Judge, as the Court of Appeal will look objectively and dispassionately at the matters before it – these are about the application of the law, not how Post Office conducts its business. Decisions about the scope of an appeal should be made accordingly.
5. 
6. The Committee should note however that while a settlement may bring the current litigation to an end, it does not :
- address the claims of anyone other than the Claimant group;
 - necessarily provide a repeatable framework for resolution of similar complaints from postmasters outside the Claimant group; or
 - address the findings in the Common Issues judgment as to the correct interpretation of the Contract, and the operational impacts of those findings will remain.

Input Sought

7. The Committee is requested to consider:
- appealing the Common Issues judgment and, if thought fit, approve the scope of the Common Issues Appeal; and
 - whether Post Office should seek to have the Common Issues Appeal heard together with the already filed Recusal Appeal.

The Report

What was the strategy behind the litigation and is that still appropriate?

8. The dispute between Post Office and a number of mainly former postmasters has been ongoing for a number of years. Despite attempts to resolve these previously without recourse to litigation, a claim was issued against Post Office in early 2016.
9. Post Office considered that absent litigation, the matters under dispute would continue without resolution and that it was therefore in the interests of both Post Office and the affected postmasters to bring matters to a conclusion which would provide a fair and repeatable basis for resolving issues arising from in-branch losses. This basis would apply to both those claimants in the Group Litigation, and to claims (current, legacy or future) arising outside the current litigation.
10. Post Office expected that the litigation would address the following issues (among others):
 - whether Horizon is 'robust', and whether it is likely to be the cause of in branch losses;
 - who bears the responsibility for demonstrating the cause of in-branch losses;
 - if Post Office is determined to be responsible for in branch losses (from whatever cause), but has previously held a postmaster accountable, what liability does Post Office have to the postmaster and how is compensation fairly calculated?
 - does Post Office have a legal liability to recompense all postmasters, or only those who have raised/ notified their claims in accordance with the Limitation Act (which would therefore exclude most claims arising before 2010)?
11. Additionally, there was concern that the lack of certainty around the contractual framework, and the challenges to the robustness of the Horizon point of sale system, operated as a disincentive to potential agents to contract with Post Office and disrupted business-as-usual activity, as well as causing concern to key (government) stakeholders.
12. Other desired outcomes from the Group Litigation therefore also included establishing with a reasonable degree of certainty the terms of contracts and ways of working that are effective in supporting agents and defending Post Office's interests
13. It was also Post Office's view that Horizon, although not perfect or error-free, was generally reliable. This was based on, amongst other matters, assurances from Fujitsu and the findings of Second Sight that there was no systemic problem in the system. Further, Post Office was of the view that the legal position it had adopted with its postmasters (including in civil and criminal court proceedings) for over 20 years was broadly sound; this was reinforced by legal advice from a number of sources including WBD and Linklaters during the mediation scheme and latterly from Leading Counsel.
14. Post Office has always recognised that there are likely to be individual cases where its treatment of postmasters has not met appropriate standards and/or it has acted wrongly. In such cases, Post Office should acknowledge failures and the

- postmaster should be compensated. However, although some evidence has been put forward, the court process mandated by the Judge should not have allowed for those individual issues to be properly scrutinized until at least Trial 3 in late 2019.
15. Permeating all decisions was a strong belief that any acknowledgment of past failures should be balanced against the risk of significant numbers of unrealistic demands for compensation from undeserving Claimants and encouraging more historic claims from postmasters who were not yet Claimants.
 16. Against the above objectives, it was recognised that litigation will always come with risks and that an adverse finding against either the postmaster contracts or Horizon could be seriously damaging to the business. Of particular concern was the risk that Post Office may be left in the position of not being able to recover shortfalls in branch from postmasters, putting its cash and stock at risk.
 17. Finally, there was a commercial objective to bring the litigation to a close as quickly and cost effectively as possible.
 18. Having considered the above factors, Post Office decided to contest the first two phases of the litigation, namely the legal framework of the postmaster contracts and Horizon.¹ Post Office would try to secure some positive Court decisions with a view to building a platform for settlement, [REDACTED]
[REDACTED]
[REDACTED]
 19. In light of the adverse findings in the Common Issues judgment, and Mr Justice Fraser's very dim view of Post Office in general, consideration should be given to whether the above objectives are still best served by continuing to contest the litigation beyond the first two phases of the litigation (recognising that the second, "Horizon Issues Trial" phase is currently part-heard before the Managing Judge in the High Court).
 20. Against this background, the first point addressed below is whether the Common Issues judgment could, as a matter of law, be successfully appealed, and then consideration is given to whether this is an appropriate course of action and what alternative options there are.

Are there grounds on which the Common issues judgment could be appealed?

21. As previously advised, the Common Issues judgment was formally handed down on 15 March 2019. Since then, Post Office has engaged Lord Grabiner, one of the most senior practising barristers in the country, and Lord Neuberger, the former President of the Supreme Court, to advise on appealing the Common Issues judgment. They have considered this alongside David Cavender QC who represented Post Office at the Common Issues trial.
22. WBD and Counsel believe that Post Office has good prospects of successfully appealing large parts of the Common Issues judgment. The Counsel team will be able to address this with the Committee at the meeting on 24 April 2019.

¹ WBD and the Counsel team advised against a trial solely focused on Horizon taking place without putting it in the context of individual test cases. Post Office explained this to the Court which ultimately decided to proceed with a discrete Horizon trial.

23. There are also strong business reasons for seeking the appeal. These include:

- While operational improvements and contractual changes may be implemented to address the impact of the judgment going forward, the retrospective impact of the judgment can only be addressed through a successful appeal.
- The implication of a legal duty of 'good faith' creates significant uncertainty around Post Office's ability to make operational changes going forwards – including changes to contracts and termination of agents, as Post Office must now take into account the impact of such changes on specific agents as well as agents generally, in reaching decisions. A more detailed summary of these issues is set out in the attached advice from Womble Bond Dickinson and David Cavender QC.
- The implication of a general legal duty of good faith creates uncertainty as to the scope of duties owed to postmasters historically such that in any particular case, it will be unclear whether Post Office has discharged that duty.
- The adverse findings in the Common Issues judgment make it significantly more likely that Post Office will be found to be liable to a larger number of the Claimants and significantly increase the extent of its liability.
- Post Office's position in any discussions to try to settle the litigation will be improved by appealing the Common Issues judgment.

24. The main areas where Post Office should consider appealing include:

- The implied legal duty of good faith, whilst superficially sounding uncontentious, poses significant difficulties to Post Office due to the uncertainty of its meaning and application. In a business sense, good faith is commonly understood to mean being honest; and that as a principle is obviously not objectionable. However the Common Issues judgment has gone much further than that, imposing a legal good faith duty that is defined to require Post Office to subjugate its legal rights to the interests of postmasters and take steps that are commercially onerous.
- As part of this legal duty of good faith, the Judge has then imposed a further 20 specific duties which he states were necessary for "reasons of business efficacy or as incidents of the contracts being relational contracts". While a number of these duties appear anodyne, legally it is difficult to accept certain duties while rejecting others, or without undermining the challenge to the general legal duty of good faith.
- Post Office's rights to terminate agency contracts (and indeed the rights of agents to terminate) on 'not less than x months' notice' are subject to the legal good faith obligation such that the period of notice to be given in any particular case must be considered taking into account all relevant factors. Not only is this interpretation contrary to normal commercial practice, but imposes burdensome operational considerations on both Post Office and the agent to take into account a range of other factors when deciding what notice is reasonable in the circumstances. Similar considerations will apply to suspensions.
- The Managing Judge has determined that the Unfair Contract Terms Act applies to the provisions of postmaster contracts which means that many of them could be considered to be unreasonable and therefore unenforceable.

This applies irrespective of the type of agent – individual, multiple or corporate.

- There are a number of findings that address losses and the agents' liability for losses which make recovering losses much more difficult, if not impossible. These different findings need to be considered together so as to ensure that the outcome is consistent.
 - The Managing Judge held that a disputed Branch Trading Statement is not an 'account' for the purposes of the agent's fiduciary duty to account to Post Office as its principal. We believe that the judge has based this decision on an incorrect understanding of how agents dispute transactions. He then found on the basis of this that there is no obligation on agents to demonstrate that Branch Trading Statements are wrong in respect of a disputed period.
25. The Counsel team have also reviewed whether there are any findings of fact in the Judgment that should be appealed on the grounds that those findings are perverse. Appeals of this nature are less common and more difficult, and should therefore be used sparingly, both as a legal tactic and because it comes with a higher risk of Post Office looking like an aggressive litigant. The recommendation is that the following findings of fact should be challenged:
- Mr Bates' receipt of his SPMC contract. This is a single issue. On its face this may seem to be unnecessary, however it is a clear example where the Judge has wholly ignored the documents to get to his desired conclusion and so it should strike the appeal court as very odd.
 - Findings adverse to Post Office's behaviour and witnesses. These findings are unfair and are directly relevant to the Claimants' claim for indemnity costs. There are 6 of these. These overlap with some of the recusal grounds.
 - Litigation conduct of Post Office. There are two of these. They are relevant to indemnity costs arguments made by the Claimants.
26. Set out in the Diligent Reading Room is a detailed table setting out the specific findings from the judgment and the appeal recommendation in relation to each.

Are there any aspects of the Common Issues judgment that we should accept?

27. There are a number of legal grounds on which an appeal could be sought but given the way the Common Issues Judgment has been constructed, it is difficult to disentangle the various issues so as to be able to accept some points and not others. In addition, the Managing Judge has expressed a number of findings 'in the alternative' which mean that even if he was found to be wrong on one ground, then there is at least another on which he also relies to achieve the same outcome. In those cases, it is therefore necessary to appeal against both findings.
28. Our Counsel team are of the view that 'concessions' should only be made in limited circumstances, as even accepting a few clauses could suggest to the Court of Appeal that the agency contracts are incomplete and open to further implied terms. There is a need to mount any appeal in a legally coherent manner otherwise the merits of the whole appeal could be undermined.
29. They therefore advise that the following 4 terms could be accepted (subject to some drafting modifications) as incidents of the "necessary cooperation" term rather than freestanding implied terms in their own right. This is still a concession,

although delivered in a way that runs less risk of undermining the wider legal arguments on when terms should and should not be implied.

- "to provide reasonable training and support if Post Office imposed new working practices or systems or required the provision of new services"
- "to ensure that the Horizon computer system was reasonably fit for purpose"
- "properly and accurately to effect all transactions using Horizon and to maintain and keep records of such transactions for a reasonable time"
- "that Post Office take reasonable care in performing its functions under the SPMC and NTC contracts which could affect the accounts of Subpostmasters".

30. There are other points in the Common Issues Judgment that Post Office could decide to concede, although it should be noted that the Counsel team advise against any such concessions:

- **The finding that Post Office faces the burden of proving every loss in every branch.** Post Office will always face some difficulty in trying to prove the root cause of a loss in a branch because it has no first-hand knowledge of what has happened. That difficulty is manageable if addressed at the time the shortfall arises when information is freshly available and the cooperation of the postmaster can be sought (and which the postmaster is required to provide under the mutual duty of cooperation). The difficulty comes when a dispute is raised long after the events in question or where a postmaster has been false accounting (which by its nature means that the postmaster has been rendering undisputed, albeit false, accounts). The Common Issues Judgment would require Post Office to retrospectively determine what happened long after the events in question. That is exactly what most of the Claimants are seeking to do in this litigation. The Post Office legal team consider this to be unfair on Post Office and wrong in law. The case advanced by Post Office seeks to strike a fairer balance between the parties. It allows postmasters to raise timely disputes about shortfalls and put the onus on Post Office to investigate those shortfalls at that time, whilst also holding postmasters to any undisputed accounts, unless they can later prove there was no loss or it was not their fault. These points are explained more fully in the Appeal Table in the Reading Room.
- **The various implied terms that require Post Office to pro-actively communicate information about shortfalls and Horizon to the whole network.** Although these sound innocuous, in practice they would be difficult to comply with. Conceding them would also contradict the core legal argument that there should be no duty of good faith and terms should only be implied where necessary.
- **The implied terms and findings to the effect that Post Office's right to suspend and terminate must be exercised in good faith and only when Post Office is not in breach of contract.** Conceding these would contradict the core legal argument that there should be no legal duty of good faith and terms should only be implied where necessary. From a business perspective, the judgment erodes the certainty and scope as to when Post Office can suspend and terminate postmasters, which is needed in order to protect cash and stock in the network.
- **The finding that Post Office must pay postmasters when suspended.** This is not recommended because it would expose Post Office to significant

historic claims for withheld remuneration. If Post Office wishes to change this practice going forward, it could do so through an operational change / contractual variation.

