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[] 2016

For the attention of James Hartley
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Dear Sirs

Bates & Others v Post Office Limited
Claim No. HQ16X01238

We refer to your clients' Letter of Claim dated 28 April 2016 and write to provide our client's substantive response to that letter.

Capitalised terms are defined at various points during this letter. For ease of reference, Schedule 7 is a glossary of such terms and sets out where to find their definitions.

1. INTRODUCTION

- 1.1 In recent years, a limited number of (largely former) postmasters have alleged problems with Horizon and Post Office's other operating practices. Post Office has not ignored those concerns but addressed them head on, taking its responsibilities extremely seriously.
- 1.2 Numerous discussions have been held with stakeholders including government ministers, MPs, representatives of the Justice for Subpostmasters Alliance (**JFSA**), the Criminal Cases Review Commission (**CCRC**), the media and of course hundreds of postmasters. Post Office also engaged a third party, Second Sight, independently to investigate Horizon and then created and funded the Complaint Review & Mediation Scheme (the **Scheme**) to address the individual concerns of postmasters. Thousands of hours of investigations have been conducted and tens of thousands of documents have been disclosed.
- 1.3 Despite all this scrutiny, a systemic flaw in Horizon, or Post Office's operating practices, has not been identified that has resulted in a postmaster wrongfully being held liable for a shortfall of cash or stock in a branch. That is not to say that Post Office or Horizon are perfect. Post Office is alive to the potential for errors and this is why there are robust procedures in place to ensure that postmasters can detect and resolve errors in their branches.
- 1.4 The investigations to date have consistently pointed towards human error or dishonest conduct in branches as the most likely cause of shortfalls. Significant shortfalls have generally occurred where postmasters have not followed the required procedures for remedying errors or have

attempted to cover up losses. Regrettably this is not altogether surprising, given human nature – in a network of more than 11,000 branches over a 16-year period, a small proportion of branches will inevitably encounter significant shortfalls due to the carelessness or dishonesty of the postmasters or their staff in those branches.

- 1.5 Post Office cannot allow the unfocused and unsupported complaints of a small number of largely former postmasters, many of whom admit to acting dishonestly and are now looking to excuse their actions by blaming others, to undermine the hard work of thousands of postmasters who have built thriving businesses in their local communities.
- 1.6 To date, Post Office has been prepared to give your clients and others like them the benefit of the doubt. It has been determined to understand the claims against it, and launched exhaustive efforts to do so. It has investigated their concerns in good faith. If, during the course of this litigation, it becomes clear that in individual cases Post Office has not met its obligations, it will accept any legal responsibility for its actions – as it always has been prepared to do. What our client cannot do is allow unfocused and unevidenced accusations to go unchallenged.
- 1.7 It is therefore disappointing that your firm has continued this theme of advancing poorly explained, unparticularised and unsubstantiated claims, whilst attempting to re-write the legal relationship between Post Office and postmaster in order to give merit to unfounded accusations.
- 1.8 Post Office will cooperate with your firm and the Court to conduct this litigation in a constructive manner. But your clients should be under no illusion: Post Office intends to assert its full range of legal defences and will insist on Claimants properly evidencing their claims.
- 1.9 We set out below our client's position in detail. This explains why your clients' claims will be vigorously defended and the risk they face in relation to legal costs should this matter proceed to trial. Should any Claimant, having read this letter, decide not to proceed with their claims against Post Office, our client is prepared to allow them to exit the litigation without incurring any further cost, by waiving any right to recover its costs to date.

2. EXECUTIVE SUMMARY

- 2.1 In summary, Post Office's position is that:

- 2.1.1 The claims are denied in full.
- 2.1.2 The Claimants represent a very small minority of postmasters. Horizon supports approximately 30,000 terminals in branches, with currently over 60,000 users having access to the system and processes more than six million transactions every day. Over the past 16 years, many tens of thousands of postmasters have satisfactorily operated their branches without raising claims. This would not be the case if there were, as you allege, a systemic flaw in Horizon or Post Office's operating practices wrongfully causing losses to postmasters.
- 2.1.3 In fact, the Horizon system works well. As with any IT system, there is always scope for making it easier to use, but it is not a difficult system to use and Post Office's operating procedures are not difficult to follow. The Claimants and their assistants could and should have followed those procedures. If and insofar as they have not done so, postmasters are liable to Post Office for the losses they have caused it, and not the other way around.
- 2.1.4 The Letter of Claim puts forward general allegations but does not assert any specific, properly particularised, claims. It lacks proper particulars of breach and does not address questions of causation and loss at all. It provides almost no details of the circumstances of individual Claimants. In breach of your firm's professional duties, it makes claims of fraud and bad faith without proper particulars or support. It adopts a scattergun approach, advancing as many claims as are as possible in the hope that

something will stick. This approach is contrary to the Overriding Objective under the Civil Procedure Rules and is unacceptable.

- 2.1.5 The claims proceed from a fundamentally flawed understanding of the relationship between postmaster and Post Office. That relationship is principally governed by express contractual terms that do not aid your clients' cases and are in many respects inconsistent with them. You have attempted to imply a wide range of extra terms which would completely reverse the relationship. These terms are unnecessary and unreal, they contradict the express terms of the relationship and they are denied.
 - 2.1.6 The true meaning of the Postmaster Contract, in the context of the current dispute, is that postmasters are responsible for any shortfalls occurring in their branches. These shortfalls represent real losses to Post Office and postmasters are liable for those losses unless they can prove that a breach of contract or other wrongdoing by Post Office was the cause. No postmaster has been able to discharge this burden in any case we have seen and you have presented no evidence to this effect in the Letter of Claim.
 - 2.1.7 The underlying theme to all the claims is that Post Office did not prove that a postmaster had caused a loss before it held them liable for that loss. Once one understands the essential legal relationship between Post Office and its agents, one can see that your clients' claims proceed from the wrong starting point – the burden being on the postmaster, and not on Post Office, to show that a shortfall in their branch is not the result of any failure for which they are responsible. Moreover, your clients' allegations around Horizon, training and support, access to information, concealment of issues and prosecutions, are legally unsustainable. They are, in any event, denied as a matter of fact.
 - 2.1.8 Even if we were wrong about the above, the levels of compensation payable to the Claimants would be low. There is no causal link between your allegations and the vast majority of the losses alleged to have been suffered by the Claimants. You have also attempted to advance claims in circumstances where Post Office has done nothing unlawful, such as where it has terminated contracts on notice, which it is entitled to do without cause: claims based on lawful termination are bound to fail. In any event, many of the asserted heads of loss are irrecoverable at law.
 - 2.1.9 Many of the Claimants are making claims that have no prospect of success because they are time-barred, cannot be advanced in civil proceedings because they have already been determined in a Criminal or Civil Court or have been waived under binding settlement agreements. These claims should be discontinued. So should the claims made on the basis of allegations of fraud, malice and bad faith for which there is no proper basis and which should never have been made.
 - 2.1.10 One consequence of advancing these claims is that they have highlighted that a number of the Claimants have not repaid shortfalls in their branches to Post Office. Should the Claim Form be served and the action proceed, Post Office intends to advance counterclaims for those outstanding sums.
 - 2.1.11 It is accepted that there are a few common issues that bind some of the Claimants together. Should your clients be minded to pursue their claims, it is agreed that any common issues should be addressed by way of a Group Litigation Order (**GLO**). However, it should be recognised that most of the issues turn on the specific facts of individual cases – a point we explore at the end of this letter.
- 2.2 The structure of this letter is as follows:
- Section 3 **Post Office's knowledge of the dispute.** This section highlights the lack of particularity in the Letter of Claim and addresses a number of inaccuracies in your understanding of the history of this matter.

- Section 4 **Relationship between Post Office and the Claimants.** This section sets out the factual background to and reality of the Post Office and postmaster relationship and discusses the legal duties within that relationship.
- Section 5 **Factual allegations.** This section addresses the factual allegations you have advanced and highlights the difficulties your clients face in relying on the general allegations made by Second Sight to underpin their claims.
- Section 6 **Heads of claim.** This section addresses the causes of action you have advanced and the principal deficiencies of those causes of action.
- Section 7 **Loss and damage.** This section addresses the difficulties your clients face in recovering loss and dealing with issues of causation.
- Section 8 **Barred claims.** This section addresses those claims that should be discontinued because they are time-barred, an abuse of process or are already settled.
- Section 9 **Counterclaims.** This section sets out the counterclaims that Post Office will advance if the claims proceed.
- Section 10 **GLO and other case management issues.** This section addresses the reserved points from other correspondence on the GLO, including why your formulation of the GLO Issues is unworkable.
- Section 11 **Non-victimisation.** This section explains that Post Office has not unlawfully victimised any postmaster, that there is no need for the assurance you seek and that Post Office cannot be expected to give that assurance.
- Section 12 **Disclosure and information requests.** This section responds to your disclosure requests and your questions in relation to the Official Secrets Act and access to Second Sight.
- Section 13 **ADR.** This section responds to your suggestion of mediation.
- Section 14 **Next steps.** This section sets out suggested next steps in this matter, including asking you to provide a substantive response to this letter.
- 2.3 The body of this letter refers to the Schedules below which address in more detail particular issues raised by your Letter of Claim:
- Schedule 1 **Claimants' disclosure requests**
- Schedule 2 **Schedule of information on Claimants**
- Schedule 3 **History of events**
- Schedule 4 **Background information on the operation of a Post Office branch**
- Schedule 5 **Contract models and variations**
- Schedule 6 **Rebuttal of allegations against Horizon**
- Schedule 7 **Glossary**
- 2.4 When you sent the Letter of Claim there were 91 Claimants on the Claim Form. Yesterday you sent us an Amended Claim Form, now showing 198 Claimants. Given that we committed to responding to the Letter of Claim by today, we have proceeded with sending this letter despite not having been afforded the opportunity to consider the circumstances of the additional 107 Claimants. In any event, other than providing their names and addresses, you have provided no more information on these additional claims. We therefore assume that the points made in the

Letter of Claim are intend to also apply to the additional Claimants. Accordingly, where this letter refers to "Claimants", the points made apply (subject to the above caveat) to all 198 Claimants unless otherwise stated.

- 2.5 Our client's position in respect of the 107 additional Claimants is fully reserved (as is our client's position on the validity of the amendments made to the Claim Form). We will respond to your letter of 27 July 2016 under separate cover.

3. POST OFFICE'S KNOWLEDGE OF THE DISPUTE

- 3.1 In Section A of the Letter of Claim you set out a long (and often inaccurate) history of events. Your purpose for doing so appears to have been so that you can then:
- 3.1.1 assert that Post Office is fully aware of the claims being raised, thereby apparently attempting to justify the lack of a proper explanation of these claims within the Letter of Claim,¹ and
 - 3.1.2 paint a false picture that Post Office has obstructed investigations to date or (worse) sought to mislead postmasters and others.²

A. Post Office's knowledge and the need for better particulars

- 3.2 Almost all of the points raised in the Letter of Claim are of an entirely general nature. There are few details about individual Claimants, no proper particulars of breach and no particulars of loss at all. This generic approach to the claims is not constructive. Nor is it justified by the history of this matter.
- 3.3 You have attempted to excuse this absence of information by saying that Post Office is already aware of the claims that will be advanced by the 91 Claimants due to their involvement in the Scheme.³ This is incorrect.
- 3.3.1 Twenty-one of the 91 Claimants did not participate in the Scheme and our client has no knowledge of the claims they might assert.⁴
 - 3.3.2 For those Claimants who participated in the Scheme, our client is aware of some of the factual allegations that might be raised in this litigation. However, those allegations were advanced some two years ago, which gives rise to the possibility that some allegations may now have been dropped and new allegations may now be advanced. In any event, during the Scheme those Claimants generally did not identify the causes of action on which they relied, provide particulars of breach or address questions of causation.
- 3.4 You will no doubt have been provided with the investigation reports produced during the Scheme. Even from a cursory review, it is readily apparent that each Claimant's case will be markedly different to the next one, turning very much on its individual facts. The fact that they span at least a 16-year period also makes it difficult to draw together common strands about Post Office's operational practices (which have of course changed over time). We highlight these points in this letter, but for example:

¹ Paragraph 15, Letter of Claim

² Paragraphs 45 to 47 and 127, Letter of Claim

³ Letter from Freeths to Bond Dickinson dated 23 May 2016

⁴ It should be noted that of the twenty-one, three are wives of applicants to the Scheme (Sharon Brown is the wife of Thomas Brown (M019), Gillian Howard is the wife of Graham Howard (M060), and Carol Riddell is the wife of Alan Riddell (M063)). In respect of Gillian Howard and Carol Riddell, the Scheme treated Mrs Howard as the Applicant and Mr and Mrs Riddell were treated as joint Applicants.

- 3.4.1 **Training.** Allegations about training will turn on when the training was required. Standard training programmes have changed considerably over time. Training is also partly driven by the needs of individual postmasters. It is not therefore possible to draw an inference from one postmaster's experience of the training provided and say that it applies to many postmasters.
- 3.4.2 **ATMs.** Allegations about difficulties with operating ATMs will not affect all Claimants as not all Claimants had branches that operated ATMs, not all Claimants will allege a difficulty with an ATM, different ATMs have been operated over time and even for one particular type of ATM, there are several different aspects of its operation that could be in issue. These variations are not just specific to ATMs but also apply to many other products and services offered by Post Office.
- 3.4.3 **Prosecutions.** Allegations about sufficiency of evidence for prosecutions will clearly turn on the evidence available in particular cases.
- 3.5 In circumstances where there are so many material differences between the Claimants, dealing with this matter at a general level only will create a lot of work but little forward progress in understanding the claims being advanced. A clear understanding of each Claimant's particular claims is critical to conducting this litigation in an efficient manner – a point to which we return in the section below on the draft GLO.
- 3.6 We believe it would be most beneficial to provide this information at the pre-action stage. The Practice Direction on Pre-Action Conduct requires that a Letter of Claim should include "*the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant, and if money, how the amount is calculated*".⁵ Your purported Letter of Claim does not attempt to meet these requirements.
- 3.7 You have made the point in other correspondence⁶ that to provide details at this time of the claims being advanced by the Claimants would be inefficient given that a GLO may in the future require such information to be pleaded. The need to plead your clients' cases in the future does not relieve them from their normal pre-action duty to provide information about their claims.
- 3.8 The lack of particularity is compounded by the fact that you have alleged fraud, malice and bad faith on the part of Post Office.⁷ You will be aware of your professional duties regarding advancing such claims, including your duty to have credible material to justify such allegations. If you have such material, you should be able to advance these claims with a good level of particularity. That you have not done so is unacceptable. We deal with this point further when addressing the claim for deceit.
- 3.9 We invite you again to provide proper pre-action information about the Claimants.

B. Inaccurate history

- 3.10 We have set out a correct history of events in Schedule 3. This rebuts the inference that you try to draw that Post Office has obstructed investigations to date or worse sought to mislead postmasters and others. Key corrections to your erroneous version of events include that:
- 3.10.1 Contrary to your version of events, Post Office has not claimed Horizon is error-free.⁸
- (a) Post Office has always been live to the possibility of errors in Horizon. Indeed, it informed Second Sight about certain errors during Second Sight's initial Inquiry. Post Office does however maintain that it has been presented with no evidence

⁵ Paragraph 6(a), Practice Direction on Pre-Action Conduct

⁶ Freeths' letter to Bond Dickinson dated 7 June 2016

⁷ Paragraph 9, Letter of Claim

⁸ Paragraph 45 to 46, Letter of Claim

that errors in Horizon have caused postmasters to be held wrongfully liable for shortfalls in branches.

- (b) This view is underpinned by the case of Castleton v Post Office⁹ where the High Court found that it was:

"inescapable that the Horizon system was working properly in all material respects".

- (c) It is also supported by Second Sight's conclusion in its Interim Report, a conclusion that it has never withdrawn:

"We have so far found no evidence of system wide (systemic) problems with the Horizon software".¹⁰

- 3.10.2 Contrary to your version of events, the claims are limited to a relatively small number of postmasters.

- (a) The inference drawn from your history is that alleged problems at Post Office were having wide ranging effects on many postmasters on a national level. In fact, only a small number of postmasters have raised complaints. Although there have been tens of thousands of postmasters over the years, only 47 took part in Second Sight's initial Inquiry and only 150 applied to be part of the Scheme, this is despite long running (and inaccurate) media reporting and previous attempts to bring group legal proceedings against Post Office.
- (b) Within any large organisation, such as Post Office, unsurprisingly there will be a small group of unsatisfied individuals. Their views are not representative of the wider postmaster community.

- 3.10.3 Contrary to your version of events, Post Office has sought transparently to investigate the concerns of postmasters.

- (a) Post Office has not sought to conceal matters as you allege¹¹ but has gone well beyond what many organisations would have done to investigate and discuss the allegations put forward. It would not have set up and funded an extensive mediation scheme if it was seeking to avoid issues. Indeed, at the end of its Part Two Report, Second Sight say:

"...we wish to place on record our appreciation for the hard work and professionalism of Post Office's in-house team of investigators, working for Angela Van Den Bogerd, Post Office's Head of Partnerships.

Our work would have been much harder and taken much longer without the high quality work carried out by this team. We have also received excellent support from the administrative team set up by Post Office to support the Working Group." ¹²

- 3.10.4 Contrary to your version of events, Post Office supported the Scheme through to its full conclusion.¹³

- (a) You allege that Post Office unilaterally shut down the Scheme in order to suppress Second Sight's findings and to frustrate the resolution of complaints.¹⁴

⁹ [2007] EWHC 5 (QB)

¹⁰ Paragraph 8.2, Second Sight's Interim Report

¹¹ Section E: Concealment, Letter of Claim

¹² Paragraphs 26.5 and 26.6, Second Sight's Part Two Report

¹³ As set out in Schedule 3, Section 5B

¹⁴ Paragraphs 39 to 42, Letter of Claim

In fact, the Working Group to the Scheme was closed down due to JFSA's refusal to participate in meetings. Post Office nevertheless continued to fund Second Sight so that it could complete all its investigations and publish its Part Two Report to Scheme applicants. Post Office also continued to offer mediations to Scheme applicants long after JFSA abandoned the Scheme.

3.10.5 Contrary to your version of events, Post Office did not unilaterally fetter the scope of Second Sight's work.¹⁵

- (a) Second Sight was engaged within agreed written terms of reference – those terms being mutually approved by Second Sight, JFSA, MPs, the Working Group and Post Office. Post Office never sought to vary those terms of reference. It was Second Sight that decided to step outside those terms and purport to investigate matters that were beyond its expertise. Regrettably, this led to Second Sight reaching a number of unsupported and incorrect conclusions.

4. RELATIONSHIP BETWEEN POST OFFICE AND THE CLAIMANTS

4.1 We set out below our client's position on the contractual relationship between Post Office and postmaster using the following structure:

- A Factual background to the relationship
- B Express terms in the Postmaster Contract.
- C Implied terms
- D Fiduciary duties
- E Duty in tort
- F Burden of proof
- G Governing law and jurisdiction

4.2 In Schedule 4 we have set out a detailed factual background to the relationship between Post Office and postmaster. That Schedule should be read carefully. In Section 4A, we summarise some of the points it makes as these inform the approach to be taken to the construction of the agreement between each postmaster and Post Office and the terms that fall to be implied into that agreement. Section 4C explains that the various implied terms you are seeking do not meet the test for the implication of terms, not least because they are not necessary for business efficacy and would in many cases contradict the express terms of the agreement discussed in Section 4B.

4.3 As explained in Schedule 5, there are several forms of contract between Post Office and postmasters. In this letter, we have, like you, concentrated on the Standard Subpostmaster Agreement (as varied from time to time). This is because the vast majority of the Claimants were engaged under such agreement. For convenience, this letter refers to the agreement as "the Postmaster Contract", but it should be borne in mind that there are other contracts between postmasters and Post Office.

A. Factual background

4.4 As is made clear in the Postmaster Contract, postmasters are independent business people. They are not employees. They act as agents of Post Office and owe to it the fiduciary duties that

¹⁵ Paragraph 32, Letter of Claim and as set out in Schedule 3, Section 5A

flow from that relationship. At a commercial level, postmasters operate their branches in a way that is analogous to the operation of a franchise. The Postmaster Contract is, on its express terms, a contract for services and not an employment contract, a point which the courts have emphasised more than once.¹⁶

- 4.5 Postmasters benefit from the infrastructure provided by Post Office and from the “footfall” that the Post Office services bring to the retail businesses (such as convenience stores) that postmasters typically operate in the same premises. It is fundamentally a business-to-business arrangement under which the postmaster stands to profit if he manages his Post Office operations efficiently. Post Office covers the costs of providing (amongst other things) equipment, working cash, back-office administration and national advertising, as well as providing the benefit of contractual arrangements with third-party clients and suppliers.
- 4.6 Postmasters are not required to make long term, expensive commitments to Post Office when they take up appointment. Although they have certain upfront costs (e.g. fit out costs) so does Post Office in that it must provide working capital, equipment, etc. The Postmaster Contract also expressly provides that it is terminable on three months' notice by either party.
- 4.7 The cash and stock in a branch is owned by Post Office; it is not the property of the postmaster but is in their custody as agent to Post Office. Given the scale and geographical spread of the Post Office network, postmasters are required to undertake transactions using Post Office's cash and stock and render branch accounts in accordance with Post Office's operational instructions. Beyond the terms of the Postmaster Contract and the operational instructions provided by Post Office (and compliance with applicable legislation), a postmaster is free to operate in accordance with their own judgement and business interests (including to the extent that any retail business is enhanced by the provision of Post Office services).
- 4.8 Postmasters may employ assistants to undertake work on their behalf but for which the postmaster nonetheless remains responsible. The recruitment, training, remuneration and management of assistants are under the full control of the postmaster, who is responsible for the suitability, competence, diligence and honesty of their assistants, and the postmaster may not rely on their assistants' failings to excuse any failure properly to account to Post Office or to discharge any of the other obligations under the Postmaster Contract.
- 4.9 Post Office has no presence in a branch during normal operations and cannot have first-hand knowledge of the transactions effected in the branch; nor can Post Office oversee the proper performance of the daily, weekly and monthly record-keeping and checks that postmasters are obliged to undertake, such as reconciling cash and stock, etc. By contrast, a postmaster (either directly or through their assistants) has full control over branch operations in that they have:
 - 4.9.1 physical control over the cash and stock in the branch;
 - 4.9.2 decision making control over what transactions are entered into their branch accounts; and
 - 4.9.3 access to first-hand and contemporaneous knowledge (their own or that of their assistants) as to the transactions that have taken place, allowing them effectively to investigate any discrepancy between what is recorded what in fact took place (e.g. a cash withdrawal of £100 having been recorded erroneously as a withdrawal of £1,000).
- 4.10 A postmaster has obligations to ensure that checks and controls over these matters are carried out and the truth of cash balances and accounts are affirmed on an ongoing basis. These are

¹⁶ Wolstenhome & Ors v Post Office Ltd [2003] ICR 546: *"In any event, particularly in the light of the previous EAT decisions, with which we entirely agree, the arguments against these contracts being contracts of employment appears overwhelming. There are not just the relatively limited ambit of control and the substantial absence of undertaking of personal service, but also the factors which were so influential with Slyn P in Hitchcock, including the fact that the sub-postmaster is providing his own premises and his own equipment and at least has the right to provide his own staff and to run his own business, subject to keeping separate accounts."*

important. Consistent with this and with their status as a fiduciary, the postmaster is responsible for shortfalls of cash and stock shown in their branch accounts.

- 4.11 Since 1999,¹⁷ Post Office's operational instructions have required that a postmaster uses the point of sale and accounting system, Horizon, to conduct transactions and render branch accounts. Horizon is subject to numerous quality control processes, including third party accreditations. It has been used by over hundreds of thousands of users since it was established. Like any software system, it has been found over time to suffer from occasional technical defects (sometimes referred to as "bugs"), and these have been addressed when detected (see Schedule 6). It has nonetheless functioned well and without the endemic network-wide problems that you allege. Without proof of such systematic errors, which is altogether lacking, the claims you allege are bound to fail. The supposed existence of systematic problems has at various times been disproved, not least by the simple fact that thousands of postmasters have operated and continue to operate their branches using Horizon without significant problem.
- 4.12 As noted above, no complex IT system like Horizon could ever be affirmed to be entirely free from defects and/or fool-proof. Quite apart from bugs, any software system can be modified over time to improve the user experience, including to provide greater ease of use and robustness to misuse or to accommodate different working habits. Post Office does not hold out Horizon as being perfect, and no organisation could ever hold itself out as achieving such an impossible standard. The key point is that there are however in place robust safeguards and controls to allow Post Office and postmasters to identify and remedy errors (whether resulting from bugs or user error or a combination of the two), and Post Office has a track record of pro-actively identifying and remedying such issues. There can be no question of Post Office having breached any obligations in this regard.
- 4.13 Given the scale of the Post Office network and the volume of transactions being processed, there will occasionally be discrepancies in branch accounts and shortfalls of cash and stock in branches. We anticipate that these discrepancies are likely to be the source of many if not all of the complaints that underpin the claims. Where the Claimants have been unable to find the root cause of shortfall, they have often sought to blame Horizon (albeit without evidence of the same and without being able to show that they were not responsible for the shortfall). Where the root cause of shortfalls has been identified, it has been found to be errors (i.e. breaches of required operational procedures causing Post Office loss) and/or dishonesty (i.e. theft or other deliberate misfeasance causing Post Office loss) on the part of the postmasters or their assistants for whom they are responsible.
- 4.14 It is important to note that a shortfall in a branch's accounts reflects a real loss to Post Office, rather than a mere accounting error. The loss may take different forms: a physical loss of Post Office cash or stock or an accounting error that causes Post Office to overpay or under-recover monies from third parties. In either case, the error or dishonesty of the postmaster and/or their staff imposes an economic loss on Post Office which it is entitled to recoup from the responsible postmaster.
- 4.15 Without prejudice to the fundamental point that postmasters are liable for shortfalls in their branches, Post Office has put in place many processes that postmasters can use to identify, correct, and prevent, or at least minimise, the incidence and consequence of errors:
 - 4.15.1 Postmasters are required to conduct daily cash balances and monthly trading balances of all cash and stock. There are also a wide range of other daily and weekly reports and checks that can be conducted in branch. These will help show any shortfalls in the branch and may help identify the root cause. Post Office relies on postmasters performing these functions in accordance with the Postmaster Contract as a means of protecting itself and postmasters from losses that cannot later be investigated and explained.

¹⁷ Horizon was piloted in 1997 with roll out being started in 1999. The majority of branches were migrated to Horizon in 2000.

- 4.15.2 Post Office makes training available for postmasters regarding Horizon and its operating instructions. It is the responsibility of the postmaster (not Post Office) to identify their own training needs and to identify any training needs of their assistants beyond the training materials provided by Post Office.
- 4.15.3 Post Office provides helplines that assist with operational queries and technical issues with Horizon, as well as providing further on-site support where requested and appropriate to do so. This support also includes the ability to escalate issues to more senior subject matter experts within Post Office as required.
- 4.15.4 Post Office reconciles data from third parties against data recorded by branches on Horizon. Unresolved anomalies are then flagged to a branch and can be investigated and confirmed or disputed by the postmaster, relying on his or her first-hand knowledge of the branch's operations.
- 4.15.5 At the technical level, Horizon has built in recovery processes that, so long as properly followed by the postmaster, prevent shortfalls being created in a branch's accounts as a result of *inter alia* interrupted sessions or power and telecommunications failures.
- 4.15.6 Any transactions generated by Post Office (as opposed to being generated in branch) will only be done with the knowledge of the postmaster (or their assistants), Post Office having provided the postmaster with sufficient information of the transaction and the opportunity to seek more information if desired. For example, transaction corrections issued by Post Office will be accompanied with supporting evidence / documentation and/or a contact number of someone at Post Office who can provide further information.
- 4.15.7 There are processes in place that allow a postmaster to dispute any discrepancy in their accounts for which they believe they are not responsible. Disputed sums can be placed in suspense, allowing the branch accounts to be rendered accurately while the matter is investigated. Such issues can then be escalated to Post Office for further assistance and investigation.
- 4.16 Where requested to do so, Post Office has cooperated with postmasters in investigating any discrepancy. Post Office accepts that it has a duty to provide cooperation to the extent necessary to allow postmasters generally to comply with their obligations under the Postmaster Contract. However, given Post Office's limited ability to know the exact operational situation "on the ground" in any particular branch, it may not be possible or reasonably practicable for Post Office to identify the root cause of some discrepancies or even to provide effective assistance in this regard. This is especially the case where the postmaster has failed to ensure proper cash balances, records and checks have been carried out from time to time as required, which can often then make it impossible to identify the root cause. That the root cause of a shortfall has not been identified does not negate the loss suffered by Post Office as a result of the shortfall or the fact that the postmaster is liable for it in accordance with the Postmaster Contract and role as agent to Post Office.
- 4.17 Irrespective of its strict legal rights and duties, Post Office always seeks to reach a mutually agreed outcome with a postmaster whenever there is a dispute about a transaction or a discrepancy, and does so successfully in the majority of cases. It is in Post Office's commercial interests to reach a satisfactory and agreed outcome where it can. In rare cases, where a dispute cannot be resolved, Post Office will consider whether it feels safe to continue with the postmaster as its agent and, if not, may terminate the postmaster's appointment (typically on notice unless there are other circumstances that justify summary termination). As we have already noted, Post Office may terminate a postmaster's appointment on notice at any time and for any reason (whether good or bad), just as a postmaster can resign on notice at any time and for any reason.
- 4.18 In some cases, shortfalls in a branch are regrettably caused by theft by a postmaster (or their assistants) or are covered up through the postmaster (or their assistants) submitting false accounts. False accounting is a particularly toxic act that destroys the accounting audit trail,

making finding the root cause of shortfalls very difficult, if not impossible. For this reason, Post Office investigates these incidents and, where appropriate, prosecutes those it believes to be responsible. As is to be expected, false accounting and theft will often result in the summary termination of the postmaster's engagement.

