

1 Wednesday, 3 April 2019

2 (10.30 am)

3 Housekeeping

4 LORD GRABINER: My Lord, on this application I appear for
5 the Post Office, and I think your Lordship will be
6 familiar with all the characters in the story. I am
7 with my learned friends Mr Cavender and Mr Cohen, and my
8 learned friends Mr Green, Ms Donnelly, Mr Warwick,
9 Mr Miletic and Ms MacKenzie appear for the claimants.

10 MR JUSTICE FRASER: Yes.

11 LORD GRABINER: Your Lordship will have seen our skeleton
12 argument and a draft of the order that we seek. We
13 invite your Lordship to recuse your Lordship as managing
14 judge of this litigation and in association with that
15 application we also seek an order that the Horizon trial
16 currently being heard by your Lordship should be stayed
17 or adjourned, as the case may be. And for the avoidance
18 of doubt, we do not say that if this application
19 succeeds, the Common Issues trial will have to be
20 re-run.

21 MR JUSTICE FRASER: The Common Issues trial?

22 LORD GRABINER: Precisely. So if we are successful, we do
23 not say that that trial will be have to be re-run, which
24 I think is one of the concerns expressed by the other
25 side. We do propose to appeal against your Lordship's

1 judgment, and the view we take is that the matters we
2 complain about can be rectified on appeal without the
3 need for a retrial.

4 Can I turn, then, to apparent bias.

5 MR JUSTICE FRASER: Yes, just before you do, Lord Grabiner,
6 in terms of logistics, we usually have a break sometime
7 round about a quarter to 12 for five or ten minutes just
8 for the shorthand writers, which I know you will know is
9 entirely conventional.

10 LORD GRABINER: Indeed.

11 MR JUSTICE FRASER: Although the application is set down for
12 the whole day, if you could aim to finish your
13 submissions some time between 12.30 and 1 o'clock, or
14 1.30 at the latest.

15 Application by LORD GRABINER

16 LORD GRABINER: Yes, my Lord.

17 I can deal first of all with the law very shortly by
18 reference to four cases. And I am not going to trouble
19 your Lordship to turn them all up, but give you
20 a reference because there are short quotes I can deal
21 with.

22 The first is the well-known legal test stated by

23 Lord Hope in Porter v Magill, and the reference for the
24 transcript is {B9.5/8/1} and it is just in
25 paragraph 105, where Lord Hope says the test is, and

1 I quote:

2 "Whether the fair-minded and informed observer,
3 having considered the facts, would conclude that there
4 was a real possibility that the Tribunal was biased."

5 So it is an objective test.

6 The second case is the case of Otkritie v Urumov,
7 and that is in bundle 9.5, tab 25, {B9.5/25/1} and it is
8 at paragraph 1 of the judgment of Lord Justice Longmore,
9 to the effect that bias includes conveying the
10 impression of having prejudged any issue which remains
11 to be decided. And Lord Justice Longmore's observation
12 is this, and I quote:

13 "The concept of bias extends further to any real
14 possibility that a judge would approach a case with
15 a closed mind or indeed with anything other than an
16 objective view; a real possibility, in other words, that
17 he might in some way have prejudged the case."

18 The third case I want to show your Lordship, because
19 you may not be familiar with it, and there are passages
20 in it that I want to draw to the court's attention, and
21 that is the case of Mengiste. It is in your Lordship's
22 bundle {B9.5/23/1}.

23 MR JUSTICE FRASER: I think it is tab 24, isn't it?

24 LORD GRABINER: It is certainly tab 24 for me.

25 MR JUSTICE FRASER: It is tab 24 for me as well.

1 LORD GRABINER: Very good. I wasn't sure if the electronics
2 had caught up.

3 MR JUSTICE FRASER: Tab 24 for me is the costs law report
4 version, is that the one that you have?

5 LORD GRABINER: Yes. That case, we say, is instructive.

6 I can just tell your Lordship something about it first,
7 it will save going through the headnote. There
8 Mr Justice Peter Smith had criticised the evidence of an
9 Ethiopian law expert witness. He is improbably called
10 Mr Jones in the case, but that was to protect him
11 against possible repercussions in Ethiopia, so Mr Jones
12 is just a nom de plume.

13 In his judgment, he went on to criticise the
14 solicitors for the party who had relied on Mr Jones on
15 the basis that the solicitors had failed to educate the
16 expert as to his proper functions and duties.
17 Encouraged by what the judge had said, the other side
18 applied for a wasted costs order against the solicitors.

19 The judge granted permission for that application to
20 proceed, that was stage 1, but he refused to recuse
21 himself from the substantive hearing, stage 2. The
22 Court of Appeal held that the judge should have recused

23 himself because of his concluded views as to the
24 behaviour of the solicitors, as expressed in his
25 judgment.

1 If your Lordship would be kind enough to go
2 paragraph 59 of the judgment of Lady Justice Arden.

3 MR JUSTICE FRASER: Give me one second, my chair seems to be
4 broken, so I'm just swapping it for this one. (Pause)

5 LORD GRABINER: Paragraph 59, my Lord, the Lady Justice says
6 that she has reached the clear conclusion that this was
7 an exceptional case and that there was apparent bias
8 stemming from the facts of the case which meant that the
9 judge should have recused himself.

10 MR JUSTICE FRASER: Yes.

11 LORD GRABINER: Then under various headings, the
12 cross-heading is "No necessity to make the findings"
13 and, and I want to emphasise the words:

14 "The judge's criticisms were not, in my judgment,
15 necessary to enable the judge to evaluate Mr Jones'
16 evidence."

17 And a few lines below that:

18 "The question why his reports contained inadmissible
19 material or he performed poorly as a witness, which
20 I accept were likely to increase costs, were primarily
21 relevant when it came to costs. As it seems to me, the
22 judge in making criticisms against the solicitors over

23 their explanation to Mr Jones about his duties was
24 concerned to warn off an application for a wasted costs
25 order against Mr Jones."

1 And that was to anticipate an application that had
2 not yet been made, and your Lordship might want to
3 glance at the balance of that paragraph, but I am not
4 going to read it out. And then the next cross-heading
5 is "Criticisms expressed in absolute terms," and
6 your Lordship might like to read that paragraph through.

7 Then the other cross-heading is "Repetition, further
8 criticism and concern to meet criticisms of the judge's
9 conduct."

10 And the learned Lord Justice says:

11 "While I might not have reached the same conclusion
12 if a criticism had been made in absolute terms on
13 a single occasion, here the judge accepted that there
14 were six criticisms of the appellant's solicitors in the
15 stay judgment."

16 And I wasn't going to read the balance of that, but
17 if your Lordship would be kind enough to go to
18 paragraph 63, about seven or eight lines down:

19 "The second principle is that a judge who is doing
20 no more than discharge his judicial function does not
21 create an impression of bias, which is
22 well-established."

23 MR JUSTICE FRASER: I'm sorry, I have reached 63, but ...

24 LORD GRABINER: 63, you will see it is split into the first

25 principle and then the second principle, about six lines

1 down.

2 MR JUSTICE FRASER: I see, yes.

3 LORD GRABINER: "A judge who is doing no more than his
4 discharge his judicial function does not create an
5 impression of bias, which is well-established. What
6 occurs in that situation is adjudication, not unsought
7 findings."

8 And I emphasise those words, "unsought findings".

9 And then about four or five lines below that:

10 "Where there is an issue of apparent bias, the test
11 in Porter v Magill must be fearlessly applied by this
12 court and the fourth and fifth principles overlook the
13 possibility that mere criticism expressed in absolute
14 terms may of itself be extreme and unbalanced because
15 the impression to even the fair-minded observer that the
16 door has not been left open for whatever explanation the
17 party or non-party, who has not yet had the chance of
18 providing that explanation, may have to say."

19 And I shall be submitting that your Lordship does
20 express himself in the judgment in very firm terms.

21 The fourth case, and it is probably helpful to --
22 I have got a hard copy, old school bundle with me, but

23 the fourth case perhaps we can also just briefly look
24 at, and this is the final case, is Stubbs v The Queen
25 {B9.5/29/1}.

1 MR JUSTICE FRASER: Yes, it is. I too am using an old
2 school bundle.

3 LORD GRABINER: Very wise. But again, I don't know if
4 your Lordship is familiar with this case, it is an
5 appeal to the Privy Council in a murder trial from the
6 Caribbean, and you can see in the sort of second line of
7 the headnote:

8 "In 2007 a second trial took place before
9 a different judge and jury, in the course of which the
10 judge made certain rulings relating to the admissibility
11 of evidence and dock identification and ruled against
12 the submission of no case to answer. Then that trial
13 was aborted."

14 When there was in due course, I think, a third trial
15 and the defendants were convicted, the Court of Appeal,
16 on hearing that appeal:

17 "It transpired that the judge who had sat in the
18 second trial was a member of the Court of Appeal in the
19 third trial and the Court of Appeal rejected the
20 defendant's objection --"

21 This is just above F:

22 "-- that the participation of the same judge in the

23 second trial and in the appeal would not give rise to a
24 reasonable apprehension of bias, since the aborted trial
25 had taken place some seven years earlier, the judge

1 wouldn't be sitting alone, but in a panel of two other
2 judges."

3 So they seemed to think it didn't matter if one of
4 the three infected the other two, but the Privy Council
5 took a different view. Just from the top of the
6 headnote in the holding:

7 "Whether fair-minded and informed observer having
8 consider the facts would conclude that there was a real
9 possibility that the Tribunal was biased, that the
10 appearance of bias as a result of pre-determination or
11 pre-judgment was a recognised ground for other recusal."

12 If your Lordship would be kind enough to just flick
13 to paragraph 16 in the judgment of Lord Lloyd-Jones in
14 F, between F and G, a couple of lines below F:

15 "The issue will only arise in all the circumstances
16 where prior involvement is such as might suggest to
17 a fair-minded and informed observer that the judge's
18 mind is closed in some respect relevant to the decision
19 which must now be made."

20 Then after some citation of Locabail, which I will
21 come back to later on, the learned judge says:

22 "However, relevant factors are likely to include the

23 nature of the previous and current issues, their
24 proximity to each other and the terms in which the
25 previous determinations were pronounced."

1 And in paragraph 17:

2 "It is not acceptable for a judge to form or to give
3 the impression of having formed a concluded view on an
4 issue prior to hearing full argument by all parties on
5 the point."

6 So that is all I wanted to show your Lordship for
7 the moment, but judging from my learned friend's
8 skeleton argument, the impression I have is that what
9 I have just been showing your Lordship is not
10 controversial.

11 Then it is also necessary, we suggest, to bear in
12 mind the big picture. The incomplete disclosure and
13 evidence itself relates only to a tiny proportion of the
14 claimant group. There were six lead claimants in the
15 Common Issues trial out of, I gather, about 550-odd
16 claimants, and the 550-odd are themselves a small
17 proportion of the many thousands of Subpostmasters
18 currently serving, so there must also be some historic
19 examples as well of people who are no longer acting as
20 Subpostmasters, and we don't have any disclosure or
21 evidence from any of that wider group.

22 MR JUSTICE FRASER: But there would never be disclosure of

23 Subpostmasters who weren't claimants, would there?

24 LORD GRABINER: Well, in principle, that is quite correct,

25 but there would be disclosure from those who were.

1 MR JUSTICE FRASER: Yes.

2 LORD GRABINER: And I suppose in theory, it might be
3 possible for disclosure to be widened, notwithstanding
4 the fact that the others are not parties as claimants.
5 I don't know.

6 MR JUSTICE FRASER: In terms of third party disclosure?

7 LORD GRABINER: Yes, exactly.

8 MR JUSTICE FRASER: Yes.

9 LORD GRABINER: But it is a theoretical possibility,
10 I readily accept.

11 MR JUSTICE FRASER: But you are entirely right, there were
12 six lead claimants out of 557 claimants in the
13 litigation.

14 LORD GRABINER: I am grateful. Two points follow from that.
15 First of all, the danger of reaching premature
16 conclusions is magnified because the incomplete
17 evidential picture for the lead claimants is itself part
18 of a larger unexplored evidential canvass, in my
19 submission.

20 And secondly, the consequence of making that mistake
21 would be great, given -- or could be great, given that
22 this litigation extends far beyond the lead claimants'

23 claims.

24 Turning to this litigation. Obviously your Lordship
25 is very familiar with it and the various disputes

1 between the parties, and I am not going to even attempt
2 to rehearse the details. The starting point of my
3 submissions is the proper scope of what is called the
4 Common Issues trial. The Common Issues are set out in
5 your Lordship's paragraph 45 of the judgment, very
6 helpfully.

7 And then paragraph 1 of the order of the
8 27 October 2017, just for the transcript, that is
9 {B9.3/2/1}, gave an accurate and convenient precis of
10 the Common Issues, and paragraph 1 simply says:

11 "Issues relating to the legal relationship between
12 the parties."

13 So it couldn't be clearer or more concise than that.
14 For convenience, we have summarised the Common Issues
15 under four headings in paragraph 18 of our skeleton
16 argument.

17 We have comprehended every item there, and
18 paragraph 18 summarises each of those items.

19 Your Lordship might want to glance at that.

20 MR JUSTICE FRASER: Just give me a second. I had been
21 working off the schedule to the order, but I am sure
22 they are correctly identified. Paragraph 18 of your

23 skeleton?

24 LORD GRABINER: Paragraph 18 of our skeleton on page 7. It

25 identifies all the issues, but puts them under

1 particular sort of generic headings.

2 In our submission, there was little scope for
3 factual evidence at the Common Issues trial, looking at
4 those items.

5 Then pre-trial at the 22 February 2018 hearing,
6 your Lordship said that you had, and I quote "reminded
7 yourself that the Common Issues were" and I quote
8 "purely points of construction". And the reference for
9 that, but we don't need to go to it, is the
10 22 February 2018 hearing at page 9D and that is
11 {B9.3/2/85}. That is probably a transcript page
12 reference.

13 Now, that was, in my submission, an important and
14 accurate statement. Your Lordship repeated a version of
15 the same point several times at a number of
16 interlocutory hearings thereafter. The parties were
17 entitled to rely on those clear and correct indications
18 as to the scope of the Common Issues trial.

19 As your Lordship rightly said on various occasions,
20 evidence was only admissible if it went to the
21 Common Issues. You said that at the 5 June 2018 hearing
22 at page 57E {B9.3/2/271} and your Lordship also said

23 that the only relevant evidence for contractual
24 construction is knowledge common to the parties, when
25 the relevant contract was made and with which, if I may

1 say so, I respectfully agree, 22 February 2018 hearing
2 at page 9E, {B9.3/2/85}, and the other point for that
3 trial was a much narrower one, namely whether the lead
4 claimants had been properly notified of the contractual
5 terms, which obviously was an issue in the case in
6 Common Issues 1.

7 MR JUSTICE FRASER: I think it went to a number of
8 Common Issues, due to onerous and unusual terms.

9 LORD GRABINER: Indeed, under the Unfair Contract Terms Act.

10 MR JUSTICE FRASER: Onerous and usual terms in terms of
11 incorporation and then if incorporated, whether they
12 were reasonable under the Unfair Contract Terms Act.

13 LORD GRABINER: Exactly, and your Lordship is familiar with
14 the successive trial structure that was set up under the
15 litigation management arrangement. Under that scheme,
16 in respect of each trial, there needs to be disclosure
17 and witness statements geared to the issues in the
18 particular trial.

19 The Common Issues trial was never intended to decide
20 issues which fall to be investigated and determined in
21 some later trial, and still less to provide a platform
22 for wide-ranging evidence, for example on the Horizon

23 Issues or alleged breaches of duty. That is an
24 important point.

25 Prior to and during the Common Issues trial, the

1 Post Office on a number of occasions drew attention to
2 its developing concern that the evidence and arguments
3 adduced by the claimants might lead your Lordship, when
4 giving judgment, to trespass on matters outside the
5 Common Issues which were yet to be tried, for example
6 Horizon or breach issues.

7 The relevant passages are scheduled to our skeleton
8 argument, which I think your Lordship will have seen.
9 Just in summary, they include transcripts of pre-trial
10 hearings, extracts from our trial skeleton, passages
11 from Mr Cavender's oral opening and closing at the
12 trial, as well as extracts from the Post Office's
13 written closing at trial. But in the event, I am
14 I afraid, those concerns, in my submission, turned out
15 to be well-founded.

16 In addition to our criticisms of the way the
17 judgment deals with issues outside of the Common Issues,
18 we also complain about prejudicial and irrelevant
19 observations made in the judgment about Post Office and
20 its witnesses.

21 Both categories of complaint, taken separately or
22 together, would lead the fair-minded observer to

23 conclude that there is at least a real possibility that
24 your Lordship will not be able to judge the remainder of
25 these proceedings impartially. I regret making that

1 submission, but I do make the submission firmly.

2 Now, in these submissions, I propose to focus on the
3 paragraphs in your Lordship's judgment we rely on and
4 which we have given notice of. In the interests of
5 time, I was not proposing to take your Lordship through
6 Mr Parsons' 14th and 15th witness statements, which were
7 prepared and served specifically for this hearing, and
8 I am sure your Lordship has looked at those.

9 MR JUSTICE FRASER: They identify effectively pre-trial
10 transcript passages and then in the 15th, the actual
11 specific judgment passages.

12 LORD GRABINER: My Lord, yes. And similarly, I would prefer
13 to take our skeleton argument as read. I should make it
14 clear that we rely on everything in those witness
15 statements and in our skeleton argument in support of
16 this application.

17 Now, as to the first category, I want to go to the
18 paragraphs in the judgment which show that your Lordship
19 made many findings and numerous observations both about
20 the facts and the witnesses, which, in the first place,
21 were not necessary for the purpose of deciding the
22 matters which were the subject of the Common Issues

23 trial, and that this was done without disclosure and
24 witness evidence, and secondly, because your Lordship
25 adopted that approach, the judgment prejudices many

1 matters, including technical characteristics of the
2 Horizon system and supposed breaches of contract and
3 duties on the part of Post Office, which are still to be
4 dealt with in the Horizon trial and the other future
5 trials.

6 Now, it would be helpful if your Lordship would be
7 kind enough to take up my learned friend's skeleton
8 argument. I just want to make a brief reference to
9 a couple of the paragraphs because my learned friend's
10 skeleton helpfully narrows the dispute. If,
11 your Lordship, you have got that skeleton handy, if
12 your Lordship would be kind enough to go to paragraph 8.

13 MR JUSTICE FRASER: This is Mr Green's skeleton?

14 LORD GRABINER: My Lord, yes.

15 MR JUSTICE FRASER: Yes.

16 LORD GRABINER: What he says in paragraph 8 is:

17 "In the judgment, the judge correctly resolved
18 matters that were put in issue before him. He did so in
19 the light of the evidence adduced, how it was challenged
20 and the case advanced by the parties before him.
21 A party can't be surprised when a judge makes findings
22 on a point when the same party has elected to adduce

23 evidence on that point or to cross-examine on it."

24 In paragraph 9:

25 "The judge rightly made his assessment of the above

1 matters and resolved the Common Issues."

2 And I really emphasise those words:

3 "In the light of the parties' pleaded cases, in
4 particular Post Office's expressly pleaded case on
5 issues of construction and its procedural election not
6 to amend that case, this approach was a proper and
7 necessary part of his judicial assessment of the
8 proceedings before him."

9 And I emphasise those words as well. Then in
10 paragraph --

11 MR JUSTICE FRASER: There is no dispute that I had to
12 consider and resolve the Common Issues, I think.

13 LORD GRABINER: Indeed, that is common ground.

14 MR JUSTICE FRASER: And I had to do that in respect of the
15 six lead claimants as well.

16 LORD GRABINER: Indeed, absolutely.

17 MR JUSTICE FRASER: And insofar as there were issues of
18 fact, because there were issues of contract formation --

19 LORD GRABINER: Indeed.

20 MR JUSTICE FRASER: -- that went to each of the six.

21 LORD GRABINER: Indeed.

22 MR JUSTICE FRASER: So I assume your position on that is

23 that insofar as fact had to be resolved to identify the
24 contractual relations of each of those six, that was
25 a necessary part of the Common Issues trial.

1 LORD GRABINER: Absolutely, I respectfully agree.

2 MR JUSTICE FRASER: All right.

3 LORD GRABINER: If your Lordship would look at paragraph 12,
4 my learned friend says:

5 "In any event, these matters were not irrelevant.

6 In many cases, they were relevant because of

7 Post Office's expressly pleaded case as to how the

8 relevant contract should be construed or in the

9 resolution of issues directly arising from challenges

10 mounted before the court by Post Office's own

11 cross-examination of lead claimants."

12 You see how the point has now been elided away from

13 the contract terms into the cross-examination debate.

14 Then in 13:

15 "It does not lie in the Post Office mouth to

16 complain that the judge resolved matters that the

17 Post Office itself elected to put in issue and contested

18 before him or on which it expressly invited him to make

19 findings, still less as a basis upon which to seek to

20 derail the entire group litigation by alleged apparent

21 bias."

22 Then in paragraph 17:

23 "The court cannot be fairly criticised for making
24 a judicial assessment of both parties' cases, evidence
25 and witnesses in the usual way, particularly on the

1 basis of the parties' respective pleaded cases and the
2 way their cases were actually advanced at the
3 Common Issues trial."

4 So there is a clear departure away from the contract
5 terms, as your Lordship put it to me a few moments ago,
6 and into matters such as what was pleaded and what was
7 cross-examined and so on.

8 MR JUSTICE FRASER: But just pausing there just for
9 a moment, because your expression "the cross-examination
10 debate" I think as useful shorthand term for it. But if
11 the Post Office was challenging a particular lead
12 claimant's veracity and cross-examined on particular
13 material to demonstrate that that witness should not be
14 believed, and there is an issue of fact as to whether
15 that witness' contractual relations with the Post Office
16 were formed on X, Y, or Z, does that mean that the
17 material in respect of which cross-examination has been
18 performed remains irrelevant or does it become relevant?

19 LORD GRABINER: If the cross-examination was concerned to
20 deal with the Common Issues, entirely appropriate to
21 deal with -- to make findings in relation to that
22 cross-examination, yes.

23 MR JUSTICE FRASER: What if it was done to deal with the
24 credit of the witness, which is itself in issue in
25 respect of their contract formation?

1 LORD GRABINER: Well, as I say, if it is concerned with
2 contract formation, fair dos, but insofar as there might
3 have been cross-examination which went to wider issues
4 at the trial, which I understand is the case, that is
5 driven essentially by the background about whether or
6 not the material that was incorporated into the
7 claimants' witness statements was admissible and
8 relevant material.

9 One of the concerns on this side was not to leave
10 unchallenged matters which shouldn't have been in
11 evidence at all, because they were not relevant to the
12 Common Issues as defined. That, I think, is the area
13 for disagreement, and I will develop it a little bit
14 further, because when we look at various paragraphs in
15 the judgment, you will see how that distinction can be
16 demonstrated from the paragraphs in the judgment that we
17 rely upon.

18 But that was a grumbling issue all the way through,
19 because at the outset it was anticipated that that would
20 not be a problem, and indeed your Lordship at one stage
21 had actually invited the possibility that there would be
22 a strike-out application in respect of the witness

23 statements on the grounds that my side were saying that
24 the witness statements contained matters of fact which
25 were wholly irrelevant to the Common Issues.

1 In the event, when that application was made,
2 I think your Lordship said that would either be dealt
3 with by way of a strike out or by way of no
4 cross-examination. In the event, the strike-out
5 application was made, but was rejected by your Lordship.
6 But, of course, my side were then left in a quandary,
7 not knowing whether or not your Lordship would take
8 account of irrelevant material, irrelevant for the
9 purposes of the trial of the Common Issues. That,
10 I think, is the area for difference.

11 MR JUSTICE FRASER: The strike-out application was first, or
12 concerns about scope of evidence were first mentioned
13 before the witness statements had been served, so there
14 was a lot of debate about the scope of evidence that
15 might be served in the absence of seeing what that
16 evidence was.

17 LORD GRABINER: Yes.

18 MR JUSTICE FRASER: But I understand your submission. Your
19 submission is as a result of the judgment on the
20 strike-out application, you, the Post Office, was in
21 a quandary about what it could or should do in respect
22 of the evidence that had not been struck out, is that

23 correct?

24 LORD GRABINER: Precisely. What would be very, very

25 unattractive, in the face of the events that had

1 happened, that if, by the time you got to the trial, my
2 learned friend Mr Cavender spent a lot of his time
3 during my learned friend's Mr Green's cross-examination
4 of witnesses jumping up and down saying, "You can't put
5 that because it doesn't arise in the Common Issues
6 trial", nothing could be more irritating either to
7 Mr Green in his cross-examination, still less to the
8 learned judge, because that is just not the way to
9 proceed.

10 So that said, the only way in which you can cover
11 yourself, you either say nothing at all, which is a high
12 risk strategy because you don't know what the judge's
13 thinking is or what relevance the judge may apply to the
14 matters that have been the subject of the questioning,
15 or you actually indulge yourself in some
16 cross-examination.

17 But it doesn't follow that because you have done
18 that, by some kind of process of osmosis, the definition
19 of the Common Issues are suddenly being dramatically
20 expanded or increased. It doesn't change the definition
21 of the Common Issues in the slightest. It means there
22 has been some cross-examination on some irrelevant

23 material, which is perfectly reasonable.

24 But I take your Lordship's point that if the
25 cross-examination goes to credit and was in respect of

1 a matter such as what were the contract terms, or some
2 other issue under the Common Issues' rubric, then that
3 would be fair dos, and if your Lordship came to
4 a conclusion about that, that would be reasonable.

5 But on the other hand, your Lordship came to
6 a conclusion about the credibility of some witness, but
7 in the context of a debate about breach of contract, in
8 my submission, that would be wholly irrelevant and
9 should not have entered upon the debate.

10 Similarly, if it was an issue about the working of
11 Horizon, the idea or the notion, as we shall see, I am
12 afraid, when we get to the paragraphs, that
13 your Lordship expresses a view about the witnesses'
14 position in relation to a Horizon Issue for example, in
15 my submission, that was an irrelevant consideration and
16 should not have figured in the judgment on the
17 Common Issues. I hope your Lordship understands where
18 I am coming from.

19 MR JUSTICE FRASER: No, I do. That is very clear. But just
20 to take a worked example, for example, in respect of
21 credit, there were issues of fact concerning
22 Mr Abdulla's contract formation.

23 LORD GRABINER: Indeed.

24 MR JUSTICE FRASER: And the claimant called, as is

25 conventional, its evidence of fact first and Mr Cavender

1 cross-examined Mr Abdulla quite extensively by reference
2 to what I will call his suspension interview, which was
3 the point at which the Post Office effectively sought
4 his side of the story for explanations for shortfall in
5 his branch accounts. In that interview, it was put to
6 Mr Abdulla that he had admitted false accounting, which
7 is a criminal offence, and that obviously went to his
8 credit.

