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Our ref: IFR/2113618/1
Your ref: AP6/364065.1369

Dear Sirs,

BATES & OTHERS -V- POST OFFICE LIMITED
CLAIM NUMBER: HQ16X01238

INTRODUCTION

1. We write further to our Letter of Claim dated 28 April 2016, and in reply to your Letter of Response dated 28 July 2016.

A. Correspondence

2. Since receiving your Letter of Response we have separately corresponded with you on a number of matters including access to Second Sight, disclosure of documents and the required information from each Claimant for the Schedules of Information.
3. You most recently wrote to us in relation to these issues on 13 October 2016, including a proposed protocol in relation to Second Sight. As per our letter dated 19 October 2016, we respond to matters raised in your 13 October 2016 letter in this letter. Given the timing of your proposal in relation to Second Sight, we write this letter without the benefit of discussing your Letter of Response with Second Sight.

B. Listing of GLO Application

4. The hearing of our GLO application has now been listed before Senior Master Fontaine on 26 January 2017.
5. In this letter we address a number of the outstanding issues between us with a view to trying to agree as much as possible in advance of the hearing and thereby sensibly narrowing the

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issues as the Court will expect in advance of that hearing. We provide an updated draft Order which we hope is now in a form that can agreed.

C. Preliminary observations

6. Your letter explains various things that you say Post Office cannot allow, including “*undermin[ing] the hard work of thousands of postmasters*”¹ and “*allow[ing] unfocused and unevicenced accusations to go unchallenged.*”²
7. Just to be clear:
 - 7.1. there is no basis upon which the outcome of these proceedings could conceivably undermine the hard work of thousands of postmasters – although it may call into question the conduct of Post Office; and
 - 7.2. neither the court nor indeed the Claimants would expect Post Office to be prevented from challenging any allegations, even where (following disclosure) they prove to be soundly based in evidence before the Court – it is for Post Office to defend these claims as they see fit.
8. You will however understand that the Claimants will respectfully invite the Court not to allow Post Office to use the asymmetry of information in these proceedings, at this early stage, to afford Post Office an opportunity to stifle, discredit or delay these claims.

D. The Relationship

9. This pre-action correspondence has been helpful in some respects, in that it has begun to clarify the parties’ respective positions and identified issues which, it appears to be common ground, the parties regard as central to resolution of the dispute,³ particularly the nature of the relationship between Post Office and the Claimants and the respective rights and obligations to which that gives rise.
10. By way of introductory overview, your Letter of Response: (1) emphasises Post Office’s reliance on the express terms in standard documents drafted by it (not subject to negotiation and in some cases not seen by Subpostmasters when entering into the commercial relationship with Post Office); (2) warns that “*Post Office will seek appropriate costs orders should [our] clients waste time and costs seeking to advance any of the misconceived*

¹ Letter of Response, paragraph 1.5

² Letter of Response, paragraph 1.6

³ Letter of Claim, paragraph 48 and footnote 13 thereto.

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*arguments ... at pghs 52 et seq*⁴; (3) then concedes the necessity to imply terms into the contract, albeit limited to the *Stirling v Maitland* Term and the Necessary Cooperation Term;⁵ (4) fails to concede the term that the power of suspension would not be exercised capriciously, which Post Office conceded in *Lalji v Post Office*⁶; (5) fails to acknowledge or reflect the impact of the Unfair Contract Terms Act 1977 on the contractual relationship, particularly given the bleak picture of the Subpostmasters' rights and obligations which Post Office positively asserts;⁷ and (6) avers a contractual burden of proof which appears (on Post Office's own case) to have been impossible to discharge, by any Subpostmaster ever.⁸

11. You state in the Letter of Response that, "*The claims proceed from a fundamentally flawed understanding of the relationship between postmaster and Post Office*".⁹ If you are right about that, it would have a fundamental impact upon the case. However, if it is your approach to the relationship which is wrong, then it will evidently be necessary for you and Post Office to reassess the merits of these claims. Either way, it is in the interests of all parties that the relationship between the parties and their respective rights and obligations be determined clearly.
12. We therefore agree that the relationship between the parties and the determination of their respective rights and obligations will be central to the determination of the Claim.
13. Accordingly, we would regard determination of those rights and obligations at an early stage as both a sensible and appropriate course to adopt in this case. The initial management of these proceedings should seek to identify agreed issues for such preliminary determination – we would suggest, confined to the contractual obligations, agency¹⁰ and related fiduciary duties. We invite your comments on this proposal for the efficient case management of proceedings, not least since you recognise these issues to be common issues. This would seem to us to be a sensible way forward.

⁴ Letter of Response, paragraph 4.24.

⁵ Letter of Response, paragraph 4.35.

⁶ At paragraphs 69 to 71 and 77, below.

⁷ An impact of which Post Office must be keenly aware, given the observations of Sedley LJ in *Lalji* referred to below at paragraphs 69 to 71.

⁸ Assuming that neither Horizon nor Post Office is perfect, as the Letter of Response concedes.

⁹ Letter of Response, paragraph 2.1.5.

¹⁰ Your letter dated 1 July 2016 refers to business agency and states: "*this would include the status of postmasters as agents of Post Office which is, in our view, a key common issue that ties all of the claims together.*"

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E. Generic Particulars of Claim

14. As we indicated in our evidence in support of our Application, we intend to provide draft Generic Particulars of Claim in advance of the GLO hearing. We will aim to provide these to you within the next 5 weeks, i.e. by 1 December 2016. It would be extremely helpful to have a sensible basis upon which to discuss with Second Sight the matters which you raised in your Letter of Response, which we very much hope can be agreed in good time, well in advance of this date.
15. We would also be greatly assisted by provision of further underlying documents, relevant to the assertions which you have made in your Letter of Response. For example, as we explain below, provision of (improved) training material from 2015 is not a helpful basis for assessing what was provided in, for example, 2003, 2006 or 2009.
16. Your client's co-operation in assisting us to draft the generic Particulars of Claim from an informed position (rather than impeding access to information which will become available to us, in any event, later in the proceedings) would be greatly appreciated. We regard such co-operation as required by the overriding objective and the obligations upon the parties and their legal representatives to assist the Court in furthering the overriding objective; but nonetheless, we ask for it.
17. We are proposing that the draft Generic Particulars of Claim will address issues (1) to (4) of the GLO issues as set out in our amended draft Order and identify the categories of conduct alleged which are capable to amounting to breaches of the obligations of Post Office for which the Claimants contend. This will allow subsequent individual Particulars of Claim to identify those categories and to particularise the individual facts falling thereunder.
18. In terms of efficient case management, we would propose that issues (1) to (4) are suitable for determination as preliminary issues. Early resolution of the preliminary issues will then provide a clear framework within which the parties are able to take stock of the case as a whole and contest and resolve the individual claims. We look forward to hearing from you in relation to this proposal, which we consider will substantially advance the overriding objective, by establishing the parties' respective rights and obligations at an early stage.

OVERVIEW OF KEY ISSUES

19. There are a number of aspects of your Letter of Response which we wish to address first, before turning to particular sections.

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20. **Errors and “Systemic flaw”:** You now embrace the assertion that Horizon is not a perfect system and there is the potential for errors,¹¹ however you suggest as an answer to the Claimants’ claim that *“a systemic flaw has not been identified that has resulted in a postmaster wrongfully being held liable for a shortfall of cash or stock in a branch”*¹². We wish to make clear that we have not asserted a systemic flaw, and we refer you to the brief details in the Claim Form as to the way in which the Claimants’ case is put. It is not the Claimants’ case that all transactions were affected or even that all Subpostmasters were affected. Rather it is the Claimants’ case that: (1) Horizon is imperfect and there is the potential for errors - which you accept, as above; (2) Post Office is aware of this - as must follow from what you have accepted; and (3) certain Subpostmasters have been affected by such errors with the result that shortfalls have been alleged against them which did not (or there was a material risk that they did not) represent genuine loss to Post Office, and (4) Subpostmasters have been required by Post Office to make up such alleged shortfalls or been held responsible for them. You dispute this on the basis that no Subpostmaster has been able to prove a wrongly attributed alleged shortfall, and also that you claim there are robust procedures in place for Subpostmasters to detect and resolve errors in branch. We respond to these points at paragraphs 21 and 22, below as they are wholly flawed.
21. **Contractual burden of proof:** As above, your position is that it is the Subpostmaster who bears the burden of proof and must show that alleged shortfalls in their Branch were *“not the result of any failure for which they are responsible”*.¹³ However, the express words of Section 12, clause 12 of the Subpostmasters Contract 1994 are: *“The Subpostmaster is responsible for losses caused through his own negligence, carelessness or error, and also for all losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay”*. These express words do not support your contention - even before normal contractual principles of interpretation are applied such as *contra proferentem*, and indeed, before fairness of the result falls to be considered for the purposes of UCTA. It is striking that despite conceding that neither Post Office nor Horizon is perfect, you chose to rely on an assertion that not a single Subpostmaster has ever been able to *“discharge [the] burden”* of proving that a breach of contract or other wrongdoing by the Post Office was the cause of a shortfall.¹⁴ Given the millions of transactions, thousands of Subpostmasters, and admitted imperfections in the Horizon system, this provides powerful evidence of the unfairness of the contractual relationship for which you now contend and which Post Office has imposed upon affected Subpostmasters over many years. We note that Second Sight reached the positive

¹¹ Letter of Response, paragraph 1.3.

¹² Letter of Response, paragraph 1.3

¹³ Letter of Response, paragraph 2.1.7.

¹⁴ Letter of Response paragraph 2.1.6.

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view that a particular error in 2011 (undiscovered by Post Office until 2013) would have led to branches being asked to make good shortfalls for which they were not responsible.¹⁵

22. **“Robust procedures” for Subpostmasters to detect and resolve errors:** Throughout your letter you repeatedly rely on there being allegedly “*robust procedures in place to ensure that postmasters can detect and resolve errors in their branches*”,¹⁶ but this does not reflect the reality of the situation. In their Interim Report, Second Sight identified the complexity of Trading Period processes and the lack of a suspense account option to allow disputed transactions to be dealt with in a neutral manner, as an issue being reported by multiple Subpostmasters and of particular concern.¹⁷ In their Briefing Report – Part Two, they also identified particular problems namely (1) data not being available for some transaction types at all, even on the day of transaction, (2) data not being available to respond to Transaction Corrections after the 42 / 60 day period, and (3) data not being available to Subpostmasters who had been suspended.¹⁸ The reality is that Subpostmasters experienced very considerable difficulties in detecting and resolving errors, understanding and challenging Transaction Corrections, and obtaining information from Post Office to enable them to do so (including in relation to Transaction Corrections which were issued by Post Office outside of the period in which Subpostmasters had access to relevant data, and following which Post Office frequently did not respond constructively, or at all, in relation to Subpostmaster requests for assistance).
23. **Post Office Suspense Account:** You deny that Post Office instructed its investigators to ignore possible problems with Horizon,¹⁹ on the basis that “*It would be to [Post Office’s] own disadvantage to ignore such issues*”. However this is demonstrably wrong in circumstances where Post Office holds surpluses in suspense accounts, which after 3 years are credited to its profits, without tracing back the source of the surpluses to Subpostmasters who have contributed to those funds. The importance of this issue is compounded by the fact (as the Claimants contend) that there were Transaction Corrections by which Subpostmasters were wrongly required to make payments, thus giving rise to potential surpluses in Post Office’s accounts. Post Office does therefore benefit from any errors wrongly attributed to Subpostmasters (for which they are held liable) and which generate or contribute to surpluses in its own suspense accounts. It is therefore quite wrong to say, as you do, that it would be to Post Office’s own disadvantage to ignore such issues and that contention is also

¹⁵ Second Sight Interim Report paragraphs 6.6 to 6.9.

¹⁶ For example, Letter of Response paragraph 1.3.

¹⁷ Second Sight Interim Report paragraph 7.2(d) and 8.2(f).

¹⁸ Second Sight Part Two Report paragraphs 13.1 to 13.6.

¹⁹ Letter of Response paragraph 5.54.

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extremely difficult (if not impossible) to reconcile with other conduct of Post Office, such as its attempts to prevent references being made to errors due to Horizon, to which we refer below at paragraph 26.

24. **Instructions to investigators to disregard possible problems with Horizon:** You further deny that Post Office instructed its investigators to disregard possible problems with Horizon, on the basis that the allegation is “*unsupported by any evidence*”. However, in our Letter of Claim we referred to the Second Sight Part Two Report on this issue,²⁰ and our understanding is that this section was based on an account given by Professor Charles McLachlan to this effect. If it is necessary for us to do so we will call Professor McLachlan to give evidence on this issue and/or another witness to the conversation. In any event, it is plain from the way in which Post Office has conducted itself in relation to the investigation of individual Claimants that Post Office does not investigate errors, or the possibility of alleged shortfalls having been caused by errors in Horizon, in individual cases where shortfalls are alleged and/or recovered. We refer to Post Office’s recent conduct in relation to Mrs Elizabeth Stockdale, who specifically asked about the investigation in her case, and the extent to which errors generated or potentially generated by the Horizon system had been or would be investigated in her case.²¹ Despite her expressly raising these issues, we understand that no such investigation into these matters was ever carried out prior to her appointment being terminated by Post Office on 16 September 2016. If it is Post Office’s position that in fact there was such an investigation, then please make this clear.
25. **Improper inference of dishonesty:** It is apparent from your Letter of Response that Post Office has proceeded upon the wholly flawed basis that it is “*a sound and logical inference that one would only submit false accounts to cover up their own theft*”, and that you are seeking to maintain that as a proper inference in these proceedings.²² Post Office’s position amounts to an automatic inference of dishonesty against Subpostmasters, many of whom had unblemished careers for many years and were upstanding citizens in their communities. The inference is utterly flawed. Subpostmasters faced alleged shortfalls in circumstances they could not explain and which they could not effectively resolve. Post Office’s position was to require them to repay the money as a condition of their continued appointment, and many individuals found themselves at a loss as to what to do and signed off branch accounts hoping that the position would resolve itself (as indeed some of them were advised or encouraged to do). They could not afford to pay, or keep paying, thousands of pounds to Post Office out of their modest incomes or from their savings and the alternative would be

²⁰ Letter of Claim paragraph 101.4.1, Second Sight Part Two Report paragraph 25.16.

²¹ Our letter dated 13 June 2016.

²² Letter of Response paragraph 5.79.2.

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termination of their position and consequent very significant losses. It is truly outrageous to infer theft in these circumstances. These facts also strongly indicate that, in such circumstances, Subpostmasters acted under economic duress and that the relationship was such that the Post Office was able to take advantage of the inherent inequality of bargaining power in a manner which constituted unconscionable dealing.

26. **No mention of Horizon errors as condition of plea:** In our Letter of Claim we said that on occasion Post Office required undertakings in criminal prosecutions that the accused would not mention any alleged errors in the Horizon system as a condition of the plea, and identified the case of Josephine Hamilton as such a case.²³ You have responded to the case of Josephine Hamilton over the course of three pages of your Letter of Response,²⁴ but have not denied that Post Office required this condition. We take this to be an implicit acceptance that Post Office did indeed impose this condition on Ms Hamilton. Mrs Alison Henderson is a further case in which Post Office charged a Subpostmaster with theft and false accounting, and agreed to drop the theft charges on condition that she pleaded guilty to false accounting and agreed not to mention Horizon to the Court. The only rational explanation for this conduct (particularly when viewed in context of Subpostmasters who were having problems with Horizon being told they were “*the only one*”) is concealment by Post Office.
27. **Basis of Factual Allegations:** You assert that the vast majority of factual allegations in our Letter of Claim are based upon Second Sight’s Part Two Report and that “*this report does not constitute evidence that would be admissible in Court*”.²⁵ You go on to heavily criticise the Second Sight Part Two Report.²⁶ It is an interesting feature of your Letter of Response that you rely on material produced by Second Sight where you consider it helpful to Post Office’s case,²⁷ but disavow it otherwise. To be clear, the Claimants regard Second Sight’s Part Two Report as a proper foundation for the factual allegations made in the Letter of Claim. It is an independent report no doubt borne of careful consideration of the underlying factual material made available to Second Sight. We reasonably anticipate that the factual findings relating to Post Office’s conduct will be borne out on the documentary and witness evidence which will be produced as part of the trial process (although the allegations made in this pre-action protocol correspondence are without prejudice to the position which may in fact be revealed on disclosure as ordered by the Court, which will include documents beyond those provided by Post Office to Second Sight, and our analysis of that evidence). We do not

²³ Letter of Claim paragraphs 105 to 108.

