

# OPUS 2

## INTERNATIONAL

Alan Bates & others v Post Office Limited

Day 13H

May 23, 2019

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Alan Bates &amp; others v Post Office Limited

Day 13H

1 Thursday, 23 May 2019  
2 (10.30 am)  
3 Discussion re housekeeping  
4 MR JUSTICE FRASER: The agenda has slightly changed. I'm  
5 sorry, Mr de Garr Robinson, if I appear to do a double  
6 take; I can't see Mr Cavender.  
7 MR DE GARR ROBINSON: My Lord, he is hiding.  
8 MR JUSTICE FRASER: I can see Mr Cavender.  
9 I assume you are here as a result of the emails  
10 I sent yesterday.  
11 MR DE GARR ROBINSON: My Lord, yes.  
12 MR JUSTICE FRASER: What I just want to do then, we will  
13 start with that first because I imagine that's the only  
14 point upon which you are going to be present.  
15 MR DE GARR ROBINSON: Yes.  
16 MR JUSTICE FRASER: Just in the interests of transparency,  
17 at 15.22 yesterday the court received an email direct  
18 from Dr Worden sending me a document which was attached  
19 which was called the "Third Expert Report" and three  
20 annexes or appendices thereto. That email was not  
21 copied to anybody from the claimants but it was copied  
22 to one of the Post Office's solicitors.  
23 As the parties know, I sent two emails in pretty  
24 short succession after receiving that: the first was  
25 making the point that witnesses, even expert witnesses,

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1 are not to directly communicate with the court or send  
2 documents directly; and the second is that all  
3 communications to the court have to be copied to the  
4 other side, and that email went both to the claimants  
5 and also to counsel for the Post Office.  
6 It then occurred to me a few minutes later that  
7 I also ought to make it clear, because the status of  
8 that document was unclear to me and I haven't read that  
9 document, that there may be privilege issues, which is  
10 why I issued a direction to the claimants that they  
11 should neither read it nor deal with it nor distribute  
12 it, pending explanation of the situation this morning.  
13 MR DE GARR ROBINSON: My Lord, yes.  
14 MR JUSTICE FRASER: Which I imagine is why you are here to  
15 explain the situation.  
16 MR DE GARR ROBINSON: I'm here at your Lordship's  
17 invitation, if I may say so.  
18 My Lord, can I just briefly address on you the two  
19 points which your Lordship made at the beginning. First  
20 of all, the communication should have been copied to the  
21 claimants' solicitors. My Lord, actually what happened  
22 is that Dr Worden sent it to your Lordship's clerk and  
23 immediately forwarded it to Freeths. So it is in fact  
24 the case that the document was provided immediately.  
25 MR JUSTICE FRASER: Was that being served on behalf of the

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1 Post Office to the claimants?  
2 MR DE GARR ROBINSON: My Lord, no. Your Lordship may recall  
3 from the hearing on 11 April, this comes from Dr Worden.  
4 Dr Worden, as your Lordship is more than aware, as  
5 an independent expert, considers it to be his duty to  
6 assist the court, irrespective of his instructions.  
7 Pursuant to that duty, which is enshrined in CPR 35.3  
8 I think, and also pursuant to his duty provided for in  
9 paragraph 2.5 of the practice direction to CPR 35, he  
10 conceives it to be his duty, in my submission on proper  
11 grounds, to inform your Lordship that he has had  
12 material changes of view. It is also his view that  
13 those views, the views that are set out in the report,  
14 are helpful to your Lordship in resolving the Horizons  
15 issues, and in my submission there is more than  
16 an arguable basis for justifying that view. But those  
17 are his views.  
18 My Lord, given that he owes your Lordship a direct  
19 duty to assist you, given that he is under an obligation  
20 to inform the parties and the court of a change of view,  
21 as your Lordship will recall I said on 11 April, this  
22 puts my client in a difficult position. None of this  
23 has been instigated or requested by my client; it is  
24 what Dr Worden conceives it to be his duty to do.  
25 My Lord, to deal with your Lordship's second point,

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1 in my respectful submission it is entirely proper for  
2 an independent expert to communicate directly with the  
3 judge. That underpins CPR 35.14, which your Lordship  
4 will also be well aware of, the provision which allows  
5 experts to seek the directions of the court.  
6 MR JUSTICE FRASER: Well, whether that's correct or not, in  
7 the circumstances of this case, the way in which it was  
8 done and the time at which it was done -- and I went  
9 back and reread what you had said to me on 11 April --  
10 two points arise. I'm not in any way finding or stating  
11 that it was improper for him to have done that.  
12 MR DE GARR ROBINSON: I'm grateful for your Lordship to say  
13 that.  
14 MR JUSTICE FRASER: However, it is highly unusual for  
15 an expert to do that without some sort of prior  
16 notification that that's happening; and secondly, it was  
17 not clear on the face of his email whether the claimants  
18 knew that was happening.  
19 MR DE GARR ROBINSON: My Lord, there was prior notification.  
20 MR JUSTICE FRASER: Right.  
21 MR DE GARR ROBINSON: If I can go back to the chronology,  
22 I'll deal with this very quickly; I hope we don't have  
23 to go into the correspondence, but there is  
24 correspondence dealing.  
25 On 10 April, this is the day before I addressed

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1 your Lordship, my instructing solicitors wrote a letter  
2 to Freeths indicating that Dr Worden had these changes  
3 of views and he wished to produce a short supplemental  
4 report.  
5 On the 11th, at the hearing, I then told you about  
6 the awkward position my client found itself in, on the  
7 basis of the two provisions I have just adverted  
8 your Lordship to and also the ICI v Merrell case that  
9 your Lordship decided. I indicated that Dr Worden would  
10 be seeking to collaborate with Mr Coyne with a view to  
11 seeing whether it's possible to have any agreed or  
12 disagreed position.  
13 In response to that, your Lordship directed that the  
14 experts should meet by 3 May, making it clear you  
15 weren't giving any directions as to what they should  
16 talk about.  
17 MR JUSTICE FRASER: Well, I was going to order them to meet  
18 anyway. That direction for a meeting was not as  
19 a result of the 11th; it was in order usefully to use  
20 the time that had been created in the trial timetable.  
21 MR DE GARR ROBINSON: I see. I wasn't aware of that.  
22 MR JUSTICE FRASER: But that doesn't matter.  
23 MR DE GARR ROBINSON: In any event, your Lordship gave that  
24 direction.  
25 The same day, after the hearing, Dr Worden provided

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1 his workings -- that's the raw data -- to Mr Coyne.  
2 My Lord, on 16 April there was a relatively brief  
3 discussion between Dr Worden and Mr Coyne about that raw  
4 data and Dr Worden's approach. It's a without-prejudice  
5 discussion; I don't want to say any more than that.  
6 MR JUSTICE FRASER: But the short point is there is  
7 a detailed chronology which leads, I imagine, at some  
8 point to notification by your solicitors to Freeths that  
9 another expert's report is coming. Is that right?  
10 MR DE GARR ROBINSON: Yes. If I could give you the  
11 chronology, just to be clear.  
12 On 25 April, so this is a month ago, a draft of the  
13 report was provided without prejudice to Mr Coyne, and  
14 on 29 April I'm instructed the appendices to the draft  
15 were provided. The purpose of providing those documents  
16 was to facilitate a meeting, but a meeting didn't happen  
17 by 3 May, or indeed a meeting hasn't happened at all,  
18 although they have had conversations over the telephone.  
19 My Lord, what then happened was that on 16 May  
20 Dr Worden provided that report your Lordship has  
21 received to Mr Coyne on an open basis, the final  
22 version. The earlier version was a draft; this was the  
23 final version. He provided it to Mr Coyne saying that  
24 he hoped that they could meet to discuss it, but  
25 pursuant to his duties to the court, he was intending to

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1 provide it to your Lordship next Wednesday, which was  
2 yesterday.  
3 MR JUSTICE FRASER: That date being chosen for what reason?  
4 MR DE GARR ROBINSON: That was chosen by Dr Worden, as  
5 I understand it. Oh, that's right, I'm so sorry, it was  
6 because Mr Coyne was going on holiday on that Wednesday.  
7 MR JUSTICE FRASER: As in yesterday?  
8 MR DE GARR ROBINSON: As in yesterday, but he was not on  
9 holiday on Monday or Tuesday. What Dr Worden was hoping  
10 was that they would be able to have a discussion in  
11 those early two days. When that proved not possible, he  
12 then sent it to your Lordship.  
13 MR JUSTICE FRASER: I'm not sure that necessarily explains  
14 why Wednesday was chosen, but let's leave it at that.  
15 Is there anything else that you would like to  
16 explain?  
17 MR DE GARR ROBINSON: My Lord, if you have any questions  
18 you'd like me to --  
19 MR JUSTICE FRASER: My major concern, Mr de Garr Robinson,  
20 was that yesterday this arrived with me out of the blue,  
21 not on its face obviously sent to the claimants, and  
22 obviously I didn't have any of the --  
23 MR DE GARR ROBINSON: Yes. That was a --  
24 MR JUSTICE FRASER: -- I hesitate to use the word  
25 "backstory", but any of the detailed background. You

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1 have explained sufficient to me to make me realise that  
2 there are no concerns in terms of the claimants now  
3 having received a document from the court which they  
4 ought not to have had, because you have explained they  
5 had it anyway.  
6 MR DE GARR ROBINSON: I see. I now understand your second  
7 email.  
8 MR JUSTICE FRASER: If you look at it from the court's point  
9 of view, the court received a quantity of material  
10 yesterday unilaterally which it had to provide to the  
11 other side in the litigation, but which wasn't clear  
12 either what the status of it was or whether or not the  
13 Post Office even knew that that was being provided to  
14 the court --  
15 MR DE GARR ROBINSON: I understand.  
16 MR JUSTICE FRASER: -- which was what led to the direction  
17 3 minutes after the first email telling the claimants  
18 that they were not either to open it or look at it or  
19 anything until the situation had been cleared up.  
20 Now the situation has been cleared up, obviously  
21 that concern doesn't apply and that direction no longer  
22 applies, in the sense that it had any teeth anyway  
23 because they had it already. But I think what I am  
24 going to ask you to do, and you will please just tell me  
25 how long you would like to do it, is I think a short

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1 witness statement setting out that chronology from the  
2 10 April to now, please, would greatly assist me.  
3 MR DE GARR ROBINSON: Very good, my Lord.  
4 MR JUSTICE FRASER: I'm not suggesting it is something that  
5 has to be done in the next day or the next couple of  
6 days, but I think just a short witness statement from  
7 whichever of your solicitors is the right person, just  
8 to explain that background that you've just taken me  
9 through, please.  
10 MR DE GARR ROBINSON: Very good. My Lord, can I just take  
11 instructions?  
12 MR JUSTICE FRASER: Just take instructions as to when you  
13 would like that to be.  
14 MR DE GARR ROBINSON: My Lord, my instructing solicitors  
15 suggest the end of next week.  
16 MR JUSTICE FRASER: Which would be I think the 31st; is that  
17 right? Friday the 31st.  
18 MR DE GARR ROBINSON: Yes, it would be.  
19 MR JUSTICE FRASER: Noon on Friday the 31st.  
20 MR DE GARR ROBINSON: My Lord, yes.  
21 MR JUSTICE FRASER: All right. Thank you very much indeed.  
22 Unless there is anything else on that particular  
23 point or dealing with the experts -- I don't know if,  
24 Mr Green, there's anything that you would like to make  
25 by way of submissions or not. I'm not inviting you

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1 expressly to.  
2 MR GREEN: My Lord, there are only two points which I just  
3 very briefly make.  
4 One is that just in relation to your Lordship's  
5 observation about correspondence directly with the  
6 court, we don't agree with my learned friend's analysis  
7 at all. The point is extremely short. 35.14 expressly  
8 carves out an unusual and separate channel, which is for  
9 experts to ask the court for directions.  
10 MR JUSTICE FRASER: Yes.  
11 MR GREEN: It does not provide or allow experts to do what  
12 happened yesterday.  
13 MR JUSTICE FRASER: Yes.  
14 MR GREEN: It is just not right. So that is the short point  
15 on that.  
16 The other matter, I don't know to what extent, how  
17 far back the chronology is going to go, but the short  
18 point underpinning our concerns about how this has  
19 arisen is that Mr Coyne made a request for information  
20 in July 2018 for the OCPs, the OCRs and the MSCs, and  
21 the Post Office list has responded, I think it was  
22 6th August from memory, saying that those were  
23 irrelevant, and the new report arising after what should  
24 have been the conclusion of the Horizon Issues trial is  
25 based on an analysis, which we're trying to understand,

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1 of those documents said to be irrelevant in the summer  
2 of last year.  
3 So those are the only two points I wanted your  
4 Lordship to have.  
5 MR JUSTICE FRASER: All right. Insofar as you want to  
6 explore, examine or pursue any of those points in  
7 cross-examination, we will cross that bridge when we  
8 come to it. I have ordered a witness statement.  
9 Nothing that I say should be taken as coming to  
10 a concluded view on whether or not it was correct or  
11 incorrect for him to have sent his third report direct  
12 to the court. However, for today's purposes I think we  
13 have gone as far as we need to.  
14 Mr de Garr Robinson, thank you for coming at very  
15 short notice, and I imagine you are not going to want to  
16 stay for the rest of the morning.  
17 MR DE GARR ROBINSON: I'm going to want not to stay.  
18 MR JUSTICE FRASER: All right. Thank you very much.  
19 Please --  
20 MR DE GARR ROBINSON: I'm grateful to your Lordship.  
21 MR JUSTICE FRASER: So turning to the main business of the  
22 day. Can I firstly tell you what I think is on the  
23 agenda and remind you that we are going to need a break  
24 for the shorthand writers at some point.  
25 I have read all of the material that everybody has

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1 submitted. There are the following issues and  
2 sub-issues that we have to deal with. There is  
3 an application by the Post Office for permission to  
4 appeal. There are costs to be dealt with,  
5 an application in respect of the necessary costs order  
6 for the Common Issues trial. It appeared at one point  
7 as though there were also an application for the release  
8 of the security, but as I understand it, that's no  
9 longer live business for today. Is that correct?  
10 MR GREEN: My Lord, yes, not for today; to be reserved.  
11 MR JUSTICE FRASER: Not for today. It also at one point  
12 appeared to be on today's agenda the proper costs order  
13 consequent upon the recusal application, but as  
14 I understand it, that's now gone away as well. Is that  
15 right?  
16 MR GREEN: My Lord, yes. The only point on that is that the  
17 order is for payment of a fixed sum of £300,000 up to  
18 20 April, but with costs occasioned by the making of the  
19 application, thereafter to be claimants' costs reserved.  
20 MR JUSTICE FRASER: Right.  
21 MR GREEN: So in a sense the immediacy of dealing with it  
22 has gone, because the first part of it has been agreed,  
23 but how it all arose is not something that your Lordship  
24 can put out of your mind, in a sense, because that might  
25 need to be revisited in due course.

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1 MR JUSTICE FRASER: But so far as today -- there was  
2 a slight difference in wording, and it might be me  
3 looking at matters in overly technical detail. But in  
4 Mr Cavender's skeleton for today, at his paragraphs 3(a)  
5 and 3(b), there was an extent of agreement in relation  
6 to the relevant costs order on the recusal application.  
7 Has that now all been swept up into the consent order?  
8 Because the wording wasn't necessarily exactly the same.  
9 MR GREEN: My Lord, yes. So it is now just as in the  
10 concept. We have a hard copy here signed, if  
11 your Lordship wants a hard copy.  
12 MR JUSTICE FRASER: No, I have that. That was lodged  
13 yesterday.  
14 MR GREEN: My Lord, yes.  
15 MR JUSTICE FRASER: So apart from the word "draft" in the  
16 heading, neither party needs me to do anything with that  
17 except approve it?  
18 MR GREEN: My Lord, that's right.  
19 MR JUSTICE FRASER: All right. And you are going to be paid  
20 £300,000 by 4 o'clock on 7 June, as per paragraph 1, and  
21 then paragraph 2 is to reserve the claimants' costs from  
22 that date onwards.  
23 MR GREEN: My Lord, yes.  
24 MR JUSTICE FRASER: All right. I approve that order.  
25 MR GREEN: I'm most grateful.