B. Express terms

- 4.19 The nature of the relationship as explained above is reflected and recorded in the express terms of the Postmaster Contract.
- 4.20 The express terms make clear that the postmaster is an agent of the Post Office who may act through others and is not an employee of Post Office:¹⁸
- 4.20.1 *"The contract is a contract for service and consequently the Subpostmaster is an agent and not an employee of Post Office Ltd." (Section 1, Clause 1).*
- 4.20.2 *"If [Post Office] alters the services to be provided or withdraws a service the Subpostmaster has no claim to compensation for any disappointment which may result from the change." (Section 1, Clause 7)*
- 4.20.3 *"The terms of appointment of Subpostmaster do not entitle the holder to be paid...compensation for loss of office." (Section 1, Clause 8).*
- 4.20.4 *"The Subpostmaster is not obliged to attend the Post Office branch personally but he is required, whether he is there or not, to accept full responsibility for the proper running of his Post Office branch and the efficient provision of those Post Office services which are required to be provided there. Retention of the appointment as Subpostmaster is dependent on the Post Office branch being well managed and the work performed properly to the satisfaction of Post Office Ltd." (Section 1, Clause 5).*
- 4.20.5 *"A Subpostmaster, under the terms of his contract, is not obliged to render personal service and is therefore free to absent himself from the office, provided he makes suitable arrangements for the conduct of the office during his absence.*
- [...]*
- A Subpostmaster's responsibility for the proper conduct of the office, or for any losses occurring during his absence, is in no way diminished by his absence from the Post Office branch." (Section 3)*
- 4.20.6 *"The Subpostmaster must provide and maintain, at his own expense, reasonable office accommodation required by Post Office Ltd, and pay also at his own expense, any assistants he may need to carry on Post Office Ltd business." (Section 1 Clause 3).*
- 4.20.7 *"The Subpostmaster is expressly forbidden to make use of the balance due to Post Office Ltd for any purpose other than the requirements of the Post Office® service; and he must, on no account apply to his own private use, for however short a period, any portion of Post Office Ltd funds entrusted to him. He must also be careful to keep the Post Office® money separate from any other monies. Misuse of Post Office Ltd cash may render the offender liable to prosecution and, or, the termination of his Contract of Appointment." (Section 12, Clause 3).*
- 4.20.8 *"The Subpostmaster is held strictly responsible for the safe custody of cash, stock of all kinds and other Post Office Ltd property, papers and documents, whether held by himself or by his Assistants, and should keep them in a place of security, especially at night." (Section 12, Clause 5)*

¹⁸ We agree that Post Office changed its name from Post Office Counters Ltd to Post Office Limited in 2001 and so have expressed the contract terms based on that variation (see Schedule 5).

4.21 The express terms make clear that the postmaster may employ assistants, that the postmaster is responsible in all respects for such assistants, including their competence and suitability for the performance of the tasks entrusted to them by the postmaster, and that the postmaster is responsible for these assistants and remains responsible for any losses that result from their incompetence, unsuitability, negligence, dishonesty or any other failings:

4.21.1 *"The Subpostmaster must ...pay also at his own expense, any assistants he may need to carry on Post Office Ltd business."* (Section 1 Clause 3).

4.21.2 *"A Subpostmaster must provide, at his own expense, any suitable assistants with the relevant skills which he may need to carry out the Post Office® work in his sub Post Office® branch ("Assistants")."* (Section 15, Clause 1)

4.21.3 *"The Subpostmaster is responsible for...losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay."* (Section 12, Clause 12)

4.21.4 *"Assistants are employees of the Subpostmaster, and the Subpostmaster will consequently be held wholly responsible for any failure, on the part of his Assistants, to:*

2.1 *apply Post Office® rules or instructions as required by Post Office Ltd;*

2.2 *complete any training necessary in order to properly provide Post Office® Services; and*

2.3 *comply with the obligations set out below.*

The Subpostmaster will also be required to make good any deficiency of cash or stock which may result from his Assistants' actions or inactions." (Section 15, Clause 2)

4.21.5 *"A Subpostmaster, under the terms of his contract, is not obliged to render personal service and is therefore free to absent himself from the office, provided he makes suitable arrangements for the conduct of the office during his absence.*

[...]

A Subpostmaster's responsibility for the proper conduct of the office, or for any losses occurring during his absence, is in no way diminished by his absence from the Post Office branch." (Section 3)

4.21.6 *"Post Office Ltd will:*

7.1.1 *provide the Subpostmaster with relevant training materials and processes to carry out the required training of his Assistants on the Post Office® Products and Services;*

7.1.2 *inform the Subpostmaster as soon as possible where new or revised training will be necessary as a result of changes in either the law or Post Office® Services; and*

7.1.3 *where appropriate (for instance where clause 7.1.2 of this Section 16 applies) update the training materials (or processes) or provide new training materials (or processes) to the Subpostmaster.*

However, it is the Subpostmaster's responsibility to ensure the proper deployment within his Post Office® branch of any materials and processes provided by Post Office Ltd and to ensure that his Assistants receive all the training which is necessary in order to be able to properly provide the Post Office® Products and Services and to perform

any other tasks required in connection with the operation of the Post Office® branch."
(Section 15, Clause 7; emphasis added)

- 4.21.7 *"The Subpostmaster will be responsible for ensuring that transactions are carried out accurately, that all reasonable steps are taken to prevent fraud and that all documentation is properly completed and despatched at the due time...."* (Section 22, Clause 3).
- 4.22 The express terms as to termination make clear that each party may terminate the business relationship on notice without cause and that Post Office may terminate without notice for breach:
- 4.22.1 *"Should the Subpostmaster desire to resign his office he must give three calendar months' notice in writing failing which he shall be liable to bear any expense incurred by Post Office Ltd in consequence..."* (Section 1, Clause 10)
- 4.22.2 *"The Agreement may ... be determined by Post Office Ltd on not less than three months' notice."* (Section 1, Clause 10)
- 4.22.3 *"The Agreement may be determined by Post Office Ltd at any time in case of Breach of Condition by him, or non-performance of his obligation or non-provision of Post Office Services..."* (Section 1, Clause 10).
- 4.23 We agree that the terms set out in paragraph 53 of the Letter of Claim form part of the Postmaster Contract.¹⁹ In addition to the terms set out above, the following terms are also relevant:
- 4.23.1 *"If on resignation of his appointment the Subpostmaster disposes of his private business and/or premises in which the Post Office branch is situated, the person acquiring the private business and/or the premises or exchanging contracts in connection with the purchase of the private business and/or premises will not be entitled to preferential consideration for appointment as Subpostmaster."* (Section 1, Clause 9)
- 4.23.2 *"If a Subpostmaster considers that any stock items have been accidentally lost, or stolen he should make a report, in accordance with Appendix 1, as quickly as possible to Post Office Ltd."* (Section 12, Clause 16)
- 4.23.3 *"The Subpostmaster will be responsible for ensuring that transactions are carried out accurately, that all reasonable steps are taken to prevent fraud and that all documentation is properly completed and despatched at the due time. Where under the terms of its contracts with its clients Post Office Ltd incurs financial penalties as a result of the Subpostmaster's failure in this regard, Post Office Ltd may pass on this additional cost to the Subpostmaster."* (Section 22, Clause 3)
- 4.24 It is principally these express terms that establish and govern the relevant aspects of the legal relationship between Post Office and postmasters. We reject your attempts to replace or modify this relationship by drawing inappropriate analogies with different legal relationships. Post Office will seek appropriate costs orders should your clients waste time and costs seeking to advance any of the misconceived arguments that are set out at paragraphs 52 et seq of your letter, including:
- 4.24.1 The reference to some (undefined) *"true agreement"* between the parties other than that set out in the written contract to which postmasters gave their signature and agreement. You refer in this regard to the decision of the Supreme Court in *Autoclenz v Belcher*²⁰ where, exceptionally, it was found that the words of the written *"agreement"* between the parties did not reflect what had in fact been agreed. There is no possible

¹⁹ Subject to one minor variation as the section quoted in paragraph 53.10 of the Letter of Claim has been replaced with new but similar wording.

²⁰ [2011] UKSC 41

analogy with that very extreme case, which related to people turning up to work as car washers. Postmasters clearly agreed the terms that they accepted in writing (such terms being the “*true agreement*” between the parties).

- 4.24.2 Despite the reference to Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd²¹ in footnote 13 of the Letter of Claim, you have not identified any terms that you contend to be onerous or unusual in the relevant sense; nor have you explained what steps ought to have been and were not carried out to bring such terms to the attention of postmasters. In any event, the principle in Interfoto cannot assist your clients, not least because they entered into the Postmaster Contract on a business-to-business basis.
- 4.24.3 The suggestion that the Postmaster Contract includes an implied duty of good faith (and even an implied duty of trust and confidence) because it qualifies as a “*relational*” contract in the sense that term is used in Yam Seng Pte v International Trade Corp²². We address this point in detail below. In short, Yam Seng does not establish any special rule for contracts that may be categorised as “*relational*” and, in any event, the agreements at issue here are not, on the facts, “*relational*” contracts.

There is no “*analogy with the employment context*” as alleged at paragraph 61 of the Letter of Claim. This is clear from cases such as Wolstenhome²³, which indicates that the better analogy is that of a franchise agreement. The Postmaster Contract does not give rise to an employment relationship and does not fall to be treated as such for the purposes of interpretation and/or implying terms. We deal with these points in more detail further below.

C. Implied terms

- 4.25 At paragraph 52 of the Letter of Claim, you say that Post Office's standard contracts are “*replete with power and discretion in the hands of the Defendant*”. You do not however identify the particular powers or discretions that Post Office allegedly wields, nor identify the terms which allegedly confer those powers or discretions. We do not consider the point you make in paragraph 52 to have any substance, but will reconsider it if you explain the alleged legal significance of the point.
- 4.26 You go on to reference Post Office's “*ability to prosecute Subpostmasters*”. This is not a contractual right but a statutory right of all persons in England and Wales to bring a private prosecution.²⁴ Any principal, retailer or franchisor like Post Office would have the same right. Further, Post Office has no ability to prosecute in Scotland or Northern Ireland. Subject to what you say about jurisdiction and governing law,²⁵ we cannot see how the statutory right to prosecute has any bearing on the construction or implication of contractual terms, particularly given that that right is only applicable to that part of the Post Office network located in England and Wales.
- 4.27 You also refer to the “*asymmetry of information*” between Post Office and postmaster: the implication being that the Postmaster Contract is weighted towards Post Office because it holds more information than a postmaster. For the reasons stated above,²⁶ we disagree that Post Office holds more information than a postmaster. There is often critically important information to which only the postmaster has access, and Post Office cooperates with postmasters by providing them with such information as is necessary to the discharge of their obligations under the Postmaster Contract.

²¹ [1987] EWCA Civ 6

²² [2013] EWHC 11 at [143]

²³ [2003] ICR 546

²⁴ We explore this issue in more detail at Section 5F below

²⁵ See Section 4G

²⁶ At paragraph 3.3 and further explored at Schedule 4 below

- 4.28 At paragraph 55 of the Letter of Claim you describe the contractual relationship between postmaster and Post Office as "*a long term relationship to which the parties made a substantial commitment*". This characterisation of the relationship overlooks the express terms of the Postmaster Contract which permits termination by either party, without cause and with no exit penalties, on three months' notice. The postmaster is not required to make long term, expensive commitments in the form of investments specific to the provision of Post Office services. Although they have certain upfront costs (e.g. fit out costs) so does Post Office in that it must provide working capital, equipment, etc. Not for the first time, your argument ignores the clear terms of the Postmaster Contract.
- 4.29 As touched on above, you draw on case law applicable to employment relationships in paragraphs 61 and 64 of the Letter of Claim, and seek to argue that this case law is applicable here because the role of postmaster is analogous to the role of an employee.
- 4.29.1 It is denied, if it is alleged, that postmasters are employees. We refer to the express terms and case law set out above. We trust that your clients agree with this position. Please confirm this.
- 4.29.2 Your reason for saying that the agreement is akin to an employment contract is based on the notion that a postmaster has "*obligations which are personal*".²⁷ This is again flatly contradicted by the express terms identified above: the postmaster is not obliged to provide personal service and is entitled to perform his or her obligations under the agreement through assistants (although the postmaster of course remains responsible for the actions of those persons). There is no requirement for personal service as in an employment relationship.
- 4.29.3 We do not accept that the Postmaster Contract is akin to an employment contract. If an analogy is to be drawn at all, a more appropriate analogy would be with a franchise agreement. In any event, there is no principle of law under which terms implied by law into employment contracts are to be implied into non-employment relationships that are in some respects similar to employment relationships. There are only limited circumstances in which the Court will imply terms as a matter of law (rather than on the facts of the specific agreement), and the case you advance does not fall even arguably within any of those circumstances.
- 4.30 There is accordingly no arguable basis on which a term as to mutual trust and confidence could be implied. To the extent that reference to loosely analogous contractual relationships may be useful, we note that the terms of the kind your clients would imply have been found not to be appropriate to franchise agreements: see Jani-King (GB) Ltd v Pula Enterprises Ltd and others²⁸ and Carewatch Care Services Ltd v Focus Caring Services Ltd and Grace²⁹. These cases reinforce our contention that no such terms would be implied in this case.
- 4.31 As we have noted above, the attempt to rely on Yam Seng is equally misconceived, for two reasons:
- 4.31.1 Contrary to the reasoning at paragraphs 55 to 57 of the Letter of Claim, there is no special rule for "*relational*" contracts: see Globe Motors Inc & Ors v TRW Lucas Varity Electric Steering Ltd & Anor³⁰, Carewatch Care Services³¹ and Greenclose Ltd v National Westminster Bank plc³². The categorisation of an agreement as "*relational*" does not modify or relax the strict test for the implication of terms.
- 4.31.2 In any case, the Postmaster Contract is not a "*relational*" contract in the sense that term is used in Yam Seng. You say at paragraph 55 that the agreement gave rise to "a

²⁷ Footnote 19, Letter of Claim

²⁸ [2007] EWHC 2433 (QB)

²⁹ [2014] EWHC 2313 (Ch)

³⁰ [2016] EWCA Civ 396 per Beatson LJ at [65]

³¹ (n29) at [108]

³² [2014] EWHC 1156 (Ch) at [150]

long term relationship to which the parties made a substantial commitment", but that is unsustainable. The express terms of the agreement provide that it is terminable without cause on relatively short notice (3 months), and postmasters are not required to make significant relationship-specific investments. Your argument fails on the facts as well as the law.

- 4.32 It is on the basis of the false premises that the Postmaster Contract is (or is analogous to) an employment agreement and/or should be treated differently because it is a "*relational*" contract that you seek to imply a wide variety of other terms. The true position is that any term to be implied must meet the strict test of necessity that governs the implication of all terms on the facts (as set out in Marks and Spencer plc v BNP Paribas Securities Services³³). The arguments you have advanced do not satisfy that test.
- 4.33 Indeed, the process of implication that you put forward involves a transparent attempt to set aside the parties' actual agreement and replace it with one that your clients consider would be "*fairer*" to them (as viewed with the benefit of hindsight), rather than applying the law as set out in Marks and Spencer. We do not intend to traverse each of the terms that you advance. We instead address below several of the terms that you propose, using them as representative examples, and give the reason(s) for which each is unsustainable:
- 4.33.1 You propose a term requiring Post Office "*properly to account for, record and explain all transactions and any alleged shortfalls which were attributed to the Claimants*".³⁴ This is contrary to the express terms of the Postmaster Contract, which impose accounting obligations and responsibility for transactions and shortfalls on postmasters, not Post Office. It is also impossible to conceive of such an obligation "*going without saying*" given that it is postmasters that have the principal access to information about transactions undertaken, and cash and stock physically held, at their branch (you conveniently overlook this important fact). It would require an express term to shift responsibility for explaining transactions away from the party with first-hand knowledge of, and accounting responsibility in relation to, those transactions.
- 4.33.2 You then propose a term debarring Post Office from recovering in respect of shortfalls until it has complied with various implied duties.³⁵ This again flatly contradicts the express terms of the Postmaster Contract, which establish in clear and unqualified terms that postmasters are responsible for shortfalls and must make them good. The term is in any event so specific (relying on Post Office having a "*rational and considered basis*" to seek recovery of the shortfall) that it cannot plausibly be said that this (and no other) is the term that the parties would necessarily have agreed upon had they addressed their minds specifically to this issue (ignoring for one moment that the agreement in fact makes express and complete provision for the recovery of shortfalls).
- 4.33.3 More generally, Post Office maintains that a reasonable contracting party in its position would not even plausibly (let alone obviously) have taken on the onerous obligations in relation to shortfalls that you argue should be implied. Having agreed that the postmaster was to act as Post Office's agent (reflecting their first-hand access to information and responsibility for Post Office cash and stock), it is unreal to suggest that Post Office would then effectively reverse this relationship by itself taking on responsibility for ensuring the accuracy of individual branch accounts and investigating discrepancies. In this context, for example, the idea that it went without saying that Post Office was obliged to "*investigate, rectify or mitigate*" all shortfalls in all branches is fanciful.³⁶ The same applies to the alleged term at paragraph 65.2 of the Letter of Claim.
- 4.34 The terms that your clients put forward do not come close to satisfying the rigorous test of necessity.

³³ [2015] 3 WLR 1843

³⁴ Paragraph 57.2, Letter of Claim

³⁵ Paragraph 57.9, Letter of Claim

³⁶ As alleged at paragraph 62.2 of the Letter of Claim

- 4.35 Post Office accepts that the express terms of the Postmaster Contract and the matrix of fact give rise to the following (hopefully uncontroversial) implied terms. If your clients do not agree that these terms fall to be implied, please explain why. The terms are:
- 4.35.1 Each party must refrain from taking steps that would inhibit or prevent the other from complying with its obligations under the contract (the "Stirling v Maitland³⁷ Term").
 - 4.35.2 Each party must provide the other with such cooperation as is necessary to the performance of that other's obligations under the contract (the "Necessary Cooperation Term").
- 4.36 These terms will of course interact with the express terms of the Postmaster Contract and their effect will vary according to specific factual circumstances. These terms must, for example, yield to (rather than cut across) the express and unqualified rights granted to the parties, such as the right to terminate without cause on notice. They will also, however, give rise to requirements to provide active assistance or information to postmasters in certain circumstances. For example:
- 4.36.1 It is accepted that, in relation to the use of Horizon, Post Office is required to provide postmasters with such information and training as would be necessary for a competent and diligent postmaster to use that system in the discharge of its accounting and related obligations.³⁸
 - 4.36.2 It is accepted that Post Office is required to provide (through its helplines or otherwise) such technical advice and support as would be necessary to enable a competent and diligent postmaster to operate Horizon sufficiently well to discharge the postmaster's accounting and related obligations under the Postmaster Contract.
- 4.37 With these implied terms, there is no need to imply any of the terms that you have suggested; the Postmaster Contract works perfectly well without them.
- 4.38 To the extent that you disagree with the above implied terms, and seek to continue to imply different terms / place a different construction on the Postmaster Contract, we should be grateful for your detailed response to the above.

D. Fiduciary duties

- 4.39 It is denied that Post Office is subject to any fiduciary duties.
- 4.40 First, the Postmaster Contract makes clear that it is the postmaster that fulfils the functions of a fiduciary and not Post Office. The postmaster is entrusted with control of Post Office property without Post Office having immediate oversight, and it is therefore unsurprising that he or she should owe the characteristic fiduciary duty of loyalty and the express duty to account. There is no equivalent relationship in the other direction.
- 4.41 Second, the designation of a person as a fiduciary follows from his undertaking the characteristic obligations of a fiduciary, rather than the status of fiduciary being imposed in order to generate such obligations: see Bristol and West Building Society v Mothew³⁹. Post Office undertook no such obligations, and there is accordingly no basis on which to impose the duties of a fiduciary. Further, the terms of the Postmaster Contract discussed above would in any case negate the imposition of such duties (for the reasons set out above).

³⁷ (1894) 5 B. & S. 841

³⁸ It is also accepted that Post Office is required to provide to postmasters the training materials that would be necessary to enable suitable, competent and diligent assistants to operate the Horizon system. However, this requirement is not the product of an implied term but of Section 15, Clause 7 of the Postmaster Contract (see paragraph 4.21.6 above).

³⁹ [1998] Ch 1 at [18] per Millett LJ

E. Duty in tort

- 4.42 We invite you to withdraw the allegation that Post Office owed a general duty of care in tort. We do not see how any such duty could conceivably avail the Claimants, especially in relation to purely economic loss. In this case, there is no sensible basis on which it could be contended that Post Office assumed a responsibility to postmasters which goes beyond or cuts across the obligations it assumed under the terms of its Postmaster Contract with them.

F. Burden of proof

- 4.43 We anticipate that all or nearly all of the claims will turn on there being a shortfall of cash in a branch and any inquiry into the root cause of that shortfall. If that is not the case, please let us know.
- 4.44 We also anticipate that it will not now be possible to determine the exact root cause of a shortfall in a number of cases due to a variety of reasons, including postmasters' failure to retain adequate records and/or to reveal and investigate discrepancies at the time that they first arose.⁴⁰
- 4.45 It is therefore important to note that your clients will, as the Claimants, bear the burden of proving the matters that they advance, including (presumably) that shortfalls for which they were held responsible were in fact caused by breaches on the part of the Post Office.
- 4.46 In *Post Office v Castleton*⁴¹, the High Court confirmed that a postmaster is bound by the account he renders to Post Office unless he can show that the account was made unintentionally and by mistake. The postmaster faces the burden of proof in this regard.
- 4.47 The position at law fairly reflects the position on the ground. As explained above, Post Office is not aware of the events that occur in any branch and the postmaster has the greater access to relevant information. Post Office can only investigate that which it knows. It is quite right therefore that the postmaster should carry the responsibility for identifying any error in their accounts. This also follows from the fact that the Postmaster Contract on its clear terms imposes responsibility for shortfalls on postmasters. If they wish to show that such treatment would amount to a breach of some other obligation of the Postmaster Contract, they bear the burden of doing so. We accept that Post Office may in some circumstances have an obligation to support a postmaster's investigation in accordance with the implied duties set out above. However, primary responsibility rests with the postmaster and Post Office is not obliged to protect or indemnify a postmaster from the consequences of their failure to discharge that responsibility.
- 4.48 The effect of this is that, to the extent that a postmaster asserts a claim in damages, it is for them to prove the factual basis of that claim, including that a shortfall did not in fact exist or existed only as a result of a breach of duty on the part of Post Office.
- 4.49 Moreover, a postmaster is bound by the accounts they have rendered to Post Office. Where that account shows a derived cash figure in excess of the cash on hand and (absent any other explanation for the shortfall) the postmaster is liable to compensate Post Office for that shortfall.
- 4.50 Post Office's entitlement to such compensation arises as:

⁴⁰ Second Sight comment in the Final CRR for case M084 (at paragraph 4.7) and in the Final CRR for case M138 (at paragraph 4.13) that "*We recognise that, whenever a Subpostmaster falsifies figures to conceal losses, Post Office is prevented from seeing, and therefore also prevented from reacting to, those losses. It follows that, although false accounting can never be the initial cause of a loss, it can exacerbate the impact of the initial loss by preventing its detection and mitigation. False accounting can therefore turn potentially remediable accounting or transaction errors into actual losses and can also prevent the correction of the practices and procedures that generated those losses in the first place*"

⁴¹ [2007] EWHC 5 (QB)

- 4.50.1 a claim in debt arising from the common law duty of an agent to pay over to his principal any amounts due to the principal under an account they have rendered (the postmaster being bound by the account if they cannot show how and why it was wrong); and / or
- 4.50.2 a claim for damages arising from breaches of *inter alia* Section 12, Clause 4 and/or Section 12, Clause 5 and/or Section 22, Clause 3 of the Postmaster Contract in that they have failed to secure Post Office property, not rendered an accurate account and/or not carried out transactions accurately, causing Post Office loss; and / or
- 4.50.3 a claim for an indemnity under Section 12, Clause 12 or Section 15, Clause 2 of the Postmaster Contract, on the grounds that, on the balance of probabilities (the burden of proof being on the postmaster), the shortfall was caused by the postmaster's carelessness, negligence or error and/or by their assistants.
- 4.51 Even where Post Office is shown not to have performed any specific duty, the burden again falls on the postmaster to show that the breach of duty caused the relevant shortfall. Where a postmaster cannot establish that Post Office's acts or omissions caused the shortfall, they will again be bound by the account they have rendered and will be required to compensate Post Office for the shortfall.
- 4.52 From our experience of reviewing cases through the Scheme, we have no doubt that the Claimants will have great difficulty in discharging any burden of proof upon them, not least because of failures to carry out the required (or any adequate) cash balances, record-keeping and contemporaneous checks and investigations as they were required to do.

G. Governing Law and Jurisdiction

- 4.53 The Postmaster Contract does not have a jurisdiction or governing law clause but we note that two Claimants had branches located in Scotland⁴² and two Claimants had branches located in Northern Ireland.⁴³
- 4.54 In respect of these Claimants, please confirm which governing law you consider applies to:
 - 4.54.1 any contractual duties between Post Office and postmaster; and
 - 4.54.2 any non-contractual claims being advanced.
- 4.55 If the governing law is not English law, we should be grateful if you would explain on what basis you consider it appropriate to bring claims on behalf of these Claimants in the High Court of England and Wales.

5. FACTUAL ALLEGATIONS

- 5.1 Sections C and D of the Letter of Claim make a series of factual allegations, some of which are very serious indeed. However, on careful analysis, the supporting explanations are inadequate:
 - 5.1.1 The allegations are of a most general nature with very limited details provided. They are also presented in a confusing structure.⁴⁴ As things stand, these allegations are inadequately particularised and a long way short of the detail required to establish a case, let alone prove any claim against Post Office. We refer again to our comments

⁴² Philip Cowan and Frank Holt

⁴³ Katherine McAlerney and Deirdre Connolly

⁴⁴ See Section D(b) of the Letter of Claim that is entitled "*Helpline, significant discrepancies and the level of error and bugs*" – three discrete topics that appear unrelated.

in Section 3 about the importance of your clients complying with their pre-action duties and providing proper information on their claims.

- 5.1.2 Even in general terms, no explanations are given as to how the facts alleged caused any shortfalls in any branches – this being the critical issue in this matter. You have not provided any examples explaining how particular shortfalls have been caused by particular acts or omissions of which you complain.
 - 5.1.3 Finally, Section F of the Letter of Claim alleges that these allegations amount to breaches of duty or give rise to other causes of action. You have however not linked any specific factual allegation to a breach of any particular duty.
 - 5.2 The vast majority of the factual allegations put forward in Sections C and D of the Letter of Claim are based on Second Sight's Part Two Report. However, this report does not constitute evidence that would be admissible in Court.
 - 5.3 The quality of Second Sight's work also declined after its Interim Report. This decline was closely linked to Second Sight's increasing desire to opine on areas outside their expertise (being areas that were also outside the scope of their engagement). This meant many of the conclusions reached in the Part Two Report are on topics where Second Sight has no expertise and/or suffer from a lack of supporting evidence / reasoned analysis.
 - 5.4 Examples of the Part Two Report commenting on areas outside Second Sight's expertise are as follows:
 - 5.4.1 Second Sight, as a firm of accountants, were not qualified to opine on criminal investigations or prosecutions, nor was Second Sight engaged under its Engagement Terms to do so⁴⁵. This is clear from several documents.
 - (a) Second Sight's Engagement Terms stated:

*"it is acknowledged that matters relating [to] criminal law and procedure are outside Second Sight's scope of expertise and accordingly shall not be required to give an opinion in relation to such matters."*⁴⁶
 - (b) Second Sight acknowledged this limit on its scope of work in one of its Case Review Reports:

*"Issues relating to Post Office's prosecution policy, and the conduct of any prosecution, fall outside our terms of reference."*⁴⁷
- Comments in the Part Two Report on the conduct of any Post Office criminal investigation or prosecution are therefore inexperienced speculation rather than informed opinion.
- 5.4.2 In a number of places, the Part Two Report sets out a view that Post Office had not done enough or had under-performed. Second Sight did this, however, by artificially creating a benchmark standard for Post Office to meet: a standard which went above that required by the Postmaster Contract. Second Sight's views on Post Office's performance therefore proceed on the wrong basis and stem from a misunderstanding of the legal allocation of responsibilities under the Postmaster Contract.
 - 5.5 Examples of the lack of supporting evidence / reasoned analysis in the Part Two Report are as follows:

⁴⁵ Second Sight's Engagement Terms are available for inspection, see paragraph 12A below for further detail.

⁴⁶ Section 5.1, Scope of Services

⁴⁷ Paragraph 5.9, Draft CRR of case M039

- 5.5.1 The Part Two Report lacks facts and examples to substantiate its conclusions. It also fails to describe the overarching methodology used by Second Sight to examine the issues reviewed. These would be fundamental requirements for an expert report purporting to provide sound investigative analysis and conclusions.
- 5.5.2 At numerous points, the Part Two Report treats allegations from postmasters as if they were established facts. Often Second Sight has accepted the anecdotal assertions as true, without weighing those (usually very general) assertions or testing their credibility against the specific evidence available. From this unsound foundation, the Part Two Report then sets out incorrect conclusions.
- 5.5.3 The language used in the Part Two Report makes it appear as if there are general issues that apply widely to many postmasters. However, a number of topics raised in the Report give rise to no discernible "*thematic*" issues affecting multiple postmasters. Instead, case specific allegations are presented so that they seem more extensive than they really are.
- 5.5.4 The Part Two Report also makes no attempt to identify a causal link between any alleged problem and shortfalls in branches.
- 5.6 These failings meant that Second Sight went on to make many unsupported, and sometimes inconsistent, statements. For example, in one Case Review Report, they wrote:
- "Had it not been for the Applicant's admission of theft we would have considered the possibility that errors made in the branch might have been the cause of some or all of this branch's losses."*⁴⁸
- 5.7 The Part Two Report provides no proper basis to support the claims being advanced. The burden is on the Claimants to particularise and prove their cases in the normal way.
- 5.8 We set out below a full response to the following factual allegations advanced in the Letter of Claim:
- A Defects in Horizon
 - B Data integrity and remote access
 - C Training
 - D Access to information
 - E Support
 - F Criminal investigations and prosecutions
 - G Other technical allegations
- 5.9 It is difficult for us to respond with the specificity and clarity that we would like given the absence of any clarity or particularity as to what precisely Post Office is alleged to have done (or not done) in relation to these matters; as to which Claimants were affected by these actions (or omissions); and as to what the consequences were for these Claimants. However, as you will see from Sections 5A to 5F below, your allegations of wrongful conduct are specifically denied.