31. It should be noted that it is not legally possible for Post Office to appeal generally but concede a duty of good faith. The legal duty of good faith pervades the entire judgment. A decision not to appeal the finding of a legal duty of good faith would undermine nearly all other grounds of appeal. If Post Office wished to accept the legal duty of good faith, this would require it not to appeal at all.

What are the risks of bringing the Appeal?

32. While the Counsel team believe that "Post Office has reasonable to strong prospects of success on nearly all of the above recommended legal grounds of appeal" (albeit some stronger than others), appealing against the Common Issues Judgment is not risk free.
33. First, although appealing a decision on the interpretation of contracts is common place, and the Common Issues Judgment states several times "in the event that I have got it wrong" which language is not unusual where a judge anticipates that a point may be subject to appeal, nevertheless an appeal is implicitly a criticism of the decisions of the trial judge and could be seen by the Managing Judge as a further aggressive step. Having made a recusal application and appealed that application, an appeal on the Common Issues Judgment is however a lesser and more ordinary step by comparison and one that this Managing Judge is very much expecting to happen by his comments in Court.
34. Second, Post Office may lose the Common Issues Appeal with the following consequences:
- Mr Justice Fraser's comments about Post Office may be vindicated, leading to further negative publicity.
 - Mr Justice Fraser will feel emboldened to treat Post Office even more harshly in further hearings and trials.
 - The Claimants will be in an even stronger negotiating position.
 - Post Office will have incurred further legal costs and be liable for the Claimants' legal costs.
 - Post Office will still have to implement the Common Issues Judgment but after a 6-12 month delay (see further below on timing).
35. Third, even if the appeal is successful, there is a further right of appeal open to the Claimants to the Supreme Court. Getting permission to appeal to the Supreme Court is more difficult, but the legal duty of good faith arguments are new law and something that the Supreme Court may be prepared to hear.

What is the timing and process for making the appeal?

36. The Recusal Appeal was lodged with the Court of Appeal on 11 April 2019. Unless we file the Common Issues Appeal rapidly and seek to have the two appeals heard together (see below), the Court of Appeal will shortly consider the Recusal Appeal as standalone question.

37. The Managing Judge has set aside time on 16 May 2019 to allow either party to seek permission to appeal the Common Issues Judgment. Assuming the Managing Judge allows an appeal, then Post Office has a further 21 days within which to file its appeal. If permission to appeal is refused, then as with the recusal judgment, we could apply to the Court of Appeal directly (again within 21 days). In either case, Post Office will lose its right to appeal unless the Appeal Notice is filed with the Court of Appeal by 6 June 2019.
38. The Counsel team believe that it is unlikely that the Managing Judge will give permission to appeal based on his approach to date and therefore recommend making an application directly to the Court of Appeal as soon as possible (which is a permitted way of proceeding under the Court rules).
39. Assuming that permission is given for the Common Issues Appeal, in the absence of the Recusal Appeal, there are limited grounds to argue for an expedited hearing which means that it could be 6-12 months before the Common Issues Appeal is heard.
40. Once both appeals are lodged (and assuming that permission to appeal is granted in both cases), the Court of Appeal will then decide whether to hear them together or separately. If separately, the Recusal Appeal will likely move faster, perhaps being heard within 1-3 months. The Common Issues Appeal, being more complex, will likely take 6-12 months. If the two appeals are heard together, they will likely move on the slower timetable but with more chance of being towards the shorter end of that timetable.

Should Post Office seek to have the two appeals heard together?

41. The Counsel team believe that the two appeals should be heard together as they believe that there is a better prospect of winning both appeals by having them heard together rather than separately:
 - The Recusal Appeal will require the Court of Appeal to form a view on whether the Managing Judge has pre-judged issues outside the scope of the Common Issues trial. It will therefore need to consider certain of the issues which would be raised in the Common Issues Appeal in forming that view. It is also the case that the findings of fact that Counsel recommend appealing in the Common Issues Appeal are the same findings that are the subject of the Recusal Appeal. If the appeals are not heard together the Court of Appeal would need to consider the same points twice. This is inefficient and there is doubt as to whether the Lord Justice managing the appeal will allow this to happen.
 - The two appeals give complementary impressions. The extent of the errors of law in the Common Issues Appeal reinforce that the Recusal Appeal is one of substance not just form. The Common Issues Appeal makes clear that the Managing Judge has not made a trifling error for which he should not be recused and lays out the full extent of the flaws in his reasoning and helps justify (publicly and to the Court) why Post Office has sought the sanction of recusal. The Common Issues Appeal therefore makes a recusal more likely.
 - This will be the most efficient use of resources. One hearing will always take less work and cost less than two separate ones, which will benefit both parties and be attractive to the Court of Appeal.

- Even if the Recusal Appeal receives the Court of Appeal's permission and goes forward separately and quickly, the litigation could not be fully re-started (if re-started at all) before the Common Issues Appeal was determined.
 - We anticipate that the Claimants may want the two appeals heard together. Their principal argument against recusal is that the Common Issues Judgment, and the Managing Judge's approach in it, was correct. They will therefore want to argue that the Common Issues Judgment should properly be the subject matter of the any appeal.
42. A further benefit of joining the appeals is that they are not likely to be heard before the Autumn which creates a window for mediation and settlement discussions over the Summer. Although settlement can be discussed at any time, the present litigation timetable is densely packed with the Horizon trial due to continue in June and July and Trial 3 still currently scheduled to start in November 2019. This will strain the Claimants' resources and may restrict their lawyers' ability to engage in settlement discussions. A combined appeal should (but this is not guaranteed) lead to all other activity in this litigation being paused, freeing the Claimants up to focus on settlement over the Summer. The Claimants appear to be open to this, having sought to push further court activity (including completion of the Horizon Issues trial) back until the Autumn (they have also previously refused to mediate where that overlapped with their preparations for the Horizon Issues trial).
43. The alternative view is that Post Office does not proactively seek to have the appeals heard together (which is in any event a case management issue for the Court of Appeal to determine). Reasons why Post Office may want to hold the appeals separately include:
- the Recusal Appeal concerns a very sensitive subject, which may influence how the Court of Appeal approaches the otherwise more objective legal issues in the Common Issues Appeal (the outcome of which is of greater operational significance for Post Office);
 - Post Office may be able to test how the Court of Appeal assesses its case and conduct of the litigation in the Recusal Appeal, applying any "lessons learned" to a subsequent Common Issues Appeal;
 - it avoids any suggestion that Post Office is looking to delay the Recusal Appeal by joining it with the Common Issues Appeal so that it can delay the Horizon trial; and
 - it avoids a possible criticism that by joining the two appeals together the immediate next step in this litigation (a joint appeal) is more expensive and that Post Office are promoting this as a tactical step to put the Claimants under financial pressure (although the overall cost should be cheaper than two separate appeals in the long run).
44. The potential consequences of the Appeals being heard separately include:
- if the Recusal Appeal is successful and the Managing Judge is recused, a new Managing Judge will be appointed, but will be unlikely to make any further directions for the subsequent conduct of the litigation until the Common Issues Appeal is resolved, given its relevance to issues in dispute overall; or
 - if the Recusal Appeal is rejected, the Managing Judge can be expected to continue with the existing timetable for Trials 3 and 4 on the assumption that his findings in the Common Issues judgment are correct, even though many of the issues in those trials will be affected by the outcome of a Common

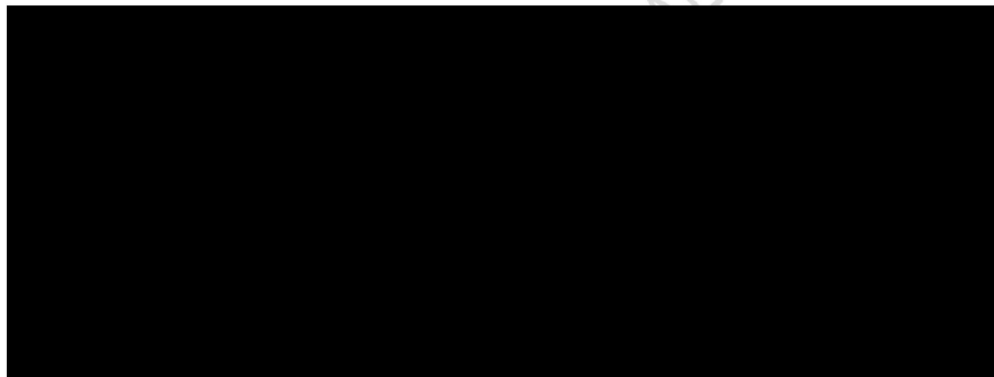
Issues Appeal. The work done for those trials would therefore be wasted if the Common Issues Appeal alters the Managing Judge's findings in the Common Issues judgment.

Options

45. Against the above background, Post Office has the following options for the future conduct of this litigation.

- (a) Appeal the Common Issues judgment so as to try to obtain a more favourable judgment and then use that as a platform to settle – whether or not through mediation (or potentially cause the Claimants to give up).
- (b) Appeal the Common Issues judgment and then look to settle **before** the appeal is heard. The Common Issues judgment has put the Claimants in a stronger negotiating position and appealing the judgment will put this negotiating position at risk such that they may want to settle now.

(c)



- (d) Do not appeal, wait for the judgment on the Horizon Issues and then seek to settle. The merits of this approach will turn on the outcome of the Horizon Issues trial. That trial should turn on the expert evidence which has not yet been heard but, if the Managing Judge is not recused, Post Office has a serious risk of another adverse judgment.
- (e) Contest the litigation through further trials, until Post Office resolves all 557 individual cases or the Claimants' funding collapses. This would take years of further litigation, risk further adverse judgments and reinforce the impression that Post Office is an overtly aggressive organisation. This is an unattractive option but it is included for completeness.

Recommendations

46. The Post Office legal team recommends Option A. In parallel, Option B should be explored with the Claimants so to better understand the settlement range and to keep open the possibility of an earlier settlement.