²⁴ Letter of Response paragraphs 5.74 to 5.81.

²⁵ Letter of Response paragraph 5.2.

²⁶ Letter of Response paragraphs 5.3 to 5.7.

²⁷ For example, Letter of Response paragraphs 3.10.1(c) and 3.10.3(a).

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accept that your wholesale dismissal of the points we have identified in the Second Sight Part Two Report is consistent with Post Office's professed quest for truth, or its reliance on the outcome of scrutiny by others to date as contrary to the claims being advanced by the Claimants.

28. **Criticism of Letter of Claim:** You make many criticisms of our Letter of Claim to the effect that the claim is "*unparticularised and unsubstantiated*".²⁸ We respond to the individual sections of your letter below, including your obvious misconception as to what it is reasonable for individual claimants to provide in proceedings managed pursuant to the CPR 19 Group Litigation provisions. We will respond proportionately to the criticisms you have made of the way in which our clients' claims have been formulated to date and will provide further information and clarification where it is appropriate to do so. We do not intend to respond to every criticism, or every factual assertion you have made with which we do not agree, as this would not be reasonable or proportionate and is not the purpose of the Pre Action Protocol process. Your client's position is in any event quite clear that it is committed to defending the claims without any acceptance of any possibility of fault or liability on its part.

RESPONSE BY SECTIONS OF LETTER OF RESPONSE

Section 1: Introduction

29. We reject the criticisms you have made of our clients and the Letter of Claim. Your characterisation of Post Office's conduct and the reality of this litigation is wholly unrealistic.
30. We have substantially responded to the points you have raised in section 1 of your Letter of Response in the preceding section of this letter, and refer to these points above.
31. We specifically disagree with your claim that investigations to date have "*consistently pointed towards human error or dishonest conduct*"²⁹ as the most likely cause of shortfalls. We have addressed the entirely flawed basis on which Post Office has sought to infer dishonesty against individual Subpostmasters,³⁰ and also its instructions to investigators to disregard Horizon as a possible source of alleged shortfalls.³¹ It is also apparent that Post Office has not conducted formal investigations in many cases, relying on its erroneous approach to the

²⁸ For example, Letter of Response paragraph 1.7.

²⁹ Letter of Response paragraph 1.4.

³⁰ Paragraph 25 above.

³¹ Paragraph 24 above.

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contractual burden of proof.³² On this issue, see for example the Second Sight Case Review Report relating to Mr James Withers, which records, *“it is likely that the matter was not formally investigated as, in accordance with his contract, [Mr Withers] was responsible for making the shortfall good, and because it would appear that no criminal offences were suspected of having been committed. However, it is not clear to us how that conclusion was arrived at in the absence of any investigation having taken place.”*³³ Similarly in relation to Mrs Gillian Howard: *“...We consider it likely, therefore, that [Mrs Howard’s] admission of false accounting, and her acknowledgement of her husband’s contractual responsibility for making the branch’s shortfall good, led to Post Office concluding that there was no need to continue to investigate the cause of the discrepancies or to identify the culprit(s) in regard to theft.”*³⁴ Second Sight endorsed the view that the investigation was as such “unjust”.

32. To be clear, we entirely accept that on some occasions shortfalls or discrepancies will have been caused by human error, but this is not an answer to the claim in circumstances where Subpostmasters were not able to identify effectively that this had occurred, where Post Office failed to establish that to be the case, and where training and support were inadequate. We do accept that in a small number of cases shortfalls may have been caused by the dishonesty of a particular Subpostmaster, but this is very much likely to be the exception. For you to seek to characterise the Claimant group as dishonest and/or “*looking to excuse their actions by blaming others*”³⁵ is entirely misplaced and liable to cause further reputational damage to claimants in this litigation.
33. In relation to the point you make that the Claimants are “*largely former postmasters*”³⁶ this is hardly surprising. We anticipate that this reflects both Post Office’s unlawful termination of Subpostmasters to whom Post Office wrongfully attributed losses, as well as the fact that currently serving Subpostmasters are concerned about the potential for their contracts to be terminated by Post Office or some other action to be taken to their detriment if they raise a complaint as a claimant in this action. We raised this point in our Letter of Claim³⁷ and have corresponded with you about it further but Post Office has refused to provide any of the assurances sought. Indeed, since issuing this claim three of the Claimants have been suspended and/or terminated from their posts by Post Office. A further Claimant has been the subject of an audit and had his branch shut by Post Office since issuing this claim.

32 Paragraph 21 above.

33 Second Sight Case Review Report, James Withers paragraph 4.2.

34 Second Sight Case Review Report, Gillian Howard paragraph 4.2.

35 Letter of Response paragraph 1.5.

36 Letter of Response paragraph 1.5, and Schedule 3 paragraph 1.2.2.

37 Letter of Claim, section J.

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Section 2: Executive Summary

34. Our responses to the matters summarised in Section 2 of your letter are best addressed in response to the subsequent sections in which you set out Post Office's position in more detail.
35. In relation to the particular point that you highlight in section 2 and indeed elsewhere in the Letter of Response namely that the current number of Claimants to this claim represent a small minority of Subpostmasters, we refer you to paragraph 20 above and your erroneous approach based on "systemic flaw", and also highlight the following obvious points: (1) affected Subpostmasters may not realise that losses attributed to them were wrongly attributed or that they have a right to bring a claim; (2) of those that do, some may not wish to litigate, particularly against Post Office given its approach to being challenged on these issues, as illustrated in the Letter of Response; and (3) many currently serving Subpostmasters are particularly concerned about bringing claims against Post Office, as we have addressed above.³⁸
36. The current Claimant group stands at 198 named Claimants on the Claim Form and it is reasonable to expect that this group will increase after the making of a GLO together with appropriate advertising. We also note that in our draft GLO we have requested that Post Office should provide a searchable electronic list of all Subpostmasters against whom Post Office has taken civil or criminal action in respect of alleged shortfalls after the introduction of Horizon, such that we can inform them of these proceedings. This is information which Post Office must hold and if not already in schedule form, it must be relatively easy to compile it as such.

Section 3: Post Office's Knowledge of the Dispute

A. Extent and Relevance of Post Office's Knowledge & Your Request for Individual Particulars

37. Undoubtedly Post Office is in a much more informed position about the factual matters which give rise to the Claimants' claims than had it not been involved in the Second Sight review and the Mediation Scheme, attended before Select Committees and published its response to matters raised in the Panorama programme.
38. This is highly relevant for the purposes of the Pre Action Protocol, because what is reasonable for a claimant to set out in a Letter of Claim concerning matters about which a

³⁸ Paragraph 33 above.

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defendant has no previous knowledge, and what is reasonable for a claimant to set out in relation to matters about which a defendant has very substantial knowledge, are two very different propositions. That is why we included an overview of your client's knowledge in our Letter of Claim, as it set the context for the Letter of Claim.

39. In Section 3 of your letter you downplay the relevance of your client's previous knowledge and say that 21 of the 91 Claimants referred to in the Letter of Claim did not participate in the Scheme (paragraph 3.3.1) and, of the Claimants who participated in the Scheme, *"allegations were advanced two years ago, which gives rise to the possibility that some allegations may now have been dropped and new allegations may now be advanced"* (paragraph 3.3.2).
40. On any view your approach is wholly unrealistic. The point is not the 21/91 Claimants referred to in the Letter of Claim who did not participate in the Scheme, but rather the very substantial number of Claimants, i.e. 70/91, who did. As part of the Scheme, your client has seen the allegations which were made by those Claimants, considered documents relating to alleged shortfalls, and previously set out its own position. Your client is uniquely placed in being able to anticipate issues which these Claimants' claims will give rise to. Your client can also sensibly anticipate that the circumstances of the Claimants whose cases it has not individually considered as part of the Scheme are likely to be similar to the many Claimant cases it has, and indeed even in relation to the non-Scheme Claimants, your client must also have its own records in relation to alleged shortfalls attributed to these Claimants, whether their appointments were terminated, and if civil or criminal action was subsequently pursued. Whilst there is indeed the possibility that the allegations made by the Claimants in this litigation who participated in the Scheme will not be *exactly* the same as those raised by them as part of the Scheme, the facts as to which alleged shortfalls were attributed to them by Post Office, what action your client took, and the documents held by your client relating to such alleged shortfalls will not change. As above, in relation to the Scheme Claimants, your client not only has all this information, but it has previously collated and considered it. We confirm that the current position is that of the 198 Claimants who are now named, 90 Claimants participated in the Scheme.
41. We further note from your Letter of Response that in fact Post Office has had yet further opportunities to analyse and consider the issues which the Claimants' claims gives rise to, as you identify (1) a counterclaim raised by a Mr Castleton on the basis of alleged defects in Horizon in contested proceedings concerning alleged shortfalls pursued by your client against him, and (2) pre-action correspondence with Shoosmiths in 2011 in relation to shortfalls, defects in Horizon, and the operation of the Helpline.
42. Indeed, in your Letter of Response, your client actively prays in aid of its involvement in the Scheme and previous claims as addressing the issues raised by the Letter of Claim, for

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example at 1.6 you say “*To date, Post Office has been prepared to give your clients and others like them the benefit of the doubt. It has been determined to understand the claims against it, and launched exhaustive efforts to do so. It has investigated their concerns in good faith*” (emphasis added), and you later specifically rely on the judgment in Castleton, at paragraphs 3.10.1(b) and 4.46.

43. On any view it is obvious that your client has previous and (in respect of the Scheme Claimants) extensive knowledge of the factual matters underpinning the Claimants’ claims against it, and your protestations otherwise are suggestive of a strategy to delay or suppress the pursuit of these claims by a managed and cost effective GLO process.
44. At paragraphs 3.5 to 3.6 of your Letter of Response you request individual particulars of each Claimant’s claim to be provided to you at the pre-action stage. This is a theme which you repeat at a number of points in your latest letter to us dated 13 October 2016, and indeed you go so far as to say that “*Only once [particularisation of each of the Claimant’s claims] has been provided will the parties be able to hopefully agree the scope of the GLO and, in particular, consider whether generic Particulars of Claim ... would be suitable*”.³⁹
45. This is a completely unreasonable position which does not comply with the objectives in the Practice Direction on Pre-Action Conduct, and would subvert much of the purpose of the anticipated GLO, for reasons we have previously set out in correspondence with you. The criticisms you make of the alleged lack of particularisation in the Letter of Claim on this basis are entirely misplaced.
46. We draw your attention to paragraph 6 of the Practice Direction on Pre-Action Conduct (emphasis added):

“the parties should exchange correspondence and information to comply with the objectives in paragraph 3, bearing in mind that compliance should be proportionate”.

47. The objectives in paragraph 3 are to:

“[exchange] sufficient information to-

- (a) understand each other’s position;*
- (b) make decisions about how to proceed;*
- (c) try to settle the issues without proceedings;*

³⁹ Paragraph 2.5 of your 13 October 2016 letter, see also 2.4.2, 2.4.3, 2.4.5.

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- (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;*
- (e) support the efficient management of those proceedings; and*
- (f) reduce the costs of resolving the dispute”.*

48. In our Letter of Claim (and as further explained in this letter) we have provided you with sufficient information in order to meet the objectives in paragraph 3. As must be abundantly clear, the provision of further information in relation to each of the Claimants (i.e. now a group of 198) is best managed as part of the GLO.
49. These issues raise similar points to those we corresponded with you about in relation to your suggestion that we engage in a process of individual Claimant “*mapping*” against GLO issues, and we refer you to pages 3 to 5 of our letter dated 7 June 2016 for further detail in relation to these issues. Our position remains as set out therein, and we wholly disagree with your position that in these circumstances, where there are very many Claimants and a GLO is anticipated, each individual is nevertheless required to provide particulars of their individual claim at the pre-action stage.
50. We have previously expressed concern about your enthusiasm for this approach, and the likely waste of costs, and we draw your attention to paragraph 4 of the Practice Direction on Pre-Action Conduct which states that “*A pre-action protocol or this Practice Direction must not be used by a party as a tactical device to secure an unfair advantage over another party. Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues.*”
51. It would be wholly unreasonable for you to refuse to agree the scope of the GLO on the basis that we have not provided individual particularisation of each of the Claimants’ claims (i.e. your position as expressed in your 13 October 2016 letter).

B. History of Events

52. We have read your version of Post Office’s involvement in the Scheme and other matters in response to the background matters raised in our Letter of Claim. We accept that you and your client have a greater understanding than us of your client’s involvement in the Scheme, how the Scheme terminated, and other investigations into the matters about which we complain. Whilst we can identify a number of significant issues with your version of events (which we address below), a particular problem we have in responding to any matters relating to Second Sight, is that until your proposals contained in your letter of 13 October 2016, you refused to release Second Sight from their confidentiality agreement. Because of the position you adopted in your Letter of Response and in subsequent correspondence prior to 13 October 2016, we have not been able to ask Second Sight about the version of events set out in your Letter of Response.

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53. This problem is compounded by the restrictive approach you have taken to pre-action disclosure. For example, in relation to training materials, which we requested in our Letter of Claim, your Letter of Response identified that you would only provide us with current Horizon training materials and processes. However, these documents post-date 2015 and therefore give no indication as to the level of training received by Subpostmasters in the period following the introduction of Horizon and underpinning many of the Claimants' claims, as you are aware. We made a further suggestion to you designed to address the objections raised by you in your Letter of Response, (we proposed that you provide materials for a single snapshot year, 2006),⁴⁰ and you have only just responded to this, now opposing our request for different reasons.⁴¹ The consequence is that you have not disclosed any historic training materials at all. You have also failed to provide us with documents which you previously made available to Second Sight and which will plainly be relevant to the issues in this case, purportedly on the basis that "*the documents are stored on an encrypted hard drive to which [Post Office] does not have the password*".⁴² If you are genuinely unable to decrypt the hard drive, then we would expect you to take steps to obtain and provide these documents from other sources.
54. We do not agree the history of events you set out in Schedule 3 of your Letter of Response presents an accurate or complete picture, and there is obvious selectivity and spin in the presentation of material. For the proportionate purposes of this letter, we confine our response to the five "*key corrections*" you suggest to our Letter of Claim, as set out at paragraph 3.10 of your Letter of Response:
- 54.1. Errors in Horizon: You say Post Office has not claimed Horizon is error free and that "*Post Office has always been live to the possibility of errors in Horizon*". This is certainly not consistent with the impression given to Subpostmasters experiencing alleged shortfalls and being required by Post Office to repay those alleged shortfalls in order to continue trading, nor is it consistent with Post Office's approach to investigations. We have addressed these points and the significance of errors in Horizon generally in the Overview section above.
- 54.2. Number of Claims: We already have responded to the points you have made about numbers of Claimants at paragraph 35 above, and very similar points arise in relation to the Second Sight review and Scheme.

⁴⁰ Our second letter dated 25 August 2016.

⁴¹ Your letter dated 13 October 2016.

⁴² Letter of Response, Schedule 1 point 25.