⁴⁸ Paragraph 5.9, Final CRR of case M068

A. Defects in Horizon

- 5.10 The Letter of Claim does not present any evidence of there being a systemic flaw in Horizon that has wrongfully caused loss to postmasters. Even Second Sight, in its final conclusion to its Part Two Report, could only make the weak point that:

*"when looking at the totality of the 'Horizon experience' we remain concerned that in some circumstances Horizon can be systemically flawed from a user's perspective."*⁴⁹

- 5.11 This is a long way short of saying that there is a problem with Horizon's data handling processes that create false entries in branch accounts resulting in false shortfalls and wrongfully causing postmasters to suffer losses, for which they were improperly held liable by Post Office. Second Sight never identified such a problem. We do not know what is meant by the phrase *"from a user's perspective"*. If this is intended to mean that certain individuals may subjectively believe Horizon to be flawed, this is not evidence of a flaw. If it is intended to mean that Horizon is not as easy to use as some users might like, this does not constitute a breach of contract. Either way, even if it constituted evidence (which it does not), this point would not be an adequate basis on which to mount a Court action.
- 5.12 You also refer to a number of historic *"bugs"* that you say Second Sight identified. This characterisation is incorrect – Post Office identified these issues and it pro-actively resolved them in accordance with its usual operating practices. No evidence has been presented to suggest that these issues had any effect on the Claimants. To attempt to dispel any myths around these issues, we have provided full details of them in Schedule 6.⁵⁰
- 5.13 If you wish to maintain a claim that there is a systemic defect in Horizon that has wrongfully caused loss to postmasters, it is incumbent upon you to identify the defect, explain what it does and what consequences it has had for your clients. At a minimum, your clients would need to precisely identify the transaction(s) or entries in the branch accounts that they consider to be wrong. You should properly set out that claim and explain the evidence that supports it. Your Letter of Claim does not begin to do this. We put you on notice that our client will challenge any statements of case that do not properly identify and particularise a claim of this nature.

B. Data integrity and remote access

- 5.14 The Letter of Claim makes a number of imprecise references to the idea that Horizon does not accurately record branch transactions and / or that Post Office has edited branch transaction data so to make it inaccurate.⁵¹ We repeat our above points about the need for your clients to provide proper particulars of allegations if they are to be maintained, in particular you have not put forward any evidence that Horizon has inaccurately recorded a transaction or that Post Office has manipulated Horizon data in relation to any of the Claimants or otherwise.
- 5.15 There are a number of controls and processes in place to protect the integrity of data within Horizon. These include:
- 5.15.1 Each basket of transactions must balance to zero (i.e. the value of goods and services vended must match the payments made / taken from the customer) otherwise the basket will not be accepted by the counter terminal in branch. This ensures that only complete baskets are recorded.
 - 5.15.2 Counter transactions are committed automatically (i.e. a transaction is either successful in its entirety or it is not successful at all).

⁴⁹ Paragraph 26.8, Second Sight's Briefing Report – Part 2

⁵⁰ To be clear, we are not saying that these issues are an exhaustive list of the *"bugs"* that may exist in Horizon. They are however the ones on which you rely and so we have addressed them in detail.

⁵¹ At paragraphs 5.7, 44.4, 46, 57, 125, 127.4 and 153.5 of the Letter of Claim

- 5.15.3 A unique Journal Sequence Number is applied to "digitally sign" every counter transaction. This allows missing or duplicate transactions to be detected and remedied.
- 5.15.4 A master record of transaction data is stored in a central "audit store" which has controls to ensure the permanency of data and a data retrieval process which validates data integrity.
- 5.16 The majority of transactions that make up the branch accounts are generated in branch. There are however four ways in which Post Office (or Fujitsu on Post Office's instruction) can influence those accounts:
 - 5.16.1 **Transactions originating at Post Office.** A number of "transactions" are generated by Post Office and sent to branches, namely transaction corrections, transaction acknowledgements and remittances of cash / stock into a branch.⁵² A key feature of these transactions is that they must be approved in branch (by the postmaster or his assistants) before they form part of the branch accounts.
 - 5.16.2 **Global Users.** Global Users are setup by default on Horizon in every branch. These are user accounts for Post Office staff to use when undertaking activity in a branch, such as training or audits. It is possible for these Global Users to conduct transactions within a branch's accounts. However, this access is only possible if the user is physically in the branch using a local terminal and the transactions are recorded against the Global User ID.⁵³
 - 5.16.3 **Balancing transactions.** Fujitsu (not Post Office) has the capability to inject a new "transaction" into a branch's accounts. This is called a balancing transaction.⁵⁴ The balancing transaction was principally designed to allow errors caused by a technical issue in Horizon to be corrected: an accounting or operational error would typically be corrected by way of a transaction correction. A balancing transaction can add a transaction to the branch's accounts but it cannot edit or delete other data in those accounts. Balancing transactions only exist within Horizon Online (not the old version of Horizon) and so have only been in use since around 2010.⁵⁵ Their use is logged within the system and is extremely rare. As far as Post Office is currently aware a balancing transaction has only been used once⁵⁶ to correct a single branch's accounts (not being a branch operated by one of the Claimants).⁵⁷
 - 5.16.4 **Administrator access to databases.** Database and server access and edit permission is provided, within strict controls (including logging user access), to a small, controlled number of specialist Fujitsu (not Post Office) administrators. As far as we are currently aware, privileged administrator access has not been used to alter branch transaction data. We are seeking further assurance from Fujitsu on this point.
- 5.17 Ultimately, no postmaster going through the Scheme was able to point to a particular transaction that they believed had been created, edited or deleted by Post Office without their knowledge. Moreover, you have presented no evidence that misuse of any of the above processes by Post Office was the cause of any shortfall in any Claimant's branch.

⁵² See paragraph 7.16 onward in Second Sight's Part One Report for a more detailed explanation of these processes.

⁵³ Strictly speaking, the Global User ID should be used to generate a new unique ID for the Post Office staff member and the new ID would then be used for training, audits, etc.

⁵⁴ The use of balancing transactions was explained to Second Sight and is referenced in its Part Two Report at paragraph 14.16.

⁵⁵ Post Office is making enquiries as to whether something akin to a balancing transaction existed in Horizon before the upgrade in 2010.

⁵⁶ This was in relation to one of the branches affected by the "Payments Mismatch" error described in Schedule 6.

⁵⁷ Several hundred other balancing transactions have been used but not in a manner that would affect branch accounting. These were generally used to "unlock" a Stock Unit within a branch.

- 5.18 Post Office maintains that the combination of technical controls in Horizon and operational controls at Post Office and in branch (including the need for postmasters to diligently monitor their branch accounts, cash and stock as described in Schedule 4) provides satisfactory assurance that Horizon does accurately record the transactions input by the Claimants (or their assistants).

C. Training

- 5.19 Your claim that Post Office universally failed to provide adequate training to the Claimants is not accepted. Post Office has acknowledged that in individual cases, it might have done more to train certain postmasters but it is very clear there is no widespread problem with training as you are seeking to suggest. Even in those individual cases, it did not breach its contractual obligations discussed in Section 4 above.
- 5.20 As explained in Section 4, Post Office accepts it has a duty to offer training to postmasters. That offer has to be accepted by Postmasters. As is clear from Section 15, Clause 7 of the Postmaster Contract, responsibility for the training of assistants falls on the postmaster.
- 5.21 The standard for the training offered by Post Office was what was necessary to allow a competent and diligent person to follow Post Office's operating instructions.⁵⁸ Unless Post Office's training has dropped below this "*necessary*" threshold then there is no breach of contract. Post Office's training has always met this threshold. This is entirely different to any subjective views on the quality and content of training or on any 'room for improvement'.
- 5.22 The fundamental point to be made about training is that Post Office has delivered it to many thousands of postmasters over at least 16 years and the overwhelming majority have gone on to run branches satisfactorily. This would not be the situation if Post Office's training was fundamentally inadequate.
- 5.23 In many cases, Claimants themselves have run their branches satisfactorily for years before encountering problems. In relation to these Claimants, training cannot be an issue; otherwise they would have encountered problems from day one. For example, your client Scott Darlington appears to have had no problems running the branch for three years before the point at which he claims he experienced his first material shortfall in 2008.⁵⁹
- 5.24 Any argument about the quality of training turns on the facts of specific cases. We note that while you make some general claims in relation to alleged omissions from the training package, you do not detail the respect (or respects) in which you allege Post Office's training fell short in each of the individual claims. This is important because (i) training has changed over time and (ii) training is often driven by the needs of the individual postmaster.
- 5.25 We address the allegations made in relation to training below.

The standard training package

- 5.26 The account you purport to give of the training offered by Post Office is inaccurate. It is incorrect to suggest, as you seek to do, that postmasters were given brief training and then left to fend for themselves. The standard training package offered to new postmasters has changed over time. We have set out the key differences below but these changes were introduced iteratively. It would take a considerable amount of work to reconstitute Post Office's training programmes for the last 16 years and so this description should not be seen as definitive but rather indicative of the historic training available:

- 5.26.1 In around **2001-2002**, the standard training consisted of classroom training followed by 10 or 11 days of on-site training and support. Both the classroom and the on-site

⁵⁸ See paragraph 4.36 above

⁵⁹ See pages 7 and 8 of the POIR for Mr Darlington's case (M038)

training would cover counter-based transactions and the balancing process, including dealing with surpluses and shortfalls. The on-site training would give postmasters the chance to learn by performing transactions in a live setting with a trainer on hand to answer any questions. This was followed up with an extra day of "follow-up" balancing support whereby a postmaster is taken through the completion of their first monthly balancing process with a trainer present.

- 5.26.2 In around **2003**, there was between 5 and 10 days of optional classroom training offered to new postmasters which was followed up by 6-10 days of onsite training and support, depending on whether the postmaster attended the classroom training. Again, the postmaster would receive an extra day of follow-up balancing support.
- 5.26.3 In around **2004-2005**, there was between 5 and 10 days of optional classroom training offered to new postmasters which was followed up by 5-10 days of onsite training and support, depending on whether the postmaster attended the classroom training. Again, the postmaster would receive an extra day of follow-up balancing support.
- 5.26.4 In around **2006**, between 5 and 10 days of optional classroom training was offered to new postmasters and 6 days of on-site training and support was given, again depending on whether the classroom training was attended.
- 5.26.5 Between around **2007-2011**, there were 5, 8 or 10 days of training on basic transactions and balancing, sales (e.g. travel and financial products) and specialised modules such as DVLA-related transactions or passport-related transactions. This was followed by 6 days of on-site training and support and 1 day of follow-up balancing support. In 2007, Post Office started: (a) visiting the branch after 3 months to check how a postmaster was settling into their role and giving them an opportunity to request further support or training if needed; and (b) making telephone calls to postmasters at intervals of 1 and 6 months, again to check whether the postmaster was content they had the skills and knowledge required to run the branch and offering another chance to raise concerns around any specific transactions or processes.
- 5.27 Post Office's training never ended with the above mentioned sessions and check-up calls/visits. Training is an ongoing process and at any point postmasters have been able to contact the NBSC if there are areas on which they feel they require further training or assistance. They also have access to an operating manual which is a reference tool they can use on a day-to-day basis.
- 5.28 It will be seen that in relation to training, the true position is very different from the picture you seek to paint in the Letter of Claim.⁶⁰ We specifically reject your suggestion that the training offered by Post Office was "weak" in relation to balancing, something which every postmaster has to do on a regular basis throughout the period of their appointment.⁶¹
- 5.29 You also suggest that the training manuals could not be accessed on Horizon if the system crashed.⁶² We trust the above shows that the support offered to postmasters is multi-faceted. If at any particular time a postmaster could not for any reason access the relevant guide on Horizon, he or she was free to call the NBSC for assistance.⁶³

⁶⁰ Paragraph 86, Letter of Claim

⁶¹ See paragraph 5.26 above

⁶² Paragraph 87, Letter of Claim

⁶³ Historically, prior to Horizon online, manuals were available in hardcopy at the branches which highlights the need to deal with training on a claimant by claimant basis.

Identifying a need for further training

- 5.30 The suggestion in your Letter of Claim that Post Office is responsible for identifying and fulfilling the training needs of postmasters and their assistants is incorrect.⁶⁴ Indeed, it is based on a misunderstanding of the relationship between Post Office and postmasters.

5.30.1 First, the duty on Post Office is only to offer training.

5.30.2 Second, Post Office properly relies on postmasters to seek assistance or further support with training. The postmaster is in the best position to assess the need for further training based on a variety of factors particular to their specific branch, for example changes in their assistants, changes in the way they operate the business, seasonal pressures and changes to the associated retail business. Post Office does not have the insight a postmaster enjoys in relation to all these factors which can impact on a branch's performance and the need for further training. It is entirely appropriate, therefore, that the onus is on postmasters to seek further training when required.

- 5.31 This approach by postmasters was all-too-often found to be lacking in the Scheme cases. For example, your client Kamaljit Kooner complained that he was given no additional training upon moving to a larger branch. However, the NBSC call logs show Mr Kooner made no requests for additional training, as would be expected if indeed he considered he was not adequately trained to operate his branch. Indeed, Mr Kooner's complaints were misplaced in any event as the branch offered exactly the same products as those offered in the smaller branch which Mr Kooner ran successfully for three years.

- 5.32 The case of your client Julie Carter shows that Post Office provided on-site support where requested. While Ms Carter complained in the context of the Scheme that Post Office provided *"no help or support [...] in connection with the long term problems with Horizon, the GIRO discrepancies, or the Bank of Ireland ATM"*,⁶⁵ Post Office's investigations into her case demonstrated that claim to be entirely unfounded. In fact, Post Office provided further training and support on three separate occasions within six months, twice in relation to ATM operation/balancing and, separately, in relation to the introduction of single stock unit balancing.

Training of assistants

- 5.33 Separately, you raise the issue of the training and supervision of branch assistants by postmasters.⁶⁶ The Postmaster Contract makes clear that it is a postmaster's responsibility to train their staff.⁶⁷ In claiming that there was no *"quality control function"*⁶⁸ you are seeking to imply a term which cannot be implied as it would cut across and contradict the express terms of the Postmaster Contract.
- 5.34 The Postmaster Contract makes commercial sense without such a term because postmasters are in a better position than Post Office to carry out the quality control function on their staff. Post Office is simply not in a position to carry out this function. Each postmaster is an independent business person who chooses who to employ and what tasks to assign in whichever way they see fit. It is postmasters, not Post Office, who are in a position to assess the suitability and the performance of their assistants. We note that Post Office's investigations as part of the Scheme indicated that many postmasters failed to scrutinise adequately the performance of their staff.
- 5.35 For example, your client Timothy Burgess acknowledged in his interview under caution that he was trying to run two businesses – a public house and the Post Office branch – and this resulted in *"a lot of errors and mismanagement"*. Mr Burgess also admitted he was at fault *"for not*

⁶⁴ Paragraph 87, Letter of Claim

⁶⁵ Paragraph 4.1, Final CRR for M024

⁶⁶ Paragraphs 85 and 87, Letter of Claim

⁶⁷ Section 15, Postmaster Contract

⁶⁸ Paragraph 87, Letter of Claim

*training my assistants up better in the first place or spending more time with them*⁶⁹. Separately, Second Sight concluded in the case of your client Guy Vinall that theft by a member of staff was a possible cause of the shortage and the postmaster's *"poor accounting controls meant it went unnoticed"*⁷⁰.

D. Access to Information

- 5.36 At paragraph 93 of the Letter of Claim you note that there is no express term of the contract which entitles postmasters to receive data held by Post Office *"with the exception of data routinely made available to the branch by Horizon"*. You go on to suggest that a postmaster is unable to access information necessary to establish the cause of a shortfall in a branch.
- 5.37 This is based on a misunderstanding of the information needed to investigate a shortfall, and also what information is available in a branch. In addition to paper records of all branch transactions, a postmaster (and their staff) has access to a number of reports. The reports range from those specifically focussed on particular products or transactions, to a complete line-by-line listing of all transactions completed on a given day. If reviewed contemporaneously (i.e. when a discrepancy comes to light in the course of a daily cash check), a postmaster has all the information they need to assist in identifying a shortfall. In this regard, we emphasise the importance of the daily cash check which every postmaster is required to perform. This provides the postmaster with an opportunity to identify and investigate most discrepancies on the very day on which they arise.
- 5.38 Full transaction by transaction data has always been available in branch for a minimum of 42 days (and with the introduction of Horizon Online now 60 days) and so has always been available at the time of the full cash and stock reconciliation which postmasters are required to perform at the end of each trading period (being four to five weeks). Where requested and necessary, Post Office will pull archived Horizon data outside these date ranges. However, in practice, this is needed only in a very small number of instances.
- 5.39 Where Post Office generates a transaction correction, the postmaster is provided with supporting information with the transaction. The transaction correction will have on it the telephone number of a person at Post Office who can be contacted to discuss the transaction correction and from whom further information can be sought if needed. There have been complaints made about transaction corrections coming through after the 42 / 60 day period when a postmaster can access line by line transactions data. However, in those cases, the information accompanying the transaction correction, combined with paper records held in the branch and the opportunity to contact Post Office to discuss the transaction correction, are sufficient to assess and challenge the transaction correction. The availability of line-by-line transaction data in this scenario is therefore beside the point.
- 5.40 In respect of the point you raise about debit and credit card transactions⁷¹, this line of enquiry is not understood. Debit and credit card details have never been retained on Horizon as to do so would be in breach of Payment Card Industry Standards and Horizon is PCI accredited. However, we repeat that branches can access line-by-line transaction data which records, among other things, the method of payment as debit or credit card.
- 5.41 Post Office is aware that allegations have been made by postmasters about personal documents having been taken at audit. Post Office is within its rights to take any documents that relate to the branch at audit but personal documents should not be removed. There is a lack of any particularity or evidence on this point. However, if and to the extent any personal documents were removed – which is not accepted – Post Office has not seen any evidence to suggest this has caused postmasters detriment, nor have you identified any such evidence in your Letter of Claim. The other branch records are the property of Post Office. Where a postmaster is suspended, Post Office may need to remove such records for investigation.

⁶⁹ Paragraph 4.12, CRR

⁷⁰ Paragraph 4.27, CRR

⁷¹ Paragraph 81, Letter of Claim

- 5.42 During the Scheme, it became apparent that the issue of access to information could only be addressed on a product by product basis, as each product had different information requirements. There were two areas where Second Sight raised particular questions about the availability of information, being ATMs in the context of retract fraud and Girobank deposits. Post Office's comprehensive answers to these questions are available for inspection.⁷² These show that branches have all the necessary information. Post Office considers that a detailed review of any other product would similarly reveal that a branch has all the necessary information. Again, this is an area where specific details are necessary in order to advance a claim and your current generic allegations will not suffice.

E. Support

- 5.43 We repeat the point made in relation to training that the standard of the support offered by Post Office was that which was necessary. It is easy to say that Post Office's support could be better⁷³ but you have not presented any evidence that Post Office's support fell below the threshold that would amount to a breach of contract. Post Office denies any such breach.
- 5.44 Your claims in respect of the support offered to postmasters fall into two categories: (i) advice given by the Post Office helpline; and (ii) investigative support for postmasters. We deal with each of these categories below.

Helplines

- 5.45 As you note in the Letter of Claim⁷⁴, there are two helplines available to postmasters and their staff: the NBSC and the HSD. We note that the claims relate to the NBSC rather than the HSD.
- 5.46 The NBSC was set up in December 1999 with the purpose of helping postmasters and their staff with transactions and, generally, with navigating Horizon. Postmasters can call the NBSC for advice in relation to a range of queries including, for example, conducting particular types of transaction, dealing with discrepancies and balancing.
- 5.47 You make seven allegations in paragraphs 90 and 91 of the Letter of Claim about the NBSC helpline:
- 5.47.1 **Limited availability.** As to the allegation of "*limited availability*", it has already been acknowledged by Post Office that there have been periods where the NBSC was more difficult to contact than in other periods. However, changes were made to the hours for which the NBSC was available particularly at the end of trading periods. Now, the NBSC is available from 08:00 to 20:00 on Monday to Friday (available to 21:00 on Thursday), 08:00 to 18:00 on Saturday and 09:00 to 17:00 on Sundays and Bank Holidays. The opening hours of the helpline are kept under review by Post Office so that it can adequately respond to the needs of postmasters. That said, the level of support never dropped below a threshold so as to amount to a breach of contract. Moreover, you have provided no basis for thinking that any limited availability caused postmasters to suffer shortfalls for which they have been held liable.
- 5.47.2 **Script based responses.** The allegation that responses from the NBSC were "*script-based*" is not correct. NBSC call handlers listen to the question or questions posed by postmasters and categorise the call on an online system called Dynamics⁷⁵. This allows them to access articles on the Post Office Knowledge Base – an online "bible" containing information on how to deal with Horizon queries – relevant to the precise query raised. The call handler then uses the relevant article or articles to inform the advice they give to the caller.

⁷² See paragraph 12A below for further details

⁷³ Paragraph 95, Letter of Claim

⁷⁴ Paragraphs 88 and 89, Letter of Claim

⁷⁵ Previously known as Remedy

- 5.47.3 In circumstances where the Knowledge Base does not cover the specific point raised by a caller, the query can be escalated to a second tier of advisers. If the problem cannot be resolved at this stage, the second tier experts can liaise with Post Office product teams to arrive at the answer to a caller's query. Finally, if the problem persists, a branch visit or further training may be arranged.
- 5.47.4 **Contradictory advice.** Post Office has seen no evidence in the course of its investigations to substantiate claims that contradictory advice was given by NBSC call handlers. You have asserted a claim in generic terms, but we would expect this claim to set out when the advice was given, what was said and what effect the advice had. You have not provided anything like the necessary level of detail or even provided some examples. Nor have you explained how and in what way this issue may have caused any of your clients wrongfully to suffer loss.
- 5.47.5 **Incorrect advice.** It would be impossible to run a service where callers were always entirely satisfied with the advice given (e.g. the advice may be that the postmaster is responsible due to a branch operational error). All calls received by the NBSC are logged in writing with a summary of the query and answer given. If there were issues around the advice being given, the caller would be expected to escalate the query (which should have been recorded in the logs) or the NBSC would have received further calls (also logged) about the same.
- 5.47.6 In the course of the Scheme, Post Office thoroughly analysed call logs in all of the investigated cases. In the context of these investigations, the absence of evidence of repeat escalations and/or repeat calls on the same issues indicated that, generally speaking, callers to the NBSC were content with the advice given.
- 5.47.7 Once again, your complaints in this regard are generic, no detail is given and no explanation has been provided as to how any incorrect advice given has caused your clients wrongfully to suffer loss.
- 5.47.8 **Only one.** Another complaint made in the Letter of Claim is that callers were told they were "*the only one*" experiencing problems.⁷⁶ Again, Post Office has seen no documentary evidence to substantiate this claim.
- 5.47.9 Furthermore, you appear to be saying that Post Office had an established practice of instructing call handlers at NBSC to lie to postmasters about problems in order to make them feel isolated and to cover up issues. This is preposterous. It is entirely inconsistent with maintaining a helpline and Knowledge Base to assist postmasters, and is also an allegation of bad faith that must be properly particularised if it is to be maintained, with details of the sort referred to in paragraph 5.47.1 above.
- 5.47.10 For the avoidance of doubt, Post Office has never given an instruction to any of its staff to tell a postmaster that they were the "*only one*" experiencing a problem with Horizon known to be also affecting other postmasters.
- 5.47.11 **Sort itself out.** The claim that callers were told a problem would "*sort itself out*" may be a reference by NBSC operators to the possibility that a transaction correction may be generated following a surplus or shortfall. This may be perfectly fair advice if given in an appropriate context. This allegation would need to be addressed on a case by case basis and we invite you to provide the necessary details.
- 5.47.12 **Sign off false accounts.** Finally, you have presented no evidence – nor has Post Office seen anything in the course of its extensive investigations to date in relation to the Scheme cases – to suggest postmasters were directed to sign off cash balances without being able to satisfy themselves that they were accurate.

⁷⁶ Paragraph 123, Letter of Claim

- 5.47.13 It is absolutely critical that postmasters undertake cash declarations that they believe to be accurate. This point has always been made absolutely clear to them, but it is obvious in any event. For example, as we point out in Schedule 4, they are required expressly to certify the accuracy of their balancing and trading statements.
- 5.47.14 Postmasters are independent business people who make a choice when deciding whether to declare their accounts accurately or falsely. Training and support are irrelevant. Every postmaster knows they should not render false accounts. Irrespective of what was said to a postmaster (and for the avoidance of doubt Post Office denies that any incorrect advice was given in this regard) there are no circumstances in which the practice of false accounting can be justified.

Investigative Support

- 5.48 Your allegations about deficiencies in Post Office's investigative support are derived from an incorrect understanding of the duties on Post Office. You have attempted to imply a very onerous obligation on Post Office that it must determine the root cause of a shortfall before it can hold a postmaster responsible for that shortfall.⁷⁷ This then drives, on your case, the need for extensive investigative support from Post Office.
- 5.49 The correct formulation is that the postmaster is liable for any shortfall in their branch unless they show that Post Office caused the shortfall. Post Office has a duty to cooperate with and not to prevent a postmaster performing their duty to account to Post Office, but this does not negate the postmaster's responsibility for any shortfall in their branch unless they can prove that the root cause of the shortfall was something for which they were not responsible.
- 5.50 This gives rise to two practical points:
- 5.50.1 First, Post Office only needs to provide support where support is requested. Post Office need only investigate discrepancies where a postmaster asks for assistance – it does not make sense to investigate discrepancies where a postmaster who is best placed to know how the discrepancy has come about, is prepared to bear a shortfall / surplus. The fact that a branch has not asked for assistance in investigating a discrepancy suggests that they understand its origins.
- 5.50.2 Second, Post Office is not under a duty to find the root cause of every error made in every branch, as explained above⁷⁸ and in Schedule 4. In many cases, Post Office simply cannot know what happened. In circumstances where there has been false accounting on the part of the postmaster it will often be impossible to determine what happened. But this does not mean that the postmaster is not liable for the shortfall.
- 5.51 While the onus is on postmasters to trigger an investigation, once they do they can access support in a number of ways including the NBSC, Post Office's Financial Service Centre (**FSC**) and field support teams.
- 5.52 The FSC will work alongside branches to help identify the cause of a discrepancy. This process can involve discussing the relevant transaction(s) with the branch, liaising with clients such as customers' banks to gather various external pieces of information about a transaction and contacting customers.
- 5.53 If the FSC and NBSC are unable to resolve the issue, field support teams may get involved. At this stage, Post Office may send out specialist teams to offer on-site support.
- 5.54 Contrary to your allegation at paragraph 101.4.1 of the Letter of Claim, Post Office has not instructed its investigators to ignore possible problems with Horizon. Post Office would want to

⁷⁷ Paragraph 98, Letter of Claim

⁷⁸ See paragraph 4.16 above.

know if there is a problem with Horizon as it could be damaging to its business. It would be to its own disadvantage to ignore such issues. Again, this allegation is unsupported by any evidence.

- 5.55 At paragraph 97 of the Letter of Claim, you state that requests for investigative help were often refused. You have presented no evidence to substantiate this claim. We note that the only time where Post Office might suspend its usual investigative support is where criminal activity is suspected. In that circumstance, it is necessary to conduct any investigation in accordance with Police and Criminal Evidence Act so to ensure that evidence is collected in a way that is admissible in Court. We address criminal investigations below.

F. Criminal investigations and prosecutions

- 5.56 The Letter of Claim is not entirely clear as to the allegations made against Post Office in relation to the prosecutions it has conducted. Doing the best we can, our understanding is that your clients allege that:
- 5.56.1 Post Office should not have been conducting prosecutions at all;
 - 5.56.2 Post Office's investigations only looked for evidence of criminal behaviour and did not try to identify the root cause of a shortfall; and
 - 5.56.3 Where Post Office did prosecute, it brought charges where there was insufficient evidence to support a charge.
- 5.57 We cannot see that any cause of action attaches to the first allegation or how that allegation would give rise to any recoverable loss. Please can you clarify this point.
- 5.58 The second allegation misunderstands both Post Office's investigative practices, and the extent to which criminal behaviour may mask the root cause of a shortfall.
- 5.59 In relation to the third allegation, please confirm that the only cause of action that applies is malicious prosecution. We cannot see any claim for breach of contract relevant to these facts.
- 5.60 Before proceeding, we note that only 29 of the original 91 Claimants are currently known to have been prosecuted by Post Office.⁷⁹ These are shown in Schedule 2. We anticipate that this ratio will be reflected through all 198 Claimants. This section of the Letter of Claim will therefore only apply to this small subset of the Claimants.

Post Office as prosecutor

- 5.61 Post Office brings private prosecutions under section 6(1) of the Prosecution of Offences Act 1985. It has the same right any other private individual or entity has to bring a prosecution. Post Office has no special statutory power to prosecute. Moreover, as a private prosecutor, Post Office is not legally bound by the Code for Crown Prosecutors (**the Code**).⁸⁰ It is free to conduct prosecutions in any way it sees fit within the bounds set by the law on malicious prosecution – a point we address below – however, Post Office may choose to take guidance from the Code.
- 5.62 The accusation that Post Office lacked the necessary independence to carry out prosecutions is misplaced:
- 5.62.1 First, there is no legal requirement for "*independence*" when bringing a private prosecution.

⁷⁹ It should be noted that of this 29, two of the Claimants were wives of the branch Postmaster.

⁸⁰ *R (Charlson) v Guildford Magistrates' Court* [2006] EWHC 2318: "*Private prosecutors are not bound to apply the Code for Crown Prosecutors when deciding whether to institute proceedings...*"

- 5.62.2 Second, Post Office is not an anomaly in prosecuting cases concerning its own area of interest. Organisations including the DVLA, the Environmental Agency and many local authorities also conduct their own prosecutions.
- 5.62.3 Third, Post Office's actions as a prosecutor are held to account by the defendant and the Courts. A defendant is entitled to their own legal advice to dispute the charges. Post Office must disclose to the defendant and his/her lawyers any material that could help the defence or undermine the prosecution's case.⁸¹ It is also open to the defendant's lawyers to ask Post Office to produce material they believe Post Office may hold which could help their client's case.
- 5.63 A sub-argument you advance is that Post Office was motivated to prosecute by an improper purpose, namely the recovery of money and you say that this would not satisfy the tests set out in the Code.⁸²
- 5.63.1 First, Post Office is not bound by the Code; the only threshold that Post Office needs to satisfy is that its prosecution is not malicious.
- 5.63.2 Second, the Code only sets out the minimum standards for bringing a prosecution. It only says that a prosecution should not be brought where those standards are not met. Post Office, as a private entity, is entitled to adopt its own rationale for bringing prosecutions (so long as it does not do so maliciously).