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1 MR JUSTICE FRASER: So that removes both the potential  
2 summary assessment of that order and any argument or  
3 disagreement about how the costs of adjourning the  
4 Horizon Issues trial was going to be dealt with.  
5 MR GREEN: Precisely.  
6 MR JUSTICE FRASER: So we are now, therefore, at permission  
7 to appeal and then costs of Common Issues.  
8 MR GREEN: My Lord, that's right.  
9 MR JUSTICE FRASER: Right. Unless either of you would like  
10 me to deal with it in a separate order, I will deal with  
11 the permission to appeal first.  
12 MR GREEN: I'm most grateful.  
13 MR JUSTICE FRASER: Mr Cavender.  
14 Application by MR CAVENDER  
15 MR CAVENDER: My Lord, I'm obliged. You will have seen we  
16 have put in draft grounds of appeal, which are quite  
17 extensive.  
18 MR JUSTICE FRASER: Yes.  
19 MR CAVENDER: We have also put a skeleton argument in  
20 in support of those grounds of appeal.  
21 The grounds, as you will see, are grouped really in  
22 three areas: one, appeals on points of law arising out  
23 of the Common Issues; secondly, some limited appeals on  
24 fact; and thirdly, an appeal based on procedure. We say  
25 there is a real prospect of success on each of those

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1 areas, and we apply on that basis, but also on the  
2 alternative basis that this is a case where there are  
3 other compelling reasons why permission should be given.  
4 Your Lordship is obviously very familiar with the  
5 test and it's not normal on such applications to go into  
6 such huge amounts of detail, particularly when you've  
7 had in advance a skeleton and the grounds of appeal.  
8 I don't intend to do so.  
9 The first point really, and we sort of flagged this  
10 in the skeleton, the underlying criticism we have of the  
11 whole structure of the court's approach to this of  
12 course starts with good faith and the implication of  
13 that term and the relational contract debate. Of course  
14 you know well the views in my submissions I have put  
15 forward; I'm not going to put them all again.  
16 This area is clearly a developing area of law; it is  
17 clearly a relatively controversial area of law.  
18 I wouldn't say lawyers fall into two camps, those that  
19 are quite keen on the continental views and good faith  
20 coming in, and those on the other hand who are much  
21 keener on certainty of law and freedom of contract,  
22 although you could identify groups of lawyers in those  
23 relative camps.  
24 What Mr Justice Leggatt, as he then was, did in  
25 Yam Seng was to start the firing gun really on debate in

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1 English law. You can see the views of Chitty trying to  
2 make sense of Yam Seng, and making sense of it by  
3 saying: well, this can only be honesty really. You can  
4 only have good faith, the honesty part of that, which  
5 you can imply in this way.  
6 But your Lordship has taken a radically different  
7 view. In my submission, there must at least be a real  
8 prospect of success if your Lordship is wrong about  
9 that, or the Court of Appeal might want to have a look  
10 at it, because it is a striking development if it is  
11 right.  
12 To be clear here, this isn't a point based on the  
13 facts of this case. It's not a factual matter, it's  
14 a question of law, for a couple of reasons. One is  
15 because on analysis of the court's judgment, you have in  
16 fact implied the good faith requirement as a matter of  
17 law, which in my submission is wrong, as opposed to on  
18 the basis in Geas(?) that it's implied in fact based on  
19 the circumstances of the contract.  
20 Secondly, and this is really the crucial point and  
21 where your Lordship has gone very much further than  
22 anyone has ever gone, and is truly radical, is the  
23 extent to which you then go on and use that implication  
24 of good faith to inject itself into each and every major  
25 term in the contract. No one has ever done that before,

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1 there's no authority or warrant to do it, and in my  
 2 submission it is wrong and at least there is a real  
 3 prospect that it is wrong.  
 4 Let me give you an example. In relation to the  
 5 termination provisions is where it finds its most  
 6 obvious grounding. The terms of these contracts said  
 7 that they are terminable on not less than three and six  
 8 months respectively.  
 9 Leaving aside the point that "not less than" is  
 10 a well-known, tried and tested commercial formula for  
 11 many years and doesn't reflect in any way good faith, to  
 12 inject good faith into those provisions, and to do so  
 13 contrary to their express terms, is truly radical. It  
 14 has never been done before. It is also contrary to  
 15 a decision of the Court of Appeal in Ilkerler Otomotiv  
 16 where Lord Justice Longmore, with whom  
 17 Lord Justice Briggs, as he then was, agreed, said that  
 18 whatever else you think about Yam Seng, it is talking  
 19 about the performance of the contract, not its  
 20 termination.  
 21 MR JUSTICE FRASER: Can you just take me to that part of the  
 22 Common Issues judgment. I have just been trying to find  
 23 it on Opus and I can't.  
 24 MR CAVENDER: The part where you deal with ...  
 25 MR JUSTICE FRASER: The part that you are just using as

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1 an example.  
 2 MR CAVENDER: The termination provisions, my Lord, start at  
 3 865. It is paragraph 865 and following {B7/29/252}.  
 4 MR JUSTICE FRASER: Yes, I would like to call it up on the  
 5 screen if I could, but I can't seem to find where it is.  
 6 I don't mean within the judgment, I mean where the  
 7 judgment is.  
 8 MR CAVENDER: Where the judgment is? I'm sorry, I have  
 9 a hard copy. I don't know if my learned friend can help  
 10 me or not.  
 11 MR GREEN: It is {B7/29/1}. My Lord, there is one in J,  
 12 because the hard-copy bundles mirror the Opus bundles,  
 13 and then there is the original one we had in the trial  
 14 in B.  
 15 MR JUSTICE FRASER: I don't mind where it is. All I can say  
 16 is I can't find it on my separate screen. I can see it  
 17 on the common screen.  
 18 MR CAVENDER: The reference in the J bundle is {J3.1/7/352}.  
 19 MR GREEN: Does your Lordship have the Horizon Issues  
 20 environment or the Common Issues?  
 21 MR JUSTICE FRASER: Well, I had both, but one of them has  
 22 just disappeared, and now it says "no internet". The  
 23 other one appears to be -- well, it doesn't say whether  
 24 it is Horizon or Common Issues, to be honest, but it  
 25 doesn't have a J. Just bear with me a minute. (Pause)

18

1 So the B7 reference, is that the Common Issues trial  
 2 bundle?  
 3 MR GREEN: It is the Common Issues trial bundle, my Lord.  
 4 (Pause)  
 5 MR JUSTICE FRASER: I think part of my Opus appears just to  
 6 have crashed. Just bear with me one second. (Pause)  
 7 I think, Mr Cavender, what I'm going to do is --  
 8 I seem to have lost everything now -- I will just rise  
 9 for five minutes, just so as not to put anyone under  
 10 undue pressure. I'm sorry about this. I would have  
 11 brought my hard copy down; I do have one upstairs. But  
 12 now that everything seems to have gone down, I will just  
 13 rise for five minutes and then I will come back in.  
 14 (11.02 am)  
 15 (A short break)  
 16 (11.08 am)  
 17 MR CAVENDER: My Lord, I think you're connected again. If  
 18 you are, I am not sure what page they have put you on.  
 19 The reference is {B7/29/256}; it should be, hopefully,  
 20 paragraph 888 of the judgment.  
 21 MR JUSTICE FRASER: Thank you very much. Which page, sorry,  
 22 of the judgment?  
 23 MR CAVENDER: So it is paragraph 888.  
 24 MR JUSTICE FRASER: Yes, which is page 256.  
 25 MR CAVENDER: Indeed.

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1 MR JUSTICE FRASER: Thank you very much.  
 2 MR CAVENDER: So that's where you start dealing with  
 3 termination.  
 4 MR JUSTICE FRASER: Yes.  
 5 MR CAVENDER: There are two points. One is the "not less  
 6 than" point, and you deal with that at paragraphs 893  
 7 and 894.  
 8 Dealing with that first, in my submission that's  
 9 simply wrong. That is a well-worn formula you find in  
 10 a wide range of commercial contracts. Why? To avoid  
 11 the need where you get notice having to be given on  
 12 a date certain, people taking points on whether the day  
 13 of giving the notice or receiving it are included. So  
 14 that provision is put in, and of course you give more  
 15 notice than the three or six months, and that is  
 16 a standard commercial provision. It is not intended to  
 17 inject any kind of discretion. So that's the first  
 18 point.  
 19 The second point, and if you go over to 899  
 20 {B7/29/258} --  
 21 MR JUSTICE FRASER: So you're saying on this application  
 22 that your case is that there was no discretion in  
 23 respect of how the notice provision is exercised by the  
 24 Post Office?  
 25 MR CAVENDER: Correct.

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1 MR JUSTICE FRASER: Is that how you argued it before me at  
2 the trial?  
3 MR CAVENDER: Yes, that the "not less" meant -- the point  
4 your Lordship made is we took it as if it said three  
5 months'/six months' notice.  
6 MR JUSTICE FRASER: No, that's not the point I made. I just  
7 asked you if you were saying there was no discretion in  
8 the clause at all in the way you argued it before me.  
9 MR CAVENDER: Yes.  
10 MR JUSTICE FRASER: You're saying you argued there was no  
11 discretion?  
12 MR CAVENDER: Correct, and we do so now.  
13 MR JUSTICE FRASER: No, I know you say that now.  
14 MR CAVENDER: It's as if it is three months' or six months'  
15 notice.  
16 So then you go on to paragraph 899 {B7/29/258},  
17 where you draw your conclusions. You say:  
18 "I consider that in both instances -- termination  
19 without notice, and termination summarily -- the Post  
20 Office must take the decision in accordance with the  
21 obligation of good faith."  
22 Does your Lordship see that at the top of 899?  
23 MR JUSTICE FRASER: Yes.  
24 MR CAVENDER: So you tie the two together. So there are two  
25 points: the "not less than"; and furthermore, good faith

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1 is injected. That's injected not just to termination on  
2 notice, but also on the right to terminate for  
3 repudiatory breach or material breach.  
4 MR JUSTICE FRASER: Yes.  
5 MR CAVENDER: That has never been done before, in my  
6 submission it is wrong in principle, and there is real  
7 prospect with the Court of Appeal agreeing with that.  
8 Let me take you to the case of Ilkerler Otomotiv,  
9 which --  
10 MR JUSTICE FRASER: Can you just remind me: what common  
11 issue was termination? It was 15 and 16, wasn't it?  
12 MR CAVENDER: Termination for cause was 15.  
13 MR JUSTICE FRASER: I think termination on notice was 16.  
14 MR CAVENDER: Correct.  
15 Can I refer your Lordship to the authorities bundle  
16 number 2, tab 24 {J7/24/1}, the decision of the  
17 Court of Appeal in Ilkerler Otomotiv.  
18 MR JUSTICE FRASER: Tab 24?  
19 MR CAVENDER: Tab 24, my Lord, yes.  
20 This was a case involving the termination of the  
21 distribution agreement. The first thing you will  
22 notice, just by way of passing, if you go to paragraph 4  
23 of that {J7/24/2}, you will see the terms of the  
24 agreement are not dissimilar to our one: they use the  
25 words "at least six months' prior written notice" in

22

1 paragraph 2.3.  
2 MR JUSTICE FRASER: Yes.  
3 MR CAVENDER: What was argued here was based on Yam Seng and  
4 good faith. It failed. What was argued was something  
5 a little bit similar to what my learned friends tried to  
6 do, and successfully tried to do, here.  
7 The point I should refer your Lordship to is  
8 paragraph 29 {J7/24/6}. Having quoted Yam Seng, this is  
9 the Court of Appeal saying:  
10 "Interesting and informative as these comments are  
11 they do not support the terms proposed by Mr Sutcliffe  
12 ... [and] as ... Charles Hollander QC ... pointed out,  
13 Leggatt J is expressly talking ... [about the]  
14 requirements in the contract for communication and  
15 co-operation 'in its performance'. Requirements for  
16 communication and co-operation in relation to  
17 termination would take one into a different realm  
18 altogether."  
19 So that was the response of the Court of Appeal to  
20 the notion that in some way the provision for  
21 termination could be visited or altered by Yam Seng or  
22 the good faith, and it's saying: no, it's a different  
23 thing. What Yam Seng is talking about is performance,  
24 not termination.  
25 So in my submission there must at least be

23

1 a realistic prospect that the Court of Appeal would want  
2 to look at that, and there is a realistic prospect of  
3 success on it.  
4 The same point applies to the repudiatory breach or  
5 material breach argument.  
6 MR JUSTICE FRASER: Just before you move on to that though,  
7 I've just had a look at your closing submissions on  
8 Common Issues between paragraphs 447 to 457 {J2/4/160}.  
9 I don't think you cite this case.  
10 MR CAVENDER: My Lord, no, it wasn't cited before you. We  
11 came across it subsequently.  
12 MR JUSTICE FRASER: That's germane, isn't it, whether you  
13 should get permission to appeal on a point which wasn't  
14 argued before me?  
15 MR CAVENDER: My Lord, we are not sure it is. The point was  
16 argued before you; we just hadn't found this authority  
17 at that point. The point that supports our point is  
18 that good faith does not have anything to say about  
19 termination and "not less than" does not invoke any kind  
20 of discretion.  
21 MR JUSTICE FRASER: All right. If you say the authority  
22 wasn't cited before me, I think we're agreed about that.  
23 If you have a look at 447 to 457 {J2/4/160}, I'm not  
24 sure that the point was argued, but it might be that you  
25 say it was.

24

1 But regardless of that, you're saying that error of  
2 law on this point, as set out in your grounds, which  
3 shows there is a reasonable prospect that the  
4 Court of Appeal will overturn it .  
5 MR CAVENDER: There is a real prospect of that, my Lord.  
6 MR JUSTICE FRASER: Yes, all right .  
7 MR CAVENDER: Also my learned friend has shown no authority  
8 that good faith has ever been used to curtail rights of  
9 termination, whether express rights or for termination  
10 on notice or termination for repudiatory breach. The  
11 same point applies there.  
12 What your Lordship has said is: you can't accept  
13 a repudiatory breach unless you do so in good faith, nor  
14 can you do so where you're in breach in relation to the  
15 matters for which you are seeking to accept repudiatory  
16 breach. Good faith has never been used in that way  
17 before, to alter what is normally an objective standard,  
18 namely either side can accept a repudiatory breach to  
19 some degree of subjectivity . No authority has been  
20 shown to you for that proposition, and in my submission  
21 there must be a real prospect --  
22 MR JUSTICE FRASER: Where in the judgment, please, can you  
23 show me that I have said you can't accept repudiatory  
24 breach unless you do so in good faith?  
25 MR CAVENDER: Give me one moment, my Lord.

25

1 MR JUSTICE FRASER: Yes.  
2 MR CAVENDER: Paragraph 899 {B7/29/258}:  
3 "... in both instances -- termination without  
4 notice, and termination summarily ..."  
5 Which it's talking about in context, termination  
6 because of repudiatory breach:  
7 "... must [be] take[n] in accordance with the  
8 obligation of good faith."  
9 MR JUSTICE FRASER: How does that say: accepting  
10 a repudiatory breach?  
11 MR CAVENDER: Because that is what termination summarily  
12 involves. There's no other way you can terminate  
13 summarily, my Lord. You can terminate a contract  
14 summarily because one side is in repudiatory breach or  
15 termination on notice. That's what this portion of the  
16 judgment is dealing with. Again, I say we have a real  
17 prospect on that point.  
18 So, my Lord, going back to my skeleton argument, if  
19 I may. I'm dealing here with common issue 1 largely, at  
20 paragraph 9 {j6/2/3}. Our case was and is that the  
21 relational contract idea is useful as assistance in  
22 identifying types of contracts.  
23 The other complaint we make and made is that at  
24 (ii), the "long term" point. Of course at this stage,  
25 before you're deciding whether it's a relational

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1 contract and whether to imply a term of good faith,  
2 you're looking at the express terms at that stage. And  
3 the express terms are three months' notice or six  
4 months' notice. Whether parties expect or do not expect  
5 to exercise those rights doesn't turn what is not  
6 a long-term contract into a long-term contract.  
7 The third point we make there is about the agreed  
8 implied terms. Again, my learned friend, in his  
9 skeleton for today, seeks to move away from those. In  
10 my submission this is a very serious point and really  
11 wasn't grappled with by the court at all really, apart  
12 from a single paragraph.  
13 But these implied terms of "necessary co-operation"  
14 and *Stirling v Maitland*, we have submitted and do  
15 submit, have real power and force, are taken alongside  
16 the express terms and they need to have meaning and  
17 effect given to them. Until they have meaning and  
18 effect given to them, one doesn't know whether or not  
19 other terms are necessary.  
20 So we say there is a reasonable prospect on that  
21 that the Court of Appeal will take a different view  
22 about the way the court dealt with those implied terms,  
23 which was effectively that they had no real effect and  
24 was essentially a pleading point in the case, when in  
25 fact it was the cornerstone of the Post Office's case

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1 that they were akin to express terms once they had been  
2 accepted by both sides.  
3 The other major feature here is your Lordship  
4 implied 17 implied terms or incidents based on the  
5 imposition of a good faith term. In my submission one  
6 can only do that to the extent that the terms that you  
7 imply or the instants you apply are parasitic upon and  
8 have good faith at their core, namely that they can be  
9 breached, and only breached, in the event of bad faith .  
10 So they are true sons or daughters of the good faith  
11 term.  
12 When you look at the implied terms your Lordship  
13 implied, the 17, virtually none of them have that  
14 characteristic . They all represent binary, one-way,  
15 free-standing obligations that can be breached in bad  
16 faith or in good faith .  
17 That is contrary, in my submission, to *Yam Seng*,  
18 contrary to what Mr Justice Leggatt did in that case.  
19 You remember I took you through very carefully the two  
20 terms he implied in that case and how he rejected  
21 Mr Salter QC's drafting of the terms in that case, and  
22 he did so because the terms that counsel had put forward  
23 could be breached without bad faith, without knowledge.  
24 What Mr Justice Leggatt said: no, it is essential that  
25 the terms has at its heart an obligation to act in good

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1 faith in the relevant particular. That unfortunately  
2 has not, in this case, been done in relation to these 17  
3 terms.