47. If Post Office does appeal the Common Issues judgment, it will also need to consider the scope of the appeal and how it is progressed alongside the Recusal Appeal. For the reasons stated above, it is recommended that the Common Issues Appeal is conducted in a legally coherent manner, which would mean minimising concessions and seeking for it to be joined with the Recusal Appeal.
48. The Common Issues judgment made astringent criticisms of Post Office and left a bad impression of the business. A successful recusal of the Managing Judge and/or a successful Common Issues Appeal will mitigate some of that harm by showing that Post Office was the recipient of poor judicial decision making. However, if the appeals go against Post Office, it may reinforce the message that it is a litigious/aggressive organisation. The legal team will therefore be instructed to avoid polemic language wherever possible but ultimately an appeal is, by its very nature, a criticism of a Judge's work.
49. Post Office must therefore determine whether it is more important to achieve the right legal outcomes in the interests of the business, as against the tonal risks of being seen to be aggressive in the way it conducts the litigation or engages with the Managing Judge going forward should he not be recused. Arguably these risks have already crystallised in the Common Issues judgment and Post Office has already taken the more emphatic step of seeking the Managing Judge's recusal. In comparison, appealing the Common Issues judgment, if done with care and sensitivity, is a reasonable course of action.
50. The Board sub-committee is requested to:
 - a) Approve the making of the application to appeal to the Court of Appeal in respect of the Common Issues judgment;
 - b) Approve the scope of the Common Issues Appeal as set out in the Appeal Table in the Reading Room;
 - c) Approve the proposal that we request the Court of Appeal to hear both appeal applications together.
 - d) Note the proposals to explore a settlement with the Claimants, subject to the Post Office legal team reverting to a separate meeting with a more detailed outline of the options.

Confidential and privileged
Alon Betts and Others v Post Office Limited
COMMON ISSUES LIST – NETWORK TRANSFORMATION CONTRACT ("NTC") and SUBPOSTMASTERS CONTRACT ("SPMC")

Issue	Clause ref.	Judgment ref.	Decision	Reasoning/ Comments from the Judgment	Assess or concede?	Explanation
Relational Contract ("Common Issue 1")						
1. Was the contractual relationship between the Post Office and Subpostmasters a relational contract such that the Post Office was subject to duties of good faith, fair dealing, transparency, co-operation, and trust and confidence (in this regard, the Claimants rely on the judgment of Leggatt J in <i>Yang v PwC International Trade Corp</i> [2013] EWHC 111)?	N/A	62(1) and 758	Yes – the contracts were "relational contracts"	As there was a "significant imbalance of power between the contracting parties" (P, para 58(25)), and "substantial and significant distance" from being of equal bargaining strength (P, para 1507). The contracts included an implied obligation of good faith (Q, para 1113). This means that both the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people (Q, para 1113). [Transparency, co-operation, and trust and confidence are implicit within the implied obligation of good faith. For the full reasoning see J, para 762 to 768.	Appeal	A duty of good faith exposes Post Office to a significantly higher risk of being the litigation, will be very difficult if not impossible to comply with in the future, inject a great deal of legal uncertainty into the core of its business and fetter its freedom to conduct its business. See the joint advice note of WBD and David Cawender QC dated 11 April 2019 for further explanation.
Implied terms ("Common Issue 2")						
Which, if any, of the terms in the paragraphs listed below were implied terms (or incidents of such implied terms) of the contracts between the Post Office and Subpostmasters? (Relates to both SPMC and NTC)						
2. (a) To provide adequate training and support (particularly if and when the Defendant imposed new working practices or systems or required the provision of new services)	N/A	62(1)(a) and para 760	Implied	Reasoning: business efficacy (J, para 760) Note: training materials fell within the implied term (P, para 781)	Acknowledge / Concede	The implied term is encompassed within the already admitted "necessary cooperation" and "Sitting v Millard" terms. In our view, it does not need to be implied as a freestanding term in its own right. On Appeal, Post Office can make clear to the Court that it accepts that the following obligation is already part of the contract: "To provide reasonable training and support if Post Office imposed new working practices or systems or required the provision of new services" Post Office should not go further than this because: (i) There are existing express terms in the contracts that cover training and the implied term needs to avoid cutting across those express terms. If the implied term is too wide, Post Office's position loses legal coherence, as we will be arguing in relation to many implied terms below that they should not be implied as they contradict express terms. (ii) A broader obligation in relation to training may require Post Office to proactively identify the training needs of each and every SPM (not just provide reasonable training when requested). That obligation would be onerous to comply with as Post Office cannot monitor the competence of every SPM in every branch on an ongoing basis; it needs SPMs to raise training needs with Post Office.
3. (b) To provide a Horizon system which was reasonably fit for purposes, including any or adequate error susceptibility	N/A	62(1)(b) and para 762	Implied	Reasoning: business efficacy (J, para 760) Note: "the greater 'is system' should" – see particularly as meaning the Horizon system" (J, para 748). "A system" includes the Horizon Helpline (P, para 778)	Acknowledge / Concede	The implied term is encompassed within the already admitted "necessary cooperation" and "Sitting v Millard" terms. In our view, it does not need to be implied as a freestanding term in its own right. On Appeal, Post Office can make clear to the Court that it accepts that the following obligation is already part of the contract: "To ensure that the Horizon computer system is reasonably fit for purpose"
4. (c) Property and accuracy to effect, record, maintain and keep records of all transactions effected using Horizon	N/A	62(1)(c) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748). Regardless, it should be implied to give business efficacy (J, para 762)	Acknowledge / Concede	The implied term is encompassed within the already admitted "necessary cooperation" and "Sitting v Millard" terms. In our view, it does not need to be implied as a freestanding term in its own right. On Appeal, Post Office can make clear to the Court that it accepts that the following obligation is already part of the contract: "To ensure that all transactions using Horizon are to be maintained and kept records of such transactions for a reasonable time" Note: further consideration is being given to whether the above wording is too wide. It may have the effect of giving SPMs a right to force Post Office to complete transactions with its end customers / clients. Giving that right to SPMs may then conflict with Post Office's legal obligations to, and commercial interests in dealing freely with, its clients. A practical example of this would be where Post Office is in a dispute with a client about the money due to / from the client. Its duty to settle that dispute may be fettered if it has an obligation to SPMs to fully effect every transaction with that client.
5. (d) Property and accuracy to produce all relevant records and/or to explain all relevant transactions and/or any alleged or apparent shortfalls attributed to Claimants	N/A	62(1)(d) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748). Regardless, it should be implied to give business efficacy (J, para 762)	Appeal	Please see issues 62 and 63 below for a further explanation of Post Office's position on the recoverability of losses. Given that PO does not know what happens in branch, it is impossible for it to explain all transactions and shortfalls as the implied term (and those below) would require. It can and should cooperate with SPMs in investigating transactions and shortfalls, and the obligation to do this is already covered by the admitted duty to cooperate with SPMs.
6. (e) To co-operate in seeking to identify the possible or likely causes of any apparent or alleged shortfall and/or whether or not there was indeed any shortfall at all	N/A	62(1)(e) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748)	Appeal	See above.
7. (f) To seek to identify such causes (and, in any event	N/A	62(1)(f) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748)	Appeal	See above.
8. (g) To disclose possible causes of apparent or alleged shortfalls (and the cause thereof) to Claimants candidly, fully and promptly	N/A	62(1)(g) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748)	Appeal	Further, this implied term is already covered by the admitted duty to cooperate with SPMs. From a business perspective admitting this term would have little further impact. However, from a legal perspective, this additional implied term is unnecessary and conceding it would run contrary to PO's overall legal position that only "necessary" terms should be implied. It should therefore be appealed so to maintain the cohesion of PO's legal arguments.
9. (h) To make reasonable enquiry, undertake reasonable analysis and even-handed investigation, and give fair consideration to the facts and information available as to the possible causes of the appearance of alleged or apparent shortfalls (and the cause thereof)	N/A	62(1)(h) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748)	Appeal	See above. The implied term largely duplicates the effect of the above terms in relation to investigations. It is therefore already covered by the duty to cooperate and by the admitted term not to act arbitrarily, capriciously or irrationally.
10. (i) To communicate, alternatively, not to conceal known problems, bugs or errors in or generated by Horizon that might have financial (and other) resulting implications for Claimants	N/A	62(1)(i) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748)	Appeal	From a legal perspective, this additional implied term is unnecessary and conceding it would run contrary to PO's overall legal position that only "necessary" terms should be implied. It should therefore be appealed so to maintain the cohesion of PO's legal arguments.
11. (j) To communicate, alternatively, not to conceal the extent to which other Subpostmasters were experiencing relating to Horizon and the generation of discrepancies and alleged shortfalls	N/A	62(1)(j) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748)	Appeal	Although on face value this term looks innocuous, a positive obligation to disclose all problems in Horizon would be onerous to comply with in practice. It would also be unnecessary and potentially unhelpful to provide SPMs with an excessive level of technical information given that historic bugs in Horizon have only affected a small number of branches each. To the extent that a SPM seeks assistance with investigating a specific issue in branch and it is possible that Horizon was a cause of that issue then information about Horizon should be shared. This is already covered by the duty to cooperate. Further to the extent that a branch / SPM is affected by a bug, Post Office will have a duty to communicate that to the affected SPMs either under its duty of cooperation or under the Sitting v Millard term (not to frustrate the performance of the contract) or under the above "concocted" term that Horizon must be fit for purpose.
12. (k) Not to conceal from Claimants the Defendant's ability to alter remotely data or transactions upon which the calculation of the branch accounts (and any discrepancy, or alleged shortfall) depended	N/A	62(1)(k) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748)	Appeal	This implied term has been sought to mount an attack on Post Office's limitation defenses. The CA will argue that the normal 6 year limitation period on claims has been extended due to Post Office concealing its (or more accurately, Feltus's) ability to remotely alter branch transaction data. This attack will be much easier to mount if Post Office has a positive duty to disclose the existence of this ability. Given that over 50% of the CA may be subject to a full or partial time bar defenses, it is recommended that this point is appealed for tactical reasons within the litigation. It should be noted however that to the extent that Post Office has caused a shortfall by remotely altering data (which as far as we are aware has never happened) it would be required to disclose that to the affected SPMs under its duty to cooperate.
13. (l) Property, fully and fairly to investigate any alleged or apparent shortfall	N/A	62(1)(l) and para 748	Implied	Reasoning: consequential of the contracts being relational contracts (J, para 748)	Appeal	See above. The implied term largely duplicates the effect of the above terms in relation to investigations. It is therefore already covered by the duty to cooperate and by the admitted term not to act arbitrarily, capriciously or irrationally.