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54.3. Transparency: We do not accept that Post Office has “*sought transparently to investigate the concerns of postmasters*”⁴³. Your highly selective quote from the Second Sight Part Two Report entirely omits the preceding paragraphs which are critical of Post Office’s lack of transparency, as indicated by the introductory words to the paragraph, which you have omitted from the paragraph you do quote. We also refer you to the paper produced by Post Office included at Appendix 1 to the Second Sight Part Two Report as illustrative of Post Office’s lack of transparency in its dealings with Second Sight. For example, in relation to suspense accounts, Second Sight asked a straightforward question as to whether any Subpostmasters could have been charged by Post Office for amounts that became incorporated into suspense account balances, that were subsequently taken into profit by Post Office. Rather than give a straightforward answer to this question (which must be, yes), Post Office produced a lengthy narrative account of processes and obligations on Subpostmasters, which was designed to obscure the real issue.⁴⁴ As above, Post Office has also acted so as to prevent us from speaking to Second Sight in relation to the content of your Letter of Response, and has not provided documents to us which we have reasonably requested.⁴⁵ These actions are the very opposite of what we would expect from a genuinely transparent organisation.

54.4. Support for the Scheme to Full Conclusion: On 10 March 2015, Post Office unilaterally announced the closure of the Working Group and gave notice to Second Sight of the termination of its engagement. We reject your suggestion that because Post Office made provision for payment to Second Sight to complete reports that Post Office’s conduct can be characterised as support for the Scheme through to its full conclusion. Post Office’s actions were not supportive of the Scheme, not least in: (1) refusing to provide information to Second Sight (as above); (2) closure of the Scheme by its own unilateral act (which is a straightforward fact); and (3) fettering of the scope of the Scheme (as below).

54.5. Fettering Scope of Second Sight’s work: On this issue, we refer to paragraphs 2.7, 2.8, 3.1 and 3.2 of the Second Sight Part Two Report, which make very clear that Post Office did fetter the scope of Second Sight’s work. Contrary to Post Office’s position in relation to cases which had resulted in a conviction (recorded at paragraph 3.2 of the Second Sight Part Two Report, and reflected in Post Office’s letters of 10 March 2015),

⁴³ Letter of Response, paragraph 3.10.3

⁴⁴ Initial Complaint Review and Mediation Scheme – Suspense Account, 29 July 2014 and 30 January 2015

⁴⁵ Paragraphs 52 and 53 above.

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there can be no question that the Scheme was intended to encompass such claims, and we refer to the Overview of the Initial Complaint Review and Mediation Scheme which was prepared by the Working Group and agreed by Post Office. This made it expressly clear that all complaints would be considered, including from individuals who had been subject to civil or criminal proceedings. The FAQs included the following ***“What if my case has already been considered by the civil courts and they have given judgment against me? You may put your case through the Scheme even if the Courts have already given judgment against you. What if my case involves a completed criminal prosecution or conviction? You may put your case through the Scheme even if you have already received a Police caution or have been subject to a criminal prosecution or conviction... If at any stage during the Scheme new information comes to light that might reasonably be considered capable of undermining the case for a prosecution or of assisting the case for the defence, Post Office has a duty to notify you and your defence lawyers. You may then choose whether to use that new information to appeal your conviction or sentence.”***

55. For the avoidance of doubt in relation to previous proceedings, we do not agree with the suggestions made at various points in your Letter of Response that Post Office v Castleton [2007] EWHC 5 (QB) provides the correct answer to any of the factual or legal issues raised in the present claim.⁴⁶ It is indeed apparent to us from reading the judgment in that case that Mr Castleton represented himself at trial and in many respects he did not present his case on the law or evidence well, such that it is perhaps unsurprising the judgment went against him. Further, there was no expert evidence put before the Court. The decision of HHJ Richard Havery QC in that case will not bind the Court hearing the present claim. However, since you have raised it and rely upon it, please disclose to us a full set of correspondence, pleadings and witness evidence relating to the claim.
56. We also do not agree that the fact that any pre-action correspondence sent by Shoosmiths did not ultimately result in service of a claim form is in any way indicative of the strength or otherwise of the present claim. However, again in fairness to our clients, since you have raised it as an issue, please disclose to us a copy of the claim form and a full set of your correspondence with Shoosmiths.

Section 4: Relationship between Post Office and Claimants

57. As already noted above, this pre-action correspondence has been helpful in some respects, in that it has begun to clarify the parties respective positions (e.g. as to express and implied

⁴⁶ Letter of Response paragraphs 3.10.1(b), 4.46, and Schedule 3.

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terms) and identified issues which, it appears to be common ground, the parties regard as central to resolution of the dispute, such as the respective rights and obligations of the parties.

58. It would be extremely helpful if further progress could be made in this regard, both immediately following this letter (prior to provision of the draft Generic Particulars of Claim) and thereafter, prior to the GLO hearing. The relationship is plainly central to the issues, the need to imply at least some terms appears to be common ground and the consequences of implication of the terms conceded by Post Office is an obvious matter for clarification (as we request below at paragraphs 83 to 87).

A. Factual Background

59. There are notable errors and omissions in the factual background you have set out at section 4A and Schedule 4 of your Letter of Response. We have substantially addressed many of these points in our Overview section above,⁴⁷ and respond further only to particular issues below where it is constructive and proportionate to do so.
60. Your description of the relationship between individual Subpostmasters and Post Office as “*fundamentally a business-to-business arrangement*”⁴⁸ obscures the reality and the inequality of bargaining position between the parties. Even if Subpostmasters are not technically employees (as you are at pains to emphasise),⁴⁹ many aspects of the relationship between Subpostmasters and Post Office are similar to aspects of the relationship between employee and employer. The common law has long recognised reasoning by close analogy and we feel sure that you would not dispute that. In support of your business-to-business analysis of the relationship, you repeatedly rely on what you say is an appropriate analogy with the operation of a franchise.⁵⁰ We note your client’s case on this point and refer to it further below in the context of the implied duty of good faith.
61. Contrary to your stated position,⁵¹ Subpostmasters are very much required to make long term and expensive commitments when taking up appointment. Subpostmasters have to buy the goodwill of the business from the previous Subpostmaster as well as enter into a contract to purchase or lease premises – including in many cases a linked residential home. Subpostmasters employ assistants, invest in training those assistants, and become tied to

⁴⁷ Esp. points arising from the Letter of Response paragraphs 4.10 to 4.12, and 4.17 to 4.18.

⁴⁸ Letter of Response paragraph 4.5.

⁴⁹ Letter of Response paragraphs 3.2, 4.4, 4.20, and 4.29.1

⁵⁰ Letter of Response paragraph 4.4, 4.24.3 and 4.29.3.

⁵¹ Letter of Response paragraph 4.6.

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employment contacts with those assistants, with consequences including a potential liability to make redundancy payments. We also understand that for a period of time, Post Office subjected new Subpostmasters (such as Mr Bates) to a 25% deduction from their first year's remuneration (although the basis and rationale for this is not clear). These are all costs and commitments, in addition to fit-out costs (which is the extent of your acknowledgement of costs in the Letter of Response).

62. As to your statement that *"Beyond the terms of the Postmaster Contract and the operational instructions provided by Post Office (and compliance with applicable legislation), a postmaster is free to operate in accordance with their own judgement and business interests"*,⁵² this is, in some strictly literal sense, true. However the reach of the contract and operational instructions were very broad indeed (as exemplified by the contractual terms set out at paragraph 53 of our Letter of Claim) such that any residual freedom was limited, being heavily circumscribed by Post Office's contractual powers and the obligations placed upon Subpostmasters. This far reaching control of course included the most basic aspects of operating what you describe as the Subpostmasters' own businesses, namely the requirement that Subpostmasters utilise the Horizon system to carry out all of their business for Post Office, regardless of any difficulties that they may encounter with it.
63. In relation to assistants,⁵³ it is wrong to say that training was under the full control of the Subpostmaster, not least since this overlooks Post Office's contractual obligations to provide Subpostmasters with relevant training materials and processes to carry out training of assistants, as well as the contractual architecture by which (on Post Office's case) the Subpostmasters effectively warranted the performance by their assistants in perfect compliance with all Post Office procedures and the flawless reconciliation by Horizon of transactions effected by them.⁵⁴ Furthermore, we also understand that Post Office provided some training directly to assistants. Yet further, the assistants had access to precisely the same Helpline (with the same issues) as Subpostmasters. We respectfully regard your case in this respect, as well as in others, as somewhat unrealistic.
64. You describe Post Office as having *"no presence in a branch during normal operations and cannot have first-hand knowledge of the transactions effected in the branch"*.⁵⁵ However, it is entirely within Post Office's control to carry out audits and other investigations (into what you describe as completely independent businesses), and of course, your carefully worded

⁵² Letter of Response paragraph 4.7.

⁵³ Letter of Response paragraph 4.8.

⁵⁴ Subpostmasters Contract, Section 15 (as amended July 2006), clauses 7.1.1 to 7.1.3, and prior to this date such terms would clearly be implied.

⁵⁵ Letter of Response, paragraph 4.9.

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statement distracts, in effect if not by design, from the plain and fundamental fact that Post Office at all times has complete access to branch records electronically, via the Horizon system which it requires Subpostmasters to use for all transactions and accounts. As you are well aware, and as we specified above, Subpostmasters have limited access to such data.

65. We specifically note your twin contentions that: (i) *“a shortfall in a branch’s accounts reflects a real loss to Post Office”*,⁵⁶ and (ii) Post Office is entitled to recoup a shortfall in a branch’s accounts from a Subpostmaster even when the root cause has not been identified. Neither is correct. Your approach conflates an alleged shortfall showing in branch accounts on Horizon with an actual loss to Post Office, which is demonstrably wrong. We refer to the Suspense Account Bug you have yourselves described in Schedule 6 to the Letter of Response⁵⁷. It is perfectly clear from what you have described that alleged shortfalls showing in branch accounts in 2011 and 2012 did not represent a real loss to Post Office, because these were entries which had been erroneously generated by Horizon – precisely the Claimants’ case. Nevertheless Post Office (wrongly) sought recovery of those alleged shortfalls from Subpostmasters.⁵⁸
66. We note that in your Letter of Response you say that an investigation began in 2013 and *“Post Office suspended any attempts to recover known losses from affected postmasters whilst the issue was resolved”*⁵⁹. You do not say that Subpostmasters who paid the alleged shortfalls in 2011 and 2012 were repaid these sums. Please confirm the position, including details of when any repayments were made and on what basis. We specifically request disclosure from you of any and all correspondence sent to affected Subpostmasters in relation to the 2011 and 2012 alleged shortfalls, or relating to: (i) recovery action taken (or threatened or sought to be taken) by Post Office in relation to those alleged shortfalls; (ii) any audit carried out in affected branches between 2011 and 2013; and (iii) save as otherwise provided above, documents evidencing how the issue was resolved in relation to each affected branch.
67. It is perfectly clear from this example that not only was Horizon not perfect, but that errors of precisely the type alleged by the Claimants could and did happen.
68. The example in this case further demonstrates your approach to the liability of Subpostmasters to pay alleged shortfalls irrespective of whether there is in fact any loss to

⁵⁶ Letter of Response, paragraph 4.14, also at 4.16.

⁵⁷ Letter of Response, Schedule 6, paragraphs 4.1 to 4.5.

⁵⁸ Letter of Response, Schedule 6, paragraph 4.4.

⁵⁹ Letter of Response, Schedule 6, paragraph 4.5.

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Post Office (because you wrongly conflate allege shortfall and loss) as well as its unfairness. It is contrary to the express terms of the contract and wholly unreasonable. You may contend that whether or not the express terms are unfair and unreasonable as we contend is irrelevant. However, we regard them as clearly relevant, not least in relation to construing the terms *contra proferentem*, identifying whether such terms were sufficiently clearly drawn to the attention of Subpostmasters, considering the scope and purpose of particular contractual powers claimed by Post Office and applying the provisions of the Unfair Contract Terms Act.

69. Research has revealed that the fairness of Post Office's conduct and contractual terms has been considered by the courts before, on an appeal against a strike out and summary judgment. We refer to the decision of the Court of Appeal in 2003 in Lalji v Post Office A2/2003/0623 (19th December 2003), *per* the Vice-President, Brooke LJ:

"On the appeal Mr Davies called in aid section 3(2)(b) of [UCTA]. He said that this was a contract on the Post Office's written standard terms of business by which the Post Office was claiming to be entitled to render no performance at all in relation to its obligation to remunerate Mr Lalji during each month of his suspension. In these circumstances it would be for the Post Office to show at trial that the contractual term on which it relied passed the "reasonableness" test in section 11 of the Act, and this would be essentially a matter for the trial judge to determine. I agree."

70. Sedley LJ agreed, at paragraphs 26 and 27:

"As to the first of these, I see nothing at present in the evidence which justifies the Post Office's resort to the drastic remedy of summary termination. As to the second, it seems to me cogently arguable that clause 19.6 of the contract, which purports to give an unfettered power to forfeit remuneration withheld during a period of suspension, falls foul of s.3(2)(b) of the Unfair Contract Terms Act 1977."

"The Post Office's concession that the power must not be exercised capriciously (I assume in its favour that it will at least be able to pass this test) will not be enough to meet the requirements of the 1977 Act if s.3 applies. How the section operates - whether by avoidance of the offending provision or by reading down - does not have to be determined at this stage. It may well have to be decided, however, at trial."

71. It seems to us important to have regard to the rights and obligations which result from the enforceable express terms (properly construed) and such implied terms as may be

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established. We note that, as is clear from paragraph 27 above in Lalji, Post Office conceded that the power summarily to dismiss could not be exercised capriciously. Please clarify whether that concession is made in these proceedings too, at the same time identifying any other concessions which Post Office would make but which are not made in your Letter of Response. The unfairness of Post Office's approach in insisting that alleged shortfalls all represent actual losses highlights the likely relevance of UCTA.

72. Returning to the issue itself, of whether shortfalls actually represent real losses to Post Office, despite Post Office's failure to give any clear answer to Second Sight on this issue,⁶⁰ it seems clear to us that money which Post Office recovers from Subpostmasters in relation to alleged shortfalls which do not represent real loss to Post Office (such as in the 2011 and 2012 example above), would be held in Post Office's suspense accounts and would, after a 3 year period, ultimately be credited to Post Office's profits. If it is Post Office's positive position that this would not and could not happen, it is important that you now make that clear.

B. Express Terms

73. As already noted above, this pre-action correspondence has been helpful in some respects, in that it has begun to clarify the parties' respective positions and identified issues which, it appears to be common ground, the parties regard as central to resolution of the dispute.
74. We have responded to your position on the nature of the relationship between Post Office and Subpostmasters above, and note the express terms you rely upon in support of your position that Subpostmasters are not employees of Post Office.⁶¹ We do not consider the express terms to be conclusive on this issue; and furthermore, there are certainly express terms which indicate the contrary position.⁶² The true agreement⁶³, not the written contract (sometimes unseen by Subpostmasters), is the source of the parties' rights and obligations.

⁶⁰ As above, Initial Complaint Review and Mediation Scheme – Suspense Account, 29 July 2014 and 30 January 2015.

⁶¹ Letter of Response, paragraph 4.20.

⁶² For example, Section 4, clause 8 which provides that "*The Subpostmaster must do his best to find his own substitute and make all necessary arrangements for his absence... Responsibility for concluding arrangements ... remains with the Subpostmaster concerned*", cf. James v Redcats [2007] IRLR 296 "*You need to ensure that a suitable alternative courier is available to carry out the terms of this agreement when you are unable*", which amounted to personal service. We have also seen Conditions of Appointment dated around March 1998 which included a heading "*Personal Service*", and the following statement: "*It is expected that you will render personal service at the Post Office in order to ensure a high professional and accurate standard of POCL work and to focus on initiatives to grow volume.*"

⁶³ Esp. paragraph 81.1 below.

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(In Autoclenz, the written contracts expressly disavowed any employment relationship in the clearest possible terms and the valeters were entitled to work for competitors.) However, we do not pursue that further as a separate issue here.