4 We deal with this point, my Lord, at paragraph 14  
5 and following of the skeleton argument [J6/2/5].

6 So good faith is very much at the heart of all those  
7 submissions, of all those points on both issue 1 and  
8 common issue 2. In my submission, if the court is going  
9 to give permission, they should give permission on both  
10 issues, not try and cherry-pick and say, "Well, this one,  
11 not that one", because when it gets to the Court of  
12 Appeal they would be, in my submission, helped by having  
13 the whole of those issues before them so they could form  
14 their own view as to the appropriate treatment.

15 Going to my skeleton, I don't want to spend too long  
16 going through all of those. You will see common  
17 issues -- this is paragraph 19 of the skeleton [J6/2/7],  
18 the "agents"/branch trading statement point and the  
19 agency point.

20 The thing about that, we say at paragraph 20, is  
21 effectively your holding amounted to: the only reason  
22 the express term in the contract said they were "agents"  
23 was to distinguish them from employees. The trouble  
24 with that is it doesn't give any purpose or content to  
25 the express appointment as "agents", and it doesn't

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1 begin to explain on what basis, therefore, postmasters  
2 hold stock and cash on behalf of the Post Office or  
3 explain the basis on which they contract with members of  
4 the public on behalf of Post Office and they are  
5 fiduciaries.

6 So a finding that says, "Well, the express  
7 appointment as 'agent' merely distinguishes them from  
8 employees", doesn't give any meaning or effect to the  
9 reality of what everyone accepts the postmasters were in  
10 fact doing. So, again we say there must be a real  
11 prospect of success, the Court of Appeal wanting to look  
12 at that.

13 Then if we move on in the skeleton, paragraph 25  
14 [J6/2/8], section 12, clause 12, this is the whole  
15 burden of proof point.

16 Paragraph 30 of the skeleton [J6/2/9], your  
17 understanding is at paragraphs 669 to 675 of the  
18 judgment [B7/29/209], where you understood the Post  
19 Office's case to be that postmasters would be liable for  
20 losses or deficiencies caused by a bug, when in fact  
21 that wasn't our case.

22 Indeed, when you were dealing with the same point --  
23 we deal with this at paragraph 31 -- in relation to the  
24 NTC in clause 4.1, you seem to accept the point that  
25 such losses wouldn't come within the clause. So in my

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1 submission there's no rational reason to treat the two  
2 clauses in relation to that same loss differently, and  
3 again that must give a real prospect of success on that  
4 point as well.

5 We have dealt with common issue 16, going to the  
6 skeleton at 33 [J6/2/10], termination on notice; common  
7 issue 15, termination for cause [J6/2/11].

8 Then we have suspension [J6/2/13]; onerous and  
9 unusual terms [J6/2/16]. We do seek permission to  
10 appeal the holding you made in relation to the Bates  
11 type of contract, and that's paragraph 54 of the  
12 skeleton.

13 We outlined at paragraph 54 the two elements of the  
14 conditions of appointment and the declaration, which we  
15 say in a case such as Mr Bates would result in  
16 incorporation by reference. We say that applies whether  
17 or not the documents are attached or not. It's  
18 incorporated by reference, identifies the existence of  
19 some standard-term document and that it is incorporated.

20 Then we have common issues 7, 19 and 20, Unfair  
21 Contract Terms Act, at paragraph 57 [J6/2/18];  
22 responsibility to train assistants, 23 [J6/2/19].

23 We then have the question of inadmissible evidence,  
24 what we say as a matter of law, evidence of  
25 post-contractual matters either expressly or implicitly

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1 being taken into account on points of construction. We  
2 summarise that at paragraphs 67 and following [J6/2/20].  
3 That includes, at paragraph 68, the matters you  
4 expressly as part of the relevant factual matrix to  
5 construction incorporated, and we set them out at  
6 paragraph 68, the various paragraphs.

7 MR JUSTICE FRASER: Where are we now, sorry?

8 MR CAVENDER: Paragraph 68 of the skeleton, my Lord  
9 [J6/2/20]. It cross-refers to paragraph 569 of the  
10 Common Issues judgment [B7/29/178] and the subparagraphs  
11 of that paragraph. It's paragraph 68 of the skeleton,  
12 my Lord.

13 MR JUSTICE FRASER: No, I have that. I'm looking in the  
14 grounds.

15 MR CAVENDER: Where that point is raised in the grounds?

16 MR JUSTICE FRASER: Yes, I'm trying to follow your  
17 submissions through by reference to the grounds.

18 MR CAVENDER: Oh, I see.

19 MR JUSTICE FRASER: As well as the skeleton.

20 MR CAVENDER: This point in relation to factual matrix is  
21 paragraph 23 of the grounds [J6/1/7].

22 MR JUSTICE FRASER: But that's in your introductory section,  
23 isn't it? I thought it was parts C, D and E that were  
24 your actual grounds.

25 MR CAVENDER: My Lord, no. Common issue 1 is "Relational

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1 contract", if you are looking at the grounds now.  
2 MR JUSTICE FRASER: Yes.  
3 MR CAVENDER: What happens at the end of the first ground,  
4 paragraph 23 {J6/1/7} is the factual matrix point is  
5 taken, and then where it applies, it is repeated each  
6 time in each ground.  
7 MR JUSTICE FRASER: I did understand that.  
8 MR CAVENDER: So that's the point: that it has been or looks  
9 as if it's been taken into account in terms of  
10 interpretation or factual matrix.  
11 Then the separate point in point D {J6/1/35},  
12 your Lordship points out quite rightly, is an additional  
13 point that that information has been introduced into the  
14 trial process unfairly. That's a distinct and separate  
15 point.  
16 MR JUSTICE FRASER: This is part D, your procedural  
17 unfairness grounds, isn't it, that second point that you  
18 made?  
19 MR CAVENDER: When you say "it", I was referring to the  
20 admissibility point when we were having this debate.  
21 MR JUSTICE FRASER: All right. Just to help me let's  
22 slightly rewind it just a little bit.  
23 How many total grounds do you have altogether that  
24 are errors of law, separate grounds?  
25 MR CAVENDER: They are set out in the grounds, my Lord,

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1 starting at 14 {J6/1/4}.  
2 MR JUSTICE FRASER: I know they are, Mr Cavender, but they  
3 are not numbered. I am just trying to make sure I don't  
4 miss any. How many are there altogether? Are they the  
5 different ones at paragraph 14?  
6 MR CAVENDER: My Lord, yes.  
7 MR JUSTICE FRASER: Each of those is a separate ground?  
8 MR CAVENDER: They are separate common issues, as you can  
9 see, and within them there are obviously -- it depends  
10 what you call a "ground". But there are separate  
11 grounds of appeal dealing each of those issues listed at  
12 paragraph 14.  
13 MR JUSTICE FRASER: Right. So how many separate grounds of  
14 appeal are there on errors of law? Because I had  
15 thought there were 12, because I counted through, but  
16 I'm not sure that I necessarily have them all, which is  
17 why I'm asking you how many different grounds there are  
18 which are said to be errors of law.  
19 MR CAVENDER: We can count them up, my Lord.  
20 MR JUSTICE FRASER: If you can tell me how many there are.  
21 MR CAVENDER: That can be done, my Lord.  
22 MR JUSTICE FRASER: As I understand it, we are still within  
23 part C of your grounds of appeal, dealing with errors of  
24 law?  
25 MR CAVENDER: We are, my Lord, yes.

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1 MR JUSTICE FRASER: We are, right.  
2 MR CAVENDER: The skeleton was meant to be a more cursory  
3 run-through of those points. In the skeleton I was at  
4 paragraph 67 {J6/2/20} and was dealing with reliance on  
5 inadmissible evidence. I have pointed to you in the  
6 grounds where that comes in first of all, which is  
7 paragraph 23 {J6/1/7}. This is on admissibility. That  
8 is an error in law, we say.  
9 So those are the grounds of appeal on law. Then if  
10 we look at the skeleton, paragraph 73 {J6/2/24},  
11 "Grounds of Appeal -- Error in fact".  
12 MR JUSTICE FRASER: How many of those are there?  
13 MR CAVENDER: If we go to the -- do you have the grounds of  
14 appeal there?  
15 MR JUSTICE FRASER: I do.  
16 MR CAVENDER: The errors of fact start at paragraph 147  
17 {J6/1/42}. The first is about Mr Bates' receipt of the  
18 contract and then there are a number of findings about  
19 the Post Office's behaviour and comments on its  
20 witnesses.  
21 MR JUSTICE FRASER: So are there two or are there eight  
22 altogether, in terms of separate grounds?  
23 MR CAVENDER: I think there are eight. There is the Bates  
24 one, and then there is (a) to (g) under the second head.  
25 MR JUSTICE FRASER: Right.

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1 MR CAVENDER: So there are eight.  
2 MR JUSTICE FRASER: There are eight, all right.  
3 MR CAVENDER: You will see them set out in the grounds of  
4 appeal and I wasn't intending to go through them.  
5 There are no appeals on the facts, the main facts he  
6 found, about who said what to who in the interviews and  
7 things of that kind.  
8 We then have ground D, procedural unfairness. This  
9 links with the inadmissibility point because it's the  
10 same material.  
11 MR JUSTICE FRASER: How many different grounds are there  
12 under procedural unfairness?  
13 MR CAVENDER: That starts at paragraph 128 of the grounds  
14 {J6/1/35}.  
15 MR JUSTICE FRASER: It does.  
16 MR CAVENDER: It depends on bit on what you call a "ground",  
17 because there are obviously subgrounds within them.  
18 MR JUSTICE FRASER: Let's put it this way: you are advancing  
19 in your grounds of appeal grounds that are said to be  
20 correctly categorised as procedural unfairness. How  
21 many different grounds are there? I had understood  
22 there to be possibly three, but I might be wrong.  
23 MR CAVENDER: My Lord, yes, there are three broad grounds.  
24 MR JUSTICE FRASER: Are there three?  
25 MR CAVENDER: If you want to take grounds at a high level,

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1 there are three separate grounds with subgrounds within  
2 them, is probably the right way to look at it.  
3 MR JUSTICE FRASER: All right. Let's deal with those  
4 separately, if we may, because I'm interested on what  
5 the procedural unfairness to said to be. What was the  
6 procedural unfairness in respect of the first of those  
7 three grounds?

8 MR CAVENDER: It is as it's set out in the grounds there:  
9 that the Common Issues trial that the Post Office  
10 prepared for and the court gave orders for was limited  
11 to the effectively preliminary issues on the meaning of  
12 the NTC and the SPMC and deciding the scope and extent  
13 of the agency relationship.

14 Disclosure and evidence was given on that basis if  
15 you look at ground 132 [J6/1/36]. There were contested  
16 disclosure applications decided expressly on that basis:  
17 things like helpline, training, things of that kind.  
18 Disclosure was not given on them and in fact was refused  
19 by your Lordship on the basis that this was a common  
20 issues trial that essentially was a preliminary issues  
21 trial.

22 To therefore go on in such circumstances and make  
23 comments and/or findings relating to those matters --

24 MR JUSTICE FRASER: But that's the effect of the unfairness.  
25 I want to know what you say the procedural unfairness

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1 was. What was the unfairness in the procedure?  
2 MR CAVENDER: To have a trial that went wider than that  
3 which was ordered and that which the parties reasonably  
4 expected was going to take place; and moreover, to do so  
5 in circumstances where there hadn't been disclosure in  
6 relation to the matters in relation to the extended  
7 trial, nor had the Post Office put forward witness  
8 evidence on it because they weren't expecting it.

9 MR JUSTICE FRASER: So what matters did the Post Office not  
10 put forward witness evidence on which they otherwise  
11 would have done absent the alleged procedural  
12 unfairness?

13 MR CAVENDER: They would have given disclosure --

14 MR JUSTICE FRASER: No, I'm asking about the evidence. You  
15 just made a submission that said the Post Office hadn't  
16 put forward witness evidence on matters because they  
17 were not expecting it. So what were those matters?

18 MR CAVENDER: Training.

19 MR JUSTICE FRASER: Yes, all right.

20 MR CAVENDER: Helpline.

21 MR JUSTICE FRASER: Yes.

22 MR CAVENDER: The accounting relationship --

23 MR JUSTICE FRASER: Yes.

24 MR CAVENDER: -- how it worked in fact. How TCs were dealt  
25 with. The intimate accounting relationship between the

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1 parties. Suspension and termination, how they were in  
2 fact operated, those two mechanisms.

3 MR JUSTICE FRASER: Yes, thank you very much.

4 MR CAVENDER: So that's the first head. Connected to it is  
5 the second, which is findings on post-contractual and/or  
6 irrelevant issues. Those are set out at 137(a) to (g)  
7 [J6/1/38].

8 The point about this of course is that the court is  
9 not in the business of making irrelevant findings along  
10 the way. It makes findings and decides what the matrix  
11 of contracts is because it is relevant to the matters it  
12 is engaged with; at least one can infer that.

13 So what one infers from this is that there are these  
14 findings or comments and they are being made as part of  
15 the trial process, as relevant to it, and therefore  
16 necessarily, given the nature of the exercise in  
17 a preliminary issues trial, as part and parcel of it.  
18 That's why this connects back to the error of law about  
19 taking into account irrelevant evidence, which brings me  
20 on neatly to the next ground, which is just that. So  
21 although these are three grounds, they are obviously  
22 intimately connected.

23 You will see the same points at 143 [J6/1/39],  
24 extracted from the matrix your Lordship decided was part  
25 of the matrix of the trial, not just along the way but

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1 on a contested matter. Where there was a contest about  
2 what matrix your Lordship could take into account, you  
3 ruled that these matters were relevant factual matrix.  
4 We say that is an error of law, or at least there is  
5 a real prospect that it is.

6 My Lord, those are the grounds of appeal and all  
7 I wish to say about them.

8 So we ask for permission on two bases. One is that  
9 there is a real prospect, and that in reality you ought  
10 to look at this on a high-level basis: that if you think  
11 there is a real prospect on the good faith elements,  
12 relational contract elements, that infects or applies to  
13 large parts of your findings. In my submission the  
14 right thing to do in such circumstances is to give  
15 permission across the board.

16 Moreover, we ask for permission on the separate,  
17 distinct ground that here there are other compelling  
18 reasons. Why? Because we're dealing here with  
19 11,000-odd contracts, not just the 500-odd claimants in  
20 this litigation; we're talking about a huge amount of  
21 money in issue; we're talking about the running and how  
22 a public service is run, not just in the past but in the  
23 future, in which there is a real public interest. So in  
24 my submission, for those reasons as well, this is a case  
25 where the court should give permission on that

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1 alternative ground.  
2 Moreover, if your Lordship accepts my point that, at  
3 least arguably, what your Lordship has done is to move  
4 the common law quite dramatically on good faith in  
5 a particular direction, that also is another compelling  
6 reason why that view, my submission about that, should  
7 be tested in the Court of Appeal.

8 So, my Lord, unless you have any questions, those  
9 are my submissions.  
10 MR JUSTICE FRASER: The only question is one which I think  
11 you or your juniors are endeavouring to answer: I would  
12 like to know how many different grounds of appeal there  
13 are on law, please.

14 MR CAVENDER: I'm obliged. I will ...

15 MR JUSTICE FRASER: Is someone going to give me the number?

16 MR CAVENDER: My Lord, yes. Can I come back to you in  
17 a moment about that?

18 MR JUSTICE FRASER: You can, yes. I would like to know  
19 before I decide whether I'm going to give you permission  
20 to appeal or not.

21 MR CAVENDER: No, of course.

22 MR JUSTICE FRASER: What I will do is I will rise for five  
23 minutes then. I will rise for ten minutes, because  
24 yesterday I received an email from the transcribers  
25 asking if they could always have a ten-minute break

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1 rather than a five-minute break.  
2 So I will come back in at 11.50 and then,  
3 Mr Cavender, I would just like you to tell me how many  
4 different grounds of appeal you have saying that there  
5 are errors of law.

6 MR CAVENDER: Of course.

7 MR GREEN: My Lord, can I just ask if your Lordship is  
8 anticipating a very brief response from me?

9 MR JUSTICE FRASER: No, I'm not going to be calling on you.

10 MR GREEN: I'm most grateful.

11 (11.44 am)

12 (A short break)

13 (11.54 am)

14 MR CAVENDER: The answer to the question is 37, my Lord.

15 MR JUSTICE FRASER: 37 on law. So it's 37 on law, 3 on  
16 procedural unfairness and 8 on fact?

17 MR CAVENDER: My Lord, yes. On the law ones obviously it is  
18 very difficult because often the point is repeated in  
19 relation to, say, "onerous", "unusual", and there are  
20 lots of different terms. So it depends how you -- but  
21 that's a fair review of that.

22 MR JUSTICE FRASER: Thank you very much.

23 (11.54 am)

24 (Ruling awaiting the judge's approval)

25 (12.04 pm)

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1 MR JUSTICE FRASER: Next item on the agenda?