9 Now, I assume, pausing there at that point, it can't
10 be said -- or maybe it can, but I would be grateful for
11 your guidance or your submissions on it. Can it be said
12 that that cross-examination of Mr Abdulla was irrelevant
13 because it went to the circumstances in which he was
14 suspended or --

15 LORD GRABINER: The answer to that is yes.

16 MR JUSTICE FRASER: You say it was irrelevant.

17 LORD GRABINER: Completely.

18 MR JUSTICE FRASER: When the Post Office made submissions in
19 closing that Mr Abdulla had been lying, how can those
20 submissions properly be considered without taking
21 account of the fact that the Post Office had put to
22 Mr Abdulla that he was guilty of a criminal offence?

23 LORD GRABINER: Would your Lordship bear with me?

24 I understand the point that you are putting to me.

25 I intend to come to the Mr Abdulla story in the judgment

1 and if I may, I will deal with it at that point.

2 MR JUSTICE FRASER: Yes, of course, yes.

3 LORD GRABINER: And then as I say, just coming back to the
4 point about those paragraphs in my learned friend's
5 skeleton --

6 MR JUSTICE FRASER: Yes.

7 LORD GRABINER: -- the claimants say that your Lordship
8 resolved matters in issue before you, and so they accept
9 that your Lordship has reached concluded findings. And
10 it follows that the essential difference between us is
11 that the claimants say that those findings were
12 necessary, that is their word in paragraph 9, to decide
13 the issues before you, and we say the opposite.

14 So that is a short point, but I think it does narrow
15 the issues somewhat.

16 MR JUSTICE FRASER: Yes.

17 LORD GRABINER: Now, in support of their argument that
18 your Lordship had to decide these matters, they make
19 some play of the way that Post Office conducted the
20 trial. I anticipated these points, in part at least,
21 a few moments ago in my exchange with your Lordship, but
22 I can summarise them now. There are really two answers

23 to that point.

24 First, as explained in Parsons 14 and our skeleton,

25 this is irrelevant, ie the way that Post Office

1 conducted the trial. At all times, both before and
2 during the trial, Post Office made clear its position as
3 to the proper scope and limits of the Common Issues
4 trial. We never, ever altered that position, and
5 nothing that we did or said can fairly be said to have
6 amounted to some kind of waiver or enlargement of the
7 definition of those issues.

8 Secondly, the fact that Post Office was reluctant to
9 allow irrelevant evidence to go unchallenged cannot make
10 that evidence suddenly relevant.

11 The other side's proposition, if they do make
12 a proposition to that effect, is simply a non sequitur.
13 The conclusions that your Lordship reached either were
14 or were not necessary to decide the matters that were
15 before you.

16 Now, I would like to turn next to the judgment.
17 There are really seven matters in respect of which we
18 submit that your Lordship reached premature concluded
19 findings. If I can just give you the seven items first
20 and then I am going to deal with each of them through
21 the paragraphs in the judgment. I am sorry, it is
22 a tedious process, but it is the only way to do this

23 exercise.

24 So the seven matters are as follows: first of all,

25 Subpostmasters' experiences of using Horizon and its

1 functionality, including Subpostmasters' ability to
2 identify the causes of shortfalls; secondly,
3 Post Office's alleged knowledge of problems with
4 Horizon; thirdly, the quality and operation of the
5 helpline, in particular as an adjunct to the accounting
6 system; fourthly, the quality of Post Office's
7 investigations into shortfalls; fifthly, demands for
8 payment and threats of legal action allegedly made by
9 Post Office; sixthly, the circumstances in which
10 Subpostmasters' contracts were suspended or terminated;
11 and seventhly, the adequacy of training.

12 We need, as I indicated, to look at the relevant
13 paragraphs.

14 So taking the first item, Subpostmasters'
15 experiences of using Horizon and its functionality,
16 including Subpostmasters' ability to identify the causes
17 of shortfalls, so the way I propose to do this, and
18 I hope it accords with what would be convenient for
19 your Lordship, is if you have a copy of the judgment
20 handy --

21 MR JUSTICE FRASER: I do.

22 LORD GRABINER: -- then I will just go to the paragraphs,

23 and we have given full notice of all the matters that we
24 rely upon. So the first paragraph I want to go to is
25 172 {B7/29/64}.

1 MR JUSTICE FRASER: Is this numbered the first of your seven
2 categories?

3 LORD GRABINER: Yes.

4 MR JUSTICE FRASER: Yes, all right.

5 LORD GRABINER: So when I have just gone to the relevant
6 paragraphs, I am going to make a very brief submission,
7 invariably I will make a brief submission in relation to
8 the bit that we just emphasised.

9 MR JUSTICE FRASER: Yes.

10 LORD GRABINER: So in 172, the emphasised passage is:

11 "Mrs Stubbs is a careful and honest witness. She
12 did her best at the time to try and work out what was
13 happening, the reasons for it, and also notified the
14 helpline on numerous occasions, as well as keeping her
15 own separate paper records in an attempt, or more
16 accurately numerous and concerted attempts, to work out
17 precisely how these shortfalls could have arisen. None
18 of the Post Office personnel involved at the time with
19 Mrs Stubbs, who attempted to obtain some input or
20 explanation from Fujitsu were called as witnesses."

21 Then several lines below there:

22 "Mrs Stubbs ran the branch perfectly satisfactorily

23 for many years."

24 And a couple of lines below that:

25 "On the evidence before me in this trial, and upon

1 my assessment of Mrs Stubbs as a witness, I consider
2 that she is reliable, thorough and honest."

3 For completeness, there you say:

4 "I accept her account of contract formation and the
5 fact that she never received, nor did she have any
6 knowledge of, the SPMC."

7 Your Lordship has come to a clear, concluded view in
8 that paragraph as to her evidence and credibility.
9 Those views went far beyond what was necessary to reach
10 a conclusion about the contractual documents she
11 received. If, at a subsequent trial, her credibility is
12 challenged, the claimants will obviously rely upon that
13 passage in your Lordship's judgment as showing that
14 your Lordship should and indeed would be bound to accept
15 the correctness of her evidence.

16 So in other words, it would have been perfectly
17 possible for your Lordship to have accepted her evidence
18 about the contract formation, but without making all the
19 observations that you have made, particularly in
20 relation to helpline and the satisfactory running of the
21 branch that she had undertaken over the period of the
22 contract, ie post-contractually.

23 MR JUSTICE FRASER: You have rather missed out the two
24 sentences in the middle of that paragraph that say:
25 "I make it quite clear that I do not speculate on

1 any of that, nor is it possible to know what the outcome
2 of the trial of the Horizon Issues will be later this
3 year."

4 LORD GRABINER: No, you do say that, and I am going to come
5 to that point towards the end of these submissions --

6 MR JUSTICE FRASER: I understand.

7 LORD GRABINER: -- because your Lordship does make that kind
8 of point, not always, but fairly regularly, during the
9 judgment.

10 MR JUSTICE FRASER: Yes, all right.

11 LORD GRABINER: I am going to say something about that, if
12 I may, at the appropriate moment.

13 Then 217, paragraph 217, this deals with the
14 position of Mr Sabir. And there are, just for context
15 your Lordship will glance down -- you must be, I am
16 afraid, very familiar with this judgment, of course --
17 but if you go down to 217, subparagraph 8, you say:

18 "Post Office's case is that Mr Sabir falsified his
19 accounts and misstated his stock by completing the
20 branch trading statements from the period he discovered
21 the mistake."

22 Then in 218:

23 "Mr Sabir's account is substantiated by the audit
24 report itself, prepared by the auditors two days after
25 the audit."

1 And then on to 219, five or six lines down:

2 "Any findings as to specific breach or breaches must
3 await a later trial. I do, however, take this evidence
4 into account in reaching my conclusions on the category
5 two facts that are disputed by the Post Office. I deal
6 with that at the end of my review."

7 Now, an important issue in the Horizon trial is how
8 easy or difficult it was for Subpostmasters to work out
9 from Horizon what the accounting position was. In this
10 passage, your Lordship has reached firm conclusions on
11 the facts and also on the credibility of Mr Sabir.
12 Your Lordship also says here that you are not making any
13 findings on breach. As I say, I will come back to that
14 and similar sentences in the course of these
15 submissions.

16 302, paragraph 302. This is in relation to
17 Mrs Stockdale, and it is the third sentence.

18 "There were no explanations for these [this is
19 experience of running the branch, not a happy one,
20 unexplained shortfalls and so on] and there was no way
21 available for her to get to the bottom of them either."

22 At 309, a few paragraphs on:

23 "Mrs Stockdale was obviously in an extremely
24 difficult position. She did not know what product had
25 caused her loss."

1 And at 310:

2 "She felt that she had no choice but to agree.

3 I find that on the options presented to her at the time,
4 she indeed had no choice but to agree."

5 And in 311:

6 "Mrs Stockdale then took very sensible and extremely
7 thorough measures ..."

8 Then your Lordship describes the measures, and then
9 several lines down in the same paragraph:

10 "She explained that she spent hours with the
11 records, including her own paper records, trying to
12 investigate. These shortfalls simply kept occurring and
13 she could not work out why."

14 In these passages, your Lordship reached conclusions
15 as to how easy or difficult it was for Subpostmasters to
16 use Horizon to get to the bottom of shortfalls, and
17 alongside that, your Lordship made broad findings as to
18 the claimant witnesses' credibility. So again, in my
19 respectful submission, this has nothing to do with
20 contract formation issues which that trial should have
21 been concerned with, but everything to do with matters
22 yet to be the subject of future trials.

23 In 824 --

24 MR JUSTICE FRASER: Before we go to 824, though,

25 Mrs Stockdale was also accused of a criminal offence in

1 her cross-examination.

2 LORD GRABINER: Right.

3 MR JUSTICE FRASER: There was a dispute of fact about what
4 was said to her at an interview before she was
5 appointed. So in terms of resolving the dispute of fact
6 at the interview, do you say I should have made
7 a finding as to her -- or I was entitled to make
8 a finding as to her credit, but in doing so, shouldn't
9 have taken account of anything to do with her departure
10 from the Post Office?

11 LORD GRABINER: I do say that, yes.

12 MR JUSTICE FRASER: You do?

13 LORD GRABINER: Yes.

14 MR JUSTICE FRASER: Thank you very much.

15 LORD GRABINER: Then in 824, this is in relation to
16 Mr Bates.

17 MR JUSTICE FRASER: Yes.

18 LORD GRABINER: The last couple of sentences:

19 "He realised that the information for him to do so
20 was simply not available to him or to any Subpostmaster
21 in a branch. The Horizon system did not allow him to do
22 this."

23 Now, that is a conclusion of fact, but it is wholly
24 irrelevant for the purposes of the Common Issues, in my
25 submission.

1 And that is all of a piece with your Lordship's
2 findings in paragraphs 819 and 852. If we go to 819:

3 "The whole issue with the information available to
4 an SPM on Horizon is that they could not identify
5 discrepancies or shortfalls or understand the basis on
6 which transaction corrections [TCs] with which they
7 disagreed were issued."

8 Then in 852, roughly in the middle of the
9 paragraph --

10 MR JUSTICE FRASER: 852?

11 LORD GRABINER: My Lord, yes.

12 MR JUSTICE FRASER: Just give me a second. Yes.

13 LORD GRABINER: "Unexplained shortfalls or discrepancies
14 became apparent at the end of a branch trading period.
15 It was simply not possible, on the information available
16 to an SPM, on the Horizon system, for them to identify
17 the day, product, and still less the time of day that
18 was responsible for this."

19 In my submission, that is classically a Horizon
20 Issue, but your Lordship has reached, on that point,
21 a concluded view.

22 Paragraph 569, that is the famous paragraph. It has

23 got lots of factual matrix points annexed to it.
24 Your Lordship will recall that paragraph. It is the
25 paragraph with lots of subparagraphs.

1 MR JUSTICE FRASER: Where I go through category 2 and
2 category 3 and make findings as to the factual matrix,
3 yes.

4 LORD GRABINER: And there are just a few of them that I want
5 to make reference to.

6 MR JUSTICE FRASER: I think it might break a record as being
7 the longest paragraph in the judgment, which is probably
8 not a particularly good record to break.

9 LORD GRABINER: You will be relieved to know that I am not
10 going to go through all the paragraphs.

11 MR JUSTICE FRASER: It runs on for a number of pages.

12 LORD GRABINER: Yes. The ones that I want to pick on are
13 51, and your Lordship says:

14 "The introduction of Horizon limited the claimants'
15 ability to investigate apparent shortfalls, particularly
16 as to the underlying cause thereof. Both this and 50
17 immediately preceding it are obvious on the evidence and
18 could readily have been agreed. It can't sensibly be
19 argued to the contrary, in my judgment."

20 So that is an Horizon conclusion, paragraph 61:

21 "The Post Office has, on occasion, detected that
22 Horizon generated errors, caused the appearance of

23 shortfalls and errors which the claimants themselves had
24 not been able to identify as the cause of those apparent
25 shortfalls."

1 Now, these are all matters for the Horizon trial.
2 These findings are made in general and unqualified
3 terms. They have a wide-ranging impact and are not
4 realistically going to be challengeable in later trials
5 in the light of further evidence and disclosure, because
6 what will be said when there is a debate about this in
7 a future trial, as inevitably there will be, is that the
8 other side will point to this analysis of your Lordship
9 and it is going to be impossible, in my respectful
10 submission, and unrealistic to expect your Lordship to
11 depart from those conclusions.

12 In 54 to 57, which I think you aggregate, the
13 passage there:

14 "I cannot make detailed findings about Fujitsu's
15 role on the basis of the evidence before me. However,
16 it is clear that Fujitsu were able to obtain greater
17 information about a particular branch's transactions
18 than either the Post Office or the Subpostmaster."

19 Then you say:

20 "How this was done and whether it included providing
21 a data transfer service between the central data centres
22 and clients of Post Office must await the Horizon

23 trial."

24 Notwithstanding that final caveat, this passage also

25 contains a clear finding on a Horizon Issue. The same

1 is true of the passage at 569, factual matrix point 59.

2 MR JUSTICE FRASER: Which Horizon Issue does that make
3 a finding on?

4 LORD GRABINER: Which one, my Lord, 59?

5 MR JUSTICE FRASER: No, before that, I think you said 54 to
6 57 makes a clear finding on a Horizon Issue.

7 LORD GRABINER: Yes.

8 MR JUSTICE FRASER: Which Horizon Issue? Maybe we can come
9 back to it if you want to.

10 LORD GRABINER: I think the point being here that the
11 information that should have been provided by the
12 Post Office or should have been available to the
13 Subpostmaster was not available, but it was apparently
14 available to Fujitsu, so it is a breach issue.

15 MR JUSTICE FRASER: Understood.

16 LORD GRABINER: Then matrix point 59, your Lordship says:

17 "I find in some instances there was discussion
18 internally at the Post Office about the altering of
19 branch transaction data directly and also of the
20 Post Office and of Fujitsu carrying out changes to
21 Horizon and/or transaction data which could affect
22 branch accounts. Mrs Van Den Bogerd accepted this could

23 be done. Further detailed findings on this will be
24 dealt with in a later trial."

25 So the implication from that is that you have made

1 some findings there and that more detailed ones would,
2 in fact, be dealt at the later trial, but for some
3 reason, your Lordship thought it was appropriate in that
4 trial to make those conclusions which I have just
5 identified.

6 Can I go to the next heading, which is "Post
7 Office's alleged knowledge of problems with Horizon".

8 MR JUSTICE FRASER: Yes.

9 LORD GRABINER: This is starting with paragraph 541. There
10 your Lordship says:

11 "Secondly, a number of contemporaneous documents
12 internal to the Post Office show that there has been, at
13 least to some degree, an awareness of Horizon problems
14 within the Post Office itself over a number of years."

15 Then in 543, in about the second or third lines, you
16 say:

17 "Behind the scenes, there were at least a number of
18 people within the Post Office who realised that there
19 were difficulties with the Horizon system."

20 Then in paragraph 1115, so you have to jump forward,
21 your Lordship says:

22 "Horizon was introduced in 2000 and from then

23 onwards, unexplained discrepancies and losses began to
24 be reported by SPMs. Internal documents obtained in
25 this litigation show that some personnel within the

1 Post Office believed at the time that at least some of
2 these were caused by Horizon."

3 And then the passages that I have been emphasising
4 in those paragraphs express a view on Post Office's
5 internal knowledge of the alleged problems with Horizon.

6 Now, those findings are going to be relied upon by
7 the other side in support of their allegations that
8 there was here deliberate concealment and deceit on the
9 part of Post Office.

10 Now, those are matters which are to be dealt with in
11 later trials. They are very, very important findings
12 and holdings and they are not provisional, they are
13 concluded views. And they are undoubtedly matters which
14 are going to arise in the later trials.

15 MR JUSTICE FRASER: But on that point, because it is,

16 I think, notable that you say those findings are going
17 to be relied upon to found deceit, if one goes back to
18 the extracts from the documents and look at 542, which
19 is where the reasons that underpin what I have said in
20 541 are identified, and have a look at 541.

21 At 542, for example, just looking at the first
22 extract of the contemporaneous document which is an

23 email:

24 "Both Frank Manning and Sue Lock work for

25 Post Office."

1 Ignore the underlining because that is my
2 underlining, but if you look over the page, this is in
3 relation to Mrs Stubbs, who was having certain problems
4 with Horizon, the phrase, "It is Horizon related", which
5 the sender of that email chose to put in bold. It then
6 goes on to say:

7 "The problems have only arisen since install and the
8 postmistress is now barking, and rightly so in my view.
9 Help, please."

10 Do you say that the conclusion of what that document
11 shows, which I have summarised in 543, is something that
12 I shouldn't have done?

13 LORD GRABINER: Definitely.

14 MR JUSTICE FRASER: So I shouldn't have given the summary of
15 the document.

16 LORD GRABINER: Definitely. Whether you did or not, you
17 certainly should not have expressed a view about it,
18 knowing that this will be a key issue at a future trial.

19 MR JUSTICE FRASER: Thank you very much. What about the
20 extract of the document itself which was relied on both
21 in evidence and in opening?

22 LORD GRABINER: I mean, I have no particular view about

23 that. What I am much more concerned about is what you
24 have said in the judgment and whether, through the eyes
25 of a fair-minded observer, it can be said that it is

1 possible for your Lordship to keep an open mind.

2 MR JUSTICE FRASER: Understood. Thank you very much.

3 LORD GRABINER: Could I go next to helpline.

4 MR JUSTICE FRASER: Yes.

5 LORD GRABINER: So paragraph 248, and this deals with

6 Mr Abdulla to whom we had a reference to a little
7 earlier:

8 "Turning to Mr Abdulla's operation of the branch,
9 I have already identified his account of how even
10 disputed transaction corrections had to be dealt with at
11 some stage prior to the next branch trading period by
12 clicking the 'accept now' button. He would contact the
13 helpline six or seven times a month and was shocked at
14 the inadequate support."

15 Just below there, or next:

16 "He would often experience apparent shortfalls on
17 the days when he would perform balances, but could
18 rarely get through to the helplines on these occasions.
19 He thought the advisers were ill-informed and would
20 often give the impression of reading off a script."

21 In 249:

22 "He could not resolve these through the helpline."

23 So here your Lordship was accepting Mr Abdulla's
24 evidence both as to his subjective impression of the
25 service that he received and as to the points of fact,

1 such as whether he could get through to the helpline.
2 And I am sorry that I am beginning to sound like
3 a broken record, but these were not matters for the
4 first trial and, specifically, they are matters for
5 subsequent trials.

6 Now, these, 303:

7 "These shortfalls continued. On 15 October 2014,
8 there were unexplained shortfalls of over ?3,500. When
9 she [and I think this is Mrs Stockdale] phoned the
10 helpline, she was told this was only ?3,000 and it is
11 a drop in the ocean compared to some people's problems.
12 This contradicted an earlier statement from the helpline
13 when she had been told that she was the only SPM
14 experiencing these problems, which just made her feel
15 inadequate. I will track this particular shortfall
16 through in terms of her evidence."

17 And your Lordship does that, and at the end of that
18 paragraph or further on in it, your Lordship says:

19 "I accept this evidence by Mrs Stockdale. There can
20 be no doubt that the shortfall was clearly in dispute,
21 even on the Post Office's understanding of how disputes
22 were to be raised."

23 MR JUSTICE FRASER: I am sorry, I have lost where you are.

24 LORD GRABINER: I am sorry, it is the end of paragraph 303.

25 Yes.

1 MR JUSTICE FRASER: Yes, thank you.

2 LORD GRABINER: "I accept that evidence."

3 MR JUSTICE FRASER: Yes, thank you.

4 LORD GRABINER: So in my submission, this is a good example
5 of your Lordship undertaking a detailed analysis of the
6 evidence, in this case, that of Mrs Stockdale, and her
7 evidence is expressly accepted by your Lordship as
8 accurate. This was not a matter for determination in
9 the first trial and when this issue does arise at
10 a future trial, a fair-minded observer of this story
11 would say that your Lordship had reached a concluded
12 view as to the accuracy and reliability of
13 Mrs Stockdale's testimony.

14 Your Lordship's concluded view about her evidence
15 was then reinforced in your summary of her evidence and
16 for that purpose, if we go forward to paragraph 328.

17 Your Lordship says there:

18 "I found Mrs Stockdale to be a careful and accurate
19 witness and I consider she was telling me the truth."

20 Then you say at the end of that paragraph:

21 "I'm making no findings in respect of breach,
22 causation or loss."

23 As I say, I will come back to that mantra later on
24 in these submissions.

25 And at 357, in relation to Mrs Dar, your Lordship

1 says:

2 "Her experience with the helpline was not a positive
3 one. She contacted them two to three times a month,
4 often in relation to apparent shortfalls or balances.
5 Most of the time, she was told to recount and if there
6 was still a shortfall, she had to make this good, which
7 means pay it herself. Once she was told how to get
8 around the problem by altering the stock figures to
9 balance, which shocked her, and she considered there was
10 some kind of fault within the system."

11 So this, in my submission, is the same point.
12 Your Lordship here accepted Mrs Dar's evidence on what
13 happened when she called the helpline, although this is
14 a matter yet to be addressed in a different trial.

15 At 556, still on the helpline, 556, my Lord, yes,
16 your Lordship says:

17 "The helpline does not seem to have operated in that
18 way and on the evidence before me for the issues in this
19 trial, the matters in dispute reported to the helpline
20 were not treated differently even when they were
21 reported. The lead claimants' evidence made it clear
22 that just getting through to the helpline was an

23 achievement in itself. When this was finally
24 accomplished, the experience would be variable at best
25 and does not seem to have come close to resolving any of

1 the disputes."

2 Then your Lordship can read the intervening
3 passages. Then at the end, you say that was simply not
4 made out on the evidence before you, that is the
5 position of Post Office.

6 This paragraph of the judgment reveals your Lordship
7 broadly accepting the claimants' case on the quality of
8 the helpline and how the disputes process functioned,
9 but again, these are prime issues for a resolution at
10 a subsequent breach trial.

11 In that passage, your Lordship is making no
12 distinction between the contractual obligation involved
13 in notifying a dispute via the helpline. So pausing
14 there, that would be entirely understandable in the
15 context of the contract issues or those issues, working
16 out or deciding what the contractual obligation was,
17 rather than what is, in fact, happening in that
18 paragraph, namely whether or not the Post Office
19 fulfilled its obligations, ie was it a breach of
20 contract, which is an entirely distinct, self-contained
21 issue for a later trial.

22 At 558, at the beginning of the paragraph:

23 "It is therefore the case that, on the evidence
24 before me, the helpline did not operate for the lead
25 claimants in the manner that the Post Office contended

1 for."

2 Then you say at the end of that paragraph:

3 "Detailed findings of fact as to this must however
4 wait for a later trial."

5 So this was a conclusory statement about what
6 happened when claimants called the helpline, it was not
7 relevant, in my submission, to any Common Issues. It
8 will be relevant at a future trial. And your Lordship's
9 use of the word "detailed" at the end of that paragraph
10 rather reinforces the concern. The implication from
11 that word is a recognition that you were making findings
12 of fact, albeit in outline, and that when you get to the
13 later trial, you are going to elaborate on those
14 findings in the light of the evidence in that case. But
15 the idea that you are going to be in a position fairly
16 to depart from those conclusions, in my submission, is
17 the gravamen of the charge.

18 MR JUSTICE FRASER: Is it not relevant though to the status
19 of a branch trading statement?

20 LORD GRABINER: With great respect, it isn't. The status,
21 the particular status of a branch trading statement,
22 would depend upon the facts surrounding that branch

23 statement. So, for example, suppose the complaint was,
24 "Well, I have got the branch statement, I was forced to
25 press the accept button, and I did so, and then when

1 I tried to register my complaint through the helpline,
2 I was unable to do so for whatever reason".

3 Now, the correctness or otherwise of that debate is
4 a breach issue. If and to the extent that there was
5 a failure of the helpline, operating in conjunction with
6 the statement, to enable that complaint to be
7 registered, that is a breach of contract complaint
8 understandably. But to investigate those matters at the
9 contract creation stage, in my submission, was a wrong
10 step.

11 MR JUSTICE FRASER: The Common Issues didn't only involve
12 contract creation, because they also involved issues of
13 agency.

14 LORD GRABINER: Yes.

15 MR JUSTICE FRASER: But it was factually in issue for about
16 three weeks of the Common Issues trial as to what
17 options were available to a Subpostmaster in respect of
18 how they would perform their branch accounts.

19 So, for example, if we just look back at
20 paragraph 558, which you have been drawing to my
21 attention, the meaning of the phrase in inverted commas
22 in the ante-penultimate line, "settled centrally", took

23 some time to unravel. By the time the trial ended, the
24 factual position was almost essentially agreed, but it
25 took some weeks to get there.

1 And so far as that point is concerned, is your
2 submission that it would have been necessary or
3 acceptable to decide what "settled centrally" meant, but
4 I shouldn't have then gone on to consider the mechanism
5 of dealing with the helpline, is that right?

6 LORD GRABINER: Absolutely.

7 MR JUSTICE FRASER: All right.

8 LORD GRABINER: Because by definition, by definition, by
9 engaging in that investigation and indeed reaching some
10 conclusions in relation to the functioning and operation
11 of the helpline, what is happening is that there is
12 a trespassing into later matters which are not relevant
13 to the immediate question.

14 For example, the question of the meaning of "settled
15 centrally" would have been a classic example of
16 something that needed to be determined in the
17 Common Issues trial. Construction questions were open
18 for debate, absolutely.

19 MR JUSTICE FRASER: Yes, but what then do you say about the
20 Post Office evidence that had been contained in the
21 Post Office's witness statements about the operation of
22 the helpline, because there was evidence on it from

23 both parties?

