

FREETHS

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28 April 2016

Our Ref: JXH/1684/2113618/1/KL

Dear Sirs

BATES & OTHERS v POST OFFICE LIMITED – GROUP ACTION LETTER PURSUANT TO THE PRACTICE DIRECTION ON PRE-ACTION CONDUCT

Introduction

1. We act on behalf of the Claimants listed on the Claim Form which was issued in the High Court, London on 11 April 2016 (Claim number HQ16X01238), a copy of which was sent to you, not by way of service, as requested on 18 April 2016. We also act on behalf of a substantial number of other individuals who are likely to be joined as Claimants in the action.
2. We write to you further to our recent correspondence and in the spirit of the Practice Direction on Pre-Action Conduct ('the Practice Direction'). We wrote to you on 19 April 2016 to explain the reasons for issuing protective proceedings, prior to sending this letter of claim.
3. You subsequently wrote on 26 April confirming, inter alia, that you were awaiting this Letter of Claim.
4. The Post Office has dealt with Subpostmasters on the basis that Horizon (including the computer system in Post Office branches, and all the accounting and training processes around it) enables Subpostmasters to account accurately for the transactions they undertake in their branch¹, when in truth that was materially incomplete or inaccurate and there were significant shortcomings and errors in that system (extending from inadequate training and support through to inadequate consideration of the reliability of Horizon's indications of apparent shortfalls and failure to identify the true cause of those). As a result of Post Office's conduct and approach in this regard, many Subpostmasters have been subjected to unlawful treatment by the Defendant causing them significant financial losses (including loss of their business and property), bankruptcy, prosecutions, serving community or custodial sentences, distress and related ill-health, stigma and/or reputational damage. The concerns

¹ This position has been reflected in Post Office's public statements as well as in its statements to MPs concerned about Post Office's treatment of Subpostmasters.

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raised by MPs or former MPs such as James Arbuthnot, and by the BBC Panorama programme provide background to this claim.

5. The proposed claim therefore concerns:
 - 5.1. the relationship between the Post Office and its Subpostmasters (and some others, including Crown Office employees (also described herein as **'Subpostmasters'** unless specified otherwise));
 - 5.2. the relative power imbalance and asymmetry of information² in the relationship as a whole, driven by the express terms of Post Office's standard contracts, Post Office's operation of its business and approach to its dealings with Subpostmasters;
 - 5.3. the vulnerability of Subpostmasters, in all the circumstances;
 - 5.4. the training and support (including the helpline) provided to Subpostmasters by the Post Office;
 - 5.5. the reliability and accuracy of Horizon;
 - 5.6. errors, problems and shortcomings in the Horizon system (including software, hardware, training and support) causing or contributing to transaction discrepancies and anomalies (particularly alleged "shortfalls") or the risk thereof;
 - 5.7. the ability of ICL/Fujitsu (Post Office's agent) remotely to alter branch transactions and data and Post Office's concealment of the same from Subpostmasters;
 - 5.8. Post Office's approach to: consideration of alleged shortfalls and causes thereof, its responses to Subpostmasters seeking help³, audits, investigations, referrals for prosecution, prosecutions⁴ and plea bargains⁵, seeking recovery (including through restraint orders⁶) as well as the exercise of other powers of Post Office; and
 - 5.9. issues arising from Post Office holding Subpostmasters responsible for alleged shortfalls (according to Horizon) – with consequences ranging from making up those shortfalls from their own savings, to distress (and related illness including attempted

² E.g. information/data held by Post Office (and/or its IT provider) required by Subpostmasters to consider and challenge alleged "shortfalls" and the relative unavailability of the same to Subpostmasters.

³ E.g. telling Subpostmasters that they were the "only one" experiencing problems that were in truth more widespread, so as to cause them to doubt their own judgment, memory and competence – thereby to induce them to be more likely to accept responsibility for alleged shortfalls.

⁴ E.g. failures to follow the requisite code of conduct, namely the Code for Crown Prosecutors or properly to apply the requisite tests in deciding whether to bring a prosecution and if so, on what basis.

⁵ E.g. requiring, as a condition of a plea bargain, that no mention be made by the Subpostmaster of any problems or errors in the Horizon system.

⁶ E.g. where there was no proper basis for evidence in support of a restraint order.

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suicide), bankruptcy, prosecution, convictions, recovery orders and some custodial prison sentences.⁷

6. Against that background, we write this letter with a view to the parties taking reasonable and proportionate steps to identify, narrow and resolve the legal, factual and/or expert issues, as well as exchanging information to further the aims and objectives of the Practice Direction.
7. This letter is not a prelude to *inevitable* litigation. We hope that through this correspondence, the parties will be able to understand their respective positions, make considered decisions about how to proceed and, particularly, try to settle the issues without these proceedings progressing (including by mediation or other ADR). This approach will support the efficient management of proceedings if the case is not otherwise resolved and, in any event, should help to reduce the costs of resolving the dispute.
8. In order to try to identify such common ground as there may be and to narrow the issues (so that further informed consideration can be given to how the parties should proceed when they take stock), we have posed a number of, hopefully helpful, questions which, for convenience, we have listed in the Appendix to this letter, to which we invite your particular response.
9. We recognise that some serious allegations are made below and we wish particularly to explain the basis upon which those are made. We are obliged to identify the claims and explain the basis of them. We therefore need to address these matters, but do not wish them to be misunderstood. For example, the allegations of deceit explained below are made on the basis of the second limb in *Derry v Peek*, confining our clients' case in deceit to allegations that the Post Office's misrepresentations were deceitful or fraudulent because the Post Office did not know or believe such representations to be true and/or exhibited "*wilful blindness*" or reckless indifference to the truth of those representations.
10. Against the background above, we would be grateful to receive from you answers to the questions set out in the Appendix, as well as a constructive response to this letter more generally, so that (in the context of matters which are serious for both the Post Office and our clients) such agreement, or common ground as can be found, is identified at an early stage.
11. We also seek:
 - 11.1. an assurance from you that our clients (existing, as well as proposed, claimants and non-claimant witnesses) will not be subject to any detrimental treatment as a result of being a claimant to this claim, or by reason of making any disclosures connected to this claim – your letter of 26 April 2016 suggests that there is no foundation for any suggestion that such action would be taken by Post Office and we therefore hope that Post Office will feel able to provide such assurance;
 - 11.2. confirmation that you have no objection to the independent investigators, Second Sight providing information to us for the purposes of these proceedings;

⁷ The Criminal Cases Review Committee is presently considering some 20 cases.

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- 11.3. clarification from you as to your position in relation to the applicability of the Official Secrets Act (referred to in our clients' contracts with you), and in particular whether your position is that any of our clients or any other person (e.g. a Fujitsu employee providing evidence in support of the claim) is in any way restricted from disclosing information about Post Office's conduct or wrongdoing; and
- 11.4. an assurance that no action will be taken by Post Office (or with Post Office's encouragement) against any person for any alleged breach of the Official Secrets Act in relation to steps taken by them or disclosures connected to this claim.
- 12. We also address the need for this claim to proceed by way of a Group Litigation Order, and seek your agreement in principle that this case is suitable to be managed as such.
- 13. We re-iterate however that we would hope that the matter may be resolved (or at the least the issues narrowed) by mediation. We wish to stress that we are **required** to set these matters out to you but do so in the hope that this correspondence will afford you the opportunity to respond fully and allow the parties a proper opportunity to seek to resolve or narrow the issues as we have suggested.
- 14. The structure of this letter is as follows:

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A. Post Office's Knowledge of the Dispute

15. The matters at the heart of this claim are not new to the Post Office; the Post Office has been heavily involved in such matters for a number of years. The Post Office's involvement thus far informs both the background to these proceedings and the context in which this letter is written. We illustrate the extent of the Post Office's involvement in, and knowledge of, these matters by reference to the following.

(a) **Second Sight**

16. Following significant pressure from a number of Subpostmasters (former and serving), and concern from their local MPs, the Post Office Chairman and CEO met with those MPs in June 2012, and it was agreed that external, independent investigators would be engaged to undertake a review of a number of cases where in the main, Subpostmasters had experienced shortfalls in their branch, and had been pursued by Post Office. These MPs had also raised wide-ranging concerns about general unfair treatment by the Post Office.
17. As a result, in July 2012, at the instigation of a number of MPs, Post Office instructed Second Sight Support Services Limited ("**Second Sight**") to conduct an independent review, and Post Office agreed to meet the cost of the same.
18. A process was jointly devised by Post Office, Justice For Subpostmasters Alliance ("**JFSA**") and Second Sight, which was intended to provide Subpostmasters with a "safe" mechanism by which they could raise concerns, which Second Sight would then investigate. A paper was jointly produced, in which the process was set out for concerns to be raised (and investigated by Second Sight). In that document, Post Office confirmed that any serving Subpostmasters "*should have no fears about raising any concerns over Horizon, including over victimisation and reprisals*". Second Sight carried out extensive investigations, although progress became hampered by constraints imposed by Post Office and by Post Office's restrictions on access to information and documents (see paragraphs 29.1 and 30.1 below).

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19. One year later, Second Sight published their interim report (the “**Interim Report**”), which is within the public domain, incorporating the preliminary results of four spot reviews which had been proposed by the concerned MPs. Within this report, Second Sight stated that in the course of their “*extensive discussions with [Post Office] over the last 12 months, [Post Office] has disclosed to Second Sight that, in 2011 and 2012, it had discovered “defects” in Horizon online that had impacted 76 branches*”.
20. Post Office subsequently provided a lengthy response and issued a press release in which it stated that the Interim Report “*does...raise questions about the training and support [Post Office] have offered to some Subpostmasters and we are determined to address these issues*”.
21. In the same month, Jo Swinson MP, Minister for Postal Affairs faced questions from MPs in the House of Commons regarding Second Sight’s Interim Report and it was agreed that a further and more detailed investigation should be undertaken. Subsequently a “Mediation Scheme” was put in place, to which we refer below. On 3 February 2015, oral evidence was given in the House of Commons to the Business Innovation and Skills Committee (“BIS”), by Paula Vennells (Chief Executive – Post Office) and Angela van den Bogerd (Head of Partnerships – Post Office), to which we refer below.
22. It is notable that Post Office has fairly consistently refused to countenance errors in the Horizon system causing alleged shortfalls: e.g. “*Post Office Ltd is fully confident that the Horizon computer system in its branches, and all the accounting processes around it enable subpostmasters to account accurately for the transactions they undertake in their branch*”.⁸

(b) Mediation Scheme

23. Following the publication of Second Sight’s Interim Report in July 2013, and in response to further pressure from Subpostmasters and MPs, a ‘Working Group’ was formed to develop a scheme to investigate and review cases. The Working Group comprised the JFSA, Post Office (who instructed Bond Dickinson as its legal advisors) and Second Sight. It developed the Initial Complaint Review and Mediation Scheme (the **Mediation Scheme**) and its role was to supervise the scheme and make sure it was run in a fair and efficient manner. In August 2013, the Mediation Scheme opened for applications.
24. During the 12 weeks that the Mediation Scheme was open to applications, a total of 150 cases were received that were accepted as being “suitable” for investigation. A small percentage were from serving Subpostmasters, and Post Office addressed a number of their issues separately. Subsequently these withdrew from the Mediation Scheme, leaving 136 cases to progress through to investigation and review. Sir Anthony Hooper was appointed as Chairman of the Working Group, which held weekly meetings. Post Office produced regular tracking status updates on each of the cases in the scheme.

⁸ Letter from Post Office’s then Managing Director, Paula Vennells, of 19 December 2011 in response to a Parliamentary question from Mike Weir MP.

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25. Following personnel changes at Post Office it became evident, during January 2014, that Post Office was attempting to redefine the brief of the Working Group and the scope of the work of Second Sight – narrowing and confining both.
26. The JFSA remained sceptical about Post Office's involvement in the Mediation Scheme and wrote to the Minister in April 2014 setting out its concerns.
27. As part of the Mediation Scheme, an independent Professional Advisor assisted an applicant to produce a report of their case. Post Office then produced its own report of that case, and both reports were sent to Second Sight for analysis and investigation, before it too produced a report based on its findings. As part of the Second Sight case report there was a decision by Second Sight as to the suitability of that case for sending to mediation.
28. Angela van den Bogerd claimed that "*thousands and thousands of pieces of evidence [were produced] in support of each of the cases*", in the evidence that she gave to the Select Committee (described below). However, not all of these cases reached a final conclusion prior to Post Office terminating the Scheme in March 2015 (see below).
29. When Second Sight was appointed by the Post Office at the request of Members of Parliament, it was on the basis of:
 - 29.1. Unrestricted access to documents held by Post Office (including documents subject to confidentiality and legal professional privilege); and
 - 29.2. No limitation in the scope of work determined necessary by Second Sight.
30. Notwithstanding the above:
 - 30.1. Second Sight "experienced significant difficulty in obtaining access to a number of documents [they] believe are necessary for the purposes of [their] investigation, notwithstanding Post Office's commitment to make requested documents available ...";⁹ and
 - 30.2. Second Sight was concerned that some decisions to prosecute may have been contrary to the Code for Crown Prosecutors but Post Office stated that this was outside the scope of Second Sight's investigation – a view with which Second Sight "*strongly disagree*".¹⁰
31. In a letter dated 17 March 2015 the Chair of the Select Committee, expressed his concerns as follows:

*"During our evidence session, Post Office assured us that individuals who had previously pleaded guilty to charges arising from information provided by Horizon were eligible for mediation. **The letter sent by Post Office to Jo Swinson MP on 9***

⁹ Briefing Report – Part Two (9.4.2015) §2.1

¹⁰ Briefing Report – Part Two (09.04.2015) § 25.24

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March would appear to contradict the evidence given to the Committee on this matter, and we wish to have clarification on this. [Emphasis in the original letter]

32. The approach taken by the Post Office to Second Sight's investigation, in limiting the scope of Second Sight's investigation and in the subsequent termination of the Mediation Scheme (preventing the Working Group, including the JFSA representatives and Sir Anthony Hooper from seeing Second Sight's Briefing Report), is a source of real concern, beyond the underlying substantive matters of concern and trains of further enquiry that Second Sight had by that stage identified.