2 Application by MR GREEN

3 MR GREEN: My Lord, I think it is me: the costs of the  
4 resolution of Common Issues.

5 MR JUSTICE FRASER: Yes.

6 MR GREEN: Your Lordship has mentioned that you've had our  
7 written cost submissions and our skeleton arguments.

8 MR JUSTICE FRASER: I think there were two rounds, weren't  
9 there?

10 MR GREEN: Exactly. Against the background of that, and the  
11 fact that much of the content of what arises in relation  
12 to this application and the issues arising in it has  
13 been traversed numerous times now, in terms of what  
14 your Lordship decided in the Common Issues Judgment on  
15 the various issues and so forth, I'm going to try and  
16 slim down what I say. But there are a number of points  
17 which I need to make and they come under four headings.

18 The fact that there should be an order for costs in  
19 the claimants' favour is number 1 and can be shortly  
20 disposed of. The contrary is unarguable and it is  
21 implicitly recognised by the defendant, by the Post  
22 Office, in its skeleton argument at paragraph 21 on  
23 {J1/4/7}.

24 MR CAVENDER: My Lord, I hate to interrupt my friend, but  
25 that isn't the case. In my submission it is probably

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1 best to deal with that point first because if we're  
2 right about reserving costs, then the other matters  
3 don't arise. If we're wrong about that, then the  
4 question of basis of assessment, timing of assessment,  
5 interim payment arise. But if we're right and the costs  
6 should be reserved, those points don't arise, subject to  
7 your Lordship. But I just make that observation.

8 MR JUSTICE FRASER: As I understand your position,  
9 Mr Cavender -- do correct me if I'm wrong -- your  
10 primary position is costs should be reserved.

11 MR CAVENDER: Correct.

12 MR JUSTICE FRASER: If I'm against you on that and I decide  
13 to deal with the Common Issues costs today, you accept  
14 I think that there has been broad success, but taking  
15 into account the other factors you're suggesting a 30%  
16 reduction?

17 MR CAVENDER: That's absolutely right.

18 MR GREEN: My Lord, I will turn therefore to the making of  
19 the order now, which is going to be point 2.

20 MR JUSTICE FRASER: What was your point 1, I'm sorry?

21 MR GREEN: Point 1 was that if an order were to be made --

22 MR JUSTICE FRASER: There has to be an order for costs in  
23 one way or another, even if it's just costs reserved.

24 MR GREEN: Precisely. Let me take it in a different order:  
25 shall I deal with whether your Lordship should make

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1 a costs order now, rather than reserve it?  
2 MR JUSTICE FRASER: No, no. This isn't mere technicalities .  
3 If I were to order costs reserved, that would be making  
4 a costs order.  
5 MR GREEN: Indeed, my Lord. I am conflating the two.  
6 MR JUSTICE FRASER: What you mean is: deal with the costs  
7 now, rather than reserve them.  
8 MR GREEN: My Lord, yes, exactly .  
9 MR JUSTICE FRASER: I understand that.  
10 MR GREEN: There are essentially --  
11 MR JUSTICE FRASER: You are saying: do it now?  
12 MR GREEN: Precisely.  
13 MR JUSTICE FRASER: I have that point.  
14 MR GREEN: There's one document in the bundle on Opus at  
15 {J5.2/1/1}, which is the letter of 14 September 2018  
16 from Post Office solicitors to my instructing solicitors  
17 and that is the letter to which the claimants' skeleton  
18 at paragraph 10 on {J5.2/1/5} refers .  
19 The context of it, my Lord, was this. Your Lordship  
20 will remember that there was a difference in the budgets  
21 and both for the purposes of assessing security and for  
22 the purpose of cost budgeting, it was said by the  
23 claimants to be important that the stages of the  
24 litigation were identified and worked out. This is, in  
25 that context, a reference to the litigation being

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1 conducted in stages with the real possibility of interim  
2 costs awards.  
3 MR JUSTICE FRASER: Where are you looking?  
4 MR GREEN: The quote is set out in paragraph 10 of our  
5 skeleton argument {J1/3/5} and it is at paragraph 4(a)  
6 {J5.2/1/1}. If your Lordship looks just below, it's  
7 paragraph 4. It's in relation to the QBE deed for  
8 security. The complaint was that the deed should  
9 provide --  
10 MR JUSTICE FRASER: I wonder if we could go back, please.  
11 MR GREEN: Just go back to the letter, if we can. You were  
12 on the right spot.  
13 The complaint was that it was unsatisfactory from  
14 the Post Office's perspective as at 14 September 2018  
15 for the deed being provided by way of security only to  
16 provide for the resolution of costs "following the  
17 conclusion of the High Court Number XXXX". The reason  
18 they give at 4(a), second line, right-hand side:  
19 "This litigation is being conducted in stages with  
20 the real possibility of interim costs awards."  
21 So before they'd lost, this not only would be  
22 potentially right in principle for the court to make  
23 such an order, but it was a direct concern. Then what  
24 happens is they lose the Common Issues trial and in  
25 correspondence then say their position is going to be

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1 that the costs should be reserved.  
2 MR JUSTICE FRASER: I understand. You're relying on this  
3 letter though, it seems to me -- and if I'm wrong, do  
4 tell me -- as showing that there was at least, at some  
5 stage in 2018, a realisation on the part of those  
6 advising the Post Office that there might be interim  
7 costs orders?  
8 MR GREEN: They were positively asserting that as a real  
9 possibility and wanting our deed of their cost to be  
10 altered, so that if they did get such an order in their  
11 favour, it would be recoverable.  
12 MR JUSTICE FRASER: Understood. That's effectively  
13 a separate stand-alone point.  
14 MR GREEN: That's stand-alone point 1.  
15 Stand-alone point 2 is: the Post Office's  
16 submissions appear to overlook the fact that in the  
17 bundle at {B3/1/62}, in the amended particulars of  
18 claim, the very first item of final relief sought by the  
19 claimants was a declaration in relation to the legal  
20 relationship between them and the Post Office.  
21 MR JUSTICE FRASER: Are we going to call that up on the  
22 screen?  
23 MR GREEN: That is hopefully coming up. It is {B3/1/62}.  
24 There we are.  
25 MR JUSTICE FRASER: Yes. So it is a separate stand-alone --

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1 MR GREEN: Free-standing final relief sought, which in  
2 substance has been achieved for the claimants.  
3 MR JUSTICE FRASER: Understood.  
4 MR GREEN: The point about that, my Lord, is that that would  
5 have had to have been determined whoever was in the  
6 group. It's a free-standing point; it doesn't depend on  
7 who is in the group action at all. And there's no  
8 recognition of that at all. That's the second point.  
9 The third point is a point I will just make in one  
10 line and come back to for its significance in the  
11 authorities, which is that these were absolutely central  
12 generic issues, properly called "common issues" by  
13 your Lordship. This is not a peripheral skirmish in --  
14 MR JUSTICE FRASER: I don't think anyone is suggesting it  
15 was a peripheral skirmish, are they?  
16 MR GREEN: I'm most grateful.  
17 MR JUSTICE FRASER: I don't know, and I'm not obviously  
18 speaking for how the Post Office might put it. But at  
19 whatever point in this litigation, these issues were  
20 going to have to be dealt with.  
21 MR GREEN: Precisely, and they were foreshadowed actually in  
22 the pre-action correspondence from July 2016 onwards.  
23 MR JUSTICE FRASER: All right. I have that point.  
24 MR GREEN: The Post Office's submissions at paragraphs 5 to  
25 20, on {J1/2/3} to {J1/2/6} of the defendant's skeleton

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1 argument, begin on {J1/2/3} of the skeleton argument  
2 rather than the outline submissions. Paragraph 6 says:  
3 "The authorities demonstrate that it may be  
4 appropriate to reserve the costs of a trial of  
5 preliminary issues, where the outcome ... does not  
6 determine ultimate success in the litigation or where,  
7 even though one party may be said to have succeeded in  
8 that trial, subsequent events could be relevant to the  
9 incidence of the costs of the earlier trial."

10 The short point, my Lord, is that the way this is  
11 put forward is essentially swimming against the tide of  
12 the proper approach in litigation of this type when  
13 issues of this importance are resolved. I will make the  
14 point good by reference to the cases in fact relied upon  
15 by the Post Office themselves.

16 If I can start by taking your Lordship to the  
17 authorities bundle, tab 18 and looking at *Beiber*  
18 *v Teather and Greenwood* {J7/18/1}.

19 MR JUSTICE FRASER: Tab 18?

20 MR GREEN: It's tab 18 in the authorities bundle.

21 MR JUSTICE FRASER: Do you want me to go to paragraph 27  
22 {J7/18/6}?

23 MR GREEN: Yes.

24 If one looks above, it's actually pretty instructive  
25 to see how this first instance decision cites from the

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1 *de Jongh Weill* case against *Mean Fiddler* at 26. So the  
2 premise of this first instance decision is what the  
3 Court of Appeal decided in *de Jongh Weill*, as recited at  
4 paragraph 26, and that is:

5 "There is much to be said for the view that the  
6 incidence of costs should be the same whether or not for  
7 case management reasons there has been an order for  
8 a split trial and whether or not the order for a split  
9 trial was made on the initiative of the claimant or the  
10 defendant."

11 It's pretty important, because these are the two  
12 principal cases advanced at paragraphs 7 and 8 of the  
13 skeleton {J1/4/3}, to go back to *de Jongh Weill*, which  
14 is cited at paragraph 7, and see what is actually said  
15 in that case. That's at tab 7 of the authorities bundle  
16 {J7/7/1}.

17 I don't know if I could respectfully ask  
18 your Lordship to have handy the hard copy of the  
19 skeleton alongside --

20 MR JUSTICE FRASER: Hard copy of whose skeleton?

21 MR GREEN: Of my learned friend's skeleton -- and then look  
22 at the penultimate page of *de Jongh Weill* {J7/7/10}.

23 Your Lordship will see that the quotation in the  
24 skeleton goes from the beginning of paragraph 33 --

25 MR JUSTICE FRASER: Yes.

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1 MR GREEN: -- and it goes down to:

2 "... whether justice to the defendant requires him  
3 to postpone any decision on costs until the final  
4 outcome of the action is known."

5 MR JUSTICE FRASER: Yes.

6 MR GREEN: Pausing there, your Lordship will already have in  
7 mind these are unitary claims that are relied on by the  
8 Post Office. That's a side point which I will come back  
9 to in a moment. But even on the basis of what is quoted  
10 in the skeleton, the question is whether justice to the  
11 defendant requires the judge to postpone think decision  
12 on costs until the final outcome is known.

13 Pausing there, when your Lordship goes to the  
14 judgment itself on the screen in the authority  
15 {J7/7/10}, at paragraph 32 it gives pretty important  
16 context to the test the Court of Appeal was applying and  
17 what the Court of Appeal's own view was, because four  
18 lines down on the right-hand side:

19 "Whilst in the exercise of his discretion the Judge  
20 could have made, and indeed might well have been  
21 expected to make, an immediate order for the payment to  
22 the Claimant of the costs of the trial of the issue of  
23 liability or at least a proportion of those costs ...  
24 with some hesitation I reach the conclusion that on this  
25 appeal it is not possible to say that the Judge's

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1 decision was clearly one which he was not entitled to  
2 reach."

3 So the artifice --

4 MR JUSTICE FRASER: So you're saying the part of  
5 paragraph 32 that's quoted in the skeleton is taken out  
6 of context.

7 MR GREEN: Paragraph 33 in the skeleton.

8 MR JUSTICE FRASER: Paragraph 33 is taken out of context and  
9 if you read paragraph 32, actually it looks very  
10 different.

11 MR GREEN: The out of context --

12 MR JUSTICE FRASER: Is that the short point?

13 MR GREEN: It is. It goes the other way directly, we  
14 respectfully say.

15 MR JUSTICE FRASER: I have that point.

16 MR GREEN: I'm most grateful. That of course unravels to  
17 some extent --

18 MR JUSTICE FRASER: The case wasn't group litigation anyway.

19 MR GREEN: It wasn't group litigation anyway, which is why  
20 it is more instructive, if I may respectfully say so, to  
21 look at -- if we can go to *Giambrone* next, which is at  
22 tab 6 {J7/6/1}, which again is a case against the  
23 Post Office but which the Post Office cites as if it  
24 supports it.

25 The very paragraph that's relied on at {J7/6/4} --

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1 MR JUSTICE FRASER: Just give me the paragraph number of the  
2 skeleton.  
3 MR GREEN: The paragraph number of the skeleton is at  
4 paragraph 40 on {J1/4/13}.  
5 MR JUSTICE FRASER: It says, "generally ... inappropriate in  
6 group litigation".  
7 MR GREEN: Yes.  
8 MR JUSTICE FRASER: Yes.  
9 MR GREEN: Before going into the detail that follows from 11  
10 onwards, it's pretty important for your Lordship to see  
11 what 10 actually says {J7/6/4}, because true it is that  
12 the first sentence says:  
13 "In my judgment in almost all group litigation cases  
14 there should be no need for any detailed assessment of  
15 costs until the conclusion of the group litigation.  
16 Solicitors engaged in group litigation will be  
17 specialists and experienced in the field."  
18 Then pausing there:  
19 "Solicitors for claimants ..."  
20 This is very important, and reflects the approach in  
21 Corby:  
22 "Solicitors for claimants are fully entitled to  
23 an adequate cash flow from the defendants once the  
24 general issue of liability has been admitted or  
25 determined in the claimants' favour, similarly on

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1 determination of generic issues in the claimants [  
2 favour and on the assessment or settlement of awards of  
3 damages to individual or batches of claimants."  
4 So in either of those cases, this is positively  
5 authority in favour of that point. And the cash flow  
6 point faced by claimants has been recognised in a number  
7 of decisions, as your Lordship knows.  
8 So --  
9 MR JUSTICE FRASER: So you're saying that's in your favour.  
10 MR GREEN: Your Lordship has the point.  
11 MR JUSTICE FRASER: Right. Yes.  
12 MR GREEN: Can I take your Lordship just briefly to Corby,  
13 which is at tab 11, simply because it is referred to.  
14 A slightly different situation. But {J7/11/4} of the  
15 Opus reference, tab 11 physically of the authorities  
16 bundle, "Should the Court make a costs order at all at  
17 this stage?"  
18 MR JUSTICE FRASER: Which paragraph are you looking at?  
19 MR GREEN: Paragraph 9, my Lord, I'm sorry, under that  
20 heading, "Should the Court make a costs order at all at  
21 this stage?":  
22 "There is no good reason not to make a costs order  
23 at this stage. The Group Litigation is now effectively  
24 over."  
25 Which was the situation in this case.

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1 MR JUSTICE FRASER: Well, the situation in that case, not  
2 the situation in this case.  
3 MR GREEN: No, in Corby. So it is a fair distinction that  
4 can be said to be made there.  
5 "The Claimants have effectively and substantially  
6 won on the Group Litigation issues. It was always open  
7 to CBC to make admissions on those issues but it decided  
8 that the issues merited contesting. There are no  
9 Part 36 offers or payments into Court ... to complicate  
10 matters."  
11 And there is nothing of that sort here. Indeed,  
12 my Lord, the approach the claimants took in this  
13 litigation on the Common Issues, particularly in  
14 relation to the implied terms, was openly, not without  
15 prejudice save as to costs, openly to send a table of  
16 implied terms and say, "Please tell us what you say the  
17 implied terms or their incidence are and we will  
18 sympathetically consider them because it could  
19 substantially narrow everything".  
20 Your Lordship had submissions on that and I'm not  
21 going to go over them again. They were foreshadowed in  
22 our opening under the heading of "Utility", and that  
23 throws your Lordship forward in our --  
24 MR JUSTICE FRASER: I understand.  
25 MR GREEN: That's all.

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1 Paragraph 10 {J7/11/4}:  
2 "The only argument of any force ... for CBC was that  
3 until one knows what the final outcome of all the  
4 Claimants' claims is it would be premature and  
5 inappropriate to award costs now. There is at least  
6 a hypothetical possibility that all the Claimants will  
7 fail to recover damages."  
8 I mention that, my Lord, because basically the big  
9 fight was over but it wasn't clear whether they would  
10 all actually recover damages. So that's the sense in  
11 which one has to read paragraph 9.  
12 This paragraph is instructive, as your Lordship has  
13 probably seen already. This is six lines down:  
14 "The scale and breadth of the Group Litigation  
15 issues would inevitably lead to a major litigation  
16 exercise with a large number of witnesses, experts and  
17 documents and a very large costs risk. It was open to  
18 CBC to protect its position on the Group issues by  
19 admitting the duty ..."  
20 All the other issues they had there. {J7/11/5}:  
21 "Put another way, these issues and the additional  
22 25 associated issues (largely agreed to be resolved)  
23 have been fought because CBC contested them. It would  
24 be wrong for the Claimants to be out of pocket as  
25 a result."

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1 We respectfully say that that and the reference at  
2 paragraph 12 to the Colour Quest case, your Lordship  
3 will see just above the bottom hole punch, the fact that  
4 the trial judge is well placed to make a relevant  
5 assessment of the criteria is correctly in issue.