Approach to criminal investigations

- 5.64 Your second allegation is that Post Office investigators "*defaulted*" to seeking evidence to support a charge of false accounting rather than carrying out an investigation into the root cause of suspected problems. This allegation confuses the roles of Post Office's Security Team, whose objective is to determine whether there has been any criminal misconduct in the Post Office network (which is not confined to crimes related to branch accounting), and the roles of other departments at Post Office who investigate matters in branches more generally and who would, in appropriate circumstances, look to determine the root cause of a shortfall.⁸³
- 5.65 The Post Office Security Team is unapologetically focussed on preventing and deterring criminal misconduct. Depending on the circumstances, a Security Team investigation may or may not require an investigation of wider issues such as the root cause of a shortfall. To pursue its objectives, the Security Team will collect evidence in a forensically sound manner and in line with the Police and Criminal Evidence Act, otherwise it risks evidence being inadmissible or an otherwise valid prosecution failing on procedural grounds, should a prosecution be the appropriate course of action in a particular case.
- 5.66 In very broad terms, Post Office's standard operating practice in this regard is as follows:
- 5.66.1 If Post Office considers there may have been criminal misconduct in a branch, the matter is reported to the Security Team. Any other investigations by other teams at Post Office are often paused so to avoid the evidential problems described above.
- 5.66.2 If the Security Team find evidence of criminal misconduct, the matter is passed to Post Office's legal team for review. Where appropriate, Post Office may bring a

⁸¹ You have asked us (question 22) to confirm whether Post Office has made any such disclosures after a prosecution has concluded. We confirm this has happened. If a disclosure has been made to one of your clients, they will have this information already. Disclosures to other persons are not relevant and requests for this information are a fishing expedition.

⁸² Paragraph 104, Letter of Claim

⁸³ The Postmaster Contract provides "*The main job of the Investigation Division is to investigate, or help the Police investigate, criminal offences against the Post Office, British Telecommunications and the Department of National Savings. The Investigation Division does NOT enquire into matters where crime is not suspected.*" (Clause 12, Section 19)

prosecution. The bringing of criminal charges will often also result in a postmaster's contract being terminated.

- 5.66.3 If the Security Team or legal team decide not to proceed with a prosecution, the need to comply with the criminal standards on evidence collection will no longer apply. Where the Security Team investigation concerns branch conduct, the matter will be passed to the contract advisor⁸⁴ who will decide on whether to conduct further investigation.
- 5.67 In its Part Two Report, Second Sight often confused these separate investigations: security investigations into matters where criminal conduct is suspected and commercial investigations for other reasons.
- 5.68 In any event, as explained in Schedule 4, the process of establishing how a shortfall arose in branch can be frustrated when the postmaster declares false accounts. Where false accounting has taken place, it is this deliberate act of false accounting carried out by the postmaster and not the approach of the investigators which often prevents the root causes of problems from being identified.
- 5.69 Your allegation that Post Office does not properly investigate shortfalls is therefore misplaced.

Insufficient evidence

- 5.70 The third allegation is that Post Office brought charges without sufficient evidence. This is denied. As noted above, Post Office does not fulfil any public function in bringing prosecutions. Although it may choose to take guidance from the the Code, as a matter of law it is not bound. In order to found a cause of action against Post Office, your clients will need to show more than that there was just insufficient evidence to support a charge but that Post Office acted maliciously in bringing a prosecution. Both these points are denied absolutely.
- 5.71 You have alleged that Post Office charges theft, not because there is evidence to support the charge, but to pressure defendants into pleading guilty to false accounting. This allegation has been taken from the Part Two Report and we have already explained the danger in relying on Second Sight's views in an area where they have no expertise. Again, the allegation is denied absolutely.
- 5.72 The mere fact that a theft charge is "dropped" when there is a guilty plea to false accounting does not establish as a point of fact that the theft charge was unsubstantiated or that it was brought maliciously. There are many reasons why a charge may not be fully pursued, including that the circumstances of the case may change during the course of the prosecution.
- 5.73 You raise two cases in the Letter of Claim to support this allegation. These are addressed below. It is nevertheless incumbent on you to properly set out the alleged evidential deficiencies in each Claimant's case as each case will turn on its own facts. Given that this is again an allegation of bad faith, general assertions will not suffice.

Josephine Hamilton

- 5.74 You refer at paragraph 105 of the Letter of Claim to the case of your client Ms Josephine Hamilton. Ms Hamilton was postmistress at South Warnborough Post Office between 2003 and March 2006. She employed one assistant who would assist in selling stamps and dealing with pension and allowance customers but never carried out any balancing/cash declarations or had access to the safe.
- 5.75 Post Office contacted the branch in March 2006 due to the extremely high levels of cash reported as being held at the branch. An audit carried out on 9 March 2006 revealed a £36,000 shortfall

⁸⁴ Historically, this may have been someone else in a line management position.

and Ms Hamilton was suspended later that day. Given the level of the shortfall and the fact that the shortfall had not been reported in the branch accounts, there was a suspicion that Ms Hamilton had at least committed false accounting.

- 5.76 Post Office's Security Team was called in to investigate the matter. This investigation led to Ms Hamilton being charged with theft and false accounting. Ms Hamilton later pleaded guilty to false accounting and the theft charge was not pursued to trial.
- 5.77 At the outset of the security investigation process, a report was produced by Graham Brander, Post Office's investigation manager, on 17 May 2006. Before proceeding further, we note that the investigator's report is a privileged document. It was provided to Second Sight during its original Inquiry (and then again at a later date by accident) on terms that preserved privilege. Second Sight should not have referred to this document in any of its reports. That said, Post Office is prepared to disclose this document in this particular case.⁸⁵ This is not a waiver of privilege in any other similar documents or in any other documents related to this case.
- 5.78 You rely on Mr Brander's report to demonstrate that there was insufficient evidence of theft, in particular the following statement:

*"Having analysed the Horizon printouts and accounting documentation I was unable to find any evidence of theft or that the cash figures had been deliberately inflated."*⁸⁶

- 5.79 There are a number of difficulties in relying just on this statement to support your allegation:

- 5.79.1 First, the above wording related solely to Mr Brander's analysis of the Horizon records, not his overall assessment of the case which took into account other matters, including Ms Hamilton's responses when she was asked about the shortfall. He went on to state in the same report:

*"You may wish to consider a charge of a theft for the audit deficit of £36,644.89 covering the period from when Mrs Hamilton became Postmaster (21/10/03) to the date of the audit (09/03/06). The only evidence appears to be the fact that the audit identified the money as missing."*⁸⁷

Mr Brander clearly thought that there may be grounds to support a theft charge, and that proper consideration should be given to this.

- 5.79.2 Second, it is a sound and logical inference that one would only submit false accounts to cover up their own theft. Indeed, this was Post Office's case advanced in Court. We are confident that should you discuss this scenario with any experienced criminal lawyer they will confirm that this is, in principle, a legitimate basis on which to charge theft.
- 5.79.3 Third, Post Office submitted the case to external Counsel to settle the indictment. This was not a prosecution conducted by Post Office alone, but rather was one where it sought and obtained specialist external advice (the privilege in which is not waived). The malice you attempt to attach to Post Office would therefore need to include Counsel, which makes it inherently unlikely that both parties would act with such malice.
- 5.79.4 Fourth, Ms Hamilton had independent legal advice and various Court hearings were held. No attempt was ever made at the time to say that the theft charge was baseless.
- 5.79.5 Fifth, contrary to your account, it was Ms Hamilton (presumably on advice from her lawyers) who approached Post Office to present a guilty plea to the false accounting

⁸⁵ See paragraph 12A below for further details

⁸⁶ Page 3, Graham Brander's Report

⁸⁷ Page 5, Graham Brander's Report

charges on the basis that the theft charges were not pursued. These pleas were reviewed and accepted by the Court.

- 5.80 The suggestion that Post Office acted with malice in bringing a prosecution for theft against Ms Hamilton has no merit.
- 5.81 As an aside, we would ask that you ensure that Ms Hamilton, and any other Claimant who wishes to allege malicious prosecution, preserves all legal advice they have received during their prosecutions. We may in due course call for this material to be disclosed regardless of its privileged nature.

Darren King

- 5.82 At paragraphs 109-111 of the Letter of Claim, you raise the case of your client Mr Darren King and allege that Post Office sought a restraint order without sufficient grounds to do so. This allegation is misconceived.
- 5.83 Post Office supported its request for a restraint order with a witness statement from Dave Posnett of Post Office. Schedule 40(2) of POCA sets out various alternative conditions for the exercise of the Crown Court's powers under s.41 of POCA, including that (a) a criminal investigation has been started in England and Wales with regard to an offence, and (b) there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct.
- 5.84 Accordingly, Mr Posnett's statement in support of Post Office's application provided that:
- 5.84.1 on 1 March 2013, a criminal investigation was started by Post Office into offences of theft and false accounting;
 - 5.84.2 this investigation was prompted by an audit at Mr King's branch which found a shortage in the accounts of £30,258.41;
 - 5.84.3 after the audit Mr King was suspended and during a subsequent interview with Post Office investigators admitted to falsifying accounts by inflating the cash on hand figures when completing the Branch Trading Statement each month for a period of between 12 and 24 months; and
 - 5.84.4 these facts taken together constituted reasonable cause to believe that Mr King benefited from his general criminal conduct, which was the essential question arising on Post Office's application for a restraint order.
- 5.85 HHJ Goymer considered and approved the application at Southwark Crown Court on 10 June 2013. He read Mr Posnett's statement, was satisfied that the conditions at s.40 of POCA had been met and made the order sought.
- 5.86 On any view, the application was properly made by Post Office and you have no basis for suggesting otherwise.

G. Other technical allegations

- 5.87 In amongst other issues cited in Sections C and D of the Letter of Claim, there are allegations about certain technical issues in the operation of Horizon / branch accounting. The two key issues relate to ATMs and Horizon connectivity. These issues are very case specific, relating to only certain Claimants (for example, not all Post Office branches have ATMs and it only tends to be rural branches that have connectivity complaints). We refer you to Post Office's Response to the Part Two Report that addresses both these points.

6. HEADS OF CLAIM

- 6.1 We address below the six heads of claim advanced in Section F of the Letter of Claim.
- 6.2 In the Claim Form your clients have also advanced claims for unjust enrichment, negligent misstatement, misrepresentation⁸⁸ and breaches of human rights. These claims have not been addressed in the Letter of Claim. Please confirm whether these claims are being pursued or discontinued. If they are to be pursued, you have not complied with your pre-action duties to provide details of these claims and our client reserves the right to raise this point on the question of costs.
- 6.3 As to the remaining six heads of claim, the claims for harassment, deceit, unlawful means conspiracy, misfeasance in a public office and malicious prosecution are spurious, they should never have been made and they should be discontinued immediately.
- 6.4 Our client is prepared to work with your clients to conduct the claims for breach of contract (and related breach of fiduciary and duty of care) in as constructive a way as possible. However, you must be aware that the other heads of claim are utterly without merit. If your client continues to advance such meritless claims, our client will have no choice but to adopt a vigorous defensive posture. We anticipate that this will require much more elaborate pleadings and many more Court hearings and result in a substantial increase in costs, all of which will ultimately prove to have been wasted.
- 6.5 In the interests of focusing on the real issues and of not wasting time and money on claims for which there are no credible justification, we urge you to take instructions on whether your clients wish to proceed with the other heads of claim.

A. Breach of contract

- 6.6 In your Letter of Claim, you do not clearly identify the particular breaches of contract which you say have been committed, nor do you explain what effect such breaches had on your clients, what losses they suffered as a result, or how the breaches caused them to suffer such losses. In these circumstances, we will deal with their breach of contract claims briefly.
- 6.7 For the reasons explained in Section 4 above, Post Office accepts that certain terms are to be implied into the Postmaster Contract. These terms are implied because they are necessary to give business efficacy to the Postmaster Contract. They are nothing like the wide variety of onerous terms that your clients seek to imply, which appear to be intended to reverse the responsibilities assigned and accepted under the Postmaster Contract and to rewrite the entire relationship between the parties.
- 6.8 Without prejudice to the burden of proof (which is borne by your clients), Post Office has not committed breaches of any express or implied terms of the Postmaster Contract. Post Office has provided a point of sale and accounting system which works and has offered sufficient training and support for the operation of that system. This is demonstrated by the fact that many tens of thousands of postmasters have received training and satisfactorily operated their branches over the last 16 years. Post Office has not withheld any information from your clients to which your clients were entitled. Insofar as Post Office has demanded payment from your clients for shortfalls arising in their branches, it was entitled to do so under the Postmaster Contract and your clients were liable for those shortfalls. Insofar as Post Office has terminated any Postmaster Contracts, it was entitled to do so under those contracts.
- 6.9 Post Office owed your clients no contractual duties in relation to the bringing of criminal prosecutions but, even if it had owed some duties, these would not have prevented it from bringing a prosecution if it had reasonable and proper cause and was not acting maliciously. As is explained below, in relation to any prosecution brought against your clients, Post Office

⁸⁸ Included in the Amended Claim Form

specifically denies that it did not have reasonable and probable cause and it denies that it acted maliciously.

- 6.10 Thus, all your clients' claims for breach of contract are denied. Furthermore, if any breach of contract had occurred, as is also explained below, it is denied that any such breach would entitle your clients to anything like the sort of damages that your clients apparently have in mind.

B. Harassment

- 6.11 A claim for harassment would require your clients to prove that:

- 6.11.1 Post Office pursued a course of conduct that amounts to harassment;
- 6.11.2 Post Office knew, or ought to have known, its conduct amounted to harassment; and
- 6.11.3 the conduct was not reasonable in the circumstances.

- 6.12 In the leading case of Majrowski v Guy's and St Thomas' NHS Trust⁸⁹ the House of Lords made clear that there is a difference between unreasonable conduct and harassment:

"...courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability..."

- 6.13 Majrowski followed the Court of Appeal's decision Thomas v News Group Newspapers Ltd⁹⁰, in which Lord Phillips MR said of the Protection from Harassment Act:

"'Harassment' ... has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in Section 7 which is oppressive and unreasonable." (emphasis added)

- 6.14 Nadeem v Shell UK⁹¹ concerned similar circumstances to those in the present case. Mr Nadeem was a franchisee of Shell contracted to run retail operations at several Shell petrol stations. Mr Nadeem asserted that his contract with Shell was a contract of service and also alleged harassment by Shell in the way he was managed and the lack of support from Shell. From the judgment, one can see similarities between the relationship of Mr Nadeem and Shell and the relationship of Post Office and postmasters. The Court held that Mr Nadeem was not an employee and that although Shell's conduct was unattractive and unreasonable, it did not amount to harassment in a commercial context.

- 6.15 We have set out below an extended extract from the Judgment as the Judge's reasoning makes clear that your clients have no reasonable prospect of showing that Post Office's conduct was sufficiently grave to amount to harassment.

"67. I have already explained why I found Mr Morris essentially cold, uncompromising, driven simply by business performance issues and not particularly or often motivated by any sense of care or responsibility for the wellbeing of the claimant. That was less true of Mr Bean, but both men had little interest in anything other than the business performance of the claimant. There is no doubt that relations between this group were stressful to the claimant [...] it is also right that he was pursued, pretty relentlessly, not to default on his financial obligations. They were however founded in contract and therefore well

⁸⁹ [2006] UKHL 34

⁹⁰ [2002] EMLR 4

⁹¹ [2014] EWHC 4664 (QB)

and completely within the business rights of the defendants. It is also right that layers of support that he was entitled to expect were singularly absent and for no good reason. Mr Morris and Mr Bean accepted that the role of territory manager included at least to some extent a role as business mentor or business coach for retailers because it was in the interests of those managers for retailers to succeed. There is no good reason to explain why, with but one exception, the quarterly business reviews that were supposed to deliver this aim simply never happened.

68. *One is left with the impression that the defendants paid scant regard, if not frankly mere lip service, to this aspect of the relationship and there is no doubt that the claimant developed and harboured significant grievance about this lack of support. I find however, therefore, that there was much in the defendant's conduct through its employees, Mr Morris in particular and to a lesser extent Mr Bean that was unattractive and unreasonable, but I reject the submission that it was unjustified in the sense deployed by Jacob LJ in Ferguson or that it was oppressive and unacceptable to a degree that constituted a criminal offence as it would have to be in order to give rise to civil liability.*
69. *Moreover, it was not the behaviour that led Mr Morris in particular, whose conduct is most impugned, to know that it amounted to harassment, nor would a reasonable person in all of the circumstances I have described have regarded it as amounting to harassment. Accordingly, the harassment claim ... fails." (emphasis added)*

- 6.16 In addition to above, you have not identified the specific course of conduct pursued by Post Office that you say amounts to harassment or against whom it is supposed to have been directed, nor shown that Post Office had the requisite state of knowledge, nor demonstrated that Post Office's actions were unreasonable, let alone oppressive and unacceptable to a degree that amounted to a criminal offence.
- 6.17 A key element of harassment is the need for a course of repeated conduct; it does not apply to single one off events.⁹² This means that your clients cannot base a claim for harassment on the termination of a contract or a prosecution⁹³ – both being isolated events.
- 6.18 Given above and your reference to Ferguson v British Gas Trading Ltd⁹⁴ we presume that your intention is to allege that Post Office asking postmasters to repay shortfalls is an act of harassment. In effect, you are saying that one commercial party asking for payment from another commercial party amounts to harassment. Nadeem demonstrates that such behaviour, occurring as it does between businesses all the time, cannot constitute harassment. It is clearly not sufficient to sustain criminal liability as required by Majrowski.
- 6.19 In any event, Post Office has a legitimate interest in ensuring that branches are run properly and that losses are remedied promptly. Where Post Office has a contractual right to recover shortfalls from postmasters, the pursuit of this right cannot amount to harassment. As regards its prosecution of a relatively small number of Claimants, Post Office can also avail itself of the reasonable conduct defence under section 1(3)(c) of the Act.
- 6.20 Please confirm that your clients will discontinue this claim.

⁹² Lau v DPP [2001] 1 FLR 799

⁹³ An allegation that Post Office's prosecutions amount to harassment would, in any event, be met with a full defence under s.1(3)(a) of the Act which provides that harassment does not include conduct that "was pursued for the purpose of preventing or detecting crime".

⁹⁴ [2009] EWCA Civ 46

C. Deceit

- 6.21 This claim is remarkable. Notwithstanding the length and complexity of your letter, we have no idea what representations Post Office is alleged to have made, to which of your clients it is alleged to have made those representations, how and in what way the relevant clients are alleged to have relied on such representation, and how and in what way your clients are alleged to have suffered loss and damage as a consequence of such reliance.
- 6.22 These matters are fundamental. It is difficult to see how you feel able to assert a claim for deceit without addressing them in your Letter of Claim. The Claim Form you have drafted does not do so either.
- 6.23 As you well know, fraud has to be asserted with great particularity so that the defendant knows precisely the case which it has to meet.⁹⁵
- 6.24 The gravity of a claim for fraud is reflected in the 2011 Solicitors' Code of Conduct. The Code states that a solicitor should not draft any documents relating to any proceedings containing "*any allegation of fraud, unless you are instructed to do so and you have material which you reasonably believe shows, on the face of it, a case of fraud.*"
- 6.25 Your general approach to a claim in deceit (and the other allegations of bad faith and malice that are spread through the Letter of Claim) is unacceptable. If you wish to pursue a claim in fraud, you must provide particulars of:
- 6.25.1 the exact representation made, by whom, to whom and when for each relevant Claimant;
 - 6.25.2 why each representation was false;
 - 6.25.3 Post Office's knowledge or recklessness as to its falsity;
 - 6.25.4 when and how each Claimant relied on that representation; and
 - 6.25.5 what loss each such Claimant has suffered as a result of that reliance.
- 6.26 With respect to the two matters raised in your letter on which you seek to base a claim in deceit:
- 6.26.1 It is not understood how Post Office systemically excluding the possibility of Horizon errors from their investigations (which is denied) gives rise to a representation actionable in deceit. This is a hopeless basis for a fraud claim.
 - 6.26.2 There is no evidence that Post Office told a postmaster that they were "*the only one*" affected by an issue. It is denied that Post Office had in place an established process of making its personnel repeatedly lie to postmasters about problems they were facing. This allegation is absurd.
- 6.27 Please confirm that your clients will discontinue this claim.
- 6.28 If your clients will not discontinue this claim, we must ask you without further delay (1) to identify the Claimants on whose behalf you assert a claim for deceit, (2) to confirm that these Claimants have instructed you to assert this claim and (3) to identify (by reference to the ingredients of deceit referred to in paragraph 6.25 above) the material which you reasonably believe shows a case of deceit.
- 6.29 Should you fail to do this, our client reserves the right to report your firm to the SRA and / or to take any other action that may reasonably be open to it in relation to this unwarranted claim of fraud.

⁹⁵ Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2001] UKHL 16

D. Misfeasance in public office

6.30 You assert that Post Office has committed misfeasance in public office by not following the Code for Crown Prosecutors when conducting prosecutions. This claim fails on three grounds:

- 6.30.1 Post Office denies that, in the course of its prosecution of any Claimants, it has done something which would constitute a breach of the Code.
- 6.30.2 In any event, although it instructs its prosecutors be guided by the Code, as a matter of law Post Office is not bound by the Code and so could not be said to have conducted an act of misfeasance simply by not following the Code.

6.30.3 Post Office is not a holder of public office and its private prosecutions are not public functions.

- (a) This tort requires the defendant to hold public office; it does not apply to private entities:

*"The requirement that the subject of misfeasance in public office should be a governmental body springs from the very nature of the tort. As Hale LJ pointed out in the passage cited above, the nature of the wrong is that a public official, who is given powers for public, governmental purposes, misuses them for a different purpose, conscious that in so doing he may injure the claimant."*⁹⁶

- (b) Post Office is a limited company subject to the Companies Act 2006.
- (c) The only statutory obligation of Post Office in relation to its branch network is to provide an annual Network Report to the Secretary of State (under section 11 of the Postal Services Act 2011).
- (d) While Post Office may also provide services to the public that are in the public interest for it to provide, that fact alone does not make Post Office a public body, nor its functions public functions. Moreover, while it may provide certain services to the public on behalf of government, the right to provide those services was competitively procured under EU procurement rules; other private businesses bid for and can win the right to provide such services.
- (e) The act of conducting a prosecution is a private act. Post Office is not obliged to bring prosecutions by statute; it brings private prosecutions under section 6(1) of the Prosecution of Offences Act 1985.

6.31 We note that that the claim for misfeasance involves an allegation of bad faith and must be properly particularised in relation to each relevant Claimant.⁹⁷ Yet it has not been particularised.

6.32 This head of claim is meritless. Please confirm that your clients will discontinue this claim.

E. Malicious prosecution

6.33 We have addressed above the factual allegations on which the claim for malicious prosecution is based, when explaining Post Office's prosecution practices.⁹⁸ In short, Post Office had reasonable and probable cause to proceed with its prosecutions and they were not motivated by malice.

⁹⁶ Society of Lloyd's v Henderson [2008] 1 WLR 2255 at [23] to [24]

⁹⁷ Carter v Chief Constable of the Cumbria Police [2008] EWHC 1072 (QB)

⁹⁸ See Section 5F above

- 6.34 Your Letter of Claim refers to the Privy Council's decision in Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd⁹⁹. On the basis of this case, you faintly suggest (but do not explain) that Post Office may be liable for malicious prosecution even in relation to its prosecution of civil actions against your clients. In this regard, we note that Crawford Adjusters itself indicates that there can be no liability unless a claimant has brought civil proceedings for a predominant purpose other than that for which they were designed. It cannot seriously be suggested that Post Office brought any civil proceedings for a predominant purpose other than the recovery of the shortfalls claimed in those proceedings. Indeed, as we understand your argument, your clients' essential complaint is that Post Office was too motivated by a desire to recover such shortfalls. This being the case, we assume that you are not seriously maintaining a claim in relation to the bringing of civil proceedings and we invite you to confirm.
- 6.35 In the context of criminal prosecutions, the constituent components of a claim for malicious prosecution¹⁰⁰ are:
- 6.35.1 The postmaster was prosecuted by Post Office;
 - 6.35.2 The prosecution was determined in the postmaster's favour;
 - 6.35.3 Post Office did not have reasonable and probable cause to institute the prosecution; and
 - 6.35.4 Post Office was motivated by malice.
- 6.36 Point 2 means a claim cannot lie against Post Office where the postmaster has been convicted and the conviction / orders made in this case still stand. You put forward two cases, Hamilton and GRO as examples of malicious prosecution by Post Office. You have raised no other cases in the Letter of Claim. We have addressed both these cases above. We note that Ms Hamilton remains convicted and GRO was never prosecuted, and so regardless of your views on the sufficiency of evidence supporting these "convictions", no claim for malicious prosecution can lie against Post Office in these cases.
- 6.37 From our review of the 91 original Claimants, we have so far only identified seven Claimants that were prosecuted but not convicted.¹⁰¹ We note that no postmaster has successfully appealed a conviction. Please confirm that the claims for malicious prosecution at this stage only apply to these seven Claimants.
- 6.38 In each of these cases, Post Office is confident that your clients will neither show a lack of reasonable and probable cause nor show malice on the part of the Post Office. We note that your clients face the burden of proof in this regard. So far as we can tell from your Letter of Claim, you may have misconstrued the reasonable and probable cause requirement, and you appear to misunderstand what is necessary to constitute malice in this context.
- 6.39 A good example of the hopelessness of this claim is the case of your client GRO
- 6.39.1 GRO committed fraud by double withdrawing from the accounts of elderly customers and keeping the extra withdrawal for herself. The customer would ask for a withdrawal and receive the amount they requested at the counter but a second amount would be taken from their account at the same time (usually for the same amount) and not passed to the customer.
 - 6.39.2 Twelve customers were identified as being subject to this fraud. All were contacted by the Post Office and all provided witness statements.

⁹⁹ [2014] AC 366

¹⁰⁰ Martin v Watson [1994] QB 425 CA

¹⁰¹ Joy Taylor, Thomas Brown, Sarah Burgess-Boyd, Susan Hazzleton, Kym Wyllie, Susan Knight and Jasvinder Uppal.

- 6.39.3 [GRO] was interviewed at Walsall Police Station on 21 July 2009 by two Post Office Investigation Managers. During this interview, the question of the fraud was put to her. She admitted on a number of occasions during her interview that she had been *"taking customers' money", "stealing which is "totally wrong", "asking them [the customers] to put their card back in again telling them that the first transaction didn't go through and asking them to put their pin number in again", she had "spent it ([the stolen Post Office funds] [on] Food, clothing household stuff anything and everything I've just got a bit carried away" and that she "was just enjoying the money".*
- 6.39.4 At a further interview on 11 September 2009, [GRO] stated that what she had done *"was totally wrong I was just taking their money, I was spending it on anything and everything, I was just trying to enjoy myself 'cos there was so much going on in my life".*
- 6.39.5 [GRO] even explained how her theft had started:
- "It happened once as a mistake and when the customer didn't come back he didn't come back for ages nobody come back and I was worried about it because I realised afterwards after they'd [sic] what had happened there was 2 transactions gone out. After that I just thought well he hasn't come back so this is easy and I just took the money and I started spending it ... but then it got worse and worse and then I couldn't stop myself...I'm totally ashamed of myself".*
- 6.39.6 [GRO] was subsequently prosecuted. Shortly before trial, four psychiatric reports were produced on behalf of [GRO] some of which suggested that she was unfit to plead. Given [GRO] alleged health issues, Post Office decided that it was not appropriate to proceed with the prosecution.
- 6.40 The contrasting factual circumstances of the cases of Hamilton [GRO] and [GRO] show why each case will need to be considered on its own merits. It is difficult to see how claims for malicious prosecution could be advanced as a common issue under a GLO.
- 6.41 Malicious prosecution also involves allegations of bad faith. We again repeat the need for you to properly particularise this claim for each individual Claimant should your clients wish to pursue these claims further.
- 6.42 This head of claim is meritless. Please confirm that your clients will discontinue the claim.

F. Unlawful means conspiracy

- 6.43 A claim for unlawful means conspiracy requires your clients to prove (amongst other things) two elements:
- 6.43.1 a combination between two or more persons with an intention injure another; and
- 6.43.2 that the means by which they cause injury is unlawful.
- 6.44 The factual basis for this claim is said to be that Post Office, in combination with its directors or employees, or Fujitsu, concealed faults in Horizon. This claim is baseless for many reasons, including the following:
- 6.44.1 First, you have presented no evidence of a fault in Horizon that has caused injury to a postmaster.
- 6.44.2 Second, we infer that it must be your clients' case that Post Office has a duty to disclose to postmasters all faults in the Horizon system as and when they appear. However, you have presented no basis for alleging that Post Office owed your clients such a duty.

- 6.44.3 Third, you have not shown that Post Office has concealed any faults in Horizon.
- 6.44.4 Fourth, you have presented no evidence of a combination between Post Office, its directors and employees or Fujitsu. Further:
- (a) As Lord Wright said in Crofter Hand Woven v Veitch¹⁰², the fact that a trader employs servants or agents in the conduct of his business would not make the servants or agents liable as co-conspirators with him. Nowhere do you suggest (and we are not aware of any basis for suggesting) that, in relation to the matters of which you complain, any Post Office directors have done anything other than carry out their constitutional roles in the governance of the company¹⁰³ or that any Post Office employees have acted outside the scope of their authority. In these circumstances, there is clearly no basis for alleging an actionable conspiracy between Post Office, its directors and its employees.
 - (b) The only other alleged conspirator is Fujitsu and you have advanced no case that Fujitsu was involved in, or even aware of, the events in question. The suggestion that it was for some reason complicit in a conspiracy to injure your clients by unlawful means is not credible.
- 6.45 Yet again, this head of claim has no merit. We are bound to say that, even if it had some merit, it can only succeed if your other claims of unlawful conduct succeed. But if those claims succeed, the conspiracy claim would achieve nothing more than that which would be achieved through those other claims. In the context of this case, where there is only one defendant, it is superfluous. We invite you to reconsider the justification for adding this cause of action to the proceedings in circumstances where it will offer no additional advantage to your clients.
- 6.46 We invite you to discontinue this claim or explain why it has merit and why it offers anything beyond the other claims put forward.