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30	Changes in conditions of service and operational instructions, including those which are agreed with the National Federation of Sub-Postmasters, will appear from time to time in Circular News or by amendment to this Contract. Such changes and instructions are deemed to form part of the Submaster's contract.	Section 1, clause 18	ES(s) and para 1001	Potentially onerous	Q, para 999: "If my finding on relational contracts is correct, these terms are not onerous or unusual. This is because the ability of the Post Office to introduce new terms could not be exercised in an arbitrary fashion, or in a way that would be considered commercially unacceptable by reasonable and honest people". Q, para 1000: "If my finding on relational contracts is not correct... the terms are not onerous or unusual...". The introduction of new terms would themselves have to be properly incorporated with... required specific and reasonable notice to the SPMS, the degree of such notice depending upon the content of the new term...". Q, para 1001: "... these provisions, on their face entitle the Post Office to change, past contractually, the substantive terms as opposed to the operational instructions. Have the potential to be onerous and unusual (but depends on the content of the new terms sought to be introduced)".	Judge agreed with PO - no appeal required	Counsel is giving this point further consideration but at present does not believe that an appeal is required because the judgment is a statement of how the law may be applied in the future.
31	All instructions received from the Regional General Manager should be carried out as promptly as possible.	Section 1, clause 19	ES(s) and para 984	Enforceable	Reasoning: not onerous and unusual, as they deal with the way in which business is transacted, keeping rules up to date, and following the rules and instructions (Q, para 984).	Judge agreed with PO - no appeal required	
32	Clauses of business The Submaster is informed at the time of his appointment of the clauses of business he is required to provide. He must also undertake, if called upon to do so later, any other class of business not required at the time of his appointment but which the Defendant may subsequently and reasonably require him to do, except that the Defendant may not require him to undertake business where the Submaster did not undertake to do so as part of the terms of his appointment.	Section 1, clause 6	ES(s) and para 1002	Enforceable	Reasoning: in the context of the Judge's finding that this was intended to be a long term arrangement, it is inevitable that the range of services may change and be unpredictable (Q, para 1002).	Judge agreed with PO - no appeal required	
33	If the Defendant alters the services to be provided or withdraws a service the Submaster has no claim to compensation for any disappointment which may result from the change.	Section 1, clause 7	ES(s) and para 1002	Enforceable	Reasoning: in the context of the Judge's finding that this was intended to be a long term arrangement, it is inevitable that the range of services may change and be unpredictable (Q, para 1002).	Judge agreed with PO - no appeal required	
34	Accounts and liability for loss The Submaster must ensure that accounts of all advice and cash entrusted to him by the Defendant are kept in the form prescribed by the Defendant.	Section 12, clause 4	ES(s) and para 1005	Enforceable	Reasoning: not onerous nor unusual (Q, para 1005). Construed as reasonable (P, para 1005).	Judge agreed with PO - no appeal required	
35	The Submaster is responsible for any losses caused through his own negligence, carelessness or error, and also for losses of all funds caused by his Assistants. Defence due to such losses must be made good without delay.	Section 12, clause 12	ES(s) and para 1004	Enforceable	Reasoning: a life term to this would be implied into its appointment in any event for reasons of business efficacy (Q, para 1004). Construed as reasonable: "it requires fault in order for a SPM to be liable, and that is entirely reasonable" (P, para 1005).	Judge agreed with PO - no appeal required	
36	The financial responsibility of the Submaster does not cease when he relinquishes his appointment and he is required to make good any losses incurred during his term of office which may subsequently come to light.	Section 15, clause 2	ES(s) and para 1017	Enforceable	Reasoning: ensuring an assistant follows the rules and serves the public correctly is neither onerous nor unusual (Q, para 1017).	Judge agreed with PO - no appeal required	
37	Assistants 1994-2006 Assistants are employees of the Submaster. A Submaster will be held wholly responsible for any failure, on the part of his Assistants, to apply Post Office rules, or to provide a proper standard of service to the public. He will also be required to make good any deficiency of cash or stock, which may result from his assistants' actions.	Section 15, clause 2	ES(s) and para 1017	Enforceable	Reasoning: ensuring an assistant follows the rules and serves the public correctly is neither onerous nor unusual (Q, para 1017).	Judge agreed with PO - no appeal required	
38	Assistants as employed in July 2006 Assistants are employees of the Submaster, and the Submaster will consequently be held wholly responsible for any failure on the part of his Assistants to: (2.1) apply Post Office rules or instructions as required by the Defendant; (2.2) complete any training necessary in order to properly provide Post Office services; and (2.3) comply with the obligations set out below. The Submaster will also be required to make good any deficiency of cash or stock which may result from his Assistants' actions or inactions.	Section 15, clause 2	ES(s) and para 1017	Enforceable	Reasoning: although the scope of the clauses goes wider than the 1994-2006 clause, the subject matter remains neither onerous nor unusual (Q, para 1018).	Judge agreed with PO - no appeal required	
39	Suspension A Submaster may be suspended from office at any time if that office is considered desirable in the interests of the Defendant in consequence of his: (a) being arrested; (b) being civil or criminal proceedings brought or made against him; (c) where irregularities or misconduct at the office; (d) where he holds appointments have been established to the satisfaction of the Defendant; or are arrested; or are suspected and are being investigated.	Section 15, clause 5	ES(s) and para 1028	Enforceable	Reasoning: given that SPMs are in custody of Post Office cash and stock and have some features of a bank, it makes eminent commercial and common sense to have such powers (Q, para 1028).	Judge agreed with PO - no appeal required	
40	"Where a Submaster is suspended his remuneration in respect of any period of suspension will be withheld so long as such suspension continues". On the termination of the period of suspension whether by termination of contract or reinstatement, the Submaster's remuneration in respect of the period may, after consideration of the merits of the circumstances of the case, be deferred wholly or in part."	Section 15, clause 5	ES(s) and para 1028, 1107	Unenforceable (Chevrol). Also unreasonable under UCTA. The fact the contract wasn't signed meant inadequate notice/definition was given to onerous/unusual term.	Reasoning: they are capable of setting a SPM in a "financially impossible" position. Even after reinstatement the PO may decide not to pay any remuneration that would otherwise have been due. The consequences are potentially "financially ruinous" for any SPM (Q, para 1028). Unreasonable as the PO could, whilst preventing the PO from running the branch, ensure it is kept open yet no longer observe the contractual requirements to remunerate the SPM for running the branch (P, para 1107). As the clause fails the reasonableness test in UCTA 1977 (P, para 1108).	Appeal	In the Common Issues trial, Post Office accepted that any decision to pay (or not) remuneration during a period of suspension would not be exercised arbitrarily. The Judge ignored this concession when forming his view that this clause is unenforceable. Once it is acknowledged that SPMs who are suspended are not due to their own fault or misconduct, should receive back pay. This, in our view, makes this clause fair because it means that Post Office has to take into account all the surrounding circumstances before making a decision and that decision cannot be irrational. The alternative proposed by the Judge leads, we believe, to a greater injustice. If Post Office always has to pay SPMs who are suspended, it may have to pay SPMs who are later terminated for misconduct or even criminal offences. It will also have to pay suspended SPMs even though it may also be paying a temporary SPM at the same time (who in turn may be paying the SPM). Not appealing the point also exposes the business to a potentially extensive claim from all historically suspended SPMs (and not just Claimants, though many were suspended) for back-pay stretching back at least 6 years, and may be further if Post Office's limitation defences are not successful. Although we do not have data on the average length of a suspension period, we are aware of cases where SPMs have been suspended for many months, even years. Suspension pay is an area that Post Office should consider for review and update. We would recommend that this is done through a change of process / policy or maybe a contractual variation as these would only have forward facing effect and avoid the risk of a substantial claim in relation to historic suspensions.
41	Termination The Agreement may be determined by the Defendant at any time in case of Breach of Condition by the Submaster, or on non-performance of his obligation or non-provision of Post Office Services, but otherwise may be determined by the Defendant on not less than three months' notice.	Section 1, clause 10	ES(s) and para 1038	Unenforceable (Chevrol). The fact the contract wasn't signed meant inadequate notice/definition was given to onerous/unusual term.	The termination without notice provisions would not be onerous and unusual if combined as being subject to regulatory breaches. If not, they would be onerous and unusual (Q, para 1038 to 5). Note "that was then three months" continued to mean that the PO will have discretion over the fixed period of time. It is a sign notice period, "further consideration is required" (para 1037). If the latter, the clause will fail the UCTA test of reasonableness (P, para 1107). Regardless, the three months' notice period is onerous and unusual even if not a statutory contract (Q, para 1060). "Non-performance" and "non-provision" are very broad (Q, para 857). Notice could be given particularly immediately upon branch transfer. There is no limit upon the exercise of the notice provision. As the clause fails the reasonableness test in UCTA 1977 (P, para 1108).	Appeal	Post Office is entitled to have clear and enforceable notice periods for terminating contracts. The Judge's finding makes it unclear exactly how much notice is required and when such notice can be given. This will create uncertainty when looking to terminate contracts in the future. In particular, it is noted that major business transformation projects are ultimately enforced through Post Office's power to terminate SPM contracts on notice. All business transformation projects, even those done through contract, will have a residual group of SPMs who will not move to the new ways of working / terms. A clear right to terminate is needed to avoid transformation projects being unencumbered with legacy contractual issues. From a legal perspective, this is also one of the more extreme decisions made by the Judge and appealing it helps demonstrate to the Court of Appeal the poor judicial reasoning in the Judgment.
42	No compensation for loss of office The terms of the appointment of Submaster do not entitle the holder to be paid sick or annual leave, pension or to compensation for loss of office.	Section 1, clause 8	ES(s) and para 1044, 1107	Unenforceable (Chevrol). Also unreasonable under UCTA. The fact the contract wasn't signed meant inadequate notice/definition was given to onerous/unusual term.	Reasoning: the right of the PO to terminate and pay nothing by way of compensation is onerous and unusual (Q, para 1044). A statement of entitlement to any compensation for loss of office cannot be reasonable" (P, para 1107). As the clause fails the reasonableness test in UCTA 1977 (P, para 1108).	Appeal	The Judge has interpreted the clause as an exclusion of all liability as a result of termination. Post Office's position at the Common Issues trial was that this clause was limited to making clear that there was no special form of compensation when an SPM does their office, not that the was blanket exclusion of liability. Again, the Judge has construed the clause in an onerous way so that it can be struck down as unreasonable. Also, the Judgment appears to strike down the entire clause including the exclusions of SPMs from any right to sick pay, annual leave or a pension from Post Office. These are important exclusions that help maintain the separation between SPMs and employees.
43	Rules, instructions and standards The Defendant agrees to provide the Branch on behalf of the Defendant in accordance with the terms of the Agreement (including for the avoidance of doubt the Manual), and the definition of Manual at Part 5 paragraph 1.1 is as follows: The following list includes the manuals, guidelines and instructions which currently come under the definition of "Manual": • Local Post Office Operations Manual • Horizon online administration and equipment operations manual • National delivery operations manual (where branch offers the product) • Ordering stock and operations manual • Post Office outreach services operations manual (where applicable) • Post Office payment operations manual • Security operations manual • Horizon system user guide (online) • Horizon online help (online) • Branch Factual • Post Office branch checklist • Post Office Ultra Accessibility Guide • Branch Compliance Standards • Post Office cash and secure stock remittance services manual (online) • PDS project operations manual • PDS project delivery guidelines (2)	Part 2, paragraph 1.1	ES(s) and para 999, 1001 and 1045	Enforceable (but potentially onerous)	Q, para 999: "If my finding on relational contracts is correct, these terms are not onerous or unusual. This is because the ability of the Post Office to introduce new terms could not be exercised in an arbitrary fashion, or in a way that would be considered commercially unacceptable by reasonable and honest people". Q, para 1000: "If my finding on relational contracts is not correct... the terms are not onerous or unusual...". The introduction of new terms would themselves have to be properly incorporated with... required specific and reasonable notice to the SPMS, the degree of such notice depending upon the content of the new term...". Q, para 1001: "... these provisions, on their face entitle the Post Office to change, past contractually, the substantive terms (as opposed to the operational instructions). Have the potential to be onerous and unusual (but depends on the content of the new terms sought to be introduced)".	Judge agreed with PO - no appeal required	Counsel is giving this point further consideration but at present does not believe that an appeal is required because the judgment is a statement of how the law may be applied in the future.