24 LORD GRABINER: Well, all I can say about that is that the

25 key point in this debate is the relationship between the

1 functioning of the helpline and the account statement --

2 MR JUSTICE FRASER: Right.

3 LORD GRABINER: -- and in what circumstances the account
4 statement could be relied upon or would or would not be
5 binding. And that is classically a contract question,
6 if I can put it in a very concertinaed way. But to
7 investigate events which are really breach events and
8 then to make findings about them after the event was, in
9 my submission, a false step.

10 MR JUSTICE FRASER: I understand, thank you very much.

11 LORD GRABINER: And it is trite law, of course, but the fact
12 is that what was not legitimate was to participate in
13 a post-contractual factual investigation, is what it
14 comes to. The factual investigation of that kind is
15 entirely distinct from matters which should have been
16 investigated at the Common Issues trial. The
17 contractual position as to the trading statement and the
18 helpline falls to be analysed at the time of
19 contracting. Classic law.

20 For this purpose, the factual matrix must be
21 examined at that point in time, but what happened here
22 was that there is then an investigation of, by

23 definition, post-contractual events and conclusions in
24 relation to matters such as alleged breaches of
25 contract, for example as to the effectiveness of the

1 helpline after the event to improve or clarify the
2 factual matrix, which is absolutely impermissible.

3 Now, the next topic of the seven is how good or bad
4 Post Office's investigations of shortfalls were, and
5 whether Post Office disclosed what it knew about
6 shortfalls to Subpostmasters.

7 MR JUSTICE FRASER: Can I just check, before you move on to
8 that. The third of your seven categories, I think we
9 went to 248, 303, 357, 556 and 558, is that right?

10 LORD GRABINER: That is exactly right.

11 MR JUSTICE FRASER: Now we are going on to the fourth of the
12 seven.

13 LORD GRABINER: Yes. I haven't gone back to count, but
14 I think it is the fourth.

15 MR JUSTICE FRASER: Yes.

16 LORD GRABINER: The first paragraph that I want to refer to
17 is 115.

18 MR JUSTICE FRASER: 115, yes.

19 LORD GRABINER: Your Lordship says:

20 "Putting entirely to one side the fact that it has
21 taken Post Office 15 months to finalise how it was to
22 resolve this matter and Mr Bates was given only 16 days

23 to reply."

24 And your Lordship says:

25 "Which attitude appears to me to be symptomatic of

1 how Post Office regularly treated at least some of its
2 SPMs."

3 That is a very strong statement, my Lord, and that
4 is exactly the kind of statement -- and I appreciate
5 that was and is your Lordship's view, but it is not
6 necessary for the purposes of the judgment that you were
7 dealing with, or that you were giving. And also, it is
8 obviously going to be relied upon by the other side. If
9 I were on the other side, I would be banging the drum on
10 a sentence like that. I would be accusing Post Office
11 of being a disgraceful bunch and, "That is already
12 your Lordship's view: see your judgment in the
13 Common Issues case", that is obvious.

14 MR JUSTICE FRASER: When you say, "That is already
15 your Lordship's view", do you mean that you are
16 summarising what Mr Green would be saying, relying on?
17 You are not telling me -- I don't assume you are
18 expressing that as that is a view that I, the judge,
19 currently hold.

20 LORD GRABINER: What I am submitting is that having, so to
21 speak, committed yourself in print on that point, a
22 fair-minded -- I don't care what Mr Green will say or

23 won't say or indeed what I think or say. It is all
24 irrelevant, and in a sense, what your Lordship thinks or
25 says is irrelevant for this purpose because it is an

1 objective test. The fair-minded observer will look at
2 this along with all the other material that we are going
3 through at the moment and will have to come to
4 a judgment as to whether your Lordship can fairly
5 approach the future trials given the conclusive
6 expression of opinion that you have given there.

7 MR JUSTICE FRASER: Yes.

8 LORD GRABINER: It is just another example. And then in
9 subparagraph 1 of 115, you say in the first line:

10 "It suggests that Mr Bates' experience was not an
11 isolated one."

12 Then we can leave over 1 and go straight to 2,
13 sub-2, the second sentence:

14 "I'm satisfied that if he had simply paid the amount
15 to the Post Office as demanded in the Post Office letter
16 of 16 July 2001, which sought as matter of some urgency
17 that he 'advise me of your proposals to now make good
18 the loss', in other words, how he would pay the
19 Post Office that money which was at that stage demanded,
20 this would not have occurred.

21 "3. No explanation was provided to Mr Bates as to
22 how the shortfall had occurred.

23 "5. The consistent policy, if indeed there was one,
24 seems to have been that the Post Office would simply
25 claim all such sums from the SPMs in question."

1 These are all findings to the effect that
2 Post Office's investigation was, in your Lordship's
3 view, inadequate and that Post Office demanded payment
4 without a proper basis. Now, in my respectful
5 submission, those findings had no place in the
6 Common Issues trial. They trespass into matters which
7 we all know fall to be determined in a later case or
8 cases.

9 165 deals with the evidence of Mrs Stubbs, and if we
10 go 15 or 20 lines down, maybe fewer than 20,
11 your Lordship says:

12 "It might be thought that if there were any proper
13 investigation which actually reported on this, it could
14 and should have been put to Mrs Stubbs, but if what was
15 put to Mrs Stubbs in this trial is said by the
16 Post Office to amount to such an investigation, then
17 it is telling. The investigation appears, on the
18 material deployed in this Common Issues trial, to have
19 consisted of nothing more than Fujitsu asserting that
20 there was nothing wrong with the kit. That is not, in
21 my judgment, an investigation under any normal
22 understanding or meaning of that word in society

23 generally."

24 That is really the same point that we just saw for

25 Mr Bates. Your Lordship is saying that Post Office's

1 investigation was inadequate and that Post Office
2 demanded payment without a proper basis. Again, in my
3 submission, those findings had no place in the
4 Common Issues trial.

5 In 208, and your Lordship can glance at the
6 paragraph for context, and there was a sort of help
7 issue that is identified there, this is in relation to
8 Mr Sabir, but your Lordship concludes in the last
9 sentence of 208:

10 "That help simply never came."

11 MR JUSTICE FRASER: I am sorry.

12 LORD GRABINER: 208.

13 MR JUSTICE FRASER: I am in 208.

14 LORD GRABINER: The last sentence. {B7/29/74}

15 MR JUSTICE FRASER: "This was counted against him at the
16 time and used as a --"

17 LORD GRABINER: "That help simply never came."

18 MR JUSTICE FRASER: That is in the middle.

19 LORD GRABINER: I am sorry. I don't have the whole
20 paragraph in front of me.

21 MR JUSTICE FRASER: That is in the middle.

22 LORD GRABINER: Very good. That is also a finding as to how

23 co-operative or unco-operative Post Office was in trying
24 to establish the cause of the shortfall. In my
25 submission, it is a breach question.

1 MR JUSTICE FRASER: Yes.

2 LORD GRABINER: 217, sub-2:

3 "Mr Sabir had no separate record and no access on
4 Horizon to the number of scratchcards he should have
5 had."

6 And then your Lordship says:

7 "He requested this information from the Post Office,
8 who did have it. It was not provided. He used the
9 helpline to notify Post Office of a problem. This is
10 the way that the Post Office maintained disputes should
11 be notified."

12 Then in 223:

13 "In my judgment, the attack on Mr Sabir's credit,
14 which I have identified above, fundamentally ignores the
15 reality. The fact that he had contacted the helpline
16 and sought assistance and the fact that the vital piece
17 of information he needed, the number of scratchcards the
18 system was showing that he should have, was so readily
19 accessible to the Post Office auditors, but never
20 provided to him."

21 So again, those are findings that Post Office did
22 not supply Mr Sabir with information, which he could not

23 obtain himself through Horizon and which could have
24 enabled him to establish the extent of the shortfall.
25 Again, those are findings on Horizon and on breach.

1 MR JUSTICE FRASER: I did have to make a finding on his
2 credit, though, did I not?

3 LORD GRABINER: That may be. You mean because of challenge
4 in relation to the contract formation?

5 MR JUSTICE FRASER: There were various challenges to
6 Mr Sabir's credit, but not least -- I think it is
7 a point that has been --

8 LORD GRABINER: I am told by Mr Cavender that we never
9 relied on any of this material.

10 MR JUSTICE FRASER: Mr Cavender -- well, the transcript
11 shows the way that Mr Sabir was cross-examined, but
12 let's not waste time on that at the moment. So that is
13 223.

14 LORD GRABINER: 557, still under the same heading, 557:

15 "Mrs Stockdale telephoned the helpline. She then
16 assumed the debt recovery letter she received meant an
17 investigation had been done and resolved against her.
18 That assumption was not correct. Mrs Stubbs had been
19 pressing for many years to find out the outcome of
20 whatever investigation was in fact performed in her
21 case. In both cases, the helpline had been notified by
22 each of these lead claimants. In neither case

23 [your Lordship says] could the Post Office produce and
24 put to each of these lead claimants or show the court
25 the end product of any such investigation."

1 So here your Lordship found that Post Office had not
2 conducted an investigation into Mrs Stockdale's
3 shortfalls and your Lordship also criticised Post Office
4 for not adducing what would have been inadmissible
5 breach of contract evidence. So if they had produced
6 this material at that trial, it would actually not have
7 been relevant to the issues in that trial, but obviously
8 it would have been relevant material for the purposes of
9 a breach trial or a trial about Horizon and its
10 effectiveness or otherwise.

11 MR JUSTICE FRASER: Mr Cavender did put to Mrs Stubbs at
12 least that there had been an investigation on the basis
13 that -- I mean, it is the same point perhaps as the one
14 that I explored with you earlier about Mr Sabir, but if
15 a positive point is put to a witness, for example, that
16 an investigation has happened, do you say I should weigh
17 that up in respect of the credit of the witness so far
18 as contract formation is concerned but then stop there,
19 effectively?

20 LORD GRABINER: Yes, because it would have been ex hypothesi
21 cross-examination on irrelevant material. I mean,
22 I think what is revealed by just our exchanges here this

23 morning, my Lord, is the absolute difficulty of keeping
24 a clear bright line between the matters which were the
25 subject of that trial, bearing in mind the fact that

1 under the case management arrangement, there were going
2 to be future trials where these matters would be
3 investigated. It is a very -- it is a difficult task,
4 I absolutely respect that and I accept that, but we do
5 respectfully submit that you went over the line.

6 MR JUSTICE FRASER: I understand.

7 LORD GRABINER: Mr Cavender draws to my attention the
8 closing transcript on {Day 14/46}.

9 MR JUSTICE FRASER: Do you want me to pull that up on the
10 screen?

11 LORD GRABINER: I can just read it into the transcript.

12 Your Lordship's question was:

13 "So far as the claimants' evidence is concerned,
14 therefore, you say treat it all with caution for all the
15 reasons that you have gone through, but you are inviting
16 me not to make any findings on their credibility.

17 "MR CAVENDER: Indeed.

18 "MR JUSTICE FRASER: Any adverse findings on their
19 credibility, is that right?

20 "MR CAVENDER: Yes, because to do so you would have
21 to make findings as to the accounting system, to the
22 TCs, what happened in fact, and you haven't had full

23 evidence on that by any means."

24 Then on the following page of the transcript,

25 {Day 14/51}, line 12, Mr Green:

1 "I'm sorry to interrupt, but I have let this run
2 since {Day14/38:14}, what my learned friend is saying.
3 He said someone in his position might say Mr Abdulla
4 lied. Well, that is exactly what he does say at
5 paragraph 592 of his closing submissions. So I don't
6 understand --"

7 Then your Lordship interrupted and said:

8 "MR JUSTICE FRASER: All right.

9 "MR GREEN: -- where he is on it.

10 "MR CAVENDER: But I don't ask for findings on it.

11 "MR JUSTICE FRASER: Mr Green, as a rule, I am not
12 saying you can't make these points, but you might want
13 to store them up.

14 "MR GREEN: I am grateful."

15 MR JUSTICE FRASER: The position on finding so far as credit
16 were concerned, I gave the Post Office an opportunity to
17 consider their position on that after the oral
18 submissions were over, because I had difficulty
19 following it. And there was a written explanation
20 provided by the Post Office which explained to me what
21 the Post Office said I should do in terms of findings as
22 to credit, because as the exchange that you have just

23 read out demonstrates, on the one hand, the closing
24 submissions accuse some of the lead claimants of lying,
25 but orally, Mr Cavender said, "Don't make findings on

1 credit". I am sure the dichotomy in those two positions
2 needed to be resolved.

3 So I think the correct place to start or finish in
4 terms of findings as to credit is probably what the
5 Post Office said in their written submissions after the
6 hearing.

7 LORD GRABINER: I --

8 MR JUSTICE FRASER: I understand your submission.

9 LORD GRABINER: What I would respectfully submit is that
10 bearing in mind the fact that there was yet to be
11 a breach trial --

12 MR JUSTICE FRASER: I understand.

13 LORD GRABINER: -- enormous care was required --

14 MR JUSTICE FRASER: I understand.

15 LORD GRABINER: -- in order to ensure that the concerns that
16 we are now expressing would not arise.

17 MR JUSTICE FRASER: I entirely understand.

18 LORD GRABINER: Now, my Lord, I don't know if that is a good
19 moment to break? I could, because I am just going to
20 a new topic.

21 MR JUSTICE FRASER: If you have finished number four of your
22 seven ...

23 LORD GRABINER: Would you bear with me a moment.

24 MR JUSTICE FRASER: The last paragraph before I distracted

25 you I think was 557.

1 LORD GRABINER: You did not distract me. Yes, that is
2 convenient. That would be a convenient moment. I have
3 got quite a lot still to get through, but I will go as
4 fast as I can.

5 MR JUSTICE FRASER: Understood. Shall we say five minutes?

6 LORD GRABINER: My Lord, yes, I am grateful.

7 MR JUSTICE FRASER: We will have a five minute break. I am
8 going to see if I can turn the temperature down a bit.
9 It seems to be quite hot. I don't know if I am alone.

10 LORD GRABINER: You are quite right, it is.

11 MR JUSTICE FRASER: I will see if I can do something about
12 that. Five minutes.

13 (11.50 am)

14 (Short break)

15 (11.55 am)

16 LORD GRABINER: My Lord, there just one point from this
17 morning. Your Lordship wanted to know which Horizon
18 Issues. This was in the context of my referring to
19 paragraph 569 --

20 MR JUSTICE FRASER: Yes.

21 LORD GRABINER: -- and those points 54 to 57.

22 MR JUSTICE FRASER: Yes.

23 LORD GRABINER: And the Horizon Issues referred to were
24 issues 7 to 9 --
25 MR JUSTICE FRASER: Thank you very much.

1 LORD GRABINER: -- which are in B7/14/4.

2 MR JUSTICE FRASER: Thank you very much.

3 LORD GRABINER: Turning then to the next topic, and I am
4 going to try to speed up if I may, because there is
5 going to be a time issue.

6 So the next topic is whether Post Office sent
7 unjustified demands for payment and/or threats of legal
8 action to SPMs. Paragraph 222:

9 "There can be no excuse, in my judgment, for an
10 entity such as Post Office to misstate in such clearly
11 express terms in letters that threaten legal action and
12 the extent of the contractual obligation upon an SPM for
13 losses. The only reason for doing so in my judgment
14 must have been to lead recipients to believe that they
15 had absolutely no option but to pay the sums demanded.
16 It is oppressive behaviour."

17 In 327, towards the end of it:

18 "The documents available in this litigation show
19 that this simply was not true and she had expressly done
20 both of those things."

21 This is in relation to Mrs Stockdale. At 462, after
22 a few lines:

23 "This conclusion means that the Post Office fraud
24 prevention and debt recovery procedures will be used
25 against SPMs in this position unless an SPM can show

1 that the shortfall or discrepancy was not their fault."

2 Then your Lordship says:

3 "This judgment does not contain findings on breach,
4 loss or causation."

5 So in the same vein, your Lordship made a number of
6 findings in your section of the factual matrix at
7 paragraph 569, which go to show how transaction
8 corrections were treated. So for example, factual
9 matrix point 35:

10 "However, even amounts that were disputed in this
11 way were treated by Post Office as debts owed by the
12 SPM."

13 And factual matrix point 40:

14 "The defendant sought recovery from the claimants
15 for apparent shortfalls, and I would add also on the
16 evidence that the Post Office did this regardless of
17 whether disputes had been reported to the helpline or
18 not."

19 And then factual matrix point 42:

20 "The Post Office required claimants to accept
21 changes to records of branch transactions unless the
22 claimant was effectively able to prove that the

23 transaction correction was not correct."

24 And factual matrix point 43:

25 "The Post Office did sometimes issue transaction

1 corrections after the end of the branch trading period
2 in which the transaction had taken place."

3 So, in my submission, none of this was relevant
4 matrix for the Common Issues trial.

5 Then at 7231:

6 "Even though Post Office's own case on the relevant
7 provision in the SPMC [that is one of the contracts]
8 dealing with liability for losses requires negligence or
9 fault on the part of an SPMC, this was routinely and
10 comprehensively ignored by Post Office, who sent letters
11 of demand for disputed sums in express terms as though
12 SPM had strict liability for losses. These letters
13 entirely misstate the legal basis of SPMs' liability
14 even where they had been appointed under the SPMC."

15 723, subparagraph 4:

16 "The approach of the Post Office is to brook no
17 dissent. It will adopt whatever measures are necessary
18 to achieve this."

19 And then after the reference to section 15,
20 clause 19 of the SPMC, your Lordship says:

21 "Other parts of section 15 deals with the
22 requirement for caution, but I find it somewhat unusual

23 and potentially oppressive that the Post Office should
24 seek to use the Official Secrets Acts in this way.
25 I don't see how in a routine case these Acts could

1 possibly apply in the way suggested by a Post Office in
2 this contract."

3 So again, in my submission, all of this was
4 irrelevant to the Common Issues trial.

5 The next topic is whether Post Office acted properly
6 in suspending and/or terminating SPMs' contract. The
7 relevant paragraph in the judgment is paragraph 20
8 {B7/29/8}. Perhaps your Lordship would just look at
9 this to remind your Lordship of it for context. This is
10 all about termination, sometimes abrupt termination, and
11 you are looking at Mr Bates' position and Mrs Stubbs'
12 position.

13 Then, in my submission, this again shows
14 your Lordship's hand in a concluded way. The reasonable
15 onlooker would think that your Lordship's mind is at
16 least or may be closed as to the propriety of
17 Post Office's actions in effecting these suspension and
18 terminations. Again, this is wholly irrelevant to the
19 Common Issues.

20 Paragraph 263, {B7/29/90} just for context, this is
21 in relation to the letter sent to Mr Abdulla dismissing
22 his internal appeal. Your Lordship will recall all of

23 this, and then 263 sets out the letter. 264,

24 your Lordship says:

25 "It's not clear if 'my investigation' included any

1 further information from or investigation of the
2 situation regarding Camelot either by Mrs Ridge or
3 Mr Mylchreest. Given the timescale, this appears
4 unlikely. Certainly no documents were produced in this
5 trial that suggested it was."

6 And so on. If your Lordship would look at the rest
7 of that paragraph and 402 for context. Then after the
8 reference to the statement and the appeals process in
9 the rehearing, there is a reference to Mrs Ridge, and
10 then about halfway through that paragraph:

11 "It is more than an academic nicety. Terminating
12 without notice is a severe step. A right of appeal was
13 supposed to be present under the SPMC. The Post
14 Office's own witnesses do not know what that appeal
15 consisted of and what the test was. This is deeply
16 unsatisfactory."

17 403:

18 "I do not know why risk to the Post Office
19 reputation should be a relevant factor in such an
20 appeal, which is what I find Mr Breeden's evidence to
21 consist of, or why SPM's entitlement to be heard on
22 appeal would differ from case to case."

23 Further down:

24 "Unjustified suspension ought to be a factor in
25 favour of an appeal succeeding on any sensible view."

1 At the end of that paragraph:

2 "The reputation of the Post Office would best be
3 served by appeals that were justified, succeeding, and
4 those that were not, failing, should not have formed any
5 part of the criteria."

6 479 {B7/29/147} a long way into it:

7 "Given the odd combination of various items all for
8 ?1,092 - which she accepted 'was a bit odd' - this
9 information would evidently have been very useful."

10 Then a couple of lines on:

11 "I found he was giving her an account concerning
12 ?1,092 which she would have been more willing to
13 consider was truthful had she had the Excel spreadsheet
14 at the interview."

15 And so on. Your Lordship can read to the end of
16 that paragraph:

17 480 {B7/29/148}:

18 "The hearing process in respect of Mr Abdulla's
19 suspension and eventual termination therefore proceeded
20 with incomplete information being provided to the person
21 tasked with conducting the hearing, making this
22 important decision, and still less information being

23 given to Mr Abdulla by the Post Office."

24 Towards the end of that paragraph:

25 "I make no findings on any matters connected with

1 breach, causation or loss."

2 All of that consists of criticisms of Post Office's
3 process for determining whether or not to suspend or
4 terminate a postmaster. They go directly to allegations
5 of breach of contract and have nothing whatever to do
6 with the contractual matters or the Common Issues --
7 I am always concertinaing into contract matters, but
8 your Lordship knows what I mean by that -- which were
9 the subject of that trial.

10 In 514 {B7/29/155}:

11 "Mr Carpenter was also responsible for the decision
12 to suspend Mrs Stockdale. Because this happened after
13 the litigation had commenced, I was most interested in
14 the exact sequence."

15 Then your Lordship goes through a good deal, or you
16 recite a good deal, of extract from the transcript, and
17 then after going through summarising and setting out the
18 transcript at 515, your Lordship says:

19 "The following pertinent points arise from this
20 evidence, which I found of considerable interest."

21 And then you set out your conclusions from that
22 evidence, and at paragraph 5 underneath as part of 515:

23 "Mr Carpenter wasn't 100% sure that he did not know
24 Mrs Stockdale was a claimant when he recommended her
25 suspension, even though on his evidence he found out on

1 the day. That does not seem to have had any effect on
2 his recommendation to suspend at all."

3 In 516, at the end of the paragraph:

4 "Also expressly stated to her factually untrue
5 statements, namely she had not contacted the NBSC or
6 asked Post Office for assistance. I find that she had."

7 517:

8 "It must be understood with crystal clarity."

9 I think your Lordship will recall this paragraph.

10 And then a few lines down:

11 "However, even putting it at its best for the
12 Post Office, such conduct towards Mrs Stockdale during
13 this early stage of the litigation could potentially be
14 construed as threatening, oppressive and potentially
15 discouraging to other potential claimants to become
16 involved in the litigation, whether by accident or
17 design. I can think of no reason why such an approach
18 was taken unilaterally by Post Office in such a way
19 without the Post Office's solicitors giving advance
20 notice to her solicitors so a less confrontational and
21 aggressive path was adopted. However, even once it was
22 done and she was suspended Post Office continued to act

23 in a highly regrettable fashion."

24 519, a few lines down:

25 "Post Office put itself in the position of giving

1 itself the appearance that this behaviour towards her
2 was directly influenced by her having issued
3 proceedings."

4 So that was a response to the fact that she had
5 commenced proceedings against her, appears to be
6 your Lordship's view.

7 Now, as to those passages your Lordship said that
8 these points were of considerable interest, but, in my
9 submission, they were obviously not relevant to the
10 Common Issues, not least because they concern events
11 post-dating the commencement of the litigation, which
12 your Lordship very fairly points out. A fair reading of
13 the analysis is that your Lordship was criticising
14 Post Office for its suspension decision-making, which is
15 a serious criticism of systems adopted by the
16 Post Office in its dealings with Subpostmasters.

17 This also contains findings as to the threats and
18 the hostile statements that the Post Office allegedly
19 made. These points bear on the breach issues which are
20 to be the subject of future trials.

21 Then in 723, sub-2, there is a discussion about
22 legal representation in the Post Office interview

23 process in connection with a suspension mechanism, and

24 then your Lordship says:

25 "Regardless of whether this is justified or not

1 [ie the fact that you can't have representation], the
2 specific grounds and proper particulars of why they face
3 potential termination are not even clearly identified in
4 advance to the SPM in question. Additionally,
5 information directly relevant to the grounds or at least
6 what the Post Office is concerned about, in the absence
7 of properly identified grounds, is not provided to the
8 SPM either, or at least not in the case of lead
9 claimants who face such procedures.

10 "Mr Abdulla tried at his interview to explain the
11 situation regarding TCs and of the lottery. He was
12 disbelieved. The documents available in the trial show
13 that whatever else he had done, he was telling the truth
14 about the existence of these TCs. Neither he nor the
15 interviewer had this information available to him at the
16 time."

17 Again, these are criticisms of Post Office's
18 termination procedure. They are irrelevant, in my
19 submission, to the Common Issues. They might be very
20 relevant indeed in future trials.

21 The next topic is training, paragraph 104, and there
22 is just one emphasised passage in that paragraph. This

23 is in relation to Mr Bates:

24 "There was no explanation for how to identify the

25 cause of any shortfalls or discrepancies or how to

1 dispute them."

2 105 is part of that, but there is no specific piece
3 that I want to make reference to. But again, in my
4 submission, this is all irrelevant post-contractual
5 evidence.

6 Your Lordship made similar findings or comments in
7 relation to Mrs Stubbs in paragraph 142, where
8 your Lordship says in the middle of the paragraph:

9 "The training did include balancing, but did not
10 include shortfalls, how to get to the root cause of them
11 or how they should be disputed."

12 Then looking at Mr Sabir, this is paragraph 193:

13 "Thereafter, Mr Sabir accepted the appointment and
14 received training."

15 Then a long way into that paragraph:

16 "Mr Sabir's evidence on this, which I accept,
17 matches the other evidence from other lead claimants
18 about in branch training. It is characterised by the
19 trainers observing rather than training and also by
20 early departures from the branch itself by the trainers.
21 I do, however, make these comments without making
22 findings on anything to do with breach, causation or

23 loss."

24 And I will come back to that mantra, if I may.

25 MR JUSTICE FRASER: Is that at the end of 193? Is that the

1 part that you have just read?

2 LORD GRABINER: Yes, exactly right. Yes, precisely.

3 And:

4 "Mrs Stockdale [at 297] was accepted as an SPM and
5 had some training. She attended the classroom training
6 with her son. She did not have all the training she was
7 told she would receive."

8 And then there is some explanation of that factual
9 context.

10 So in that paragraph, Mrs Stockdale's evidence is
11 summarised about her allegations of deficiencies in the
12 training process, and the third sentence is at least
13 a partial acceptance of her evidence on a topic that was
14 not before the court in that trial.

15 Then for Mr Abdulla, paragraph 246, the second
16 sentence or third sentence:

17 "This did not include balancing in any detail, if at
18 all."