7. LOSS AND DAMAGE

- 7.1 If your clients were able to properly particularise and evidence any of their claims, they would still need to demonstrate that these claims have caused them loss and that such loss is recoverable. In your Letter of Claim no attempt is made to do this or even to explain it.
- 7.2 We note that you have listed various broad heads of loss allegedly suffered by the Claimants in section G of the Letter of Claim but you have made no attempt whatsoever to:
- 7.2.1 particularise the types of loss suffered within each head of loss;
 - 7.2.2 identify which heads of loss arise from which causes of action (for example, stigma damages cannot be recovered in a claim arising from the breach of a commercial contract);
 - 7.2.3 demonstrate a causal link between your factual allegations and a loss being suffered as a result of the matters alleged (taking into account some rather obvious points such as that Post Office cannot be liable for post-termination losses where it has terminated Postmaster Contracts by giving lawful notice in accordance with their terms); or

¹⁰² [1942] 1 All ER 147

¹⁰³ Prudential Assurance Co Ltd v Newman Industries Ltd (No.2) [1982] Ch 204: "...a director will not be treated as liable with the company as a joint tortfeasor if he does no more than carry out his constitutional role in the governance of the company - that is to say, by voting at board meetings. That, I think, is what policy requires if a proper recognition is to be given to the identity of the company as a separate legal person. [...] I would accept that, if all that a director is doing is carrying out the duties entrusted to him as such by the company under its constitution, the circumstances in which it would be right to hold him liable as a joint tortfeasor with the company would be rare indeed."

- 7.2.4 quantify the alleged losses for each (or indeed any) Claimant.
- 7.3 This unfocussed approach to causation and loss is unacceptable. For the reasons stated below, issues of causation will be critical in this matter and are likely to result in your clients having very little recoverable loss even if their claims were well-founded (which is denied).
- 7.4 Once these points are taken into account, there are clear cases within the 91 Claimants where there is no recoverable loss at all. For example, we cannot see that any recoverable loss has been incurred in the case of Alan Bates. Mr Bates was not required to make good the shortfalls in his branch (of £1,041.84 in March 2001 and a further £1,407.38 in November 2003), so he has suffered no loss on that front. In addition, his Postmaster Contract was terminated by Post Office giving three months' notice in writing on 5 August 2003. Post Office was entitled to give notice of termination at will, whether its reasons were good or bad. There can be no claim that the termination was unlawful and no claim on the footing that his contract would have continued any longer than Post Office wanted it to.
- 7.5 We invite you to address these matters now so to avoid having to address them in your clients Reply to Post Office's Defence, which we suspect will cause a need for unnecessary amendments and Requests for Further Information.

A. Financial loss

- 7.6 Given the complete lack of detail on the claims for harassment, deceit, misfeasance, malicious prosecution and unlawful means conspiracy, we have focussed below on the loss and causation issues which arise from a breach of contract claim.
- 7.7 Despite the many different implied terms on which you seek to rely, your client's cases appear to boil down to two situations:
- 7.7.1 Post Office has held a Claimant wrongfully liable for a shortfall in a branch; or
- 7.7.2 Post Office has wrongfully terminated a postmaster's contract.
- 7.8 The loss stemming from the liability for a shortfall only arises in cases where the postmaster actually repays the shortfall to Post Office. In many cases, the postmaster never repaid the shortfalls – these outstanding sums are the subject of the counterclaims discussed in Section 9 below. In circumstances where a postmaster is wrongfully required to compensate Post Office for a shortfall that was not in fact due, the postmaster may have a *prima facie* claim to recover the sum paid. No other direct or indirect¹⁰⁴ loss is however recoverable.
- 7.9 The recoverable loss following the termination of a postmaster's contract is also limited:
- 7.9.1 First, there can only be a claim where the contract was wrongfully terminated by Post Office. The following situations can therefore never give rise to a claim for post-termination losses:
- (a) The postmaster is still in post.
 - (b) The postmaster resigned.
 - (c) The postmaster's contract was terminated by Post Office having given the requisite period of contractual notice (three months in most cases).
 - (d) The postmaster's contract was summarily terminated by Post Office due to criminal misconduct or some other valid reason.

¹⁰⁴ Within the meaning of Hadley v Baxendale (1854) 9 Ex. 341

- 7.9.2 Second, any claim for lost remuneration will be limited to the minimum contractual notice period that Post Office could have given, being three months in the Postmaster Contract.¹⁰⁵
- 7.9.3 Third, any claim for the loss of profit from a postmaster's retail business (say due to a reduction in footfall) will similarly be restricted to the minimum contractual notice period. In this regard, we refer to Section 1, Clause 8 of the Postmaster Contract, which makes it clear that postmasters are not entitled to compensation for loss of office.¹⁰⁶
- 7.9.4 Fourth, Post Office is not responsible for any devaluation in the sale price of a postmaster's retail business due to the removal of the Post Office branch. The Post Office branch is not a saleable asset – the postmaster's contract cannot be transferred to another person. Post Office is always able to terminate a postmaster's appointment on notice and is not obliged to appoint a replacement postmaster or appoint as postmaster any person acquiring the retail business.
- 7.9.5 Fifth and in any event, any claim in connection with losses at a retail business will face substantial difficulties in establishing causation on the facts. The value and sales of a postmaster's retail business are affected by a range of factors over which Post Office exercises no control. For example, the quality and location of the premises, the property market at a particular point in time, the level of investment made in the business by the postmaster and the decision by the postmaster as to what represented an acceptable price for the sale. It cannot be said, as a question of fact, that the termination of a postmaster's contract is the cause of losses in an associated retail business.

B. Stigma and / or reputation damage

- 7.10 It is well established that stigma / reputation damages are not recoverable on an ordinary breach of contract claim¹⁰⁷ or on a claim for unlawful means conspiracy.¹⁰⁸ As a general proposition, damages for loss of reputation in tort stem from a claim for defamation¹⁰⁹ and no such claim is advanced.¹¹⁰ Stigma / reputation damages will therefore not be recoverable in claims for deceit, misfeasance or harassment.
- 7.11 Quite apart from the above legal points, Post Office cannot be liable for stigma / reputation damages as a result of a postmaster being asked to repay a shortfall in a branch or having had their contract terminated. These are private commercial matters – Post Office does not publicise that a postmaster has repaid a shortfall or that it has terminated a postmaster's contract (as distinct from closing a branch which may be for any number of reasons including the postmaster's own resignation). As a point of causation therefore it must have been your clients who have made public these matters and in doing so they have failed to mitigate their own loss. A claim for this head of loss arising from normal commercial dealings is therefore irrecoverable.
- 7.12 We accept that the position is different where there has been a prosecution and that, as a broad principle, this head of damage is recoverable in claims for malicious prosecution. However, as we have already explained, your clients' claims for malicious prosecution are untenable.
- 7.13 Should a claim for stigma / reputation damage be advanced this will obviously turn on the specific circumstances of each individual Claimant, with each Claimant needing to prove any loss suffered. You have so far not provided any evidence of such reputation damage.

¹⁰⁵ Chitty on Contracts, 32nd Edition at 26-001

¹⁰⁶ see Section 4B above

¹⁰⁷ Addis v Gramophone [1909] AC 488

¹⁰⁸ Lonrho Plc. and Others v Fayed and Others (No. 5) [1993] 1 W.L.R. 1489

¹⁰⁹ McGregor on Damages at 3-010

¹¹⁰ In the vast majority of cases such a claim would be clearly time-barred; the limitation period being one year from date of publication (section 4A Limitation Act 1980).

- 7.14 In light of the above, please confirm that any attempts to recover stigma / reputation damage will be limited only to malicious prosecution claims.

C. Distress and related ill-health

- 7.15 A distinction must be drawn here between distress amounting to personal injury and general distress. Very different rules apply to these two limbs and it is not appropriate to bundle them together.
- 7.16 Distress that amounts to personal injury will be recoverable on some of the claims you have advanced, where that it is within the contemplation of the parties or is reasonably foreseeable that this sort of injury would be suffered by a person of reasonable fortitude. However, we are aware of few cases that have given rise to such circumstances. If you are aware of such cases, please can you identify them now and confirm that you hold appropriate contemporaneous medical reports of the particular Claimant's injuries.¹¹¹
- 7.17 General distress is not recoverable on claims for breach of contract¹¹², unlawful means conspiracy¹¹³ or generally in tort.¹¹⁴ This head of loss is therefore limited to your clients' claims for deceit, harassment and malicious prosecution. Please confirm that you agree with this assessment.

D. Bankruptcy

- 7.18 The mere status of being bankrupt is not a recoverable head of loss. We can see how bankruptcy may be the product of suffering other financial loss or may cause further financial loss, distress or reputation damage. If that is what you meant by this heading, then our above points apply here. If you are alleging that this represents some form of distinct head of loss, please can you explain why.

E. Prosecutions

- 7.19 The mere fact that one has been prosecuted is not a recoverable head of loss. We can see how being prosecuted may be a step in the chain of causation that leads to the other heads of loss set out above, but being prosecuted is not a head of loss in itself. Again, if you are alleging that this represents some form of distinct head of loss, please can you explain why.

F. Community or Custodial Sentences

- 7.20 If any of your clients have been subject to a community or custodial sentence, they must have first been convicted. Given our explanation above about the components of a claim for malicious prosecution and the fact that no claim can lie against Post Office where a postmaster has been convicted, Post Office cannot be liable for any losses arising out of community or custodial sentences.
- 7.21 Please confirm that this head of loss will not be advanced.

¹¹¹ Practice Direction 16 of paragraph 4.3 requires medical reports to be appended to any Particulars of Claim so we presume you must either hold or be procuring these reports now.

¹¹² Addis v Gramophone [1909] AC 488

¹¹³ Lonrho Plc. and Others v Fayed and Others (No. 5) [1993] 1 W.L.R. 1489

¹¹⁴ Lynch v Knight (1861) 9 HLC 577

8. BARRED CLAIMS

- 8.1 For the reasons already explained, the claims you have made are unfounded. In addition to these points, a number of the Claimants have no prospects of succeeding in their claims by virtue of being: (i) time barred; (ii) criminal cases where closely connected allegations have been looked at by a court previously so issue estoppel arises; or (iii) settled as part of the Scheme.
- 8.2 Please confirm that Claimants that fall into one or more of the following groups will withdraw their claims.

A. Cases barred by limitation

- 8.3 Sections 2 and 5 of the Limitation Act 1980 provide that the limitation period for actions in respect of simple contracts and actions in tort is six years. Given that the last act between Post Office and a postmaster that could constitute a breach of duty will generally be the termination of a postmaster's contract, this creates a clear latest date from which the limitation period will generally run. Please find at Schedule 2 details of the 50 claims within the original 91 Claimants which are currently known to be time barred on this basis.¹¹⁵
- 8.4 We note Section E of your Letter of Claim on concealment. Although you do not expressly assert that the allegation of concealment is tied to questions of limitation, we note that the language used in paragraph 129 of the Letter of Claim mirrors the wording of set out in section 32 Limitation Act 1980. We therefore address Section E against the background that your clients intend to assert that limitation should be extended on the grounds of deliberate concealment.
- 8.5 At no point did Post Office conceal facts relevant to the Claimants' causes of action in relation any of the matters referred to in paragraph 127 of the Letter of Claim. You assert four ways in which Post Office allegedly concealed matters:
- 8.5.1 You say that Post Office's investigators disregarded problems with Horizon – a point we have addressed above. We cannot see how ignoring an issue amounts to a deliberate act of concealing information from your clients. By ignoring an issue as you suggest, Post Office would not have had the information in the first place in order to subsequently conceal it.
- 8.5.2 You say that helpline operators persistently said to postmasters that "*they were the only one*". No evidence has been advanced which shows that this statement was ever made, still less in relation to issues that were known by the relevant operators to be recurring. The idea that there was some form of conspiracy orchestrated by Post Office to make all its helpline operators lie to postmasters using these exact words to hide known problems is ridiculous.
- 8.5.3 You say that Post Office has acted obstructively in refusing to disclose certain information. We have addressed Second Sight's particular requests for documents in Schedule 4, which shows these requests were minor in the wider context. Against a background where Post Office has handed over tens of thousands of documents to third parties, including Second Sight and the CCRC, it is not sustainable to suggest that Post Office has operated a system of mass suppression of documents. In any event, we note Second Sight's views at the end of the Part Two Report:

"...we wish to place on record our appreciation for the hard work and professionalism of Post Office's in-house team of investigators, working for Angela Van Den Bogerd, Post Office's Head of Partnerships.

Our work would have been much harder and taken much longer without the high quality work carried out by this team. We have also received excellent support

¹¹⁵ Certain claims may arise from events that pre-date termination and Post Office reserves the right to assert that such other claims or certain other Claimants are also time-barred.

*from the administrative team set up by Post Office to support the Working Group."*¹¹⁶

These comments make clear that Post Office has been anything but obstructive.

- 8.5.4 You say that Post Office has concealed its "*ability to remotely alter transactions*" but this allegation is too imprecise to be a basis on which to extend limitation:
- (a) in light of our explanation above, you need to specify exactly what capabilities Post Office is said to have concealed;
 - (b) as this is an allegation of bad faith, you need to particularise why you believe that Post Office has allegedly misrepresented the situation (including what was said, by whom, to whom, when and in what context, for each individual Claimant);
 - (c) you need to show that Post Office's alleged concealment was "*deliberate*" – Post Office will say that it made due enquiries before making any statement on this topic; and
 - (d) you need to demonstrate that the fact concealed was an essential fact needed to found a cause of action.¹¹⁷ However, the issue of "*remote access*" cannot be said to be essential to the claims you assert.

8.6 As to the matter of Seema Misra cited at paragraph 128 of the Letter of Claim:

- 8.6.1 You describe an alleged conversation between Mr Charles McLachlan and an unnamed Post Office investigator where it was said that Post Office would not investigate possible IT errors. Post Office has not seen any documentary record of that conversation and, to the extent such a record exists, we would be grateful if you could provide it. In any event, this is not the case and we repeat our point at paragraph 8.5.1 above that ignoring an issue is not concealing an issue.
- 8.6.2 You also describe a meeting between Post Office and Fujitsu before the trial of Seema Misra. Please provide the "*minutes*" of that meeting to which you refer. You admit that these minutes discuss matters not relevant to Mrs Misra's case and so we do not understand how Post Office can be said to have concealed this information from her.
- 8.6.3 Further, Mrs Misra's Defence made very wide-ranging requests for disclosure during her prosecution and these were ruled on at the time by the Court.

8.7 There is no basis on which you can credibly assert that the limitation period has been postponed in relation to any of the time-barred claims and these claims should be withdrawn, failing which we reserve the right to apply for them to be struck out.

B. Criminal cases

8.8 The claims of 30 Claimants are currently known to have been the subject of criminal convictions for fraud, false accounting and/or theft.¹¹⁸ These Claimants are listed at Schedule 2.

¹¹⁶ Paragraphs 26.5 and 26.6

¹¹⁷ Arcadia Group Brands Ltd v Visa Inc [2014] EWHC 3561 (Comm): "*The claimant must satisfy 'a statement of claim test': in other words, the facts which have been concealed must be those which are essential for a claimant to prove in order to establish a prima facie case. [...] Thus section 32(1)(b) does not apply to new facts which might make a claimant's case stronger.*"

¹¹⁸ It should be noted that of this 29, two of the Claimants were wives of the husband who acted as the Postmaster.

- 8.9 We note that a statement of case can be struck out under CPR 3.4(2) for various reasons, one of which being to prevent proceedings which would be an abuse of the court's process (CPR 3.4(2)(b)).
- 8.10 Under the well-established principle of issue estoppel, where an issue has been decided in earlier proceedings, it is binding on the parties in future litigation. Claimants cannot bring proceedings on an issue that has already been determined.
- 8.11 In bringing these claims, the Claimants will be asking the civil court to re-open matters which a criminal court has already determined. This is an abuse of process. We note that a claim for malicious prosecution does not assist in this regard because, for the reasons set out above, that claim is not open to Claimants who have been convicted.
- 8.12 Please confirm these 29 Claimants will withdraw their claims immediately. If these Claimants do not withdraw their claims, Post Office reserves the right to apply to strike out these claims.

C. Settled cases

- 8.13 There are six Claimants within the original 91 Claimants – Graham Ward, Paul Popov, Revti Bhanote, Arun Bhanote, Margaret Boston and Lawrence Bailey – who settled their cases in the course of the Scheme.
- 8.14 Under the terms of these agreements, each of the four Claimants listed above agreed, in full and final settlement, to release any and all claims, whether or not presently known to the parties that they ever had against Post Office and/or any of its related parties in relation to their respective complaints.
- 8.15 It is not sufficient to unwind a settlement agreement to say that a party settled without having the full information or evidence available to them. You would need to show fraud on the part of Post Office and, for the reasons outlined above, there are no credible grounds for such an argument. You have not even attempted to identify any false representations on which these Claimants relied.
- 8.16 Please confirm that the claims of these six Claimants will be discontinued. If not, please properly particularise the fraud that Post Office would have had to have committed in order to invalidate these settlement agreements (bearing in mind your duties to properly explain and evidence such assertions). In the absence of a proper response to this request, Post Office reserves its right to apply to strike out these claims.

D. Previous civil proceedings

- 8.17 We are still investigating whether any of the Claimants have been involved in civil proceedings in such a way that would bar them from participating in the Group Action. Three of the Claimants are currently known to have been the subject of civil proceedings and these Claimants are listed at Schedule 2. To the extent that the matters now complained of have already been subject to civil judgments, new claims cannot be brought.

9. COUNTERCLAIMS

- 9.1 A number of the Claimants left their branches with an outstanding shortfall. In none of these cases has the postmaster shown that the root cause of the shortfall was a breach of duty by Post Office. As such, and for the reasons stated above, Post Office considers that those Claimants are obliged to compensate Post Office for those shortfalls.

- 9.2 Should you proceed to serve the Claim Form, Post Office will bring counterclaims to recover the outstanding shortfalls (along with interest thereon). Schedule 2 shows Claimants, which of the original 91, Post Office currently considers may be subject to a counterclaim.

10. GLO AND OTHER CASE MANAGEMENT ISSUES

A. Correspondence to date

- 10.1 Since your Letter of Claim, we have exchanged correspondence regarding a GLO. All parties are agreed that a GLO would be an appropriate way of managing this litigation. On 15 July 2016, we sent you a mark-up of a draft GLO along with our substantive comments. We look forward to receiving your response.
- 10.2 For clarity, references below to "GLO Schedule X" are references to the schedules to the draft GLO rather than references to the schedules to this letter.
- 10.3 As set out in our correspondence, we have sought to progress the GLO as far as possible whilst noting that agreeing the scope of the GLO (namely the "GLO Issues" in GLO Schedule 1) and the information required from Claimants (as per the Schedule of Information in GLO Schedule 3) would be more easily understood and agreed once you had sight of this letter.
- 10.4 In particular, we consider that a number of the issues that you propose be treated as "common or related" issues are not at all common or related. A consequence of this is that much more detailed information will be required from each Claimant on these unrelated issues, which in turn requires a more extensive list of required information under GLO Schedule 3.
- 10.5 We identify below the issues that we do not consider to be common or related and then set out our proposals for defining the GLO Issues and the Schedules of Information required from each Claimant.

B. Related and unrelated issues

- 10.6 Your current approach to identifying the GLO Issues does not distinguish between Claimants advancing similar causes of action and those causes of action engaging common or related issues of fact or law – the latter being the criteria for a GLO. For example, just because a number of postmasters may wish to bring a claim for malicious prosecution against Post Office, does not mean that those malicious prosecution claims engage common or related issues of fact or law. Indeed, for the reasons stated above, it is clear that malicious prosecution claims will be highly fact specific.
- 10.7 The advantage of a GLO is that it allows the Court to make a determination on a point of fact or law that will help progress multiple claims towards resolution. A clear understanding of what is a common issue and what is a Claimant specific issue is important when drawing up a GLO and related case management directions.
- 10.8 The issues that our client accepts are common or related issues¹¹⁹ are:
- 10.8.1 The duties, meaning and effect of the Postmaster Contract (including any implied terms or related agency or fiduciary duties or related duties of care in tort) in relation to the provision of Horizon, the procedures for operating Horizon, training in relation to Horizon, support in relation to Horizon and liability for shortfalls identified by Horizon of cash or stock in a branch.

¹¹⁹ This list of issues should not be taken to mean that Post Office considers these issues have merit. A number of these allegations should be discontinued for the reasons stated in this letter.

- 10.8.2 Whether there is any error in Horizon that is the root cause of shortfalls in multiple Claimants' branches.
- 10.8.3 Whether Post Office deliberately concealed or unlawfully misrepresented the true position in relation to errors in Horizon of the sort referred to in paragraph 10.8.2 above.
- 10.8.4 In particular, whether and if so in what context Post Office has instructed its staff operating its NBSC helpline to tell postmasters that they are "*the only one*" experiencing a particular problem with Horizon even though Post Office knew that problem was more widespread.
- 10.8.5 Whether Post Office can be the subject of a claim for misfeasance in a public office, in particular whether Post Office is a public office holder.
- 10.8.6 What obligations (in terms of evidential requirements, public interest requirements and other motivating factors) must Post Office satisfy in order to bring a lawful prosecution?
- 10.8.7 Whether Post Office has conspired with its directors or employees, or with Fujitsu, to injure postmasters in general by the unlawful means of breaching the implied terms or other duties referred to in paragraph 10.8.1 above.
- 10.8.8 Whether Post Office can be liable for losses caused following (i) a postmaster's resignation or (ii) the lawful termination of a postmaster's contract (either by giving the contractually prescribed notice or by lawful summary termination).
- 10.8.9 Whether, as a matter of law, damages for stigma, loss of reputation and distress are recoverable for breaches of the implied terms or other duties referred to in paragraph 10.8.1 above.
- 10.9 The following issues are not common or related issues (this is not an exhaustive list):
 - 10.9.1 The duties between Post Office and any Claimant who was not subject to the Postmaster Contract. You have not set out any case in this respect and therefore our client's position on this point is reserved at this time.
 - 10.9.2 Whether Post Office unlawfully recovered a shortfall from a postmaster. This will turn on the circumstances of the particular case and the steps taken or not taken by the Claimant and Post Office in relation to each shortfall.
 - 10.9.3 Whether Post Office's training was inadequate (in the sense that it was in breach of the implied duties or other terms referred to in paragraph 10.8.1 above). The provision of training will be different for each Claimant and standard training programmes have changed over time.
 - 10.9.4 Whether Post Office's support was inadequate (in the sense that it was in breach of the implied duties or other terms referred to in paragraph 10.8.1 above). The provision of support will be different for each Claimant and standard support programmes have changed over time.
 - 10.9.5 Whether Post Office has prosecuted a Claimant without sufficient evidence to support the charges brought against that Claimant or has brought such prosecution for the wrong reasons (e.g. malice). This will turn on the evidence and circumstances in individual cases.
 - 10.9.6 Whether, as a question of fact (as distinct from any question on the true meaning of "harassment" under the Act), Post Office has harassed any Claimant. This will turn on the specific steps taken by Post Office in relation to each Claimant.

- 10.9.7 Whether the claims of those Claimants who are subject to a criminal conviction should be struck out.
- 10.9.8 Whether those claims subject to binding settlement agreements should be struck out.
- 10.9.9 Whether any claim is time barred. This will turn on the timing in each individual case of when the cause of action accrued and when any action was taken (or not) by Post Office that is said to amount to concealment of a fact relevant to a cause of action.
- 10.9.10 The causation, mitigation and quantification of losses for each Claimant.
- 10.9.11 Any counterclaim by Post Office against any particular Claimant.

C. GLO SCOPE

- 10.10 We recognise that the GLO Issues are not intended to be an exhaustive list of all issues in dispute, that they may be refined in due course and that they will be general in nature. However, your current approach appears to have attempted to use the GLO Issues to simultaneously set out the scope of the claims that are intended to fall under the GLO (i.e. by reference to a list of common or related issues) whilst at the same time trying to draw up a list of all issues in dispute that may arise between any of your clients and Post Office (many of which are specific to individual Claimants). In doing so, it achieves neither purpose. It has resulted in the potential for claims to be caught by the GLO that are not within the scope of the matters set out in the Letter of Claim and therefore should not be so caught.
- 10.11 For example, paragraph 1 of your proposed GLO Schedule 1 extends the GLO to cover the true interpretation of the Postmaster Contract. That issue alone would bring into scope every dispute our client may have with any of its 10,000+ postmasters, all of which ultimately go back to the obligations under that contract. By way of specific example, your draft GLO could be said to cover:
 - 10.11.1 our client's Network Change and Network Transformation programmes that have led to a number branch closures and changes in working practices; and
 - 10.11.2 issues around maintaining proper opening hours, selling products restricted under the Postmaster Contract or failing to conduct mailwork properly.
- 10.12 We believe that the scope of the GLO (namely the GLO Issues) can and should be much more simply stated. They should refer only to those issues that are common or related, thereby representing the issues on which a Court could make a determination that would advance multiple claims toward resolution. At a later date, we can agree a full list of issues in dispute – a process that we anticipate will require great care.
- 10.13 We enclose a further amended version of the draft GLO adopting this approach (which shows all our proposed amendments, under this letter and previous letters, against the last version of the GLO that you circulated).
- 10.14 The counterpoint to this simple set of GLO Issues is that the Schedule of Information (GLO Schedule 3) required from each Claimant must be much more extensive. The above explanation of related and unrelated issues highlights that there is much information needed on each individual Claimant's case, so that it can clearly be understood (1) which GLO issues their claims raise and how and in what respects they raise those issues and (2) what other principal issues their claims raise. The information referred to in (2) is as important as the information referred to in (1), since it will enable the parties to understand and agree the nature and scope of the statements of case needed in this litigation. In Prudential v HMRC¹²⁰, the Court of Appeal made clear that proper Particulars of Claim are required even in group litigation:

¹²⁰ [2016] EWCA Civ 376

"Particulars of Claim must comply with CPR Part 16. If the claim is made under Part 8 rather than under Part 7, then the rules require relevant evidence to be served when the claimant makes his claim. Either way, relevant facts must in our view be pleaded. If they are facts generally applicable to all claimants, they may be pleaded in Group Particulars of Claim; if they are specific to a particular claimant they may be set out in a schedule."

- 10.15 We can, if you wish, provide a draft Schedule of Information now however it would make more sense for us to first see your response to this letter, as that will help define what points are in dispute and what information is needed from each Claimant.
- 10.16 We invite your comments on these proposals. It is not our intention to artificially restrict the scope of the GLO in order to secure some form of advantage for our client, but we must insist on the matters which are to be subject to the GLO being clearly defined. Please therefore let us know if you believe that there are more common or related issues that could be added to the GLO Issues. We would be prepared to meet in person (potentially on a without prejudice basis if that would help facilitate an open dialogue) to discuss the GLO and any points of disagreement.

11. NON-VICTIMISATION

- 11.1 We have made our client's position clear on the issues raised in Section J of your Letter of Claim in our earlier correspondence. For the avoidance of doubt:
- 11.1.1 Our client has not unlawfully "victimised" any postmaster who has brought a claim against Post Office (and you have not suggested that there is any evidence that shows otherwise).
- 11.1.2 In these circumstances, there is no basis for seeking any sort of assurance. Our client is happy to make it clear that it has no intention of victimising any postmaster because they have brought proceedings such as this against it. Whether any postmaster is party to these proceedings or not, our client will continue to follow its normal procedures in the normal way. However, our client will not give the assurance you seek as it would unreasonably restrict our client's legal rights and ability to manage its business (for example, its right to take appropriate action if any of your clients reveal that they have committed serious breaches of their postmaster contracts).
- 11.2 We trust you will inform us if you believe that Post Office is undertaking any unlawful act in relation to a postmaster who is still in post. We will then take our client's instructions on an urgent basis.

12. DISCLOSURE AND INFORMATION REQUESTS

A. Your disclosure requests

- 12.1 At paragraph 169 of the Letter of Claim, you request an extremely wide range of documents in what can only be described as a trawling expedition.
- 12.2 The breadth of documents requested is remarkable. The request would effectively require Post Office to search for documents in all corners of its organisation. The number of documents that would need to be considered would likely be in the millions. No justification has been put forward for why each category of document is required or to what issues they would go to. The scale of the exercise that would be required to find the requested documents would be massive. Your requests are wholly disproportionate.

- 12.3 Given your refusal to provide information on the 91 Claimants on the grounds that this would be a duplication of effort¹²¹, it is contradictory for your clients to demand that our client provides such a vast quantity of documentation.
- 12.4 That said, our client is keen to be helpful when it comes to the provision of information where reasonable to do so. Schedule 1 contains Post Office's itemised response to each of your disclosure requests. It also lists the documents available for inspection which are referred to in this letter. As you will see, our client's approach has been to disclose the requested documents wherever reasonable and proportionate to do so at this early stage of the proceedings.
- 12.5 Please confirm that the restrictions on the use of documents under CPR 31.22 will apply to any documents we disclose. Please also confirm that you have explained the restrictions under CPR 31.22 to each of the Claimants and that each of them agrees to comply with these restrictions. Once we have these confirmations, the documents in Schedule 1 will be provided to you. If you have undisclosed clients who are not Claimants, they will not be entitled to view any disclosed documents until they become a Claimant. Please confirm that you agree with this.

B. Access to Second Sight

- 12.6 You have asked for Post Office to release Second Sight from its confidentiality obligations so that they may speak to you.¹²² Our client is not opposed to this in principle but has reservations about doing this for the following reasons:
- 12.6.1 First, given the reservations already expressed about Second Sight's work,¹²³ our client is understandably concerned that their further involvement will only cause more time to be wasted on meritless avenues of enquiry.
- 12.6.2 Second, you already have Second Sight's reports and it is difficult to see what further information they may have of value.
- 12.6.3 Third, Second Sight has had access to Post Office's privileged material. Although Second Sight says that it has returned all such material to Post Office (and destroyed all other copies), they still hold some of this information in their heads. There is a risk of privilege being inadvertently waived should you consult them.
- 12.7 In the light of these reservations, we should be grateful for your answers to the following questions:
- 12.7.1 For what purpose do you wish to speak to Second Sight and why do you believe that this will advance matters?
- 12.7.2 Are you intending to call them as a witness (and, if so, as a witness of fact or an expert witness)?
- 12.7.3 Please provide proposals for managing the privilege risks outlined above.
- 12.8 Once we have your answers to these questions, we will seek our client's instructions.