(c) Settled Cases

33. A limited number of cases which progressed through the Mediation Scheme were settled between Post Office and the Subpostmasters. In addition, we understand that a number of other Claimants settled outside of the mediation process. Those agreements were reached on a confidential basis. However, it is apparent that the Subpostmasters did not have the full information or evidence available to them (which was only available to the Post Office), when forming their decision to settle their claims. The relevant Claimants will invite the court to infer that the Post Office must have known that they were entering into such agreements on a factual basis that was materially incomplete and thereby misleading. Those Subpostmasters would not have entered into those settlement agreements, upon the terms which they did, had they been aware of the full factual matrix. Therefore, those settled cases do and will form part of these proceedings and we will request that the Court sets such settlements aside accordingly, on the grounds of misrepresentation amounting to deceit.¹¹

(d) Select Committee

34. On 3 February 2015, as the Mediation Scheme was ongoing, Paula Vennells, Chief Executive of Post Office and Angela van den Bogerd, Head of Partnerships at Post Office gave oral evidence before a Select Committee, attended by Secretaries of the CWU, Alan Bates, Kay Linnell and Ian Henderson of Second Sight.
35. As part of her evidence, Ms Vennells stated that the Mediation Scheme was set up "*with the ambition to find out exactly what those [136 SPMs joined into the scheme] are concerned about, because it is of concern to me, and the Post Office that we do that.*" She went on to state that Post Office had "*investigated every single case in the most thorough detail. Post Office have been rigorous about this.*"
36. Post Office was therefore, on the face of it, fully aware of the detail and nature of each of the claims in the Mediation Scheme, albeit serious concerns were raised by the Committee and

¹¹ *Derry v Peek* second limb deceit, as explained above. The affected Claimants will contend that they did not enter into the settlement agreements "*with [their] eyes wide open*" as the Court of Appeal contemplated in *Hayward v Zurich Insurance Co plc* [2015] EWCA Civ 327 and the asymmetry of information between the parties and the surrounding circumstances justify the setting aside of the settlement agreements. The scope of the settlement agreements will also be in issue: *Bank of Credit and Commerce International SA (in liquidation) v Ali and others* [2001] 1 All ER 961.

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Chair regarding Post Office's "*culture of denial*" and "*obstructive*" behaviour in failing to provide documentation requested by Second Sight. Furthermore, Second Sight made it abundantly clear that they had serious concerns over the fact that they had seen no evidence that Post Office's investigators were ever trained or prepared to consider that Horizon was at fault. (The apparent exclusion of the possibility of errors generated by Horizon, or the practice of disregarding the same, is a central feature of this case.)

37. As stated above, following the evidence given to the Select Committee, the BIS Committee's Chairman wrote to the (then) Minister, Vince Cable, regarding the Mediation Scheme. Within this letter Mr Bailey raises concerns over Post Office's handling of the Mediation Scheme, not least because of the lack of information that was provided to Second Sight, hindering their investigation. We note from this letter that Mr Bailey requested that a full set of documents which Second Sight had provided to Post Office (before being forced by Post Office to destroy any further record of them), be copied and provided to BIS. We will look forward to receiving a full set of these documents in response to this letter, as part of the exchange of relevant documents below.
38. Post Office subsequently terminated the Mediation Scheme (as explained below) and issued a press release to that effect. In June 2015 there was a further, televised debate led by James Arbuthnot MP at Westminster Hall, to which the Post Office responded in a 15 page public statement.¹²

(e) Termination of Mediation Scheme

39. Shortly after Post Office gave evidence in the BIS hearing, the Mediation Scheme was unilaterally terminated by Post Office without prior discussion with the Working Group. As far as the Claimants are aware, even Sir Anthony Hooper was not consulted prior to the decision to terminate the Scheme or to terminate his engagement to Chair the Working Group. The engagement of Second Sight was also terminated by giving Second Sight one month's notice – this was despite the assurance given in a letter to JFSA by the Minister, that "*Second Sight were not employed by Post Office*" which had at the time conveyed the impression that Second Sight would be free to pursue their role to its conclusion without control or impediment from Post Office.
40. The termination of Second Sight's appointment in March 2015, meant that the last report produced by Second Sight was the "*Part Two Briefing Report*", which formed part of a background briefing pack for independent CEDR mediators. It summarised the main issues which applicants to the Mediation Scheme had raised, and Second Sight's findings (thus far) on those issues. It also set out, amongst other things, a full list of questions to which Post Office had failed to respond. However, Second Sight's work was still not complete at that time.
41. The timing of Post Office's decision to terminate the Mediation Scheme was not only significant in following the evidence given at the BIS hearing (above) but in immediately

¹² On any view, it is clear that Post Office should have a fairly deep and thorough understanding of the concerns and complaints of Subpostmasters, by way of general background to these proceedings.

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preceding the provision of Second Sight's *"Part Two Briefing Report"*, to the Working Group for consideration and discussion: the Briefing Report was due to be provided to the Working Group the day after the Mediation Scheme was terminated, so that terminating the Scheme prevented its provision to the Working Group members.

42. As a result of Post Office terminating the Scheme, a number of cases were left unresolved. This compounded the frustrations of the Subpostmasters affected who had already suffered ill-treatment at the hands of Post Office and it made a mockery of their participation in the Scheme up to that point.

(f) Panorama

43. Between October 2014 and July 2015 BBC Inside Out and The One Show reported on some individual cases in which Subpostmasters had experienced shortfalls and had been pursued by Post Office as a result.

44. In July 2015, Panorama screened a programme entitled *"Trouble at the Post Office"*. As part of this documentary, the BBC interviewed a number of Subpostmasters and an ex-Fujitsu employee. This programme had the knock-on effect of a number of articles being generated in journals such as 'Computer Weekly'. Points arising from the Panorama programme included:

- 44.1. Ian Henderson, of Second Sight, describing a failure on the part of the Post Office to properly investigate cases where problems had occurred with Horizon. He likened the Post Office's approach to one of *"institutional blindness"*.

- 44.2. Ian Henderson further attested to a disclosure by the Post Office of *"two software bugs that have had quite a significant impact on a number of branches and it took, in one case, over twelve months for those bugs to be detected and for the consequences to be appreciated."*

- 44.3. James Arbuthnot MP (as he then was) spoke of an *"abuse of power"* on the part of the Post Office, describing the Post Office as a *"big organisation, bullying individuals with no ability to cope, in ways which sometimes see them sent to prison, made bankrupt, lose their livelihood..."*

- 44.4. Richard Roll, a Fujitsu computer technician between 2001-2004, stated that there were *"a lot of errors, a lot of glitches coming through"* with the Horizon system. He also stated that, contrary to the Post Office's assertions, financial records were changed remotely without the Subpostmasters' knowledge; he contended *"we went in through the backdoor and made changes... if we hadn't done that, then the counters would have stopped working."*

- 44.5. Charles McLachlan, the expert witness for the defence in the prosecution of Seema Misra, stated that he had spoken to one of the Post Office's investigators and he was told that *"as a matter of policy, [Post Office Investigators] would never consider an IT error, a computer error, as the source of the discrepancy."*

- 44.6. The programme described a meeting that took place between the Post Office and Fujitsu just before the trial of Seema Misra. The minutes in respect of that meeting

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warn of "another computer bug that could cause a loss of confidence in the Horizon system if widely known; the bug made money disappear". This minute went on to say that this bug could "impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data". The bug did not affect Seema Misra's branch, but it was evidence that there were problems with Horizon, and the same was never disclosed to Charles McLachlan during Seema Misra's trial or indeed to the court. We are not aware of any such bug having been disclosed to any Subpostmaster to whom shortfalls have been ascribed by Post Office.

45. The Post Office published a response to the Panorama programme on its website. The response included the following statements:
 - 45.1. The Post Office "wholly rejects extremely serious allegations repeated in BBC's Panorama programme of 17 August 2015. The allegations are based on partial, selective and misleading information."
 - 45.2. "There is no evidence that faults with the computer system caused money to go missing at these Post Office branches".
 - 45.3. "The Post Office has always taken its duty to act fairly, proportionately and with the public interest in mind extremely seriously."
 - 45.4. "In the rare instances that prosecutions are undertaken, the Post Office follows the Code for Crown Prosecutors (the same code as the Crown Prosecution Service). The Code requires a prosecution to have sufficient evidence and to be in the public interest, both of which are kept under review right up to and including any trial. It means that there must be sufficient evidence for **each** charge – if a theft charge is brought, there must be sufficient evidence for a realistic prosecution of a conviction for theft."
 - 45.5. "The Post Office has a continuing duty after a prosecution has concluded to disclose any information that subsequently comes to light which might undermine its prosecution or support the case of the defendant and continues to act in compliance with that duty."
 - 45.6. "There is also no evidence of transactions recorded by branches being altered through 'remote access' to the system. Transactions as they are recorded by branches cannot be edited and the Panorama programme did not show anything that contradicts this."
46. There is, plainly, a clear conflict between the impression given by those appearing on the Panorama programme and the wholly unnuanced position advanced by Post Office, which invites conclusions that Horizon is entirely error free (at least in so far as such errors could have any financial implications for Subpostmasters) and Post Office's approach and conduct has been perfect. Neither of those conclusions is accepted, for the reasons set out in this letter.
47. It is however clear that Post Office must be very familiar with the issues raised in these proceedings and have looked into them extremely carefully, in order to be able to make statements (above) which appear to give such an unequivocal impression of the position.

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B. Relationship between Post Office and Claimants

(a) Contract framework

48. The Subpostmasters were engaged on standard form contracts, the true construction and effect of which will be a common and central issue in these proceedings.¹³
49. Given that these contracts are entirely under the control of the Post Office, we would be grateful for a clear explanation of how the Post Office understands they were amended, from the 1994 contract which pre-dated the introduction of Horizon.
50. We would hope that agreement can be reached, as far as possible, on which standard contracts were in force during which periods, and what the express terms of those contracts were – we would hope that this would not be controversial.
51. Against the background of such agreement, we would then wish to try to reach agreement as to the terms and duties of the Post Office which were implied into those contracts, or arose from the relationship created by them and their operation. For example:
 - 51.1. a common issue will be whether or not the contracts were relational contracts (as we explain at paragraph 55 on page 15 below);
 - 51.2. another common issue is likely to be the extent to which a narrow fiduciary duty arose on the Post Office properly to execute, effect, record and account for transactions of or attributed to the Subpostmasters (as we explain at paragraph 66 on page 18 below);
 - 51.3. you will also see that we contend that, in any event, there were relevant implied terms in the standard contracts between the Claimants and the Post Office (as we explain at paragraph 59 to 65 from page 16 below); and
 - 51.4. where the Post Office acted as investigators¹⁴, the duties of its officers in discharging that role will also be in issue.

¹³ The Claimants' primary submission is that they should be construed as we indicate below. However, to the extent the Post Office seeks to rely on particular contract terms in response to this letter of claim or subsequently, in justifying its conduct towards the Claimants, we will respond further as to the proper construction, enforceability (including under the Unfair Contract Terms Act 1977, 'UCTA') and true effect of the said terms, such as the provisions purporting to render the Subpostmasters legally responsible for the cash and stock entrusted to their care and any losses that may occur through negligence, carelessness or error. Not only did Post Office contract on its own standard terms, for the purposes of section 3 of UCTA but it is unclear how those terms were sufficiently drawn to the attention of Subpostmasters. There is a clear line of authority (e.g. *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1987] EWCA Civ 6) holding that an onerous or unusual contract term on which a party seeks to rely must be fairly brought to the notice of the other party if it is to be enforced – putting in issue the practice of the Post Office generally in seeking to draw any such terms (as the Post Office may rely upon) to the attention of Subpostmasters, when they were accepting appointments. It presently appears to us that this line of authority would only be relevant if the other matters contended for by the Claimants (e.g. relational contracts, fiduciary duty and implied terms) were unsuccessful.