75. As to the contractual terms relating to assistants, we have identified Post Office's own obligations in relation to training, above.⁶⁴
76. As to liability of Subpostmasters for losses caused by assistants, the express terms which are relevant are Section 12, clause 12, and then Section 15, clause 2 (which can only sensibly be read in light of the prior Section 12, clause 12).⁶⁵ On a true construction of those terms (1) liability of a Subpostmaster is only for actual "losses" (and not e.g. for an alleged shortfall in branch accounts shown by Horizon which does not represent a real loss to Post Office, as above); and (2) such losses must be "caused by" the negligence carelessness or error of an assistant. We respectfully reject any construction to the contrary.
77. In relation to termination, we agree that Section 1, clause 10 provides an express term by which Post Office can terminate at any time for breach of condition or non-performance of obligation or non-provision of Post Office services, and a right otherwise to terminate on 3 months' notice. However, this express term must be construed in light of the factual matrix and other express terms of the contract, including those at Section 18, Non-Observance of Rules: Appeals Procedure, and Section 19, Offences: Suspension, and the terms we set out at paragraph 53 of the Letter of Claim illustrating Post Office's powers and the extent of its discretion. The operation of Section 1, clause 10 is also subject to implied terms, as we set out below. It would be helpful to know if Post Office would, upon reflection, make any further concessions as to implied terms, as for example conceded in Lalji above.
78. You have referred to Section 1, clause 9 which provides that when a Subpostmaster resigns and disposes of his private business and/or premises in which the sub-office is situated, the person acquiring the private business and/or the premises or exchanging contracts in relation to the same will not be entitled to preferential consideration for appointment as Subpostmaster. We understand that Post Office adopted the same approach where Post Office had terminated the appointment of a Subpostmaster, as we referred to in our Letter of Claim.⁶⁶ This is a further example of the imbalance of power between Post Office and Subpostmaster and informs the interpretation of Contract on the issue of termination.

⁶⁴ Paragraph 63 above.

⁶⁵ Amended in July 2006.

⁶⁶ Letter of Claim paragraph 101.5.

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79. It has come to attention that a number of Subpostmasters were not in fact provided with the Subpostmasters Contract (in full, or in some cases, at all) when they were appointed by Post Office. The same issue arises in relation to “*other contractual documents*”, such as operational manuals which you allege form part of the agreement.⁶⁷ Therefore, in each case it will be for Post Office to prove that the express terms relied upon in any individual case were in fact incorporated into the agreement, particularly in relation to onerous standard terms which Post Office would need to prove were drawn to their attention.
80. We do not agree that the relationship between the parties can be constrained to the express terms identified in your Letter of Response as you suggest⁶⁸ (even with the benefit of the implied terms which you then go on to concede – which we address below). Your threat of adverse costs, if we pursue these arguments, is an attempt to stifle our clients’ reliance on proper principles of contractual construction and interpretation and are wholly inappropriate. We are seeking, through this correspondence, to narrow the issues between the parties and move towards an agreed view of the parties’ respective rights and obligations. We look forward to your further co-operation in that respect.
81. As to the points we have raised, and which you assert to be “*misconceived*”,⁶⁹ we respond as follows:
- 81.1. **True Agreement:** Autoclenz v Belcher⁷⁰ is a Supreme Court authority on the interpretation of contracts and discerning the true agreement between the parties, which may be different from the express terms. The dicta of Lord Clark SCJ⁷¹ are particularly relevant in light of your attempt to rely on the written agreement only

⁶⁷ Letter of Response, Schedule 5, paragraph 1.2.

⁶⁸ Letter of Response paragraph 4.24.

⁶⁹ Letter of Response paragraph 4.24.

⁷⁰ [2011] UKSC 41, [2011] ICR 1157, [2011] 4 All ER 745, [2011] IRLR 820

⁷¹ Lord Clark prefaced these with a reference to the distinction between the cases before the court and ordinary commercial disputes, by reference to the reasoning of Aikens LJ in the Court of Appeal at [92], in the following terms:

"I respectfully agree with the view, emphasised by both Smith and Sedley LJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. ..."

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(emphasis added): "*So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.*"⁷² You seem to be under the misapprehension that we have relied on Autoclenz on the issue of whether Subpostmasters are in fact employees, however the reason we referred to it is in the context of determining the true terms of the contractual agreement. This is obviously a proper issue in these proceedings.

81.2. **Onerous Terms:** Business-to-business contractual arrangements⁷³ are not exempt from the general rule on onerous and unusual terms, and for example *AEG (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 265 demonstrates the application of this principle in a business-to-business context. You are therefore mistaken in your understanding of breadth of application of the Interfoto principle. It is now clear from your Letter of Response that Post Office seeks to rely on express terms which it interprets in a particularly onerous way, for example: Section 12, Clause 12 (so as to hold Subpostmasters liable even when there is no real loss); Section 1, Clause 10 (so as to entitle Post Office to terminate the appointment of an Subpostmaster for any breach without notice, and without cause on 3 months' notice – as Post Office now argues, operating effectively as a limitation of liability clause); and Section 1, Clause 8 (so as to restrict any claim for loss of office to a 3 month period).⁷⁴ All of these terms are onerous terms if construed in the way Post Office contends, particularly in light of the long-term expensive commitments and substantial investment made by Subpostmasters as we have addressed at paragraph 61 above. These terms (and particularly Post Office's interpretation of them) were not fairly and reasonably brought to the attention of Subpostmasters on taking up appointment. If you contend otherwise, please let us know which specific steps you say were taken to do so and on which Post Office relies.

81.3. **Implied Duty of Good Faith:** The Letter of Response denies the applicability of Yam Seng and an implied duty of good faith. It does so expressly by reference to your position that the relationship between Subpostmasters and Post Office is analogous to that of a franchise agreement. Yet franchise agreements are expressly considered in

⁷² Autoclenz v Belcher *supra* at paragraph 20.

⁷³ We have addressed your reliance on this categorisation at paragraph 60 above

⁷⁴ For the avoidance of doubt, the limitation of liability relied upon is not one which would comply with the Unfair Contract Terms Act 1977 and the Claimants will so contend.

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Yam Seng and we draw your attention to paragraph 143 of the judgement of Leggatt J, in which he expressly referred to franchise agreements as the very type of case in which a relational contract might arise. We clearly consider the present cases to be cases in which the relationship is properly characterised as a relational contract, for reasons set out in our Letter of Claim (and indeed in many respects, such characterisation is consistent with obligations Post Office seeks to impose on Subpostmasters, and Post Office's own characterisation of the relationship).⁷⁵ For you to threaten costs orders if this argument is advanced is a patent attempt to shut down a legitimate and meritorious contention which Post Office finds unwelcome. It is also a point upon which your denial is not readily reconcilable with either the terms of the judgment itself or the analogy with franchise agreements upon which you rely.

C. Implied Terms

82. We have responded to your position in relation to Yam Seng and the implied duty of good faith above. Determination of this issue naturally falls within the scope of the preliminary issue which we have proposed above, together with other express and implied terms, their scope and effect.
83. It is significant that you acknowledge a necessity to imply terms into the Subpostmaster Contract. The issues between us are therefore limited to the identification and interpretation of implied terms, and not whether any terms should be implied at all.
84. In relation to the implied terms which you propose,⁷⁶ do you agree that these terms would give rise to some or all of the matters we have set out in our Letter of Claim at paragraph 57.1 to 57.9 and 62.1 to 62.3, and 65.1 to 65.3? It is important that you make your position clear in relation to each of these paragraphs so that we can understand your client's position on these important issues.
85. It is not helpful or in compliance with the Pre Action Protocol for you to confine your response, in relation to these important issues, to "*representative examples*" only. We disagree with the position you have set out in relation to those examples, for reasons we

⁷⁵ For example, compare the Letter of Claim at paragraph 55 ("[The contractual relationship] *required a high degree of communication, co-operation and predictable performance, based on mutual trust and confidence*") with paragraph 4.40 of the Letter of Response ("*The postmaster...should owe the characteristic fiduciary duty of loyalty and the express duty to account. There is no equivalent relationship in the other direction*") – despite then expressly conceding a necessarily implied Necessary Cooperation Term in contract.

⁷⁶ Letter of Response paragraph 4.35.

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have already set out in our Letter of Claim and above, including your erroneous conflation of alleged shortfalls and actual losses.⁷⁷

86. Specifically as to Post Office's obligations to account for transactions and shortfalls, the Claimant will contend that Post Office undertook to supply the Horizon system (as a service to Subpostmasters essential to their business) and to effect, record and account for transactions executed by Subpostmasters.⁷⁸ The Claimants will further contend that Post Office was obliged to provide such services "*with reasonable care and skill*" in accordance with the provisions of section 13 of the Supply of Goods and Services Act 1982. We would therefore invite you to re-consider Post Office's contention at paragraph 4.33.1 of the Letter of Response – not in regard to information held only by Subpostmasters, but rather, in regard to information held by Post Office or Fujitsu on its behalf. In the context of considering the fiduciary duty arising from these obligations, we consider them further below at paragraphs 88 to 93.
87. We will further consider the proper incidents of the implied terms which we have identified in our Letter of Claim prior to service of our draft generic Particulars of Claim.

D. Fiduciary Duties

88. We note your denial that Post Office was subject to any fiduciary duties.⁷⁹ For reasons set out in our Letter of Claim, we maintain that Post Office was subject to a narrow and specific fiduciary duty, arising from having undertaken obligations to effect, record and account for transactions executed by Subpostmasters. An incident of these obligations and the fiduciary duty arising therefrom as the duty including promptly, accurately and candidly to make transactional records available to Subpostmasters where an alleged discrepancy or shortfall is identified.
89. We understand that Post Office takes three points in relation to the fiduciary duty contended for by the Claimants:
- (1) whilst Subpostmasters are fiduciaries of the Post Office (by virtue of the Subpostmasters being entrusted with control of Post Office property without Post Office having immediate oversight), Post Office contends that "*there is no equivalent relationship in the other direction*",⁸⁰

⁷⁷ See paragraph 65 above, *et seq.*

⁷⁸ Letter of Response, paragraph 4.11.

⁷⁹ Letter of Response paragraph 4.39.

⁸⁰ Letter of Response, paragraph 4.40.

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- (2) “*designation of a person as a fiduciary follows from his undertaking the characteristic obligations of a fiduciary*” and “*Post Office undertook no such obligations*”,⁸¹
- (3) “*terms of the Postmaster Contract ... would in any case negate the imposition of such duties*”.⁸²
90. We do not agree that “*there is no equivalent relationship in the other direction*” or that “*Post Office undertook no such obligations*”. Post Office’s analysis of the relationship between it and Subpostmasters is one of a business to business relationship. In that relationship, it is clear that Post Office undertook to supply the Horizon system (as a service to Subpostmasters essential to their business) and to effect, record and account for transactions executed by Subpostmasters.⁸³ The Claimants will contend that Post Office was obliged to provide such services “*with reasonable care and skill*” in accordance with the provisions of section 13 of the Supply of Goods and Services Act 1982. Post Office accepts that it is also obliged to provide information and training⁸⁴ and technical advice and support.⁸⁵ The Claimants will contend that such duties also arose in tort (below).
91. If it is Post Office’s case that it owed no relevant duties whatsoever in effecting, recording and accounting for transactions executed (or apparently executed) by Subpostmasters or doing so with reasonable care and skill, please confirm this.
92. Your Letter of Response contends that express terms would negate such a duty. Please state which terms you are referring to so that we can understand your position.
93. Although you dispute that such a duty in fact arises, we note you have not disputed the factual matters which we have relied upon at paragraphs 70.1 to 70.5 of the Letter of Claim. We regard such matters as uncontroversial, but would welcome your confirmation of that. Please confirm our understanding that you do not dispute these paragraphs of our Letter of Claim.

E. Duty in Tort

94. Contrary to the suggestion in your Letter of Response,⁸⁶ we have not claimed a “*general duty of care in tort*”. We have identified that in addition to its contractual obligations to the

⁸¹ Letter of Response, paragraph 4.41.

⁸² Letter of Response, paragraph 4.41.

⁸³ Letter of Response, paragraph 4.11.

⁸⁴ Letter of Response, paragraph 4.36.1.

⁸⁵ Letter of Response, paragraph 4.36.2.

⁸⁶ Letter of Response paragraph 4.42

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Subpostmasters, Post Office owed Subpostmasters a concurrent duty in tort.

95. Post Office clearly assumed responsibility to Subpostmasters in such a way that a concurrent duty arose in accordance with *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 principles. The contract gave rise to mutual undertakings and the need for cooperation between the parties, not least in relation to the accounting functions carried out and hosted by Post Office, and training and support provided by Post Office, including via the Helpline. Subpostmasters obviously relied on Post Office in these and other respects in which Post Office held itself out as having special knowledge and skills.
96. We disagree that this concurrent duty would run counter to the terms of the Subpostmasters Contract, for the very reasons we have previously identified as to the proper construction of that Contract.

F. Burden of Proof

97. We agree that as a basic principle, it is the Claimants who will bear the burden of proof, to the normal civil standard, that Post Office breached one or more of its contractual or other duties to them.
98. The scope of the contractual duties include the implied terms, which we have identified in the Letter of Claim. These include the implied term that a power conferred by a contract on one party must be exercised honestly and in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably.⁸⁷ They also include the incidents of the implied duty of good faith, including to co-operate with claimants in seeking to identify the possible or likely causes of alleged shortfalls.⁸⁸
99. Your Letter of Response assumes that in order for a Subpostmaster to establish breach of duty by Post Office, it will be necessary for a Subpostmaster to prove "*that a shortfall did not in fact exist or existed only as a result of breach of duty on the part of Post Office.*"⁸⁹ This is obviously wrong. A Subpostmaster would only have to establish the attribution to him or her of an alleged shortfall, in circumstances where Post Office cannot discharge the contractual burden of proof necessary to support its claim that the Subpostmaster is liable for that alleged shortfall.

⁸⁷ Letter of Claim paragraph 60.

⁸⁸ It seems to us that you do not object to this obligation on Post Office, in light of your position at paragraph 4.35.2 and in paragraph 4.47 your acceptance that "*Post Office may in some circumstances have an obligation to support a postmaster's investigation in accordance with the implied duties set out above.*"

⁸⁹ Letter of Response, paragraph 4.48.

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100. Alternatively, a Subpostmaster who establishes breach of duty by Post Office would be entitled to damages on an application of the relevant principles of causation and remoteness. If, for example, a Subpostmaster establishes that Post Office in breach of duty failed to co-operate in assisting him or her to identify the cause of an alleged shortfall, and Post Office wrongfully terminated the Subpostmaster's appointment as a result, it is wrong for Post Office to contend that the contractual burden of proof would be reversed as a pre-condition to the Subpostmaster recovering damages.
101. Further, it is Post Office's position that alleged shortfalls amounted to actual losses to Post Office.⁹⁰ That is also an important issue upon which Post Office will bear the burden of proof. If it is to be Post Office's case that it was lawfully entitled to recover alleged shortfalls from Subpostmasters under Section 12, clause 12 of the Subpostmasters Contract, it will be for Post Office to establish that the alleged shortfalls in a particular case in fact amounted to real "losses" and then that those losses were contractually the responsibility of the Subpostmaster.
102. You have relied on the case of Post Office v Castleton [2007] EWHC 5 (QB) in support of your position that at trial it is the Subpostmaster who bears the burden of proof and is bound by accounts he renders unless he can show the account was made unintentionally and by mistake. However, as above,⁹¹ Castleton is a first instance decision and is not a binding authority; Mr Castleton was a litigant in person and it is apparent he did not pursue his claim in the same way as the Claimants do in this case; and it appears that there was no independent expert evidence before the Court. We do not consider that a Court hearing full legal argument and being presented with evidence which is properly tested would reach the same conclusions as to legal rights and obligations as were reached by the HHJ Richard Havery QC in that case. The accounting relationship between Subpostmasters and Post Office is far more nuanced than the judgment in Castleton would suggest, and whilst Subpostmasters are an accounting party in relation to the cash they hold, the accounting system in place was set up by Post Office, and it is Post Office, as opposed to the Subpostmaster, that has control of electronic records of transactions, access to all underlying data and the ability to remotely access and alter transactions. We also note that the implied terms and duties for which we contend, as well as economic duress and unconscionable dealing, appear not to have been argued at all in Castleton.
103. You have also referred to Section 12, clauses 4 and/or 5, and Section 22, clause 3, of the Subpostmasters Contract as purported bases on which you say Post Office is entitled to

⁹⁰ Letter of Response, paragraph 4.14 and 4.16.