C. Official Secrets Act

- 12.9 At paragraphs 175-185 of the Letter of Claim, you express concern about the provisions in the Postmaster Contract relating to the Official Secrets Act 1989 (**OSA**) and the effect this may have

¹²¹ Freeths' letter to Bond Dickinson dated 7 June 2016

¹²² For the avoidance of doubt, should Second Sight speak to you (or make any disclosures in connection with the litigation) without Post Office's consent this will be a breach of contract and a breach of confidence.

¹²³ See paragraphs 5.2 to 5.7 above

on your clients providing information to you. We disagree with your interpretation of these provisions. However, we do not believe that it is necessary to debate this matter.

- 12.10 It is obviously not within Post Office's gift to relieve postmasters of any obligations under the OSA. But to avoid unnecessary argument, our client agrees not to assert any rights it may have under Section 16 of the Postmaster Contract against any Claimant (named on a Claim Form that is registered as part of the group action) who makes disclosures of information for the dominant purpose of this litigation.

13. ADR

A. Previous attempts at resolution

- 13.1 Your firm is new to this matter. By contrast, our client and many of your clients have spent the last two years going through an extensive ADR process, namely the Scheme.
- 13.2 In relation to the original 91 Claimants, of the 70 Claimants who participated in the Scheme, Post Office investigated all their cases and offered to mediate with 43 of them. Of the 43 Claimants invited to mediation, 22 either declined or did not respond to Post Office's offer. Our client has therefore already made considerable efforts to resolve matters outside Court.
- 13.3 Our client refused to mediate with 25 Claimants¹²⁴ on the grounds that mediation had no prospect of success. Twenty-two of these 25 had been convicted of a criminal offence. It would be wrong for our client to countenance the possibility of paying any sum to a postmaster who has been and remains convicted of a criminal offence by a Court. Whilst those convictions remain, our client will not mediate or settle with any convicted Claimant.

B. Settlement offer

- 13.4 In the recent case of Webb Resolutions Limited v Countrywide Surveyors Limited¹²⁵ a Claimant was ordered to pay a Defendant's pre-action costs where the Claimant issued but did not serve a Claim Form. Your clients are therefore already at risk of paying our client's costs. However, Post Office is prepared not to pursue any claim for the costs our client has incurred to date should your clients discontinue these proceedings now.
- 13.5 For the reasons set out in this letter, these proceedings will be vigorously defended. Now that our client's position has been made clear, some or all of your clients may not wish to proceed.
- 13.6 Your clients are not all in the same position. Some may well not wish to embroil themselves in long and expensive litigation. The above offer is designed to allow Claimants who do not wish to proceed with the litigation to exit now without incurring any further liability for legal costs. We should therefore be grateful if you would take each of your clients' instructions on whether they wish accept this settlement proposal.
- 13.7 This offer is made on an open basis but without any admission of liability or responsibility on the part of Post Office. It has been tabled as a pragmatic way to avoid future litigation. It is open for acceptance for the next 30 days or until the Claim Form is served, whichever is sooner. This offer is subject to contract and will require a written and signed settlement agreement to be completed before it is binding.

¹²⁴ In relation to the other two Claimants that make up the total of 70: the Scheme Working Group refused to authorise mediation in one case (M057 – Banks) and the other Claimant did not respond to any correspondence so his case was closed before reaching the mediation stage of the scheme (M102 – Abbas Choudry).

¹²⁵ [2016] Ch Div (4 May 2016)

C. Further mediation

- 13.8 Our client's extensive efforts to resolve matters, both through the Scheme and through the above offer, have discharged any duty it may be regarded as having to seek a resolution without litigation. The current deficiencies in how your clients' claims have been presented, the lack of details on individual Claimants (including Claimants who did not take part in the Scheme) and the total absence of particulars of loss mean that we cannot see how a further mediation at this point would have any prospect of success. Our client does not propose to engage in a further mediation at this stage.

14. NEXT STEPS

- 14.1 We trust that this letter has addressed the matters raised in the Letter of Claim and the questions set out in the Appendix to that letter.
- 14.2 If your clients are minded to continue with their claims, we consider that it would be beneficial for your firm to provide a full substantive response to this letter. We would ask that this response is provided by [26 August 2016].
- 14.3 We will respond separately regarding the service of the Claim Form and the timing of the Particulars of Claim.

Yours faithfully

Bond Dickinson LLP

SCHEDULE 1: DISCLOSURE REQUESTS

Where below it is confirmed that a document will be provided, this is subject to prior confirmation from you that CPR 31.22 will apply to that document.

No	Claimants' Request for Documents	Post Office Response
1.	Contractual documents between Post Office and the postmasters and Crown officers since 1998.	Copies of the contracts and variations will be provided as per Schedule 5.
2.	Contractual documents between Post Office and ICL/Fujitsu from 1999 to present.	A redacted version (removing commercially sensitive data) of the latest version of the core agreement will be provided as per Schedule 6.
3.	Documents containing or referring to non-contractual understandings, practices, policies, guidance or memoranda relating to the relationship Post Office and ICL/Fujitsu and/or ICL/Fujitsu's performance.	In circumstances where you have not particularised any factual basis on which Horizon is defective, disclosure of these documents (if they exist) is not relevant, reasonable or proportionate. In any event, the volume of documents that may need to be considered in order to respond to this vague and highly generalised request would be significant. These documents will also not be located in one place. A full disclosure exercise would be required to locate these documents.
4.	Operations manual(s) for Horizon – 1999 to present.	Post Office has no objection to providing the current version of the Operations manual. However, this document is ordinarily accessible via Horizon and so is not held in a readily accessible format that can easily be provided to your firm. We are investigating further how this document may be disclosed to you. Providing historic documents would require a full disclosure exercise. This is neither reasonable nor proportionate at this time.
5.	Schedule of Horizon updates, modifications and software versions since installation and the issues which each of the versions addressed.	In circumstances where you have not particularised any factual basis on which Horizon is defective, disclosure of these documents (if they exist) is not relevant, reasonable or proportionate. In any event, the volume of documents that may be covered by this request would be significant. These documents will also not be located in one place. A full disclosure exercise would be required to locate these documents.
6.	Schedule of software architecture since launch in 1999.	In circumstances where you have not particularised any factual basis on which Horizon is defective, disclosure of these documents (if they exist) is not relevant,

No	Claimants' Request for Documents	Post Office Response
		reasonable or proportionate.
7.	Post Office internal notes, memoranda, correspondence, emails and briefing documents regarding errors, bugs or problems in Horizon.	In circumstances where you have not particularised any factual basis on which Horizon is defective, disclosure of these documents (if they exist) is not relevant, reasonable or proportionate. In any event, the volume of documents that may be covered by this request would be significant. These documents will also not be located in one place. A full disclosure exercise would be required to locate these documents.
8.	Post Office internal notes, memoranda, correspondence, emails and briefing documents regarding the Helpline support in dealing with shortfalls in Horizon.	In circumstances where you have not particularised any factual basis on which Horizon is defective, disclosure of these documents (if they exist) is not relevant, reasonable or proportionate. In any event, the volume of documents that may be covered by this request would be significant. These documents will also not be located in one place. A full disclosure exercise would be required to locate these documents.
9.	Post Office internal notes, memoranda, emails and briefing documents regarding risk or likelihood of Horizon issues causing transaction shortfalls or discrepancies.	In circumstances where you have not particularised any factual basis on which Horizon is defective, disclosure of these documents (if they exist) is not relevant, reasonable or proportionate. In any event, the volume of documents that may be covered by this request would be significant. These documents will also not be located in one place. A full disclosure exercise would be required to locate these documents.
10.	Horizon "cheat sheet" which was provided to postmasters by Post Office.	We are not able to identify the document that you request, and are not aware of a "cheat sheet". To the extent that you are able to clarify the request, please do. To the extent that the requested document exists and is relevant to the issues in dispute, we anticipate that the Claimants would be able to provide you with a copy of this document. It is not appropriate to request documents from our client that you can obtain from your clients.
11.	Course materials for Horizon training - 1999 to date.	Not all of the training materials retained by Post Office are relevant to the issues in dispute. We will therefore provide certain current Horizon training materials, and supporting materials, relating to cash balancing. Other material may be disclosed in due course where appropriate to do so.

No	Claimants' Request for Documents	Post Office Response
		Providing historic documents would require a full disclosure exercise. This is neither reasonable nor proportionate at this time
12.	"Knowledge Base" database of guides and manuals used by helpline staff since 1999.	The Knowledge Base database contains in excess of 5,000 entries. It is therefore not practicable to provide disclosure of the documents held on this system. If there are specific entries on which you want disclosure, please provide details and we will consider the relevance, reasonableness and proportionality of those requests.
13.	Helpline logs and any internal related records for the Claimants.	With regard to the 70 Claimants who were part of the Scheme, the NBSC logs will, in many respects, have been included with Post Office's Investigation Reports. You will be able to obtain these documents from your clients. If you require further such documents, please specify the particular documents and we will consider the reasonableness and proportionality of those requests.
14.	Audit guidelines since 1998, including any revisions to date.	The current guidelines on "Performing a Branch Audit" will be provided. Providing historic documents would require a full disclosure exercise. This is neither reasonable nor proportionate at this time.
15.	Investigation guidelines since 1998, including any revisions to date.	We presume that your request is limited to guidelines relating to the criminal investigations. The current "Conduct of Criminal Investigation Policy" will be provided. Providing historic documents would require a full disclosure exercise. This is neither reasonable nor proportionate at this time.
16.	Transaction logs and information on the sums held in the respective suspense accounts, relating to the alleged shortfalls for the Claimants.	With regard to the 70 Claimants who were part of the Scheme, transaction logs will, in many respects, have been included with Post Office's Investigation Reports. You will be able to obtain these documents from your clients. If you require further transaction logs, please specify particular Claimants and time frames and we will consider the reasonableness and proportionality of those requests. You have not asserted any claim in relation to Suspense Accounts in the Letter of Claim so this element is not relevant.
17.	Notes of audits and investigations and copies of the individual case reports and decisions reached by Post Office in	With regard to the Claimants who were part of the Scheme, these documents will, in many respects, have been included with Post

No	Claimants' Request for Documents	Post Office Response
	suspending and/or terminating relevant postmasters.	Office's Investigation Reports. You will be able to obtain these documents from your clients. If you require further such documents, please specify the particular documents and we will consider the reasonableness and proportionality of those requests.
18.	Records or transcripts of interviews for each of the Claimants.	With regard to the 70 Claimants who were part of the Scheme, where in existence, these documents will, in many respects, have been provided as part of the evidence supporting Post Office's Investigation Reports. You will be able to obtain these documents from your clients. If you require further such documents, please specify the particular documents and we will consider the reasonableness and proportionality of those requests. We presume that your request related to transcripts of interviews that proceeded under caution.
19.	Internal memorandum generated in around late 2000 regarding problems with Giro Bank deposits.	We do not recognise the document to which you refer. Please provide further details.
20.	Documents concerning referral for prosecution, including but not limited to meeting notes confirming decision to prosecute and the policy documents relied upon in doing so, for the Claimants.	These documents are likely to be subject to legal privilege and will not be disclosed.
21.	Documents relating to termination of Mediation Scheme.	The correspondence with Second Sight and the Working Group in relation to this point mentioned in Schedule 3 will be disclosed.
22.	The 'known error log' kept by Fujitsu and provided to Post Office and all correspondence relating to the same.	In circumstances where you have not particularised any factual basis on which Horizon is defective, disclosure of these documents (if they exist) is not relevant, reasonable or proportionate.
23.	Internal memoranda from Fujitsu and POL referred to by Second Sight as identifying a 'Horizon bug' with Horizon Online.	We do not recognise the document to which you refer. Please provide further details.
24.	Email correspondence between Fujitsu and Post Office in 2008, as requested by Second Sight.	This is addressed in Schedule 3, Section 6B.
25.	Copies of the email data supplied by Post Office to Second Sight in May 2013	Post Office has copies of the documents provided to Second Sight in May 2013, but

No	Claimants' Request for Documents	Post Office Response
	(referred to at paragraph 50 of the Executive Summary to Post Office document entitled "Complaint Review and Mediation Scheme").	these are held on an encrypted hard drive to which it does not have the password. These documents may be among the documents returned to Post Office by Second Sight, but on reviewing those documents there is nothing that clearly identifies the emails provided to Second Sight in May 2013.
26.	A copy of the witness statement from the member of staff who worked at the Fujitsu site at Bracknell (referred to at paragraph 51 of the Executive Summary).	This document will be provided. Note – this statement remains in draft.
27.	A copy of the written paper (relating to suspense accounts) produced to Second Sight in July 2004 [sic], together with the subsequent paper (referred to at paragraph 53 of the Executive Summary).	You have not asserted any claim in relation to Suspense Accounts in the Letter of Claim so this request is not relevant.
28.	Copies of all documents provided by Post Office to the CCRC to date.	These documents relate to an ongoing investigation being carried out by the CCRC, and have been provided to the CCRC pursuant to its specific statutory powers. Notwithstanding that many of the documents within this class will be subject to legal privilege, it is clearly inappropriate to request such disclosure where the CCRC's investigations are ongoing. Accordingly, unless documents properly fall to be disclosed separately under some other request, they will not be disclosed.
29.	Documents relating to Post Office's disclosure to Second Sight that, in 2011 and 2012, it had discovered "defects" in Horizon online that had impacted 76 branches (referred to at paragraphs 6.4 - 6.6 inclusive of Second Sight's Interim Report).	These issues are covered in Schedule 6. No disclosure is necessary.
30.	Second Sight's main report at paragraph 14.8 refers to an internal memorandum from October 2008, which Post Office disclosed, including the remark "<i>Fujitsu have the ability to impact branch records via the message stored but have extremely rigorous procedures in place to prevent adjustments being made without prior authorisation — within [Post Office] and Fujitsu</i>". Please provide a copy of this memorandum.	The email (not memorandum) to which we understand this request to relates to will be provided.
31.	Second Sight state at paragraphs 14.10 to 14.12 of its final report " <i>in our Interim Report we referred to software bug in Horizon that had impacted a small number</i>	The documents to which we understand this request to relates to will be provided.

No	Claimants' Request for Documents	Post Office Response
	<i>of branches. We have recently discovered two further documents that describe in more detail how Post Office handles this issue. In both of these documents a process is described that involves directly altering branch data."</i> The first document to which Second Sight refer is named "Correcting Accounts for "lost" Discrepancies" and was created by a senior engineer at Fujitsu in September 2010. The second is entitled "Receipts/Payments Mismatch issue notes" which appears to be a minute of a joint Post Office and Fujitsu meeting held in August 2010. Please provide copies of these documents.	
32.	A schedule or list of all documents delivered up by Second Sight to Post Office and BIS as requested, on or following the termination of Second Sight's contract.	We do not believe that any documents were delivered up to BIS (as suggested). We understand that in excess of 35,000 documents were returned, some of which will be subject to legal privilege. It is clearly not reasonable to expect our client to review these documents at this stage, assess which are potentially disclosable, and provide a list of the disclosable documents.

Documents available for inspection which are referred to in this letter:

No.	Reference	Document
33.	Paragraph 5.4.1	Second Sight's Terms of Engagement
34.	Paragraph 5.42	Post Office's comprehensive answers to Second Sight queries about the availability of information in relation to ATMs and Girobank.
35.	Paragraph 5.77	Report of Graham Brander dated 17 May 2006.
36.	Schedule 4, paragraph 5.3	Sample BTS.

SCHEDULE 2: SCHEDULE OF CLAIMANTS

No.	Claimant	Branch location	Time barred? ¹²⁶	Convicted? ¹²⁷	Civil judgment? ¹²⁸	Settled? ¹²⁹	Contract type ¹³⁰	Still in post?	Possible counterclaim? ¹³¹
1	GRO	England	✓	X	X	X	Postmaster Contract	X	✓
2	GRO	England	✓	✓	X	X	None – Postmaster assistant	X	
3	GRO	England	✓	X	X	X	Postmaster Contract	X	✓
4	GRO	England	✓	X	X	X	Postmaster Contract	X	✓
5	GRO	England	X	X	X	X	Postmaster Contract	X	
6	GRO	England	✓	X	X	✓	Postmaster Contract	X	
7	GRO	England	✓	X	X	X	Postmaster Contract	X	
8	GRO	England	✓	✓	X	X	Postmaster Contract	X	
9	GRO	England	X	✓	X	X	Postmaster Contract	X	
10	GRO	England	✓	✓	X	X	Postmaster Contract	X	✓

¹²⁶ See Section 8A above for further details¹²⁷ See Section 8B above for further details¹²⁸ See Section 8D above for further details¹²⁹ See Section 8C above for further details¹³⁰ See section 6.4 above¹³¹ Excluding interest and costs, see Section 9 above for further details

No.	Claimant	Branch location	Time barred? ¹²⁶	Convicted? ¹²⁷	Civil judgment? ¹²⁸	Settled? ¹²⁹	Contract type ¹³⁰	Still in post?	Possible counterclaim? ¹³¹
	GRO								
11	GRO	Scotland	✓	X	X	X	Postmaster Contract	X	
12	GRO	England	✓	X	X	X	Postmaster Contract	X	✓
13	GRO	England	✓	X	X	X	Postmaster Contract	X	
14	GRO	England	X	X	X	X	Postmaster Contract	X	✓
15	GRO	England	X	X	X	X	Postmaster Contract	X	✓
16	GRO	England	X	X	X	X	Postmaster Contract	X	✓
17	GRO	England	✓	X	X	X	Postmaster Contract	X	
18	GRO	England	✓	X	X	X	Postmaster Contract	X	
19	GRO	England	✓	X	X	X	Postmaster Contract	X	
20	GRO	England	✓	✓	X	X	Postmaster Contract	X	
21	GRO	Wales	X	X	X	X	NT Contract - Main branch model	✓	TBC

No.	Claimant	Branch location	Time barred? ¹²⁶	Convicted? ¹²⁷	Civil judgment? ¹²⁸	Settled? ¹²⁹	Contract type ¹³⁰	Still in post?	Possible counterclaim? ¹³¹
22	GRO	England	✓	✓	X	X	Postmaster Contract	X	✓
23	GRO	England	✓	✓	X	X	Postmaster Contract	X	
24	GRO	England	✓	X	X	X	Postmaster Contract	X	✓
25	GRO	England	✓	✓	X	X	Postmaster Contract	X	
26	GRO	England	✓	X	X	X	Postmaster Contract	X	
27	GRO	England	✓	X	X	X	Postmaster Contract	X	✓
28	GRO	England	✓	✓	X	X	Postmaster Contract	X	✓
29	GRO	England	X	X	X	✓	Postmaster Contract	X	
30	GRO	England	X	✓	X	X	Postmaster Contract	X	✓
31	GRO	England	✓	✓ ¹³²	X	X	Postmaster Contract	X	
32	GRO	England	✓	X	X	X	Postmaster Contract	X	

¹³² Criminal conviction relates to Claimant's wife

No.	Claimant	Branch location	Time barred? ¹²⁶	Convicted? ¹²⁷	Civil judgment? ¹²⁸	Settled? ¹²⁹	Contract type ¹³⁰	Still in post?	Possible counterclaim? ¹³¹
33	GRO	England	X	X	X	X	Postmaster Contract	X	✓
34	GRO	England	✓	✓	X	X	Crown branch employee	X	
35	GRO	England	X	X	X	X	Postmaster Contract	X	TBC
36	GRO	England	X	✓	X	X	Postmaster Contract	X	✓
37	GRO	England	X	X	X	X	Postmaster Contract	X	
38	GRO	England	✓	X	X	X	Postmaster Contract	X	✓ ¹³³
39	GRO	England	✓	X	X	X	Postmaster Contract	X	
40	GRO	England	X	✓	X	X	Postmaster Contract	X	
41	GRO	Wales	X	X	X	✓	Postmaster Contract	X	✓
42	GRO	England	✓	✓	TBC	X	Modified Sub Post Office Agreement	X	
43	GRO	Wales	X	✓	X	X	Community Subpostmaster Agreement	X	

¹³³ Note: currently paying £125.00 a month

No.	Claimant	Branch location	Time barred? ¹²⁶	Convicted? ¹²⁷	Civil judgment? ¹²⁸	Settled? ¹²⁹	Contract type ¹³⁰	Still in post?	Possible counterclaim? ¹³¹
44	GRO	England	X	✓	X	X	Postmaster Contract	X	✓
45	GRO	Wales	✓	✓	X	X	Postmaster Contract	X	
46	GRO	England	X	X	X	✓	Postmaster Contract	X	
47	GRO	England	✓	X	X	X	Postmaster Contract	X	
48	GRO	England	X	✓	X	X	Postmaster Contract	X	
49	GRO	England	✓	X	✓	X	Postmaster Contract	X	
50	GRO	England	✓	✓	X	X	Postmaster Contract	X	
51	GRO	England	✓	✓	X	X	Franchise Agreement	X	✓
52	GRO	England	✓	✓	X	X	Postmaster Contract	X	
53	GRO	England	✓	✓	X	X	Postmaster Contract	X	
54	GRO	England	✓	X	X	X	Postmaster Contract	X	
55	GRO	Wales	X	X	X	X	Postmaster Contract	X	

No.	Claimant	Branch location	Time barred? ¹²⁶	Convicted? ¹²⁷	Civil judgment? ¹²⁸	Settled? ¹²⁹	Contract type ¹³⁰	Still in post?	Possible counterclaim? ¹³¹
	GRO								
56	GRO	England	X	X	X	X	Post Office Essentials (pilot for Post Office Local Agreement)	X	✓
57	GRO	England	X	✓	X	X	Postmaster Contract	X	
58	GRO	Northern Ireland	✓	X	✓	X	Community Subpostmaster Agreement	X	✓
59	GRO	England	✓	✓	X	X	Postmaster Contract	X	
60	GRO	England	✓	X	X	X	Postmaster Contract	X	✓
61	GRO	England	X	X	X	X	Postmaster Contract	X	✓
62	GRO	England	X	X	X	X	Postmaster Contract	X	
63	GRO	England	✓	X	X	✓	Postmaster Contract	X	
64	GRO	England	✓	X	X	✓	Postmaster Contract	X	
65	GRO	England	✓	X	X	X	Postmaster Contract	X	
66	GRO	England	✓	X	X	X	Postmaster Contract	X	

No.	Claimant	Branch location	Time barred? ¹²⁶	Convicted? ¹²⁷	Civil judgment? ¹²⁸	Settled? ¹²⁹	Contract type ¹³⁰	Still in post?	Possible counterclaim? ¹³¹
67	GRO	Wales	✓	X	X	X	Postmaster Contract	X	
68	GRO	Wales	X	X	X	X	Postmaster Contract	X	✓
69	GRO	England	X	X	X	X	Postmaster Contract	X	
70	GRO	Northern Ireland	X	X	X	X	Postmaster Contract	X	
71	GRO	England	✓	✓	TBC ¹³⁴	X	Postmaster Contract	X	
72	GRO	England	X	X	TBC	X	Postmaster Contract	✓	✓
73	GRO	England	X	✓	TBC	X	Postmaster Contract	X	TBC
74	GRO	England	X	X	TBC	X	TBC	X	£36,645.00
75	GRO	England	X	X	TBC	X	Postmaster Contract	X	£32,582.00
76	GRO	England	✓	X	TBC	X	Postmaster Contract	X	
77	GRO	England	X	X	TBC	X	Postmaster Contract	✓	

¹³⁴ From Claimant 71 onwards, these Claimants were not part of the Scheme and as such Post Office has limited details in relation to these postmasters.

No.	Claimant	Branch location	Time barred? ¹²⁶	Convicted? ¹²⁷	Civil judgment? ¹²⁸	Settled? ¹²⁹	Contract type ¹³⁰	Still in post?	Possible counterclaim? ¹³¹
78	GRO	Scotland	X	X	TBC	X	Community Subpostmaster Agreement	✓	£32,372.00
79	GRO	England	X	✓	TBC	X	None – Assistant only	X	TBC
80	GRO	England	✓	✓	TBC	X	Postmaster Contract	X	
81	GRO	England	X	X	TBC	X	Postmaster Contract	X	
82	GRO	England	✓	✓	TBC	X	Postmaster Contract	X	
83	GRO	England	TBC	TBC	TBC	X	NT Contract - Main branch model	TBC	TBC
84	GRO	England	X	X	TBC	X	Postmaster Contract	TBC	
85	GRO	England	✓	X	TBC	X	Postmaster Contract	X	
86	Anonymity Order	England	X	TBC	TBC	X	Postmaster Contract	X	
87	GRO	England	X	X	TBC	X	Postmaster Contract	✓	TBC
88	GRO	England	X	X	TBC	X	Postmaster Contract	X	
89	GRO	England	✓	TBC	TBC	X	Postmaster Contract	X	

No.	Claimant	Branch location	Time barred? ¹²⁶	Convicted? ¹²⁷	Civil judgment? ¹²⁸	Settled? ¹²⁹	Contract type ¹³⁰	Still in post?	Possible counterclaim? ¹³¹
	GRO								
90	GRO	England	X	X	TBC	X	PO Local Agreement	✓	TBC
91	GRO	England	X	X	TBC	X	Postmaster Contract	✓	

SCHEDULE 3: HISTORY OF EVENTS

1. OVERVIEW

- 1.1 We set out below a short history of this matter. This shows that Post Office has sought to engage at all times with the complaints being made. It would not have shone a light so brightly on itself if it was attempting to conceal something.
- 1.2 For ease of reference, we repeat the points made in Section 3B above about the key errors in the version of events set out in Section A of the Letter of Claim:
 - 1.2.1 Post Office has not said that Horizon is error-free.
 - 1.2.2 The current claims are limited to a relatively small number of largely former postmasters and are not reflective of a major problem at Post Office.
 - 1.2.3 Post Office has sought to investigate transparently the concerns of postmasters and not tried to conceal matters.
 - 1.2.4 Post Office supported the Scheme through to its full conclusion.
 - 1.2.5 Post Office did not unilaterally fetter the scope of Second Sight's work.

2. POST OFFICE LIMITED V LEE CASTLETON

- 2.1 Your history of events overlooks the case of Post Office v Castleton¹³⁵. In this case, Horizon was tested in Court.
- 2.2 In January 2007, the High Court ruled on a counterclaim by a former postmaster, Lee Castleton, against Post Office. Mr Castleton alleged that "*there were anomalies in the operation of the Horizon system*". He asserted that these anomalies were the cause of a shortfall in his branch of £22,963.34.
- 2.3 After a six-day trial, Judge Richard Harvey QC found that that it was "*inescapable that the Horizon system was working properly in all material respects, and that the shortfall of £22,93.34 is real, not illusory*".
- 2.4 Mr Castleton was found liable for the shortfall of £22,963.34. He was ordered to compensate Post Office for the shortfall in his branch and also to pay Post Office's legal costs of over £300,000. He never repaid these sums, instead making himself bankrupt.

3. SHOOSMITHS

- 3.1 In 2011, Shoosmiths claimed to represent over 100 postmasters who had claims against Post Office arising from shortfalls in branches. Only five test cases were ever advanced, each asserting roughly the same issues:
 - 3.1.1 inadequate training;
 - 3.1.2 insufficient access to Post Office helplines; and

¹³⁵ [2007] EWHC 5 (QB)

3.1.3 defects in the Horizon system.

- 3.2 Four of those claims only resulted in pre-action correspondence between Shoosmiths and us. Shoosmiths issued one Claim Form (on behalf of Lynn Prosser) in order to protect against a limitation deadline. Shoosmiths did not serve the Claim Form within the standard four-month time limit and, after an interim hearing, the Court struck out the Claim Form and found that the Claim was time barred. Following this, no further action was taken by Shoosmiths.
- 3.3 It is telling that even with the backing of a national law firm, and a concerted campaign to drum up interest, only five postmasters advanced claims against Post Office. This militates against your theory that there are wide ranging problems at Post Office.

4. SECOND SIGHT'S ORIGINAL INQUIRY

- 4.1 In early 2012, a small number of postmasters persuaded some MPs to champion their cause. To attempt to resolve the ongoing complaints and re-assure MPs, Post Office engaged Second Sight to investigate the issues being raised. Post Office would not have done this had it been trying to conceal issues.
- 4.2 Second Sight's work for Post Office was split into two distinct phases:
- 4.2.1 Phase One (June 2012 to August 2013) was the original Inquiry which focused on investigating Horizon from a general perspective. This resulted in Second Sight's Interim Report.
- 4.2.2 Phase Two (August 2013 to around May 2015) was focussed on investigating the circumstances of individual complaints through the Scheme.

A. Scope of the Inquiry

- 4.3 The Raising Concerns with Horizon document set out the scope of work of Second Sight's Inquiry in Phase One. It provided:
- "The remit of the Inquiry will be to consider and to advise on whether there are any systemic Issues and/or concerns with the "Horizon" system, including training and support processes, giving evidence and reasons for the conclusions reached."*
- "The Inquiry is not a mediation or arbitration. It is not intended to resolve or affect any dispute there may be between any individual Horizon user and Post Office limited."*
- "The Inquiry is not asked to investigate or comment on general improvements which might be made to Horizon, or on any individual concern raised (see below) save to the extent that it concludes that such investigation or comment is necessary to address the remit."¹³⁶*
- 4.4 At paragraph 18 of the Letter of Claim (which cross refers to paragraph 29), you state that Second Sight was appointed on the basis that it would have unrestricted access to documents held by Post Office (including documents subject to confidentiality and legal professional privilege) and that there was no restriction on Second Sight's scope of work. At paragraph 30 of the Letter of Claim you cite Second Sight's Briefing Report – Part Two to support these assertions and to allege that Post Office did not comply with these requirements.
- 4.5 These assertions are incorrect. They stem from a misunderstanding of the two distinct phases of Second Sight's work. Second Sight's scope of work in Phase One was not unrestricted but defined by the Raising Concerns with Horizon document – as quoted above.

¹³⁶ Appendix of Raising Concerns with Horizon

- 4.6 As Second Sight was not, in this phase of work, looking to resolve issues in individual postmasters' cases, Post Office did permit Second Sight access to privileged material without waiving the privilege that subsisted in that material. This was possible because Second Sight would only be reporting general findings about Horizon on an anonymised basis. In light of this, Second Sight made commitments to keep such information confidential and privileged.
- 4.7 In its Interim Report, Second Sight raised no complaint about Post Office withholding documents, failing to cooperate or improperly seeking to limit Second Sight's scope of work.