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(b) Power and vulnerability

52. Post Office's standard form contracts ("Contracts") were replete with power and discretion in the hands of the Defendant. They and the true agreement between the parties fall to be considered in the context of the relative bargaining position of the parties¹⁵, Post Office's powers and ability to prosecute Subpostmasters and the asymmetry of information is referred to above.
53. By way of illustration of the relationship between Post Office and Subpostmasters, the Subpostmasters' standard form contract (version dated September 1994) included the following terms:
- 53.1. Section 1, paragraph 5 *"...Retention of the appointment as Subpostmaster is dependent on the sub-office being well managed and the work performed properly to the satisfaction of Post Office Counters Ltd."*¹⁶
- 53.2. Section 1, paragraph 6 *"The Subpostmaster is informed at the time of his appointment of the classes of business he is required to provide. He must also undertake, if called upon to do so later, any other class of business not required at the time of his appointment but which Post Office Counters Ltd may subsequently and reasonably require him to do...."*
- 53.3. Section 1, paragraph 7 *"If Post Office Counters Ltd alters the services to be provided or withdraws a service the Subpostmaster has no claim to compensation for any disappointment which may result from the change."*
- 53.4. Section 1, paragraph 8 *"The terms of the appointment of Subpostmaster do not entitle the holder to be paid ... compensation for loss of office."*
- 53.5. Section 1, paragraph 18 *"Changes in conditions of service and operational instructions, including those which are agreed with the National Federation of Subpostmasters, will appear from time to time in Counter News or by amendment to the Contract. Such changes and instructions are deemed to form part of the Subpostmaster's contract."*
- 53.6. Section 1, paragraph 19 *"All instructions received from the Regional General Manager should be carried out as promptly as possible."*
- 53.7. Section 12, paragraph 4 *"The Subpostmaster must ensure that accounts of all stock and cash entrusted to him by Post Office Counters Ltd are kept in the form prescribed by Post Office Counters Ltd. He must immediately produce these accounts, and the whole of his sub-office cash and stock for inspection whenever so requested by a person duly authorised by the Regional General Manager."*

¹⁴ See also the duties when acting in a prosecutorial role at paragraph 102 on page 26, below.

¹⁵ *Autoclenz v Belcher* [2011] UKSC 41, [2011] 4 All ER 745, [2011] IRLR 820, [2011] ICR 1157.

¹⁶ Post office changed its name from Post Office Counters Limited on 1 October 2001.

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- 53.8. Section 12, paragraph 12 *"The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay."*
- 53.9. Section 12, paragraph 13 *"The financial responsibility of the Subpostmaster does not cease when he relinquishes his appointment and he will be required to make good any losses incurred during his term of office which may subsequently come to light."*
- 53.10. Section 15, paragraph 10 *"In cases where an Assistant is accused or suspected of dishonesty or any other offence such as wilfully delaying postal packets, the Subpostmaster must report the particulars to the Regional General Manager as soon as possible and await instructions."*
- 53.11. Section 19, paragraphs 4, 5 and 6: *"A Subpostmaster may be suspended from office at any time if that course is considered desirable in the interests of Post Office Counters Ltd in consequence of his: (a) being arrested, (b) having civil or criminal proceedings brought against him, (c) where irregularities or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of Post Office Counters Ltd, or are admitted, or are suspected and are being investigated"; "Where a Subpostmaster is suspended his remuneration in respect of any period of suspension will be withheld so long as such suspension continues; "On the termination of the period of suspension whether by termination of contract or reinstatement, the Subpostmaster's remuneration in respect of the period may, after consideration of the whole of the case, be forfeited wholly or in part..."*
54. There were also onerous provisions in that contract by which the Post Office required Subpostmasters to sign Official Secrets Act declarations, and purported to impose onerous non-disclosure obligations upon them, under threat of criminal sanctions, addressed in detail at section K (Official Secrets Act) below.
- (c) Relational contract**
55. The contractual relationship between the Subpostmasters and the Post Office was a long term relationship to which the parties made a substantial commitment. It required a high degree of communication, co-operation and predictable performance, based on mutual trust and confidence. In all the circumstances, they were relational contracts imposing obligations of good faith on the Defendant (including duties of fair dealing and transparency, trust and confidence and co-operation).
56. The contract included an implied duty of good faith, and was a 'relational' contract - per Mr Justice Leggatt in *Yam Seng Pte v International Trade Corp* [2013] EWHC 111 (QB), at paragraph 143.
57. The requirements of the duty of good faith and implied terms above required the parties to communicate effectively and cooperate with each other in performance of the contract between them. In particular, they required Post Office:
- 57.1. properly to execute all transactions which the Claimants effected;

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- 57.2. properly to account for, record and explain all transactions and any alleged shortfalls which were attributed to the Claimants;
 - 57.3. to co-operate with Claimants in seeking to identify the possible or likely causes of any such shortfalls and/or whether or not there was indeed any shortfall at all;
 - 57.4. to disclose possible causes of the appearance of alleged shortfalls (and the cause thereof) to the Claimants candidly, fully and frankly;
 - 57.5. to make reasonable enquiry, undertake reasonable analysis and give fair consideration of the facts and information available as to the possible causes of the appearance of alleged shortfalls (and the cause thereof);
 - 57.6. not to conceal known problems, bugs or errors in or generated by Horizon that might have financial (and other resulting) implications for Subpostmasters;
 - 57.7. not to conceal from the Claimants the ability remotely to alter data or transactions upon which the calculation of the branch accounts (and any alleged shortfalls) depended; and
 - 57.8. properly and fairly to investigate any such alleged shortfalls; and
 - 57.9. not to seek recovery from Subpostmasters unless and until:
 - 57.9.1. Post Office had complied with the duties above; and/or
 - 57.9.2. the existence, cause and reason for any alleged shortfall has been established after reasonable enquiry and analysis, and fair consideration, such as to provide a rational and considered basis for asserting Post Office's entitlement to make such recovery.
 58. The test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people in all the circumstances (*Yam Seng*, at paragraph 145). The incidents of the implied terms above are reasonably well established and we hope that agreement might sensibly be reached as to the content of Post Office's obligations to Subpostmasters.
- (d) Implied terms**
- Trust and confidence*
59. In all the circumstances, the Contracts (i.e. the standard form contracts for Subpostmasters and Crown Office employees, and others held accountable by Post Office), included an implied term of trust and confidence.

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Exercise of power

60. There is a body of authority which shows that a power conferred by a contract on one party to make decisions which affect them both 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 (in the sense of irrationally): see e.g. Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) [1993] 1 LI Rep 397 , 404; Socimer International Bank Ltd v Standard Bank London Ltd [2008] 1 LI Rep 558 , 575–7.¹⁷
61. By analogy with the employment context, the landmark decision of the Supreme Court in Braganza v BP Shipping Limited,¹⁸ significantly modified the justiciability of decisions by employers (and by analogy, the Post Office) upon which entitlement to certain benefits depends – in favour of employees rather than decision-makers. Braganza is of particular significance where an employer exercises a discretion in its own favour, against the interests of an employee, or has the power to do so. The Claimant will contend that the principles in this case apply with equal vigour in the relationship between the Post Office and the Claimants.

Co-operation and support

62. There were also implied terms imposing obligations on the Post Office:
- 62.1. to provide adequate training and support to our clients (particularly if and when the Post Office imposed new working practices or systems or required the provision of new services); and
 - 62.2. to co-operate with the Claimants in seeking to identify the cause of any alleged shortfalls, or otherwise to investigate, rectify or mitigate the same;
 - 62.3. to take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls) of our clients.
63. These implied terms meet both the business necessity and obviousness tests (which are of course alternatives) and are well established implied terms in such relationships or materially similar ones. They meet these tests because:
- 63.1. the contracts would lack commercial or practical coherence were such terms not to be implied;
 - 63.2. any reasonable person in the position of the parties at the time that they were contracting would have agreed such terms “*went without saying*”;
64. Further, in many respects the contracts between the Post Office and the Subpostmasters were akin to employment contracts, not least the degree of control in the hands of the Post

¹⁷ paragraph 146 of Yam Seng above

¹⁸ [2015] UKSC 17, [2015] 1 WLR 1661, [2015] IRLR 487, [2015] ICR 449, 165 NLJ 7646, (2015) Times, 06 April, [2015] All ER (D) 185 (Mar)

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Office and requirements for personal service,¹⁹ and authorities as to the implication of terms in the employment context are relevant by analogy.

Control of transactions

65. In the context of imposing and providing Horizon (and/or introducing new or changed services), and through Horizon effecting transactions for which the Claimants were or could be said to be responsible, it was an implied term that the Post Office would:
- 65.1. properly execute all transactions which the Claimants carried out;
 - 65.2. properly account for, record and explain all transactions and any alleged shortfalls which were attributed to the Claimants; and
 - 65.3. properly, even-handedly and fairly investigate any such alleged shortfalls.

(e) Fiduciary duty

66. As noted above (at paragraph 52 above), the Post Office's standard form contracts ("Contracts") were replete with power and discretion in the hands of the Post Office.
67. Relationships in which a fiduciary obligation have been imposed generally possess three broad characteristics:
- 67.1. The fiduciary has scope for the exercise of some discretion or power.
 - 67.2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
 - 67.3. The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.
68. Each of these characteristics is well grounded in the relationship between the Post Office and the Subpostmasters, and in all the circumstances it is likely that a fiduciary obligation will be held to exist on the facts of this case.

Horizon: the accounting system

69. As a further or alternative basis for such an obligation on the Post Office, the Post Office undertook to provide and manage the accounting system on behalf of the Subpostmasters, in circumstances which gave rise to a relationship of trust and confidence, thereby meeting the classic test outlined by Lord Justice Millett in Bristol and West Building Society v Mothew

¹⁹ Section 1, paragraph 5 of the contract states that the Subpostmaster is not obliged to attend the sub-office personally, but the contract is otherwise clear that a Subpostmaster has obligations which are personal, e.g. requirements in relation to Assistants (Section 1, paragraph 15), requirement to provide a substitute (Section 4, paragraph 8), obligations in relation to production of accounts (Section 12, paragraph 4).

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[1998] Ch 1: “A *fiduciary* is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.”

70. Post Office’s fiduciary duties arise by reason of the relationship between Post Office and Subpostmasters and in particular, the extent to which Post Office effected, recorded and managed the reconciliation of transactions affecting the businesses of the Subpostmasters in the following circumstances:
 - 70.1. Post Office requires Subpostmasters to establish themselves effectively as a separate businesses, yet Subpostmasters are the Post Office’s agents in some respects;
 - 70.2. Post Office effects, records and manages the reconciliation of transactions affecting such businesses, as aforesaid;
 - 70.3. accordingly, Post Office keeps the underlying transaction data in respect of the business of each Subpostmaster;
 - 70.4. Subpostmasters bear the risk of making good any deficiencies resulting from error or carelessness for which they are contractually responsible; and
 - 70.5. Subpostmasters are therefore vulnerable to any failure by Post Office properly to discharge its duties set out above.
71. In the circumstances, Post Office undertakes to act for or on behalf of Subpostmasters in the particular matters identified above, in circumstances which give rise to a relationship of trust and confidence.
72. Such a duty is narrow and based upon the fact that the Post Office is the custodian/fiduciary for the specific functions above, including properly accounting to Subpostmasters in respect of transactions effected by them. This includes duties of recording transactions and accounts properly, maintaining records properly as well as promptly and candidly making transactional records available to Subpostmasters, where an alleged discrepancy or shortfall is identified.

Agency

73. By reason of the agency relationship between the Claimants and the Defendant and/or in all the circumstances (and having particular regard to the Defendant imposing and undertaking to provide the system by which transactions were effected, recorded and reconciled and the vulnerability of the Claimants to the exercise of power by the Defendant in this and other respects), the Defendant owed the Claimants a fiduciary duty properly to execute all transactions which the Claimants effected, and properly to reconcile, account for, record and explain all transactions and any alleged shortfalls which were attributed to the Claimants.
74. Any terms relied upon as negating duties owed by Post Office will be said to be unfair for the purposes of UCTA.²⁰

²⁰ See e.g. Chitty (at 31-126); Bowstead & Reynolds (at 6-030 and 6-058-059).

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75. Further or alternatively, the relationship amounted to an accounting relationship so as to give rise to such duties.

(f) Tort

76. The Defendant also owed the Claimants a duty of a care in tort in exercising its functions and powers within its relationship with the Claimants.

(g) Public functions and private duties

77. Section 19, paragraph 14 of Sub-Postmaster standard form contract provides as follows:

“Although they comprise the minority of all Investigation Division crime investigations, there are many cases where the possibility (or even direct suspicion) arises that persons employed on Post Office business may be involved. Officers of the Investigation Division conduct interviews about these suspected offences and they are required to observe the same code of conduct when obtaining evidence as that laid down for Police Officers ...” [emphasis added]

78. In response to the Panorama programme, the Post Office publicly stated as follows:

“The Post Office does not prosecute people for making innocent mistakes and never has” [...]

“The Post Office has always taken its duty to act fairly, proportionately and with the public interest in mind extremely seriously. The Prosecutions it brings are scrutinised by defence lawyers before they advise their clients and are, ultimately, ruled upon by the courts.

If money is missing from a Post Office branch and the fact that cash is missing has been dishonestly disguised by falsifying figures in the branch accounts, the Post Office is entitled to take action and does so based on the facts and circumstances of that specific case. Though rare, where there is evidence of criminal conduct, a decision may be made to prosecute.