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44	The Defendant may amend the list of documents and add in the Part 1 and may amend the contents of any manual or documents on that list by giving written notification (which may be by electronic means) to the Operator. In the Agreement, unless otherwise specified, a reference to the Manual is a reference to it as amended, consolidated or extended by the Defendant from time to time.	Part 5, paragraph 13	65(a)(i) and para 1001	Enforceable by incorporation: whilst term (verbally onerous/unusual), it was not unenforceable as it was deemed sufficiently incorporated into the contract (it was signed).	As above.	Judge agreed with PCO - no appeal required	
45	In addition to the Manual, the Defendant may issue to the Operator instructions which deal with various classes of Products and Services to be transacted at the Branch and the design and operational standards required to run the Branch.	Part 5, paragraph 13	65(a)(i) and para 984	Enforceable	Reasoning: "Not onerous or unusual... They deal with the way in which business is transacted, keeping rules up to date, and following the rules and instructions." (D, para 984)	Judge agreed with PCO - no appeal required	
46	All such instructions must be complied with immediately (unless otherwise notified by the Defendant) and must be read up to date by incorporation of updates issued by the Defendant. They must be carefully studied by the Operator, its Manager and Assistants. No breach of instructions will be excused on the grounds of ignorance.	Part 5, paragraph 16	65(a)(i) and para 985	Enforceable	Reasoning: "Not onerous or unusual... They deal with the way in which business is transacted, keeping rules up to date, and following the rules and instructions." (D, para 984)	Judge agreed with PCO - no appeal required	
47	The Operator shall: "maintain the highest standards in all matters connected with the Branch and Branch Premises, including implementing and maintaining the standards specified in the Manual and comply with all instructions given to it by the Defendant with regard to standards and quality in the operation of the Branch."	Part 2, paragraph 3.2.1, 3.2.2	65(a)(i) and para 986	Enforceable	Reasoning: "Not onerous or unusual... They deal with the way in which business is transacted, keeping rules up to date, and following the rules and instructions." (D, para 984)	Judge agreed with PCO - no appeal required	
48	Business of business The Defendant has the right to enter into contracts or arrangements with Clients for the handling of products or the supply of services by the Network (including the Branch) on such terms as the Defendant considers fit. [The Defendant] retains the discretion as to where within the Network particular products and services are offered.	Part 2, paragraph 17	65(a)(i) and para 1002	Enforceable	Reasoning: in the context of the Judge's finding that this was intended to be a long term arrangement, it is inevitable that the range of services may change and be unpredictable (D, para 1002).	Judge agreed with PCO - no appeal required	
49	Accounts and liability for loss The Operator shall account for and remit to the Defendant all monies collected from Customers in connection with Transactions in accordance with the Manual. Any cash which the Defendant provides to the Operator or which the Operator collects as a result of Transactions does not belong to the Operator and shall be held by the Operator at the Operator's risk on behalf of, and in trust for, the Defendant and the Clients. Any such cash shall not form part of the assets of the Operator. The Operator acknowledges it is expressly forbidden from making use of any such amount due to the Defendant for any purpose other than the operation of the Branch and it must on no account apply to its own private use, for however short a period, any portion of those belonging to the Defendant entrusted to it. Any breach of this clause 3.6.6 and/or any misuse of the Defendant's cash by the Operator or its Personnel shall be deemed to be a material breach of the Agreement which cannot be remedied and may render the offender liable to prosecution.	Part 2, paragraph 3.6.6	65(c)(i) and para 1006	Enforceable	Reasoning: not onerous nor unusual (D, para 1006).	Judge agreed with PCO - no appeal required	
50	The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (whether the occur 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 the Defendant's security procedures or by taking reasonable care. Any deficiencies in stocks of Products and/or any resulting shortfall in the money payable to the Defendant must be made good by the Operator without delay so that, in the case of any shortfall, the Defendant is paid the full amount when due in accordance with the Manual.	Part 5, paragraph 4.1	65(c)(i) and para 1007, 1010, 1102	Unenforceable (UCTA) Also overly onerous/unusual, but was not unenforceable as it was deemed sufficiently incorporated into the contract (the contract was signed).	Reasoning: onerous and unusual (D, para 1007), it has a very wide ambit with a "potentially enormous financial impact upon an SPM" (D, para 1008). Note: this clause was identified as particularly onerous and unusual (D, para 1008) "Clear and conspicuous notice should have been given to incoming SPMs" (D, para 1008). As a "matter of construction this clause in the NYC imposes full liability on an SPM", with the sole exception of a criminal act (D, para 1002). As it "effectively imposes strict liability upon an SPM" (D, para 1011). As the clause fails the reasonableness test in UCTA 1977 (D, para 1108).	Appeal	See below in relation to issue 63. If issue 63 is appealed, then this issue also needs to be appealed as they are inter-related.
51	The Operator's responsibility for such items shall begin from the time at which the Post Office Cash and Stock are received by the Operator and shall end when the Post Office Cash and Stock are given to Customers in the proper context of the Branch or are returned to the Defendant or, in the case of cash or financial instruments are collected by a cash in hand provider or are paid into a bank. Whilst the Post Office Cash and Stock are in the Operator's possession, it shall keep them in a place of security.	Part 2, paragraph 4.2	65(c)(i) and para 1009	Enforceable	Reasoning: not onerous nor unusual (D, para 1006).	Judge agreed with PCO - no appeal required	
52	The Operator shall retain financial responsibility in accordance with the Agreement following the termination of the Agreement, and it will be required to make good any losses (including losses arising from Transaction corrections and stock losses) incurred during its operation of the Branch which may subsequently come to light.	Part 2, paragraph 4.3	65(c)(i) and para 1006	Enforceable	Reasoning: not onerous nor unusual (D, para 1006).	Judge agreed with PCO - no appeal required	
53	The Operator shall reimburse the Defendant in full on demand for all losses, claims, demands, proceedings, liabilities, costs and expenses (including reasonable legal costs and expenses) incurred by the Defendant as a result of (13.1) its negligence or breach of the Agreement by the Operator or its Personnel, (13.1.2) any misuse or infringement of any intellectual property of any third party by the Operator or its Personnel, and/or (13.1.3) any claim brought under the EA and/or its regulations in respect of the Branch.	Part 2, paragraph 13.1	65(c)(i) and para 1007, 1011, 1105	Unenforceable (UCTA) Also overly onerous/unusual, but was not unenforceable as it was deemed sufficiently incorporated into the contract (the contract was signed).	Reasoning: onerous and unusual (D, para 1007), the words of the clause are very wide, impose a potentially very wide liability upon SPMs. "Clear and conspicuous notice should have been given to incoming SPMs" (D, para 1008). Note: this clause was identified as particularly onerous and unusual (D, para 1008) "It doesn't satisfy the reasonableness test as it is 'unfairly onerous', has a potentially unlimited effect in financial terms and there is no evidence of at that there is or would be any insurance available to a SPM to insure against such losses" (D, para 1105). As the clause fails the reasonableness test in UCTA 1977 (D, para 1109).	TBC	Counsel are giving further thought to whether any part of this clause should be conceded as unenforceable. In particular (i) may be conceded as unenforceable.
54	Supervision The Defendant may suspend the Operator from operating the Branch (and/or, acting reasonably, require the Operator to suspend all or any of its Assistants engaged in the Branch from working in the Branch), where the Defendant considers this to be necessary in the interests of the Defendant as a result of (15.1.1) the Operator and/or any Assistant being arrested, charged or investigated by the police or the Defendant in connection with any offence or alleged offence, (15.1.2) civil proceedings being brought against the Operator and/or any Assistant, or (15.1.3) there being grounds to suspect that the Operator is incompetent, to suspect that the Operator has committed any material or persistent breach of the Agreement, or to suspect any irregularities or misconduct in the operation of the Branch, the Bank Business or any other Post Office services with which the Operator and/or any Assistant is connected (including any financial irregularities or misconduct).	Part 2, paragraph 15.1	65(c)(i) and para 1020	Enforceable	Reasoning: given that SPMs are in custody of Post Office cash and stock and have some features of a bank, it makes eminent commercial and common sense to have such powers (D, para 1022).	Judge agreed with PCO - no appeal required	
55	During the period of any suspension, whether under clause 15.1 or otherwise, the Defendant may (15.2.1) suspend payment of all sums due to the Operator under the Agreement, (15.2.2) with the agreement of the Operator appoint a temporary substitute for the Operator to operate the Branch from the Branch Premises, in which case any fees in relation to Transactions carried out at the Branch will be paid by the Defendant direct to such temporary substitute, and (15.2.3) to the extent such sums have been agreed with the Operator, deduct its costs incurred in appointing a temporary substitute together with other costs and expenses incurred by the Defendant as a result of the suspension from any payments due to the Operator under the Agreement. The Defendant shall initially meet the cost of appointing the temporary substitute but shall be entitled to recoup some or all of such cost from the Operator in accordance with clause 15.2.3 or otherwise. Following the end of the period suspension, the Defendant may, in its discretion (taking into account the relevant circumstances, agree to pay the Operator all or part of such sums as have been suspended in accordance with clause 15.2.1.	Part 2, paragraph 15.2	65(c)(i) and para 1028, 1107	Unenforceable (UCTA)	Reasoning: PCO are capable of putting a SPM in a "financially impossible" position. Even after suspending the PCO may decide not to pay any remuneration that would otherwise have been due. The consequences are potentially "financially ruinous" for any SPM (D, para 1028). As the clause fails the reasonableness test in UCTA 1977 (D, para 1108).	Appeal	This is the same issue as raised in issue 40 above.