19 This is in relation to the training he was supposed
20 to have got.

21 Then in 247, I think this is in relation to
22 Mr Sabir, the last couple of sentences:

23 "This included conducting a balance. He was told
24 that he had to make good any losses and he was not told
25 how to investigate or resolve discrepancies or apparent

1 shortfalls. He was simply told to contact the
2 helpline."

3 And finally Mrs Dar:

4 "Mrs Dar considered [on the fourth or fifth line]
5 the training was inadequate."

6 MR JUSTICE FRASER: Which paragraph?

7 LORD GRABINER: Paragraph 346. So that is in about the sort
8 of third or fourth line:

9 "Mrs Dar considered the training inadequate."

10 And at the end of the paragraph:

11 "Mrs Guthrie spent some of her time trying to fix
12 problems with Horizon rather than doing the induction
13 training that Mrs Dar was expecting."

14 So here your Lordship was accepting Mrs Dar's
15 evidence at face value both as to what she believed
16 about the quality of the training and as to what
17 happened, notwithstanding the fact that the training
18 issue is for a later trial.

19 In paragraph 352, I think we are still with
20 Mrs Guthrie and Mrs Dar, and at the end of that
21 paragraph, that is 352:

22 "Mrs Guthrie did not attend on Mrs Dar's first

23 balance day as she was supposed to. Mrs Guthrie also
24 said she would come back to give further training and
25 support. In fact she did not, at least not until some

1 months later on 15 July 2015, when she came back to
2 carry out an audit."

3 Paragraph 569, factual matrix point 70:

4 "On the evidence of six lead claimants, even when
5 further training was specifically questioned, it was not
6 provided."

7 437:

8 "Nowhere in the training or the interview or
9 anywhere else is there any recognition of how to deal
10 with a shortage, discrepancy of disputed TC of any order
11 of magnitude, still less those of the six lead
12 claimants."

13 Then this paragraph expresses, in my submission,
14 a concluded view on the content and quality of the
15 training.

16 955:

17 "One feature which seemed to be wholly absent from
18 the training courses run by the Post Office for the lead
19 claimants was any sort of assessment or test of
20 competence at the end of the training."

21 Then further down the paragraph:

22 "This situation is in no one's interest. In my

23 judgment, I would go further and say it is contrary to
24 business logic. Although there was some in-branch
25 training, the approach to that did not appear to be

1 uniform either. It can be seen [a couple of lines down]
2 that inadequate training is not likely to be readily
3 discernible to the Post Office."

4 MR JUSTICE FRASER: That rather skips over the introductory
5 sentence to 954, though, doesn't it:

6 "I have certain non-binding observations on the
7 evidence given before me by both sides in terms of
8 training."

9 LORD GRABINER: Your Lordship's point is the non-binding
10 point.

11 MR JUSTICE FRASER: And that it was evidence from both
12 sides.

13 LORD GRABINER: Okay.

14 MR JUSTICE FRASER: But I think, if I understand your
15 submissions correctly, I should have resisted the
16 temptation to do that.

17 LORD GRABINER: Precisely.

18 MR JUSTICE FRASER: Right. Thank you very much.

19 LORD GRABINER: So the paragraphs that I have been drawing
20 to your Lordship's attention in this context reveal, in
21 my submission, concluded views and observations on
22 matters arising for determination in subsequent trials.

23 We have done a separate exercise. Actually, I have done
24 this separate exercise, but I hope it is nonetheless
25 accurate. So these paragraphs appear in the course of

1 very extensive recitation by your Lordship and analysis
2 of the evidence of each of the lead claimants.

3 So it is interesting. For the record, Mr Bates,
4 your Lordship deals with his evidence between
5 paragraphs 69 and 124, 55 paragraphs. Mrs Stubbs,
6 paragraphs 125 to 172, 47 paragraphs. Mr Sabir,
7 paragraphs 173 to 223, 50 paragraphs, Mr Abdulla,
8 paragraphs 224 to 274, 50 paragraphs. Mrs Stockdale,
9 paragraphs 275 to 328, 53 paragraphs. Mrs Dar,
10 paragraphs 329 to 364, 35 paragraphs.

11 The point I want to make is that the individual
12 paragraphs I have been drawing to your Lordship's
13 attention were not observations by the way. In each
14 case, they came out of a very, very detailed scrutiny of
15 the witnesses' testimony. And it is obvious that in
16 a future case when these points are litigated, breach,
17 Horizon and so on, there is at least a real possibility
18 that your Lordship will simply not be able to revisit
19 your own conclusions with an open mind.

20 The other side will say you could not have done
21 a more thorough analysis of the evidence that you
22 received from each of these witnesses, and when you were

23 expressing concluded views about them, they were what
24 they are; concluded views which are now immovable
25 regardless of the evidence which might subsequently be

1 given in one or other of those later trials.

2 So, in my submission, the fair-minded observer of
3 this story would perceive that as a real and concerning
4 risk.

5 If I can turn away now from the individual seven
6 items that I have been addressing. So in addition to
7 all the points I have been making, there is a separate
8 category of examples of what we call negative findings
9 or comments as to Post Office's integrity and behaviour.
10 And the passages to which I now refer, taken together
11 with the matters that I have already dealt with,
12 reinforce our concern that your Lordship's mind is
13 closed against Post Office.

14 That concern, we submit, would be shared by
15 a reasonable observer possessed of the facts.

16 MR JUSTICE FRASER: I think you mean gives the appearance of
17 being closed.

18 LORD GRABINER: Yes.

19 MR JUSTICE FRASER: Because if it were your case that it
20 were closed, it would be an application based on actual,
21 not apparent, bias.

22 LORD GRABINER: I apologise for having misspoken.

23 MR JUSTICE FRASER: It is a question of my being clear.

24 LORD GRABINER: No, you should be absolutely clear, there is

25 no such allegation being made.

1 So under the particular headings that we have
2 devised, first of all, Post Office's alleged
3 mistreatment of Subpostmasters, or indeed mistresses.

4 Paragraph 117:

5 "The full subsequent trial of Mr Bates' claim will
6 show what if any consideration was given at the
7 Post Office internally not only to this shortfall but
8 others, if there were others, in the period December
9 2000 to March 2002. If the Post Office did in reality
10 do what Mr Bates suggested they did, namely bury their
11 heads in the sand, press on regardless and press
12 numerous SPMs for shortfalls and discrepancies caused by
13 the Horizon system, that would be behaviour of an
14 extraordinary kind, and given the criminal implications
15 for some SPMs may be extraordinarily serious."

16 Then you say at the end of that paragraph:

17 "I make no findings either way at this stage of the
18 proceedings in this judgment."

19 Here your Lordship specifically does not make any
20 finding, but you were prepared to speculate as to the
21 possibility of extraordinarily serious misbehaviour on
22 the part of Post Office.

23 MR JUSTICE FRASER: Lord Grabiner, that is the claimants'
24 case, and you have skipped over the passage that says:
25 "On the other hand, his shortfall may, upon

1 investigation ..."

2 Et cetera, et cetera.

3 LORD GRABINER: Fine. When you say skipped over, I am just
4 trying to do this at speed, and I apologise.

5 MR JUSTICE FRASER: I understand.

6 LORD GRABINER: And I accept your Lordship's point, but I do
7 emphasise the point that the expression "extraordinarily
8 serious behaviour" is a strong expression. It is an
9 eye-catching expression. And in the context of this
10 debate, there was no warrant for it and, in my
11 submission, it is extremely prejudicial and certainly
12 wasn't necessary for the purposes of the Common Issues.

13 523, you say:

14 "For the reasons I have expressed above, I have
15 considerable misgivings about Post Office's motivation
16 for the treatment of Mrs Stockdale during this
17 litigation and for the treatment itself in terms of
18 refusal to provide obviously relevant documents. The
19 evidence of Mr Carpenter, far from satisfying these
20 concerns, actually increases them. The Post Office
21 appears, at least at times, to conduct itself as though
22 it is answerable only to itself."

23 And then missing a couple of lines:

24 "This would be a worrying position were it to be

25 adopted by any litigant. The Post Office is an

1 organisation responsible for providing a public service
2 which, in my judgment, makes it even worse."

3 In 724, in the closing sentence:

4 "It appears to wield that power with a degree of
5 impunity."

6 That, of course, is the Post Office.

7 And 1059, at the end of that paragraph:

8 "It would be perhaps too cynical for even the most
9 hardened Post Office watcher to suggest that the
10 problems with Horizon led to changes to and extension of
11 the contractual liability of SPMs for losses that were
12 adopted in the NTC. However, that option can't be
13 entirely discounted."

14 In my submission, this is an unnecessary and
15 speculative and offensive observation about Post Office,
16 and there was simply no justification for the
17 incorporation of that passage and it reveals a mindset
18 impacting upon the future cases.

19 MR JUSTICE FRASER: Lord Grabiner, that passage at 1059
20 arises in the following circumstances. The clause that
21 deals with liability for losses in the SPMC expressly
22 requires negligence, carelessness or fault on the part

23 of an SPM. The NTC clause that deals with liability for
24 losses does not have that limitation, and the
25 Post Office witness who explained the evolution of one

1 contract form to the other told me that the intention
2 was that there would be no difference in scope for
3 liability. In other words, the NTC, on his evidence,
4 was intended also to require fault, and the finding that
5 I made on the clauses themselves is that that plainly
6 wasn't the case on the actual words, and I rejected his
7 evidence.

8 In those circumstances, there was no explanation for
9 the change in extent of liability from the SPMC into the
10 NTC, and any comments I have made in 1059 have to be
11 read in the context of the fact that I had rejected
12 Mr Beal's evidence and what Mr Beal's evidence in fact
13 was.

14 But do I understand the submission to be effectively
15 that I should simply have made the findings on the
16 contractual effect of the two different contract forms
17 and not dealt with Mr Beal's evidence about them at all.

18 LORD GRABINER: Absolutely, because what you have actually
19 done is to lay the ground for a very strong attack on
20 the basis that the contract amendments were specially
21 designed in order to make life much tougher for
22 Subpostmasters in the future, and this would have been

23 obviously a matter for breach debate or for a more
24 general view about the conduct of Post Office in the
25 whole of this litigation.

1 MR JUSTICE FRASER: I understand.

2 LORD GRABINER: But to say it at that stage, in my
3 submission, is unnecessary and prejudicial.

4 MR JUSTICE FRASER: I understand.

5 LORD GRABINER: In paragraph 1111, your Lordship says:

6 "The Post Office describes itself as the nation's
7 most trusted brand."

8 You say:

9 "So far as these claimants and the subject matter of
10 this group litigation are concerned, this might be
11 thought to be wholly wishful thinking."

12 Then at the end of the paragraph:

13 "The Post Office asserts that its brand is trusted
14 by the nation. The SPMs who are claimants do not trust
15 it very far, based on their individual and collective
16 experience of Horizon."

17 Well, I mean, your Lordship can imagine what I would
18 be saying about that, but my submission is that the
19 passage speaks for itself.

20 Criticisms under a new rubric, criticisms of
21 Post Office's behaviour in this litigation,
22 paragraph 34. Your Lordship describes the evidence that

23 you received, and at the end of that paragraph,

24 your Lordship says:

25 "The Post Office seemed to adopt an extraordinarily

1 narrow approach to relevance, generally along the lines
2 that any evidence that is unfavourable to Post Office is
3 not relevant."

4 Obviously that is a serious criticism of the way
5 that the Post Office conducted the litigation.

6 Then paragraph 21, you begin with the words:

7 "Nothing in the judgment should be taken as my
8 expressing any concluded view on the functionality of
9 Horizon systems."

10 So your Lordship is obviously aware of the concern
11 that we are now focused upon. And I will not go through
12 the whole of that paragraph, but towards the end,
13 your Lordship says:

14 "However, Post Office seemed to want findings on
15 that only if they were in the Post Office's favour.
16 This is a peculiarly one-way approach by any litigant."

17 Then I think what I want to do is to show
18 your Lordship the closing submissions. Could you look
19 at transcript Day 14/36, lines 17 to 25, which are in
20 {B9.3/2/682}.

21 MR JUSTICE FRASER: I am afraid it has not come up yet.

22 LORD GRABINER: Day 14, page 36, lines 17 to 25. It is in

23 the bottom right-hand corner there. So it is line 17.

24 So the closing submission is:

25 "On credibility, we have a problem here."

1 Does your Lordship have it? Line 17, page 36, if
2 you are on the four on a page, right-hand corner.

3 MR JUSTICE FRASER: Yes, I do, sorry.

4 LORD GRABINER: "On credibility we have a problem here
5 because, of course, someone in my position would like to
6 rely on the answers of these individuals and how they
7 accounted, some of which, in my submission, was
8 dishonest or at least not credible. The trouble with
9 that submission is that would require your Lordship to
10 make findings as to that which, given the nature of this
11 trial, I am not in a position to do, because at least
12 there has not been full disclosure of the accounting
13 relationship."

14 Now, what I say about that is this. It may be
15 a good submission and it may be a bad submission, but my
16 learned friend Mr Cavender was certainly not submitting
17 that findings on credit should only be made if they were
18 in Post Office's favour, and, in my submission, the
19 conclusion that your Lordship has reached in the earlier
20 paragraph we are complaining about, namely 21, I think,
21 and 34, were not justified.

22 Then paragraph 28 you say:

23 "Another point with which I have to deal is what
24 Mr Cavender called or described in Opening as a
25 'challenge to the court'."

1 Then just at the end of that paragraph:

2 "The Post Office may have made these submissions
3 because, on an objective analysis, it fears objective
4 scrutiny of its behaviour, or it may have made them for
5 other reasons."

6 This, with respect, is a common theme in the
7 judgment. Your Lordship is speculating on all the bad
8 things Post Office might have done. Even though
9 your Lordship doesn't reach a concluded view, the
10 fair-minded observer would still be struck by the
11 one-sided and, in my submission, prejudicial speculation
12 contained in that observation.

13 Paragraph 30 at the end, when your Lordship is
14 summarising another approach adopted by the Post Office,
15 and you say at the end:

16 "This seemed to me to be an attempt to put the court
17 in terrorem."

18 And then at paragraph 123, your Lordship can look at
19 that for context, but the bit I am interested in is
20 towards the end of the paragraph, the last 15 lines or
21 so:

22 "The Post Office must have decided to attack him

23 [that, I think, is Mr Bates] ..."

24 MR JUSTICE FRASER: Where are we? I am sorry.

25 LORD GRABINER: Paragraph 123. I am sorry.

1 MR JUSTICE FRASER: Not at all, 123, yes.

2 LORD GRABINER: Just the last 15 lines or so:

3 "The Post Office must decided to attack him [I think
4 that is Mr Bates] because the whole case of the Post
5 Office requires an assumption or acceptance that the
6 predominant, or only, cause of shortfalls is fault (or
7 worse) on the part of SPMs. The case by the Post Office
8 is that careful and/or diligent and/or honest SPMs
9 and/or their assistants do not experience shortfalls.
10 Therefore, so far as the Post Office is concerned, in
11 each branch where such shortfalls occurred, either the
12 Claimants and/or their assistants must have at least
13 some, and potentially all, of those characteristics. If
14 it were otherwise, the Post Office edifice would run the
15 risk of collapse."

16 Again, this is an offensive conclusion and it does,
17 in my submission, or would in the minds of the observer,
18 reveal a mindset on the part of your Lordship.

19 Paragraph 295 --

20 MR JUSTICE FRASER: Before you move on, if you go back to
21 the end of paragraph 121, if you would.

22 LORD GRABINER: Yes, my Lord.

23 MR JUSTICE FRASER: I summarise in the last four lines the
24 submissions that the Post Office made to me about
25 Mr Bates and/or put to him in his cross-examination,

1 which I described as a sustained attack, and terms used
2 by the Post Office to describe his evidence included the
3 following words: risible, meaningless, nonsensical and
4 weak, and the Post Office's case also was that he had
5 convinced himself of the truth of his own account
6 because he had been campaigning against them for years.

7 So in terms of putting the findings at the end of --
8 I beg your pardon, not the findings, the criticisms at
9 the end of 121 in context, they have to be read with
10 123, don't they?

11 LORD GRABINER: That is fair enough, and I apologise. That
12 is perfectly fair, but my submission nevertheless is
13 that what is at the end of 123 does involve some
14 conclusions, and revealing your Lordship's thinking.
15 But the real point is that regardless of what the
16 evidence was or the cross-examination was, this has
17 nothing to do with the contract issues, but it has
18 everything to do with other matters yet to be tried.

19 Of course, the last sentence is particularly
20 revealing:

21 "If it were otherwise, the Post Office edifice would
22 run the risk of collapse."

23 So it looks like a fanciful construct. It does
24 reveal a view, in my submission.
25 MR JUSTICE FRASER: Understood.

1 LORD GRABINER: 295 {B7/29/100}, this is in relation to
2 Mrs Stockdale, and her interview. The last few lines:

3 "If that replacement took place after April 2016,
4 and if it is because of the replacement that this
5 recording is not available, then that means that
6 Post Office has failed properly to deal with an
7 important record directly relevant to the litigation
8 during the proceedings themselves."

9 So the implication from that is that Post Office has
10 failed to preserve evidence or may have destroyed
11 evidence, but it is all left up in the air and it is
12 a speculative observation.

13 In 393 {B7/29/129}, again, if your Lordship would be
14 kind enough just to look at that for context.

15 MR JUSTICE FRASER: 393.

16 LORD GRABINER: The passage that I am going to go is to 394,
17 a few lines down, after reference to Mrs Rimmer's team:

18 "It may well not have been drafted by Mrs Rimmer at
19 all, as some litigants' solicitors are often responsible
20 for the content of witness statements. This was not
21 pursued in cross-examination, so it is neither necessary
22 nor desirable to make any finding about it. I certainly

23 don't criticise Mrs Rimmer for it, although if it were
24 not written by her, it should not have been in her
25 statement."

1 So this is an implied allegation of professional
2 impropriety against Post Office's legal advisers. We
3 are all familiar with the context, but your Lordship is
4 speculating about something which is actually very
5 serious and it was entirely inappropriate, in my
6 submission, to incorporate that into the judgment.

7 Then in 532, you wholly:

8 "I wholly reject this evidence by Mr Trotter."

9 Then at the end of that paragraph, 532:

10 "This next point was not put to him. It appeared as
11 though his witness statement had been written by someone
12 else and not by Mr Trotter."

13 A similar point, 476, 10 or 12 lines down, reference
14 to Mr Abdulla:

15 "This part of her written evidence [this must be
16 Mrs Dar's evidence] sought to give the impression,
17 through careful wording of her witness statement, that
18 she had covered the same ground in the interview as
19 contained in these much later checklists."

20 Several lines down on, but towards the end of the
21 paragraph --

22 MR JUSTICE FRASER: I think it is Mrs Ridge's evidence.

23 LORD GRABINER: You may well be right and I apologise, yes,
24 that is right, and then just further on, towards the end
25 of the paragraph:

1 "This passage of her evidence appears to have been
2 written for her, but again the point was not put so
3 I make no findings about it."

4 This is another example of an implicit allegation of
5 what would be professional impropriety. Why speculate
6 about it? It is quite unnecessary but very, very
7 damaging to the view of the observer looking at this
8 bearing in mind the expectation of the future trials.

9 483 is the next paragraph. It is again for context.
10 If your Lordship could be kind enough to look at the
11 paragraph. But at the end of the paragraph:

12 "Given by early 2017 this litigation was well under
13 way it may be an example of internal suppression of
14 material, but I make no specific findings on that as the
15 point wasn't raised. I can think of no rational
16 explanation for this however."

17 This is, in my submission, wholly inappropriate, not
18 least the conclusion that apart from the suggested
19 impropriety your Lordship could think of no other
20 rational explanation for Post Office's behaviour. That
21 is a conclusory statement and it is an incredibly
22 damaging statement. And it is a highly prejudicial

23 statement.

24 MR JUSTICE FRASER: This was a Post Office auditor asking

25 for internal documents from the Post Office.

1 LORD GRABINER: It doesn't matter, my Lord, because these
2 were matters which everybody knows were going to be
3 subsequently dealt with.

4 Paragraph 560, in subparagraph 5, even the identity
5 of both the sender and the recipients of internal emails
6 have been redacted from disclosed correspondence.

7 MR JUSTICE FRASER: Where are we now?

8 LORD GRABINER: Sorry, it is paragraph 560, subparagraph 5.
9 Your Lordship may recall this. This is where the
10 disclosed correspondence was redacted.

11 MR JUSTICE FRASER: Yes.

12 LORD GRABINER: Then in later submissions on typographical
13 corrections:

14 "... maintain this was done for data protection
15 reasons. The contents of the emails heavily redacted
16 ... the court will not go behind an assertion of
17 privilege."

18 Your Lordship says:

19 "However, given that part of the emails are accepted
20 as not being privileged and have not been redacted
21 I can't see any sensible basis for maintaining any
22 redaction of the identity of the sender and recipients."

23 That is a serious criticism of the disclosure
24 process adopted by Post Office. It proceeds actually on
25 a false basis. Post Office did not redact those

1 documents for the purposes of these proceedings. They
2 had been disclosed in these proceedings in exactly the
3 same form that they were in when originally provided to
4 Mr Bates. The original versions had been redacted for
5 data protection reasons.

6 MR JUSTICE FRASER: But the contents were redacted as well
7 as the senders and the recipients.

8 So, Lord Grabiner, if you look at line 5 of 560,
9 subparagraph 5 {B7/29/175}, the contents of the emails
10 were themselves heavily redacted. So if the sender and
11 the recipient's identity were redacted at the time for
12 data protection I entirely accepted the correction
13 Mr Cavender I think submitted.

14 LORD GRABINER: I understand your Lordship's point.

15 If we may, we may come back to you.

16 MR JUSTICE FRASER: Yes, of course.

17 LORD GRABINER: All the redactions I am told were related to
18 third party data. All the redactions.

19 MR JUSTICE FRASER: Does that, therefore, mean that the
20 redactions within the contents of the emails need to be
21 reviewed again?

22 LORD GRABINER: No. Those redactions within the content are

23 there because they reflected data protection redactions
24 in the originals.

25 My understanding is that that was explained to

1 your Lordship during the trial. But I am not going to
2 invite him to deal with it now, but it may be that
3 Mr Cavender can deal with it.

4 MR JUSTICE FRASER: No. Of course.

5 LORD GRABINER: Then in 561 your Lordship says:

6 "These are examples in my judgment of a culture of
7 excessive secrecy at the Post Office about the whole
8 subject matter of this litigation. They are directly
9 contrary to how the Post Office should be conducting
10 itself. I do not consider that there can be a sensible
11 or rational explanation for any of them."

12 The criticism I would make speaks for itself.

13 Then turning to another heading: "Criticism of
14 Post Office witnesses". 375:

15 "Mr Beal's way of giving evidence was very much the
16 house Post Office style, certainly for the more senior
17 of its management personnel who gave evidence. This was
18 to glide away from pertinent questions or questions to
19 which the witness realised a frank answer would not be
20 helpful to Post Office's cause."

21 Then just below that:

22 "He sought to give me evidence highly favourable to

23 Post Office which I consider was slanted more towards
24 public relations consumption rather than factual
25 accuracy."

1 Then in 400, the sentence:

2 "That is simply not correct. I do not accept that
3 Mr Breeden could believe it was."

4 In 425 in relation to Mrs Van Den Bogerd your
5 Lordship said:

6 "This, therefore, must mean that Mrs Van Den Bogerd
7 is an extremely poor judge of relevance."

8 In 544:

9 "I have no reason to think that any of Post Office
10 witnesses were doing anything other than stating their
11 genuine belief as at 2018 based on their recollection,
12 with two exceptions. The first is some of Mr Beal's
13 more extreme claims that the drafting of the NTC was
14 designed to replicate a SPM's responsibility for losses
15 under the SPMC. It was also intended by Post Office
16 that the contract with NFSP would be made public.
17 Neither of those claims bear analysis when compared with
18 the detailed drafting of each of those documents, both
19 of which have been carefully drafted, no doubt with the
20 assistance of sophisticated legal advisers.

21 "The second is Mrs Van Den Bogerd. She tried to
22 give the impression that the detailed cross-examination

23 about Mr Abdulla was something she couldn't really deal
24 with because she had no detailed knowledge in the
25 witness-box. That is simply not correct. She had

1 signed a very detailed witness statement just a few days
2 before for the Horizon Issues trial which dealt with the
3 matters being put to her about Mr Abdulla in
4 considerable detail. I find that she was simply trying
5 to mislead me."

6 Further on your Lordship described an answer from
7 her was "simply disingenuous". Then further on in the
8 emboldened part:

9 "Mrs Van Den Bogerd did not provide any reference in
10 his witness statement to matters unfavourable to the
11 Post Office case."

12 So two things are especially striking, in my
13 submission, about these extracts.

14 First your Lordship makes a very general statement
15 about Post Office's house-style of giving evidence.
16 That shows that from now on you are likely to disbelieve
17 Post Office's evidence because it comes from
18 Post Office. In my submission that is how it would be
19 viewed by an objective observer.

20 Secondly, those criticisms of Post Office witnesses
21 are founded on what they said or did not say about
22 evidence which was irrelevant. Ie irrelevant for that

23 trial.

24 Mr Beal is criticised for his understanding of how
25 the liability provisions in the NTC should be construed.

1 But his subjective understanding is quite irrelevant to
2 their proper interpretation or construction. That is
3 always a matter for the court.

4 He is also criticised for his evidence on the NFSP.
5 This too was irrelevant. Mrs Van Den Bogerd was
6 criticised for not giving evidence on Horizon. Her
7 evidence on Horizon belongs properly to the Horizon
8 trial.

9 So we say that your Lordship's conclusions as to the
10 credibility of these witnesses are unfair, not least
11 because the evidence they were giving was supposed to be
12 confined to the Common Issues, which is what their
13 witness statements were directed to.

14 The other point about these conclusions is that they
15 will inevitably colour your Lordship's view of these
16 witnesses as and when they come before you in one or
17 other of the later trials.

18 Then I think with a bit of luck I will get done by
19 the short adjournment, my Lord.

20 The next topic heading is "Attacks on the NFSP and
21 Post Office's relationship with NFSP".

22 So there were attacks on Post Office's relationship

23 with the National Federation of Subpostmasters. It was
24 not represented in court and had no opportunity to
25 comment on your Lordship's judgment.

1 So in 368 you say:

2 "It is obvious, in my judgment, that the NFSP is not
3 remotely independent of Post Office, nor does it appear
4 to put its members' interests above its own separate
5 commercial interests."

6 In 369 just for context, 370, the second sentence:

7 "Such matters plainly should not be linked in the
8 way that NFSP and the Post Office link them in this
9 instance. I don't consider that NFSP can, in these
10 circumstances, properly be considered to be independent
11 or to be acting in the interests of SPMs, given the way
12 it involved its own commercial interests as a condition
13 in the way explained in Part F of the judgment."