⁹¹ Paragraph 55 above.

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claim, as “*compensation*”, any amount declared by a Subpostmaster in an account which is in fact in excess of the cash on hand. We disagree that those clauses give rise to any such claim, and Post Office would be required to prove both breach and loss. It would in any event be a bar to these claims if the breach of the Subpostmaster was brought about by Post Office’s own breach of duty. It is also clear that Subpostmasters were often under economic duress in taking the decisions that they did. Furthermore, the Claimants will rely upon unconscionable dealing by Post Office constituted by the conduct which they allege.

104. If it is your case that Post Office relied on Section 12, clauses 4 and/or 5, and/or Section 22, clause 3 in contemporaneous correspondence with Subpostmasters in relation to accounts rendered by them, please make that clear and provide us with the relevant correspondence. It is our understanding that Post Office sought recovery of alleged losses from Subpostmasters on the basis of Section 12, clause 12 of the Subpostmasters Contract, which we have already addressed above. In order to be entitled to rely on that provision, Post Office must establish (1) an actual loss; (2) caused by a Subpostmaster’s negligence, carelessness or error (or that of an assistant). Your contention that in some way there should be a presumption that a Subpostmaster is responsible for any alleged shortfall⁹² would place a burden on a Subpostmaster to prove a negative (i.e. that the alleged loss was not in fact a loss to Post Office, or if it was, it was not caused by his or her negligence, carelessness or error) is absurd, in circumstances where Subpostmasters do not have access to all of the information which would be required in order to do so and/or are unable effectively to interrogate the information that is available. Your construction is contrary to the express words of Section 12, clause 12, and obviously runs counter to the principle of *contra proferentem*.

G. Governing Law and Jurisdiction

105. We have corresponded with you separately in relation to these issues. There is no issue in relation to jurisdiction – the parties have agreed to proceed on the basis that the applicable jurisdiction for all of these claims is England and Wales. In relation to governing law, we have made our position clear that we consider English law applies to contractual and non-contractual causes of action. If you intend to contend otherwise, please now make your position clear.

⁹² Letter of Response paragraph 4.50.3

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Section 5: Factual Allegations

106. We have responded above to your complaints of allegedly inadequate particularisation,⁹³ we quite properly rely on Second Sight's reports as a proper basis for our allegations, and the way in which you have sought to disavow all parts of Second Sight's reports which are critical of Post Office.⁹⁴ Your approach to causation of loss⁹⁵ is also wrong for reasons we have addressed above.⁹⁶
107. For the avoidance of any doubt, we do not see any reason why Second Sight's reports should not be admissible in these proceedings as you seem to suggest, although you have identified no basis for your position.⁹⁷
108. We are not in a position to respond fully to the points you have raised in relation to Second Sight's expertise, because you have, to date, prevented us from speaking to them in relation to these issues raised in your Letter of Response.⁹⁸ However, it is clear to us that your attempt to avoid the substantial criticisms made by Second Sight of Post Office's investigations (or lack thereof) and approach to prosecutions (see paragraph 25.1 to 25.24 of the Second Sight Part Two Report) as "*inexpert speculation*" is an inappropriate attempt to undermine Second Sight, and ignores the evidence which was obviously available to Second Sight in relation to these issues.
109. As to your criticisms that Second Sight's Part Two Report lacked supporting evidence or reasoned analysis,⁹⁹ we disagree that this is in any way a reasonable summary of the position. It is also clear that Second Sight's attempts to obtain relevant evidence were in a number of respects, impeded by Post Office's own conduct, and ultimately, Post Office's unilateral decision to terminate the Scheme.

A. Defects in Horizon

110. Your Letter of Response proceeds on a false footing. To be clear, our Letter of Claim is not predicated on the particular Second Sight quote as to their concerns about a systemic flaw,

⁹³ See paragraphs 28 and 44 to 51 above

⁹⁴ See paragraphs 27 and 54.3 above

⁹⁵ For example Letter of Response paragraph 5.1.2

⁹⁶ See paragraph 94 above

⁹⁷ Letter of Response paragraph 5.2

⁹⁸ See paragraph 3 above

⁹⁹ Letter of Response paragraph 5.5

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which you set out in your Letter of Response and then critique.¹⁰⁰ (We have responded above as to why your characterisation of our case as alleging a “*systemic flaw*” in Horizon software is wrong.¹⁰¹)

111. Our Letter of Claim sets out our case that there were a significant number of software defects and problems which required rectification and rebuilding of transaction data in branch,¹⁰² and that Subpostmasters did not know how discrepancies and alleged shortfalls had come about - rather Fujitsu IT specialists were engaged by Post Office to search through hundreds of thousands of lines of coding in order to resolve issues which had been identified. It will plainly be necessary for factual and expert evidence to be obtained in relation to the operation of Horizon, defects, problems and bugs, and their potential to generate alleged shortfalls.
112. We have addressed above the significance of the Suspense Account defect as to Post Office’s position that an alleged shortfall in a branch account is equivalent to an actual loss to Post Office – as your own account of this issue demonstrates, this is plainly not the case.¹⁰³
113. In our Letter of Claim we asked you for internal notes, memoranda, correspondence, emails and briefing documents regarding errors, bugs or problems in the Horizon system.¹⁰⁴ You have declined to provide these, on the basis that it would require a full disclosure exercise, which you say is not reasonable or proportionate at this stage.¹⁰⁵ It is obviously not possible for us to provide further particularisation prior to receiving these documents from you, and our position is therefore fully reserved pending disclosure and expert evidence in relation to the same.
114. In Schedule 6 to your Letter of Response, you provide an account of three particular defects which you say have affected Horizon, and which you describe as Calendar Square / Falkirk, Payments Mismatch, and Suspense Account Bug. It appears to be Post Office’s case that it can identify precisely which Subpostmasters were affected by each of these defects. At paragraph 5.12 of your Letter of Response you say that “*No evidence has been presented to suggest that these issues had any effect on the Claimants*”. It is plainly reasonable for Post Office to identify which branches were affected by the defects referred to in the Letter of Response and also whether any Claimants were so affected. Please therefore co-operate

¹⁰⁰ Letter of Response, paragraphs 5.10 to 5.11.

¹⁰¹ See paragraph 20 above.

¹⁰² Letter of Claim paragraphs 119 to 123.

¹⁰³ See paragraphs 65 to 68 above.

¹⁰⁴ Letter of Claim paragraph 169, point 7.

¹⁰⁵ Your letter dated 13 October 2016, paragraphs 8.4 to 8.7.

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and provide this information to us. Please also provide a copy of any communication(s) sent to Subpostmasters in relation to these defects.

115. We note that you provide information in relation to these three defects on the express basis that *“Post Office does not claim that these have been the only defects in Horizon”*.¹⁰⁶ In the context of Post Office's lack of transparency in relation to Subpostmaster complaints, and the vigour with which it has expressed it will defend these claims, we anticipate that this is a significant point. Certainly the matters set out in our Letter of Claim indicate that there were further and numerous problems. If you are not willing to provide information in relation to these problems, we will pursue it as part of the disclosure process.

B. Data integrity and remote access

116. We set out in our Letter of Claim the statements made by Richard Roll, a Fujitsu technician between 2001-2004, which clearly indicate that changes to data were being made *“through the backdoor”* and without Subpostmasters' knowledge.¹⁰⁷ We also identify that there was a frequent need to *“rebuild”* branch transaction data (giving rise to the obvious possibility for error to be introduced in this way), and there were a large number of coding errors which required fixes to be developed and implemented.¹⁰⁸
117. The response in your Letter of Response is in general terms, and to the effect that there are controls and processes in place to protect the integrity of data, and that there are four defined ways in which Post Office or Fujitsu on Post Office's instruction, can *“influence”* those accounts.¹⁰⁹ It is notable that you have chosen not to engage with the points we have made about rebuilding transaction data or the large number of coding errors.
118. One of the ways you admit that accounts can be *“influenced”* is by what you describe as *“balancing transactions”*. You say that Fujitsu *“has the capability to inject a new “transaction” into a branch's accounts”* and that *“[balancing transactions] have only been in use since around 2010”*, and have only been used once since then.¹¹⁰
119. You also say that *“Database and server access and edit permission is provided, within strict controls (including logging user access), to a small, controlled number of specialist Fujitsu (not Post Office) administrators. As far as we are currently aware, privileged administrator*

¹⁰⁶ Letter of Response, Schedule 6, paragraph 1.8

¹⁰⁷ Letter of Claim paragraph 44.4

¹⁰⁸ Letter of Claim paragraph 119

¹⁰⁹ Letter of Response paragraphs 5.15 to 5.16

¹¹⁰ Letter of Response paragraph 5.16.3

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*access has not been used to alter branch transaction data. We are seeking further assurances from Fujitsu on this point.*¹¹¹ It is evident from this statement that Fujitsu has the ability to alter branch transaction data in this way (and we understand from your Letter of Response that this has always been the case).

120. In light of these two admitted ways in which branch accounts could be altered by Fujitsu (acting on behalf of Post Office), we do not understand on what basis Post Office made the statement that *"to be clear, Horizon does not have functionality that allows Post Office or Fujitsu to edit or delete the transactions as recorded by branches"*¹¹² and similarly in response to the BBC Panorama programme that *"Transactions as they are recorded by branches cannot be edited and the Panorama programme did not show anything that contradicts this."*¹¹³ In light of the matters now admitted in your Letter of Response, these statements were untruthful. We invite Post Office to provide a candid explanation.
121. Despite the evident importance of this issue, you have not provided us with any further information as to the Fujitsu "assurances" that you said that you were seeking. Please disclose a complete copy of the communications you have had in relation to this matter with Fujitsu. Further, it is difficult to understand Post Office's position that this access was strictly controlled, if Post Office does not know how it was used, and therefore please provide us with a copy of all Fujitsu logs and records in relation to administrator access to branch accounts or which may have affected branch accounts.
122. Against that background, the requirements you seek to impose on a Subpostmaster to *"point to a particular transaction that they believed had been created, edited or deleted by Post Office without their knowledge"*, and to identify such matters by their own monitoring,¹¹⁴ are completely unreasonable, and all the more so when Post Office has publically concealed the true position as to the capability for transactions to be edited without Subpostmasters' knowledge.

C. Training

123. We agree that whether training provided by Post Office to a particular Subpostmaster was in breach of Post Office's express and implied duties is an issue which is fact sensitive to each Subpostmaster; however, it is clear that many Subpostmasters have raised similar issues in relation to the inadequacy of training they received, as we indicated in our Letter of Claim.

¹¹¹ Letter of Response paragraph 5.16.4

¹¹² Paragraph 2.8 of Reply of Post Office to Second Sight Part Two Report published in April 2015.

¹¹³ BBC Panorama – Our response [<http://corporate.postoffice.co.uk/bbc-panorama-our-response>]

¹¹⁴ Letter of Response paragraphs 5.17 and 5.18.

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Your position that Post Office did not breach its duties to any of the Claimants¹¹⁵ is surprising in the circumstances.

124. We are in any event unable to respond to your case that training provided was adequate and in compliance with Post Office's duties (or any of the matters you set out in relation to how training has changed over time) when you have refused to provide us with any documents relating to training other than those which are currently in use.¹¹⁶ We do not accept this position is reasonable, for reasons we have previously expressed.
125. As a minimum, please now provide us with training records for the named Claimants. If it is your position that this would be too onerous at this pre-action stage, please provide us with records in relation to the first 25 named Claimants on the Claim Form, by way of a sample.
126. Our position in relation to training is otherwise as expressed in our Letter of Claim.¹¹⁷

D. Access to Information

127. We have set out the Claimants' position as to the ability of Subpostmasters to access information and interrogate it effectively in our Letter of Claim and also addressed this issue further above.¹¹⁸ The account you give in your Letter of Response is inconsistent with the experience of many Claimants who found themselves faced with unexplained shortfalls and discrepancies, which they were unable to resolve and Post Office did not provide them with effective assistance in this regard. Transaction data outside the 42/60 day period was not routinely made available to Subpostmasters even when they specifically requested it, and the experience of many Subpostmasters who called the Helpline in relation to alleged shortfalls was that they were simply asked how they wished to "*make good the loss*".
128. In our Letter of Claim we set out our understanding that Post Office is able to retrieve a certain amount of Horizon transaction data under the terms of its contract with Fujitsu, but there is a limit to the data that can be retrieved without triggering further payments. Post Office therefore has a financial incentive to refrain from providing Subpostmasters with Horizon transaction data.¹¹⁹ You responded on this point in Schedule 6 to your letter, by referring us to clause 25.10 of the Fujitsu Contract (which you have disclosed to us in heavily redacted form, obscuring all charges), which you say "*entitles, but does not compel, Fujitsu*

¹¹⁵ Letter of Response paragraph 5.19.

¹¹⁶ Paragraph 53 above.

¹¹⁷ Letter of Claim, in particular paragraphs 85 to 87

¹¹⁸ Paragraphs 22 and 104 above

¹¹⁹ Letter of Claim paragraph 118

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*to charge for the "reasonable and demonstrable costs" incurred by Fujitsu in supplying documents, subject to certain further restrictions. Whilst there can be a cost associated with recovering historic transaction data, these files are obtained by our client where appropriate to do so".*¹²⁰ Your response indicates that Post Office does indeed have the financial incentive we identified in our Letter of Claim, and also that it exercised a discretion whether to request documents from Fujitsu to provide to Subpostmasters at their request or otherwise.

129. So that we understand the position, please provide answers to the following questions:

129.1. What are the circumstances in which Post Office determines it is "*appropriate*" or not appropriate to recover historic data?

129.2. Does Post Office agree that it refused Subpostmasters access to archived data on the basis of cost?

129.3. What would be the typical cost of obtaining archived data for a Subpostmaster seeking to challenge an alleged shortfall?

129.4. Please disclose to us any document which identifies how Post Office determines the appropriateness of obtaining archived data in an individual case, and any record of any instructions to Post Office employees, as to when such data should be provided or refused or other guidance in this respect.

E. Support

130. We have fairly identified the Claimants' case as to the lack of effective support made available to them via the Helpline and in relation to the conduct of investigations.¹²¹ It is clear that whether Post Office's conduct was in breach of duty will be an issue in individual claims and will be dependent both on generic evidence (for example as to Post Office's instructions to Helpline staff and investigators), and evidence specific to individual cases. We note that you maintain there was no breach of contract in any case on any basis, even where you evidently agree there is scope for criticism of Post Office.¹²²

131. The overall account you have given in your Letter of Response as to the way in which support was provided paints a rosy picture but does not fit the reality of what was

¹²⁰ Letter of Response, Schedule 6, paragraph 5.3

¹²¹ Letter of Claim paragraphs 90 to 91 and paragraphs 22, 24 and 31 above.

¹²² Letter of Response paragraph 5.47.1

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experienced by individual Subpostmasters. Your claim that Post Office *“thoroughly analysed call logs in all of the investigated cases [and] ... the absence of evidence of repeat escalations and/or repeat calls on the same issues indicated that, generally speaking, callers to the NBSC were content with the advice given”*¹²³ is not well founded, as of course a lack of repeat escalations and repeat calls is entirely consistent with Subpostmasters receiving advice which did not help them to resolve their problems, and difficulties getting through to the Helpline at all – points we made in our Letter of Claim.¹²⁴ In any event, please disclose the call logs and Post Office’s analysis which you rely upon in relation to this issue.