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64	Common issue 14.1: It is, was the Defendant lawfully required to comply with any or all of the following obligations: (a) Property and accuracy to effect, details, accuracy and retention and keep records of all transactions which the Claimants initiated using Horizon or for which the Claimants were ultimately responsible; (b) To render and make available to the Claimant accounts; (c) Further or alternatively, where the Defendant alleged shortfall to be attributed to the Claimants, to comply with the duties set out in paragraph 20.1 to 20.6 above.	N/A	611 (a)(b)(c) and 663	As above, PO was not agent (L, para 861), therefore not relevant.	Judge agreed with PO - no appeal required	
65	Common issue 14.2: Was the extent and effect of the agency of Subpostmasters to Post Office such that: (i) Subpostmasters owed fiduciary duties to Post Office, including a duty to act in Post Office's interests in relation to the functions they undertook on Post Office's behalf (which functions included holding and dealing with Post Office cash and stores, effecting and recording Post Office transactions, generating liabilities for Post Office, maintaining proper and accurate records and preparing and entering accounts); (ii) Subpostmasters owed a duty to account to Post Office; (iii) 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.	N/A	612 (a)(b)(c) and 663	"SPMs were under an express contractual duty to account to the Post Office in the manner required or prescribed by the Post Office. This was by using the Horizon system." This required a Branch Trading Statement, which is not subject to the same common law principles that would apply to a branch if it were an agent or sub-agent. The Branch Trading Statement required a SPM to "account now" in respect of items that were disposed of or agreed. The common law principle at Common Law 14.2(a) and (c) do not apply to the Branch Trading Statement (L, para 1121(1)).	Appeal	For the reasons stated in issues 62 and 63 above, this issue should be appealed. The Judge has misunderstood that an account disposed through any route, via the Horizon or otherwise, is a disputed account. That the account could not be disposed through Horizon does not change that the account could be disposed (and in many cases it is disposed and was indeed disposed by the Lead Claimant).
67	Common issue 13.1: Did Subpostmasters lose the burden of proving that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect?	N/A	613 and 663	"I find that the PO is not therefore entitled to rely upon the Branch Trading Statements, for any period in respect of which a SPM notified a dispute to the Horizon, as a settled account between agent and principal. Nor do SPMs bear the burden of demonstrating that Branch Trading Statements is wrong for such a period" (L, para 1116) "No, SPMs bear no such burden" (L, para 1122).	Appeal	See above. The judgment is unclear on the timing and effect of a disputed account. Clarification is needed that the dispute (i) must be raised when the account is rendered not long after the event and (ii) where an account is part-disputed, Post Office can rely on the undisputed part.
Suspension and Termination ("Common issue 14.16")						
SPMC						
68	Common issue 14(1): On a proper construction in what circumstances and/or on what basis was the Post Office entitled to suspend? "A Subpostmaster may be suspended from office at any time if that course is considered desirable in the interests of the Defendant in consequence of the (a) being arrested, (b) having civil or criminal proceedings brought or made against him, (c) where implicated or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of the Defendant, or are advised, or are suspected and are being investigated."	Section 13, clause 4	614(c)	"The circumstances are those identified in the implied term dealing with suspension in Common Law 20(1). It must be done in accordance with the implied duty of good faith." (L, para 1122) "In both cases (the SPMC and the NTC), the clauses must be considered as containing... the 'legitimate interests' of the Post Office." (L, para 872). "The fact that the SPMC states that the SPM 'may be suspended' by the Post Office... means that it is discretionary whether the Post Office exercises the power that it has under each contract to suspend a SPM. This discretion must be exercised in good faith, and not arbitrarily or capriciously." (L, para 879). "Suspended SPMs are not only entirely excluded from the Post Office part of their premises, they appear to be excluded in some cases from the entire premises and are also completely denied access to any information or records... it is difficult to see how they can have such an opportunity to meet the need if they are denied access to even copies of information or records... I do not see how a decision about a SPM's future can sensibly be taken on proper grounds in the absence of such a document being made available either to the SPM, or to the Post Office personnel tasked with taking such a decision." (L, para 886).	Appeal	See issue 15 above.
69	Common issue 15(1): On a proper construction in what circumstances and/or on what basis was the Post Office entitled to terminate? "The Agreement may be determined by the Defendant at any time in case of breach of Condition by the Subpostmaster, or non-performance of the obligation or non-observance of Post Office Services, but otherwise may be determined by the Defendant at not less than three months notice."	Section 1, clause 10	615(i)	"The Post Office was entitled to terminate a SPM's appointment summarily in circumstances where the breach or breaches on the SPM's part was or were regulatory in nature." (L, para 1122). "The SPMC uses the phrase 'breach of Condition' by the SPM, or 'non-performance of obligation' or 'non-observance of Post Office Services'. The first of these, breach of condition, uses the language of regulatory breach. However, the latter part of the clause... is more problematic. These are, on the face of them, very wide words... since breaches of non-performance of obligation or non-observance of Services would give the Post Office the right to behave as though they were regulatory breaches." (L, para 886(1)). "The answer to this is to interpret the whole of this part of the clause as being limited to regulatory breaches." (L, para 886). "In both instances... termination without notice, and termination summarily... the Post Office must have the decision in accordance with the obligation of good faith." (L, para 886).	Appeal	See issue 16 and 41 above.
70	Common issue 16(1): On a proper construction, in what circumstances and/or on what basis was the Post Office entitled to terminate on notice, without cause? "The Agreement may be determined by the Defendant at any time in case of breach of Condition by the Subpostmaster, or non-performance of the obligation or non-observance of Post Office Services, but otherwise may be determined by the Defendant at not less than three months notice."	Section 1, clause 10	616(i)	"Termination on notice must be done in accordance with the implied duty of good faith." (L, para 1122). "The implied 'duty of good faith' means that the Post Office must exercise its power to terminate in a way that is consistent with the implied duty of good faith. It cannot be exercised arbitrarily." (L, para 884). "That consideration should be exercised in compliance with its duty of good faith, as explained above, and take into account of relevant factors, and not take account of irrelevant ones. In a non-arbitrary way, relevant factors would include the reasons that the Post Office wanted to close the branch the length of time a SPM had been in post, their investment in purchasing the business, and whether they had received accommodation as part of the business premises in which they themselves lived. Examples of irrelevant ones would be whether they are Claimants in the Group Litigation, and whether they were taking payment (or would be able to) of the Horizon system to account properly or sufficiently." (L, para 885). "In both instances... termination without notice, and termination summarily... the Post Office must have the decision in accordance with the obligation of good faith." (L, para 886).	Appeal	See issue 16 and 41 above.
NTC						
71	Common issue 14(1): On a proper construction in what circumstances and/or on what basis was the Post Office entitled to suspend? "The Defendant may suspend the Operator from operating the branch (Horn), acting reasonably, require the Operator to suspend all or any of its Assistants engaged in the branch from working in the branch, where the Defendant considers this to be necessary in the interests of the Defendant as a result of (15.1) the Operator and/or any Assistant being arrested, charged or investigated by the police or the Defendant in connection with any offence or alleged offence (15.1.2 civil proceedings being brought against the Operator and/or any Assistant, or (15.1.3) there being grounds to suspect that the Operator is required, to suspect that the Operator has committed any material or persistent breach of the Agreement, or to suspect any irregularities or misconduct in the operation of the branch, the basic business or any other Post Office services with which the Operator and/or any Assistant is connected (including any financial irregularities or misconduct)."	Part 2, paragraph 15.1	616(i)	"The circumstances are those identified in the implied term dealing with suspension in Common Law 20(1). It must be done in accordance with the implied duty of good faith." (L, para 1122) "In both cases (the SPMC and the NTC), the clauses must be considered as containing... the 'legitimate interests' of the Post Office." (L, para 872). "The fact that the NTC states that... the PO 'may suspend' the SPM means that it is discretionary whether the Post Office exercises the power that it has under each contract to suspend a SPM. This discretion must be exercised in good faith, and not arbitrarily or capriciously." (L, para 879). "Suspended SPMs are not only entirely excluded from the Post Office part of their premises, they appear to be excluded in some cases from the entire premises and are also completely denied access to any information or records... it is difficult to see how they can have such an opportunity to meet the need if they are denied access to even copies of information or records... I do not see how a decision about a SPM's future can sensibly be taken on proper grounds in the absence of such a document being made available either to the SPM, or to the Post Office personnel tasked with taking such a decision." (L, para 886).	Appeal	See issue 15 above.
72	Common issue 16(1): On a proper construction in what circumstances and/or on what basis was the Post Office entitled to terminate? "In addition to any other rights of termination contained in other Parts, the Defendant may terminate the Agreement immediately on giving written notice to the Operator if the Operator: 16.2.1 commits any material breach of the provisions of the Agreement or any other contract or arrangement between the Parties and fails to remedy the breach if capable of remedy within 14 days of a written notice from the Defendant specifying the breach and requiring the same to be remedied. Any reference in these Standard Conditions to a breach of a particular obligation by the Operator being limited to be material and/or continuing is to be construed as being limited to be material and/or continuing; 16.2.2 fails to provide the Products or Services to the standards required by the Defendant as set out in the Annex and fails to remedy the failure if capable of remedy within 14 days of a written notice from the Defendant specifying the failure and requiring the same to be remedied... 16.2.3 fails to comply with any other terms of the Agreement to the satisfaction of the Defendant."	Part 2, paragraph 16.2	615(i)	"The Post Office was entitled to terminate a SPM's appointment summarily in circumstances where the breach or breaches on the SPM's part was or were regulatory in nature." (L, para 1122). "The phrase 'material breach' in Paragraph 16.2.1 identifies that this is the subject matter of the provision. A more or substantial failure to provide the Services or Products would not, in my judgment, fail to be considered within this clause, entitling the Post Office summarily to terminate the appointment." (L, para 867). "The fact that the NTC states that... the PO 'may suspend' the SPM means that it is discretionary whether the Post Office exercises the power that it has under each contract to suspend a SPM. This discretion must be exercised in good faith, and not arbitrarily or capriciously." (L, para 879). "Suspended SPMs are not only entirely excluded from the Post Office part of their premises, they appear to be excluded in some cases from the entire premises and are also completely denied access to any information or records... it is difficult to see how they can have such an opportunity to meet the need if they are denied access to even copies of information or records... I do not see how a decision about a SPM's future can sensibly be taken on proper grounds in the absence of such a document being made available either to the SPM, or to the Post Office personnel tasked with taking such a decision." (L, para 886).	Appeal	See issue 16 above.
73	Common issue 16(1): On a proper construction, in what circumstances and/or on what basis was the Post Office entitled to terminate on notice, without cause? "Following the Commencement Date the Agreement will continue until: (16.1) either Party gives to the other not less than 6 months written notice (unless otherwise agreed between the Parties in writing, which cannot be given as to a notice before the first anniversary of the Start Date, or (16.1.2) it is terminated at any time in accordance with its terms."	Part 2, paragraph 16.1	616(i)	"Termination on notice must be done in accordance with the implied duty of good faith." (L, para 1122). "The same reasoning applies to the words 'not less than 6 months' in the NTC as it does to the words 'not less than three months' in the SPMC. If the words 'not less than' are to mean anything, there must be a period within which the Post Office decides what the period of notice should be. In this context, these words in their contractual and commercial context, cannot be construed as meaning 'arbitrarily'." (L, para 861). "My conclusion on the provisions in the NTC for termination upon notice is the same as that for the SPMC, although the exercise of discretion is different because the two contexts are different. The decision must be taken in accordance with the obligation of good faith, and be one that takes account of all relevant factors and does not take account of irrelevant ones. I have already identified in 68(1) above in relation to the SPMC the factors I consider relevant, and irrelevant, in a non-exhaustive list." (L, para 861).	Appeal	See issue 16 above.
True Agreement ("Common issue 17.1")						
74	Common issue 17.1: Do the express written terms of the SPMC and NTC between the Post Office and Subpostmasters represent the true agreement between the parties, as to termination in this respect, the Claimants rely on Autbeloe v Bekker [2011] UKSC 41?	N/A	617(b)	"The Claimants argue that... the true agreement is to be found in paragraph 7 of the General Conditions of Sale (L, para 1121). "I do not... consider that the 'True Agreement' and Autbeloe v Bekker are relevant for determination." (L, para 1121).	Appeal	The Judge tentatively suggests that if his findings on Post Office's right to terminate are incorrect, he would have found the termination rights to have been a sham and that the true agreement was for there to be a longer notice period than that stated in the contract. As this could potentially be attacked by the Claimants on an alternative argument, it needs to be appealed because it could undermine other points of appeal on termination issues discussed above.