14 Then if your Lordship would just be kind enough to
15 look for context at 576 and 577, and then I want just to
16 pick up on a emboldened passage at the end of 577. This
17 is in relation to Paula Vennells, the chief executive of
18 the Post Office. Then at the end of 577 your Lordship
19 says:

20 "Rather curiously, therefore, the email above
21 demonstrates that the NFSP was only prepared to agree
22 what amounted to an increase in its members' potential

23 compensation if its own future was assured by the
24 payment of substantial sums to it. I find that this
25 shows that the NFSP put its own members' interests well

1 below its own. I also find that NFSP is not fully
2 independent."

3 So your Lordship has there embarked on a lengthy
4 discussion of the circumstances in which Post Office
5 disclosed a copy of its grant agreement with NFSP in
6 response to a freedom of information request.

7 Your Lordship was especially interested in the fact
8 that NFSP's website had been altered in the course of
9 the trial. You will probably remember that. This is in
10 your Lordship's 589. Then towards the end of 589
11 your Lordship said:

12 "I was given no evidence by anyone from Post Office
13 about why this was done and done in terms that suited
14 the Post Office's case on this point. I find this
15 behaviour highly suspicious. It also undermines yet
16 further the claim by Post Office that NFSP is
17 independent."

18 So here your Lordship seems to be adopting the
19 conspiracy theory approach to the evidence. That would
20 be a matter of grave concern to the fair-minded observer
21 aware of the context. And, of course, a party to that
22 conspiracy apparently was the Post Office, but there was

23 no detailed evidence on any of this because it simply
24 wasn't relevant to the Common Issues trial.

25 Then earlier in these submissions and from time to

1 time by reference to various paragraphs of the judgment
2 I drew attention to observations of your Lordship to the
3 effect that you were specifically going out of your way
4 to make it clear that you were not making any findings
5 on Horizon or breach.

6 So if we can go back now to paragraph 517, which
7 I think is the classic example in the judgment,
8 your Lordship will be familiar with this paragraph and
9 I will not re-read it, but 517. It is the "crystal
10 clarity" paragraph.

11 MR JUSTICE FRASER: Just give me a moment.

12 LORD GRABINER: 517.

13 MR JUSTICE FRASER: Yes, thank you. Yes.

14 LORD GRABINER: Your Lordship will obviously recall what you
15 said there.

16 That form of words, in my respectful submission,
17 would appear to the fair-minded observer to be aimed at
18 pre-empting the substantive criticisms that I have been
19 making throughout. It is just a mantra which would not
20 convince the observer that your Lordship had not
21 prejudged the issues which still fall to be tried by
22 your Lordship.

23 Unsurprisingly there is some learning on this
24 subject. The authority is the case of Steadman-Byrne.
25 Could I invite your Lordship's attention to it.

1 MR JUSTICE FRASER: Yes. Is this the one where the parties
2 were called in over the short adjournment, having heard
3 the claimant's evidence, and the district judge said he
4 believed them and he made various other comments. There
5 are about maybe 16 comments in the judgment of
6 Lord Justice Sedley that set out exactly what he said,
7 I think.

8 LORD GRABINER: Yes, there was a dispute about what was said
9 but Lord Justice Sedley thought that that was
10 irrelevant. It is {B9.5/13/1} I think it should be.

11 MR JUSTICE FRASER: Is it tab 14?

12 LORD GRABINER: It is genuinely 14, yes.

13 MR JUSTICE FRASER: That is the practice note. I have
14 actually been looking at it in the judgment itself. But
15 the judgment is in the practice note so ...

16 LORD GRABINER: Yes, it is. Yes, it is, you are quite
17 right.

18 MR JUSTICE FRASER: So I think paragraph 4 sets out what the
19 district judge said to them over lunch.

20 LORD GRABINER: There was a dispute about what was said but
21 Lord Justice Sedley didn't think that was terribly
22 important.

23 If we go to paragraph 5:

24 "The defendant's case is that the judge, by saying

25 what he said, went well beyond giving counsel an initial

1 indication of his thinking and expressed firm views
2 adverse to a defendant whose evidence he had not yet
3 heard. When, therefore, in his judgment the next day he
4 found against the defendant, a reasonable observer,
5 knowing what we have recounted, would infer that he
6 might well have done so because of a prior prejudice in
7 favour of the claimants and against the defendant."

8 I cite that merely to make it clear beyond argument
9 that it was a case of apparent bias and not actual bias,
10 because the learned Lord Justice is using the formula
11 applicable to the apparent bias cases. Then at
12 paragraph 12 Lord Justice Sedley says:

13 "The claimants rely strongly on the remark recorded
14 by their counsel but not recalled by the defendant's
15 counsel; namely that the judge wanted to give both
16 counsel an indication of his thoughts. We are entirely
17 content to accept that whether the district judge said
18 it or not it is what he was seeking to do. The question
19 remains whether the thoughts he communicated were
20 nevertheless such as to suggest to a reasonable observer
21 that his mind was all but closed against the defendant."

22 Then in paragraph 16 the learned Lord Justice says:

23 "Both the common law and the convention for the
24 protection of human rights and the fundamental freedoms
25 recognise the fundamentality of every litigant's right

1 to a Tribunal free both of bias and of the objective
2 appearance of bias. The appearance of bias includes
3 a clear indication of a prematurely closed mind. In our
4 respectful view the district judge, albeit acting out of
5 the best of motives, gave the parties an inescapable
6 impression that he had formed a view not only favourable
7 to the claimants, but that the defendants were not going
8 to be believed if he contradicted them."

9 Now the reasonable observer would certainly not be
10 convinced by the formulation of words which are belied
11 by the substance of the judgment, because in every case
12 you can't just point to the words. What will matter is
13 the impression gained by the observer of the substance
14 of the language used by the judge in the case; in this
15 case your Lordship.

16 What Amjad shows, in my submission, is that the
17 court will and can look through the mantra and be
18 prepared rigorously to test the reality.

19 The real question is whether in the eyes of the
20 reasonable observer there is a real possibility that
21 your Lordship has prejudged matters which are still due
22 to be tried by you. That is the key question.

23 As your Lordship knows, I am sure, from the Locabail
24 case -- that is the only other case that I want to make
25 reference to --that the benefit of any real doubt should

1 be resolved in favour of recusal.

2 Perhaps we can just look at that. This is
3 Lord Justice Bingham's judgment {B9.5/7/480} at the foot
4 of the page between G and H.

5 Lord Justice Bingham says, do you see that, between
6 G and H:

7 "In most cases we think the answer, one way or the
8 other, will be obvious, but if in any case there is real
9 ground for doubt that doubt should be resolved in favour
10 of recusal."

11 Your Lordship's use of what I have called, I hope
12 not disrespectfully, the mantra, demonstrates your
13 understanding that you should not have made findings for
14 example about Horizon or breaches of contract or
15 breaches of duty.

16 Our case is that your Lordship nevertheless went
17 ahead and made those findings. Many of your conclusions
18 and observations are strongly expressed.

19 So in a nutshell my submission is that in the eyes
20 of the fair-minded observer this is a very plain case
21 where there is a risk of an appearance of bias infecting
22 the current Horizon trial and the future trials between

23 these parties.

24 For that reason I respectfully invite your Lordship

25 to recuse yourself from these proceedings and also

1 either to stay or adjourn the Horizon trial.

2 My Lord, those are my submissions. I am sorry they
3 were undertaken at great speed, but they are my
4 submissions.

5 If there is anything you would like to ask me about
6 I am very happy to try and help you.

7 MR JUSTICE FRASER: I just had a couple of questions.

8 LORD GRABINER: My Lord, yes.

9 MR JUSTICE FRASER: So far as relief on the application,
10 I think the application itself said adjourn the Horizon
11 trial, which obviously is underway at the moment, and
12 today you have said adjourn or stay.

13 LORD GRABINER: My Lord, yes.

14 MR JUSTICE FRASER: Can I just be clear what in fact is
15 meant by either or each of those terms.

16 The evidence of fact is almost finished. If I were
17 to recuse myself from being the managing judge of the
18 group litigation that would obviously include recusing
19 myself from any further involvement in the Horizon
20 Issues trial.

21 LORD GRABINER: My Lord, yes.

22 MR JUSTICE FRASER: That would then have to start again in

23 front of another judge. Is that correct?

24 LORD GRABINER: Yes, is the answer. How long has this trial

25 been going on for?

1 MR JUSTICE FRASER: Two weeks.

2 LORD GRABINER: Would your Lordship bear with me for
3 a moment.

4 MR JUSTICE FRASER: Yes. (Pause)

5 LORD GRABINER: Yes, I think that would be the consequence.
6 Yes.

7 MR JUSTICE FRASER: It is really abandon or stop the Horizon
8 trial.

9 LORD GRABINER: Yes.

10 MR JUSTICE FRASER: So it can be reheard from scratch.

11 LORD GRABINER: Precisely.

12 MR JUSTICE FRASER: Yes. Right, thank you very much. That
13 is the first question.

14 The second question is slightly mundane in terms of
15 the observations and submissions that you have made
16 already in respect of Mr Beal, but just to ask
17 a specific question about Mr Beal with particularity.

18 At page 94 of today's transcript when you were
19 taking me through the passages in respect of my
20 observations on the relationship with the NFSP you said
21 that I had criticised Mr Beal for giving irrelevant
22 evidence, or I had criticised him in respect of

23 irrelevant evidence. Do you recall those submissions?

24 LORD GRABINER: Let me just look at my --

25 MR JUSTICE FRASER: 544 is the paragraph of the judgment

1 where I deal with an observation on Mr Beal and an
2 observation on Mrs Van Den Bogerd.

3 LORD GRABINER: What I said was Mr Beal is criticised for
4 his understanding of how the liability provisions in the
5 NTC should be construed.

6 MR JUSTICE FRASER: Yes, that is correct, you did say that.

7 If we can just call up on the common screen for the
8 Common Issues trial, please, {C2/2/6}.

9 That is Mr Beal's witness statement where he gives
10 evidence about a point which you and I have already
11 debated a little bit, which was the difference in fault
12 or no fault liability under each of the two contract
13 forms.

14 Now on the basis that he had given that evidence in
15 his witness statement I assume the Post Office's
16 position is that that was relevant evidence and Mr Green
17 could cross-examine on it. But if I have misunderstood
18 that would you tell me.

19 LORD GRABINER: My response to that is first of all it
20 obviously was in the witness statement but it was
21 irrelevant to the matters in the trial.

22 MR JUSTICE FRASER: Understood.

23 LORD GRABINER: And whatever came out of the
24 cross-examination was similarly irrelevant.
25 MR JUSTICE FRASER: Yes.

1 LORD GRABINER: It goes back to a point that I sought to
2 make at the beginning of these submissions, which is
3 that the fact that irrelevant material was incorporated
4 into any of the witness statements and/or was
5 cross-examined is supremely irrelevant because it
6 doesn't thereby enlarge the Common Issues that were the
7 subject of the trial.

8 MR JUSTICE FRASER: I understand. That is very helpful,
9 thank you.

10 Then the final point -- and it may be that you are
11 not able to give me an answer immediately, in which case
12 you can just give me the brief answer at the beginning
13 of your reply -- am I entitled or not, would
14 a fair-minded hypothetical observer take account of the
15 result in the Common Issues judgment in terms of how
16 many issues were resolved in the Post Office's favour
17 and how many were resolved in the claimants' favour or
18 not?

19 LORD GRABINER: Absolutely not.

20 MR JUSTICE FRASER: Wouldn't take note. Thank you very
21 much. That is very helpful.

22 LORD GRABINER: Absolutely not. It would be irrelevant.

23 The only matters that are relevant is whether it can
24 fairly be said that there are passages in the judgment
25 which give rise to the concern I have been describing.

1 MR JUSTICE FRASER: Thank you very much.

2 LORD GRABINER: The fact that at the end of the day the
3 weight of the findings was in favour of one side or the
4 other would, in my submission, be irrelevant.

5 MR JUSTICE FRASER: Thank you very much indeed. That is
6 almost perfectly timed on your part, if I may say so,
7 and we will come back at 5 past 2 and I will hear from
8 Mr Green.

9 (1.00 pm

10 (The short adjournment)

11 (2.05 pm)

12 Submissions by MR GREEN

13 MR JUSTICE FRASER: Mr Green.

14 MR GREEN: May it please your Lordship. The claimants'
15 submission is that this is an application without merit
16 and without foundation. There are effectively three
17 strands to that submission.

18 The first is that it wholly ignores the proper role
19 of context. The second is that it appears to proceed on
20 a misapprehension as to the correct approach to
21 analysing apparent bias. The third is that it proceeds
22 specifically on a misapprehension as to the proper

23 judicial assessment of the proceedings as they actually
24 were before your Lordship during the Common Issues
25 trial.

1 There is a preliminary point to make about the
2 informed observer test. The informed observer is
3 someone who is presumed to actually have been at the
4 trial and know what happened, not commenting on it from
5 afar and not island-hopping between different findings
6 and observations to make assertions about those without
7 having regard to the judgment as a whole.

8 Taking the points in stages --

9 MR JUSTICE FRASER: Is that right, though? Is it not
10 sufficient for the reasonable well-informed observer
11 just to read judgment number 3?

12 MR GREEN: My Lord, no, the law is clear that the
13 reasonably -- well, the informed observer test is (a) an
14 objective one and (b) an informed one. So the informed
15 observer knows about the trial as it was presented to
16 your Lordship.

17 In one case, there is even a point about knowing
18 things that perhaps even weren't in the public domain
19 about the trial. So "informed" I would underline in
20 relation to the approach of the informed observer test.

21 A couple of short points in relation to context, and
22 those points are these, and I think your Lordship will

23 have apprehended what these submissions would be anyway.

24 The first point is that specific findings or
25 observations in a judgment should not be taken out of

1 their immediate context. That is, either lines which
2 are within the same paragraph but have been omitted from
3 mention, which either directly contraindicate what is
4 being said of the other lines that are mentioned or put
5 those lines into a context which is explanatory, or
6 adjacent paragraphs which give the overall context
7 within which the particular paragraph falls. I refer to
8 that as the immediate context.

9 The second point of context is that those passages
10 should not be considered without regard to the judgment
11 as a whole and read as a whole, including
12 your Lordship's findings in favour of some of
13 Post Office's witnesses, for example, and having due
14 regard to the presence or absence of a careful and
15 meticulous approach to analysing with precision what
16 evidence was and was not given, how it was challenged
17 and what submissions were made about it.

18 The third matter of context is to look at the
19 proceedings themselves and the issues that your Lordship
20 had directed to be tried and how the parties had in fact
21 presented their cases before the court.

22 The fourth matter of background, but important

23 context, is the fact that this is group litigation where
24 frequently the managing judges are put in a position
25 where parts of trials have to be separated off, as

1 sensibly as they can be, never perfectly hermetically
2 sealed from other aspects, and tried, and tried fairly
3 and sensibly.

4 That is the quintessential role of the managing
5 judge for which part 19 of the Civil Procedure Rules
6 makes provision.

7 I will take your Lordship, if it is necessary, to
8 the British Coal case, which we have in the bundle,
9 which addresses the generosity of approach to a managing
10 judge in those circumstances.

11 Your Lordship is very familiar with the passages
12 that have been identified in Mr Parsons' 15th witness
13 statement and the words that precede and follow them and
14 their context, because it is in your Lordship's
15 judgment, so I am not going to spend the time that I do
16 have taking your Lordship through them paragraph by
17 paragraph, not least because I hope we have given
18 sufficiently illustrative examples of our answers in our
19 written skeleton argument.

20 But it is important to address some of the points
21 which arise in relation to the Common Issues themselves,
22 and how they in fact arose before your Lordship. So the

23 first point to note is that the Common Issues were not
24 plucked out of the air.

25 The Common Issues were agreed between the parties

1 and they were derived from the parties' generic
2 pleadings, which is an important point, and the key
3 paragraphs to which they referred, although inevitably
4 not all paragraphs, were identified in the schedule to
5 the order which defined the Common Issues themselves.

6 Your Lordship will know that, for example, some of
7 the more famous paragraphs in the generic defence, like
8 93 and 94 about the approach to construction and where
9 the burden of proof should lie, were identified in that
10 Common Issues document.

11 And what then followed was the service of evidence
12 by Post Office for their part, which was designed to
13 support the factual premises which they had pleaded as
14 being expressly relevant to construction of the
15 contracts. I will very briefly make these points good
16 in a moment.

17 What then followed was Post Office's attempt to
18 strike out the only evidence that the lead claimants
19 individually could give in response to whether or not
20 the factual assertions designed to support Post Office's
21 pleaded case on construction were in fact a reliable and
22 realistic account of what would happen on the ground or

23 not.

24 That was unsuccessful for a number of reasons which

25 your Lordship will remember in the admissibility

1 judgment, which is judgment number 2, which I will also
2 come to very briefly in a moment.

3 From there, Post Office then elected not to put in
4 any more evidence, not to abandon the evidence that it
5 had chosen to put in on matters such as training and so
6 forth, but in its opening and closing to continue with
7 the premise for construction upon which Post Office's
8 entire case on the Common Issues depended.

9 There were two particularly important facets to
10 that. The first facet was what had been pleaded at
11 paragraphs 76, 85, 93 and 94 of the generic defence, and
12 those factual assertions which I will take your Lordship
13 to in a moment. That is one side of it.

14 The other facet of the Post Office's case was the
15 agency relationship, because Post Office expressly
16 opened and closed on the footing that the agency
17 relationship suffused the entire contractual
18 relationship, and the contractual relationship sat atop
19 of the agency relationship and any findings as to the
20 nature of the agency relationship and the role of the
21 account as between principal and agent necessarily
22 involved the court determining what the branch trading

23 statement was, in fact, because that was disputed, as
24 your Lordship records in the judgment, and how it came
25 about and what it included.

1 That was necessary, and I don't think that can
2 sensibly be disputed.

3 So those were the two key facets in relation to
4 construction. The third area was credit. That loomed
5 very, very large in the proceedings as they were
6 actually conducted before the court.

7 My Lord, can I just take your Lordship very briefly
8 to the generic pleadings, which I think your Lordship
9 will remember. Rather than going through them in
10 detail, your Lordship will remember --

11 MR JUSTICE FRASER: I don't think on an application such as
12 this, given its subject matter, it is necessary to go
13 through the pleadings in detail.

14 MR GREEN: I am grateful.

15 MR JUSTICE FRASER: But if you are going to draw my
16 attention to what a part of a pleading says -- because
17 I remember the Common Issues' schedule or schedule 1 to
18 the order that set down the Common Issues was drafted
19 and agreed by the parties, but it was approved by the
20 court.

21 MR GREEN: Exactly.

22 MR JUSTICE FRASER: And within it, it had numerous

23 references to pleading paragraphs, a point which, during
24 the trial, I required both parties to get rid of those
25 so that it was a standalone document.

1 MR GREEN: Indeed.

2 MR JUSTICE FRASER: Where do you want me to go?

3 MR GREEN: Maybe the most convenient place to look, my Lord,
4 is in judgment number 2, in the admissibility judgment,
5 which I think your Lordship may have in a separate hard
6 copy folder. {B7/27/1} on Opus.

7 If we look at paragraph 40 {B7/27/14} of that, this
8 is your Lordship's judgment on the admissibility
9 application, and so this highlighted the relevance of
10 these paragraphs, if it was ever in doubt, which I will
11 submit it wasn't to Post Office:

12 "This paragraph is pleaded to by the defendant in
13 paragraphs 93 and 94 of the generic defence. These
14 state as quoted below."

15 Another relevant passage precedes these in
16 paragraph 76. 76 sets out some subparagraphs and in
17 particular, if we look at (4) onwards:

18 "Post Office was unable to monitor at first hand the
19 transactions undertaken in branches on ..."

20 MR JUSTICE FRASER: Pause for a moment. I think we need to
21 go on to page 15.

22 MR GREEN: It is on the next page, if we can. {B7/27/15}

23 MR JUSTICE FRASER: Yes.

24 MR GREEN: There we go:

25 "Post Office was unable to monitor at first hand the

1 transactions undertaken in branches on its behalf, in
2 relation to which it was liable to Post Office clients.
3 These transactions and the manner in which they were
4 carried out were the responsibility of the relevant
5 Subpostmasters."

6 Then the same point about custody of property, and
7 then (6):

8 "Post Office relies on the accurate reporting by
9 Subpostmasters of accounts, transactions and the cash
10 and stock held at the branch."

11 And then at 93, paragraph 93, which is just below:

12 "Post Office notes the claimants' case set out in
13 paragraph 55 applies only to section 12, clause 12
14 [which is the burden of proof point]. More generally,
15 as regards shortfalls disclosed in a Subpostmaster's
16 accounts, the Post Office notes the following
17 principles, each of which applies to Subpostmasters."

18 And then the subparagraph (1):

19 "Where a Subpostmaster asserts that he or she is not
20 responsible or liable for a shortfall, the legal and/or
21 evidential burden of proof is on him or her to establish
22 the factual basis for such assertion in that:

23 "(a) In the absence of evidence from a Subpostmaster
24 to suggest that a shortfall arose from losses for which
25 he or she was responsible, it is appropriate to infer

1 and/or presume that the shortfall arose from losses for
2 which he or she was responsible. Such an inference
3 and/or presumption is appropriate because (1) branches
4 are under the management of Subpostmasters or their
5 assistants, (2) losses do not arise in the ordinary
6 course of things without fault or error on the part of
7 Subpostmasters or their Assistants and (3) it would not
8 be right to infer or presume that a shortfall or loss
9 was caused instead by a bug or error in Horizon."

10 Then it goes on:

11 "Subpostmasters bear the legal burden of proof that
12 a shortfall did not result from the losses for which
13 they were responsible. This is because (1) the truth of
14 the matter lies peculiarly within the knowledge of
15 Subpostmasters as the persons with responsibility for
16 branch operations and the conduct of transactions in
17 branches, (2) it would be unjust for Post Office to be
18 required to prove allegations relating to matters that
19 fall peculiarly within the knowledge of Subpostmasters,
20 and/or (3) where a person is subject to fiduciary
21 obligations as regards his or her dealing with assets
22 the burden is on that person ..."

23 And so forth.

24 So if your Lordship looks at the foot of that page,

25 94 as to section 12, clause 12 of the SPMC:

1 "That should be construed in accordance with the
2 principles set out in paragraph 93 above."

3 So that is all from the generic defence, not recited
4 there, but from paragraph 85 of the generic defence,
5 which is -- page 39 of the generic defence is:

6 "The written Subpostmasters' contracts are to be
7 construed as a whole and in light of the relevant
8 factual matrix pleaded in paragraph 76 above."

9 Which is the paragraph to which I have already
10 referred the court.

11 So the starting point was that your Lordship had
12 regard to the positive case being advanced by the
13 Post Office when considering the relevance of the
14 evidence that was sought to be struck out by the
15 Post Office.

16 That is essential context, and I note my noble and
17 my learned friend Lord Grabiner did not actually refer
18 to the basis upon which the Post Office itself invited
19 this court to construe the contracts at all in his
20 submissions.

21 We respectfully say that is an impermissible
22 omission because it seeks to advance a criticism of the

23 judgment which is unfounded when you go back to look at
24 the case that your Lordship was considering as advanced
25 by Post Office and the case in support of which the

1 relevant evidence was adduced by Post Office through its
2 witness statements.

3 Now, the evidence of Mrs Van Den Bogerd was
4 considered in some detail and your Lordship made
5 findings in relation to her evidence. And the reading
6 note which Post Office submitted to the court explaining
7 the relevance of different aspects of their evidence --

8 MR JUSTICE FRASER: Bear with me one moment, Mr Green, just
9 one moment. (Pause)

10 Yes, sorry. I mislaid a file. Reading note.

11 MR GREEN: The reading note is at {C2/0/1} on Opus.

12 MR JUSTICE FRASER: I think I mentioned the reading note in
13 the judgment.

14 MR GREEN: Indeed.

15 MR JUSTICE FRASER: Do you have a reference for where I did
16 that?

17 MR GREEN: I don't, my Lord, but I can find one. And the
18 reading note identified, if we go over the page
19 {C2/0/2}, there is Mrs Van Den Bogerd's evidence.

20 MR JUSTICE FRASER: Paragraph 365, I described it as
21 a helpful reading note, I think.

22 MR GREEN: Indeed, and your Lordship will see at page 2 of

23 that reading note under "Subpostmasters and their
24 branches" there are, for example, Horizon, training and
25 support, causes of shortfalls, see also Helen Dickinson,

1 Post Office's reliance on Subpostmasters and
2 responsibility for shortfalls.

3 MR JUSTICE FRASER: Yes.

4 MR GREEN: Then Helen Dickinson we can see at the bottom
5 gives evidence about fraud in branches and concealing
6 shortfalls and so forth.

7 What is striking in Mrs Van Den Bogerd's statement
8 was the extent to which she covered matters which did in
9 fact or purport to support the case that Post Office --
10 Post Office's pleaded case in those pleaded paragraphs
11 to which I have just referred. If we look at {C2/1/1}
12 --

13 MR JUSTICE FRASER: That is her witness statement.

14 MR GREEN: That is her witness statement. And at the foot
15 of that, there is an index, but just above that, she
16 says:

17 "I also provide some commentary on what the
18 real-world effects of the Claimants' alleged
19 interpretation of the Subpostmasters contracts."

20 I think it should say "are" or "would be" and
21 I think that is suggesting relevance because it may
22 assist the court to test the commercial sense of

23 different constructions contended for.

24 But it is clearly, as we can see in a moment,

25 designed to show that the Subpostmasters' contention,

1 the claimants' contention, was unworkable. I am not
2 going to take your Lordship through the statement.

3 MR JUSTICE FRASER: I don't think, on the basis of how
4 Lord Grabiner puts the application, you need to or ought
5 to, because it is put fairly squarely on the contents of
6 judgment number 3.

7 MR GREEN: My Lord, indeed. The only problem is that I was
8 going to briefly identify a couple of points, if I may,
9 and then explain why I say it is relevant to how the
10 application is put.

11 Just by way of a couple of points, page 23 of that
12 document at paragraph 78 {C2/1/23}, does your Lordship
13 have the bottom three lines from the middle:

14 "This means that the Subpostmaster has complete
15 control over the branch accounts and transactions only
16 enter the branch accounts with the Subpostmaster's (or
17 his assistant's) knowledge."

18 And that rather teases out the point that
19 your Lordship asked my learned friend about in relation
20 to transaction corrections entering the accounts and how
21 the branch trading statement would come about.

22 On page 37 at page 135 at the end of that paragraph

23 {C2/1/37}, it says:

24 "It would be unlikely that a Subpostmaster, having

25 kept his accounts diligently, still had no idea where

1 a material problem was arising from."