Prosecutions are brought to determine whether there was criminal conduct in a branch, not for the Post Office’s financial considerations.

Post Office prosecutors are all experienced criminal lawyers, many of whom have significant experience in prosecuting for both Post Office and the Crown Prosecution Service. In the rare instances that prosecutions are undertaken, the Post Office follows the Code for Crown Prosecutors (the same code as the Crown Prosecution Service). The Code requires a prosecution to have sufficient evidence and be in the public interest, both of which are kept under review right up to and including any trial. It means there must be sufficient evidence for each charge - if a theft charge is brought, there must be sufficient evidence for a realistic prospect of a conviction for theft.

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A charge upon which there is no evidence will inevitably fail. It is the duty of the defence lawyers to identify to the court where there is insufficient evidence to sustain a charge. If the court agrees then the Judge must dismiss that charge.

The Post Office takes extremely seriously any allegation that there may have been a miscarriage of justice. We have seen no evidence to support this allegation. The Post Office has a continuing duty after a prosecution has concluded to disclose any information that subsequently comes to light which might undermine its prosecution or support the case of the defendant and continues to act in compliance with that duty."

C. Facts and Matters Relied Upon

(a) Change to Claimants' work

79. The claims herein arise following the Defendant's introduction of a new electronic point of sale system known as "**Horizon**" in or around 1999/2000 and changes (including new or changed services) introduced by the Defendant thereafter. The name Horizon relates to the entire application. This encompasses software, both bespoke and software packages, the computer hardware and communications equipment installed in branch and the central data centres. It includes the software used to control and monitor the systems. In addition, testing and training systems are also referred to as Horizon.²¹ Issues experienced by the Claimants in relation to Horizon extended to the Defendant's audit and investigative processes in respect of the same, as well as the Defendant's general behaviour towards the Claimants when problems arose.
80. Horizon itself significantly changed how the Claimants were required and able to work in their branches and significantly limited their ability to access, identify, obtain and reconcile transaction records and themselves investigate any alleged shortfalls.
81. By way of example²², issues arose in relation to transaction types where Horizon produces, at the end of the day, only an *aggregate amount* and *volume* for that day's transactions. These transaction types are those where customers have paid for goods by debit or credit card. In the event of an end-of-day discrepancy for one of these transaction types, and without the benefit of disaggregation of a total amount into its constituent transactional components, the Claimants found it difficult, if not impossible, to identify the individual transactions that had brought about the discrepancy. Typically, a Claimant would need to find items:
- 81.1. that should have been, but were not, included in the aggregate total; or
 - 81.2. amounts that had been incorrectly entered, such as £50.00 entered as £500.00, or a withdrawal processed as a deposit; or

²¹ This definition was provided by the Post Office's Information Manager in May 2011 – see Second Sight's *Interim Report into alleged problems with the Horizon system* of July 2013 at §1.6.

²² See *Briefing Report– Part Two* (9.4.2015) at §13.4-13.8.

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- 81.3. amounts that formed part of the aggregate total, but should not have been included in that total or at all.
82. It was only by finding these errors and omissions that Claimants could begin the process of correction, reduction or mitigation of losses from alleged shortfalls. This may sometimes have involved attempting to contact the relevant customer, however in order to do this the Claimant required the name and details of the relevant customer. Prior to the introduction of Horizon by the Defendant this was a simpler process, as the paper dockets, retained to evidence each transaction, provided this information. This is only one example of the significant changes to the Claimants' work that were brought about by the introduction of Horizon and, indeed, the inferior functionality of Horizon in comparison to the previous manual system that was in place.²³
83. A further specific example of a significant change to the Claimants' work took place in 2005, when the Defendant awarded a contract to Bank of Ireland to provide Automated Teller Machines ("ATMs") in its branches. This led to the following additional work having to be undertaken by the relevant Claimant, all of which involved Horizon:
- 83.1. Each day, a Subpostmaster was required to print from the ATMs a "totals receipt" that provides the number and value of withdrawal transactions. The data from this receipt must then be manually input into Horizon by the Subpostmaster or branch staff.
- 83.2. In respect of retracted transactions, the retracted cash must be physically removed from the ATM by the Subpostmaster, counted, and the amount also recorded in Horizon so that the customer's account could be re-credited.
- 83.3. Once a week, the Subpostmaster should remove and count all the cash in the ATM and manually record this figure in Horizon.
84. Notwithstanding several Claimant complaints to the Defendant regarding ATM shortfalls (for which the Claimant would later be held accountable), and the possibility of external theft-related cash disappearances in respect of ATMs, the Defendant simply accepted as correct whatever Bank of Ireland reported as having been dispensed by each branch's ATM, without immediately and thoroughly investigating each material shortfall reported by Claimants. The Defendant's investigation processes, more generally, are dealt with below.

(b) Training and support

85. From the introduction of Horizon and throughout, the Defendant failed to provide adequate training and support to the Claimants. The duration of basic training varied widely over the years and in 1998-2010 many Claimants received two or fewer days' training and were simply handed Operating Manuals for self-study and to train their counter staff.²⁴ Some then received two to three days' training at their branch.

²³ Briefing Report— Part Two (9.4.2015) at §13.8.

²⁴ Briefing Report— Part Two (9.4.2015) at §11.5.

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86. The basic training provided was predominantly sales focused and weak in regard to End of Day, End of Week and, in particular, End of Trading Period, balancing.²⁵ Indeed, little or no coverage was provided of how to deal with: (i) discrepancies, both surpluses and shortfalls; (ii) how to identify the root causes of recurring problems; or (iii) how to deal with Transaction Corrections.²⁶
87. Subpostmasters were also responsible for training and supervising their own staff as the Defendant had no contractual responsibility to train branch staff, other than in its Crown Offices. As stated above, the Defendant provided Subpostmasters with what it deemed to be relevant training materials, but it did not operate an effective quality control function in order to ensure that this further training was properly delivered.²⁷ We understand that some of the training manuals were stored on the Horizon system itself and could therefore not be accessed in the event of the system crashing. On some occasions, Subpostmasters were placed in other branches to train newly appointed Subpostmasters and/or agency replacements, in circumstances in which the instructing Subpostmaster had only had their own initial training and was provided with no further or adequate training properly to equip them to train others.
88. The Defendant also set up a telephone Helpline (the “**Helpline**”), known as the Network Business Support Centre (“NBSC”) which was the first port of call for post office branches if they had a query or needed help. According to Post Office, this service could “*support postmasters with a wide range of issues such as providing assistance with transactions carried out through Horizon, navigation, how to address and deal with mistakes, and any issues arising out of the weekly branch trading statement.*”²⁸
89. There was also a resource known as the Horizon Service Desk (“HSD”) which dealt with technical queries. According to Post Office “*The HSD deals with technical issues concerning Horizon, for example, if Horizon appears to be 'offline' or there are log-in issues. In the event that a technical issue cannot be resolved over the telephone, the HSD can request an engineer to attend the branch to investigate the issue further.*”
90. The Helpline however sometimes failed to provide proper or adequate information, assistance and/or support when contacted, particularly where alleged shortfalls were concerned. Specific criticisms include:
- 90.1. difficulty in contacting the Helpline due to its limited availability;
- 90.2. unhelpful, script-based, responses;

²⁵ Briefing Report– Part Two (9.4.2015) at §11.2.

²⁶ As you are no doubt well aware, Transaction Corrections are, (as defined in *Briefing Report – Part One*), an electronic accounting adjustment issued by Finance Services Centre Chesterfield which corrects previous errors in branch. This has an impact on the branch balance and would cause a discrepancy for the value issued.

²⁷ Briefing Report– Part Two (9.4.2015) at §11.7.

²⁸ See paragraph 114 of Post Offices report entitled “Factfile”.

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- 90.3. instructions received during one call that are later, sometimes months later, countermanded in another; and
- 90.4. incomplete and/or misleading information being given as to:
- 90.4.1. the likely cause of any alleged discrepancy or shortfall;
 - 90.4.2. the Subpostmasters' being "*the only one*" experiencing problems, which the claimants now know to be untrue (see also paragraph 139 below).
91. There are several cases in which advice provided by a Helpline operator to a Claimant resulted in an instant and significant increase in a discrepancy on the branch's account, on the system, while the Subpostmaster was still on the telephone to the Helpline. The advice provided by Helpline operators in relation to shortfalls frequently tended to be: "*don't worry about it, it will sort itself out*". However, often discrepancies would not sort themselves out, nor was there any indication provided by the Helpline operator as to how long one should wait before realising that a problem that had not sorted itself out and would probably then not do so, nor how one was supposed to balance the books during the intervening period.²⁹ This was compounded by statements that the transaction data was only retained by Post Office for a limited period of time.
- (c) Investigation**
92. It is evident that when financial, accounting and other alleged errors or failures arose, including or resulting in alleged shortfalls in branch accounts, the Defendant did not investigate the existence or causes of the alleged shortfalls fairly, properly or at all.
93. As set out above in relation to the contract between the Defendant and the Claimants, the express terms of the contract do not provide an automatic entitlement to investigative support to the Claimants when problems arise. Further, the express terms of the contract do not provide an entitlement for the Claimants to be provided with data held by the Defendant, with the exception of data routinely made available to the branch by Horizon.
94. Therefore, the contract, and the Defendant's purported exercise of its contractual powers, placed the Claimants in a difficult position. This is because the Defendant generally insisted on losses being made good, with the Claimant not necessarily entitled to receive all of the information and explanations necessary to establish the cause of the loss.³⁰
95. One would reasonably have expected that when Post Office detected significant or repeated errors, shortfalls or frauds, that it would undertake investigative and analytical work to determine whether its Standard Operating Procedures, its hardware or software, or its employee/agent training and support procedures (or changes to the same), might have

²⁹ Briefing Report– Part Two (9.4.2015) at §12.3.

³⁰ Briefing Report– Part Two (9.4.2015) at §3.8.

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caused or contributed and whether improvements might reduce the likelihood and/or seriousness of future recurrence.³¹

96. In not fully investigating errors, even where it is obvious that some of those errors have been systematically repeated in a branch, the Defendant was not taking 'ownership' of finding ways to reduce or mitigate these errors; this led to a situation whereby Claimants were bearing the cost of apparent losses caused by errors and fraud that could have been designed out of the system, or where improved operational procedures and training could have reduced the incidence and severity of errors.³²
97. When faced with requests from the Claimants for investigative help, these requests were often refused.³³ There was little clarity in Post Office's standard contracts as to its obligations to investigate, as illustrated by Section 19, Paragraph 12 of the Standard Contract, which states that:

"The main job of the Investigations Division is to investigate, or help the Policy to investigate criminal offences against the Post Office, British Telecommunications and the Department of National Savings".

"The investigation Division does NOT enquire into matters where crime is not suspected".

98. The Claimants will contend that Post Office was under a duty to make proper enquiries, as explained in this letter, *prior to* alleging (implicitly or expressly) that any supposed shortfall is the responsibility of the Subpostmaster. Thereafter, it has a duty properly and fair-mindedly to investigate and to exercise all its functions in accordance with the obligations set out in this letter.
99. Despite that contention, it is noteworthy that, notwithstanding the use of this double-negative (quoted above), Post Office's established practice indicates that the above paragraph does not mean that the Investigation Division can necessarily be expected to carry out investigative work even where *crime is suspected*. This has led to situations where some Claimants have found that even where one or more of their employees has been suspected – both by themselves and Post Office – of having stolen branch funds, no investigative work was carried out.³⁴ This left the Claimant with an apparent contractual responsibility to repay the resultant alleged loss, but with no help from the Defendant in recovering any of the stolen money from those who had taken it.³⁵
100. The failure of the Defendant to investigate and correct material discrepancies appears to be a feature of the Defendant's business model. In light of the *express* terms of the contract

³¹ Briefing Report– Part Two (9.4.2015) at §21.1.

³² Briefing Report– Part Two (9.4.2015) at §21.3-21.4.

³³ Briefing Report– Part Two (9.4.2015) at §25.10.

³⁴ Briefing Report – Part Two (9.4.2015) at §25.12-25.13.

³⁵ Briefing Report – Part Two (9.4.2015) at §25.14.

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between the Defendant and the Claimants, and the asymmetry of information and power in the relationship, there appears to be little commercial incentive for the Defendant to establish the root causes of discrepancies because the burden of cost (and risk) is being carried in most instances either by Subpostmasters, in respect of shortfalls, or by the customers, in the case of surpluses.³⁶

(d) Post Office's response to shortfalls

101. Post Office's responses to the discovery of shortfalls included:

Requiring Claimants to make good alleged shortfalls

101.1. The Defendant controls the Horizon infrastructure, including back-office accounting and reporting functions. A consequence of this is that the Defendant may hold a Subpostmaster accountable for shortages that they are unable to fully investigate due to a lack of access to data. The Subpostmaster, therefore, has very limited options in these circumstances and often has to make good losses even where the underlying root cause has not been established or properly understood.³⁷

Encouraging Claimants to sign-off cash balances

101.2. Encouraging Claimants to sign-off cash balances without being able to satisfy themselves that they were accurate and/or exercising undue or unreasonable pressure or influence on Claimants to do so. Indeed, as set out above, a frequently recurring response by Helpline operators in respect of shortfalls was "don't worry about it, it will sort itself out".³⁸

Suspending and/or terminating the Claimants' appointment

101.3. There are also several instances in which Claimants were subject to pressure from the Defendant to resign from their post.