132. We note in particular that you deny Claimants were told they were *“the only one”* experiencing problems, on the basis that *“Post Office has seen no documentary evidence to substantiate this claim”*¹²⁵. This is an unusual response, as it is hardly surprising that there might be a lack of documentary evidence in the Claimants’ possession on this issue. However, as you can reasonably anticipate, the Claimants will address the issue in their witness evidence.
133. As set out in our Letter of Claim, we consider it inherently unlikely that such a statement would have been disseminated with the frequency it was without a level of coordination between the Post Office and Helpline operators. However, your characterisation of our case as *“preposterous”* is noted, as is your very specific denial that *“For the avoidance of doubt, Post Office has never given an instruction to any of its staff to tell a postmaster that they were the “only one” experiencing a problem with Horizon known to be also affecting other postmasters.”*¹²⁶
134. In relation to investigative support, for reasons we have already addressed, we fundamentally disagree with your interpretation of Section 12, clause 12 of the Subpostmaster Contract,¹²⁷ and we do not accept what you say on the issue of instructions given to investigators to disregard errors in Horizon.¹²⁸
135. We do note with interest your description of the role of the FSC to *“work alongside branches to help identify the cause of a discrepancy”*, and the suggestion that if the FSC and NBSC are unable to resolve the issue *“field support teams may get involved”* and *“Post Office may*

¹²³ Letter of Response paragraph 5.47.6

¹²⁴ Letter of Claim paragraphs 90-91

¹²⁵ Letter of Response paragraph 5.47.8

¹²⁶ Letter of Response paragraph 5.47.10

¹²⁷ See paragraph 21 above

¹²⁸ See paragraph 24 above

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send out specialist teams to offer on-site support".¹²⁹ Please disclose instructions, policies and guidance relating to the work of these FSC, field support teams and specialised teams, as what you have described is very different from the experience of the Claimants.

F. Criminal investigations and prosecutions

136. We note the matters you set out in relation to criminal investigations and prosecutions, and respond to you further in relation to this topic in Section 6, under heading E, below in relation to malicious prosecution.

Section 6: Heads of Claim

137. In your Letter of Reply, you assert that all causes of action pursued by the Claimants, with the exception of breach of contract (and related breach of fiduciary duty and tortious duty of care), are spurious and will only result in an increase in costs.¹³⁰ While, undoubtedly, those other causes of action necessarily require pleadings, evidence and hearings of greater scope, they are far from spurious.
138. As demonstrated by the Letter of Claim, and the paragraphs below, there are solid, reasonable factual and legal bases for bringing claims pursuant to these causes of action and we reject your contentions that allegations such as deceit are improper. These causes of action have differing (if at times overlapping) requirements and have prospects of success that are independent of one another, with differing principles as to remedies. It is perfectly proper for the Claimants to advance these causes of action in the alternative, as much as it is Post Office's prerogative to "*adopt a vigorous defensive posture*"¹³¹ in respect of the same.
139. Further, the 'additional' causes of action are necessary as they ensure that the entire cohort affected by Post Office's conduct in relation to Horizon is encompassed. One of the objectives of Group Litigation is to litigate "*the action as a whole in an effective manner*".¹³² In resolving this action against Post Office "*as a whole*", it is appropriate to include all issues arising, particularly those that are closely related to or corollaries of the overarching themes of the dispute, namely: (i) the introduction of Horizon; (ii) the reliability of the same; (iii) the alleged shortfalls identified by the system; and (iv) Post Office's conduct specifically as it

¹²⁹ Letter of Response paragraph 5.52 to 5.53

¹³⁰ Letter of Response, paragraphs 6.3 to 6.4.

¹³¹ Letter of Response, paragraph 6.4.

¹³² White Book Commentary at 19.10.0.

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relates to Horizon and those shortfalls. This naturally leads into issues such as those captured by causes of action like harassment and malicious prosecution.

140. It follows that these proceedings, particularly given the context of Group Litigation, are far more nuanced and intricate than simple breach of contract claims. Accordingly, the Claimants, quite reasonably, will not limit their claims in the manner you have suggested.
141. Nevertheless, without prejudice to the above and the merits of these causes of action (as set out in the Claim Form and Letter of Claim), we wish to engage constructively with you so as to narrow the issues between the parties at this stage of the proceedings. We recognise that the value of this pre-action correspondence has already been demonstrated by your agreement as to the necessary implication of the Stirling v Maitland and Necessary Cooperation Terms. We will continue to seek to engage constructively with you to narrow the scope of dispute particularly as to the relationship between the parties.
142. As to that, we agree with your view that the first issue between the parties encompasses the *"duties, meaning and effect of the Postmaster Contract (including any implied terms or related agency or fiduciary duties or related duties of care in tort) in relation to the provision of Horizon, the procedures for operating Horizon, training in relation to Horizon, support in relation to Horizon and liability for shortfalls identified by Horizon of cash or stock in a branch."*¹³³ This issue is the central feature in this case and, indeed, is the prism through which all of the other causes of action fall to be viewed. Other causes of action are likely to be alternatives (even if not mutually exclusive alternatives) to the foregoing.
143. Against this background, we would propose that a sensible way forward in managing this litigation would be to address and determine those matters above at an early stage, staying all other causes of action pending such determination.¹³⁴ We return to this later in this letter in relation to the GLO.

A. Breach of Contract

144. Establishing relevant breaches of duty will necessarily depend on resolution of the logically anterior questions as to the existence, scope and extent of the relevant duties – hence our proposal at paragraph 18 above that those matters be determined as preliminary issues.

¹³³ Letter of Response, paragraph 10.8.1.

¹³⁴ See paragraph 18 above and 206(21) below.

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145. It must be clear to you from our Letter of Claim that duties contended for are those which the Claimants allege were breached. The factual basis upon which the Claimants complain that Post Office failed in its duties to them is also clear from the Letter of Claim.
146. The point which you raise as to precisely how the matters alleged breach the duties owed by Post Office to Subpostmasters underscores the advantages of early determination of the preliminary issues which we have identified as to those duties.
147. As we have noted in paragraph 17 above, we propose to address this by category of conduct capable of breaching each relevant duty in the Generic Particulars of Claim.
148. By way of example, at the most basic level, if Post Office's construction of the contract as to the burden of proof is wrong and the burden of proof was upon Post Office, the Claimants will contend that Post Office was not entitled to operate the contract (and require repayment of unsubstantiated alleged shortfalls) on the basis which it claims to have done. In those circumstances, it follows, as night follows day, that the Claimants will claim losses in the amounts wrongfully demanded by and paid to Post Office as a result.
149. Another obvious example would be a failure to provide adequate training as addressed at paragraph 86 of our Letter of Claim, would obviously amount to a breach of a duty to provide adequate training, or other relevant overarching duties including the implied terms which you admit. A further such example would be a failure to investigate the existence or causes of alleged shortfalls properly or at all, as addressed at paragraphs 92 to 100 of our Letter of Claim, which would clearly be a breach of a duty properly and fair-mindedly to investigate such alleged shortfalls.
150. As to the bringing of criminal prosecutions, whilst it may be held that an actual prosecution itself fell outside the scope of any contractual duties owed by Post Office, a decision to treat a Subpostmaster as dishonest may amount to a breach of the implied term of trust and confidence, or terms as to good faith and necessary co-operation. This, in turn, is likely to cause or contribute to a failure to investigate properly or fair-mindedly. Each and all of the above (and/or a failure to disclose or have regard to the possibility of errors in or generated by Horizon) would foreseeably result in prosecutions being brought, when they would otherwise be unlikely.

B. Harassment

151. We consider the facts of *Nadeem v Shell UK* [2014] EWHC 4664 (QB)¹³⁵ to be readily

¹³⁵ Letter of Response, paragraph 6.14.

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distinguishable from those of the Claimants' cases, however the extract from the judgment on which you rely underlines the importance of determining the parties' contractual rights before determination of the harassment claims (which again reinforces the good sense of determining the preliminary issues which we have proposed at an early stage).

152. We make clear our position that requests for payment which are contractually due can indeed constitute harassment, and *Nadeem v Shell UK* is not authority for the broad proposition to the contrary for which you contend in arrangements between so called commercial parties, and would certainly not exclude a Subpostmaster from establishing harassment by Post Office on this basis.
153. For the avoidance of any doubt, such demands are not the only matters relied upon by Claimants as establishing a course of conduct amounting to harassment, and other relevant conduct would include, for example, threats to terminate a Subpostmaster's appointment and/or advice or encouragement to resign and threats and/or pursuit of civil and/or criminal proceedings.

C. Deceit

154. You say you have "*no idea what representations Post Office is alleged to have made*".¹³⁶ Please refer to paragraphs 138 to 140 of our Letter of Claim where you will find this information, namely (1) the express representations made to Claimants that they were the "*only one*" experiencing difficulties with Horizon, and (2) implied representations that Post Office investigators had not excluded the possibility of errors in the Horizon system.
155. The basis on which we have alleged these representations to be false must also be perfectly plain to you: (1) there were in fact many Claimants experiencing difficulties with Horizon and dealing with alleged shortfalls which they were unable to resolve (other than by simply accepting the amount and paying it to Post Office) – as set out in detail in the Letter of Claim; and (2) Post Office investigators had in fact been instructed to exclude the possibility of error in the Horizon system.¹³⁷
156. As to Post Office's knowledge or recklessness, we made perfectly clear in our Letter of Claim that we made allegations of deceit on the basis of the second limb in *Derry v Peek*.¹³⁸ Reliance is a case sensitive issue, but obviously would include Subpostmasters who paid alleged shortfalls to Post Office in reliance on representations that they were the only ones

¹³⁶ Letter of Response, paragraph 6.21

¹³⁷ Letter of Claim, paragraphs 36 and 153, and paragraph 24 above.

¹³⁸ Letter of Claim, paragraph 9

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experiencing problems – again, this was identified in the Letter of Claim.¹³⁹ Loss is also a case sensitive issue, but as a matter of approach would encompass all losses flowing from Post Office's breach.

157. Your threat to report this firm to the SRA is entirely unwarranted. We have received instructions and reviewed material which we reasonably believe gives rise to an actionable claim in deceit against Post Office. We are not instructed to discontinue the deceit claim and do not agree to do so. We do propose that the deceit claim is however stayed pending determination of the preliminary issue we have identified.
158. We agree it will be necessary for individual Claimants to identify whether they claim to have relied on representations giving rise to a claim for deceit, and we consider this is something which can properly be managed as part of the GLO and potentially the provisions to be made in respect of Schedules of Core Information (SOCIs).

D. Misfeasance in Public Office

159. We have considered the objections you raise to this claim, and confirm that the Claimants do not intend to pursue it.

E. Malicious Prosecution

160. We do maintain that a claim for malicious prosecution can properly be brought by Claimants who were the subject of civil actions by Post Office. We do not agree your interpretation of the judgment in Crawford Adjusters (Cayman) Ltd v Sagikor General Insurance (Cayman) Ltd which you say means that "there can be no liability unless a claimant has brought civil proceedings for a predominant purpose other than that for which they were designed",¹⁴⁰ because the section of the judgment which concerns the test of predominant purpose on which you rely is in relation to the tort of abuse of process, not malicious prosecution.
161. In relation to prosecution of criminal actions, we agree that a claim cannot lie in malicious prosecution against Post Office where a Subpostmaster has been convicted and the conviction still stands. However there are a number of Claimants who were prosecuted but not convicted, as you recognise, and also as you know, there are 30 cases amongst the 198 Claimants which are being reviewed by the Criminal Cases Review Commission.
162. In terms of case management, we deal with this below from paragraph 196.

¹³⁹ Letter of Claim, paragraph 5.8 footnote 3

¹⁴⁰ Letter of Response paragraph 6.34.

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F. Unlawful Means Conspiracy

163. We fairly set out the basis on which the Claimants allege unlawful means conspiracy in our Letter of Claim,¹⁴¹ making clear that those allegations are subject to disclosure. We do not agree these claims can be simply dismissed as without merit or superfluous to the other claims. We agree that these claims may sensibly be stayed pending determination of the preliminary issue we have proposed.

Section 7: Loss and Damage

164. We agree that Claimants who are successful on liability will then need to establish causation and recoverable loss – as required by the relevant cause of action.¹⁴² That is uncontroversial. The broad categories of loss which we identified in our Letter of Claim were intended to indicate the nature of the losses claimed, rather than the circumstances of individual Claimants. For example, the full or precise extent by which a given Claimant's reputation is tarnished by an accusation of dishonesty in the local community in which they have been working (usually for many years) is not likely materially to improve Post Office's understanding of the complexion of that head of loss in this litigation. We respond to the particular points which you have raised below.
165. We agree and accept that causation will be an important issue in this case. However, for the reasons set out below, we do not agree that this is *"likely to result in [Claimants] having very little recoverable loss"*¹⁴³ where those Claimants successfully establish wrongful conduct by Post Office. The very nature of the matters said to constitute such unlawful conduct (e.g. requiring payment or making good of alleged shortfalls, misleading Subpostmasters as to the basis upon which such shortfalls were being investigated and wrongful termination of engagement) all involve the likely infliction of substantial loss and damage to the Subpostmaster.
166. As to termination at will, we disagree with your contention at paragraph 7.4 (in the context of Mr Bates, but relied upon by Post Office generally) that:

"Post Office was entitled to give notice of termination at will, whether its reasons were good or bad. There can be no claim that the termination was

¹⁴¹ Letter of Claim paragraphs 153 to 154.

¹⁴² Contrast for example, recovering damages for breach of contract with damages at large for deceit or unlawful means conspiracy.

¹⁴³ Letter of Response, paragraph 7.3.

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unlawful and no claim on the footing that his contract would have continued any longer than Post Office wanted it to.” [emphasis added]

167. This amounts to a contention that: (a) Post Office was entitled to use this power capriciously, arbitrarily or even to discourage Subpostmasters from challenging the accuracy of Horizon; and (b) if Post Office acted unlawfully, it has the power to limit its liability¹⁴⁴ to a 3 month notice period.
168. As above, Post Office also relies upon Section 1, Clause 8 to the effect that Post Office is free to terminate (even wrongfully) without any obligation to pay compensation for loss of office.¹⁴⁵
169. Taking these two clauses together makes good the summary (at 167 above) of Post Office's case as to the exclusion or limitation of its liabilities to Subpostmasters. These terms will fall foul of UCTA, just as Sedley LJ held would the “*unfettered power to forfeit remuneration withheld during a period of suspension*” in Lalji.
170. Furthermore, these terms appear to compound yet further the extraordinary imbalance of relational power between Post Office and the Subpostmasters – indeed, that is effectively Post Office's positive case, namely that it has all the power and even if it acted unlawfully, the Subpostmasters would have limited, if any, redress available to them under Post Office's standard contract terms.
171. There are three immediate answers to this contention that Post Office has effectively excluded liability for any such damages beyond the 3 month period of contractual notice:-
- (1) The power to give contractual notice was not exercisable otherwise than for the purpose for which that power was conferred – certainly not for the purpose of precluding those harmed by unlawful conduct of Post Office from recovering damages.
 - (2) Exercise of that power was subject to implied terms – such as those conceded in this case and in Lalji (above) and/or those advanced by the Claimants – such that it would not be available to Post Office for the purpose now contended.
 - (3) The specific effect of the 3 month termination clause for which Post Office contends, would not pass the reasonableness test in UCTA, particularly section 3,¹⁴⁶ in

¹⁴⁴ It is implicit here that the losses to which both Post Office and Subpostmasters refer are those ongoing losses (i.e. not prior alleged shortfalls wrongfully attributed to Subpostmasters) to which the 3 month notice period is relevant.

¹⁴⁵ Letter of Response, paragraph 4.20 (at 4.20.3) and then paragraphs 7.9.2 and 7.9.3. See paragraph 81.2 above.

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circumstances in which Post Office seeks to use the 3 month termination clause to exclude liability for breach of contract, permit a performance of Post Office obligations substantially different from what is expected and/or allow no performance at all of the whole or any party of a contractual obligation. This rule applies where one of the contracting parties is a business (as Post Office contends) contracting on the other's written standard terms (as Post Office contends). The wide interpretation¹⁴⁷ of the phrase "*written standard terms*" is more than wide enough to capture the terms in the present case. Furthermore, the specific effect of the 3 month termination clause for which Post Office contends was not drawn to the attention of Subpostmasters as required by the Interfoto principle.