6 If we go over the --  
7 MR JUSTICE FRASER: Which authority are we in now?

8 MR GREEN: It's just on paragraph 12 [J7/11/5], my Lord, in  
9 the same --

10 MR JUSTICE FRASER: Still in Corby?

11 MR GREEN: Yes. There is just a reference there to  
12 Colour Quest dealing with indemnity costs, but I will  
13 come to indemnity costs separately. The short point is:  
14 by parity of reasoning, just as the judge is well placed  
15 to assess indemnity costs, the trial judge is extremely  
16 well placed to assess the context of this.

17 MR JUSTICE FRASER: Your short point I think, or short  
18 points, is, or are, depending on how many there are, is  
19 that these were a group of self-contained issues that  
20 had to be resolved one way or the other. They were in  
21 a separate trial. They are part of group litigation.  
22 You have won on the majority of those issues and you  
23 shouldn't be out of pocket until the end.

24 MR GREEN: Precisely.

25 MR JUSTICE FRASER: It is as simple as that, isn't it?

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1 MR GREEN: Plus they are determinative of final relief  
2 claimed, declaration --  
3 MR JUSTICE FRASER: Understood.  
4 MR GREEN: -- plus --  
5 MR JUSTICE FRASER: But even if they weren't, they would  
6 still have to be determined in order to move on to the  
7 next step.  
8 MR GREEN: Precisely.  
9 MR JUSTICE FRASER: You're saying even though some of the  
10 claimants might in due course not recover substantial or  
11 indeed any damages -- and Mr Cavender makes a perfectly  
12 fair point, which is quite a lot of the claimants might  
13 be time-barred -- you're saying in the group litigation  
14 it had to be resolved anyway.

15 MR GREEN: Precisely. My Lord, the only final point in  
16 relation to that is that the points made by the  
17 Post Office in relation to no evidence of injustice are  
18 wrong, and demonstrably wrong, for three reasons.

19 The first reason is: there is obviously injustice to  
20 funded claimants of the cash flow point and the multiple  
21 point, because your Lordship is entitled to take  
22 judicial notice that funders aren't doing it for free.  
23 Even very --

24 MR JUSTICE FRASER: Sorry, what's the multiple point? You  
25 mean multiple of the costs?

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1 MR GREEN: Yes. So there's an acute difference in the  
2 impact of those cash flow considerations for claimants  
3 when they're funded, and the ordinary cash flow point  
4 underlying it even without funders has been recognised,  
5 as I have just shown your Lordship. So that's wrong,  
6 that there isn't any injustice.

7 The second point they make is: there's no evidence  
8 of injustice, which is wrong because Mr Hartley's third  
9 witness statement, which is at [J3.4/10/13], spelt out  
10 the consequence -- the multiple point, if I can put it  
11 that way. So there is evidence of it, even if  
12 your Lordship didn't take judicial notice.

13 The third point is --

14 MR JUSTICE FRASER: Hold on, before you go there. We  
15 haven't got to Mr Hartley yet. We're now in  
16 Mr Hartley's third statement. Which paragraph?

17 MR GREEN: It's on page 13 [J3.4/10/13]. It's under the  
18 costs and security point. At paragraph 42, second line:  
19 "The Claimants are reliant on funders continuing to  
20 invest further money and the greater the level of  
21 investment, the greater the sum required to be repaid to  
22 the funders from the sums recovered on success."

23 MR JUSTICE FRASER: Understood.

24 MR GREEN: And:

25 "The net effect is to magnify ..."

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1 MR JUSTICE FRASER: Right. Can you just remind me of the  
2 date of that statement? I know it's September 2018.

3 MR GREEN: It is ...

4 MR JUSTICE FRASER: If we just go back to the first page,  
5 please [J3.4/10/1].

6 MR GREEN: Yes. 12 September 2018.

7 MR JUSTICE FRASER: Thank you very much. Right, so that's  
8 your second point.

9 MR GREEN: And the third point is that the Post Office  
10 really ought to know that there is injustice and there  
11 is evidence of it because that very witness statement,  
12 that very point, was referred to in our written  
13 submissions for this application in March at  
14 paragraph 39, which is on [J1/1/9]. So it's a bad  
15 point.

16 MR JUSTICE FRASER: All right.

17 MR GREEN: So those are the points in relation to now.

18 MR JUSTICE FRASER: In relation to whether they're now or  
19 they're reserved.

20 MR GREEN: Precisely.

21 MR JUSTICE FRASER: Yes, all right.

22 MR GREEN: My Lord, is it convenient, do you want to hear --

23 MR JUSTICE FRASER: I will hear from Mr Cavender because he  
24 perfectly sensibly says: if he's right on this, then we  
25 don't need to go on to the next point.

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1 MR GREEN: Precisely.  
2 MR JUSTICE FRASER: Mr Cavender.  
3 Submissions by MR CAVENDER  
4 MR CAVENDER: My Lord, in my submission the normal order in  
5 a case like this, following the termination of  
6 preliminary issues, would be to reserve the costs.  
7 MR JUSTICE FRASER: They are not preliminary issues, is the  
8 first point, are they?  
9 MR CAVENDER: My Lord, in my respectful submission they are  
10 akin to preliminary issues. True it is that it's being  
11 done in the context of group litigation, but for the  
12 purpose of costs, in my submission the analogy is a good  
13 one.  
14 The time-honoured formula has been and still  
15 remains, to decide who has won or lost the case and has  
16 to pay the costs, who writes the cheque at the end of  
17 the day. As your Lordship rightly pointed out in the  
18 recusal judgment, no one yet has won or lost.  
19 What the court has done is to determine the rules  
20 that will apply, the contract, so to speak, and I think  
21 I used, not flippantly but by way of analogy, the rules  
22 of the game, so to speak, have been determined by the  
23 contract and the agency relationship. But the "game"  
24 so-called, ie who wins or loses, has yet to take place.  
25 That is, on the authorities I'm going to go through,

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1 in my submission a classic case where relying on the  
2 various -- we have seen a little bit of the authority --  
3 snippets of authority, the court can't be sure that  
4 things will happen in the future that will affect and  
5 alter its view about incidence of costs. It simply  
6 cannot do so. If it does so now, in my submission as  
7 a matter of principle, that would evidence  
8 a predetermination or would go towards suggesting the  
9 court has reached a view about matters as to how things  
10 are going to pan out in the future.  
11 In the future whether any of these claimants win or  
12 lose will be dependent on questions of breach, questions  
13 of causation, questions of limitation and settlement.  
14 All this is in the skeleton. So simply to have declared  
15 the contract and its incidence in a way that the  
16 claimants wanted doesn't mean to say they are going to  
17 be successful in the action. Indeed, I think we said  
18 that in our cost submissions and your Lordship was kind  
19 enough in your recusal judgment to say you thought that  
20 reflected the position.  
21 MR JUSTICE FRASER: Can you show me in your skeleton where  
22 you say it would suggest a predetermination that the  
23 court has reached a view on matters yet to be dealt with  
24 in the future?  
25 MR CAVENDER: My Lord, it doesn't say it in my skeleton.

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1 I'm saying that now, as a --  
2 MR JUSTICE FRASER: I thought you said -- you just said,  
3 "All this is in the skeleton".  
4 MR CAVENDER: Not that part, my Lord, no.  
5 MR JUSTICE FRASER: All right. But your express submission  
6 today is that if I were to decide costs now in any way  
7 other than reserving them, that would provide evidence  
8 that there had been a predetermination by the court  
9 suggesting how the trial, the group litigation as  
10 a whole, would pan out?  
11 MR CAVENDER: Well, it would award success to one party at  
12 a preliminary stage; it is no most or less than that.  
13 If we could go to the Mean Fiddler case again. It's  
14 a Court of Appeal authority. That's in bundle 1, tab 7.  
15 My learned friend was looking at paragraphs 32 and 33  
16 {J7/7/10}. He is right to say that 33 has to be read in  
17 light of 32, no problem about that. And I do rely upon  
18 the point that:  
19 "There is much to be said ..."  
20 This is in 33:  
21 "... for the view that the incidence of costs should  
22 be the same whether or not for case management reasons  
23 there has been an order for a split trial ..."  
24 Pausing there, that's an important point. You can  
25 imagine a different court at an earlier stage saying

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1 there would be an omnibus trial deciding all the issues,  
2 deciding issues of construction, breach, causation,  
3 limitation and settlement and loss. In that world, the  
4 result may have been very different.  
5 If that's right -- in my submission it must be --  
6 then why should there, as a matter of principle, be  
7 a different result because for case management reasons  
8 the court decides to have an earlier trial, a Common  
9 Issues trial, which I say is akin to preliminary issues?  
10 Why, as a matter of principle, should that alter the  
11 incidence of costs? In my submission it should not;  
12 neither should the fact it is wrapped up in the envelope  
13 of group litigation, as a matter of principle, make any  
14 difference either.  
15 Taking my learned friend's point on Mean Fiddler, he  
16 is right to say that the Court of Appeal in this extract  
17 was deciding whether or not to interfere with the  
18 discretion of the judge. But look at paragraph 31  
19 {J7/7/9}, which he hasn't taken you to, which is the  
20 important point here as to what the outstanding issues  
21 that the defendants were saying were at large and which  
22 prevented the award of costs:  
23 "In this case the Defendant sought ..."  
24 This is in the third line down in 31:  
25 "... to establish the existence of special

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1 circumstances requiring or justifying a different  
2 course. These special circumstances were that: (a) the  
3 Defendants would at the subsequent hearings seek to  
4 establish (though no hint of this suggestion was given  
5 in the Defence) that the warrants were valueless ...  
6 [and the] damages ... would be nominal ...

7 So what the defendant in Mean Fiddler was doing was  
8 saying, "Well, whatever was argued or pleaded, we have  
9 these other great points we're going to bring, and  
10 therefore there are still matters to be determined".  
11 That is a million miles from our case, where there are  
12 on the pleadings issues of causation or breach of  
13 causation, of settlement, of limitation and of damage.  
14 So it's not: we're coming along and saying, "Oh, well,  
15 we may have lost on the first set of issues, but there  
16 are all these other issues that we haven't even pleaded  
17 or hint", in 31. So it's a very different case. In  
18 that context, the submission based on 33 in my  
19 submission is a good one.

20 If we can go to the Beiber decision, authorities  
21 bundle 2, tab 18, the decision of Mr Justice Norris. It  
22 is paragraph 27 {J7/18/6}, I think as your Lordship  
23 said, obviously having pre-read this, which in my  
24 submission encapsulates the correct principle, namely  
25 that:

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1 "... the ultimate outcome of costs should not be  
2 determined by the case management directions that have  
3 been given. I consider that the court should be  
4 confident (before making a major and final costs order  
5 partway through a staged trial) ..."

6 We're talking about such a case here, millions of  
7 pounds:

8 "... that nothing will occur in the remainder of the  
9 case that will render such an immediate order  
10 substantially unjust."

11 And he refers to the de Jongh Weill case.

12 Then he says, over at 28 {J7/18/7}:

13 "In my judgment, there is a real possibility that  
14 the outcome of any trial will affect the merits of the  
15 parties' entitlement in respect of the settlement of  
16 earlier determined issues. I think that justice to the  
17 claimants requires me to postpone any decision on costs  
18 until the final outcome of the action is known."

19 So, my Lord, that is the principle I urge you to  
20 follow and adopt, and that's based on the prior Court of  
21 Appeal authority.

22 Can I then take you to Perriam v Wayne, bundle 2,  
23 tab 16 {J7/16/1}, the decision of Mr Justice Coulson, as  
24 he then was. This was an appeal he heard against  
25 a judgment of his Honour Judge Cockcroft in the Leeds

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1 County Court.

2 In terms of the liability for costs, because he  
3 allowed an appeal on the point of construction, but the  
4 costs bit is paragraph 50 and following {J7/16/13}. So  
5 at 51:

6 "In the present case, I have allowed the appeal  
7 against Judge Cockcroft's order as to the interpretation  
8 of clause 4.2. In my judgment, clause 4.2 does provide  
9 the appellants with a complete defence to the  
10 dilapidations claim ...

11 "... [the court has] no basis on which the  
12 appellants should pay the claimant's costs of the  
13 preliminary issues."

14 He talks about the "driving seat". Then 53 is  
15 really the point:

16 "I do not make an order that the claimant should pay  
17 the appellants' costs of the preliminary issues, despite  
18 their success on the preliminary issues. It seems to me  
19 that those costs should always have been costs in the  
20 case."

21 So there are a couple of points one gets from that.  
22 One is that failure or success of preliminary issues at  
23 an earlier stage is not an event, so far as  
24 Mr Justice Coulson is concerned in that case, that they  
25 be costs in case. There is nothing in the rules, in my

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1 submission, that simply says because something is part  
2 of group litigation that some other rule should apply.

3 If we go to Corby, for instance. My learned friend  
4 relies on that. You have to be careful about Corby  
5 because there the group litigation had ended.

6 MR JUSTICE FRASER: No. Duty breach and causation had been  
7 resolved, but the group litigation hadn't.

8 MR CAVENDER: I may have misunderstood it then. Let's go to  
9 it. If we go to tab 11 {J7/11/1}.

10 MR JUSTICE FRASER: Maybe it had de facto ended. I don't  
11 think damages had been quantified, but I might be wrong.

12 MR CAVENDER: Let's go to it. It is bundle 1, tab 11  
13 {J7/11/2}. At paragraph 2 he says:

14 "Following my judgment on the Group Litigation  
15 issues, and subject to questions of costs and  
16 applications for leave to appeal ... as the judge  
17 allocated ... [I] have completed all that I have been  
18 required to do."

19 MR JUSTICE FRASER: Yes, that's right. That's because what  
20 happens in group litigation, we haven't yet reached this  
21 stage in this case, but the managing judge is in charge  
22 of effectively such issues as the managing judge feels  
23 he or she ought or wants to resolve themselves, but, for  
24 example, damages consequent on those findings can be  
25 tried by other courts elsewhere.

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1 MR CAVENDER: Indeed. No, I understand that.  
2 Then paragraph 9 {J7/11/4}. So that's the  
3 background to paragraph 9. It says:  
4 "There is no good reason not to make a costs order  
5 at this stage. The Group Litigation is now effectively  
6 over."  
7 Often what happens in group litigation, I think as  
8 you're hinting at, very often the case is then released  
9 to county courts and other courts across the land --  
10 MR JUSTICE FRASER: Yes.  
11 MR CAVENDER: -- to then implement the determinations by the  
12 group litigation order and the managing judge.  
13 MR JUSTICE FRASER: Correct.  
14 MR CAVENDER: So as far as he's concerned, his jurisdiction  
15 is over really, so he has nothing else to say. And  
16 there has been cost-sharing and all the rest of it by  
17 the group litigation people on the register at that  
18 date, so it's not surprising that in such a case he  
19 decides to deal with the costs in the way he does, even  
20 though there may be issues hypothetical.  
21 That's the other point, my Lord, paragraph 10  
22 {J7/11/4}:  
23 "There is at least a hypothetical possibility that  
24 all the Claimants will fail to recover damages."  
25 So he's saying, "Well, okay, that's theoretical."

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1 But as far as I'm concerned, as managing judge, my role  
2 is over", and therefore it's not surprising in such --  
3 MR JUSTICE FRASER: Right, because the group litigation  
4 issues had all been resolved by then.  
5 MR CAVENDER: Exactly. So in my submission that doesn't  
6 really assist my learned friend very much at all, when  
7 looked at in context.  
8 Then if we can go to Mr Justice Foskett in  
9 AB & Others v The Ministry of Defence. This is trial  
10 bundle 1, tab 12 {J7/12/1}. This was group litigation.  
11 There were a series of preliminary issues. The debate  
12 was whether costs should be reserved or not.  
13 One of the points that the judge made is at  
14 paragraph 14 {J7/12/5}, that doesn't apply here. Does  
15 my Lord have paragraph 14 of this case?  
16 MR JUSTICE FRASER: Remind me of the tab number?  
17 MR CAVENDER: This is tab 12 in bundle --  
18 MR JUSTICE FRASER: In the authorities.  
19 MR CAVENDER: In the authorities at bundle 1. Bundle 1,  
20 tab 12 {J7/12/5}.  
21 MR JUSTICE FRASER: Yes.  
22 MR CAVENDER: The submission made by Mr Browne there was  
23 that:  
24 "... since the Defendant elected to take the  
25 limitation point and has substantially failed on that

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1 issue, it should meet the costs of that issue."  
2 That isn't the case here. This is the case where  
3 the court, divested of its management role, has decided  
4 to decide the issues for case management reasons in  
5 a particular order.  
6 MR JUSTICE FRASER: Yes.  
7 MR GREEN: In my submission, as a matter of principle, that  
8 should not affect the incidence of costs.  
9 So those are the two cases my learned friend relies  
10 upon, Corby and AB. They don't, in my submission,  
11 really get very far and don't really say much about the  
12 general principle that Mr Justice Norris, in the case  
13 I referred you to, thought he got from the Court of  
14 Appeal case, and in my submission he's right: that the  
15 court can't at an early stage, in preliminary issues,  
16 determine who is going to be the eventual winner.  
17 By "winner", I mean winner in the action, not just  
18 the winner of deciding what the rules of the game are,  
19 if I may put it that way. The winner is the winner of  
20 the game, not the person that at the first stage gets  
21 its rules adopted and approved by the court.  
22 There can't be, in my submission, a different rule  
23 based on whether the claimants have commercial offshore  
24 funders. It cannot be the law, as a matter of  
25 principle, that if you have commercial offshore funders

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1 that fund litigation of this type for commercial reward,  
2 that somehow that should be taken into account in making  
3 an order at this stage of costs which otherwise you  
4 would not make.  
5 So the injustice point -- did your Lordship want to  
6 carry on reading that, and I can sit down and then carry  
7 on?  
8 MR JUSTICE FRASER: No.  
9 MR CAVENDER: No.  
10 MR JUSTICE FRASER: I'm paying attention.  
11 MR CAVENDER: All right.  
12 MR JUSTICE FRASER: I'm actually looking at the part of the  
13 White Book that deals with specific costs orders in  
14 group litigation, which you told me didn't exist. I am  
15 paying attention to what you are saying.  
16 MR CAVENDER: My Lord, of course there is a part in the  
17 White Book dealing with costs in group litigation. I'm  
18 saying as matter of principle though --  
19 MR JUSTICE FRASER: No, I understand. You're saying the  
20 situation where there are commercial offshore funders  
21 doesn't put this into its own separate category, and if  
22 I wouldn't ordinarily make an order in the claimants'  
23 favour, the fact that they have funders means I should  
24 not make an order in reliance on that feature --  
25 MR CAVENDER: Exactly.