B. Inquiry process

- 4.8 The Raising Concerns document created a channel for postmasters to raise issues with Second Sight (either directly, through their MP, or through JFSA). Although the Inquiry was open to the tens of thousands of former and current postmasters, only 47 postmasters came forward to feed information into Second Sight's investigation.
- 4.9 The issues raised were then filtered by Second Sight. Second Sight conducted:
- "a 'fast track' review of the available information in each case and identified the key issues that were relevant to the remit of the Investigation. Each key issue was then dealt with as a Spot Review. [...] Each Spot Review was then submitted to POL for a formal response. The POL response was then discussed with both the SPMR and the JFSA and an attempt made to reach agreement and closure between POL and the SPMR as to the issues dealt with in each Spot Review."*¹³⁷
- 4.10 Second Sight distilled the information from the 47 postmasters into 29 Spot Reviews. Ten of those Spot Reviews were presented to Post Office for comment in around March 2013. The limited number of issues identified by Second Sight after nine months of investigations reflects that there are not the endemic problems that you allege.
- 4.11 Post Office responded in detail to all ten Spot Reviews. Again, it would not have done so had it been seeking to conceal issues.

C. Interim report

- 4.12 Approximately one year after being engaged, in July 2013, Second Sight presented its Interim Report. The Interim Report only commented on four Spot Reviews. Its conclusion was that:
- "We have so far found no evidence of system wide (systemic) problems with the Horizon software".*¹³⁸
- 4.13 By this time concern was being expressed amongst MPs, Post Office, JFSA and Second Sight about the scope of the Inquiry being undertaken. Both Second Sight and Post Office generally considered that:
- the scope of the Inquiry was too broad to be conducted effectively, it requiring a review of nearly all Post Office's operating practices;
 - Second Sight did not have the resources to be able to render a final report by the end of 2013 sought by the MPs. This was reflected by the fact that Second Sight had taken a year to report on four Spot Reviews, with another 25 Spot Reviews still to be considered; and
 - the final results of the Inquiry would likely not assist postmasters. One point that had become clear from Second Sight's early work was that the complaints of postmasters

¹³⁷ Paragraph 3.2, Second Sight's Interim Report

¹³⁸ Paragraph 8.2, Second Sight's Interim Report

were very fact specific. Drawing general conclusions from these fact specific situations was difficult and, even where general conclusions could be found, this did not mean that they would apply to any particular postmaster's case.

- 4.14 It was also recognised that there was a good deal of emotion felt by postmasters and that a cold rational Inquiry would not address the underlying ill-feeling that was driving the postmasters and MPs. It was considered that some form of direct interaction between Post Office and the postmasters was needed.

5. THE SCHEME

- 5.1 The Scheme represented the second phase of Second Sight's work.
- 5.2 The idea of the Scheme arose from a desire to address the above concerns about difficulties with continuing the Inquiry. Post Office (and subsequently Second Sight and JFSA) believed that Second Sight would be better focussed on the individual circumstances of particular cases rather than continue to answer a general question about Horizon. For that re-focussed effort to lead to tangible results for postmasters, it was also considered necessary for Post Office and postmasters to discuss the findings of Second Sight's work. After discussions with Second Sight, Post Office proposed the idea the Scheme.

- 5.3 Paragraph 21 of the Letter of Claim hints that the Scheme was put in place by the Minister for Postal Affairs or MPs. Paragraph 23 of the Letter of Claim suggests it was the Working Group that developed the Scheme. Both paragraphs are incorrect - the Scheme was proposed by Post Office of its own volition. It put forward the idea of the Scheme as another attempt to try to get to the bottom of the (often ill-defined) complaints being raised. Again this shows that Post Office was not trying to conceal issues.

- 5.4 Several meetings were held in July and August 2013 between Post Office, Second Sight, representatives of JFSA and MPs to discuss how a scheme would work. The core terms of the Scheme were recorded in an Overview and Frequently Asked Questions document (Scheme Rules) that was approved by the Working Group and made publicly available. The Scheme Rules provided:

*"The Scheme is open to any Subpostmaster who believes they have suffered a loss or been treated unfairly as a result of the Horizon system or any associated issues."*¹³⁹

- 5.5 The ambit of the Scheme was therefore not open-ended, as alleged in paragraph 29 of the Letter of Claim. It was limited to *"the Horizon system or any associated issues"*. The adoption of the Scheme was also not a unilateral change by Post Office, but a mutually agreed change supported, at that time, by all interested parties.

A. Role of the Working Group and Second Sight

- 5.6 You make an unexplained allegation at paragraph 25 of the Letter of Claim that *"Post Office was attempting to redefine the brief of the Working Group and the scope of the work of Second Sight"*. We do not know what this is a reference to, in what way your clients allege that Post Office sought to redefine the Scheme, or how that is relevant to the claims your clients are now advancing. We do note that the Scheme Rules, Working Group Terms of Reference and Second Sight's Engagement Terms (as set out below) were all mutually agreed and did not change, without further mutual agreement during the course of the Scheme.

- 5.7 The Scheme was supervised by a Working Group. The Working Group's Terms of Reference, which were negotiated and agreed by the Working Group, provided that:

¹³⁹ Page 1, Scheme Rules

"4 *Role of the Working Group*

- 4.1 *To establish and, where appropriate, revise the Scheme's operational and working practices.*
- 4.2 *To monitor the efficacy of the Scheme in achieving the Scheme Objectives.*
- 4.3 *To ensure that Applicants' cases progress through the Scheme in a timely manner.*
- 4.4 *To review at each stage Applicants' cases that may not be suitable for the Scheme and to decide whether and/or how those cases may proceed. For clarity, the Working Group shall have no role in deciding the suitability or process for cases subject to live criminal investigations or proceedings – such authority being retained solely by Post Office as the investigating and prosecuting authority.*
- 4.5 *To ensure, as far as possible, that the Scheme treats all cases consistently.*
- 4.6 *To manage the administration of the Scheme so as to ensure that the Scheme's processes and procedures are offering value for money for taxpayers (which for clarity does not extend to any assessment of the merits / value of any settlement proposed or reached between Post Office and any SPMR)."¹⁴⁰*

5.8 The Terms of Reference also provided that:

"In conducting Working Group business, Post Office may act in a manner that promotes its own interests. Likewise, JFSA may act in a manner that promotes the interest of Applicants."¹⁴¹

5.9 Second Sight's role was described in the Scheme Rules as follows:

"The starting point for the Scheme is for Subpostmasters to submit details of their case to Second Sight as part of an initial application process. Second Sight, in collaboration with the Working Group, will recommend whether the case should be investigated.

Second Sight will then work with each Subpostmaster and Post Office to gather information about and investigate that case. The Subpostmaster will be sent a Case Questionnaire setting out requests for more detailed information. Post Office will also provide additional information from its own records.

As a result of this investigation, Second Sight will produce a Case Review summarising its findings and a recommendation on whether the case is suitable for mediation. A copy of this Case Review will be provided to you. The Working Group will however take the final decision on any cases that may not be suitable for mediation."¹⁴²

5.10 Second Sight's Engagement Terms with Post Office for its work in relation to the Scheme, which it agreed to and signed, described its role as follows:

"The Services Second Sight agrees to provide to the Working Group are as follows:

- *serving as a member of the Working Group and attending Working Group meetings as required, and act in accordance with any directions from the Working Group Chair;*

¹⁴⁰ Paragraph 4, Working Group's Terms of Reference

¹⁴¹ Paragraph 2.4, Working Group's Terms of Reference

¹⁴² Page 2, Scheme Rules

- *advising, as requested by Post Office or the Working Group, on the format, style and content of the documents which are submitted by Post Office and/or Subpostmasters during the Scheme;*
- *investigating the specific complaints raised by each Subpostmaster who has been accepted into the Scheme with the aim of providing:*
 - *an assessment of points of common ground between Post Office and that Subpostmaster;*
 - *an assessment of points of disagreement between Post Office and that Subpostmaster;*
 - *where there is disagreement, a logical and fully evidenced opinion on the merits of that Subpostmaster's complaint where it is possible to do so;*
 - *a summary of any points on which it is not possible to offer a fully evidenced opinion due to a lack of evidence / information;*
 - *a view on whether a case is suitable for mediation; and*
- *assisting with any reasonable requests made by the Working Group and/or Post Office;*¹⁴³

- 5.11 Second Sight's role has often been described as being "*independent*" of Post Office. Some have misunderstood the idea of Second Sight being "*independent*" as meaning that Second Sight would have freedom to investigate any issues it wished. This is not the case as Second Sight has always been required to act within a defined scope of work – as set out above.
- 5.12 There is no mention in the Scheme Rules or in Second Sight's Engagement Terms that it had a remit to continue the original Inquiry or to conduct a general review into Horizon.
- 5.13 We suspect that some of your misunderstanding about Second Sight's and the Working Group's roles stems from the confused chronology in paragraphs 25 to 32 of the Letter of Claim, which, in a rather haphazard fashion, starts with an allegation about Post Office's actions in January 2014 but then references matters reaching as far back as 2012 and the original Inquiry¹⁴⁴ and as far forward as the end of the Scheme in mid-2015¹⁴⁵. As can be seen from above, Post Office has not forced through unilateral changes.

B. End of the Scheme

- 5.14 Your description of how the Scheme came to an end has been skewed, perhaps in an attempt to suggest that Post Office has tried to suppress information. On the contrary, Post Office actively supported the completion of Second Sight's work and the mediation of cases.
- 5.15 By March 2015, Post Office had completed its investigations into all cases within the Scheme, having provided all its Investigation Reports and supporting evidence to Second Sight. Post Office had also responded to all of Second Sight's outstanding queries in relation to the Briefing Report – Part Two. There was however a back-log of Second Sight Case Review Reports that were overdue.
- 5.16 14 cases had been mediated by this time. The Centre for Effective Dispute Resolution (**CEDR**) had long been appointed to independently manage the mediation process and to appoint mediators. There was, therefore, an established process in place through which all mediations

¹⁴³ Scope of Services, Clause 1, Second Sight's Engagement Terms

¹⁴⁴ See paragraph 29 of the Letter of Claim

¹⁴⁵ See paragraph 32 of the Letter of Claim

were being conducted. Once cases were passed to CEDR, the Working Group had no more control over their conduct.

- 5.17 Prior to March 2015, there had also been increasing tension in Working Group meetings regarding the Working Group's role in deciding on whether cases should proceed to mediation. The Working Group Terms of Reference provided that the Working Group had such a discretion – see paragraph 5.7 above.
- 5.18 The Scheme Rules also provided for the Working Group to take an active decision making role in deciding on whether cases should proceed to mediation. One of the Frequently Asked Questions was:

"Will my case definitely be referred to mediation?"

If your case is suitable and you provide accurate, detailed information to Second Sight, then this is likely in most circumstances.

However, the Working Group may consider that some cases are not suitable for mediation. For example, if there is insufficient information about a case or the case is not one requiring resolution.

Also, once Second Sight has submitted its findings, Post Office may contact you to discuss your case and to seek a resolution without needing to attend mediation.

If your case is not referred to mediation, then you may still pursue other methods of resolution such as by bringing a claim through the Courts."¹⁴⁶

- 5.19 Despite the Working Group Terms of Reference and Scheme Rules, JFSA unilaterally decided that the Working Group should not be deciding on which cases go to mediation. It then refused to participate in any further discussions at Working Group meetings about this topic and indeed often physically left meetings during these discussions¹⁴⁷.
- 5.20 JFSA's walk out unbalanced the decision making process of the Working Group as there was then no-one left to advocate on behalf of applicants (Second Sight and the Chair retaining neutral roles at the Working Group).
- 5.21 The effect of the above is that by March 2015 the Working Group had been rendered redundant:
- 5.21.1 Post Office's investigative work was complete so there was no activity ongoing at Post Office for the Working Group to supervise.
 - 5.21.2 JFSA's refusal to participate in Working Group meetings had frustrated its decision making processes in relation to mediations.
 - 5.21.3 CEDR's role was well-embedded with no ongoing Working Group oversight.
- 5.22 Post Office therefore announced the closure of the Working Group on 10 March 2015. However, Second Sight's work, on both individual cases and its Briefing Report – Part Two, continued, as can be seen in Post Office's letter of the same date (a copy is available for inspection¹⁴⁸). Post Office initially proposed that it would provide funding direct to Applicants so that they could pay Second Sight to finish their individual case reports – this is why it initially terminated Second Sight's Engagement Terms. Ultimately, this proved too challenging to manage and so Post Office paid Second Sight direct to complete this work.¹⁴⁹

¹⁴⁶ Page 7, Scheme Rules

¹⁴⁷ See, for example, paragraph 5b of the Working Group minutes dated 17 October 2014.

¹⁴⁸ See paragraph 12A above for further details

¹⁴⁹ See the Agreement to Complete Work entered into between Post Office and Second Sight

- 5.23 Ultimately, Second Sight completed its work on the Briefing Report – Part Two and all its individual Case Review Reports and these were provided to applicants. Post Office also publicly committed to mediating all cases remaining in the Scheme except those subject to a previous Court ruling. Having completed all its investigations, Post Office had found no reason to conclude that any original prosecution was unsafe. It was therefore Post Office's view that there was no reasonable prospect of mediation assisting with the resolution of the complaints raised in those cases.
- 5.24 It cannot therefore be said, as you suggest, that Post Office terminated the Scheme. Indeed, it did the exact opposite in supporting the Scheme to its final conclusion.

6. SECOND SIGHT'S PART TWO REPORT

- 6.1 Contrary to your allegation that Post Office hampered Second Sight's investigation in this regard, Second Sight chose not to take advantage of the information Post Office took pains to provide. For example, Post Office invited Second Sight to a meeting at Post Office's headquarters on 9 January 2015 at which Second Sight were to be given unfettered access to at least a dozen subject matter experts on a range of subjects from the NBSC to IT. A meeting was scheduled for the entire day and Second Sight arrived at the meeting without having a single question to ask this bank of experts.
- 6.2 Both before and during the Scheme, Post Office provided a significant volume of information to Second Sight including:
- 6.2.1 Spot Reviews (papers designed to answer Second Sight's recurring questions about specific questions raised by postmasters).
 - 6.2.2 Post Office's investigation findings for each case.
 - 6.2.3 Line-by-line comments on Second Sight's reports.
 - 6.2.4 Technical papers on issues raised by Second Sight.
 - 6.2.5 Comprehensive feedback on Second Sight's first thematic report.
 - 6.2.6 Responses on more than 100 questions received from Second Sight.
- 6.3 As for the specific information that Second Sight claim was denied to them (detailed at paragraph 127.3 of the Letter of Claim), it should be noted that only three categories of information were involved, and Post Office provided much of the information that Second Sight requested. In relation to some of the information requested, Post Office provided all the information that was available. In relation to the rest, the requests were unnecessary and/or disproportionate and Post Office was justified in withholding further information. These points are explained below.

A. Legal files

- 6.4 Post Office made any non-legally-privileged documentation from its prosecution files available to Second Sight during the Scheme. This included reviewing its prosecution and legal files and extracting any non-privileged material. However, in line with accepted practice, the Post Office has not provided legally privileged material. We trust you will agree that there is nothing inappropriate about any organisation keeping legally privileged material confidential to itself.

B. Emails

- 6.5 In 2013, Second Sight asked Post Office to provide the email accounts of some of its employees dating from 2008 in response to an issue raised by Second Sight as part of its initial investigation,

prior to the publication of its report in July 2013. The request was tied to an allegation that the Horizon test environment in the basement of Fujitsu's office in Bracknell could have been used to edit live branch data. Post Office explained that owing to the age of the information, locating it may be difficult, but provided the email data it was able to retrieve in May 2013.

- 6.6 Post Office also sent to Second Sight a witness statement from a well-placed member of staff who worked at a Fujitsu site at Bracknell confirming that (a) the basement was a secure test environment and there was no connection to any live transaction data; (b) live transaction data could not be accessed from the basement; and (c) the basement was never used to access, change or manipulate live transaction data in branches.
- 6.7 In addition to the above information, Post Office provided Second Sight with a significant volume of policy documentation relating to the Bracknell office covering systems access, building access and security.

C. Suspense account data

- 6.8 In June 2014, Second Sight requested that Post Office explain the operation of its suspense account. Post Office responded in a written paper dated July 2014. Second Sight then made a request for further data on the accounting entries being posted to the suspense account. However, as the purpose of this request was unclear, Second Sight agreed to provide further clarity on the nature of the enquiry, which they did in October 2014. Post Office subsequently sent a further written paper to Second Sight explaining the operation of its suspense account.
 - 6.8.1 Post Office has acknowledged that it took longer to respond to Second Sight's initial requests than it would have wished. However, once Second Sight and Post Office reached a common understanding of the nature of the enquiry, Post Office was able to answer Second Sight's questions.
 - 6.8.2 There were also two meetings between Post Office's Chief Financial Officer and Second Sight to discuss these matters. At these meetings, Post Office provided Second Sight with further contextual data and, following the second meeting, Second Sight agreed that it needed no further information on the suspense account.
 - 6.8.3 The above shows that far from being obstructive, Post Office has constantly engaged with Second Sight and provided voluminous information to assist with their work. If anything, Post Office was frustrated by Second Sight's unwillingness to engage with it directly to discuss matters.

7. PARLIAMENT AND THE MEDIA

- 7.1 You reference various statements made in Parliament and by the media. These statements have largely been made by third parties who have had no direct involvement in the matters at hand. These statements have little, if any, evidential value and hence we do not intend to respond to these points. If you are relying on this material, please could you explain its relevance.
- 7.2 We also note that statements made in Parliament were made under the protection of Parliamentary privilege.

SCHEDULE 4: BACKGROUND INFORMATION ON THE OPERATION OF A POST OFFICE BRANCH**1. BACKGROUND**

- 1.1 To set this response in its proper context, we have set out below a brief description of the structure of the Post Office network and the role of postmasters within that network. The key points to be drawn from the information below are summarised in Section 4 above.

2. POST OFFICE NETWORK

- 2.1 Post Office has a network of around 11,500 branches in the United Kingdom. Of this number, around 315 branches are currently operated by employees of Post Office and are known as Crown branches. The remainder of the branches in the network are run by third parties, the majority of whom are independent postmasters acting as Post Office's agents. These branches are known as agency branches.
- 2.2 It is common for the independent business people who take on the role of postmaster to run a Post Office branch on the premises of a wider retail business such as a general store or newsagent.
- 2.3 A postmaster may wish to operate a Post Office branch in tandem with their existing business for a number of reasons. The principal reasons often cited by postmasters are that it allows them to sell a wider range of products, they can make use of shop floor space that would otherwise be under-utilised, the Post Office branch, and in particular the Post Office brand, attracts customers (known as footfall) which then drives more business through the retail unit and the Post Office branch generates its own income for the postmaster and therefore supplements the retail business income.
- 2.4 The other advantage of operating a Post Office branch is that the postmaster enjoys access to the infrastructure and supply network operated by Post Office and so does not need to invest in building this infrastructure from their own funds. For example:
- 2.4.1 Post Office has a supply chain in place for delivering cash and goods to branches and provides branches with "working cash";
- 2.4.2 Post Office provides payment and treasury services for branches – for example, Post Office banks customer cheques on behalf of branches, manages cashflow and recovers payments made by debit or credit cards;
- 2.4.3 Post Office undertakes national advertising campaigns that seek to increase footfall; and
- 2.4.4 Post Office has in place contracts with third party product suppliers (such as banks, government services, the Royal Mail, Camelot – the operator of the National Lottery, etc.). This saves the need for a postmaster to enter into multiple contracts with such suppliers.

3. OPERATING REQUIREMENTS

- 3.1 In return for Post Office's support services and remuneration, postmasters are required to operate a branch in accordance with Post Office's operational instructions. They do so as Post Office's agents. The physical cash and stock in a branch is owned at all times by Post Office. The postmaster (or their staff – i.e. assistants whom they employ) then conducts transactions on

behalf of Post Office and are required to account for the transactions they have conducted and make good any losses they cause.

- 3.2 Postmasters are not employees and are not required to render personal service – a point we address in Section 4 of our letter. This principle underlies the operational balance between Post Office and postmaster. Post Office needs transactions (and the accounting of transactions) to be undertaken in a uniform manner otherwise the administrative cost of running a network of 11,500 branches would be too great. A consistency of approach is also required so that Post Office can report information back to product suppliers (such as banks, etc.) who require certain information to be provided in prescribed formats at prescribed times.
- 3.3 Against this requirement is a desire not to over-encumber branches. Postmasters are independent business people who want the freedom to run and grow their businesses. An excessive administrative burden may make running a Post Office branch unattractive or at worst sub-economic.
- 3.4 Post Office's operational requirements therefore set only the minimum standards to be met by branches. How a postmaster implements these requirements in their branch is their choice – they may choose to conduct all work themselves, delegate all responsibility to others¹⁵⁰ or strike some balance in between. For this reason, postmasters employ assistants to work in their branches on the explicit basis that they take responsibility for those assistants. Where we refer in this letter to a particular action in branch being undertaken by a postmaster, this action could likely also be taken by an assistant unless we indicate otherwise.
- 3.5 A postmaster may choose to only implement the minimum standards required by Post Office or supplement these with additional processes and controls.
- 3.6 For example, Post Office requires a full cash and stock account to be rendered once approximately every four weeks.¹⁵¹ Nevertheless, some postmasters voluntarily produce a full cash and stock account every week so that they have additional clarity of what is happening in their branch. They may do so because, for example, they are largely absent from the branch during its day-to-day operation and/or they have a large number of staff who are relatively new and/or they simply want to have greater personal oversight over the branch's accounting position. Other postmasters may be present in the branch at nearly all times and employ only a small handful of experienced, long serving and trusted staff members. In that scenario, the postmaster may consider a full weekly cash and stock account to be unnecessary.
- 3.7 A critical point to note is that Post Office is not present in any agency branch and does not require a postmaster to report to Post Office on how they are organising the day-to-day operations of their branch. Post Office does not, therefore, know first-hand how a branch is being operated save for what is logged on Horizon, recorded in the branch accounts or tracked through a third party data feed.
- 3.8 The key piece of information that Post Office never knows is what physically happens at the counter: what the customer says about the services they want, what the branch staff say in response, what paperwork is exchanged or what payment is taken / paid out and whether what is put into Horizon reflects properly the transaction conducted. Responsibility for these events lies with the postmaster.

¹⁵⁰ Where a postmaster has fully delegated the running of a branch to another, this other individual is often referred to as an "Officer in Charge" or "OIC". Despite this title, this position has no legal effect. The OIC is just another assistant of a postmaster and Post Office has no influence over whether an OIC is appointed or what that role may entail.

¹⁵¹ We describe this process in more detail below at paragraph 5.3

4. HORIZON

- 4.1 Horizon is a point of sale IT system similar to that operated by most retailers across the UK. The system is used by postmasters and other staff in all Post Office branches to process and record transactions. It is used by more than 68,000 people across the 11,500 branches and more than six million transactions are processed on it every day. It has been in operation since 1999.¹⁵²
- 4.2 It is also subject to three industry standard evaluations: ISAE3402 audits (carried out by Fujitsu and Ernst & Young); Payment Card Industry Data Security Standards (carried out by Information Risk Management plc, focussing on cardholder data); and Bureau Veritas ISO27001 reports (over the Fujitsu networks).
- 4.3 As well as providing a means by which postmasters and their staff can process transactions, Horizon is also an accounting system which tracks every transaction inputted by a postmaster. This spans sales and services to customers as well as deliveries of cash and stock in and out of a branch.
- 4.4 Horizon is generally working well. It has been used by hundreds of thousands of users over many years without mass complaints of the sort now raised in the Letter of Claim.

5. BALANCING

- 5.1 Postmasters are under a duty to account to Post Office for the cash and stock held at their branches in a process known as "balancing". In essence, postmasters are required to ensure that the cash and stock physically on hand matches the derived and declared figures in the branch accounts.
- 5.1.1 Derived figure: This is the aggregate value of cash and stock which should be in a branch based on the transactions conducted. It is an arithmetic calculation derived from adding up the value of all transactions recorded in the branch accounts in a given period.
- 5.1.2 Declared figure: This is the amount that the postmaster manually inputs into the branch accounts as being the amount of cash and stock that is physically in the branch. There is no arithmetic calculation undertaken by Horizon – it is a simple piece of data entry by the postmaster.
- 5.2 A key stage in this process is the "monthly" Branch Trading Statement. However, there are a number of other important reporting processes which postmasters must also undertake which help ensure that the branch balances at month end. The more critical processes which Post Office requires postmasters to perform are discussed below.

A. Branch Trading Statement

- 5.3 Approximately every four weeks, there is a mandatory "monthly" balance. This involves a full count of all cash and stock in the branch. The postmaster is required to sign a Branch Trading Statement ("BTS") confirming that the cash and stock declared in the branch accounts match the cash and stock on hand in the branch. A sample BTS is available for inspection.¹⁵³ The BTS must be submitted electronically on Horizon and also printed out and signed. The declaration on the BTS provides:

"I certify that the content of this balancing and trading statement is an accurate reflection of the cash and stock on hand at this branch."

¹⁵² Horizon was piloted in 1997 with roll out being started in 1999. The majority of branches were migrated to Horizon in 2000.

¹⁵³ See paragraph 12A above for further details

It is at this point that any discrepancies in the branch's accounts – including any identified during the course of the month by daily cash declarations and other checks – must be resolved. This is discussed in more detail below.

Although Post Office only requires a monthly balance, it is open to a postmaster to perform a balance at any time and some branches conduct daily or weekly balances.

B. Daily Cash Declaration

- 5.4 It is required that postmasters submit a daily cash declaration. This involves counting the cash on hand at their branch and declaring that figure on Horizon.
- 5.5 An important purpose of the daily cash declaration is to allow Post Office to manage working cash levels in branches. However, the daily cash declaration can also reveal any losses incurred during the day's trading. After a postmaster has made a cash declaration, Horizon can show any discrepancy between the derived and declared cash figures. Postmasters are therefore immediately alerted to any issues. This gives them the ability to investigate, identify and resolve such issues and, where appropriate, to give instructions or take other steps to avoid them in future.
- 5.6 At this stage, Post Office does not require a postmaster to correct any discrepancy, though many postmasters choose to do so. We refer to our earlier point that Post Office only sets minimum operational requirements and postmasters then elect whether to adopt additional safeguards and processes.
- 5.7 Post Office uses each branch's daily cash declaration for cashflow management. Post Office does not pro-actively monitor daily cash declarations to identify discrepancies: to do so would be a colossal and unworkable task, given that over 250,000 cash declarations are submitted every month. It should be noted that the daily cash declaration only gives Post Office half the picture – it only shows cash and does not record stock positions. It may be that a shortfall of cash can be easily explained by a gain in stock in the branch.

C. Other regular checks

- 5.8 In addition to the above a postmaster is required to undertake a number of other regular accounting checks:
 - 5.8.1 **Cash remittances.** Cash is normally received in branches on a weekly basis. Postmasters and/or their staff must scan the bar codes on the cash pouches into Horizon before opening the pouches and checking the overall amount of cash matches the paperwork included with the cash pouches. They are also required to do manual checks when returning cash to the cash centre as they are sometimes required to do.
 - 5.8.2 **Stock remittances.** Typically, every fortnight, branches receive stock to be remitted into Horizon (in addition to ad hoc items of stock received for promotions, special issues of stamps and so on). Postmasters must check the amounts of stock against the accompanying paper work before inputting the value of each product on Horizon.
 - 5.8.3 **Santander Deposits.** When a customer hands over a "paying-in" slip, branches must enter in the relevant value of the deposit on Horizon and compare the total value of deposits recorded on Horizon at the end of the day (on a Horizon report isolating the Santander deposits) against the physical slips held in the branch before sending off the physical slips to the bank.
 - 5.8.4 **Santander withdrawals.** Again, the physical slips filled out by customers must be compared with the Horizon generated report every day to ensure that they match.

- 5.8.5 **Personal banking cash deposits.** Again, the total on the physical paying-in slips handed over by customers should be compared with the value of the deposits reported by the Horizon report at the end of the day to ensure that they match.
- 5.8.6 **Passports Check and Send.** Some branches perform a service where they check customers' passport applications and send them off for a fee. The relevant paperwork must be checked at the end of the day against the Horizon recorded figures before despatching to Post Office.
- 5.8.7 **Cheque "cut off" process.** Some customers pay for products and services by cheque. At the end of the day, the branch must run off a report on Horizon to check that the volume and value of the cheques listed match the physical cheques on hand at the branch to be despatched.
- 5.9 All these required checks enable discrepancies to be identified, investigated and resolved at the earliest possible stage, at a time when the paperwork generated in the branch for its transactions is readily available, when line by line transaction data can be reviewed on Horizon and when matters are fresh in the minds of the relevant staff members. We emphasise this point because it wholly contradicts the essential impression that your Letter of Claim seeks to give that postmasters are powerless to identify or correct errors or wrongdoing occurring at their branches. In fact, they are well able to do these things and they should be doing them. If they fail to do them and/or they conceal any discrepancies identified by making false declarations to Post Office, they are responsible for the consequences, discussed below.

6. INVESTIGATING DISCREPANCIES

- 6.1 If a postmaster discovers a discrepancy, there are tools available to allow that discrepancy to be investigated. The allegation that postmasters do not have the information they need to properly investigate discrepancies stems from a misunderstanding of the nature of the information needed to undertake such an investigation.¹⁵⁴
- 6.2 The first step in identifying errors is to determine the days on which the cash position in the accounts is different from the cash on hand. Once the day has been identified, the transactions for that particular day can be reviewed for anomalies.
- 6.3 This involves looking for transactions that have been incorrectly recorded on Horizon (eg. withdrawals being recorded as deposits) and values being entered incorrectly on Horizon (eg. £1000 instead of £100). A central point to make about Horizon is that, like all IT systems, it is only as accurate as the figures entered into it by postmasters and their staff.
- 6.4 This review should be done by the postmaster and/or the branch staff contemporaneously as they are the only people in a position to recall the transactions carried out on that day and may, therefore, be able to identify a mismatch between their memory of a transaction and the manner in which it has been recorded.
- 6.5 It is therefore important for this review to be carried out contemporaneously:
 - 6.5.1 To give a sense of scale, an average branch conducts around 276 transactions per day. If a postmaster only looks to identify discrepancies on a weekly basis, they will need to review 1,930 transactions on average and, if left to the end of the trading period, around 7,720 transactions may need to be reviewed to identify an error.
 - 6.5.2 A prompt review also means that memories are fresh and it will be easier to spot a mistake.