172. Alternatively, the formal provision for 3 months' notice did not reflect the true agreement under which Subpostmasters were engaged, on the basis that the true agreement was that the 3 months' notice provision would not normally be used by Post Office, in that it would not be used to defeat Subpostmasters' reasonable expectations arising from their investment in the business and service to Post Office.
173. For the avoidance of doubt, the Claimants do challenge (and will challenge at trial) the reasonableness of the terms relied upon by Post Office as having the effects for which Post Office contends in answer to these claims.

A. Financial Loss

174. As a matter of principle, it is wrong for you to proceed on the basis that a Subpostmaster who paid an alleged shortfall that was wrongfully attributed to him or her by Post Office would have a claim for loss only in the sum of the actual amount repaid.¹⁴⁸ Losses sustained by Subpostmasters in availing themselves of the necessary sums in order to effect such payments will also be recoverable (for example, losses suffered by way of early redemption penalties in interest-bearing accounts and insurance policies). Damages at large may also include all damages that the court thinks it just that Post Office should pay.
175. We disagree that Post Office can never be liable for post-termination losses where a Subpostmaster has resigned – if the resignation was caused or induced by Post Office's breach(es) of duty or vitiated by economic duress or unconscionable dealing, then losses will include post termination losses. For example, this may arise where Post Office has

¹⁴⁶ Further or alternatively, section 13 of UCTA.

¹⁴⁷ See: St Albans City and District Council v International Computers Ltd [1996] 4 All ER 481.

¹⁴⁸ Letter of Response, paragraph 7.8.

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suspended a Subpostmaster pursuant to onerous and unfair terms, breached its implied duty to co-operate by failing to provide adequate information and/or failing to carry out an adequate investigation, and a Subpostmaster has resigned as a result. Given the points which we have made about economic duress above, it will immediately be clear to you that the actions of Subpostmasters in such circumstances require careful appraisal and, in any event, the mere fact that a Subpostmaster has resigned will be no answer to a claim for damages for anterior breach of duty causing such resignation.

176. As to your position that any claim for ongoing loss of remuneration (or related business loss) in any case will be limited to the minimum contractual notice period of 3 months,¹⁴⁹ again, we disagree for the reasons set out above.
177. As to devaluation in the sale price of a business as a consequence of unlawful acts by Post Office, we also disagree with your contentions.¹⁵⁰ There is no reason in principle why a Subpostmaster should not recover losses in that respect. The practical points which you make are true of many properties and businesses and the courts are used to making sensible value assessments, usually with the benefit of evidence of suitable comparators. As to the points of principle (and the limitation of any liability) we do not accept your analysis on this issue for reasons we have already outlined, and if it is Post Office's case that it also had a wholly unfettered power to refuse to appoint a person acquiring the retail business, the Claimants will identify that as a further onerous and unusual term which ought not to be upheld and/or which contributed to the acute relational imbalance to which we have referred above. Please clarify (1) whether Post Office claims to be able to refuse to appoint a purchaser as a new Subpostmaster, without objectively reasonable grounds for so doing; (2) whether Post Office accepts any implied terms affecting or circumscribing that discretion; and (3) whether Post Office concedes, in particular, that the exercise of any power in this respect is subject to the implied terms conceded in the Letter of Response and/or the obligation not to act capriciously (see Lalji, above).

B. Stigma and/or Reputational Damage

178. In relation to the principle of recoverability of damages for stigma and reputational damage in contract, we refer you to Malik v Bank of Credit and Commerce International SA [1998] A.C. 20, which provides a proper basis for a recovery under this head arising from Post Office's conduct in characterising Subpostmasters as dishonest, causing foreseeable financial loss to them in the form of loss of trade and/or prejudice of future employment prospects.

¹⁴⁹ Letter of Response, paragraphs 7.9.2 and 7.9.3.

¹⁵⁰ Letter of Response, paragraph 7.9.4

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179. Whereas we agree that the Court of Appeal in *Lonrho Plc and others v Fayed and others* (No. 5) [1993] 1 WLR 1489 held that damages for reputational harm are not available in unlawful means conspiracy, we do not agree there is any general restriction in English tort law restricting recovery of these types of damages to defamation only – the decision in *Malik* leaves open the possibility for stigma claims to succeed in tort. Is it Post Office's case that it owed Subpostmasters no relevant duty in tort, with regard to statements made by Post Office, by words or conduct?
180. Your characterisation of the circumstances in which Subpostmasters have been suspended and terminated and thereafter prosecuted on the basis of alleged dishonesty as “*private commercial matters*” is surprising and appears totally unrealistic. The very act of suspension or termination creates an immediate and inevitable need to explain matters to the local community. Doubtless you would expect Subpostmasters to give a truthful account of Post Office's actions when asked – certainly, a locum or replacement Subpostmaster would also face such questions and be expected to tell the truth.
181. You are entitled to raise failure to mitigate should you seek to do so in any individual case. However, we do not accept that an accused Subpostmaster, giving a truthful answer when asked, would be acting unreasonably – as Post Office would have to establish.
182. Accordingly, we do not agree to restrict this head of damage to malicious prosecution claims only.

C. Distress and Related Ill Health

183. We do not dispute your summary of the position in tort, namely that damages for distress are recoverable in claims for deceit, malicious prosecution and harassment.
184. The position as to the recoverability of distress for breach of contract is not as straightforward as you suggest on the basis of *Addis v Gramophone* [1909] AC 488 which has been the subject of considerable judicial criticism, and it is plainly arguable that the particular contractual relationship between Post Office and Subpostmasters would give rise to an entitlement to claim damages for general distress arising from breach. The breach of the implied terms of trust and confidence and similar terms (on the Claimants' case) or Necessary Cooperation (on Post Office's case) invite a careful assessment of the content of those duties. It is the content of those duties which will determine whether or not, on the facts, there is liability for causing significant distress or ill-health.
185. As to personal injury claims, we agree it would be helpful for Claimants to identify whether they pursue such claims at an early stage, and propose to include provision for this in the SOCI.

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D. Bankruptcy

186. We did not intend to suggest that the status of being bankrupt was itself a recoverable head of loss. However, as you recognise, bankruptcy may cause particular financial loss (such as disadvantageous realisations of assets and trustee's costs), distress and reputation damage, which is why we considered it helpful to identify it in our Letter of Claim.

E. Prosecutions

187. Our position is as for bankruptcy, above. In short, there are obvious financial and other losses which are likely (if not certain) to flow from a prosecution (for example, withdrawal of credit, and loss of employment prospects and earning capacity) – they are on any view foreseeable. It was therefore sensible to identify these, as we did for bankruptcy.

F. Community or Custodial Sentences

188. We set out below at paragraph 199 our proposals for dealing with claims brought by Claimants who have been successfully prosecuted by Post Office, namely that these claims should presently be stayed pending the decision of the CCRC. We understand that there are now 30 such claims before the CCRC. As you implicitly accept, if the convictions of Claimants are overturned, these are perfectly proper losses to be pursued.

Section 8: "Barred Claims"

A. Limitation

189. If Post Office raises limitation as a defence to the claims of individual Claimants then you are correct to identify that we will seek to rely on section 32 of the Limitation Act 1980. The basis on which we have alleged concealment in the Letter of Claim is clearly set out, and we do not agree with Post Office's professed transparency on these issues for reasons addressed earlier in this letter.
190. Furthermore, the following contention at paragraph 8.5.1 is deeply flawed and wrong:

"You say that Post Office's investigators disregarded problems with Horizon – a point we have addressed above. We cannot see how ignoring an issue amounts to a deliberate act of concealing information from your clients. By ignoring an issue as you suggest, Post Office would not have had the information in the first place in order to subsequently conceal it."

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191. Post Office was clearly aware of the matters upon which the Claimants rely including that (for example) potential errors in or generated by Horizon were being overlooked, ignored and/or concealed.

192. As you will be aware, there are three limbs to section 32(1) of the Limitation Act, which provides as follows:

“(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

193. The allegations of deceit (in this case, Derry v Peek, second limb deceit) and unlawful means conspiracy fall within section 32(1)(a). Deliberate concealment for the purposes of section 32(1)(b) is defined as including *“deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time [as amounting] to deliberate concealment of the facts involved in that breach of duty”*. The restitution claimed in the Claim Form is relief sought from the consequences of a mistake, in the payment of alleged shortfalls. For these reasons, we will contend that section 32 is obviously applicable to all these claims, not just the 50 which you identify in the Letter of Response.

194. Furthermore, the fact that the (changing) position as to the remote alteration¹⁵¹ of transaction records by Fujitsu (for and on behalf of Post Office) was concealed and remained unknown is of absolutely central significance to allegations that alleged shortfalls did not represent shortfalls which were contractually attributable to the Subpostmasters. Indeed, we are unaware of any criminal court being made aware of this possibility during the course of prosecuting Subpostmasters – a matter which might obviously inform any fair appraisal of the existence of a reasonable doubt. Please confirm that we are correct and that no criminal court was ever informed of this possibility. Please also confirm whether or not any civil court has been so informed – we presently believe not.

¹⁵¹ Letter of Response, paragraph 8.5.4(d), and see paragraphs 118 to 121 above

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195. As to paragraph 8.6, we do propose to ascertain precisely what was said to Professor McLachlan and to obtain such contemporaneous documents as we can. Please confirm whether or not Post Office is aware that Professor McLachlan raised concerns as to the manner in which Post Office had investigated Seema Misra's case and provide any documents which you hold relating to Professor McLachlan's involvement in that (or any other) case.

B. Criminal Cases

196. We expect that there is scope for agreement as to how to deal with cases in which there have been criminal convictions.
197. We agree that, as a starting point, it is correct that where an issue has been decided in earlier proceedings, it is binding on the parties in future litigation.¹⁵² However, issue estoppel is properly confined to estoppel to issues which are *res judicata* in civil actions between the same parties,¹⁵³ which we address below.
198. The point which we think you are seeking to advance in relation to criminal cases is abuse of process on the basis of a collateral attack on the conviction, as you suggest in paragraph 8.11. The principle is always subject to exception where fresh evidence would probably have an important influence on the result of the case (though it need not be decisive) or entirely changes the aspect of the case determined in the criminal proceedings. The abuse of process principle in this context means "*the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.*"¹⁵⁴ You will appreciate from the nature of the allegations made by the Claimants that it is a central part of their case that important facts concerning the alleged shortfalls and the basis upon which Post Office had investigated them were concealed from them. We regard this as highly material to your contention that bringing these cases would amount to such an abuse of process, particularly in the light of the new evidence from Second Sight, Post Office's admission that transactional records could be altered by Fujitsu (cf. Post Office's previous statements to the contrary)¹⁵⁵ and the pattern of evidence emerging from the cases as a whole, that would not have been available in individual cases.

¹⁵² Letter of Response, paragraph 8.10.

¹⁵³ Hunter v Chief Constable of the West Midlands Police [1982] AC 529, at 540H–541A

¹⁵⁴ Hunter at 541B *per* Lord Diplock

¹⁵⁵ paragraphs 118 to 121 above

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199. Rather than pursue these issues at this stage and given that a number of the cases which you have identified are presently before the CCRC, we would suggest that the parties agree that all claims in which a Claimant has been convicted of a criminal offence relating to an alleged shortfall be presently stayed, pending the outcome of the reviews being undertaken by the CCRC. The parties will then revisit this issue at that point.
200. If Post Office agrees with this approach, it will be necessary to make consequential amendments to the draft GLO accordingly and we will seek to co-operate with you in order to agree those.

C. Settled Cases

201. We are considering the issues you raise in relation to the 6 Claimants you identify, who settled their claims with Post Office as part of the Scheme. The legal bases upon which the settlements may be set aside are the deceit which we have alleged (amounting to fraud, for these purposes) persisting in the course of settlement negotiations¹⁵⁶ and/or mistake, unconscionable dealing or duress.
202. On any view, this is an issue which affects a small number of Claimants and it would presently not be reasonable or proportionate for Post Office to seek strike out of these claims at this stage.

D. Previous Civil Proceedings

203. If Post Office raises *res judicata* or issue estoppel in response to any individual case on the basis of previous civil proceedings we will consider it. Please provide us with a copy of the pleadings and judgment in relation to each of the Claimants you identify as having been the subject of previous civil proceedings.

Section 9: Counterclaims

204. We note Post Office's position in relation to the pursuit of counterclaims in relation to allegedly outstanding shortfalls which it has apparently been content thus far not to pursue. It is difficult to see what the rational basis is for any decision to pursue such amounts as counterclaims now, especially as this is a matter which is likely to cause financial uncertainty to individual Subpostmasters and potentially deter them from joining or continuing in the

¹⁵⁶ The test is whether misstatements were in some way material to entering into the settlement, such that knowledge of *some* problems with Horizon is no answer for Post Office: Haywood v Zurich Insurance Co Ltd [2016] UKSC 48

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group – perhaps that is the intention. We invite Post Office to reconsider its position (in the light of the concerns regarding victimisation below), such that Post Office would only rely upon its counterclaims in the event that the Claimants' claims were successful.

205. In any event (1) in many cases such counterclaims would clearly be time barred and (2) we have previously set out why the contractual interpretation for which Post Office contends it has a right to recover alleged shortfalls is wholly flawed. We would welcome a considered response in relation to these issues.

Section 10: GLO and Case Management Issues

206. The procedural history is:

- 206.1. we sent you a draft GLO on 17 June 2016;
- 206.2. you responded with a draft on 15 July 2016 raising certain objections;
- 206.3. also on 15 July 2016 we sent you our proposed paragraphs in relation to costs to be inserted into the draft GLO;
- 206.4. we made an Application for a GLO and enclosed a revised draft GLO (taking account of points you had raised in your 15 July 2016 letter) on 26 July 2016;
- 206.5. in your Letter of Response you have made some further proposals in relation to (1) defining the common or related issues¹⁵⁷ and (2) scope of the GLO,¹⁵⁸ and you also said that you would provide a draft Schedule of Information if we wished, albeit you said it would make more sense for you to first see our response to your letter;
- 206.6. we specifically asked for your proposals in relation to Schedules of Information in our letter dated 11 October 2016, but in your letter of 13 October 2016 you declined to provide them at this stage, albeit you said you would "*give the topic further thought pending [our] response*".

207. Please find enclosed an updated draft GLO (and a track changed version showing changes between this draft and the draft we filed with our Application Notice). We explain below our position in relation to each paragraph of this draft, including addressing where there may be any remaining dispute between us:

¹⁵⁷ Letter of Response paragraph 10.1

¹⁵⁸ Letter of Response paragraphs 10.10 to 10.16

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- (1) Paragraph 1 identifies the scope of the GLO. Your proposed amendments as set out in the draft you provided on 15 July 2016 are not agreed. They are not clear or easy to understand (your paragraph (a) does not make sense), and the way in which they link to the GLO issues (your paragraph (b)) creates unnecessary confusion and complexity, not least because we all anticipate that the GLO issues may need to be refined - on your draft this would change the scope of the GLO). It is important that the scope of the GLO is clear and easy to understand and easy to be applied e.g. by a district judge in a County Court who may not have detailed knowledge of these proceedings. We amended the draft we filed with our Application Notice from that we previously provided to you, to make absolutely clear that it is only individuals making claims in relation to alleged shortfalls who fall within scope. The objection you make in your Letter of Response that our drafting would "*bring into scope every dispute our client may have with any of its 10,000+ postmasters*" is therefore evidently not the case.¹⁵⁹ Please consider the draft we have proposed carefully. We invite you to agree it.
- (2) Paragraph 2 refers to the GLO Issues. The draft you provided on 15 July 2016 proposed deleting this paragraph because you referred to the GLO Issues as part of the scope of the GLO at paragraph 1. As above, we do not agree with your approach to paragraph 1, hence our paragraph 2 should also stand. We have added "*for the purposes of CPR 19.11(2)(b)*" which you suggested in relation to paragraph 7.
- (3) Paragraphs 3, 4, 5 and 6: we are agreed in relation to these paragraphs.
- (4) Paragraph 7 identifies the GLO issues. As above, we added the wording you proposed "*for the purposes of CPR 19.11(2)(b)*" in our paragraph 2. We do not consider that the parties could amend the GLO issues as specified in the order without the permission of the Court, accordingly we have not accepted your proposed wording here, but rather have proposed adding "*by order of the Court*".
- (5) Paragraph 8 defines what is meant by lead case. This paragraph was included in the draft Order we sent to you on 17 June 2016. The draft you provided in response with your letter of 15 July 2016 deleted this paragraph, but provided no explanation for doing so. Our letter of 15 July 2016 also proposed cost sharing provisions which referred to lead cases. We included paragraph 8 and our cost sharing provisions in our draft Order which we filed with our Application Notice seeking a GLO. In the evidence in support we referred to the possibility of determining the litigation on a lead claimant / test case basis (paragraph 66), and proposed the selection of lead cases as a proportionate, expeditious and fair resolution of the issues (paragraph 70). We simply don't understand your objection to paragraph 8 of our draft Order. This wording is

¹⁵⁹ Letter of Response paragraph 10.11.