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1 MR JUSTICE FRASER: -- I think.  
2 MR CAVENDER: Exactly right.  
3 MR JUSTICE FRASER: And I, for what it's worth, happen to  
4 agree with you.  
5 MR CAVENDER: My Lord, that's the so-called "injustice"  
6 point.  
7 So in terms of fairness -- and of course you  
8 exercise your discretion here, but obviously you must do  
9 so judicially and fairly. In terms of "fairly",  
10 reserving the costs holds the ring. One doesn't know  
11 what the future will hold in complex litigation of this  
12 type. It is a long road, and if the court does make  
13 costs orders, and significant, millions of pounds, then  
14 that does look as if it has formed a view that based on  
15 that, those claims are eventually going to win, because  
16 only the people that win get costs.  
17 MR JUSTICE FRASER: But that's the point at which the part  
18 of the White Book I'm looking at is rather important,  
19 which is special cases for costs, which isn't in part 44  
20 at all; it's in part 46.  
21 MR CAVENDER: Which page is your Lordship looking at?  
22 MR JUSTICE FRASER: Why don't we look at 46.6 on page 1512:  
23 "There is a difference in group litigation between  
24 costs that are common costs and costs that are  
25 individual costs."

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1 MR CAVENDER: Indeed. At the moment these, as I understand  
2 it, are all common costs.  
3 MR JUSTICE FRASER: Well, one of the things I have to do  
4 today, because I will be making an order about costs in  
5 relation to what are effectively GLO issues, one of the  
6 things I have to do -- I'm not necessarily sure it's in  
7 either party's draft order but I might have missed it --  
8 is an order under 46.6(5) that all the costs are common  
9 costs, because there is no debate between you that they  
10 are. But so far as success by an individual claimant is  
11 concerned, Mr X or Ms Y may well fail and recover  
12 nothing.  
13 MR CAVENDER: Correct.  
14 MR JUSTICE FRASER: On the basis that there is  
15 a counterclaim by the Post Office against some, if not  
16 all, of the claimants, they may well fail and in fact be  
17 ordered to pay damages in fraud to the Post Office.  
18 MR CAVENDER: Correct.  
19 MR JUSTICE FRASER: But those would be individual costs,  
20 they wouldn't be common costs, would they?  
21 MR CAVENDER: I think that's probably right.  
22 MR JUSTICE FRASER: So judging it in terms of potential  
23 overall success for a group of, or some, or even many  
24 individuals approaches it more on the basis that I would  
25 be making an individual costs order today, whereas

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1 I will be making Common Issues costs orders.  
2 MR CAVENDER: In my submission it is a distinction without  
3 a difference for these purposes.  
4 MR JUSTICE FRASER: Right.  
5 MR CAVENDER: It makes no difference at all because in order  
6 to win, to fund, if you like, your claim which is  
7 individual costs, you have to have won or lost on the  
8 common issues. It's parasitic, obviously, a bit like in  
9 the AB case. You've found a contract or a breach and  
10 causation, and perhaps causation and damage is left to  
11 the individual to bring in their local county court or  
12 whatever. That's obviously the individual costs.  
13 Here we've agreed this is common costs, but in my  
14 submission this distinction doesn't bear upon whether or  
15 not the common costs should be reserved or not. It's  
16 a distinction, but not a material one, in my submission,  
17 for this debate.  
18 MR JUSTICE FRASER: But you accept that I'm correct I should  
19 be making an order under 46.6(5)?  
20 MR CAVENDER: My Lord, yes. I haven't had my attention  
21 drawn to this previously, but yes, it looks as if that  
22 is a --  
23 MR JUSTICE FRASER: I'm specifically required to do that  
24 I think, with 100% of the costs being common costs.  
25 MR CAVENDER: Yes, the other point I'm reminded of, of

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1 course, is at the end of the day, were a claimant to  
2 win, right at the end of the day, they would obviously  
3 get their individual costs but they'd also get  
4 a proportion of the common costs, it would be allocated  
5 to them, whether they'd won or lost.  
6 MR JUSTICE FRASER: That's by no means automatic.  
7 MR CAVENDER: It's not automatic but that's my understanding  
8 of what would normally happen. Let's assume it's  
9 a single trial, to make it simple --  
10 MR JUSTICE FRASER: Yes, but that's why -- it's different.  
11 This is group litigation though, Mr Cavender.  
12 MR CAVENDER: I'm saying group litigation, where you have 50  
13 or 500, it's our case, and you win or lose at the end:  
14 in that case all the costs of the trial wouldn't have  
15 been common costs because you would be investigating  
16 individual cases as well, on my premise. So you would  
17 have individual costs and common costs.  
18 MR JUSTICE FRASER: It would be a rare group litigation case  
19 that had a single trial though, wouldn't it? The whole  
20 purpose of group litigation is that you don't have  
21 a single trial.  
22 MR CAVENDER: No, but you could have a small group of, say,  
23 15 and try all the cases out, and the common issues  
24 would be those of law and the individual things of  
25 damage would be tried.

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1 MR JUSTICE FRASER: All right.  
2 MR CAVENDER: I have just been passed something here.  
3 (Pause)  
4 If you look at 46.6(5)(a) and (b) --  
5 MR JUSTICE FRASER: That is the part I draw your attention  
6 to, I think.  
7 MR CAVENDER: Indeed. And (4) is relevant as well.  
8 MR JUSTICE FRASER: Well, at the moment -- (4) deals with  
9 a group litigant who is a paying party. The Post Office  
10 isn't a group litigant. You are not seeking your costs  
11 from the claimants. Your suggestion for today's costs  
12 order I don't think would lead to any group litigants  
13 being a paying party, but I might be wrong.  
14 MR CAVENDER: No, but the point I make is (4)(b):  
15 "... an equal proportion, together with all the  
16 other group litigants, of the common costs."  
17 So what that does do is reflect what I was saying,  
18 that there are two elements --  
19 MR JUSTICE FRASER: I think whoever has passed you that note  
20 might be jumping rather ahead. I don't understand any  
21 of the orders being sought by either party today to lead  
22 to a situation where a group litigant would be a paying  
23 party, because your primary position today is: reserve  
24 the costs, which I understand. If I'm not prepared to  
25 do that, you resist Mr Green's application on other

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1 bases.  
2 I think your skeleton also accepts that the  
3 claimants were -- let me use your exact phrase, because  
4 it was quite well put, I thought, in terms of the degree  
5 of who had won.  
6 MR CAVENDER: It was obviously more successful on the --  
7 MR JUSTICE FRASER: Yes, so you're not seeking any group  
8 litigant today to be a paying party, and that's the only  
9 position in which 46.6(4) comes into operation.  
10 MR CAVENDER: But (5) is the one you drew my attention to.  
11 MR JUSTICE FRASER: Yes.  
12 MR CAVENDER: The second part of (5), after (a) and (b),  
13 says:  
14 "... the court will direct the proportion of the  
15 costs that is to relate to common costs and the  
16 proportion that is to relate to individual costs."  
17 MR JUSTICE FRASER: Correct. That's entirely correct.  
18 MR CAVENDER: Yes. But, my Lord, the reason we went down  
19 this rabbit hole, which is whether or not this special  
20 cases provision says anything or has any influence on  
21 whether the costs should be reserved or not -- that's  
22 how we got here. In my submission you might have to  
23 make another order today to make sure we comply with  
24 this, once we agree what it says and what we need to do.  
25 But in my submission that doesn't impact in any way upon

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1 whether or not costs should be reserved --  
2 MR JUSTICE FRASER: Which is your primary position.  
3 MR CAVENDER: -- which is my primary position.  
4 MR JUSTICE FRASER: I understand that. Right.  
5 Is there anything you'd like to add?  
6 MR CAVENDER: What's being pointed out to me, 44.6(5),  
7 apparently we're not in that because that anticipates  
8 a case where there is:  
9 "... one or more GLO issues; and  
10 "... issues relevant only to individual claims ..."  
11 That suggests a situation that your Lordship thought  
12 would be unlikely: it's where you have both together.  
13 Whereas here, as I understand it, it's common ground we  
14 only have common issues.  
15 MR JUSTICE FRASER: That's why I wanted to check. That's  
16 the point I wanted to check.  
17 MR CAVENDER: Yes. So I think we don't even get down the  
18 rabbit hole.  
19 MR JUSTICE FRASER: Well, (a) it's not a rabbit hole; and  
20 (b) I'm pretty sure that whether you're confident that  
21 we do or not, the simplest thing is to include in  
22 today's draft order that all of the Common Issues costs,  
23 or the costs of the Common Issues trial, are, for the  
24 purposes of 46.6, GLO issues.  
25 MR CAVENDER: My Lord, yes. We have no objection to that.

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1 MR JUSTICE FRASER: Yes, all right. Okay. But we're not  
2 getting on to the drafting of the order at the moment.  
3 You just need a decision from me as to whether I'm going  
4 to reserve the costs or not.  
5 MR CAVENDER: Indeed. The point I make -- and again we have  
6 gone into that, very helpful -- there is nothing, in my  
7 submission, at all to do or impact upon whether to  
8 reserve costs or not.  
9 MR JUSTICE FRASER: That might be right, Mr Cavender. But  
10 you said there were no special orders for costs in  
11 relation of group litigation, and there are.  
12 MR CAVENDER: There are no provisions that are relevant to  
13 this point about reserving or not. There is nothing  
14 that says, as I understand it -- my learned friend  
15 hasn't shown you -- that because it is group litigation,  
16 the costs should be paid at every stage and all  
17 revisited later, whether preliminary issues or not.  
18 That's the point I was making. I think I'm right about  
19 that.  
20 MR JUSTICE FRASER: I don't need you to answer at all. I'm  
21 just going to tell you whether I'm going to reserve or  
22 not.  
23 MR GREEN: I'm most grateful.  
24 MR JUSTICE FRASER: All right. Because there's a passage  
25 which I'm going to start. I'm just going to give you

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1 an brief ruling about it , so that you know why.  
2 (1.00 pm)  
3 (Ruling awaiting the judge's approval)  
4 (1.10 pm)  
5 MR JUSTICE FRASER: For the purposes of today's draft order,  
6 whoever is drafting it , it will need to include  
7 a 46.6(5) passage in it at the beginning.  
8 I'm going to rise now. I will come back at 2.10.  
9 Can you, between you, just remind me what is on today's  
10 agenda then remaining?  
11 MR GREEN: My Lord, it is the remaining points --  
12 MR JUSTICE FRASER: It is what the costs order should be --  
13 MR GREEN: It's what the costs order should be.  
14 MR JUSTICE FRASER: -- basis of assessment --  
15 MR GREEN: Basis of assessment.  
16 MR JUSTICE FRASER: -- any payment on account --  
17 MR GREEN: Payment on account.  
18 MR JUSTICE FRASER: Actually what the costs order should be  
19 includes within it any percentage reduction to reflect  
20 the fact that there has been less than 100%.  
21 MR GREEN: Precisely. There is one distinction , my Lord, in  
22 relation to indemnity costs: there is the budgeted  
23 costs --  
24 MR JUSTICE FRASER: I understand that point.  
25 MR GREEN: We just say --

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1 MR JUSTICE FRASER: That's rolled up within --  
2 MR GREEN: -- standard certainty , standard basis. Sorry.  
3 MR JUSTICE FRASER: That point is rolled into basis of  
4 assessment because you are, as I understand it, seeking  
5 a different assessment up to a date in April 2018 and  
6 then -- I think you are looking for indemnity costs up  
7 to a date in 2018 and thereafter standard costs?  
8 MR GREEN: My Lord, yes.  
9 MR JUSTICE FRASER: Right.  
10 MR CAVENDER: The other point is the timing of the  
11 assessment. My learned friend wants a detailed  
12 assessment now; we are saying that shouldn't happen.  
13 That is another item.  
14 MR JUSTICE FRASER: I understand that. Is that, however,  
15 though -- and I will just ask you that question now. If  
16 I'm making a payment on account, does that really make  
17 any difference?  
18 MR CAVENDER: It's for my learned friend to answer that. It  
19 is something he's seeking, and I'm saying it's not  
20 normal. It makes less of a difference , for the reason  
21 your Lordship has intimated.  
22 MR JUSTICE FRASER: Yes.  
23 MR CAVENDER: But it is for him to decide whether he wants  
24 to maintain that or not.  
25 MR JUSTICE FRASER: All right. Mr Green, we will deal with

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1 that further this afternoon.  
2 MR GREEN: I'm grateful.  
3 MR JUSTICE FRASER: So it is what the costs order should be,  
4 including any percentage reduction; basis of assessment,  
5 including the curiosity we have identified ; when the  
6 assessment should start ; and any payment on account.  
7 MR GREEN: My Lord, yes.  
8 MR JUSTICE FRASER: Those are the matters this afternoon.  
9 MR GREEN: Those are the four points .  
10 MR JUSTICE FRASER: All right. 2.10. Thank you very much.  
11 (1.12 pm)  
12 (The short adjournment)  
13 (2.10 pm)  
14 MR JUSTICE FRASER: Just before we start , I gave  
15 an incorrect reference when I was giving the ruling on  
16 the Post Office 's application for permission to appeal.  
17 It is a case called Wheeldon v Millennium. I think  
18 I said it was [2019] EWCA; in fact it is [2018]  
19 EWCA Civ 2403.  
20 Then I just want to add one passage to the ruling  
21 I gave just before 1 o'clock about reserving the costs .  
22 What I am going to do is I am going to produce somewhat  
23 more detailed written reasons both for that and for any  
24 other rulings I make this afternoon.  
25 (2.14 pm)

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1 (Ruling awaiting the judge's approval)  
2 (2.15 pm)  
3 MR JUSTICE FRASER: So, Mr Green.  
4 Submissions by MR GREEN  
5 MR GREEN: My Lord, yes. The first point of the four is the  
6 principle of costs and any reduction.  
7 MR JUSTICE FRASER: Yes.  
8 MR GREEN: Your Lordship has seen that the Post Office  
9 contends, at paragraph 27 [J1/4/8], for a 30% reduction.  
10 MR JUSTICE FRASER: To reflect their success on the issues  
11 they succeeded on.  
12 MR GREEN: Exactly. We respectfully say our primary  
13 submission is there should be no reduction at all , for  
14 reasons I'll explain.  
15 MR JUSTICE FRASER: Yes.  
16 MR GREEN: And our secondary submission is that were there  
17 to be any reduction, it should be minimal, very small,  
18 possibly 5 --  
19 MR JUSTICE FRASER: Thank you for clarifying what "minimal"  
20 means.  
21 MR GREEN: Sorry. I was about to say: possibly of the order  
22 of 5%.  
23 MR JUSTICE FRASER: Yes.  
24 MR GREEN: The reasons for that are some of principle and  
25 some based on the judgment itself and some based on

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1 their submissions.  
2 The point of principle I would like to invite  
3 your Lordship to consider first is in the Kastor case,  
4 which is at [J7/8/1]. That is tab 8 in the authorities  
5 bundle. My Lord, I don't think these are particularly  
6 controversial points, but I think it is right to just  
7 identify any points of principle very briefly.  
8 The first point, it is paragraph 151 [J7/8/44].  
9 I can't see what page that is, but it's the  
10 penultimate --  
11 MR JUSTICE FRASER: We're at tab 7, are we?  
12 MR GREEN: I'm so sorry, tab 8. [J7/8/44]. It is the  
13 penultimate page.  
14 MR JUSTICE FRASER: Yes.  
15 MR GREEN: My Lord, bottom of the page, paragraph 153.  
16 I don't think it's in any sense controversial, it's  
17 probably absolutely trite, but it's obviously not  
18 a simple mathematical calculation.  
19 MR JUSTICE FRASER: That is effectively accepted by the  
20 Post Office. They have very sensibly said they're not  
21 seeking a mechanistic issue by issue and it should be  
22 done by means of a percentage.  
23 MR GREEN: Exactly.  
24 MR JUSTICE FRASER: That is the modern way, isn't it?  
25 MR GREEN: That's exactly right. But what we would go on to