2 MR JUSTICE FRASER: Where have you just read from?

3 MR GREEN: It is the foot of paragraph 135.

4 MR JUSTICE FRASER: Yes.

5 MR GREEN: These are just examples, my Lord, but page 39,
6 paragraph 145 {C2/1/39}, says:

7 "In any event, for the reasons set out above, the
8 Subpostmaster is best placed to investigate shortfalls
9 and Post Office generally cannot find the root cause of
10 a shortfall without the Subpostmaster's cooperation.
11 A reversal of the burden for determining the root cause
12 of shortfalls would also create the perverse situation
13 whereby the greater the scale and sophistication of the
14 false accounting by a Subpostmaster, the less likely
15 Post Office will be able to find the root cause of
16 a shortfall."

17 Et cetera. And that refers back up to evidence or
18 argument about the fact in branch, for example 142, no
19 transaction enters their accounts without their consent.
20 This includes transaction corrections, which must be
21 accepted by the Subpostmasters before they form part of
22 the branch accounts, and causation in 143.

23 Now, it is right -- I am sorry to just to have
24 pressed on to that, because I wanted to show
25 your Lordship why I say those passages are relevant, and

1 they are relevant because the correct approach on an
2 application such as this is to consider and the informed
3 observer is taken to know what the issues were and how
4 they were presented before the court.

5 And it was their positive case -- pleaded case,
6 which they repeatedly refused to abandon,
7 notwithstanding being instructed do it at least two
8 CMCs, as we have explained in our skeleton argument.

9 MR JUSTICE FRASER: Not invited to abandon by me.

10 MR GREEN: No, by the claimants.

11 MR JUSTICE FRASER: But the fact that they were invited to
12 abandon it by the other side is neither here nor there.
13 It was their pleaded case.

14 MR GREEN: It was their pleaded case. It might sharpen any
15 argument on election, having elected to persist with it,
16 but I take your Lordship's point. It was their pleaded
17 case, and all this evidence, which is the flip-side of
18 many of the findings that my learned friend
19 Lord Grabiner has been referring to, were positively
20 asserted by Post Office. So they were positively in
21 issue as to whether or not Post Office was entitled to
22 take succour from Mrs Van Den Bogerd's evidence in

23 support of its pleaded case before the court.

24 So we say it is extremely surprising that neither
25 the application nor the submissions that your Lordship

1 has heard this morning face up to and deal with head-on
2 the fact that Post Office positively advanced in its
3 pleadings and directly in its evidence the case I have
4 just identified. That is a matter of context which it
5 would be completely wrong to leave out of account.

6 Against that background, my learned friend suggested
7 there was a bit of a quandary after judgment number 2
8 about how to play the cross-examination.

9 We respectfully say that is not right, partly
10 because of the case positively being advanced and still
11 being advanced at that stage. Secondly, because the
12 admissibility application had itself spelt out -- the
13 judgment on the admissibility application had itself
14 spelt out why it was that these matters might be
15 relevant to the matters pleaded by Post Office.

16 So Post Office was not trying to get what
17 your Lordship's view could be; but had at the very
18 lowest a careful steer about its potential relevance in
19 the admissibility judgment number 2.

20 My Lord, there is an irony in the reliance that is
21 placed by the Post Office on the transcripts of the
22 hearings that run up to the admissibility application,

23 because the premise of this application is that
24 your Lordship, having expressed a robust view, will be
25 regarded by the informed observer as not amenable to

1 persuasion.

2 Your Lordship will remember the warnings that you
3 gave me about putting in irrelevant evidence and, if
4 necessary, sitting there and crossing them out line by
5 line, because they have included them in their
6 application. And those indications were robust and they
7 were repeated at a number of hearings before
8 your Lordship had heard full argument on the detail of
9 what that evidence might be relevant to.

10 That is all just part of normal adult behaviour in
11 court. What then happens is that there is an
12 admissibility hearing and it goes the other way.

13 So in Mr Parsons' 14th witness statement, he is
14 actually relying on a sequence of interlocutory events
15 that positively demonstrate that notwithstanding having
16 expressed extremely robust views at a number of
17 interlocutory hearings, your Lordship was amenable and
18 dealt with the admissibility application with an open
19 mind. The irony of that is not actually acknowledged
20 anywhere either in the application or in my learned
21 friend's submissions.

22 Now, it is right too to identify that, as

23 your Lordship will have seen from the conclusion to our
24 skeleton argument at page 51, which is at {B9.4/2/51} --
25 MR JUSTICE FRASER: Did you say your page 51 of your

1 skeleton?

2 MR GREEN: My Lord, yes.

3 MR JUSTICE FRASER: That is your final paragraph, is that
4 right?

5 MR GREEN: That is the final paragraph before the annex.

6 MR JUSTICE FRASER: Yes.

7 MR GREEN: This is just one example, but quite a striking
8 one:

9 "The Post Office's invocation to the Court in both
10 Opening and Closing Submissions to construe the contract
11 on the basis of its evidence, by way of particular
12 example, that of Mrs Van Den Bogerd:

13 "Issues 8 and 9 concern the proper approach to
14 responsibility for losses. They should be considered
15 against the factual background of how accounting works
16 in a Post Office branch as described by
17 Angela Van Den Bogerd at paragraphs 73 to 82 and 126 to
18 140 ..."

19 Now, pausing there, there is an element of
20 Groundhog Day here, my Lord, because what actually seems
21 to be the position is that when Post Office sought to
22 strike out the claimants' evidence, they wanted

23 a one-sided trial where they could tell your Lordship
24 what the factual background was in support of their
25 pleaded case, and we couldn't adduce any evidence to

1 contradict it. And your Lordship didn't accept that was
2 the appropriate way to conduct the trial on those
3 factual issues.

4 Then what happens is at the trial in opening and
5 closing, they are still saying to the court that that is
6 the right approach. So when your Lordship makes
7 findings on those matters or matters on which they may
8 depend -- so the suggestion, for example -- I will give
9 a concrete example of this. The suggestion that
10 Subpostmasters are best placed to find the root cause of
11 shortfalls, you cannot sensibly identify that and test
12 that proposition, which is, after all, the Post Office's
13 own case. Without saying, well, was there any training
14 on that, it is absolutely impossible.

15 And that is why Mrs Van Den Bogerd sought to put in
16 evidence about training in her witness statement. It
17 was the underpinning, the base layer, beneath which the
18 proposition that for various reasons, including the
19 training which told them how to do it, they would be
20 well placed or peculiarly well placed to find the cause
21 of shortfalls.

22 Not only is there the definition of the

23 Common Issues by reference to the pleadings, there is
24 also the highlighting of the significance of those
25 issues and the relevant evidence that goes to them in

1 the admissibility judgment. Then there is the opening
2 and the closing which invites the court to determine
3 these issues in the light of evidence actually given by
4 Post Office and then there is the middle of that
5 sandwich of opening and closing, we have got how
6 cross-examination was actually conducted.

7 I hesitate to say so, but my learned friend
8 Mr Cavender did actually go first in cross-examining.
9 So the idea that, as I think is suggested, at the very
10 least tentatively if not more firmly, that somehow the
11 scope of cross-examination was all my fault because of
12 how I cross-examined or others with me is a little bit
13 surprising, because actually, what happened is there was
14 widespread cross-examination by Post Office of the lead
15 claimants on a wide-ranging series of matters. There
16 are some particular categories which are important. One
17 key category is on pre-contract dealings.

18 The reason it is a key category is because it is one
19 which no one can sensibly dispute was in issue. And
20 there were very, very firm challenges made, as
21 your Lordship knows, in relation to the credit and
22 credibility of the lead claimants in relation to those

23 matters.

24 MR JUSTICE FRASER: All the lead claimants had their credit

25 challenged and there were factual issues in relation to

1 contract formation of all six of them.

2 MR GREEN: Exactly. So credit was bound to be -- was
3 necessarily relevant, we say, to any proper judicial
4 assessments. And I will make this submission good in
5 a moment by reference to an authority, but on any view,
6 it is absolutely common sense that credit generally was
7 relevant to the acceptance or rejection of the lead
8 claimants' evidence.

9 In our respectful submission, it was right that
10 your Lordship should have regard to the challenges in
11 fact made, as your Lordship did, not to parse them in
12 the way rather artificially that Post Office invited the
13 Court to do.

14 So category 1 was pre-contract. And then category 2
15 was lots of evidence about credit, and category 3 was
16 evidence about how things worked in reality. That was
17 essentially responsive evidence to the defendants'
18 evidence that it was adducing in support of its pleaded
19 case.

20 MR JUSTICE FRASER: It also goes to credit too, though,
21 doesn't it?

22 MR GREEN: I was going to say there is a big overlap, as

23 your Lordship I think put to my learned friend.

24 MR JUSTICE FRASER: Say, for example, Mr Abdulla, if

25 Mr Abdulla had not been accused of lying and had not

1 been accused of a criminal offence and had not in fact
2 been asked at all about his suspension and termination,
3 then, for example, Mrs Ridge's suspension interview with
4 him would not necessarily be relevant.

5 MR GREEN: I might not have needed to cross-examine on it.

6 MR JUSTICE FRASER: Whether you needed or not, let's put it
7 to one side. I am talking about strict admissibility
8 and relevance, because evidence has to be relevant in
9 order to be admissible.

10 MR GREEN: Precisely.

11 MR JUSTICE FRASER: Once, for example, he was cross-examined
12 on the transcript of his suspension interview, then you
13 became entitled to ask questions. The way that
14 Lord Gabor explained it this morning, though, is that
15 that attack on Mr Abdulla's credit should only have been
16 considered insofar as it went to pre-contractual --
17 well, to contractual formation matters and that
18 I crossed the line by going wider than that and dealing
19 with the other matters that Mr Cavender had put to
20 Mr Abdulla. What do you have to say about that?

21 MR GREEN: With no disrespect to my learned friend, that is
22 a hopeless and unrealistic submission and it is wrong.

23 MR JUSTICE FRASER: All right.

24 MR GREEN: If a challenge is adduced as to credit, and

25 I would say a fortiori where someone is accused of

1 a criminal offence or dishonesty --

2 MR JUSTICE FRASER: That is why I chose Mr Abdulla as an
3 example. There were two lead claimants accused of
4 criminal offences, and I think Mrs Stockdale was the
5 other one.

6 MR GREEN: Yes.

7 MR JUSTICE FRASER: All right.

8 MR GREEN: There is a powerful argument that ex debito
9 justitiae they're entitled to a finding openly in the
10 judgment if the court does not agree with what has been
11 put openly to them. And even if that is not right, if
12 there is no entitlement, it is certainly permissible.

13 MR JUSTICE FRASER: I didn't make any findings in respect of
14 either of those points.

15 MR GREEN: No, my Lord. That is my point, and I am saying
16 what your Lordship did fell well below that.
17 Your Lordship took a view about credibility in the light
18 of the matters that were put and the answers that were
19 given.

20 And the extraordinary contortions that the
21 Post Office found themselves in are reflected at
22 paragraphs 80 to 82 in our skeleton argument.

23 MR JUSTICE FRASER: Let me have a look.

24 MR GREEN: I know that my learned friend Lord Gribiner read

25 out the passage in the transcript where I interrupted my

1 learned friend Mr Cavender, who was saying: well,
2 someone in my position would normally want to say that
3 Mr Abdulla wasn't telling the truth.

4 MR JUSTICE FRASER: Where am I going?

5 MR GREEN: Page 80.

6 MR JUSTICE FRASER: I thought you said paragraph 80, I am
7 sorry. This is in the annex.

8 MR GREEN: Yes, in the annex, annex 1.

9 MR JUSTICE FRASER: Which paragraphs?

10 MR GREEN: It starts at 197, my Lord. {B9.4/2/80}

11 MR JUSTICE FRASER: Yes.

12 MR GREEN: The reason this arose, as reflected in the
13 transcript, was my learned friend was making the
14 submission that someone in his position would normally
15 want to say that Mr Abdulla had not given honest
16 evidence. I interrupted to point out that is exactly
17 what their closing submissions in writing did say at
18 paragraph 592.

19 MR JUSTICE FRASER: That is the passage that Lord Grabiner
20 took me to this morning.

21 MR GREEN: Precisely, and what follows from that, as your
22 Lordship rightly remembered --

23 MR JUSTICE FRASER: I think I politely told you to stop

24 interrupting.

25 MR GREEN: I think you politely told me to stop

1 interrupting, which I did and was noted. What then
2 happens is that the matter is effectively sought to be
3 cleared up by the document that we have at {A/18/1}
4 because the court was not clear precisely where this
5 dividing line was drawn.

6 This is the note at A/18/1, and the Post Office's
7 position by that stage, after closing, was that:

8 "The court should refrain from making any findings
9 of fact on matters going to issues outside the scope of
10 the Common Issues trial, specifically matters going to
11 issues of breach and causation. It follows, for example
12 that no findings should be made on whether various
13 claimants were guilty of false accounting, nor, by
14 parity of reasoning, should findings be made as to how
15 Post Office investigated losses or issues associated
16 with false accounting.

17 "Conversely, findings of fact will need to be made
18 on matters going, or arguably going, to the
19 Common Issues, in particular, on whether the various
20 claimants did or did not receive various contractual
21 documents and other documents relevant to the
22 Common Issues at or before the time of contracting.

23 Those findings will necessarily require the court to
24 take a view as to the credibility of the claimant and
25 the Post Office witnesses in their evidence on those

1 matters.

2 "Post Office's position is that in making those
3 findings and in taking that view on credibility, the
4 court should:

5 "(a) Take account of evidence given by witnesses on
6 matters within the scope of the Common Issues trial.
7 So, for example, the court's findings on whether
8 Mr Bates received a copy ... will presumably take into
9 account the evidence he gave on that issue, and on
10 associated issues raised in cross-examination, (for
11 example, whether he is careful generally or whether he
12 had a copy of the SPMC when writing to the
13 Post Office ..."

14 And so on:

15 "(b) Take account of evidence on matters which go to
16 the witnesses' credibility, but do not risk trespassing
17 on any future trial, because they do not go to issues of
18 breach or causation. For example, Mr Abdulla's evidence
19 on whether Christine Adams and Christine Stephens were
20 the same person can be taken into account in assessing
21 his credibility.

22 "(c) Not take account of evidence which, while it

23 may go to the witness's credibility risks trespassing on
24 a future trial or trials. For example, the Court should
25 not make any findings on whether Mr Abdulla falsely

1 accounted, even though such matters might be relevant to
2 his credibility. Nor (staying with this example) should
3 the court base any findings on Mr Abdulla's credibility
4 which are necessary to decide the Common Issues on his
5 evidence as to the allegations of false accounting made
6 against him."

7 Pausing there, they then go on to say that:

8 "To facilitate drawing that line as cleanly
9 as possible in the circumstances, the Post Office
10 withdraws the submissions made in the seventh and eighth
11 sentences of paragraph 592 of its closing submissions."

12 We have reproduced that at page 81 and page 82 of
13 our skeleton argument {B9.4/2/82}.

14 MR JUSTICE FRASER: Is that the strike through in
15 paragraph 200?

16 MR GREEN: Exactly, and what it leaves in place is:

17 "The central fact about Mr Abdulla's evidence can't
18 be avoided. He lied frequently and brazenly."

19 MR JUSTICE FRASER: That specifically wasn't withdrawn.

20 MR GREEN: Precisely, and that is left in play and
21 specifically not withdrawn.

22 And moreover, if your Lordship looks at the bottom

23 of that paragraph:

24 "He said that he was given the impression in the

25 interview held following the revelation of his

1 wrongdoing that if he paid back the money he would be
2 reinstated; that was untrue, as the transcript showed.
3 He claimed to have called the helpline very frequently,
4 then, when the call logs were put to him, said that in
5 fact he gave up and stopped calling. And he claimed to
6 believe this was all a conspiracy to eject him from his
7 branch."

8 Pausing there, not only was the very carefully
9 parsed approach to bright line relevance and irrelevance
10 such as to leave in the allegation that he lied
11 frequently and brazenly, but it was also specifically to
12 leave in all these post-contractual matters, including
13 helpline and all these other things and the impression
14 in the interview with Mrs Ridge.

15 MR JUSTICE FRASER: That is the suspension interview, isn't
16 it?

17 MR GREEN: Indeed. All of these later matters were left in
18 for your Lordship to consider, and your Lordship is now
19 saying there's an appearance of bias because you did.

20 MR JUSTICE FRASER: I am not, Lord Gribner is saying.

21 MR GREEN: Lord Gribner is saying there is an appearance of
22 bias because your Lordship did what you were asked to,

23 which is just bizarre. I have certainly never come
24 across a recusal application of this type, it must be
25 pretty unique.

1 MR JUSTICE FRASER: That is not entirely relevant, though.

2 MR GREEN: It is a trailblazer, if we can put it in those
3 terms, because it is difficult to find an example of
4 a recusal -- and I will show your Lordship why I say
5 this very carefully in a moment -- it is difficult to
6 find any example in the authorities of a judge carrying
7 out the judicial assessment that he is required to carry
8 out and giving judgment and the losing party then
9 alleging bias against him on a proper foundation.

10 MR JUSTICE FRASER: I think there is -- well, the case in
11 the bundle which seems closest is possibly Otkritie, but
12 I don't want to knock you off your course. I assume we
13 will get to the law at some point.

14 MR GREEN: My Lord let's do it now. Otkritie is at tab 26,
15 it is {B9.5/25/1}.

16 MR JUSTICE FRASER: But I do remain of the view, Mr Green,
17 that whether it is unique or not is not relevant.

18 MR GREEN: It is not dispositive, I agree. I am just trying
19 to identify where we are in the pantheon of types of
20 apparent bias that have been recognised by the courts
21 and I respectfully say on a proper analysis nowhere.

22 If we look at Otkritie, the -- can I just make one

23 final point in relation to those passages I was looking

24 at?

25 MR JUSTICE FRASER: Yes.

1 MR GREEN: I respectfully say that when a witness is accused
2 of dishonesty, the court will assess the witness'
3 honesty in the round in the light of the atmosphere in
4 court, the witness' demeanour and all the answers and
5 all the questions that the witness was asked. It is
6 quite wrong to urge upon the court a contrary approach.

7 For example, a witness who might have had difficulty
8 answering a question which was directly related to
9 a Common Issue, but gave answers which suggested he was
10 compellingly honest on a matter that one would now be
11 urged to leave out of account, we say is that
12 a completely wrong approach and not justified, and
13 I have not found any authority to support it.

14 MR JUSTICE FRASER: However I assess the credit of any of
15 the witnesses, that is contained on the face of judgment
16 number 3.

17 MR GREEN: Precisely.

18 MR JUSTICE FRASER: So any amplification or an argument
19 about it or analysis doesn't much matter, really.

20 MR GREEN: No. No, my Lord. The only point we are
21 respectfully saying is that the basis of the application
22 criticising your Lordship's judgment is wrong.

23 MR JUSTICE FRASER: Yes, all right.

24 MR GREEN: There is a second facet to that, which is this.

25 That what is said is that not only has your Lordship

1 fallen into the error of considering irrelevant
2 material, because that is present in all three
3 categories, but studiously avoided is any suggestion
4 that such findings would not have been otherwise
5 available to you.

6 So there is no suggestion that the impugned findings
7 were without proper foundation in the evidence you did
8 hear at all. What is said is they are irrelevant and
9 your Lordship should not have made those findings for
10 a number of reasons.

11 In the category of -- in the second two categories,
12 what is said about -- or the third category, perhaps,
13 the witnesses, my learned friend said this morning at
14 page 94 of the transcript between lines 14 and 19 that
15 your Lordship's findings against witnesses would
16 effectively create apparent bias in relation to
17 your Lordship entertaining their evidence in future
18 trials. That is effectively the submission that is
19 made.

20 My Lord, that is wrong in law, and demonstrably so,
21 and I will explain why. If we go to paragraph 40 of
22 Otkritie --

23 MR JUSTICE FRASER: 14.

24 MR GREEN: 40, which is on page 14 {B9.5/25/14}. One can

25 see in the second line of paragraph 4:

1 "The authorities to which I have referred make it
2 clear that the mere fact that the judge has made adverse
3 findings against a defendant (or any party to an action)
4 does not mean that a fair-minded and informed observer
5 would think the judge was biased."

6 And your Lordship will have seen our treatment of
7 the Ablyazov decision in the skeleton, and the point
8 about the Ablyazov decision was the prior consideration
9 by the court in that case of matters going directly to
10 credibility in the context of contempt.

11 MR JUSTICE FRASER: Mr Justice Teare sentenced Mr Ablyazov
12 to 22 months, I think.

13 MR GREEN: Precisely, and you could not get a more extreme
14 context for the Ablyazov decision than that. And if
15 I could take your Lordship to Ablyazov for a moment,
16 please, which is at {B9.5/21/27}.

17 MR JUSTICE FRASER: Are we going away from Otkritie or are
18 we coming back?

19 MR GREEN: I was going to come back to that in a minute, if
20 I may.

21 MR JUSTICE FRASER: Where is Ablyazov?

22 MR GREEN: It is hard copy tab 22.

23 MR JUSTICE FRASER: Okay.

24 MR GREEN: {B9.5/21/27}.

25 MR JUSTICE FRASER: Yes.

1 MR GREEN: This is in the context of -- perhaps we can start
2 on page 25 just go back to the discussion on apparent
3 bias and where it begins.

4 MR JUSTICE FRASER: Page 25.

5 MR GREEN: Page 25 at paragraph 65 {B9.5/21/25}.

6 MR JUSTICE FRASER: Yes.

7 MR GREEN: At the foot of that page, your Lordship will see:

8 "Although the principles of apparent bias are now
9 well-established and have not been in dispute in this
10 case, the application of them is wholly fact-sensitive."

11 So the submission I made earlier about context is
12 underpinned throughout the authorities.

13 MR JUSTICE FRASER: Yes.

14 MR GREEN: At 66, just above 66, there is a qualification to
15 the normal rule that findings against a party won't be
16 a ground for a bias in a future trial. It says here:

17 "A case for recusal may always arise, however, where
18 a judge has previously expressed himself in vituperative
19 or intemperate terms. That however, has not been
20 alleged in this case."

21 And just above that your Lordship will see --

22 MR JUSTICE FRASER: It is alleged in the instant

23 application, though.

24 MR GREEN: Not quite in those words, but critical invective.

25 MR JUSTICE FRASER: It's critical invective. I interpreted

1 that as meaning nonjudicial language.

2 MR GREEN: Indeed.

3 And just above, your Lordship will note just below

4 D:

5 "Fifthly no example of a designated judge being
6 required to recuse himself or herself has been found."

7 That is in the context of a designated judge in the
8 Commercial Court, we say a fortiori the case of
9 a managing judge in group litigation, and that is
10 relevant context and it goes to that fourth point on
11 context by way of background that I identified in
12 opening.

13 At 68 the court is looking at {B9.5/21/27} where
14 a judge has heard pre-trial evidence and may have come
15 to conclusions.

16 MR JUSTICE FRASER: Where are we looking now?

17 MR GREEN: On page 27, paragraph 68:

18 "Special considerations may arise in such cases.

19 Where a judge has had to form and express a view as to
20 the credibility of a party or an important witness as
21 a result of such cross-examination, should that require
22 the recusal of that judge from further involvement in

23 the litigation, even where he does so, as in this case,
24 in moderate terms? Committal applications have to be
25 judged on the criminal standard of proof, so that, where

1 such an application has resulted in a finding of
2 contempt of court, the judge has applied a standard of
3 proof higher than that of a civil trial.

4 "On the other hand, in any event, the findings of
5 the judge are part of the res gestae of the proceedings.
6 They are, as it were, writings on the wall and would
7 need to be considered (subject to appeal of course), for
8 any relevance in any subsequent proceedings and at trial
9 by the same judge or by any other judge. They may not
10 even be appealed or, as in this case, this may be
11 appealed and upheld so that in either event, it is not
12 possible to say that the judge was in error. In this
13 connection, certain findings might give rise to issue
14 estoppels, which would not only have to be taken into
15 consideration by any judge at trial but would be binding
16 on him, as Mr B?ar accepts. What then is the difference
17 between the judge who bears in mind his own findings and
18 observations and another judge who reads what the first
19 judge has written, as he must be entitled to do?
20 Mr B?ar submits that in the case of the first judge who
21 has heard and written, the impact of what he has learned
22 is more direct, immediate and powerful, and is that the

23 critical distinction. However, it seems to me that,
24 unless the first judge has shown by some judicial error,
25 such as the use of intemperate, let me say unjudicial,

1 language, or some misjudgment, might set up a complaint
2 of the appearance of bias, the fair-minded and informed
3 observer is unlikely to think that the first judge is in
4 any different position from the second judge - other
5 than he is more experienced in the litigation."

6 My Lord, this is quite important, because we learned
7 this morning from Lord Grabiner that the Post Office's
8 position is again one of these very nuanced positions in
9 relation to what the consequence of the application --
10 of your Lordship acceding to the recusal application
11 would be, and it is a surprising and difficult
12 proposition, because the entire premise of the
13 application, the thread which runs through all three
14 categories, is irrelevant material to which
15 your Lordship has wrongly had regard in the judgment.
16 Then that is deployed for different purposes.

17 But what is said is that, even though the
18 paragraphs, the two parts of paragraph 25 in Mr Parsons'
19 14th witness statement which deal with the second and
20 third categories, specifically say that there is an
21 appearance that your Lordship has not acted impartially
22 in the past in the Common Issues judgment, it is said

23 that that is not going to mean that the Common Issues
24 judgment has to be undone on that footing.

25 Now, in reality, I think that is an extremely

1 difficult submission to mount, because what is -- is it
2 truly the Post Office's position that when they seek to
3 appeal, as they have said they will, the Common Issues
4 judgment they are not going to trespass on the
5 suggestion that your Lordship took into account
6 irrelevant evidence? I doubt that.

7 If your Lordship has acceded to the recusal
8 application on the footing that you have taken into
9 account or addressed irrelevant evidence, why won't they
10 be able to say this to the Court of Appeal?

11 So it is a difficult position for them to adopt.

12 MR JUSTICE FRASER: Well, the position vis-a-vis judgment
13 number 3 and its future life depends on an application
14 for permission to appeal being made at some point,
15 permission either being granted and an appeal happening
16 or permission not being granted either by me or the
17 Court of Appeal, and we have not reached that point yet.

18 MR GREEN: No, my Lord, we haven't, but what your Lordship
19 was told immediately when my learned friend
20 Lord Gribner rose to his feet was to put the court at
21 ease that acceding to the recusal application would not
22 mean that the Common Issues trial had to be re-run.

23 MR JUSTICE FRASER: In a sense, what happens to the
24 Common Issues trial has nothing to do with me.
25 MR GREEN: My Lord --

1 MR JUSTICE FRASER: So far as judgment number 3 is
2 concerned, the only order still available that any party
3 could ask me for is permission to appeal that judgment.