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entirely standard and is also necessary for the purposes of the cost sharing provisions. Please agree it. (For completeness, we referred to claimants possibly being selected as lead claimants in our letter of 11 October 2016. Your letter of 13 October 2016 stated *"the possibility of identifying lead claimants and presumably therefore running a number a number of test cases, has never been raised previously by you, nor is part of the GLO you are seeking, nor is it mentioned in the supporting evidence to the application"*. As is apparent from the matters we have set out above, you are entirely wrong about this.)

- (6) Paragraphs 9 to 11 identify the Management Court, Managing Judge and Managing Master. Your objections raised in your 15 July 2016 letter were on the basis that you were then seeking transfer of the proceedings to the Commercial Court. We understand from the fact you have not raised this in any correspondence after 11 August 2016 that you are no longer pursuing transfer, and therefore we anticipate these paragraphs are now agreed.
- (7) Paragraph 13 refers to future claims. We did not include the sentence which you objected to on 15 July 2016 in the draft order which accompanied our Application Notice. We therefore anticipate this paragraph is now agreed.
- (8) Paragraph 14. You identified a typo in our draft which referred to "Managing" instead of "Management" which we have now corrected.
- (9) Paragraph 16. Your objection is to the words *"or similar"* after Letter of Claim. There will no doubt be cases where an individual intimates an intention to make a claim but does not comply with the Pre Action Protocol such that the letter is technically a *"Letter of Claim"*. Please be reasonable and agree our wording.
- (10) Paragraph 17. We are agreed as to the substance of this paragraph. We propose 23 February 2017 (i.e. 4 weeks from the date of the GLO hearing).
- (11) Paragraph 18. We are agreed.
- (12) Paragraph 19. Previously in correspondence we had proposed reviewing and updating the register every 3 months, whereas you proposed every 1 month. The draft Order we filed with our Application Notice proposed 2 months as a sensible compromise on this. Please confirm you agree. An update every month as you propose will only introduce complexity and costs. Also 14 days service thereafter is also more than adequate (7 days is unnecessarily short), please confirm you now agree.
- (13) Paragraph 20. We have updated the draft to reflect your proposal in relation to the date by which the Defendant may give written notice of objection, and therefore understand we are now agreed.
- (14) Paragraphs 21 and 22. We are agreed.

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- (15) Paragraph 23. We propose 2 months, reflecting paragraph 19 above. Please confirm you agree.
- (16) Paragraphs 24 and 25 are agreed.
- (17) Paragraph 26. We agreed your proposed addition of reference to form N251 (as per the draft order we filed with our Application Notice.). Otherwise our disagreement as to the terms of this paragraph reflects our disagreement as to the drafting of paragraph 1. It is important that the standard minimum requirements are clearly understood by all parties. For the reasons we set out in relation to paragraph 1, we maintain that our approach is far preferable in this respect, and invite you to agree.
- (18) Paragraph 27. We took into account your proposed reference to a signed statement of truth in the draft order we filed with our Application Notice. Please confirm we are now agreed.
- (19) Paragraph 28. Provision for the parties to agree an extension of time by consent, and for consent not to be unreasonably withheld, is entirely standard in this type of order. Please agree it.
- (20) Paragraph 29. We are agreed.
- (21) Paragraphs 30 and 31. We included paragraphs relating to generic statements of case in the draft Order we filed with our Application Notice. We have proposed an amended version of these paragraphs to reflect our proposal that the parties' contractual obligations, agency and related fiduciary duties be sensibly addressed as preliminary issues. Please consider our proposals and let us know if they are agreed.
- (22) Paragraph 32. You have not sent us any comments on our cost sharing provisions (sent to you on 15 July 2016, and also as included in our draft order filed with our Application Notice). We therefore understand you have no objection to them, but please confirm.
- (23) Paragraph 33. The normal order in relation to publicity is that costs follow the event, but if you maintain that they should be reserved then we are willing to agree this in order to achieve progress on the drafting of the order.
- (24) Paragraph 34. We consider it reasonable for Post Office to compile this information, which you say is not in one database, but we anticipate must be held in a reasonably accessible and manageable format. If it is on more than one database, we are happy to receive copies of the relevant parts of those databases. If that is not possible, then please provide us with the relevant information in paper format, or separate lists for civil and criminal claims (or any other sensible division). Please provide us with more information about what you can sensibly provide to us in order to reach agreement in relation to this paragraph.

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- (25) Paragraph 35. We are agreed as to the substance of this paragraph. As per the draft filed with our Application Notice we propose a cut-off date 6 months after the date of the Order, and a final date for entry of claims on the register as 6 weeks thereafter, i.e. 26 July 2017 and 6 September 2017 respectively.
 - (26) Paragraph 36. An order for extensions of time in the form we have proposed is a standard form order and will avoid the need for unnecessary applications in relation to short extensions where there is no dispute between the parties. Please agree it.
 - (27) Paragraph 37. We are agreed.
 - (28) Paragraphs 38 and 39. As above, we understand you are no longer pursuing transfer to the Commercial Court, therefore the substance of these paragraphs are agreed. The date of these CMC should sensibly relate to other agreed steps in these proceedings, therefore we wait to hear from you in relation to our other proposed dates before proposing dates for these CMCs.
 - (29) Schedule 1 GLO Issues. We have taken into account the proposals in your 15 July 2016 letter, your Letter of Response, and also the matters which we have raised in this letter. We proposed a revised draft which we hope can be agreed.
 - (30) Schedule 3 Schedules of Information. You have not engaged with us in relation to our proposals. It is important that you provide us with any proposed amendments, for the reasons we set out in our letter dated 11 October 2016, and we now ask for your reasonable proposals as a matter of urgency. As indicated above, we propose adding to the list details of any personal injury claim which the claimant pursues.
 - (31) Schedule 4. We are considering appropriate wording in relation to publicity, and will send our proposals to you in the next 14 days.
208. We note your invitation to meet to discuss the GLO and any points of disagreement, but it seems to us that it should be possible for you to agree to the draft we have proposed, and we ask that you do so. Specifically in relation to defining the GLO issues, we caution that it is inevitably difficult to identify GLO issues with complete precision prior to case statements being served, the GLO issues can be reconsidered as is expressly contemplated by the drafting of Schedule 1, and therefore it is unlikely to be profitable to engage in a prolonged debate on precise wording of the issues at this point.
209. In your letter of 13 October 2016, you specifically ask us to explain the grounds on which non-Subpostmasters (i.e. Crown Office employees and assistants) are bringing their

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claims.¹⁶⁰ Crown Office employees bring claims in contract (under a true construction of their agreement with Post Office), and also the non-contractual duties which we have identified, and assistants will also bring these non-contractual claims. There may be unusual cases where individuals were not appointed as Subpostmasters but contractual duties arose by implication. These individuals should properly fall within the scope of the GLO, because the issues which arise in their cases are common or related issues with those that arise in the claims being brought by Subpostmasters.

210. In your 13 October 2016 letter, you also take issue with claimants who have traded through companies,¹⁶¹ and suggest that the claim should be brought by the company rather than the Subpostmaster in his or her individual capacity, and on that basis suggest we have “*pleaded inaccurate claims, and signed a statement of truth to this effect, as the correct party to the litigation was known to be a company but joined to the proceedings as an individual*”. As must be obvious to you, these individuals, even if they contracted as a company, also have claims in their individual capacities. However, we agree, it may also be necessary to join associated companies as additional claimants, which we will consider.

Section 11: Non-Victimisation

211. You state that Post Office “*is happy to make it clear that it has no intention of victimising any postmaster because they have brought proceedings such as this against it*”.¹⁶² We find this difficult to understand in the circumstances we have outlined above i.e. Post Office is proposing to pursue hitherto forgotten counterclaims against Claimants in relation to alleged shortfalls which it had previously been content not to pursue – the only change is that the Subpostmaster has become a party to these proceedings.
212. We infer from your carefully worded statement (confined to Subpostmasters who have brought proceedings) that Post Office is not willing to give any assurances as to how any employees or contractors of Post Office or Fujitsu, who may give assistance to the Claimants in these proceedings, will be treated. Please confirm whether this correct.
213. We do not repeat the points we have made in previous correspondence on the issue of assurances, but it is clear that the current position is both unclear and unsatisfactory.

¹⁶⁰ Letter dated 13 October 2016 at paragraph 2.4.4

¹⁶¹ Letter dated 13 October 2016 at paragraphs 6.1 to 6.5.

¹⁶² Letter of Response, paragraph 11.1.2

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Section 12: Disclosure and Information Requests

214. We have previously responded to you separately on these issues and also addressed them above.¹⁶³ Your position in refusing to provide disclosure at this stage in relation to obviously important issues is obviously likely to result in the need to amend statements of case following disclosure when it is provided, and consequently increased costs.
215. Please can you confirm that Post Office has informed Royal Mail and Fujitsu of the need to preserve documents in relation to this litigation.

Section 13: ADR

216. We note your client's position and it is clear from the way it is expressed that Post Office has a closed mind to mediation as a means of resolving the present claims. The authorities show that Post Office's position will expose it to additional costs risks. There has been no mediation of any legal case such as the present proceedings. The Mediation Scheme which Post Office set up and disbanded was of a different type entirely. For the avoidance of any doubt, we believe that considerable progress towards resolution of this dispute could be made by use of ADR and, in particular, mediation. This would, at a minimum, be likely to assist the efficient resolution of the proceedings by focusing and narrowing the issues between the parties, even if no overall settlement were to be achieved. However, we would expect there to be real chances of reaching a settlement by the use of mediation and would invite Post Office to re-consider its stance on this issue.
217. It would be helpful to know what Post Office's position is on this point as soon as possible and it will certainly be necessary to have a clear idea of it by next month so that sensible consideration can be given to its inclusion or exclusion from directions to be given at the GLO hearing in January.

NEXT STEPS

A. *Second Sight Protocol*

218. The protocol you proposed in relation to Second Sight in your letter dated 13 October 2016 is entirely unreasonable and unworkable. By way of obvious example:

¹⁶³ Paragraph 53 above.

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- 218.1. **Parties and binding contract:** What is required is a release from Post Office to Second Sight from any duties of confidentiality to which Second Sight may be subject. Your suggestion we as a firm enter into a binding contact with Post Office¹⁶⁴ is highly unusual, wholly unreasonable, and we do not agree it.
- 218.2. **No application to modify protocol:** We cannot possibly agree to your proposal at paragraph 2.3. Whatever arrangement we may reach in relation to Second Sight, it must be open to the parties to seek to modify that arrangement if appropriate at a future date.
- 218.3. **No provision of documents by Second Sight:** Your proposal at paragraph 3.1.2 (and your definition of documents in paragraph 1.2) means that Second Sight would not be able to give us any document of any description for any propose. This is entirely unreasonable.
- 218.4. **Single point of contact:** There is no good reason for you to require us to have a single point of contact at Second Sight. We wish to be able to speak with Ian Henderson and Ron Warmington, and there is no reason why we should not speak to each of them individually.
- 218.5. **Excluded categories of information:** Your proposed exclusions at 3.1.4 (a) to (d) are far too broad, which is particularly concerning given your attempt to prevent us from ever applying to modify the provisions of the protocol, above. Information concerning actual or contemplated civil or criminal prosecutions should only be excluded to the extent it is privileged, as Post Office's conduct in relation to this issue clearly falls within the scope of the contemplated proceedings. There is also no reason why information relating to Subpostmasters who are not Claimants should be excluded, and it may well be the case that non Claimants are illustrative of a point which Second Sight are aware of in relation to a particular issue. The only proper exclusion is information which is privileged. We set out our proposals in relation to this below.
- 218.6. **Use of information:** We agree to treat information provided to us by Second Sight in accordance with our normal professional obligations. That is all that is sensibly required.
- 218.7. **Privileged materials:** We agree that if Second Sight discloses documents or information to us which we reasonably believe to be privileged we would not

¹⁶⁴ Protocol parties, and paragraph 2.2.

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suggest that privilege had been waived by Post Office in the same, we would return any such documents to Second Sight, and we would not seek to rely on the documents or information in these proceedings. There is no need for us to enter into a contract in respect of our normal professional duties.

218.8. **Costs:** There is no need for an indemnity by us to Post Office in relation to any costs relating to Second Sight. Obviously we were not proposing that Second Sight's time speaking with us would fall within the scope of any contract for work previously agreed between Post Office and Second Sight.

218.9. **Data protection:** We are well aware of our statutory obligations in relation to data protection, and your proposals are unreasonable and unnecessary.

219. We propose a straightforward release by Post Office to Second Sight of any confidentiality obligations other than in respect of privileged material. We are willing to make arrangements for Second Sight to have independent legal advice in relation to the identification of privileged material. Please confirm that you will co-operate with us reasonably in this respect, so that we can speak with Second Sight about the matters raised in your Letter of Response, and avoid the need to raise these issues with the Court.

B. CPR 17.2 Application

220. We have considered the proposal in section 5 of your letter dated 13 October 2016, together with the draft Consent Order. The substance of your proposed Consent Order aligns with the draft proposed by us on 9 September 2016 in relation to a notional claim date of 2 August 2016, save that you wish to add provision "*In the event that a court finds the Order made ... unenforceable*" for Post Office to be at liberty to apply to restore its application to strike out, and (presumably for that purpose) you wish for your strike out application to be stayed rather than dismissed.

221. We cannot agree to your proposed draft, as it would be unduly onerous and uncertain for the Claimants concerned. We consider your refusal to agree to our draft, and to co-operate with us in proposing a consent order in those terms to the Court in an agreed and straightforward way, to be unreasonable. Unless you actively oppose the proposed Consent Order, we see no basis for separate written submissions to the Court.

222. The reality is that if the Court does not consider itself able to make the Consent Order in the terms we have proposed, it won't do so, therefore your application won't be dismissed. If the Court does make the Order, the Claimants must have the certainty of knowing that Post Office won't at a later date seek to revive its application (we would consider it to be estopped from doing so in any event).

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223. We have provided an explanation as to why the Court can make such an Order, and further "clarification" from us as you continue to seek is not necessary. If you wish to identify an authority to say that the Court cannot make such an order then you should do so. However we consider the position to be clear, the Court can make such an order, and since we are agreed as to the pragmatism of such an order, we should apply for such an order to be made by consent.
224. In these circumstances, we propose providing an agreed covering letter to be submitted to Senior Master Fontaine, requesting approval of the Order in the terms as we sent to you on 9 September 2016. Please confirm that you are now agreeable to this course of action.

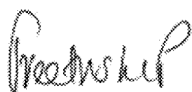
C. Requests for Clarification and Information

225. Please respond to the requests we have made for clarification and information in this letter at paragraphs 13, 18, 24, 55, 56, 66, 71, 72, 77, 81.2, 84, 91, 92, 93, 104, 105, 114, 120, 121, 125, 129, 131, 135, 177, 179, 194, 195, 200, 203, 204, 205, 207, 212, 215, 219 and, 224 above within 14 days.

D. Revised draft GLO and Draft Generic Particulars of Claim

226. Please respond to our revised draft GLO, enclosed.
227. As above, we anticipate being able to provide you with draft Generic Particulars of Claim by 1 December 2016.

Yours faithfully



Freeths LLP