Unfairly investigating the Claimants

101.4. The unfairness of such investigations is evidenced by the following:

101.4.1. The Defendant excluded from consideration the known risk³⁹, if not likelihood, of errors in or related to the Horizon system. The Defendant's

³⁶ Briefing Report – Part Two (9.4.2015) at §19.6.

³⁷ Briefing Report – Part Two (9.4.2015) at §13.2.

³⁸ Briefing Report – Part Two (9.4.2015) at §12.2.

³⁹ Specifically, in relation to 'Horizon Online', two internal memoranda, entitled 'Correcting Accounts for "lost" discrepancies' (seemingly produced by Fujitsu) and 'Receipts/Payments Mismatch issue notes' (seemingly prepared by the Defendant for its legal team), deal with a Horizon 'bug' that had existed, it seems from the inception of Horizon Online. It appears that this 'bug' caused some branches' surpluses or shortfalls to disappear when being transferred to the Local Suspense Account.

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instructions to (and its training of) its investigators seems to have disregarded the possibility that the Horizon system could ever be in any way relevant to their investigations.⁴⁰ Instead, the Defendant's investigators seem to have defaulted to seeking evidence that would support a charge of false accounting, rather than carry out an investigation into the root cause of any suspected problems.⁴¹ The approach and purpose of these investigations was never communicated to the Claimants.

- 101.4.2. The Defendant prevented or impeded the Claimants' reasonable access to relevant data, information and documents. The Claimants' ability to investigate transactional discrepancies, or to defend themselves, was often thwarted because, following their suspension (usually on the day of an Audit), they were, as a matter of the Defendant's policy, denied access to their branch. In many instances, the Defendant's investigators also removed records, often including personal documents such as diaries in which the Claimants' had: (i) noted problems which had occurred; (ii) to whom they had reported those problems; (iii) what advice and instructions they had received; and (iv) what had resulted from following that advice or instructions.⁴²

Impeding sales and transfers of branches

101.5. Unreasonably acting so as to prevent or inhibit the Claimants from preserving, realising or recovering the value of their businesses including their capital investments. For example, there are several instances of the Defendant not responding to or rejecting the applications of prospective purchasers of branches to become Subpostmasters, with the resultant delay leading to the collapse of sales and/or reduction of sale prices.

Private criminal prosecutions.

101.6. This is dealt with in detail immediately below and gives rise to potential liability for misfeasance in public office and malicious prosecution, where the relevant elements of those torts are established on the facts.

(e) Criminal prosecutions

102. The Defendant's policy or practice was usually to bring private criminal prosecutions against Subpostmasters rather than to report the matter to the Police and then allow the Crown Prosecution Service ("CPS") to prosecute.⁴³

⁴⁰ Briefing Report – Part Two (9.4.2015) at §25.16.

⁴¹ Briefing Report – Part Two (9.4.2015) at §25.3.

⁴² Briefing Report – Part Two (9.4.2015) at §13.15.

⁴³ Briefing Report – Part Two (9.4.2015) at §25.17.

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103. By bringing private prosecutions, the Defendant became responsible for ensuring that its lawyers adhere to the *Code for Crown Prosecutors* which includes ensuring that any cases that it brings to the Courts passes the tests that the CPS itself would apply. These include determining whether it has sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge; a case which does not pass this evidential stage must not proceed, no matter how serious or sensitive it may be.⁴⁴ By itself determining whether or not proposed prosecutions satisfied these tests, when the Defendant had its own private interest in the consequences of the prosecution, the Defendant had an actual or potential conflict of interest such as to accentuate the importance of the proper application of such tests and to require anxious scrutiny of the basis upon which they were to be judged to be satisfied. The Defendant ran the risk of being accused of circumventing those checks and balances that a separate and *independent* body would otherwise have carried out.
104. Notwithstanding the above, there are numerous instances in which criminal charges, such as theft, were brought in circumstances where it appears that the Defendant's primary motivation was a desire to recover financial losses. In some of these cases those criminal charges do not appear to have been supported by the necessary degree of evidence and were dropped prior to trial, often as part of an agreement to accept a guilty plea to a charge of false accounting, so long as the Claimant agreed to repay all of the missing funds.⁴⁵ On occasion, the claimant was required, as part of the plea bargain, not to mention potential errors or bugs in the Horizon system.
105. A specific example of the above is found in the case of Ms Josephine Hamilton. In the case of Ms Hamilton, the Defendant submitted several documents to Second Sight in the course of the Mediation Scheme entered into between the parties, which included a Post Office Investigator's Report, dated 17 May 2006 (the "**Investigator's Report**"), that included the following statements:

"Having analysed the Horizon printouts and accounting documentation I was unable to find any evidence of theft or that the cash figures had been deliberately inflated. ...

The prepared statement seems to intimate that she didn't receive adequate training at the time and that the manuals were old and out of date. It also suggests that she didn't receive any training in respect of other matters."

106. The Investigator's Report also refers to Ms Hamilton having mentioned a £1,500 error, which she said had doubled to £3,000 when attempts were made to correct it, and another error of £750⁴⁶. The Investigator's Report further refers to Ms Hamilton saying that "*The Post Office systems are shambolic*" and that all the branch staff used the same Horizon User ID, citing lack of training as the reason for that. In the opinion of Second Sight, the Defendant's own investigator had found no evidence of theft. Further, the investigator would have been aware of the endemic User ID and password sharing which was taking place at Ms Hamilton's

⁴⁴ See the Code for Crown Prosecutors at 4.4.

⁴⁵ *Briefing Report – Part Two (9.4.2015)* at §25.21.

⁴⁶ In fact, Ms Hamilton followed instructions given to her by the helpline, and having taken the steps as instructed, the error doubled.

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branch, which would have been relevant to Ms Hamilton's defence.⁴⁷ Despite this, the Defendant's 'Case Closure Report' shows, as the "Prosecution Outcome": "Single theft charge removed after undertaking from defence counsel that all monies owed to Post Office would be repaid prior to sentencing".

107. The case of Ms Hamilton demonstrates:

- 107.1. That the Defendant, acting in its capacity as a prosecutor, realised that there may have been insufficient evidence to support a charge of theft, but proceeded with it nonetheless.
- 107.2. The offer by the prosecution to remove the charge of theft appears to have had the effect of putting pressure on Ms Hamilton to plead guilty to the false accounting charges that it had also brought, even though the prosecution may have realised that a charge of theft was likely to fail unless further evidence was later discovered to support that charge.
- 107.3. The threat of proceeding with a charge of theft may have been used to put pressure on Ms Hamilton to agree to repay the losses and to avoid the custodial sentence normally associated with a conviction for theft.
- 107.4. The purpose of proceeding with a charge of theft may have been intended primarily to assist in the recovery of losses, rather than in the interests of justice.

The above factors (i.e. paragraph 107) are not unique to Ms Hamilton's case.

108. Further, it is of note that in the case of Ms Hamilton, part of the agreement to remove the charge of theft included a demand that no mention would be made in Court of alleged problems with Horizon.
109. Another example of a case in which the Defendant acted unreasonably in purported exercise of its prosecutorial powers is found with Mr Darren King. Following the termination of Mr King's engagement with the Defendant he was interviewed by a member of the Defendant's security team. Subsequently, the Defendant applied for a Restraint Order pursuant to section 41 of the Proceeds of Crime Act 2002 ("**POCA**"). Section 40(2) provides conditions for the exercise of the Crown Court's powers under section 41, which include:

"(a) a criminal investigation has been started in England and Wales with regard to an offence, and

(b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct."

110. A witness statement in support of the Defendant's application for a Restraint Order was provided by a Mr Dave Posnett, a Financial Investigator employed by the Defendant, and is dated 3 June 2013. At paragraph 7 of his statement, Mr Posnett sets out the financial affairs of Mr King, which include:

⁴⁷ See *Second Sight – Case Review Report* (24 March 2015) in respect of Josephine Hamilton at §4.10.

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- 110.1. Mr King is the joint owner of a property with his partner. The property had an outstanding mortgage with Santander of approximately £59,677. There was also a further advance with Lloyds TSB and an outstanding balance of £41,340. It was calculated that there was available equity of around £20,642.
- 110.2. In addition to the above, Mr King had access to: (i) a Lloyds TSB Business Account, which was overdrawn by more than £1,800; and (ii) a Santander Store Card (Halfords) with a credit limit of £550.
111. Mr Posnett's conclusion, at paragraph 8 of his witness statement, was that "*I believe that KING has a criminal lifestyle through having committed a criminal offence.*" Mr Posnett appears to base this solely on Mr King admitting in an interview to falsifying accounts. In light of the evidential test set out in the Code for Crown Prosecutors at 4.4, and the test provided by Section 41 of POCA, it is simply untenable to suggest that the Defendant satisfied itself to the requisite standard that an application for a Restraint Order was warranted and necessary; given the financial affairs of Mr King, as set out by Mr Posnett, there was no reasonable basis on which to conclude that Mr King was leading a "*criminal lifestyle*" or that he had benefited from his general alleged criminal conduct.

D. ICL/Fujitsu

(a) **Background to the Post Office/Fujitsu relationship and contracts**

112. The introduction of the Horizon system followed the infamous 1996-1999 Pathway project, aimed at computerising the nation's post offices. It was reported, and subsequently confirmed by the Comptroller and Auditor General, that up to £1bn of tax payers' money was wasted on the aborted attempt to introduce a swipe card system.
113. Quoting an extract from the 2001/02 Royal Mail Group Report and Accounts:
- "Responsibility for the liabilities of the Horizon ICL/Pathway Project was transferred from the Government to the Post Office in 1999. This results in a one-off payment by the Group for costs incurred by ICL of £550m, a write off of £571m in the 1999-2000 Accounts and the incurrence of substantial ongoing maintenance costs. By the time the contract terminates in 2005, aggregate contract costs are expected to amount to some £1bn."*
114. When the Horizon system was introduced, in 1999/2000, there were approximately 18,000 post office branches of varying types.
115. ICL Group, which we understand to have been the original contracting party with Post Office, was ultimately acquired by the Fujitsu Group.
116. We are not privy to the contractual terms as between Fujitsu and Post Office, either in respect of the original roll out of the Horizon system, nor in relation to contracts for the operation, maintenance and ongoing development of the system. Such contractual arrangements will be sought in these proceedings, to the extent that they are relevant to the issues in dispute.

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117. We understand, although are not in a position to verify, that the contractual framework between Post Office and Fujitsu included a liquidated damages mechanism, whereby Fujitsu were required to pay to Post Office a fixed sum of money on each occasion that a transaction failed to process in a branch, by reason of faults, bugs or errors in the Horizon system. We also understand that the consequential financial exposure to Fujitsu was very significant, although we are unaware of the extent to which payments were required to be made by Fujitsu to Post Office in respect of such issues.
118. We understand 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.⁴⁸ Post Office therefore have a financial incentive to refrain from providing Subpostmasters with Horizon transaction data.

(b) Helpline, significant discrepancies and the level of errors and bugs

119. The presence and function of the Post Office Helpline is well documented. The ineffectiveness of the helpline is a recurring feature in the case of the Claimants for whom we act. We address elsewhere in this letter fundamental issues arising out of statements and representations made by the Post Office Helpline. However in the context of Fujitsu, we understand that the Fujitsu technical team in Bracknell, Berkshire (which numbered circa. 30 plus people) was engaged full time in resolving and “fire-fighting” software issues and queries. The Fujitsu software team routinely received calls and queries that the Post Office Helpline had been unable to resolve, which is unsurprising given that a large proportion of the significant issues would require a great deal of time and expertise by the Fujitsu software engineers. It is unsurprising that the Post Office Helpline was ineffective in the vast majority of cases where transaction issues and anomalies had arisen. It appears that the Fujitsu team were routinely encountering software bugs and defects, which needed to be resolved on an ongoing basis. This culminated in frequent and regular corruption or interference with transaction data. Again, determining the nature of the problem, and then rectifying the consequential software issue, and “rebuilding” transaction data in the branch, was a very specialist task that was carried out by the Fujitsu IT specialists.
120. It was often not clear to Subpostmasters how discrepancies and apparent shortfalls in branches had come about – not least as it might result from hardware errors, connectivity errors or software or system errors. Hence, these would routinely have to be analysed by Fujitsu IT specialists, who would need to work through vast numbers of transactions and search through hundreds of thousands of lines of coding, to establish the likely cause of the problem. The issue would often be one of a coding error, which would be flagged to the Fujitsu software developers, who would then work on a fix. Such system and software problems regularly affected transaction data and the proportion of network branches affected by this (as well as by other issues such as connectivity errors) will be in issue in these proceedings.

⁴⁸ “Supplementary existence from Post Office Limited” to BIS – paragraph 66.