4 MR GREEN: Indeed.

5 MR JUSTICE FRASER: The order that reflected it has been
6 sealed.

7 MR GREEN: Indeed.

8 MR JUSTICE FRASER: So retrial, correction on appeal, any of
9 those points are nothing to do with me, are they?

10 MR GREEN: Let's approach it on that basis.

11 MR JUSTICE FRASER: Just in terms of jurisdiction --

12 MR GREEN: Jurisdictionally, that is right.

13 MR JUSTICE FRASER: It is a judgment that has been handed
14 down in final form and has been sealed.

15 MR GREEN: I think there was a sort of reassuring,
16 authoritative suggestion to your Lordship that you
17 needn't worry too much if you do accede to this because
18 it will all be all right.

19 MR JUSTICE FRASER: I didn't interpret it in those terms.

20 MR GREEN: I wrongly did, so I needn't address your Lordship
21 further on it --

22 MR JUSTICE FRASER: As far as I am concerned, I am pretty

23 clear that this is what the Post Office is submitting,
24 but if it is not, then Lord Grabiner will correct me at
25 the reply stage. This application concerns two parts of

1 the litigation, the extant Horizon trial --

2 MR GREEN: Indeed.

3 MR JUSTICE FRASER: -- he has been very clear about that
4 indeed, and it is a point that I made myself nearly two
5 weeks ago, because although it says adjourn, it really
6 means a backstop and restart in front of someone else.
7 And the other is my role as managing judge in the group
8 litigation. Those are the two heads.

9 MR GREEN: My Lord, they are.

10 MR JUSTICE FRASER: Whatever concomitant effect there might
11 be on judgment number 3 is gloriously off-stage, isn't
12 it?

13 MR GREEN: My Lord, I'll move on. Shall we leave it
14 gloriously off-stage? I think I made the submission to
15 your Lordship that in effect there is a collateral
16 attack on the Common Issues judgment number 3 because
17 what is being said is that your Lordship had regard to
18 irrelevant matters and didn't behave impartially in
19 drafting that judgment.

20 MR JUSTICE FRASER: I am not sure the second of those two
21 points is necessarily correct, but let's put it to one
22 side because it is not part of this application.

23 MR GREEN: I will just press on with the primary submission,
24 which is simply this: that the authorities effectively
25 sing with one voice at the highest level of authority

1 that the litmus test really is whether what the first
2 judge does he does as part and parcel of his judicial
3 assessment of the litigation before him.

4 And that is in Ablyazov at paragraph 70, as
5 your Lordship will probably know {B9.5/21/27}. What
6 Lord Justice Rix says there is:

7 "In this connection, it seems to me that the
8 critical consideration is that what the first judge does
9 he does as part and parcel of his judicial assessment of
10 the litigation before him. He is not prejudging by
11 reference to extraneous matters or predilections or
12 preferences. He is not even bringing to this litigation
13 matters from another case [et cetera and so forth]. He
14 is judging the matter before him, as he is required by
15 his office to do, and if he does so fairly and
16 judicially, I do not see that the fair-minded and
17 informed observer would consider there was any
18 possibility of bias."

19 And, my Lord, I only mention in passing that in the
20 next tab in the bundle we have got O'Neill, number 2,
21 And at page 23 of that {B9.5/22/23}, paragraph 51, that
22 passage, although in the context of a criminal case that

23 the Supreme Court was dealing with there, that passage
24 is cited with approval as applicable not just to civil
25 cases and criminal cases.

1 And that begs the question, my Lord, well, what is
2 your Lordship duty-bound to do? There is a ready answer
3 in the bundle at tab 29, in the Harb case, which is at
4 {B9.5/28/1}.

5 MR JUSTICE FRASER: Which paragraph?

6 MR GREEN: If we look first of all at paragraph 28 on
7 page 8.

8 MR JUSTICE FRASER: Paragraph?

9 MR GREEN: 28 on page {B9.5/28/8} of the report, this is my
10 learned friend making submissions in that case, and:

11 "Lord Grabiner submits that in the light of
12 Mrs Harb's evidence the doubt expressed by the judge was
13 fully justified."

14 This is where the judge in the end accepted
15 Mrs Harb's evidence in circumstances where the basis for
16 doing so was hotly disputed, and I will come in a little
17 more detail to why in a moment:

18 "But despite that, he had failed to explain what had
19 given rise to the doubt or what had enabled him to
20 overcome it. Lord Grabiner has identified several
21 aspects of both her evidence and that of
22 Mrs Mustafa-Hasan which he submits called for careful

23 consideration, but which had not been identified or
24 discussed in the judgment. In his submission, the judge
25 failed to analyse the evidence properly. He had

1 accepted the evidence of Mrs Harb and Mrs Mustafa-Hasan
2 uncritically and as a result had reached conclusions
3 which were unsustainable on the totality of the evidence
4 before him. It is necessary, therefore, to examine more
5 closely the criticisms made of their evidence."

6 Now, pausing there, your Lordship will remember
7 possibly the most hard-edged submission that my learned
8 friend Lord Gribner made to your Lordship was in
9 relation to speculations that evidence that some of the
10 Post Office's witnesses were giving was not necessarily
11 their own. And a number of passages --

12 MR JUSTICE FRASER: That was on the contents of witness
13 statements.

14 MR GREEN: Precisely, that what was in their witness
15 statements was not originally theirs.

16 MR JUSTICE FRASER: There was an extensive survey on the
17 contents of witness statements in the commercial and
18 business and property courts about a year ago which
19 received nearly a thousand responses. One of the
20 specific questions in it dealt with solicitors providing
21 material for a witness statement that wasn't in the
22 witness' own words. It was one of the questions.

23 MR GREEN: Precisely.

24 MR JUSTICE FRASER: And it was circulated to every

25 specialist Bar Association and the London Litigation

1 Solicitors Association and widely advertised in
2 magazines such as Counsel.

3 MR GREEN: I was only going to -- I wasn't going to refer to
4 that survey particularly.

5 MR JUSTICE FRASER: That is in the public domain.

6 MR GREEN: Completely, and it is a point frequently made and
7 thought about carefully since witness statements were
8 introduced, because when I started and certainly when my
9 noble and my learned friend Lord Gribner started, we
10 didn't have them. You rocked up in court, the witness
11 stood up and you found out what they said and then you
12 cross-examined them without knowing what they were going
13 to say.

14 MR JUSTICE FRASER: I am not sure "rocking up" is right.

15 MR GREEN: I might have put that a bit lightly.

16 MR JUSTICE FRASER: You might have rocked up. I am not sure
17 that is the correct way of putting it, in all
18 seriousness. Evidence-in-chief was given orally.

19 MR GREEN: Yes, evidence-in-chief was given orally. What
20 I was trying to convey, albeit rather slightly clumsily,
21 was you didn't pore over somebody's evidence for weeks
22 in advance of arriving at court and listening to what

23 they were going to say. So the observations that my
24 learned friend took your Lordship to about the contents
25 of the Post Office witness statements were directed to

1 your Lordship's judicial consideration of whether or not
2 that evidence was actually properly theirs.

3 And if we go over the page on to page 10 --

4 MR JUSTICE FRASER: Of?

5 MR GREEN: Harb, if we continue over the page {B9.5/28/10},
6 it says:

7 "Lord Grabiner has identified nine examples of what
8 he says was Mrs Harb's evasiveness or lack of
9 credibility."

10 And there are various examples. At the foot of
11 subparagraph (iii):

12 "When questioned about that, her replies were
13 rambling and confused and appeared to portray an
14 unwillingness to deal with the question.

15 "(iv) When asked by the judge why she had chosen to
16 omit that matter or any reference to the present
17 proceedings (but little else), she could provide no
18 satisfactory explanation and resorted to little more
19 than bluster."

20 And then at (v) over the page {B9.5/28/11},
21 your Lordship may think significantly, given the
22 submission being made to your Lordship about

23 your Lordship's approach:

24 "There were occasions when Mrs Harb professed to

25 being unable to remember matters set out in her witness

1 statement, giving rise to doubt whether the statement
2 contained her true recollection of events."

3 Pausing there, these are all criticisms leveled at
4 the court for failing properly to make the necessary
5 judicial assessment of the matters before it.

6 So we respectfully say not only were your Lordship's
7 observations available to you, but the analysis which
8 underpinned them was actually necessary on the approach
9 urged upon the court by my learned friend in this case.

10 At paragraph 34 on {B9.5/28/12}:

11 "In our view the judge's approach to the evidence
12 was unsatisfactory in a number of significant respects.
13 First, he failed to identify in sufficient detail the
14 questions that needed to be answered if he were to
15 decide whether an agreement of the kind alleged by
16 Mrs Harb had been made. In addition, he failed to carry
17 out a proper evaluation of all the evidence in order to
18 test its strengths and weaknesses. Having referred in
19 paragraph 80 to the fact that counsel for the Prince had
20 made extensive criticisms of Mrs Harb's evidence on the
21 grounds that it was inconsistent with her witness
22 statement, he failed to deal with any of those

23 criticisms and brushed them aside by saying that it was
24 unrealistic to expect Mrs Harb to have a clear
25 recollection of events 13 years after the event."

1 It goes on to say at the bottom of that paragraph.

2 "It also fails to deal with the criticisms of the
3 quality of her evidence and the way in which she
4 responded to questions."

5 Now, pausing there, so the criticisms that were made
6 were accepted by the court as proper criticisms and that
7 the judge had actually erred in failing to carry out the
8 necessary evaluation of all of that evidence. So,
9 my Lord, that illustrates -- I don't say completely or
10 exhaustively -- the nature of the judicial assessment
11 which it was your Lordship's duty to undertake of the
12 case actually presented before you.

13 And that we get both from the underlying
14 observations by Lord Justice Rix, but also the
15 repetition of that and the approval of it at
16 paragraph 51 of O'Neill that I have already shown
17 your Lordship.

18 So the right approach to this is to look at the
19 context, to look carefully at the way in which the
20 parties' pleaded cases were put before the court, the
21 evidence that the parties sought to adduce in support of
22 the factual assertions that they had identified in their

23 pleaded cases and the basis upon which the case was
24 opened and closed by the parties.

25 We respectfully say it is quite wrong for

23 MR JUSTICE FRASER: Yes.

24 MR GREEN: Could I just show your Lordship the Hashim

25 authority at tab 6 in the bundle, which we find at

1 {B9.5/6/8}, just below A, the paragraph beginning, "The
2 parties to this appeal were agreed":

3 "The parties to this appeal were agreed that the
4 test to be applied in a case such as this was that
5 stated by the QBD in Topping, namely would a reasonable
6 and fair-minded person sitting in court and knowing all
7 the relevant facts have a reasonable suspicion that
8 a fair trial for the applicant was not possible?"

9 This was actually mid-trial, but the dictum is of
10 general application:

11 "Most, if not all, of the cases in which this test
12 has been discussed have been cases of modest dimensions.
13 We know of no case approaching the scale of this where
14 a charge of apparent bias has been made. That makes it
15 the more important to recognise, as we understand to be
16 agreed, that the hypothetical observer is not one who
17 makes his judgment after a brief visit to the court, but
18 one who is familiar with the detailed history of the
19 proceedings and the way in which cases of this kind are
20 tried."

21 So, my Lord, we say it is demonstrably right that
22 the informed observer is assumed to know the detail of

23 the history of the proceedings and the backdrop and
24 context of group litigation and how cases of that type
25 are --

1 MR JUSTICE FRASER: I think that passage is quoted in
2 Otkritie.

3 MR GREEN: Yes, I think actually it is slightly elaborated
4 on, I think, if I remember correctly.

5 MR JUSTICE FRASER: Paragraph?

6 MR GREEN: It is {B9.5/25/1}.

7 MR JUSTICE FRASER: Remind me where it is in the hard
8 bundle.

9 MR GREEN: Sorry, it is tab 26. If we look at page 8
10 {B9.5/25/8} --

11 MR JUSTICE FRASER: It is paragraph 18, isn't it?

12 MR GREEN: It is, it is paragraph 18. There are the two
13 observations by the Master of the Rolls, the first one,
14 the one we just looked at, and the second one dealing
15 with interlocutory applications, which all go one way,
16 which is, I think, not actually directly in point here,
17 but gives some background to the role of a managing
18 judge.

19 Was there an aspect of Otkritie that my Lord wanted
20 assistance on from earlier, because I said I would come
21 back to it, or at least to hear our submissions?

22 MR JUSTICE FRASER: I wouldn't say necessarily assistance

23 because it is fairly clear, but at paragraphs 31 and
24 32 -- because in that case the judge did recuse himself
25 and he was -- it was sent back and he was told he ought

1 not to have done.

2 MR GREEN: Precisely.

3 MR JUSTICE FRASER: But it was a relevant feature, wasn't
4 it, that he, the judge, in that case at first instance
5 felt no personal embarrassment or discomfort in
6 continuing?

7 MR GREEN: Yes.

8 MR JUSTICE FRASER: I thought he said in his judgment he was
9 only recusing himself with extreme reluctance and he
10 interpreted the two challenges as being actual bias,
11 which doesn't apply here.

12 MR GREEN: Quite.

13 MR JUSTICE FRASER: At 32, I think first instance judges --
14 or it is said it is important that they don't recuse
15 themselves too readily in long and complex cases.

16 MR GREEN: Indeed.

17 MR JUSTICE FRASER: I suppose this would count as a long and
18 complex case.

19 MR GREEN: Indeed, precisely. And there is also a point of
20 approach in fact in relation to the suggestion that an
21 applicant should be given the benefit of the doubt,
22 which is one of the submissions that my learned friend

23 made. I think that needs to be thought about quite

24 carefully.

25 MR JUSTICE FRASER: He does have authority for that.

1 MR GREEN: Indeed, my Lord, and I think one needs to
2 consider quite carefully what is being said, because
3 I think where the basis for doubt is properly
4 established, then it -- and what is in issue is not
5 de minimis, then one can readily see what the court
6 means about erring on the side of caution for the proper
7 purposes of the administration of justice and justice
8 being seen to be done. One quite understands that, but
9 in fact one sees in cases where the court is discussing
10 things like having a shareholding, for example, that may
11 be small, but more than de minimis.

12 MR JUSTICE FRASER: In a litigant?

13 MR GREEN: In a litigant, something like that.

14 MR JUSTICE FRASER: I see, yes.

15 MR GREEN: Once that is established and it is not absolutely
16 de minimis, then even though it may not naturally be
17 thought to amount to apparent bias, one might give the
18 benefit of the doubt to the applicant in that situation.

19 Similarly, if it is established that what a judge
20 has done has gone beyond the bounds of proper judicial
21 assessment, that it is not part and parcel of the
22 court's judicial assessment of the litigation as it was

23 presented to it.

24 As soon as you can say with confidence that the
25 court has materially and, one might say more than once

1 because of the point about repeatedly that we saw in the
2 earlier authority, stepped outside the boundaries of
3 a proper judicial assessment of the proceedings as they
4 were before the court, then at that point, one then has
5 to look at materiality, and say, well, maybe at that
6 point the applicant should be given the benefit of the
7 doubt.

8 But we respectfully submit that the anterior
9 question of whether the court has or has not done that
10 still falls to be objectively analysed in a sensible
11 way. What you don't get to do is to disapply the
12 objective test by a side-wind by complaining about
13 things that you lost on or lost on very badly and then
14 going, "Well, that must raise a doubt and I should get
15 the benefit of the doubt".

16 Because if that were the right approach, none of
17 these indications to judges not to lightly to recuse
18 themselves, either in general or in long-running
19 proceedings, we say a fortiori in group litigation, they
20 would be meaningless and it would allow an applicant for
21 recusal to completely circumvent the carefully
22 considered and now, really undisputed approach to

23 apparent bias.

24 So I did want to make that point clear in relation

25 to the suggestion of being given the benefit of the

1 doubt, my Lord.

2 Can I show your Lordship just briefly, in relation
3 to the approach to the evidence, paragraph 114 of the
4 closing submissions, which are at {A/8/48}.

5 MR JUSTICE FRASER: Whose closing submissions?

6 MR GREEN: This is the Post Office's closing submissions.

7 This is the sort of difficulty that I think certainly
8 the claimants had with the approach that the Post Office
9 adopted, because, of course, obviously some factual
10 assertions were in, in terms of relevance on the face of
11 the pleading. Then they appeared to be out at the
12 admissibility application and then they were in again
13 for cross-examination and then out again for some
14 purposes in argument, and then in again in the closing
15 arguments, in the closing submissions.

16 If we look at 114, we can see:

17 "It is important to bear in mind the kind of factual
18 situation that is encompassed by this principle."

19 And this is Post Office relying on the principle of
20 a fiduciary's breach of duty has led to an incomplete
21 evidential picture and this is Post Office seeking to
22 illustrate the point by reference to actual -- its

23 version of the evidence that the court heard and putting

24 in issue examples of this in the lead claims:

25 "For illustration only, Mr Abdulla admitted in

1 interview that he had inflated the cash declared in his
2 branch to disguise shortfalls."

3 That is the Post Office's case:

4 "Mrs Stockdale relied on the privilege against
5 self-incrimination when asked how she had got her
6 accounts to zero despite having shortfalls and without
7 making them good or settling centrally, and Mrs Dar had
8 the misfortune to engage an assistant who falsified cash
9 declarations and seemingly lost or stole large amounts
10 of foreign currency."

11 And so forth.

12 So we go over the page {A/8/49}, then there is
13 reliance on the evidence of Mrs Van Den Bogerd about the
14 necessarily and reliance by Post Office on honest and
15 accurate accounting, Mr Howarth, and then:

16 "It is appropriate that the evidential difficulty
17 created by false accounting worked to the detriment of
18 the dishonest agent."

19 So what Post Office sought to do was, in some cases
20 absolutely directly, as we had, for example, in the
21 closing about issues 8 and 9 and Angela Van Den Bogerd's
22 evidence, but in other cases by a sort of side-wind,

23 inviting the court to accept criticisms of the lead
24 claimants or their evidence as illustrations of
25 a problem upon which they relied for certain purposes in

1 their arguments.

2 So it was replete with those sort of contradictions
3 in the sense that when evidence was helpful for the
4 Post Office, it was in, and when their witnesses
5 performed badly, that is out. And your Lordship
6 shouldn't really say anything about it because if you
7 do, it is frightfully unfair and you have made harsh
8 criticisms. And we respectfully say that in a sense,
9 that is what all of this is about.

10 They have adopted internally inconsistent positions
11 in relation to the relevance of evidence and essentially
12 tried to ride two horses going off in completely
13 different directions, and your Lordship has had to try
14 and manage the consequence of that, and clarify it,
15 where possible, on credibility, still leaving an
16 extremely unsatisfactory position, make findings in the
17 light of the litigation as it was presented before
18 court, and then be accused of apparent bias for having
19 done so.

20 We respectfully suggest that is a flawed basis for
21 an application of this sort, having in mind its
22 seriousness and gravamen.

23 My learned friend wants me to read paragraph 112, so
24 we will go back a page and read that {A/8/48}:
25 "In considering these factual issues, the court

1 should not lose sight of the prior and more important
2 point that what happened in practice (including what
3 individual C's knew from time to time and what
4 Post Office's internal views may have been) are
5 irrelevant and inadmissible as to the question of
6 whether the contracts exclude or modify the accounting
7 principles. That is a question of contractual
8 interpretation."

9 Now, pausing there, that illustrates a number of
10 points which are unsatisfactory about the way that
11 Post Office ran its case. Again, that is out, but in.
12 So we get in, out, in, out, all the way through, even on
13 the same page. But it is also wrong, because what is in
14 fact important, as your Lordship has already heard
15 argument on this in the admissibility application, it
16 wasn't just contractual principles that were in issue,
17 there were also questions of agency.

18 And the authorities, which we do have in the bundle
19 if we need to go to them, make it absolutely clear that
20 there may be agency even when the parties by contract
21 disclaim that there is. It's not dependent on
22 a contract at all; it is dependent on what, in practice,

23 the parties have consented to do for each other. And
24 that was one of key concessions which fed into
25 your Lordship's admissibility decision in judgment

1 number 2 and it is a factor which complexifies to
2 a great degree, we respectfully say an unsatisfactory
3 degree, the submissions which Post Office adopted before
4 the court in opening, which said that the contract had
5 to be construed in the light of the agency relationship,
6 because the agency relationship, as Garmac and Branwhite
7 both show, is that subsequent evidence of what the
8 parties actually do in practice will be relevant, but
9 may be less important.

10 The question is -- those cases also make clear that
11 an express agency set out in a contract is not
12 determinative of the scope and nature of the agency that
13 in fact exists. So it is hopeless to say: ah, well, the
14 contract said this about the agency.

15 The court is required, by completely uncontroversial
16 cases that are trite, to look carefully at what in fact
17 happened, to look at the nature and scope of the agency
18 and the extent to which and how that was operated in
19 practice.

20 It was in relation to agency accounting principles
21 that the branch trading statement loomed so large,
22 my Lord, so it is wrong to say that.

23 MR JUSTICE FRASER: Do you have a reference? You don't have
24 to take me to it now, but a reference for the
25 Post Office's opening to which you referred then about

1 construing the contractual relationship --

2 MR GREEN: Yes, if your Lordship looks at --

3 MR JUSTICE FRASER: -- in the light of the agency
4 relationship.

5 MR GREEN: Yes, if your Lordship looks at the Post Office's
6 opening at opening submissions at page 8, and the
7 opening submissions are {A/2/8}. I am grateful to
8 Ms Donnelly.

9 MR JUSTICE FRASER: A/2/8. I think that is the wrong A2.

10 MR GREEN: Sorry, A/2/8. May we just start at {A/2/7} to
11 give it context.

12 MR JUSTICE FRASER: It was just to give me a reference, you
13 don't have to ...

14 MR GREEN: I will show your Lordship. I am not going to go
15 through all the paragraphs, but 15 to 17 is context
16 autonomy and so forth. 17 is reliance on SPMs to
17 accurately record and transact and so forth. And then
18 over the page {A/2/8}, the reliance referred to in 18 is
19 the reliance is paragraph 17. We have just seen and it
20 provides crucial context. This is totally consonant
21 with their pleaded case, to which I have already
22 referred the court.

23 Then if we look at their third point at 21:
24 "Third and most importantly, SPMs act as
25 Post Office's agents when transacting Post Office

1 business, with all the ordinary obligations and
2 liabilities that agency entails. Ultimately,
3 Post Office cannot and does not seek to supervise and
4 prescribe in detail everything that SPMs do in operating
5 the agency business, but the basic fact is that SPMs are
6 transacting Post Office business on its behalf."

7 Then over the page, crucially {A/2/9}:

8 "The express and implied terms of the SPMC and the
9 NTC need to be viewed through the prism of an expressly
10 created agency relationship, and so the express
11 contractual terms sit atop the body of the law
12 regulating the duties of agents to their principals.
13 The common law principles of agency are important
14 background to the contracts and any implied terms need
15 to be considered (and shown to be necessary) against
16 that agency background."

17 And then 22:

18 "As such, SPMs are obliged to account to Post Office
19 as its agent. They are acting on Post Office's behalf
20 and the Post Office relies on them to do so."

21 The final line of paragraph 22:

22 "This core fact suffuses the contractual

23 relationship."

24 So your Lordship was being invited to consider the

25 nature of the agency in the course of construing and

1 determining what the contractual relationship was, so we
2 respectfully say that when you do that in accordance
3 with the authorities, identifying the nature and scope
4 and effect of the agency, it requires you to look at the
5 reality on the ground of who was in fact doing what.

6 And the evidence I showed you from
7 Mrs Van Den Bogerd was not correct in that respect.
8 Transactions were not -- the transactions that entered
9 the Subpostmaster's account were not in their sole
10 control. The fact there was no dispute button and that
11 they had to settle centrally or accept in the way that
12 the court heard evidence about, showed that was not
13 a proper starting point for the court to understand how
14 the branch trading statement came about and to
15 understand the evidence in respect of which
16 Angela Van Den Bogerd gave and directed those paragraphs
17 of her witness statement.

18 My Lord, there is a background point. Your Lordship
19 may remember it from the admissibility hearing, which
20 was that there is a suggestion that there was not
21 sufficient disclosure in relation to some of these
22 issues. Your Lordship may remember it is recorded in

23 your Lordship's judgment, in judgment number 2.
24 I directed your Lordship's attention to the disclosure
25 orders that did address things like helpline, training

1 and those things.

2 Then the second CMC order, 2 February, 22 February
3 and then the third CMC order. So I am not going to take
4 your Lordship to those, but it is wrong to proceed on
5 a footing that there had not been disclosure given in
6 relation to issues like helpline and those sorts of
7 things.

8 My Lord, finally, what Post Office, we respectfully
9 say, was seeking before the court was a trial at which
10 evidence of what happened on the ground, which is
11 advanced, if accepted, would be relevant to
12 construction, but if rejected and contrary findings
13 made, could then be characterised by Post Office as
14 relevant to breach and, therefore, your Lordship
15 couldn't have regard to them.

16 We say that that was a false dichotomy and an
17 approach that your Lordship was entitled to meet by just
18 making findings on the challenges as made on the
19 evidence before the court.

20 In fact, there is an irony in that Post Office's
21 position was effectively to seek a trial that was
22 one-sided, when it didn't get it, to then complain on

23 the footing of apparent bias about that and then to
24 invite the court effectively to consider the recusal
25 application as if the trial had been one-sided, which it

1 plainly wasn't. We respectfully say that is not the
2 right approach either.

3 My Lord, as to the NFSP, can I just deal with that.

4 Much has been made of the significance of the NFSP.

5 MR JUSTICE FRASER: The NFSP are actually mentioned in terms
6 within the NTC.

7 MR GREEN: Precisely, they are mentioned in the contract and
8 they are mentioned in the opening, and they are
9 mentioned in the evidence of two witnesses,
10 Mrs Van Den Bogerd and Mr Beal. And we have dealt with
11 this in annex 2 at page 93 onwards, which is
12 {B9.4/2/93}.

13 MR JUSTICE FRASER: Paragraph 235, I think.

14 MR GREEN: Exactly. We have just traced through there. For
15 convenience, the witness statement of Mr Beal at
16 paragraph 36, 40 to 41, and emphasising the NFSP's
17 independence at 45; the witness statement of
18 Mrs Van Den Bogerd at 98:

19 "The NFSP has publicly supported Post Office's view
20 that Horizon is robust."

21 And your Lordship will remember that was supposed to
22 play in by way of relevant background to the burden of

23 proof in an argument that, I think, was not that easy
24 for us to follow about the background likelihood of
25 Horizon being robust and, therefore, not being the cause

1 of errors.

2 And then 235.3, in respect of litigation,
3 Post Office's written opening at paragraph 13:

4 "Furthermore, it should be noted that the NFSP,
5 which is the organisation which represents SPMs and
6 their interests nationwide, does not [underlined]
7 support this action and does not endorse the factual
8 premises of the claims."