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1 say, with respect, is: when one is looking at  
2 an percentage it is not a mechanistic approach either  
3 arithmetically. It is not meant to be controversial.  
4 The reason I'm taking your Lordship to the authority  
5 is paragraph 151 [J7/8/44], which is the alternative  
6 case point, and it's quite an important point because  
7 the principle is that where a party advances two  
8 alternative arguments directed at the same outcome, they  
9 are not to be penalised if they succeed on one and not  
10 the other. This is the distinction being made, to show  
11 you exactly what's said and then relate it across to our  
12 case. It says:  
13 "This is not a case where the issue on which the  
14 successful party lost was a separate head of claim: it  
15 was a separate basis for putting the successful party's  
16 only claim. Accordingly, unlike in many cases involving  
17 issue based orders for costs, this was a case where the  
18 issue on which the successful party lost would not have  
19 been litigated if the unsuccessful party had conceded  
20 the issue on which the successful party won."  
21 Just to give a practical example from  
22 your Lordship's judgment, supply of goods and services:  
23 the Post Office claims to have won on the act. We  
24 respectfully say, on the correct principle, your  
25 Lordship doesn't just tick a box whether they won or

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1 lost, but looks at the fact that your Lordship  
2 effectively found similar obligations otherwise implied,  
3 but not by statute.  
4 MR JUSTICE FRASER: But there were issues which don't fall  
5 into that category.  
6 MR GREEN: My Lord, I agree. I'm just trying to identify --  
7 MR JUSTICE FRASER: The Post Office as SPM agent, for one.  
8 MR GREEN: Indeed. My Lord, the point I was coming to in my  
9 order -- I will take that point now -- the short point  
10 on that was essentially that was I think about two  
11 questions to Mrs Van Den Bogard, "You've said in your  
12 witness statement this is a service you supply to  
13 subpostmasters", and a couple of paragraphs in our  
14 submissions. So it's a minimal point. But  
15 your Lordship is quite right, we lost on it, and that's  
16 fair enough.  
17 The obligations which the claimants were seeking to  
18 establish by virtue of that relationship, the substance  
19 of those obligations are reflected in the finding of  
20 relational contract. So for two reasons we say there  
21 that on a proper analysis, it's more in the appearance  
22 than in the reality of a win, but it's fair to say they  
23 did win that issue.  
24 MR JUSTICE FRASER: Yes.  
25 MR GREEN: So, my Lord, that was the first point of

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1 principle.  
2 Then the court obviously has in mind --  
3 MR JUSTICE FRASER: What exactly is the point of principle  
4 though? You're saying: not mathematical?  
5 MR GREEN: No, the point is that one should carefully have  
6 regard to whether one has arrived at substantially the  
7 same route by an alternative --  
8 MR JUSTICE FRASER: Understood.  
9 MR GREEN: The second point, my Lord, is to have regard --  
10 and this picks up I think on their NTC not incorporated  
11 point. They say: it would have been fantastic if we had  
12 taken notice of the binding Court of Appeal authority.  
13 There are two points in relation to that.  
14 MR JUSTICE FRASER: On it being signed?  
15 MR GREEN: It being signed.  
16 MR JUSTICE FRASER: Yes.  
17 MR GREEN: The first point is that there is an enormous  
18 overlap between the unfair contract terms arguments and  
19 the argument that they were onerous terms in relation to  
20 NTC. And secondly, as to the principles, those had to  
21 be argued in any event for the SPMC.  
22 MR JUSTICE FRASER: Yes.  
23 MR GREEN: It is completely artificial to regard those  
24 matters of evidence as the Post Office seeks to  
25 characterise them where the same substantive material

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1 would have been deployed in any event, both the legal  
2 arguments on the SPMC and consideration of the actual  
3 effect of the terms for our purposes.  
4 There is authority for that, my Lord, which is at  
5 {J7/17/8} at paragraph 28, which picks up the point that  
6 I have already made by reference to Kastor but also adds  
7 the same material point. 28:  
8 "However, on analysis, it seems to me that that  
9 approach would not be appropriate in this case. It is  
10 right that the defendant lost on its statutory authority  
11 defence. However, all of the detailed legislation that  
12 was considered by reference to that unsuccessful defence  
13 was directly relevant to the alternative defence of  
14 reasonable user, on which the defendant was entirely  
15 successful."  
16 So you can have situations where --  
17 MR JUSTICE FRASER: That doesn't really add anything to your  
18 submissions you've already made, does it?  
19 MR GREEN: Well, my Lord, I think ...  
20 MR JUSTICE FRASER: You're saying you can't look at it, for  
21 example, as 7 -- well, let's use different numbers --  
22 10 issues out of 20, so therefore it's automatically  
23 a half, because some of the issues may have been either  
24 overlapping issues or different ways to get to the  
25 ultimate same answer.

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1 MR GREEN: Yes.  
2 MR JUSTICE FRASER: I have that point.  
3 MR GREEN: Then the second point is that some of the issues  
4 were interdependent in a different sense, in that a term  
5 may be less onerous if its exercise is governed by  
6 implied duties of good faith. And as heralded for two  
7 years by the claimants repeatedly, we could not possibly  
8 win on every issue. That was made absolutely clear for  
9 two years.  
10 MR JUSTICE FRASER: Yes.  
11 MR GREEN: Then there is the point about how the issues were  
12 in fact resolved. We would just invite some caution,  
13 my Lord, in accepting the characterisation of those  
14 issues in the lengthy footnote by which they are said to  
15 have been recited as having been determined in their  
16 favour. I will take an example. Just to take  
17 an example, true agreement, my Lord, at 925 {B7/29/264}.  
18 MR JUSTICE FRASER: Just give me a second to find the  
19 lengthy footnote.  
20 MR GREEN: There is actually a very similar one in two  
21 different places. One is a footnote in their permission  
22 to appeal skeleton and the other is a footnote at page 7  
23 of their skeleton argument, footnote --  
24 MR JUSTICE FRASER: Let's go to page 7.  
25 MR GREEN: Defendant's skeleton argument on page 7, which is

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1 {J1/4/7}. It has come up. Your Lordship will see at  
2 the bottom --  
3 MR JUSTICE FRASER: Just bear with me, just for a second.  
4 I'm just chasing up a hard copy.  
5 So this is the note at number 1?  
6 MR GREEN: It is the footnote at number 1, which is very  
7 long, and recites the issues on which the Post Office  
8 won.  
9 MR JUSTICE FRASER: Yes.  
10 MR GREEN: I have already mentioned supply of goods and  
11 services, my Lord, but can I mention, for example, true  
12 agreement, where they say they won. Your Lordship will  
13 well know from your Lordship's own decision that what  
14 you actually found was that this common issue didn't  
15 fall to be determined, but you would otherwise have  
16 followed the approach argued in the alternative by the  
17 claimants.  
18 MR JUSTICE FRASER: Yes.  
19 MR GREEN: That's at 925 on page 264 of the judgment  
20 {B7/29/264}.  
21 MR JUSTICE FRASER: 295?  
22 MR GREEN: It is paragraph 925.  
23 MR JUSTICE FRASER: Sorry, the mouse was hovering over the  
24 paragraph number. You're talking about Judgment No 3  
25 now, not what I've said in Judgment No 4?

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1 MR GREEN: No, my Lord, what you said in Judgment No 3 --  
2 MR JUSTICE FRASER: Yes.  
3 MR GREEN: -- in terms of what -- your Lordship was  
4 absolutely right in Judgment No 4 to say you were  
5 invited to decide some issues, and some of them you  
6 found in the Post Office's favour, and that's absolutely  
7 correct. But we say, when you come to costs, the  
8 context is: how were they determined in fact?  
9 MR JUSTICE FRASER: Yes.  
10 MR GREEN: And we look at paragraph 925, which is the very  
11 paragraph to which reference is made, about six lines  
12 down --  
13 MR JUSTICE FRASER: But you're saying I think, on the basis  
14 that your opening submission this afternoon was that  
15 there should be no reduction, you're effectively saying  
16 the degree of success on the Post Office's point of view  
17 on all of the common issues was such that it does not  
18 warrant a reduction.  
19 MR GREEN: Precisely.  
20 MR JUSTICE FRASER: That's pretty optimistic, if not failing  
21 to pay attention to paragraphs 295 and 296 of Judgment  
22 No 4 {B11.2/3/74}, is it not? Because I've already  
23 dealt with this point in Judgment No 4. I've given the  
24 global summary. What I said in Judgment No 4 was: the  
25 Post Office's solicitors' submissions of 29 March

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1 correctly reflected the success or otherwise of both of  
2 the parties in Common Issues Judgment No 3.  
3 MR GREEN: My Lord, I think that is completely right.  
4 MR JUSTICE FRASER: But aren't you trying to reinvent the  
5 wheel by persuading me that actually they didn't; or if  
6 they did, it shouldn't affect the costs at all?  
7 MR GREEN: I think, my Lord, I can't say that they didn't,  
8 because (a) they did, and your Lordship said they did.  
9 That's --  
10 MR JUSTICE FRASER: If one accepts they did, is not the  
11 modern consequence of that that consideration is given  
12 to a percentage reduction?  
13 MR GREEN: Yes. But, my Lord, the modern consequence is  
14 consideration is given. I'm now addressing  
15 your Lordship on whether --  
16 MR JUSTICE FRASER: But you're saying the reduction should  
17 be zero.  
18 MR GREEN: Yes, that's our primary submission because --  
19 I will give your Lordship all the points together.  
20 MR JUSTICE FRASER: I'm acutely aware of what the common  
21 issues were, what my answers were on all of them, how  
22 they interrelated between one another and whether, and  
23 if so, how many of them were more or less important than  
24 the others.  
25 MR GREEN: Precisely. I won't labour the point.

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1 MR JUSTICE FRASER: I mean, you can labour it as much as you  
2 want, but I don't think you're going to add to the sum  
3 of human knowledge, to be honest.  
4 MR GREEN: I'm most grateful, my Lord. I will move on.  
5 Your Lordship has the point though. 925 is a good  
6 example of being a bit careful about what they've said  
7 they won on and what the substance of the finding is.  
8 In relation to the NTC signature point, if we just  
9 go back to that, your Lordship already has my  
10 submissions on the UCTA and the principles being  
11 deployed on SPMC. There is a further reason for that  
12 though.  
13 Your Lordship essentially got to the point of being  
14 prepared to consider finding for the claimants on the  
15 evidence, but was barred from doing so by a Court of  
16 Appeal authority. If --  
17 MR JUSTICE FRASER: I then went on to deal with it in case  
18 I was wrong. You could have appealed that point.  
19 MR GREEN: My Lord, yes.  
20 MR JUSTICE FRASER: That doesn't mean the Post Office  
21 haven't won on it.  
22 MR GREEN: No, they have won on it. But in terms of doing  
23 that in parallel and the reasonableness of taking the  
24 point at all, which is one of the express factors that  
25 Mr Justice Neuberger, as he then was, identified, it is

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1 not available to us in the Court of Appeal if we don't  
2 have your Lordship's treatment of it in this judgment,  
3 if we seek to cross-appeal.  
4 MR JUSTICE FRASER: No, that's correct. But that doesn't  
5 mean you haven't not lost on it.  
6 MR GREEN: No, it doesn't at all. But it goes to the --  
7 MR JUSTICE FRASER: Sorry, that doesn't mean you haven't  
8 lost on it.  
9 MR GREEN: Yes, and your Lordship is right. But just on the  
10 background factor of whether it was reasonable to take  
11 the point in the first place, we respectfully say that  
12 that is a fact, although a small one, but it's  
13 a material one.  
14 MR JUSTICE FRASER: Understood.  
15 MR GREEN: The central point, which your Lordship is well  
16 aware of, basically relational contract -- which my  
17 learned friend said suffused everything else -- and the  
18 implied terms, those issues, your Lordship will  
19 remember, particularly in relation to the implied terms,  
20 which I just briefly mentioned this morning, go back to  
21 requests for further information in 2017 of what the  
22 Post Office's case actually meant for specific points.  
23 There were two of those in 2017 and the failure to  
24 answer them resulted in the Post Office agreeing to  
25 an order from your Lordship on 2 February 2018, the

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1 second CMC order, ordering them to provide the  
2 information. They didn't do so: they didn't actually  
3 provide the information itself.  
4 As your Lordship knows from the extensive recital of  
5 that in our opening and reference back to it in our  
6 closing, that rumbled all the way along, in a way which  
7 we respectfully submit was extremely unsatisfactory,  
8 through the provision of the table that we can just call  
9 up briefly at {H/19.1/1} in a final attempt to get some  
10 specificity from the Post Office as to what the terms or  
11 their incidence were.  
12 I actually prepared this and typed it myself, put it  
13 in myself. This was the table offering the Post Office  
14 the chance to say what they actually agree in respect of  
15 each of the terms. I typed it all out, so they all  
16 needed to do was type in what they said, and I even gave  
17 examples, "E.G.", of what I thought their case might be,  
18 to --  
19 MR JUSTICE FRASER: No, but as I understand it, apart from  
20 two of the terms that were agreed, that invitation  
21 wasn't taken up.  
22 MR GREEN: What they did was they responded in a very  
23 lengthy document that didn't condescend to any clarity.  
24 MR JUSTICE FRASER: Well, it may or may not have done. And  
25 the Common Issues dealing with implied terms or

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1 incidence of implied terms was, to a certain extent,  
2 entwined within a consequential upon the finding on  
3 common issue 1.  
4 MR GREEN: Indeed.  
5 MR JUSTICE FRASER: But ...?  
6 MR GREEN: My Lord, the short point is -- "but" quite a lot,  
7 we respectfully say, because if they had in 2017, when  
8 they pleaded these two general terms and we said, "Hold  
9 on a second, what does that mean for the specific areas  
10 we're actually concerned with?", and they said:  
11 actually, we agree there were the sorts of obligations  
12 your Lordship has found, there may not even have had to  
13 be a trial about all that.  
14 MR JUSTICE FRASER: Okay. I have that point.  
15 MR GREEN: So it was completely unnecessary. We say that  
16 that unreasonable conduct goes all the way back --  
17 MR JUSTICE FRASER: You're moving on to a different point?  
18 MR GREEN: I am. I say it's relevant to how the trial and  
19 the entire litigation was run for the general point  
20 about no discount, but I also say it goes to the  
21 question of the basis of assessment.  
22 Because your Lordship has seen we've set out the  
23 conduct which we rely on in our skeleton argument, and  
24 your Lordship is very familiar with it all because much  
25 of it comes from your Lordship's own judgment. That's

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1 at {J1/1/14} and {J1/1/15} in particular of our written  
2 submissions, all the way through to {J1/1/16}. But we  
3 respectfully say that it was completely unreasonable to  
4 agree to provide information and agree to an order to  
5 that effect and then not provide it, with the  
6 consequence that those matters could not be agreed.  
7 All of those offers for them to clarify the  
8 incidence or the implied terms were made openly, not  
9 even without prejudice save as to costs. And that goes  
10 all the way back to 2017. My Lord, that feeds in to  
11 the -- I think your Lordship described it as a "curious  
12 point" in relation to basis of assessment. I'm not  
13 going to go through all these points --  
14 MR JUSTICE FRASER: "Curious point"?  
15 MR GREEN: About budgeted costs and pre-budgeted costs.  
16 MR JUSTICE FRASER: Well, as I understand the situation,  
17 it's as follows, and if I'm wrong, correct me. You want  
18 indemnity costs up to a particular date --  
19 MR GREEN: My Lord, yes.  
20 MR JUSTICE FRASER: -- and detailed assessments, subject to  
21 assessment on the standard basis --  
22 MR GREEN: Indeed.  
23 MR JUSTICE FRASER: -- after a particular date.  
24 MR GREEN: Yes.  
25 MR JUSTICE FRASER: Now, I am well used to and parties often

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1 do ask for indemnity costs for a different period. It  
2 is highly unusual to have the period for indemnity costs  
3 pre-dating a period for standard assessment because it's  
4 normally because something has happened --  
5 MR GREEN: Indeed.  
6 MR JUSTICE FRASER: -- where the conduct after a particular  
7 date falls to be looked at from a different point of  
8 view --  
9 MR GREEN: Indeed.  
10 MR JUSTICE FRASER: -- or of a different character.  
11 MR GREEN: Indeed.  
12 MR JUSTICE FRASER: Very unusual to have it the other way  
13 round.  
14 MR GREEN: Yes.  
15 MR JUSTICE FRASER: It might be, I suppose, said that  
16 conduct was exceptionally unreasonable and out of the  
17 norm up to a particular date and then there was  
18 a Damascene conversion and everything changed, but  
19 I don't understand this to be --  
20 MR GREEN: No, we're not saying that.  
21 MR JUSTICE FRASER: No, that's rather why I'm asking the  
22 question.  
23 MR GREEN: That's the curious point, quite.  
24 The short point is this: that the claimants'  
25 submission is that looked at throughout the overall

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1 period as a whole, the Post Office's conduct was out of  
2 the norm in the lack of co-operation which the court  
3 would expect from a party in a case like this, in  
4 a number of material respects which we've sought to  
5 identify, and from an early stage, and I've given  
6 your Lordship the example of the repeated requests for  
7 further information in relation to those implied terms  
8 and their incidence.  
9 MR JUSTICE FRASER: Yes, but none of that really jumps out  
10 at one as all occurring at or near a watershed date.  
11 MR GREEN: No, my Lord, we're coming to that.  
12 So the primary submission is that when you look at  
13 the conduct of the case across the whole piece, you see  
14 factors justifying an award of indemnity costs across  
15 the whole piece. Another example of that is where the  
16 defendant does an apparent volte-face at trial, the  
17 seeds of that volte-face are sown not at trial but when  
18 they take the point originally. So our submission is  
19 it's the assessment across the whole period that  
20 justifies an award of indemnity costs, not that the  
21 period starts or stops.  
22 But what we have respectfully said is that we don't  
23 invite the court to exercise its discretion in the light  
24 of that conclusion in relation to the period for which  
25 costs were budgeted, because of the certainty that

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1 budgeting is supposed to bring to those costs and to  
2 avoid the need for disputes on detailed assessment  
3 ab initio, just to take the benefit of the certainty of  
4 the budgeted costs.