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121. We further understand that the Fujitsu IT specialists were able to remotely access data at a branch level, and make changes to data/transactions where required. This is in direct contradiction to the denial by Post Office that such actions are or have been possible.
122. As indicated above, other causes of problems included transaction data being lost by reason of data transfer or connectivity issues, and also hardware issues, each of which could and did translate into shortfalls being indicated on the Horizon system, when in fact there was no actual "shortfall" at all. It is salient to observe that Post Office's approach to alleged shortfalls appears to have proceeded upon a presumption which was effectively or practically irrebuttable (or unreasonably difficult for Subpostmasters to rebut) that such a shortfall did indeed exist.
123. The fact that the Post Office Helpline was inundated with calls, which were often transferred to Fujitsu when it became apparent that Post Office was unable to solve them, and that around 30 Fujitsu employees were working around the clock to attempt to fix bugs in the system, begins to highlight the enormity of the problems which were experienced by Subpostmasters, and by Post Office and Fujitsu in their attempts to fix them. Yet during this time, Post Office employees were informing individual Subpostmasters that they were the "only one" experiencing problems, and Post Office deliberately or by omission failed to thoroughly investigate these problems.

(c) Disclosure/retention of data

124. It is assumed that Fujitsu retain documentation relevant to its contractual arrangement with Post Office and, in particular, records of errors within the Horizon system. We understand that Fujitsu maintained a 'Known Error Log' for Horizon and that such reports will have been provided to Post Office. Please see the list of the categories of documents relating to Fujitsu referred to below, that we request disclosure of.

E. Concealment

125. Throughout, the Defendant concealed material facts from the Claimants, and the Claimants were thereby misled about a number of matters, including: (i) the reliability of Horizon (and the extent of errors in, and generated by, Horizon); (ii) the ability of the Defendant and/or its IT provider (ICL and, later, Fujitsu) to remotely alter transactions without the knowledge of Subpostmasters; and (iii) the Defendant's approach to, and underlying purpose in, investigating shortfalls. (iv) The scale of the impact on the branch network, particularly the large number of branches affected.
126. The Defendant's awareness of issues with the Horizon system is evidenced by, *inter alia*:
 - 126.1. the volume of complaints and issues raised by Subpostmasters relating to alleged "shortfalls" and Horizon since its introduction; and
 - 126.2. specifically, in relation to 'Horizon Online', two internal memoranda, entitled 'Correcting Accounts for "lost" discrepancies' (seemingly produced by Fujitsu) and 'Receipts/Payments Mismatch issue notes' (seemingly prepared by Post Office for its

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legal team), which deal with a Horizon 'bug' that had existed, it seems, from the inception of Horizon Online.

127. Notwithstanding this knowledge, the Defendant concealed these and other material facts in the following ways:

127.1. The view of Second Sight in its report was that the Defendant's instructions to (and its training of) its investigators seems to have disregarded the possibility that the Horizon system could ever be in any way relevant to their investigations.⁴⁹ Further, the view of Second Sight was that the Defendant's investigators seem to have defaulted to seeking evidence that would support a charge of false accounting, rather than carry out an investigation into the root cause of any suspected problems.⁵⁰

127.2. Helpline operators persistently told Subpostmasters that they were the 'only one' experiencing the issues with Horizon that they were reporting. It is inherently unlikely that such a statement would have been disseminated with such frequency without a level of coordination between the Defendant and Helpline operators.

127.3. The Defendant has acted obstructively in failing to disclose relevant information and documents⁵¹ to both Subpostmasters querying shortfalls for which they are purportedly held liable and Second Sight in carrying out its independent investigation into Horizon. With regards the latter, Second Sight commented:

"We have experienced significant difficulty in obtaining access to a number of documents we believe are necessary for the purposes of our investigation, notwithstanding Post Office's commitment to make requested documents available to us. The documents requested from Post Office fall into three main categories:

- a) the complete legal files relating to investigations or criminal prosecutions commenced by Post Office that relate to Applicants;*
- b) the complete email records relating to a small number of Post Office employees working at the Bracknell office of Fujitsu in 2008; and*
- c) detailed transactional records relating to items held in Post Office's Suspense Account(s) and to disputed transactions in a number of third party client accounts held by Post Office."⁵²*

"When we started our work on these important matters in July 2012, we believed that there was a shared commitment with Post Office to "seek the truth" irrespective of the consequences. This was reflected in us being provided with

⁴⁹ Briefing Report – Part Two (9.4.2015) at §25.16.

⁵⁰ Briefing Report – Part Two (9.4.2015) at §25.3.

⁵¹ This includes, but is not limited to, transaction information, data or documents reasonably required by Subpostmasters to consider and respond to alleged "shortfalls". In many cases, requests for such information, data or documents were refused (i.e. concealed).

⁵² Briefing Report – Part Two (9.4.2015) at §2.1.

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unrestricted access to highly confidential and sensitive documents, including legal advice relating to individual cases. This position was recognised and well received by other stakeholders, including the Rt. Hon. James Arbuthnot MP and the JFSA.

However, as time progressed, and particularly in the last 18 months, it has been increasingly difficult to progress our investigations due to various legal challenges by Post Office. There have been considerable delays in receiving responses to requests for information and legal issues have been raised, such as Data Protection and Legal Privilege, as being the reason various documents could no longer be provided to us,

We found that types of document previously provided to us without restriction, were no longer being provided. Some of these documents were also not being provided to Post Office's in-house team of investigators.

We can only conclude that this represented a policy decision by Post Office at a senior level, possibly based on legal advice. We consider this regrettable, particularly in the light of assurances previously provided to ourselves, MPs and the JFSA.¹⁶³

- 127.4. There is also the matter of the Defendant and/or Fujitsu's ability to remotely alter transactions without the knowledge of Subpostmasters. The Defendant's stance on this has consistently been that it is not, and never has been, possible for anyone to access Branch data and amend live transactional or stock data without the knowledge of Subpostmasters or their staff. However, following its investigation and review of various internal memoranda, Second Sight determined that, in 2010 at least, *"it was possible for Fujitsu/Post Office to directly amend branch data without the knowledge of the relevant Subpostmaster."*¹⁶⁴
128. A specific example of the Defendant concealing material facts is illustrated by the case of Seema Misra. Seema Misra was prosecuted by the Defendant on charges of false accounting and theft. She pleaded guilty to the false accounting charges but not guilty to the charge of theft. Part of her defence involved questioning the integrity of the Horizon system. As stated above, it was uncovered by the BBC Panorama programme that:
- 128.1. Charles McLachlan, the expert witness for the defence, stated that he had spoken to one of the Post Office's investigators and he was told that *"as a matter of policy, [Post Office Investigators] would never consider an IT error, a computer error, as the source of the discrepancy."*
- 128.2. The programme described a meeting that took place between the Post Office and Fujitsu just before the trial of Seema Misra. The minutes warn of *"another computer bug that could cause a loss of confidence in the Horizon system if widely known; the bug made money disappear"*. This minute went on to say that this bug could *"impact*

⁵³ Briefing Report – Part Two (9.4.2015) at §26.1-26.4.

⁵⁴ Briefing Report – Part Two (9.4.2015) at §14.15.

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upon ongoing legal cases where branches are disputing the integrity of Horizon Data". The bug did not affect Seema Misra's branch, but it was evidence that there were problems with Horizon, and the same was never disclosed to Charles McLachlan during Seema Misra's trial.

129. In the premises, it is evident that the Defendant deliberately committed breaches of duty in circumstances in which the same was unlikely to be discovered for some time by the Claimants and thereby deliberately concealed the facts involved in that breach of duty.

F. Breach of Duty and/or Unlawful Acts

130. By reason of the Defendant's said conduct, the Defendant is liable to the Claimants for: breach of express and/or implied contractual terms; breach of duties of care in tort; breach of fiduciary duty; unjust enrichment; harassment under the Protection from Harassment Act 1997; negligent misstatement; misrepresentation; deceit; unlawful means conspiracy; malicious prosecution; misfeasance in public office; breach of the Claimants' rights under Articles 6 and 8 ECHR and/or Article 1 of the First Protocol contrary to section 6(1) of the Human Rights Act 1998; and/or procuring a breach of those rights and their common law fair trial rights.
131. It is noteworthy that in respect of the same transactions carried out by Crown Office employees as opposed to Subpostmasters, Crown Office employees are entitled to all of the relevant information underlying transactions. This is striking, and a potential yardstick for what might be reasonable in the context of fiduciary and implied obligations owed to Subpostmasters (as well as commercially acceptable for other purposes, above).
132. By way of amplification of the foregoing, we set out the following:-

(a) Harassment

133. Protection from Harassment Act 1997 (the "Act").

Prohibition of harassment.

1(1) A person must not pursue a course of conduct—

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

Offence of harassment.

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2(1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence.

(2) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

Civil remedy.

3(1) An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

(2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

Interpretation of this group of sections

7(1) This section applies for the interpretation of sections 1 to 5A

(2) References to harassing a person included alarming the person or causing the person distress

134. *Ferguson v British Gas Trading Ltd* [2010] 1 WLR 785. In this case, a utility company made repeated and unwarranted demands for payment of bills threatening disconnection, legal proceedings and being reported to credit rating agencies — demands and threatening letters which had been computer generated. The judgment provides helpful guidance and repays reading in full. At paragraph 40, the court observed that *"It is to be noted that the Act does not provide any defence for "accidental" harassment ... one cannot think of any policy reason why big corporations should be exonerated for conduct which, if carried out by an individual, would amount to harassment."*
135. For the avoidance of doubt, the threshold requirements necessary for Post Office to establish a defence under section 1(3) (a) or (c) of the Act are not met by Post Office's conduct in this case.

(b) Deceit

136. The ambit of the tort of deceit is well known. Since *Derry v Peek*, it has been clear that the tort of deceit:
- 136.1. requires that a sufficiently clear representation be made of fact or law, which is false;
 - 136.2. requires the absence of an honest belief in the representation made; and
 - 136.3. may be established (as to the absence of honest belief) by inference from the unreasonableness of the grounds of such belief.

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137. As Lord Herschell said in *Derry v Peek*, although an unreasonable belief does not itself amount to dishonesty, there may be cases where *"the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one."*
138. One of the striking features of this case, noted above, is the skewed approach to investigating these cases, in that PO investigators appear to have both:
- 138.1. systematically excluded the possibility of any Horizon errors in their investigations; and
 - 138.2. told Subpostmasters who raised the possibility of Horizon errors or difficulties that they were individually 'the only one' having any such difficulty with the system.
139. We understand that the latter statement (i.e. that they were 'the only one') was fairly consistently disseminated to Subpostmasters experiencing difficulties with Horizon and would appear to have been made in circumstances where it appears overwhelmingly unlikely that the Post Office could properly have honestly maintained a belief in the truth of that statement.
140. If Post Office investigators were actually instructed by their management to exclude from consideration the possibility of any error in the Horizon system and did so consistently (i.e. regardless of indications to the contrary or ignoring the obvious possibility of indications to the contrary had they enquired into the Horizon system) the position is even more serious for two reasons:
- 140.1. first, there appear to be free-standing implicit but false representations inherent in Post Office's conduct as investigators (and perhaps in statements made in the course of carrying out such investigations); and
 - 140.2. second, the deliberate decision of the Post Office to exclude from consideration and investigation any possible errors in the Horizon system indicates that the consistent 'only one' representations made by investigators were also made systematically and deliberately.

(c) Misfeasance in public office

141. The rationale for the private law remedy afforded by the tort of misfeasance in public office is that *"in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior or improper purposes"*.⁵⁵
142. The allegation made by the Claimants in the present case is one of misfeasance in public office by untargeted malice, which is established upon proof of damage caused by the act of a public officer, where he so acts knowing or being subjectively reckless as to the fact that he

⁵⁵ *Three Rivers DC v Bank of England (No.3)* [2003] 2 A.C. 1, 190 per Lord Steyn.

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has no power to do the act complained of and that it will probably injure the Claimant.⁵⁶ , In order to establish liability under this tort by reason of untargeted malice, a claimant is required to prove that the public officer acted in a state of mind of reckless indifference to the illegality of his act and its consequences. A knowing excess of power in that sense is essential.

Post Office's approach to investigations

143. In the present matter, the Post Office, in investigating alleged shortfalls appearing on branch accounts (with a view to prosecution), seem to have defaulted to seeking evidence that would support a charge of false accounting, rather than carry out an investigation into the root cause of any suspected problems.⁵⁷ This tied in with the Defendant's policy or practice, which was usually to bring private criminal prosecutions against Subpostmasters rather than to report the matter to the Police and then allow the CPS to prosecute.⁵⁸ The possibility of errors arising from Horizon appears to have been deliberately excluded from consideration and the focus was on recovery of sums from Subpostmasters rather than proper investigation and consideration of the facts identified and data revealed by such investigation.
144. As set out above on page 28, by bringing private prosecutions, the Defendant became responsible for ensuring that its lawyers adhere to the *Code for Crown Prosecutors* which includes ensuring that any cases that it brings to the Courts passes the tests that the CPS itself would apply. These include determining whether it has sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge; a case which does not pass this evidential stage must not proceed, no matter how serious or sensitive it may be.⁵⁹
145. Further, in every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest. Indeed, it has never been the rule that a prosecution will automatically take place once the evidential stage is met.⁶⁰
146. By itself determining whether or not proposed prosecutions satisfied these tests, when the Defendant had its own private interest in the consequences of the prosecution, the Defendant had an actual or potential conflict of interest such as to accentuate the importance of the proper application of such tests and to require anxious scrutiny of the basis upon which they were to be judged to be satisfied. The Defendant ran the risk of being accused of circumventing those checks and balances that a separate and *independent* body would otherwise have carried out.