9 So clearly put in issue. And then we have got the
10 relevant email which was disclosed during the trial,
11 with the reference to:

12 "Please note a signed agreement with the blood of
13 both myself and Paula is necessary on the future of the
14 NFSP before any agreement is granted on either NT or
15 other points."

16 And that is the Post Office's own document, agreed
17 it was only disclosed very, very late indeed, but it was
18 disclosed and I was able to put that to the witness in
19 any event.

20 Also, the challenge -- my learned friend is
21 essentially looking back at whether Mr Beal was telling
22 the truth about the publication of the grant framework

23 agreement in re-examination. And we have got the
24 reference to the transcript there at Day 6.

25 Then in closing, the assertion about the NFSP not

1 supporting the action or endorsing the factual premise
2 is repeated. It is now pitched a little less high:

3 "Whatever the organisation's precise degree of
4 independence ..."

5 Implicitly recognising the NFSP didn't look as
6 independent as they had started with saying it was, but
7 notwithstanding that qualification, Post Office still
8 relied on the involvement of the NFSP as a relevant
9 control mechanism for the purpose of its position on
10 implied terms, and that is set out, as your Lordship
11 sees, at paragraphs 345 to 346, which we have identified
12 there.

13 So it is quite wrong for the court to be criticised
14 in making a proper judicial assessment on the basis of
15 the evidence before the court, particularly in
16 circumstances where the disclosure was given to us
17 extremely late.

18 So in result, my Lord, we respectfully say that this
19 is an application which is wrongly premised on
20 a misunderstanding of the correct approach, does not pay
21 due heed to the context, either within the judgment,
22 immediate context of the actual text criticised or the

23 judgment as a whole, fails to have regard to how the
24 proceedings were in fact conducted and relies on the
25 court and the claimants now being told at this stage

1 that much of the evidence that we were put to the
2 trouble of challenging was all irrelevant. We find that
3 out now in a trial that happened last year.

4 And furthermore, the application proceeds on
5 a misunderstanding of the right approach in cases of
6 this sort, we say a fortiori where there is a designated
7 judge and a fortiori further where it is a managing
8 judge in group litigation.

9 For all of those reasons, my Lord, we say this is
10 misconceived and without merit.

11 Are there any points I can assist my Lord with?

12 MR JUSTICE FRASER: Yes, there is two questions that I would
13 like you to address, please, or two points.

14 One is the same as a point I asked Lord Grabiner
15 about. The Horizon Issues trial is well underway, and
16 there is, I think, half a day of factual evidence left.
17 What do you have to say about that? Were I minded to
18 recuse myself, what happens to that? Does it start
19 again in front of somebody else?

20 MR GREEN: I think it might have to start again. The
21 parties might be able to seek to agree whether the
22 evidence of particular witnesses was to be taken to be

23 their evidence.

24 MR JUSTICE FRASER: Absent an agreement, which, expressing

25 myself neutrally, can't necessarily be assumed in this

1 trial, all those witnesses would have to be called
2 again, wouldn't they?

3 MR GREEN: Indeed.

4 MR JUSTICE FRASER: And then the draft judgment number 3,
5 which is the focus of today, was distributed to the
6 parties on 8 March.

7 MR GREEN: Yes.

8 MR JUSTICE FRASER: I don't think this application was
9 issued until the 21st. Have I got those dates correct?

10 MR GREEN: Yes.

11 MR JUSTICE FRASER: And there are different references in
12 your skeleton, and the authorities about waiver and
13 delay.

14 MR GREEN: Precisely.

15 MR JUSTICE FRASER: Is there anything that you want to say
16 about that?

17 MR GREEN: We say it is extremely unsatisfactory that having
18 had the draft judgment for that period of time, this was
19 not raised with the court before the Horizon Issues
20 trial began.

21 We are not in a position necessarily to say that
22 amounts to a waiver, I don't think. But, in a sense,

23 having had the draft judgment for that period of time,
24 it was open to Post Office to tell the court in advance
25 of the Horizon trial that it would be making this

1 application.

2 MR JUSTICE FRASER: When was the first you learned of the
3 application?

4 MR GREEN: My Lord, that day. I was as surprised as
5 your Lordship. I think I learnt in court just before
6 lunch.

7 MR JUSTICE FRASER: Because it was Thursday, the 21st.

8 MR GREEN: It was Thursday, and I was cross-examining
9 Mr Godeseth, and I think at some point before lunch,
10 I was told this had been done. I had not seen it and
11 then my clerks printed it for us in chambers so I could
12 actually see it. I came with a bundle to court and
13 I think your Lordship got it at 5 to 2.

14 MR JUSTICE FRASER: I got it at 5 to 2, but then I was
15 sitting dealing with the trial, so ...

16 MR GREEN: The only observation on that is El Faraghy does
17 say that the correct approach is initially to write
18 a letter to the court to say, you know, "I think the
19 court should consider whether it is right that the court
20 continues to sit", and that very notably was not done.
21 There was an unheralded application at the end of week
22 two.

23 I think whether that amounts to a waiver or not is
24 probably a question for the court.

25 MR JUSTICE FRASER: Yes, all right.

1 Okay, the final point, and it might be that I don't
2 necessarily need to look at it, but I think the
3 strike-out application which led to judgment number 2
4 was supported by a witness statement of Mr Parsons,
5 which was his 9th.

6 MR GREEN: Indeed.

7 MR JUSTICE FRASER: Do you have a reference for that?

8 MR GREEN: My Lord, we absolutely do. I can tell you
9 exactly where it is because it is one of things that
10 I might have taken your Lordship to. It is
11 {B9.3/0.1/1}.

12 MR JUSTICE FRASER: Then beginning at page 1.

13 MR GREEN: It begins there. There is a passage there that
14 is relevant to one of the objections that my learned
15 friend made this morning, which is Mr Parsons' reference
16 to adverse publicity, which was the basis for
17 your Lordship's observations in the admissibility
18 judgment, which we respectfully say your Lordship didn't
19 completely forget when you were considering matters in
20 the Common Issues judgment.

21 MR JUSTICE FRASER: The only reason for asking for the
22 reference is in case I decide to read that again, but

23 you wouldn't discourage me from reading it again.

24 MR GREEN: Absolutely not, my Lord. And in fact, there is

25 an additional point to make on that, which is that we

1 faced precisely the same approach from Post Office in
2 relation to that application as we did to this.

3 MR JUSTICE FRASER: By "that application", you mean?

4 MR GREEN: The strike-out application, which is a serious
5 application, especially the timing of it when we were
6 trying to prepare for trial.

7 There were no particulars given of the parts of
8 evidence that were said to be objectionable, so I think
9 it was 5 September and I think my learned friend
10 Mr Warwick attended in order to obtain from the court
11 a direction, which the court gave in an order, that they
12 provided particulars.

13 So we have had the same modus operandi on two fairly
14 serious matters, and I leave the matter there, my Lord.

15 MR JUSTICE FRASER: All right. Unless there is anything
16 that you want to add.

17 MR GREEN: My Lord, no.

18 MR JUSTICE FRASER: Thank you very much.

19 Lord Grabiner, just on that point, so I don't
20 disrupt the flow, I assume you don't have any objection
21 to me looking at the 9th witness statement of Mr Parsons
22 again in due course.

23 LORD GRABINER: Certainly not, I am only too pleased if
24 your Lordship looks back at whatever you want to look
25 at.

1 MR JUSTICE FRASER: Thank you very much.

2 (3.55 pm)

3 Reply submissions by LORD GRABINER

4 LORD GRABINER: Can I deal with the point raised at the end
5 in relation to the delay point, if I can call it the
6 delay point. My understanding is that we received the
7 draft judgment on the Friday immediately prior to
8 commencement of the Horizon trial on the Monday.

9 I am afraid, standing here now, I don't know what
10 the dates are.

11 MR JUSTICE FRASER: It is the 8th. It was sent out on
12 Friday, the 8th. Monday, the 11th, was oral openings.

13 LORD GRABINER: There was a passage of time between then and
14 the decision that was communicated to make this
15 application. I need hardly point out that this has
16 been -- this is regarded as an extremely serious
17 application to be making. It was made at board level
18 within the client and it also involved the need for me
19 to be got up to speed from a standing start.

20 And I am not the only judicial figure or barrister
21 that has looked at this with a view to reaching that
22 conclusion. It has also been looked at by another very

23 senior person before the decision was taken to make this
24 application.

25 The delay, such as it is, is very, very tiny in the

1 context of the seriousness of case that is being put
2 forward.

3 We had no control over the commencement of the
4 Horizon case, obviously, because that was already
5 predetermined by the arrangements that were then in
6 place.

7 MR JUSTICE FRASER: I suppose one might observe an
8 adjournment could have been requested of a week or
9 something.

10 LORD GRABINER: It may be. I just don't know because
11 I wasn't involved at that stage. I have only been
12 involved just for a few days, literally.

13 MR JUSTICE FRASER: Understood.

14 LORD GRABINER: The other point that my learned friend made
15 right at the end, but if I can deal with it now, is in
16 relation to the El Faraghy case, which he said: well, it
17 would have been much more appropriate for us to have
18 communicated by letter with the court rather than to do
19 what we did. You will find that case, I think, in
20 tab 15.

21 MR JUSTICE FRASER: Yes.

22 LORD GRABINER: Your Lordship may remember this one. This

23 is a postscript of Lord Justice Ward, paragraph 32, the
24 very last paragraph of the judgment. Does your Lordship
25 have that?

1 MR JUSTICE FRASER: Yes, the one that says recusal
2 applications are much more frequent than they used to
3 be.

4 LORD GRABINER: Yes, and he says:

5 "It is invidious for a judge to sit in judgment of
6 his own conduct in a case like this, but in many cases,
7 there will be no option but that the trial judge deal
8 with it himself or herself."

9 Pausing there, I would obviously rely upon that:

10 "If circumstances permit it [and I rely upon that as
11 well], I would urge that, first, an informal approach
12 should be made to the judge, for example by letter,
13 making the complaint and inviting recusal."

14 I should say careful consideration was given to
15 those observations before the decision was taken to do
16 what was done, and one of the --

17 MR JUSTICE FRASER: Issuing the application or asking me to
18 hear it?

19 LORD GRABINER: Going first to the court with a letter in
20 the form that is described there. And the decision was
21 taken not to adopt that approach simply because
22 your Lordship is the designated managing judge of the

23 litigation with an enormous knowledge and understanding
24 of the whole of the background history, and the idea
25 that one could have mounted and dealt with today, as we

1 have dealt with today, in front of a different judge is
2 a little bit unlikely.

3 So there were all those circumstances to take into
4 account. It would also have been open to your Lordship,
5 had you been so minded, actually to refer the matter to
6 another judge, if you had wished to do so.

7 But for all of those and some of those reasons, the
8 procedure that we adopted is what we adopted. But so
9 that your Lordship can be under no misunderstanding as
10 to how it came about that we are here in the way that we
11 are here. And I do not accept, if it is being
12 suggested, that the Lord Justice Ward approach is the
13 only approach and that is the one that we should have
14 adopted. I don't accept that, and nor does
15 Lord Justice Ward say that.

16 So far as my learned friend's submissions are
17 concerned, apart from those closing observations, what
18 has happened here is that my learned friend has simply
19 looked broadly at the judgment and he has taken some of
20 the big picture questions, and he has sought to show
21 that those areas have been effectively traversed by
22 Post Office's evidence and by cross-examination and so

23 on.

24 Now, in my submission, that approach is wrong for

25 two reasons. First of all, Post Office made clear

1 throughout that it did not accept that this material was
2 relevant to the Common Issues trial. That has been said
3 more times than I can recall. As everybody in this
4 court knows, that has been repeatedly stated all the way
5 through and we have never waived from that position.

6 Secondly, the fact that during the trial,
7 Post Office felt that it had to deal in a limited way
8 with matters which were not relevant to the
9 Common Issues does not make those matters relevant to
10 the Common Issues and, most importantly, it does not
11 enlarge the definition of the Common Issues.

12 Whether a given finding was necessary to decide the
13 Common Issues is a question which can only be answered
14 by reference to the relevant paragraphs of the judgment,
15 which is why I painstakingly -- and I apologise for
16 having done it -- but I painstakingly went through those
17 paragraphs because, in my submission, that is the only
18 proper way to analyse the issue and the concern that my
19 clients have.

20 And the point is that our detailed criticisms have
21 really not even been met by the other side. They never
22 went through those paragraphs and, indeed, that is

23 unsurprising, because they couldn't.

24 For example, if I can just summarise the points on

25 the submissions that we have been making, that none of

1 the arguments put forward by my learned friends would
2 justify findings on a whole range of matters. And
3 I will just rattle off the paragraph numbers and the
4 topics without going back to them, because we have
5 already been there.

6 But, for example, findings on Post Office's
7 knowledge of problems with Horizon: paragraphs 541, 543,
8 1115. Whether the Post Office sent threatening letters:
9 paragraphs 222, 462, 7231. Or the general findings as
10 to the inadequacy of the suspension processes:
11 paragraphs 403, 514, 517. Or the poor quality of the
12 training: paragraphs 193, 437, and 955.

13 And, of course, the reason my learned friend did not
14 go to the paragraphs was because he would need to
15 justify the findings and conclusions to which
16 your Lordship arrived, and he knows that he can't. And
17 he knows that he can't because he knows that they go
18 well beyond the issues, which is why he simply
19 cherrypicked his way through the argument throughout his
20 submissions to your Lordship.

21 Now, can I just -- I hope in the order in which the
22 points were made. I respectfully agree with an

23 observation that fell from your Lordship at the opening
24 of my learned friend's submissions when you simply said
25 to him that the way to test the validity of the argument

1 presented to the court was for the observer to look at
2 the judgment only, and in my respectful submission, that
3 is exactly the correct approach. I am not suggesting
4 that that person doesn't have full knowledge, they would
5 have full knowledge.

6 MR JUSTICE FRASER: Of all the proceedings.

7 LORD GRABINER: Absolutely, and I accept all of that, but at
8 the end of the day, what is involved here is the need to
9 examine the judgment. That is what this is all about.

10 Now, next, my learned friend drew attention to
11 paragraphs 93 and 94 of our generic defence. And the
12 reason for doing that was because he used it as a basis
13 for the proposition that thereby my clients had enlarged
14 the Common Issues. And he did that, as I say, through
15 reference to those pleadings, but he did not refer
16 your Lordship to the voluntarily particulars of
17 26 September 2018, which are in -- I don't need to turn
18 them up -- {B4/8/1}.

19 MR JUSTICE FRASER: They are also mentioned in judgment
20 number 2, I think.

21 LORD GRABINER: I am sure they are, and your Lordship is
22 inevitably ahead of me on that, but I am grateful.

23 But the point about those voluntary particulars is
24 that they confine the matters in 93 and 94 to the
25 contract issues, so that doesn't really help my learned

1 friend at all.

2 Then my learned friend referred to the post-trial
3 note, which he put up on to the screen. That is
4 document {A/18/1} and that document exactly states the
5 case that I have sought to make today and reflects the
6 submissions that I have been making to your Lordship.

7 If you look through that, you will see that really
8 is a nutshell summary of the arguments that I have been
9 seeking to make today to your Lordship.

10 Now, the peculiarity of this case -- step back. One
11 of the points that my learned friend came perilously
12 close to making was that because this is group
13 litigation, the prospects of there being a successful
14 complaint along the lines that we make would be just
15 about zero because, effectively, a group litigation
16 exercise with a judge in charge of the litigation would,
17 somehow or other, secure a much broader permit to do and
18 say the things that are said and that, somehow or other,
19 the apparent bias concept would then fall away as being
20 either marginal or unlikely ever to happen. Indeed, he
21 repeatedly made the point that there was no case on the
22 point and made some play of that.

23 Well, of course, the peculiarity of this case is the
24 fact that there are successive trials which have been
25 pre-arranged, and the reason why the apparent bias

1 argument might never have arisen in any other case, but
2 whether it has or not is supremely irrelevant, but the
3 reason why it is relevant here is because those
4 successive cases are specifically geared to dealing with
5 matters such as Horizon, breach of contract, damages and
6 all the rest of it, limitation, I think, and so on.

7 So it is precisely the kind of context where
8 somebody might be getting up to say: well, actually, in
9 this kind of context, there is a real danger or real
10 possibility that the apparent bias argument may succeed,
11 simply because perhaps not enough care has been gone
12 into the conclusions.

13 And I say that with great respect, because I'm not
14 suggesting for a moment that this was a simple case to
15 deal with or a simple series of cases to manage. It is
16 a difficult exercise, no doubt about it, and I am
17 entirely sympathetic. But I do respectfully submit that
18 given that context, it is very, very important indeed
19 that the matters that are made the subject of the first
20 judgment do not trespass upon those matters that are yet
21 to come.

22 That is the reason why this argument, whether or not

23 there has been some previous case, is a perfectly good
24 argument, and there is no force or validity in the
25 proposition that because there is not any history of

1 similar cases that, somehow or other, this is an easy
2 way in and the judge doesn't have this obligation to
3 deal with it.

4 MR JUSTICE FRASER: I think I have made it clear that the
5 fact that this may or may not have been the first time
6 doesn't make any difference.

7 LORD GRABINER: Of course not. It was just a bad point from
8 my learned friend, which I am sure he understands, and
9 it does happen to all of us.

10 The other point he made was by reference to his
11 paragraph -- 82, it is on page 82 of my learned friend's
12 skeleton argument. It is the quotation of
13 paragraph 592, which is taken from our submissions.

14 Does your Lordship have that handy?

15 MR JUSTICE FRASER: I do. Can you just give me the
16 paragraph number again?

17 LORD GRABINER: Paragraph 592, but on page 82 of my learned
18 friend's skeleton.

19 MR JUSTICE FRASER: Yes, I do have that.

20 LORD GRABINER: The only point I want to make about it is
21 that it obviously is referable only to the contract
22 terms {B9.4/2/82}:

23 "The central fact about Mr Abdulla's evidence cannot
24 be avoided: he lied frequently and brazenly. He began
25 by denying that, as his interview records, his previous

1 experience included tallying up figures. He then
2 claimed that he read the first and second paragraphs of
3 a letter [and that of course is the contract provision]
4 and then what appeared on its second page, but missed
5 out ..."

6 Et cetera, et cetera. So the point about that
7 passage is that it is concerned about the contract
8 provision.

9 MR JUSTICE FRASER: That is, Lord Grabiner, but the first
10 sentence after the struck through passage says:

11 "He said that he was given the impression in the
12 interview held following the revelation of his
13 wrongdoing that if he paid back the money, he would be
14 reinstated; that was untrue."

15 So that is a point going purely to the truth of the
16 evidence that he gave about post-contractual matters.

17 LORD GRABINER: Yes.

18 MR JUSTICE FRASER: Then the next two sentences follow.

19 LORD GRABINER: I take your Lordship's point, but again, it
20 comes back to a point that I sought to make earlier.
21 And as I have said, it is not an easy issue, but the
22 fact is that it should have been confined to the

23 contract issue matters that were in trial 1, and that is
24 precisely what that post-trial written document was
25 about that I made reference to a few minutes ago. That

1 is precisely what it says.

2 MR JUSTICE FRASER: Understood.

3 LORD GRABINER: Then there is the separate matter which

4 I think engaged some discussion between my learned
5 friend and your Lordship. It was in relation to the
6 impropriety involved in relation to the witness
7 statements. My learned friend is perfectly correct that
8 there were those wonderful days where one stood up in
9 court and called the witness and neither the judge nor
10 probably often the barristers even knew what was going
11 to come out of the witness' mouth. There was something
12 called a proof of evidence then, but you spent most of
13 your time striking it through as the witness failed to
14 come up to proof. But all that world, regrettably in
15 some ways, has gone by.

16 That has given rise to the debate which
17 your Lordship referred to, quite rightly, as to the
18 usefulness of these documents, first of all because they
19 are overlong and, secondly, you know, they make
20 references to loads of documents and are replete with
21 tonnes of quotes from them. They are hundreds of pages
22 long in any meaningful commercial trial.

23 At the end of the day, they may not be actually the
24 evidence of the individual. I completely understand all
25 of that, but that does not justify the insertion into

1 this judgment of the suggestion that that is what
2 happened in this case. I know it is a nice,
3 controversial subject, but it doesn't justify reaching
4 a conclusion, expressly or impliedly, that that is what
5 happened in this case.

6 It is a very serious criticism of professional
7 people's behaviour, even more so in this case because my
8 understanding is that the suggestion was never even put
9 to any witness. In other words, it was never said to
10 a witness, "That is not your evidence, that has been
11 concocted for you by your solicitor or, worst still,
12 your barrister", as the case may be.

13 So, in my submission, it was an entirely
14 inappropriate passage or couple of passages actually to
15 be inserted into the judgment.

16 Harb was interesting, only because I was in the
17 case, but it is very difficult to imagine what relevance
18 it had to the matters that your Lordship is presented
19 with here.

20 The key point, in my submission, is that everybody
21 knew that there were going to be further trials, and
22 that's why enormous care was necessary for the

23 production of the first judgment on the basis that it
24 might well impact upon key facts or key issues which
25 would inevitably arise in the later case.

1 On the question of whether or not there was
2 disclosure or evidence, my understanding is that there
3 has been no disclosure and no evidence or if there has
4 been any, it is only of a limited value at the moment
5 on, for example, investigations, on accounting by
6 individual postmasters, on transaction transactions. No
7 doubt there will be associated witness statements as
8 well, because these are matters yet to be determined in
9 future trials.

10 The only other point that I want to mention, my
11 final point, which will be a pleasing word for the
12 listeners, is in relation to the National Federation.
13 It is true, as I think your Lordship said, that the NFSP
14 may have been referred in the contract, but that, with
15 great respect, does not justify the conclusions that
16 there was some kind of conspiracy going on as between
17 the Federation and Post Office.

18 It doesn't justify making reference to that in the
19 judgment or speculating about the possibility of the
20 Federation changing its website in the course of the
21 trial. The fact that there is a reference in the
22 contract to the Federation simply means that insofar as

23 that is relevant to the contract issues that arose in
24 the first trial, that is the extent of it.

25 But to go on and make that explicit conclusion about

1 the possible bad nature of the relationship between the
2 Federation and Post Office is revealing, it is damaging.
3 And my submission, my respectful submission, is that it
4 might actually and would actually lead an independent
5 objective observer to the conclusion that it would be
6 very difficult, if not impossible, for your Lordship
7 fairly to try these later cases.

8 So those are our submissions.

9 MR JUSTICE FRASER: Thank you very much indeed.

10 MR GREEN: Might I make one point of clarification, in case
11 my learned friend wants to address it? It is a very
12 small point.

13 MR JUSTICE FRASER: Go on.

14 MR GREEN: It is just the relevance of the group litigation
15 point, that one may expect greater judicial interest and
16 more judicial concern about the respective parties'
17 approach to litigation and observations of that type
18 from a managing judge in ongoing litigation than one
19 would from a judge trying a unitary claim, and that
20 chimes with the sort of thing that I referred
21 your Lordship to in the authority.

22 MR JUSTICE FRASER: I will hear what Lord Gabor has to

23 say, and I'm not going to have endless back and forth,
24 because Lord Grabiner is entitled to have the right of
25 reply.

1 MR GREEN: Of course.

2 LORD GRABINER: If I may respond to that, and I can do it by
3 showing your Lordship one paragraph in
4 Lord Justice Mummery's judgment in a case called
5 AWG Group v Morrison. It is in {B9.5/11/1}, I think.

6 MR JUSTICE FRASER: Yes.

7 LORD GRABINER: It is at paragraph 29 {B9.5/11/10}.

8 MR JUSTICE FRASER: This was the witness who was known to
9 the judge, I think.

10 LORD GRABINER: Yes, I think you are right.

11 MR JUSTICE FRASER: Paragraph 29, yes.

12 LORD GRABINER: My Lord, yes, Lord Justice Mummery. Does
13 your Lordship have that:

14 "While I fully understand the judge's concerns about
15 the prejudicial affect that his withdrawal from the
16 trial would have on the parties and on the
17 administration of justice, those concerns are totally
18 irrelevant to the crucial question of the real
19 possibility of bias and automatic disqualification of
20 the judge. In terms of time, cost and listing, it might
21 well be more efficient and convenient to proceed with
22 the trial, but efficiency and convenience are not the

23 determinative legal values: the paramount concern of the
24 legal system is to administer justice, which must be,
25 and must be seen by the litigants and fair-minded

1 members of the public, to be fair and impartial.
2 Anything less is not worth having."

3 If my learned friend's submission comes to the
4 proposition that because this is group litigation, the
5 court has, so to speak, free range, although I am sure
6 he wouldn't put it that widely, but the court has more
7 flexibility to circumvent the problem that I am
8 concerned with, then he is absolutely wrong, and the
9 correct approach is summarised there by
10 Lord Justice Mummery and your Lordship should bear that
11 in mind.

12 I am grateful to my friend for reminding me of that
13 passage. My Lord, those are my submissions.

14 MR JUSTICE FRASER: Thank you very much indeed. Bear with
15 me one second.

16 This is an application that I recuse myself both
17 from being the managing judge in group litigation and
18 also that I bring the Horizon Issues trial, which is
19 currently underway, to an end. The application is made
20 in the midst of the Horizon Issues trial, which started
21 on 11 March.

22 I am acutely conscious that parties need a rapid

23 answer when applications are made in the course of an
24 ongoing trial, but I am going to reserve my judgment on
25 this application. I am going to produce a written

1 reserved judgment, which will be judgment number 4.

2 I will endeavour to produce that written judgment as
3 soon as possible. It's highly unlikely to be this week,
4 so I am going to explain to the parties now that
5 judgment number 4 will not be handed down before
6 Tuesday, 9 April, which is next Tuesday at 2.00 pm. But
7 the parties will be notified by my clerk on Monday,
8 8 April either confirming that time, either of
9 a different time on that day or a different date and
10 time, if that date is not going to be achievable. So
11 there will be an update provided on Monday.

12 Depending upon the outcome, different matters will
13 need to be dealt with. That obviously depends whether
14 I recuse myself or not. I am not going to go into what
15 those other matters might be, but they can be dealt with
16 on the day that the judgment is handed down.

17 Thank you all very much for your attention. Thank
18 you for your helpful submissions, to all the counsel
19 involved, and also thank you to the electronic trial
20 bundle provider for re-activating my access to the
21 electronic trial bundle.

22 Anything necessary?

23 LORD GRABINER: Just to thank your Lordship for dealing with

24 it in this way.

25 MR JUSTICE FRASER: Pleasure. So until an indeterminate

1 date and time, but hopefully the first part of next
2 week.

3 (4.20 pm)

4 (The hearing was adjourned until a date to be fixed)

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