75	Common issue 18: Did not, use the "true agreement" between the parties that: (i) neither party intended that the Claimants' investments in goodwill or otherwise in the business should or would be forfeited on 3 months' notice; (ii) without additional cause or reason, established after a full investigation and consideration; (iii) if the Defendant was itself in material breach of contract; (iv) indirectly, explicitly or otherwise; (v) in response to reasonable correspondence about (i) any apparent breach by the Defendant, or (ii) alleged shortfalls and the difficulties faced by Subpostmasters in investigating alleged shortfalls (such as in the case of Alan Bates and his letters dated 19 December 2000, 18 July 2001, 7 January 2002, and 13 February 2002). (vi) the Defendant would not terminate without giving such notice as the court may hold to be reasonable (which the Claimants will contend was, on any view, need to be less than 12 months)?	N/A	18 (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z)	N/A (see above)	Appeal	See above
Compensation for loss of office ("Common Issues 19 – 20")						
76	Common issue 19: On a proper construction, when the 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? "The terms of the appointment of Subpostmaster do not entitle the holder to be paid sick or annual leave, pension or to compensation for loss of office."	Section 1, clause 8	619(i)	"This is because the clauses purported to exclude this but the test of reasonableness in UCTA." (R, para 1122). "The next two Common Issues both concern loss. The first concerns compensation for loss of office upon termination with or without notice, the second concerns heads of loss. The Claimants confirmed in their written opening that no separate consideration areas under these Common Issues, and the arguments in respect of them are contained in Common Issues 5, 6 and 7. (R, para 502).	Appeal	See issue 42 above
77	Common issue 20: On a proper construction, in what, if any, circumstances are Subpostmasters' 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 the Post Office had given the notice of termination provided for in those contracts?	N/A	620	"The clauses relied upon by the Post Office in respect of removing or excluding any rights to recover compensation for loss of office fell the test of reasonableness in UCTA, regardless of whether such clauses were in each case as a matter of fact drawn to the specific attention of the incoming SPM. The heads of loss identified in this Common Issue are not therefore limited as the Post Office contends." (R, para 1122). "The next two Common Issues both concern loss. The first concerns compensation for loss of office upon termination with or without notice, the second concerns heads of loss. The Claimants confirmed in their written opening that no separate consideration areas under these Common Issues, and the arguments in respect of them are contained in Common Issues 5, 6 and 7. (R, para 502).	Appeal	See issue 42 above
NTC						
78	Common issue 19: On a proper construction, when the 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? "The Claimant acknowledges that he did not intend to receive any compensation or other sums in the event of the termination or suspension of the Agreement."	Part 2, paragraph 17.11	619(i)	"This is because the clauses purported to exclude this but the test of reasonableness in UCTA." (R, para 1122).	Appeal	See issue 59 above
79	Common issue 20: On a proper construction, in what, if any, circumstances are Subpostmasters' 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 the Post Office had given the notice of termination provided for in those contracts?	N/A	620	"The clauses relied upon by the Post Office in respect of removing or excluding any rights to recover compensation for loss of office fell the test of reasonableness in UCTA, regardless of whether such clauses were in each case as a matter of fact drawn to the specific attention of the incoming SPM. The heads of loss identified in this Common Issue are not therefore limited as the Post Office contends." (R, para 1122).	Appeal	See issue 59 above
Subsequent appointments ("Common Issue 21")						
80	Common issue 21: On a proper construction, what if any restrictions were there on the Post Office's discretion as to whether or not to appoint as a Subpostmaster the prospective purchaser of a Subpostmaster's business? "On resignation of the appointment the Subpostmaster disposes of the private business and/or premises in which the sub-office is situated, the person acquiring the private business and/or premises or exchanging contracts in connection with the purchase of the private business and/or premises will not be entitled to preferential consideration for appointment as Subpostmaster."	Section 1, Clause 9	621(i)	"There is no restriction upon the Post Office in terms of how this discretion may be exercised, other than the discretion available to the Post Office would have to be exercised for a proper purpose and in accordance with the implied duty of good faith." (R, para 1122). "The Claimants' case states that the Post Office has a discretion whether to appoint a purchaser as the next SPM, but not a veto, and that resolution of this Common Issue crucially requires consideration of whether appointment of a new SPM is subject to a veto or not." (R, para 591). "The Claimants' grounds, such as they are, for justifying this approach are somewhat unavailing. They are not, so far as I can tell, grounded in any contractual analysis. There is no reason either contained within the contracts, or without, to grant some sort of special status to prospective purchasers as applicants to become SPMs." (R, para 595).	Judge agreed with PO - no appeal required	
NTC						
81	Common issue 21: On a proper construction, what if any restrictions were there on the Post Office's discretion as to whether or not to appoint as a Subpostmaster the prospective purchaser of a Subpostmaster's business? "On termination of the Agreement, the appointment of any New Operator shall be entirely at the discretion of the Defendant. (The Defendant may, but shall not be obliged to, consider any application for the operation of a Post Office branch at the Branch Premises made by a genuine prospective purchaser of the Branch Business and the property interest of the Branch Premises, but any such prospective purchaser shall not be given preferential treatment in the application or appointment process."	Part 2, paragraph 19	621(i)	"There is no restriction upon the Post Office in terms of how this discretion may be exercised, other than the discretion available to the Post Office would have to be exercised for a proper purpose and in accordance with the implied duty of good faith." (R, para 1122). "The Claimants' case states that the Post Office has a discretion whether to appoint a purchaser as the next SPM, but not a veto, and that resolution of this Common Issue crucially requires consideration of whether appointment of a new SPM is subject to a veto or not." (R, para 591). "The Claimants' grounds, such as they are, for justifying this approach are somewhat unavailing. They are not, so far as I can tell, grounded in any contractual analysis. There is no reason either contained within the contracts, or without, to grant some sort of special status to prospective purchasers as applicants to become SPMs." (R, para 595).	Judge agreed with PO - no appeal required	
Assistants ("Common Issues 22 – 23")						
SPMC (as amended in July 2006)						
82	Common issue 22: Did SPMC, section 15, clause 7.1 and/or any of the implied terms conferred for by the parties and found by the Court pursuant 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? "The Defendant will (7.1.1) provide the Subpostmaster with relevant training materials and processes to carry out the required training of his Assistants on the Post Office 8 Products and Services; (7.1.2) inform the Subpostmaster as soon as possible when new or revised training will be necessary as a result of changes in either the law or Post Office 8 Products and Services; and (7.1.3) where appropriate, update the training materials (or processes) or provide new training materials (or processes) to the Subpostmaster. However, it is the Subpostmaster's responsibility to ensure the proper deployment within his Post Office 8 branch of any materials and processes provided by the Defendant and to ensure that his Assistants receive all the training which is necessary in order to be able to properly provide the Post Office 8 Products and Services and to perform any other tasks required in connection with the operation of the Post Office 8 branch."	Section 15, clause 7(1)	622(i)	Assistants do not have benefits conferred on them for the purposes of section 1 of the Contracts (Rights of Third Parties) Act (R, para 1122).	Judge agreed with PO - no appeal required	
NTC						
83	Common issue 23: Did NTC, Part 2, clauses 2.3 and 2.5 and/or any of the implied terms conferred for by the parties and found by the Court pursuant 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? "Where the Defendant considers it necessary, it shall inform the Post Office of the number of Assistants as the Defendant shall determine, in the operation of the System at the Branch." "The Defendant may require the Manager and/or the Assistant to undertake further training at any reasonable location and time during the Term if the Defendant (2.3.1) considers that such training to be essential; or (2.3.2) wishes to train them in new and improved techniques which have been devised and which the Operator will be required to use in operating the System."	Part 2, paragraph 6(2)(i)	622(i)	Assistants do not have benefits conferred on them for the purposes of section 1 of the Contracts (Rights of Third Parties) Act (R, para 1122).	Judge agreed with PO - no appeal required	
84	Common issue 23: What was the responsibility of Subpostmasters under the SPMC and the NTC for the training of their Assistants?	N/A	623	"SPMs had a responsibility to train their assistants, but they could not be expected, nor were they contractually required, to train them to a level above that which they had themselves received and achieved." (R, para 1122). "One feature which seemed to me to be wholly absent from the training courses run by the Post Office for the Less Claimants was any sort of assessment or test of competence at the end of the training." (R, para 595).	Appeal	The finding is contrary to the express terms of the SPM contracts that require SPMs to train and be responsible for their assistants. Limiting the training of assistants to only the training received by the SPMs also lacks commercial sense. First, some SPMs are absent from their branches or are companies so they could never be trained. This would then allow them not to train their assistants. Second, many SPMs knowledge is gained from more sources than just training eg. helpline, manuals and personal experience. It would make no sense if SPMs were not required to train staff on matters within their own knowledge just because they gained that knowledge from a source other than their own training.

Confidential and legally privileged advice
Post Office Group Litigation
11 April 2019



Common Issues Judgment: Appeal Advice

1. THIS PAPER

- 1.1 This paper outlines the advice of WBD and David Cavender QC on whether and how Post Office might appeal the Common Issues Judgment handed down on 15 March 2019 (**the Judgment**). It assumes that the reader is broadly familiar with the Post Office Group Litigation and the Judgment. This advice will be expanded on at a conference scheduled for 11 April 2019.

2. REASONS FOR APPEALING

- 2.1 We see three key reasons for appealing the CIT Judgment.

2.2 Impact on Post Office's business

- 2.2.1 The Judgment's imposition of a duty of good faith cuts across and restricts many of the contract rights that Post Office needs to manage the relationship with its SPMs and operate its business. Since the Judgment was handed down, we understand that there have been few immediate operational problems: SPMs are still accounting to Post Office and shortfalls have not gone up. However when issues do arise with shortfalls and/or the need to suspend or terminate SPMs real problems will doubtless emerge.

- 2.2.2 We however see the real problems being longer term. The duty of good faith as applied by the Judge turns SPMs into "super-employees" and gives them significantly more rights than even an employee would enjoy. In particular, it requires Post Office to take account of the interests of SPMs when making decisions. This fetters its freedom to make changes to its business. Amongst other matters, the introduction or withdrawal of products, changes to contractual conditions and remuneration and the opening and closing of branches are all now required to be assessed and balanced against the impact on SPMs. It is unclear from the Judgment how this balance is to be struck and whether Post Office is supposed to balance its business interests against the interests of SPMs as a whole network or against the interests of individual SPMs in their particular situation (indeed these interests may often be in conflict). This is an onerous obligation to comply with in form: it might require consultations across the network and / or a branch by branch impact assessment. In substance it may make unlawful some business transformation activities that have a considerable adverse effect on a large number of branches.

- 2.2.3 Moreover, in our view Post Office's current organisational setup creates a real risk of Post Office not dealing in good faith with an individual SPM. Its current structure has many different touch points between SPMs and Post Office. There is no central point for information about an SPM and no single decision maker with accountability for that relationship. Although there is often communication between departments this is fragmented; there is not, as far as we are aware, an end-to-end process or overarching policy on how Post Office manages SPMs. This has, in some of the cases we have seen, led to silo decision making within departments. We understand that work is underway to address these issues, however the operational risk remains that in any particular case, Post Office may be determined not to have acted in good faith.

- 2.2.4 The above way of working was legally permitted under the old pre-Judgment legal framework which placed the onus on the SPM to be accountable and self-sufficient. In

that framework, it was appropriate for the SPM to be responsible for raising issues and contacting the correct department for help and support. A duty of good faith however requires Post Office to act in a coordinated way, ensuring that its decisions are taken in full knowledge of its entire relationship and history with an SPM. Put another, it would not be acting in good faith to allow a decision maker to act where they did not have the full picture.

- 2.2.5 Although not experts in business transformation and organisation, we believe that compliance with the duty of good faith in the long term would require a deep restructure of Post Office's support functions for SPMs together with the necessary technology to centrally store information about each SPM. We understand that a new case management system is being implemented, however unless it included all information about a SPM – from the moment of first application, then there would be a continuing risk that Post Office staff did not have the full picture when dealing with a SPM.
- 2.2.6 Even if the above points could be addressed through organisational change, the ambiguous nature of a duty of good faith means that it will be difficult for Post Office to know (even having had legal advice) what it can and cannot do. We anticipate that the duty of good faith and other fetters on Post Office's legal rights will have consequences in ways that are currently unforeseeable. This will inject an additional measure of legal risk (in the form of claims and complaints as well as general resistance from SPMs to change) into its business activities. Post Office may then need to offer more generous remuneration and compensation to get SPMs to support changes in the network because it is unable to unilaterally procure those outcomes through its weakened legal rights.
- 2.2.7 We do not believe that the above difficulties could be fully resolved by making improvements to existing operational practices or re-drafting SPM contract terms. The Judgment goes to the heart of the SPM relationship and challenges the core balance of the relationship between Post Office and SPM. The findings of the Judgment will therefore pervade any changes made by Post Office and, although their effects might be mitigated, they cannot, in our view, be eliminated via this course of action.
- 2.2.8 For the avoidance of doubt, we are not advocating that Post Office ignores the thrust of the criticisms in the Judgment. There are ways of working highlighted above and in the Judgment that require improvement. But there is a substantial difference between being legally required to implement changes and implementing changes for good business reasons. It is perfectly ordinary for a large organisation like Post Office, faced with many competing pressures, to set its legal obligations lower than its best practice objectives. This allows a fair margin of error should it fall short without creating legal risk. It also gives it flexibility to adapt and change its business in the long term.