⁵⁶ Broadly affirming the analysis of Clarke J in *Three Rivers*, at first instance

⁵⁷ *Briefing Report – Part Two (9.4.2015)* at §25.3.

⁵⁸ *Briefing Report – Part Two (9.4.2015)* at §25.17.

⁵⁹ See the Code for Crown Prosecutors at 4.4.

⁶⁰ *Ibid.* at 4.7-4.8.

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147. The details set out above in Section C indicate quite clearly that the Defendant has acted in a manner that was motivated by an improper private purpose, namely the recovery of financial losses from Subpostmasters, in circumstances where, contrary to its express responsibilities pursuant to prosecutorial guidelines, it proceeded with prosecutions in which there was insufficient evidence to substantiate the bringing of criminal charges. The cases of Ms Josephine Hamilton and Mr Darren King (described above), are two specific illustrations of this point.
148. The Defendant, in acting as a private prosecutor, must have been aware of the relevant guidelines and the inadequacy of the evidence before it in each individual case or, alternatively, it turned a blind eye to the same and recklessly failed to make such inquiries as an honest and reasonable body would make as to: (i) the lawfulness or validity of its acts; and (ii) the probable consequences of these acts for the Subpostmaster in question or for the class of Subpostmasters as a whole of whom the relevant Subpostmaster was a member. At best, the Defendant, in failing to properly investigate the extent of the faults with Horizon and potential causation in individual cases, took means not to know the unlawfulness of its acts. At worst, the Defendant was aware of the extent of such faults and proceeded regardless, in full knowledge of the unlawfulness of its acts.
149. For the avoidance of doubt, in so taking these actions, the Defendant acted in the knowledge that its acts would probably injure the Claimants. As a direct result of the Defendant's policy on private prosecutions and the unlawful exercise of its prosecutorial powers, the Claimants suffered from a wide range of foreseeable, and indeed intended, consequences, including: (i) financial losses; (ii) restraint orders; (iii) community service sentences; and (iv) custodial sentences, both suspended and served.
150. To the extent that the acts complained of above are said to have been undertaken by employees of the Defendant and/or individuals contracted by the Defendant, the Defendant is vicariously liable for the same as it is inherently unlikely that such individuals would have been on a '*frolic of their own*' in performing their duties in such a manner. The circumstances described above are indicative of the implementation of policies that were put in place by the Defendant, and as such these actions were effectively authorised by the Defendant.

(d) Malicious Prosecution

151. A claim for malicious prosecution may be brought in respect of civil as well as criminal proceedings: *Crawford Adjusters and others v Sagcor General Insurance (Cayman) Ltd and another* [2013] UKPC 17.
152. The elements of malicious prosecution overlap with those of misfeasance in public office, in the context of the criminal prosecutions, restraint orders and civil recovery proceedings (including bankruptcy petitions).

(e) Unlawful means Conspiracy

153. On present evidence, and subject to the disclosure of further relevant documents, it would appear that there was a conspiracy between the Defendant and its directors and/or investigators and/or Helpline operators and/or Fujitsu in relation to concealing the faults of

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- the Horizon system and simply recovering its losses directly from its Subpostmasters where possible. This view is evidenced by:
- 153.1. The Defendant's apparent policy of excluding from consideration the known risk, if not likelihood, of errors in or related to the Horizon system. The Defendant's knowledge in this respect would have been informed by, inter alia: (i) the volume of complaints and issues raised by Subpostmasters relating to Horizon since its introduction; and (ii) specifically, in relation to 'Horizon Online', two internal memoranda, entitled 'Correcting Accounts for "lost" discrepancies' (seemingly produced by Fujitsu) and 'Receipts/Payments Mismatch issue notes' (seemingly prepared by the Defendant for its legal team), which deal with a Horizon 'bug' that had existed, it seems, from the inception of Horizon Online.
 - 153.2. Notwithstanding this knowledge, Helpline operators persistently told Subpostmasters that they were the 'only one' experiencing the issues with Horizon that they were reporting. It is inherently unlikely that such a statement would have been disseminated with such frequency without a level of coordination between the Defendant and Helpline operators.
 - 153.3. Further, the view of Second Sight in its report was that the Defendant's instructions to (and its training of) its investigators seems to have disregarded the possibility that the Horizon system could ever be in any way relevant to their investigations.
 - 153.4. Additionally, the view of Second Sight was that the Defendant's investigators seem to have defaulted to seeking evidence that would support a charge of false accounting, rather than carry out an investigation into the root cause of any suspected problems. Another indication of this conspiracy is the specific case of Ms Josephine Hamilton, in which: (i) Second Sight formed the view that there was insufficient evidence to support a charge of theft, but such charge was used to put pressure on Ms Hamilton to agree to repay the losses and to avoid the custodial sentence normally associated with a conviction for theft; and (ii) a plea agreement was made on the proviso that Horizon would not be mentioned in Court.
 - 153.5. There is also the matter of the Defendant and/or Fujitsu's ability to remotely alter transactions without the knowledge of Subpostmasters. The Defendant's stance on this has consistently been that it is not, and never has been, possible for anyone to access Branch data and amend live transactional or stock data without the knowledge of Subpostmasters or their staff. However, following its investigation and review of various internal memoranda, Second Sight determined that, in 2010 at least, *"it was possible for Fujitsu/Post Office to directly amend branch data without the knowledge of the relevant Subpostmaster."*
154. In all the circumstances, our clients infer, and will invite the court to infer, that the Defendant formulated and implemented a policy or practice, or otherwise encouraged a common approach, in conjunction with its directors and/or investigators and/or Helpline operators and/or Fujitsu, to cover up any issues with Horizon and pursue Subpostmasters directly without proper and fair consideration the possibility of errors generated by Horizon or otherwise not properly attributable to the Subpostmasters or any relevant fault (i.e. by them or for which they should properly be held responsible).

FREETHS

G. Loss and Damage

(a) Financial Losses

155. The Claimants have typically sustained financial losses arising from making up alleged shortfalls from their own resources and losses consequential thereon. In some cases, they have ultimately lost their business, property and livelihoods.

(b) Stigma and/or reputational damage

156. Those who have been accused of dishonesty or excluded from their branch (or subject to similar treatment by the Post Office) have suffered stigma and/or reputational damage.

(c) Distress and related ill-health

157. Many Claimants suffered distress and some of them ill-health as a result of the conduct of the Post Office, with some attempting to commit suicide.

(d) Bankruptcy

158. As the Post Office will know, some Claimants were made bankrupt on the basis of or as a result of alleged shortfalls.

(e) Prosecutions

159. As noted above, several Claimants were prosecuted and 20 cases are presently before the Criminal Cases Review Committee.

(f) Community or Custodial Sentences

160. Some Claimants suffered community or custodial sentences.

H. ADR

161. Notwithstanding the establishment of, and your subsequent termination of the Mediation Scheme for affected Subpostmasters, our clients nonetheless regard this claim as suitable for mediation.

162. Our clients are willing to enter into mediation after close of pleadings and before the very substantial costs of standard disclosure are incurred.

163. However, our clients are also prepared to consider the timing of any mediation in the light of any reasoned response from your clients on that point and are broadly prepared to mediate at any stage of the proceedings, subject to trying to avoid wasting costs and court time by doing later rather than sooner.

FREETHS

164. We would refer you to *Burchell v Bullard & Ors* [2005] EWCA Civ 358 (8 April 2005), in which the Court of Appeal decided that the unreasonable refusal of an offer to mediate before court proceedings had started could merit a sanction against the refusing party in costs. Our client has taken this into account in suggesting mediating at this early stage.
165. Importantly, in *Burchell*, the Court of Appeal also concluded that the refusing party cannot rely on its own obstinacy or view of the merits as a basis for refusing to participate in a mediation or saying the mediation would have had no reasonable prospect of reaching a settlement. The refusing party may not even be able to rely on its solicitor's or expert's advice either in seeking to excuse such a position, where the result shows that mediation ought reasonably to have at least been attempted.
166. We set these matters out now so that you have every opportunity to consider whether or not you are prepared to attempt to resolve this case by mediation, which we contend is an eminently sensible and appropriate course.
167. We therefore look forward to receiving your considered response to this invitation to mediate.

I. Disclosure

168. We now invite you again to confirm that you will undertake to preserve relevant documents, notwithstanding your recent refusal to provide such confirmation prior to receipt of this letter.
169. We request the following disclosure:
- (1) Contractual documents between Post Office and Subpostmasters and Crown Office employees governing those relationships since 1998
 - (2) Contractual documents between Post Office and ICL/Fujitsu (including but not limited to any service level agreements and/or side letters), applicable from 1999 to date
 - (3) Any documents containing or referring to non-contractual understandings, practices, policies, guidance or memoranda relating to the relationship between Post Office and ICL/Fujitsu and/or ICL/Fujitsu's performance of its role for the Post Office
 - (4) Operations manual(s) for Horizon from 1999 to date
 - (5) Schedule of Horizon updates, modifications and software versions since installation and the issues which each of the versions addressed
 - (6) Schedule of software architecture since launch in 1999 / 2000
 - (7) Post Office internal notes, memoranda, correspondence, emails and briefing documents regarding errors, "bugs" or problems in the Horizon system
 - (8) Post Office internal notes, memoranda, correspondence, emails and briefing documents regarding the Helpline support in dealing with shortfalls showing in the system

FREETHS

- (9) Post Office internal notes, memoranda, emails and briefing documents relating to the risk or likelihood of Horizon issues causing transaction shortfalls or discrepancies in branches.
- (10) Horizon "cheat sheet" which was provided to some Subpostmasters by Post Office to reduce the need to make calls to the Helpline
- (11) Course materials for Horizon training, from 1999 to date
- (12) "Knowledge Base" database of guides and manuals used by helpline staff since 1999
- (13) Helpline logs and any internal related records for the claimants listed in the schedule to the Claim Form.
- (14) Audit guidelines since 1998, including any revisions to date
- (15) Investigation guidelines since 1998, including any revisions to date
- (16) Transaction logs and information on the sums held in the respective suspense accounts, relating to the alleged shortfalls for the Claimants listed in the schedule to the Claim Form
- (17) Notes of audits and investigations and copies of the individual case reports and decision reached by Post Office in suspending and/or terminating those Subpostmasters listed in the Schedule to the Claim Form (where applicable)
- (18) Records or transcripts of interviews for each of the claimants listed in the Schedule to the Claim Form
- (19) Internal memorandum generated in around late 2000 regarding problems with Giro Bank deposits
- (20) Documents concerning referral for prosecution, including but not limited to meeting notes confirming decision to prosecute and the policy documents relied upon in doing so, for those claimants listed on the Claim Form who were prosecuted
- (21) Documents relating to termination of Mediation Scheme
- (22) The '*known error log*' kept by Fujitsu and provided to Post Office as referred to above, and all correspondence relating to the same
- (23) Internal memoranda from Fujitsu and PO referred to by Second Sight as identifying a 'Horizon bug' with Horizon Online
- (24) Email correspondence between Fujitsu and Post Office in 2008, as requested by Second Sight and which Post Office failed to provide copies of.
- (25) Copies of the email data supplied by Post Office to Second Sight in May 2013 (as referred to at paragraph 50 of the Executive Summary to Post Office document entitled "Complaint Review and Mediation Scheme")

FREETHS

- (26) A copy of the witness statement from the member of staff who worked at the Fujitsu site at Bracknell (as referred to at paragraph 51 of the Executive Summary referred to at item 25 above).
- (27) A copy of the written paper (relating to suspense accounts) produced to Second Sight in July 2004, together with the subsequent paper, both referred to at paragraph 53 of the Executive Summary referred to at item 25 above.
- (28) Copies of all documents provided by Post Office to the CCRC to date
- (29) Documents relating to POL's disclosure to Second Sight that, in 2011 and 2012, it had discovered "defects" in Horizon online that had impacted 76 branches (as referred to at paragraphs 6.4 - 6.6 inclusive of Second Sight's Interim Report)
- (30) Second Sight's main report at paragraph 14.8 refers to an internal memorandum from October 2008, which Post Office disclosed, including the remark "Fujitsu have the ability to impact branch records via the message stored but have extremely rigorous procedures in place to prevent adjustments being made without prior authorisation – within [Post Office] and Fujitsu". Please provide a copy of this memorandum
- (31) Second Sight go on to state at paragraphs 14.10 to 14.12 of its final report "*in our Interim Report we referred to software bug in Horizon that had impacted a small number of branches. We have recently discovered two further documents that describe in more detail how Post Office handles this issue. In both of these documents a process is described that involves directly altering branch data.*" The first document to which Second Sight refer is named "Correcting Accounts for "lost" Discrepancies" and was created by a senior engineer at Fujitsu in September 2010. The second is entitled "Receipts/Payments Mismatch issue notes" which appears to be a minute of a joint Post Office and Fujitsu meeting held in August 2010. Please provide copies of these documents.
- (32) A schedule or list of all documents delivered up by Second Sight to Post Office and BIS as requested, on or following the termination of Second Sight's contract.