¹⁵⁴ For further details see Section 5D of our letter

- 6.5.3 Delay in tackling discrepancies not only increases the volume of transactions to review but increases the difficulty of spotting patterns of errors. It may be that there was a sequence of errors over the course of a month that caused both shortfalls and surpluses, but the net effect of which was to leave only a small shortfall. A postmaster conducting daily checks is able to address each error one at a time before they become aggregated. A postmaster waiting to the end of the month, or who has not conducted daily cash declarations, may not be able disaggregate the net error into its component parts making spotting the underlying errors more difficult.
- 6.6 Many errors made in branch would not come to Post Office's attention unless a complaint is made by a customer or it was reported by the branch. For this reason, the postmaster is in the best position to identify errors by managing the branch and performing the regular cash and stock checks they are required to do. Sometimes they are the only ones who can do this.
- 6.7 Post Office plays a role in identifying branch errors by reconciling Horizon records against data from Post Office's clients such as banks and government departments. Where an error is detected, Post Office issues a transaction correction to the branch notifying the postmaster of the suspected error and enclosing the supporting information. It is then for the postmaster to review the transaction correction before accepting or disputing it. The vast majority of Horizon users work with these processes without apparent difficulty.

7. REMEDYING DISCREPANCIES

- 7.1 At the end of each trading period, a branch is required to account for any discrepancies.
- 7.2 Where a surplus or a shortfall is discovered in the course of a weekly balance, it can be declared and held in a suspense account to be resolved at the end of the trading period. If the discrepancy cannot be corrected by the end of the trading period, the postmaster is left with a choice to make good the shortfall from their own funds or settle it centrally (as explained below).
- 7.3 If there is a stock discrepancy, this should be corrected through a manual adjustment in the accounts. For example, if there is a shortfall of £10 of stamps, the derived stamp stock level can be manually adjusted down by £10 so that the derived stock level matches the stock on hand. Due to the double entry system operated by Horizon, this adjustment will cause a corresponding automatic increase in the derived cash figure by £10. This is because Horizon will assume that the stamps have been sold. All stock discrepancies should be resolved in this way before dealing with any cash discrepancies.
- 7.4 Cash discrepancies can be resolved in a number of ways. If there is a gain, the postmaster is permitted to remove the excess cash from the branch directly. The excess cash then becomes the postmaster's property. In practice, many postmasters keep the excess cash somewhere safe and then use it to correct any later shortfalls. This is not a Post Office mandated practice but it is one known to be followed by many postmasters.
- 7.5 Where there is a shortfall, the postmaster has the following options:
- 7.5.1 **Make good** - the postmaster may put cash (or a cheque) into the branch from their own funds to make good the shortfall.
- 7.5.2 **Settle centrally and pay** – the shortfall is transferred to the postmaster's personal account with Post Office and the derived cash figure is reduced so that it matches the amount of cash on hand. The shortfall is then payable to Post Office either by direct payment or by deductions from the postmaster's remuneration.
- 7.5.3 **Settle centrally and dispute** – if the postmaster believes that the shortfall was not their responsibility or may be resolved in some other way, the matter can be transferred to their personal account with Post Office but the debt suspended for a time to allow the shortfall to be investigated. This is done by the postmaster contacting Post

Office (typically through FSC) and has the effect of bringing the branch accounts into balance.

- 7.6 Crucially, in respect of these balancing procedures, postmasters have important choices to make. When performing a daily cash declaration or a monthly balance, they have a choice whether to count the cash (and, in the case of a monthly balance, the stock) and declare an accurate sum so that the cash actually on hand in the branch can be usefully compared with what Horizon states should be on hand. If they do these things, as they are required to do, they can ensure any shortfalls can be investigated. If they do not, the shortfall is not discovered when it should be and will remain hidden to Post Office and, by the time it is ultimately discovered, they have created a situation in which it is very difficult, if not impossible, to identify when or how the shortfall arose.

8. THE EFFECT OF FALSE ACCOUNTING

- 8.1 Regularly performed accurate cash declarations are critical to the proper running of a Post Office branch. Only postmasters have direct knowledge of the physical cash holding at a branch at any given time. Post Office does not have this information save when it conducts an audit. If a branch is not making daily cash declarations or is making false cash declarations (by inflating the declared cash figure) it becomes impossible for Post Office to know if cash has gone missing (Post Office having been told that the cash is there); to identify when it went missing; to identify the specific transaction(s) which caused the loss; to identify member(s) of staff responsible for the transaction(s); to determine whether the loss was the result of error or wrongdoing; and to make any claim which Post Office might be able to make in respect of the transaction(s) in order to recoup any of its losses.
- 8.2 The requirement for daily cash declarations is known to all postmasters and is easily performed. Simply put, postmasters have the power to manage their branch properly. There is no justification for rendering a false declaration or account.
- 8.3 Indeed, postmasters who consistently fail to make cash declarations could see their contracts terminated and, as you have alluded to in your Letter of Claim, Post Office (like any other company in its position) is entitled to bring criminal prosecutions against those postmasters who dishonestly make false cash declarations.
- 8.4 We are aware that there are a number of Claimants in this action who either failed to declare their cash daily or failed to make accurate cash declarations. These Claimants have, by their own choice either in declaring false figures or not declaring any figures, covered up shortfalls that could otherwise have been investigated contemporaneously.
- 8.5 By way of some examples of false accounting by Claimants in this action:
- 8.5.1 Your client Susan Knight (Scheme reference M058) was appointed postmaster at the St Keverne branch in August 2004 having already accumulated more than 24 years of Post Office experience in various roles. She was also appointed as postmaster of the Coverack branch in July 2009. At an audit on 6 November 2012, the auditor found a shortage of £22,511.17 at St. Keverne. Ms Knight admitted to the auditor that for a period of 12 months she had repeatedly inflated the cash on hand figures at the end of every trading period so the cash on hand figure matched the Horizon figure.
- 8.5.2 Your client Guy Vinall (Scheme reference M067) was appointed postmaster at the Funtington Post Office in December 2002 having worked as an assistant in the branch for six years previously. An audit on 14 October 2009 revealed a shortfall of £31,943.98, which was subsequently revised down to £28,298.54. Mr Vinall admitted to falsifying his accounts in a conduct interview with Post Office on 5 November 2009, preventing Post Office from intervening at an earlier stage.
- 8.5.3 Your client Alison Hall (Scheme reference M084) was appointed as postmaster of the Hightown branch in February 2005. An audit in September 2010 revealed a shortfall of

£14,842.37. Mrs Hall acknowledged that she falsified the cash on hand figures to cover up shortfalls. As noted by Second Sight at paragraph 4.7 of their final CRR, false accounting can *“turn potentially remediable accounting or transaction errors into actual losses and can also prevent the correction of the practices and procedures that generated those losses in the first place.”*

- 8.6 For the reasons explained above, in cases where shortfalls are not investigated contemporaneously, it can be difficult, if not impossible, to come to a definitive conclusion about how the shortfall occurred, and even more so when the true financial position has been covered up. In these circumstances, it is not for the responsible postmasters to criticise Post Office's failure to investigate better. The criticisms in fact go the other way.

9. POSSIBLE CAUSES OF DISCREPANCIES IN BRANCH

- 9.1 The purpose of the above processes is to identify and remedy any discrepancies in a branch, both surpluses and shortfalls. Although you have not provided any details of the 91 Claimants' individual claims, we expect those claims to be traceable back to a shortfall of cash or stock in a branch revealed by one or more of the above balancing exercises or an audit by Post Office. Where we refer to a shortfall we mean a difference between the derived figure and the cash on hand (which absent false accounting should also match the declared cash figure).
- 9.2 In the course of its investigations to date as part of the Scheme, Post Office and Second Sight repeatedly arrived at the conclusion that human error or dishonesty in a branch was the principal cause of shortfalls at branches. By way of example:
- 9.2.1 In the case of your client Guy Vinall, Second Sight concluded that *“operational errors by the Applicant or his staff were the most likely cause of some, if not most, of the losses reported”*.¹⁵⁵
- 9.2.2 In the case of your client Timothy Burgess, Second Sight concluded that *“on balance, we consider that neither the Applicant's acceptance of the four fraudulent cheques, nor his error in settling the Debit card payment to cash were caused by what could be fairly described as “Horizon system faults””*.¹⁵⁶
- 9.3 The different types of error that can occur in branches are explained in Second Sight's Part One Report and include:
- 9.3.1 Miskeying a transaction into Horizon (entering £1000 instead of £100).
- 9.3.2 Handing out or taking the wrong amount of physical cash to / from a customer.
- 9.3.3 Remitting the wrong amount of cash or stock to Post Office.
- 9.3.4 Failing to submit to Post Office the necessary paperwork to support a transaction.
- 9.3.5 Accidental loss (e.g. cash falling into mail sacks or being mixed with retail business cash).
- 9.4 Where we refer to dishonesty, we include theft and fraud.
- 9.5 A key feature of many of these errors is that they will not be known to, or discoverable by, Post Office. They are errors that occurred during the interaction between postmaster and customers at the counter, and only the postmaster and / or customer will be aware of the true events. In many cases, these types of errors will, however, be detectable (and therefore capable of remedy) by a postmaster who is operating their branch with due care.

¹⁵⁵ Paragraph 4.26, CRR

¹⁵⁶ Paragraphs 4.5, CRR

SCHEDULE 5: CONTRACT MODELS AND VARIATIONS

1. CONTRACT MODELS

1.1 The main contract models operated by Post Office are set out below.

1.1.1 **Franchise Agreement.** This contract is typically entered into by postmasters who take on a Post Office branch which has converted from crown to agency status. Generally, these are the larger Post Offices in terms of footfall. Under this contract, the postmaster has fully variable remuneration (i.e. no fixed element of remuneration). It is also distinct from the Postmaster Contract in that it is sometimes on fixed term agreement for 5 years. They are thereafter terminable on notice.

1.1.2 **Modified Sub Post Office Agreement.** This is the forerunner to the Franchise Agreement in that it also typically applied to branches which have converted from crown to agency status. Under this contract, the postmaster has a contractual right to be compensated where Post Office decide to close the branch. The vast majority of postmasters of branches which have converted from crown to agency status are either on the Franchise Agreement or the Modified Sub Post Office Agreement.

1.1.3 **Company Operated Agreement.** This contract was issued to nationally managed "multiples". Multiples are the larger businesses such as One Stop, Cooperative convenience stores or WH Smiths. The operating procedures at multiples are largely the same as at agency branches but this agreement does not contain many of the features of the postmaster contract as they would not be appropriate for a company to company relationship.

1.1.4 **Standard Subpostmaster Agreement ("the Postmaster Contract").** This is the contract which the vast majority of the Claimants entered into with Post Office. The last substantive incarnation of the Subpostmaster contract was rolled out in 1994 but has been varied since then as detailed at paragraph 2 below. Under this contract, remuneration is calculated as a mixture of fixed and variable elements.

1.1.5 **Community Subpostmaster Agreement.** This is similar to the Postmaster Contract but is offered to postmasters of part-time rural Post Office branches. There is a higher proportion of fixed remuneration as opposed to variable remuneration than in the Postmaster Contract to account for the lower footfall.

1.1.6 **Addendums.** There are a number of other arrangements which sit beneath the above contracts. For outreach branches (and satellite branches which were a forerunner to outreach), there is an addendum to the Postmaster Contract which covers the work done in relation to the outreach branch while the standard contract covers the work done at the core branch.

1.1.7 **NT Contracts.** Since 2010, Post Office has been developing and implementing a new suite of contracts in line with its Network Transformation programme (the **NT Contracts**). There are two new branch models, the most common new branch models being the "Main branch" model and the "Local branch" model. The Main branch model involves a dedicated Post Office counter which is separate from the postmaster's retail business while the Local branch model involves full integration so Post Office services can be transacted from their retail counter. As of today, some 6,000-7,000 postmasters are on these contracts so they cover the dominant part of the Post Office estate. Under the NT Contracts, postmasters have fully variable remuneration.

1.2 As well as the main body of the contract, there are other contractual documents which form part of the agreement between Post Office and postmasters. For example, section 2 (remuneration) of the Postmaster Contract provides that the current fees and remuneration booklets also form

part of the contract. Similarly, owing to paragraphs 13-19 of the Postmaster Contract, Post Office's operational manuals also form part of the agreement.

2. VARIATIONS TO THE POSTMASTER CONTRACT

2.1 At paragraph 49 of the Letter of Claim, you asked for an explanation of how Post Office's standard contracts were amended. You will appreciate that although that question seems simple, it requires one to look back over 22 years of contract history. We have nevertheless provided at least an introductory answer below. We should be grateful if you would pose any further questions on this topic as specifically as possible as this will help us identify any further required information.

2.2 We have focussed on the Postmaster Contract given that the majority of Claimants entered into this contract. Section 1, paragraph 18 provides:

"Changes in conditions of service and operational instructions, including those which are agreed with the National Federation of Sub-Postmaster, will appear from time to time in Counter News or by amendment to the Contract. Such changes and instructions are deemed to form part of the Subpostmaster's contract."

2.3 Post Office reserves a right, therefore, to vary the contract from time to time to deal with operational changes or shifts in market conditions. The NFSP is the body recognised by Post Office to negotiate on behalf of postmasters, both in respect of contract variations and on a range of other issues. In respect of remuneration rates, any changes will involve prior consultation with the NFSP under section 2, paragraph 3.3 of the Postmaster Contract.

2.4 Since the Postmaster Contract (in its various forms) was rolled out in 1994, a number of variations have been made to the terms of that agreement in line with Post Office's right under section 1, paragraph 18:¹⁵⁷

- 2.4.1 On 4 November 2002, postmasters were notified of a number of variations to the Postmaster Contract, Community Subpostmaster Agreement and the Modified Sub Post Office Agreement. The variations were in response to the change of business name from Post Office Counters Limited to Post Office Limited.
- 2.4.2 On 1 August 2004, section 23 of the Postmaster Contract and section 19 of the Community Subpostmaster Agreement were varied owing to the introduction by Post Office of a new saving stamp.
- 2.4.3 In October 2004, section 2 of the Postmaster Contract, dealing with remuneration, was varied. This variation was incorporated directly into the body of the 1994 contract because it involved the replacement of an entire section (as opposed to being a change in terminology throughout the entire document) and therefore was both easier and cheaper to achieve.
- 2.4.4 On 1 April 2005, section 21 of the Postmaster Contract and section 17 of the Community Subpostmaster Agreement were varied. This variation related to telephone facilities at Post Office branches.
- 2.4.5 On 23 September 2005, section 17 of the Postmaster Contract, section 13 of the Community Subpostmaster Agreement and Section 13(M) of the Modified Sub Post Office Agreement were varied. These sections relate to the postmaster's private business and certain restrictions, for example in relation to gambling and political activities.

¹⁵⁷ Copies of the communications / variation notices sent by Post Office to the postmasters are available for inspection - see paragraph 12A above for further details

- 2.4.6 On 31 July 2006, section 12A of the Postmaster Contract, section 8A of the Community Subpostmaster Agreement and section 9(M)(A) of the Modified Sub Post Office Agreement were varied in relation to responsibility for the safeguarding of the mail.
- 2.4.7 Also on 31 July 2006, a variation was issued in respect of section 15 of the Postmaster Contract (section 11 of the Community Subpostmaster Agreement and section 10(M) of the Modified Sub Post Office Agreement) in relation to assistants.
- 2.4.8 Finally on 31 July 2006, a variation was issued in respect of section 16 of the Postmaster Contract (section 12 of the Community Subpostmaster Agreement and section 12(M) of the Modified Sub Post Office Agreement) in relation to the divulgence of official information.
- 2.4.9 In September 2008, variations were issued to postmasters on the Postmaster Contract, the Franchise Agreement and the Company Operated Agreement in relation to the operation of paystation terminals.
- 2.4.10 In 2010, new terms relating to branch standards were introduced into the Postmaster Contract.
- 2.5 When a variation to the contract was necessary, Post Office wrote to existing postmasters to give them notice of the variation.¹⁵⁸ Post Office also took steps to ensure that newly appointed postmasters were aware of all variations to the original 1994 contract by appending all variations to the original 1994 contract. The form in which the contract was presented to new appointees changed in 2006. Up to 2006, Post Office issued an appointment pack that contained an acknowledgment of appointment form, a bound copy of the 1994 Subpostmaster Contract and associated variations (loose, rather than incorporated into the original agreement). From 2006 onwards Post Office provided the pre-2006 variations at the front of the 1994 version so they were bound to the original contract. Therefore, new postmasters appointed from 2006 onwards were provided the 1994 version with the pre-2006 variations bound to the front and any further post-2006 variations included as loose documents.
- 2.6 A copy of the 1994 contract with the pre-2006 variations attached to the front is available for inspection.¹⁵⁹ Variations issued after 2006 are enclosed as separate appendices (as listed above) as they would be for a new postmaster.
- 2.7 Beyond the variations listed above at paragraph 2.4, there are also contractual terms for niche equipment, products and services not relevant to every branch such as ATMs and AEI terminals which validate customer documents. These terms do not constitute variations as they are separate, stand-alone agreements. For example, the ATM terms will only be entered into with postmasters of branches which have an ATM.
- 2.8 From time to time, Post Office also issues changes to operational instructions and manuals. We do not propose to list these operational instructions as they are small but issued frequently so to include them here would be disproportionate, given their limited relevance to the issues currently in dispute.

¹⁵⁸ A sample letter sent to postmasters in July 2004 to give them notice of the change to section 23 of the Postmaster Contract effective from 1 August 2004 is available for inspection - see paragraph 12A above for further details

¹⁵⁹ See paragraph 12A above for further details

SCHEDULE 6: REBUTTAL OF ALLEGATIONS AGAINST HORIZON**1. OVERVIEW**

- 1.1 Given the nature of the implied terms set out above, you will see that Post Office is not trying to maintain that Horizon is error free. Post Office does not seek to suggest this.
- 1.2 For a system of Horizon's size, given the range of matters it deals with and the number of users it has, the existence of occasional defects is unremarkable. Software companies simply do not provide "error-free" software.
- 1.3 The important issue is not, therefore, whether these defects exist, as they likely do, but whether there are in place adequate controls to identify defects and take any necessary remedial action in order to avoid harm to branches. We have all explained the importance of postmasters monitoring their own accounts and raising any issues. Furthermore, changes to Horizon are controlled through a robust change management and operational governance process including a joint Fujitsu and Post Office test team. Horizon is also regularly subjected to comprehensive and independent reviews, testing and audit procedures.¹⁶⁰ Beyond these formal reviews, there is also regular interaction between technical teams at Post Office and Fujitsu.
- 1.4 It is also important to understand that the frustrations of particular individuals in using the system do not mean there is a defect in Horizon – this is just the subjective user experience of those individuals. Moreover, even if there is a defect, this does not mean that it is causing problems with branch accounting. Many defects may be minor issues that do not affecting the accounting position of branches.
- 1.5 Second Sight only reported on a number of already resolved defects in Horizon (which they called "bugs"). Second Sight did not discover these defects through its investigations. These were issues already known to and remedied by Post Office. It was Post Office that disclosed them to Second Sight.
- 1.6 Neither in its Interim Report, nor in its Part Two Report, did Second Sight find that those defects caused postmasters to be held wrongfully liable for shortfalls (due to the corrective action already taken by Post Office). Second Sight also did not attribute any shortfall in any case in the Scheme to a defect in Horizon, nor did it withdraw or revise its conclusion in its Interim Report of July 2014 that it had found no systemic error in Horizon.
- 1.7 The Letter of Claim also presents no evidence that a defect in Horizon has caused a postmaster to be held wrongfully liable for any shortfall in their branch.
- 1.8 Nevertheless, you make repeated references to the existence of historic defects in Horizon¹⁶¹ in order to give a false impression that Horizon deeply suffers from major defects, that Post Office does nothing about them and that these errors have caused postmasters losses which have gone unremedied. In order to dispel any myths around the defects reported on by Second Sight and cited by other sources, we have set out below in detail what happened in these instances. To be clear - Post Office does not claim that these have been the only defects in Horizon.

2. CALENDAR SQUARE / FALKIRK

- 2.1 This defect, which was discovered in 2005 and fixed in March 2006, involved Horizon failing to recognise transfers between different stock units.

¹⁶⁰ XREF

¹⁶¹ See paragraphs 44.2, 44.6, 101.4.1, 104, 117, 119, 123, 126.2, 128.2, 153.1, 169(31) of the Letter of Claim

- 2.2 For context, sometimes it is necessary to transfer cash between different stock units in a branch. For example, one stock unit may be running short on cash so the postmaster or branch staff may transfer some cash from stock unit A to stock unit B. Alternatively, it may be that an amount of cash has been remitted into the branch entirely on one stock unit creating a need to distribute that cash among the other stock units so they are all equipped to perform transactions.
- 2.3 The Falkirk anomaly came to the attention of Fujitsu when a postmaster in the Calendar Square branch in Falkirk highlighted a receipts and payments mismatch when balancing one of their stock units. This meant that, when the postmaster came to balance the branch's stock units, while the total for the amount of receipts into the system and the total for the amount of payments out of the system should have matched (owing to the double entry book-keeping principle), in this case they did not match.
- 2.4 The problem was that information recorded on one terminal (the terminal from which cash was being sent) was not being passed properly to the other terminal (the terminal receiving the cash). This meant that while cash was being transferred from one terminal to another, the transfer was only visible on the terminal it was being transferred out of, not on the terminal it was being transferred into. Effectively, the terminal receiving the cash could not "see" the transfer.
- 2.5 The problem produced a visible trace of "events" in the event logs¹⁶², in particular an event called "time out waiting for lock" which means that information which Horizon was trying to communicate to the terminal was effectively locked out from the terminal. In the Calendar Square branch, this problem was visible on the event logs multiple times.
- 2.6 After the problem was identified by Fujitsu, it was solved by putting a software fix into the system. This fix was distributed to the entire network – not just the affected branch – in March 2006. When the problem was diagnosed, advice was passed to the Calendar Square branch as to what to do if the problem happened again. If the branch was to simply re-start the terminal, the issue would correct itself the following day. The same guidance was made available on the help desk for any other branches experiencing the issue.
- 2.7 This anomaly was the subject of expert evidence in the criminal prosecution of Seema Misra in 2010. The expert for the prosecution, Gareth Jenkins, then of Fujitsu, explained that the Falkirk bug could not have caused the losses in Mrs Misra's branch because (a) as explained above, the manifestation of this bug was clearly visible in branch records and there was no sign of its occurrence in Mrs Misra's branch records; and (b) the bug had been resolved more than a year before the relevant period in Mrs Misra's branch.
- 2.8 Mrs Misra pleaded guilty to false accounting and was convicted by jury of theft. Mrs Misra was sentenced to 15 months imprisonment and there was no appeal against the conviction.
- 2.9 The Falkirk bug was also raised as part of a defence in a civil action by Post Office against a former postmaster, Lee Castleton in December 2006/January 2007. The Court accepted the evidence from Fujitsu's witness, Anne Chambers, and found "no evidence" of the Falkirk bug in Mr Castleton's branch.

3. PAYMENTS MISMATCH

- 3.1 The payments mismatch bug affected 62 branches (13 crown; 12 multiples; 37 postmasters). It related to the process of moving discrepancies into the local suspense account and majority of incidents occurred between August and October 2010.
- 3.2 The identification of this bug came about through Horizon's own in-built checks and balances which are designed to flag up such issues.

¹⁶² The event logs reflect the "back office" procedures such as users logging on and off Horizon, cash declarations and balancing, as opposed to "front office" transactional data.

- 3.3 When discrepancies come to light during the rolling over of a stock unit onto a new Transaction Period, the user is asked if that discrepancy should be moved into the local suspense account. If the branch pressed the "cancel" icon at this stage, the discrepancy was "zeroed" on Horizon.
- 3.4 The effect of this was that the back end branch account (Post Office's central accounting system) showed the discrepancy while Horizon, in the branch, did not. The branch may have thought they had balanced when they had not.
- 3.5 The next screen presented to the branch gave them the following options: (1) print or preview the trial balance again; (2) re-attempt the rollover; or (3) cancel the rollover. Where the branch took the "cancel rollover" option, no issues occurred.
- 3.6 However, if the branch re-attempted the rollover, a mismatch between Horizon and Post Office's central accounting system arose. The Horizon account showed no discrepancy while Post Office's central accounting system showed a discrepancy.
- 3.7 In the affected branches, this created a "receipts and payment mismatch" equal to the value of the lost discrepancies. When the new Trading Period began, the opening figures for discrepancies in the new period was zero rather than the actual value of the discrepancy.
- 3.8 In short, the affected branches appeared to have balanced when, in fact, they may have had a loss or a gain.
- 3.9 The first remedial step was for Fujitsu to ascertain which branches were affected. The mismatch generated an error code which allowed Fujitsu to identify the relevant branches. Fujitsu were then able to carry out analysis on each affected branch to gather relevant information. For example, they needed to ascertain when the receipts/payments mismatch occurred, the value of the lost discrepancy and whether it was a gain or a loss.
- 3.10 There were 17 postmasters who had a loss attributed to their branch. They were notified of this in March 2011 and, where appropriate, they were reimbursed. Postmasters who made a gain through the anomaly were not asked to refund this amount to Post Office.

4. SUSPENSE ACCOUNT BUG

- 4.1 The suspense account bug caused a small number of entries in the suspense accounts¹⁶³ of 14 branches (4 crown and 10 postmasters) in 2010 to be erroneously reproduced in those branches' suspense accounts for the same monthly trading period in 2011 and 2012.
- 4.2 By way of context, if a postmaster declares on Horizon that there is a discrepancy between the amount of cash and/or stock in the branch and the amount of cash and/or stock recorded on Horizon (say following an ad hoc cash/stock count), the discrepancies are removed from the branch's live Horizon records, so that the branch accounts will reflect the cash and stock actually in the branch at that point. However, the loss or gain in cash and/or stock is stored as a temporary accounting record in a separate part of Horizon called the "Discrepancy Account".
- 4.3 At the end of each trading period, the figures in the Discrepancy Account must be cleared before the branch can move on to trade during the next trading period (called "rolling over"). To do this, postmasters transfer the net value of all discrepancies recorded in Discrepancy Account during that trading period into a "Suspense Account". The postmaster can then settle any shortfall or surplus in the Suspense Account by making good the discrepancy or settling centrally (as per above). After settling any shortfall or surplus, the Suspense Account resets to zero and the branch rolls over.

¹⁶³ Please note that these are the branch suspense accounts, not the Post Office central suspense accounts that were subject to comments in the Part Two Report.

- 4.4 The suspense account bug was discovered when two postmasters who suffered discrepancies raised the matter with Post Office in January 2012. This error caused postmasters to re-settle the incorrect entries in order to clear their Suspense Accounts in 2011 and 2012 despite those entries already having been settled in 2010. In effect, some branches accidentally benefited from the same gain three times and some branches suffered the same loss three times.
- 4.5 Post Office began an investigation and identified the bug as being the cause of the issue in January 2013. Post Office suspended any attempts to recover known losses from affected postmasters.

5. FUJITSU

- 5.1 At paragraphs 115 to 118 of the Letter of Claim, you have summarised your understanding of Post Office's contractual relationship with Fujitsu. Your allegation is that the commercial terms of that relationship were so onerous they would have deterred Fujitsu and Post Office from properly investigating suspected problems with Horizon.
- 5.2 At paragraph 117 of the Letter of Claim, you state that "the contractual framework between Post Office and Fujitsu included a liquidated damages mechanism, whereby Fujitsu were required to pay Post Office a fixed sum of money on each occasion that a transaction failed to process in a branch, by reason of faults, bugs or errors in the Horizon System". This appears to be a reference to clause 18 of the current version of the relevant Fujitsu Contract and the related Schedules C1 and B4.4 (copies are available for inspection¹⁶⁴). Although these provisions provide for payment of liquidated damages, one can see that they are of a type usually found in large IT contracts. We note that you are essentially accusing Fujitsu of defrauding Post Office. This allegation (like all your other fraud allegations) is again unsatisfactorily particularised but it is also commercially nonsensical – Fujitsu's reputation would be irreparably damaged had it not complied with its obligations to Post Office; such obligations being similar to those likely found in many other contracts Fujitsu has with other customers.
- 5.3 At paragraph 118 of the Letter of Claim, you state that "*We understand Post Office is able to retrieve a certain amount of Horizon transaction data under the terms of its contract with Fujitsu, but there is a limit to the data that can be retrieved without triggering further payments. Post Office therefore have a financial incentive to refrain from providing Subpostmasters with Horizon transaction data*". The clause that you appear to be referring to is found at clause 25.10 of the Fujitsu Contract. This clause entitles, but does not compel, Fujitsu to charge for the "*reasonable and demonstrable costs*" incurred by Fujitsu in supplying documents, subject to certain further restrictions. This cost is therefore not prohibitive and these files are obtained by our client where appropriate to do so.

6. RICHARD ROLL ALLEGATIONS

- 6.1 With respect to paragraph 44.4 of the Letter of Claim, we understand that Richard Roll worked for Fujitsu in the early 2000s. It has been at least 10 years since he worked last at Fujitsu and since 2004 he has not worked in the IT industry.¹⁶⁵
- 6.2 Whilst certain quotes used by journalists on Panorama may be superficially attractive to your clients at this stage, they have not been tested for credibility. All complex software systems suffer from "errors" and we are not claiming that Horizon is error free. However, the word "error" is itself misleading and can pertain to many different type of issues of differing severity levels and at different layers of the software infrastructure. Your attempt to link Richard Roll's statements to the claim that there are "errors" in Horizon is therefore too vague to be of any evidential weight.

¹⁶⁴ See paragraph 12A above for further details.

¹⁶⁵ <https://uk.linkedin.com/in/richard-roll-7172a430>

SCHEDULE 7: GLOSSARY

In this letter the following terminology is used:

1. "Basket" is defined in paragraph X.
2. "FSC" is defined in paragraph X.
3. "GLO" is defined in 2.1.11
4. GLO Issues
5. "Horizon" is defined in paragraph X.
6. "HSD"
7. "NBSC" is defined in paragraph X.
8. "postmaster" is defined in paragraph X.
9. "Postmaster Contract" is defined at 4.3
10. "POIR"
11. "Second Sight" is defined at paragraph X
12. "Scheme" is defined at paragraph 1.2
13. "Shortfall" is defined in paragraph X.
14. "Stock" is defined in paragraph X.
15. "Stock Unit" is defined in paragraph X.
- 15.1 "Working Group" is defined in paragraph X.
16. ADD MORE DEFINED TERMS