2.3 Litigation merits

- 2.3.1 The Judgment is central to all the claims in the litigation. The adverse findings in the Judgment make it significantly more likely that Post Office will be found to be liable to a larger number of the Claimants and to dramatically increase the extent of its liability. This is because it weakens some of Post Office's best defences, namely responsibility for demonstrating that SPMs losses were not due to the Post Office operating system, that a large number of the claims should be time-barred, and that even successful claims should only result in limited compensation being awarded.
- 2.3.2 The legal team universally believe that an appeal is the correct and obvious course of action when considered from the perspective of the litigation. An appeal in these circumstances would be entirely ordinary. Indeed, not appealing would be considered by many as a peculiar decision, particularly where:

- (a) The Judge's decision on the implication and, in particular, the width of application of the good faith term is in our view obviously wrong and an attempt to make new law.
- (b) Post Office are appealing the decision of the Judge not to recuse himself for apparent bias and doing so on the basis that he introduced large amounts of irrelevant and inadmissible material into his decision making process in the trial. To *not* appeal the decision itself in those circumstances would be at best surprising.
- (c) The Judge himself in the Recusal Judgment says that the proper remedy for some of the complaints of Post Office *is* to appeal his decision – not to seek to recuse him.

2.3.3 David Cavender can expand on these points as needed at the conference.

2.4 Settlement

2.4.1

2.4.2

- 2.5 The above three factors represent the key reasons for lodging an appeal. In our view, the first factor alone would justify an appeal.
- 2.6 There is no real risk of appealing the Judgment except for the costs of doing so (to which see below). Even Mr Justice Fraser would find it difficult to say that Post Office is acting oppressively in bringing an appeal. Appealing a decision on the interpretation of contracts / agency relationship is common place. That this is so is clear from the terms of the Judgment itself where Mr Justice Fraser makes numerous alternative findings "*in the event that I have got it wrong*" on the good faith point.
- 2.7 Further, having made a recusal application and appealed that application, an appeal on the Judgment is a lesser and more ordinary step by comparison. Making an appeal should not in itself lead to criticism but care is needed to only appeal important points, to avoid the impression that Post Office is seeking to fight every point in an oppressive manner. It is *that* which is the real challenge given the extent of the errors contained in the Judgment.

3. **SCOPE OF THE APPEAL**

- 3.1 The Judgment covers 23 interlocking issues, with several dozen more sub-issues. The Judgment entwines these issues closely together, often using decisions on one issue to justify and amplify decisions on other issues. The Judge has also included several alternative formulations, meaning that if one part of his judgment fails there is a secondary argument that would produce the same result. Surgically dissecting the judgment for a few cornerstone points that could be appealed with significant benefit for Post Office is not therefore possible. Any appeal will, due to the shape of the issues and the structure of the Judgment, necessarily need raise a large number of points.

- 3.2 Where possible, however, Post Office is advised to make concessions. When going before the Appellate Courts it is better to have accepted any points that will be difficult to overturn or will be of limited utility in resolving the wider litigation. This would also help counteract the impression that Post Office is acting oppressively if it were to concede some ground.
- 3.3 It is therefore recommended that Post Office concedes four of the implied terms which the Judge implied, *not* under the “good faith” rubric, but because they were “necessary”. Counsel has re-drafted the four terms to narrow their ambit and make them more reasonable and acceptable. These terms are such that they could have fitted within the agreed “Reasonable Co-operation” implied term that Post Office acknowledged early in the proceedings but to which the Judge failed to give any meaning.
- Implied term (a) *“to provide reasonable training and support if Post Office imposed new working practices or systems or required the provision of new services”*
 - Implied term (b): *“to ensure that the Horizon computer system was reasonably fit for purpose”*
 - Implied term (c): *“properly and accurately to effect all transactions using Horizon and to maintain and keep records of such transactions for a reasonable time”*
 - Implied term (t): *“that Post Office take reasonable care in performing its functions under the SPMC and NTC contracts which could affect the accounts of Subpostmasters”*
- 3.4 In our opinion Post Office should however appeal the points below. These are all points of law and commonly subject to appeal. Although this is a large number of points they are all inter-linked and so need to be appealed together.
- 3.4.1 The implication of a duty of good faith.
- 3.4.2 The other implied terms not conceded above.
- 3.4.3 The proper construction of the express terms of the contract, in particular the clauses that entitle Post Office to recover losses.
- 3.4.4 The striking down of express terms as unfair and unenforceable.
- 3.4.5 An SPM's obligations as agent of Post Office and the binding nature of the Branch Trading Statement as an account rendered by an agent.
- 3.4.6 The fettering of Post Office's rights to suspend and terminate.
- 3.4.7 The notice of contractual terms given to SPMs under the SPMC by the contractual paperwork sent to SPMS in the days of Mr Bates and Mrs Stubbs.
- 3.5 Further, in our opinion Post Office ought to seek an order from the Court of Appeal that it quash the large number of findings made by the Judge on matters extraneous to the Common Issues before him – as those matters are to be determined in future trials on the basis of full disclosure and witness evidence. There are a large number of these. These are the *same* points as raised on the recusal appeal. They are the manifestation of the same points in the guise of an appeal to actually get those findings quashed. That is a form of relief that is not sought in the recusal appeal itself – as it might well muddy the waters in that appeal which would be unwelcome.
- 3.6 Careful consideration has been given to appealing findings of fact in the Judgment on the grounds that those findings are perverse. Appeals of this nature are less common and more difficult. They should be used sparingly, both as a legal tactic and because it comes with a higher risk of Post Office looking like an aggressive litigant. There are however a number of findings of fact that we believe should be challenged. This has however been limited to following

findings which are only a small fraction of the total findings in the Judgment. We have placed them in three categories:

- 3.6.1 Mr Bates: receipt of SPMC contract. This is a single issue. On its face this may seem to be unnecessary but we think that it should be included as it is a clear example where the Judge has wholly ignored the documents to get to the conclusion that he wanted to get to and so it will strike the appeal court as very odd.
- 3.6.2 Findings adverse to Post Office's behaviour and witnesses. These findings are unfair and are directly relevant to the Claimants' claim for indemnity costs. There are 6 of these. These overlap with some of the recusal grounds.
- 3.6.3 Litigation conduct of Post Office. There are two of these. They are relevant to indemnity costs arguments made by the Claimants.

4. MERITS OF APPEALING

- 4.1 The legal team's view is that Post Office has reasonable to strong prospects of success on nearly all above recommended legal grounds of appeal, with some points stronger than others. The appeals of factual findings are most finely balanced but we believe they should still be pursued.
- 4.2 To validate this decision, Lord Neuberger has been instructed to review the draft Grounds of Appeal and will advise on (i) whether the scope of the appeal is appropriate and (ii) the likely reaction of the Court of Appeal to an initial reading of the Grounds of Appeal.
- 4.3 In the longer term, Lord Neuberger could be engaged to review Common Issues entirely and offer his view on the likely outcome of the appeal. This is however a significant task that would take weeks / months to complete.

5. TIMING AND PROCESS FOR AN APPEAL

- 5.1 There is a hearing on 16 May 2019 before Mr Justice Fraser at which Post Office can seek permission to appeal. If this is refused, or simply in the alternative, Post Office can apply direct to the Court of Appeal for permission to appeal. With or without permission from Mr Justice Fraser, Post Office will need to lodge an Appeal Notice with the Court of Appeal by 6 June 2019 or it will lose its right to appeal.
- 5.2 Having refused to recuse himself, Post Office is required to lodge its recusal appeal by 11 April 2019. The recusal appeal and the main appeal are two separate appeals but with much overlap. It would be beneficial if draft Grounds of Appeal for the main appeal were submitted to support the recusal appeal. A Lord Justice looking at the recusal appeal will be expecting the main appeal to follow and will be interested in understanding the scope of the main appeal before deciding how to proceed.
- 5.3 Given Mr Justice's Fraser's refusal to give permission to appeal the recusal decision, we believe there is little chance of him giving permission on the main appeal - and even if he did it would likely be limited to the "good faith" finding. He is very unlikely to give permission on all the grounds so that Post Office will need to go to the Court of Appeal in relation to *those* grounds in any event. Also – expedition for the appeal is sought which can only be given by the Court of Appeal. Therefore, in these circumstances, the only real reason to seek permission from the Judge is out of a sense of politeness - which alone does not seek to justify the delay involved. We therefore advise that Post Office does not seek permission from Mr Justice Fraser but proceeds straight to the Court of Appeal. The appeal will therefore need to be lodged in good time before the 16 May 2019 hearing.

- 5.4 Once both appeals are lodged (and assuming that permission to appeal is granted in both cases), the Court of Appeal will then decide whether to hear them together or separately. If separately the recusal application will likely move faster, perhaps being heard within 1-3 months. The main appeal, being much more complex, will likely take 6 – 12 months but we would ask for this to be expedited given the ongoing impact of the Judgment on Post Office's business. If two appeals are heard together, they will likely move on the slower timetable.
- 5.5 In our view, there are strong reasons for the two appeals to be heard together:
- 5.5.1 The recusal appeal will require the Court of Appeal to form a view on whether Mr Justice Fraser has pre-judged issues outside the scope of the Common Issues trial. It will therefore need to consider the issues in the main appeal to an extent in forming that view. It is also the case that the findings of fact that Post Office seeks to quash on the main appeal are the same findings that are the subject of the recusal appeal. If the appeals are not heard together the Court of Appeal would need to consider the same points twice. This is inefficient. It is very unlikely that the single Lord Justice managing the appeal will allow this to happen.
- 5.5.2 The two appeals give complimentary impressions. The extent of the errors of law in the main appeal reinforce that the recusal appeal is one of substance not just form. The main appeal makes clear that Mr Justice Fraser has not made a trifling error for which he should not be recused, but lays out the full extent of the flaws in his reasoning and helps justify (publicly and to the Court) why Post Office has sought the sanction of recusal. The Judge's findings on the law are so bad that they will dissolve any sympathy the Court of Appeal might otherwise have.
- 5.5.3 This will be the most efficient use of resources. One hearing will always take less work and cost less than two separate ones, which will benefit both parties and be attractive to the Court of Appeal.
- 5.5.4 Even if the recusal appeal went forward separately and quickly, the litigation could not be fully re-started (if re-started at all) before the main appeal was determined.
- 5.5.5 We anticipate that the Claimants may want the two appeals heard together. Their principal argument against recusal is that the Judgment, and the Judge's approach in the Judgment, was correct. They will therefore want to argue for the Judgment which should properly be the subject matter of the main appeal.
- 5.6 The outcome of these appeals if successful would be:
- 5.6.1 A new judgment on the Common Issues from the Court of Appeal that is more favourable to Post Office.
- 5.6.2 The recusal of Mr Justice Fraser and either a re-trial of the Horizon Issues trial or a new Managing Judge ordering a new trial process.

6. RECOMMENDATION

- 6.1 There is clear recommendation from the legal team that appealing the Judgment maximises the chances of a successful result in the litigation, whether that be future Court decisions or settlement.
- 6.2 We also believe that there are good business reasons for lodging the appeal, but that is a decision for Post Office.
- 6.3 If Post Office approves lodging an appeal against the Judgment, we would recommend that:

- 6.3.1 Post Office should continue to implement short-term operational changes so that its current practices do not directly collide with the Judgment (and we understand this work is underway).
- 6.3.2 It may also wish to implement more extensive changes that both satisfy the Judgment and deliver the best practice that Post Office would want to achieve in any event. Even if the appeal is successful, this work will still deliver benefit to the business.
- 6.3.3 In parallel with the appeal, Post Office should also plan for, but not yet commit to, the longer term and deeper structural changes that would be needed to comply as fully as possible with the Judgment should the appeal fail. These changes are in fact in planning.
- 6.4 Even on pessimistic timetable of the appeal taking 12 months, our view is that this would be a faster, cheaper and more effective route than implementing the long term operational and contractual changes that would be needed to comply with the Judgment, particularly given that achieving full compliance through operational and contractual change alone is unlikely to be fully successful given the broad and imprecise impact of the Judgment on Post Office's business over many years into the future. In any event, operational and contractual change (even if successful) will not have retrospective effect and so Post Office would continue to carry the risk of adverse outcomes arising from pre-judgment operational activity.

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