J. Non Victimisation

- 170. A number of our clients, and in particular those who are currently serving Subpostmasters, are concerned about the potential for their contracts to be terminated by the Post Office, or some other action to be taken to their detriment as a result of their becoming claimants in this claim.
- 171. The Post Office has gone to great lengths to prevent any criticism of Horizon being made publicly, for example, by the terms of plea bargains preventing any reference to such problems being ventilated in open court. There is clearly very considerable sensitivity to such criticisms being made publicly.
- 172. The information disclosed to you in these proceedings includes protected disclosures, protected by the Public Interest Disclosure Act provisions inserted into the Employment Rights Act 1996.

FREETHS

173. In your letter dated 26 April, you imply (but do not expressly) state that Subpostmasters currently have no reason to be concerned about the issues we have raised.
174. Against that background, we seek an assurance from you that no claimant, or other witness or other person who may provide assistance in relation to this litigation (e.g. an ex Fujitsu employee) will be subjected to any pressure or other detriment by reason of being a party to these proceedings or assisting the claim in any way.

K. Official Secrets Act

175. The standard form Sub-Postmaster contract we have seen states that all Subpostmasters Paragraph 1 of Section 16 of the standard form Sub-Postmaster contract provides as follows:

"The unauthorised disclosure, or use directly, of any information or document which has come to the knowledge of a Subpostmaster or Sub-Office Assistant through the work of his Sub-Office legislation or the Official Secrets Act (see paragraph 3)."

176. The clause is apparently intended to impose onerous duties, but as any lawyer will recognise, it is incoherent and unenforceable. We invite you to agree to the unenforceability of this clause. If you contend that the clause is enforceable, please can you clearly set out your case as to the meaning of this clause and how it applied to Subpostmasters?
177. Paragraph 3 of Section 16 states that all Subpostmasters (and Assistants) are required to sign a Personal Declaration which "...brings to [their] notice ... their obligations under the Official Secrets Acts...", and that a further declaration is required on termination of appointment "...as a reminder that the provisions of the Official Secrets Acts continue to apply to him after he has left in respect of all the information which he has acquired or to which he has had access by virtue of his appointed position as Subpostmaster". Personal Declaration P13 (at the Appendix) includes the statement that "It is illegal to disclose official information without authority. A person engaged in Post Office work must not disclose any information which he/she obtains as a result of that work, unless he/she has written permission to do so."
178. The drafting of the contract accordingly suggests to Subpostmasters that the disclosure of any information at all which they have come to know during their engagement would render them liable to prosecution. Please confirm that this is not in fact the Post Office's position as a matter of law.
179. Please can you also state whether the Post Office has ever taken any steps for alleged breach of the Official Secrets Act by a Subpostmaster or any other person, and if so in what circumstances? At present we are unclear as to what acts a Subpostmaster might take which might cause the Post Office to allege a disclosure of information amounting to a breach of the Official Secrets Act.
180. We note that the Official Secrets Act is further relied upon in the contract at Section 19, paragraph 19, to prevent communications about Investigation Division interviews (i.e. interviews with Subpostmasters who are being investigated by the Post Office). Please can you explain in what circumstances a friend who attended such an interview would breach the

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Official Secrets Act by communicating facts about it? As matters stand it appears that the Post Office's reference to the Official Secrets Act is in reality driven by a desire to protect its own interests, but we invite your explanation before reaching any concluded view.

181. There are other ill-defined but apparently serious obligations in Section 16, but of further particular concern is paragraph 11, which provides as follows:

"No Subpostmaster may, without permission, make an official document or a letter from the public, or any other document which may come into his hands officially, the subject of legal proceedings."

182. The prospect of this clause preventing or inhibiting litigation against the Post Office is clear. It purports to impose imprecise, wide ranging and onerous obligations of non-disclosure on Subpostmasters, without proper basis or rationale. We invite you to confirm that you agree this clause is not enforceable.

183. Our clients rely on these clauses set out above as further evidence of the imbalance of power between the parties and the vulnerability of the Subpostmasters, as referred to at section B above.

184. In light of the existence of these clauses, it is necessary for us to seek your assurances that no claimant, or other witness or other person who may provide assistance in relation to this litigation (e.g. an ex Fujitsu employee) will be subject to any allegation, claim or proceedings for breach of the Official Secrets Act, breach of contract relating to disclosure of any information or document, or any claim on any other basis arising out of their use or disclosure of documents in or related to this litigation.

185. We put you on notice that if you do not give the assurances we seek above it is likely we will make an application for declaratory relief in these respects.

L. GLO

186. There are 91 claimants identified on the claim form as issued, and we anticipate several hundred more will join, as we are already in receipt of instructions from that number. It may be that numbers will rise further once this litigation becomes more widely known about, particularly if the assurances as to non-victimisation we have sought above are given by you.

187. If these claims were to be pursued individually in separate courts, the process would be unwieldy and unsatisfactory, cause unnecessary legal and expert fees to be incurred, and result in an undue burden on court time and resources. No doubt a particular consideration for you as Defendant would be the need for the same witnesses to attend multiple hearings to repeatedly give the same oral evidence. The risk of inconsistent judgments on issues which are common to multiple claims, and the consequent appeals therefrom, would be most unwelcome to all concerned.

188. CPR 19.11 provides that the court may make a Group Litigation Order where there are likely to be a number of claims giving rise to the GLO issues. GLO issues are defined by CPR 19.10 as "*common or related issues of fact or law*".

FREETHS

189. We consider it is clear that the conditions for a GLO are satisfied - there are many common or related issues of fact and law, as exemplified by the preceding sections of this letter. It is both necessary and appropriate for a GLO to be made, and it would be most expedient for a GLO to be made at an early stage.
190. There will be very real benefits to all parties if a GLO is made at an early stage, not least:
- 190.1. the court's comprehensive case management powers, including management by a single Managing Judge throughout the life of the case, assisted as necessary by a Master and/or a costs judge (CPR 19.13 and PD19B);
 - 190.2. the establishment of a Group register;
 - 190.3. parties can rely upon Group statements of case (with schedules or questionnaires in individual cases);
 - 190.4. there can be a trial of common issues and test claims; and
 - 190.5. the effect of a judgment or order in the GLO is binding on all parties to all other claims on the group register unless the court orders otherwise (CPR 19.12(1)(a));
191. We intend to make an application for a GLO and seek your agreement in principle to such an application. If you do not agree please can you explain why not, and realistically how you otherwise suggest these claims could be managed independently.
192. If you agree in principle to a GLO, we will engage with you further as to the initial identification of common issues (which will necessarily need to be refined as the litigation progresses), and initial directions for management of these claims, including the establishment and publication of a Group register, and the form and timing of Group Particulars of Claim.

M. Preliminary Issues

193. The court's case management powers include under CPR 3.1(i) the power to "*direct a separate trial of any issue*", which co-exist with the management court's case management powers under CPR Part 19 and the Practice Direction thereto. We consider that if this case is not initially capable of resolution, it may well be that a preliminary issues hearing to resolve particular issues of fact or law will increase the prospects of early settlement, or in any event result in a more streamlined and effective trial.
194. It will be necessary to consider the identification of preliminary issues further in light of your response to this letter, including the Appendix, by which we seek to narrow the issues between us. By way of example, if you agree that the contract between the Post Office and Subpostmasters was a relational contract there will be no need for a determination of that issue; but if you do not, we will be likely suggest that the issue be determined as a preliminary issue.

FREETHS

N. Timing of Response

195. We look forward to receiving responses to this letter, as follows:

195.1. within **14 days**, in relation to your agreement in principle to the management of this claim by way of a Group Litigation Order; and

195.2. within **30 days** in relation to all other issues.

Yours faithfully

GRO

Freeths LLP
Please respond by e-mail where possible

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APPENDIX TO LETTER OF CLAIM: Questions and requests for confirmations and/or further information

	Question	Page	Paragraph	Response
(1)	Please provide an assurance that our clients (existing as well as proposed Claimants) will not be subject to any detrimental treatment as a result of being a Claimant to this claim, or by reason of making any disclosures connected to this claim – in the light of your letter of 26 April 2016 indicating that there is no foundation for fear of such action by Post Office.	45	174	
(2)	Please confirm that you have no objection to Second Sight providing information to us for the purposes of these proceedings.	3	11.2	
(3)	Please clarify your position in relation to the applicability of the Official Secrets Act, and in particular: (i) whether your position is that any of our clients or any other person (eg a Fujitsu employee providing evidence in support of the claim) is in any way restricted from disclosing information about the Post Office's conduct or wrongdoing; and (ii) whether you agree that Paragraph 1 of Section 16 of the Standard form contract is unenforceable. If you contend that it is enforceable, please clearly set out your case as to the meaning of this clause and how it is applicable.	45	175	
(4)	Please provide an assurance that no allegation, claim, or proceedings will be taken against any person for any alleged breach of the Official Secrets Act in relation to steps taken by them or disclosure connected to this claim.	45	175	

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	Question	Page	Paragraph	Response
(5)	Please also state whether Post Office has ever taken any steps for alleged breach of the Official Secrets Act by a Subpostmaster or any other person, and if so, in what circumstances.	45	179	
(6)	Please can you explain in what circumstances a friend who attended an Investigation Division interview would breach the Official Secrets Act by communicating facts about it?	45	180	
(7)	Please confirm that Paragraph 11 of Section 16 of the Standard form of contract is unenforceable.	46	182	
(8)	Please confirm that you provided to the Business Innovation and Skills Committee, a full set of the documents which were returned by Second Sight to you.	10	37	
(9)	Please explain how the Post Office understands that the standard form contracts were subsequently amended, from the 1994 contract, which pre-dated the introduction of Horizon.	13	49	
(10)	Please confirm if you accept that the contract between Post Office and the Subpostmasters was and is a relational contract. If not, please explain.	15	55	
(11)	Please confirm if you accept that there was an implied term of trust and confidence, within the standard form contracts for Subpostmasters. If not, please explain.	16	59	

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	Question	Page	Paragraph	Response
(12)	Please confirm if you accept that there was an implied term within the standard form contracts for Subpostmasters that Post Office would exercise its powers power honestly and in good faith for the purpose for which such powers were conferred. If not, please explain.	17	60	
(13)	Please confirm if you accept that there were implied terms within the standard form contracts for Subpostmasters imposing obligations on the Post Office to provide adequate training and support and to cooperate with the Subpostmasters in seeking to identify the cause of any alleged shortfalls. If not, please explain.	17	62	
(14)	Please confirm if you accept that there were implied terms within the standard form contracts for Subpostmasters that the Post Office would (i) properly execute all transactions (ii) properly account for, record and explain all transactions and alleged shortfalls and (iii) properly, even-handedly and fairly investigate any such alleged shortfalls. If not, please explain.	18	65	
(15)	Please confirm if you accept that the Post Office owed the Subpostmasters the limited fiduciary duty set out in the main body of this letter. If not, please explain.	18	66	
(16)	Please confirm if it is correct that some Subpostmasters were required, as part of a plea bargain in criminal proceedings, not to mention potential errors in Horizon publicly, including to the court. If not, please explain whether any materially similar or related undertakings were required.	28	104	

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	Question	Page	Paragraph	Response
(17)	Please confirm whether Post Office agrees with Second Sight's finding that it is (or was) possible for Fujitsu/Post Office to directly amend branch data remotely, without the knowledge or involvement of the relevant Subpostmaster. If it is agreed that Second Sight's finding is correct, please confirm why it is that Post Office previously denied this assertion. If it is not agreed, please explain.	34	127.4	
(18)	Please confirm whether Post Office accepts that errors, bugs or other issues which have occurred in the Horizon system since 1999 have caused apparent "shortfalls" and/or other transaction anomalies and/or discrepancies at branch level.	21	79	
(19)	Please confirm: (i) why it is that minutes of a meeting were not disclosed to Charles McLachlan (the expert witness for Seema Misra during her criminal trial) which warned of a computer bug that could cause a loss of confidence in the Horizon system by making money disappear and that it could impact upon ongoing legal proceedings; and (ii) whether those minutes have ever been disclosed to any Subpostmaster in the context of investigation into an alleged shortfall or an enquiry by a Subpostmaster about any such alleged shortfall.	34	128	
(20)	Please confirm: (i) if Post Office investigators were instructed to exclude the possibility of any Horizon errors in their investigations and if so, why; and (ii) if they were not so instructed, what instructions (or guidance or similar) they were given with regard to the possibility of Horizon errors.	40	154	

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	Question	Page	Paragraph	Response
(21)	Please confirm if instruction(s) or guidance was given to any Post Office personnel (or helpline personnel providing any information to Subpostmasters) that they should inform individual Subpostmasters that they were the only one experiencing Horizon related problems, or words to that effect.	33	127.2	
(22)	Please state whether Post Office has ever disclosed any information after a prosecution has concluded, in pursuance of its continuing duty to disclose any information that subsequently comes to light which might undermine its prosecution or support the case of the defendant and if so, provide details of that information and state in how many cases it has done so.	12	45.5	
(23)	Please confirm whether in principle you are willing to mediate at this stage.	42	167	
(24)	Please confirm if you agree in principle to our proposed GLO application and if not, why not.	47	191	