5 So, my Lord, we don't say it all happens before and  
6 then it stops. What we say is: looked across the piece,  
7 it should be indemnity costs. But notwithstanding the  
8 justification for an order at that time, we say: given  
9 that costs were budgeted from April 2018 onwards, and  
10 the certainty that that affords, on balance, it is not  
11 just and convenient to make a different order because  
12 your Lordship has already approved a costs budget, which  
13 we came underneath. The cost budget was £3.4 million  
14 and we were £3.1 million. So it doesn't help anyone.

15 So it's not withdrawing from the submission.  
16 MR JUSTICE FRASER: When you say it doesn't help anyone, you  
17 mean the cost management order doesn't help anyone?

18 MR GREEN: No, no, no, no. If we were to seek to invite  
19 your Lordship to make an indemnity costs order, it's not  
20 going to make a material difference --

21 MR JUSTICE FRASER: Because you can still --

22 MR GREEN: -- such as to justify the waste of everyone's  
23 time.

24 MR JUSTICE FRASER: Understood.

25 MR GREEN: So that's the basis on which that is put.

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1 MR JUSTICE FRASER: You have, I think, dealt both with costs  
2 in principle, percentage reduction and basis of  
3 assessment.

4 MR GREEN: Indeed. My Lord, I have. Then --

5 MR JUSTICE FRASER: Is that right?

6 MR GREEN: I have, exactly.

7 MR JUSTICE FRASER: Right. Well, I would like to hear from  
8 Mr Cavender about that first.

9 Submissions by MR CAVENDER

10 MR CAVENDER: My Lord on the question of percentage  
11 assessment, this is of course is meant to be  
12 an impressionistic and to an extent broad brush, but  
13 educated broad brush; educated particularly by the trial  
14 judge of course who has just decided the case and who is  
15 intimately knowledgeable about the various issues.

16 We had grouped at footnote 1, page 7 of my skeleton  
17 {J1/4/7}, below 23, those items where the Post Office  
18 did win. That is an accurate summary.

19 My learned friend, when he talks about the true  
20 agreement point, when you look at the reference, we're  
21 just talking here about that argument in relation to  
22 termination for breach, not in a situation where it is  
23 terminated other than for breach. So that's a bad point  
24 he makes about that.

25 Again, he goes into certain of these things, but

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1 when he does so, he does so inaccurately. Take the  
2 agent point, that the Post Office was somehow the agent  
3 of the postmasters: it is obviously a ridiculous  
4 suggestion. But what's inaccurate is he says it's  
5 a couple of paragraphs. If you look just in his  
6 closing, it's six pages: it's {A/6/205} to {A/6/210} in  
7 his closing. In my closing, I don't know, it's probably  
8 a similar amount; in the opening similarly.

9 So I don't invite you to go through page by page;  
10 it's impressionistic. But my learned friend isn't being  
11 quite straight when he says it's a couple of paragraphs;  
12 it's rather more. So you ought to bear that in mind.

13 It is true that if obviously a parallel point is won  
14 then it's not mechanistic; I accept that, obviously.  
15 But my learned friend says in relation to, for instance,  
16 the onerous and unusual, it's all is the same. Well, of  
17 course it's not the same because the terms under the NTC  
18 are very different to the terms under the SPMC. You  
19 have to consider each of the terms separately. You  
20 can't begin to say, as my learned friend does, "Well,  
21 it's all the same". Clearly it isn't.

22 Similarly, although there is some overlap between  
23 the material one looks at for UCTA and onerous and  
24 unusual, of course, as your Lordship rightly points out,  
25 it is a very different test.

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1 So the points he makes don't really get him  
2 anywhere. One is then left back to the impressionistic  
3 approach that in my submission you should be doing  
4 anyway, and doing the best that we can.

5 If you look at our skeleton at paragraph 23 and  
6 following {J1/4/7}, we put some skin on the bones of  
7 what I have just said. For instance, paragraph 26  
8 {J1/4/8}, in relation to signature and incorporation,  
9 all the evidence that related to the two NTC lead  
10 claimants that went to the interview, what they were  
11 told, what they knew, Mrs Dar and Mrs Stockdale, was  
12 only related to that.

13 So I don't overemphasise it, but one has to do it  
14 fairly. We have sought to do that and we've come up  
15 with a round figure of 30%. You may think that's too  
16 high or too low. Certainly the idea that it's zero,  
17 it's difficult to understand that submission having been  
18 made. Equally, 5%: it's obviously much more than that.  
19 But whether it's 25%, 30% or 35%, right-minded people  
20 could disagree. I don't pretend that there's a right  
21 answer. This is costs, a discretion. That's really  
22 what I wanted to say on that.

23 My Lord, then going to the basis of assessment,  
24 I have to say I'm very surprised that an experienced  
25 party or team like this would seek indemnity costs in

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1 this case. I say that because the test is a very high  
2 one. If you look in our skeleton at paragraph 28 and  
3 following {J1/4/9} Lord Justice Coulson reminded us of  
4 that in a case called Hislop. It's authorities  
5 bundle 2, tab 26 {J7/26/1}.

6 MR JUSTICE FRASER: 26?  
7 MR CAVENDER: My Lord, yes.  
8 MR JUSTICE FRASER: Yes.  
9 MR CAVENDER: This is a decision of Hislop v The Board of  
10 Leicester.

11 MR JUSTICE FRASER: Paragraph 36; is that right?  
12 MR CAVENDER: Indeed, yes. He gives all the relevant  
13 authority in 35. {J7/26/14}:

14 "Indemnity costs are appropriate only where the  
15 conduct of a paying party is unreasonable to a high  
16 degree."

17 So that is the test.

18 We then cite also at paragraph 35 {J1/4/10}  
19 Arcadia Group, which is in the bundle at tab 20  
20 {J7/20/20}. I don't think I need to take you to it, but  
21 we extract it at paragraph 35 of the skeleton, where he  
22 says the "weakness of a legal argument" could not  
23 justify indemnity costs unless the argument was  
24 "motivated by some ulterior commercial or personal  
25 purpose".

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1 And what was said also in Hosking by Hildyard J  
2 {J7/28/16}:

3 "The merits of the case are relevant in determining  
4 the incidence of costs: but, outside the context of  
5 an entirely hopeless case, they are of much less, if  
6 any, relevance in determining the basis of assessment."

7 Then over the page {J1/4/11}, Digicel. So this is  
8 paragraph 36(b), the decision of Mr Justice Morgan  
9 {J7/14/11}, where he makes the point that:

10 "... further refinements of the legal or factual  
11 analysis as the parties deepen their understanding of  
12 the issues and the adoption of new positions in the  
13 light of indications, direct or indirect, actual or  
14 guessed at, of how the judge appears to be approaching  
15 the matter ... are not particularly unusual in long and  
16 complex cases."

17 That's aimed at the volte-face point.

18 MR JUSTICE FRASER: It is without doubt sensible -- or  
19 rather I will put it the other way round. It is not  
20 sensible for judges to penalise parties who concede  
21 points during litigation by saying, "Well, that  
22 justifies indemnity costs", depending upon the nature of  
23 the point, because otherwise one would hamstring  
24 advisers in terms of making sensible concessions.  
25 MR CAVENDER: Indeed. Also I think the point

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1 Mr Justice Morgan was saying is that the way you put the  
2 point may alter slightly because things develop, and if  
3 you look at the whole part of this judgment, witnesses  
4 have given evidence, the judge has a certain view: often  
5 judges will offer -- it has been done to me before --  
6 different implied terms: "How about this one?" You buy  
7 it or you don't, effectively. No one suggests that's  
8 wrong or should result in indemnity costs.

9 Then at paragraph 36(e) {J1/4/12} we cite Williams  
10 v Jervis {J7/13/3}:

11 "... important to bear in mind, firstly, that an  
12 order for indemnity costs should not be made simply  
13 because the paying party has been found to be wrong or  
14 his evidence has been rejected in preference to that of  
15 the receiving party."

16 So that is the tenor of the law. It has to be  
17 something significantly out of the ordinary.

18 What is said against the Post Office here? My  
19 learned friend says: well, for the whole time, the whole  
20 period of the litigation, he says very boldly, the  
21 Post Office behaved in the way he suggests. He gives  
22 very few particulars on his feet. The ones he does give  
23 are bad ones.

24 So he says, for instance, in relation to the implied  
25 term debate -- the implied terms were pleaded by us in

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1 our original defence: they were necessary co-operation  
2 and Stirling v Maitland. The claimant admitted those  
3 implied terms were part of the contract. If they had  
4 wanted to, at any stage they could have pleaded what  
5 they meant, how those implied terms interacted with the  
6 express terms and what the incidence of those implied  
7 terms were. Had they have done so, we would have had to  
8 plead to that. At no stage did they do so.

9 They say that we didn't answer their request. We  
10 did. Look at {B4/3/1}. The fact they don't like the  
11 answer doesn't make it not an answer.

12 So that's the main one. My learned friend says the  
13 whole costs, the millions of pounds of costs in this  
14 action going on for a number of years, because he says  
15 we didn't answer an RFI in the way he would like, in  
16 circumstances where he could have pleaded terms he  
17 admitted no incidence, the court should award indemnity  
18 costs throughout. It is, in my submission, nonsensical  
19 as a submission.

20 We then go to his costs submission at {J1/1/16},  
21 where he goes from (a) to (h) and lists what he says are  
22 grounds for giving indemnity costs. Just look at (d)  
23 and (e) by way of example:

24 "(e) Its treatment of the Lead Claimants ..."  
25 I assume he's talking about that when they were

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1 employed, the way they dealt with them. Nothing at all  
2 to do with the costs of the action in which the parties'  
3 disputes are -- it is really very surprising to see that  
4 written down.

5 "(b) Post Office's approach to agreeing facts, and  
6 the relevance of evidence."

7 Well, we did agree a lot of facts. You'll remember  
8 there were schedules of facts agreed as to whether they  
9 were true, admissible, or one of two. So a lot of work  
10 was done and there was good co-operation in relation to  
11 that.

12 Yes, we didn't agree about the relevance of certain  
13 evidence, we applied to strike it out, and your Lordship  
14 said: well, it may be; you couldn't say it was all  
15 inadmissible, some of it may be. You awarded costs on  
16 that application. You can't then say: well, therefore  
17 that then passes into the costs of the action and  
18 somehow infects that. That would be unprincipled.

19 The volte-face point, in relation to paragraph (a)  
20 of this: all your Lordship was doing was saying you  
21 understood -- in one place you said you thought it was  
22 a volte-face; in another place you said: on reflection,  
23 it is the same point. And maybe I didn't put it very  
24 clearly; maybe I can be criticised for that. But this  
25 is a complex case, we had our written submissions. To

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1 say that, "There should be awarded indemnity costs  
2 against you for the whole action", is fanciful really.  
3 I've never heard it in any other case I've been in,  
4 I have to say.

5 And then we have -- all of this, none of these,  
6 alone or together, begin to pass muster as being able to  
7 satisfy tests for indemnity costs. That's all I want to  
8 say about it.

9 MR JUSTICE FRASER: Can I just check one thing with you.

10 The date that Mr Green is taking as a watershed date,

11 I think -- is it April 2018?

12 MR GREEN: Yes.

13 MR JUSTICE FRASER: It is April 2018. Is it 11 April 2018?

14 MR CAVENDER: It is, and that --

15 MR GREEN: It's the 13th. It's the date up to which the  
16 cost budget went. We're just saying the ones in the  
17 budget.

18 MR JUSTICE FRASER: No, I understand the basis on which  
19 you've chosen the date.

20 MR CAVENDER: Then if you look at the basis of assessment in  
21 our skeleton, we outline why they've done this: it's  
22 a tactical reason, to try and avoid their costs being  
23 looked at more carefully.

24 MR JUSTICE FRASER: Well, it depends, doesn't it, on -- not  
25 that it depends on this case. On a different case

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1 though, whatever their reasons for it in this particular  
2 case, to award indemnity costs for one period of time  
3 and standard assessment for another period of time, one  
4 would ordinarily look for something that has occurred at  
5 or about that date that would relate to the conduct of  
6 the paying party, rather just than the date of  
7 a costs --

8 MR CAVENDER: My Lord, of course, and that happens. Certain  
9 points are taken, or expert evidence, or some particular  
10 point that played badly, that can be disallowed or you  
11 can't recover your costs on it.

12 But here we have a blanket for the whole period, all  
13 the costs of the action to date, we're talking about  
14 here, from the very start of the pleading all the way  
15 through, subject to a device -- and it is a device, as  
16 we explain in paragraphs 28 and following [J1/4/9] --  
17 not to have the budgeted costs area looked at because  
18 they think they will do better if indemnity costs aren't  
19 ordered over that period.

20 MR JUSTICE FRASER: Presumably because they don't have to  
21 have a detailed assessment, as I understand it.

22 MR CAVENDER: Indeed. In my submission it is in principle  
23 wrong and is -- well, it's obvious what's going on.

24 I need say no more.

25 MR JUSTICE FRASER: I don't think you need to say anything

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1 more about that. Thank you very much.

2 Right. Mr Green, anything in reply?

3 Reply submissions by MR GREEN

4 MR GREEN: Two quick points.

5 Firstly in the MacInnes case at [J7/23/8]. So it's  
6 tab 23 in the bundle of authorities. This is  
7 Mr Justice Coulson in MacInnes v Gross. At 26, the  
8 first four lines; he obviously goes on to talk about  
9 relevance to interim payments thereafter. But the first  
10 four lines:

11 "One of the main benefits to be gained from the  
12 increased work for the parties (and the court) in  
13 undertaking the detailed costs management exercise at  
14 the outset of the case is the fact that, at its  
15 conclusion, there will be a large amount of certainty as  
16 to what the likely costs recovery will be."

17 MR JUSTICE FRASER: But this is on interim payments though.

18 MR GREEN: Well, yes, he goes on to deal with interim  
19 payments, you're absolutely right. But the central  
20 point, the rationale underpinning the budgeting  
21 exercise, we respectfully rely on --

22 MR JUSTICE FRASER: That's undoubtedly correct, but it is --  
23 well, I've explored the point with you already.

24 MR GREEN: Yes. It's unusual in that respect.

25 MR JUSTICE FRASER: All right.

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1 MR GREEN: The other point I wish to address very briefly is  
2 in relation to the implied terms point which my learned  
3 friend has responded to. There are three points to make  
4 on that.

5 The first point is: this is not a criticism that we  
6 are making of the Post Office having made a concession.  
7 The criticism is that they didn't make any concession  
8 or, rather more particularly, did not actually say what  
9 the incidents were for the material purposes of the  
10 case.

11 The second point my learned friend made was that we  
12 could have pleaded what we said the incidents of those  
13 were, and we never did. He's wrong about that, because  
14 our case was that our implied terms were either  
15 free-standing implied terms or incidents of the terms  
16 that the defendant had pleaded. So we had set them out  
17 in our generic particulars of claim and they chose to  
18 plead to them in the defence as they did. So he's wrong  
19 about that.

20 The third point is just to invite your Lordship to  
21 actually look at what we did say in the reply, because  
22 it's not what you have been told. It's at {B3/3/32}.  
23 I'm obviously aware that the pleading point didn't find  
24 favour with your Lordship anyway in the judgment. But  
25 actually looking at it carefully, if we start under

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1 "Implied Terms" at B.4. If you look at paragraph 58,  
2 that's pleading back to 106 in their defence. And at  
3 58.2:

4 "As to the Defendant's averment, at  
5 paragraph 106(2), that 'many' of the implied terms  
6 pleaded by the Claimants 'address matters that are  
7 already governed by the [thereto] terms ...' the  
8 Claimant notes the Defendant's refusal to specify which  
9 of those terms are 'already governed' by the Defendant's  
10 accepted implied terms."

11 So that's the first point. It's not that they're  
12 denying them. They're saying, "They are governed by  
13 Stirling v Maitland and the other term, but we're not  
14 going to tell you how".

15 58.3 was the reference to the only example  
16 identified in the RFI. Then over the page {B3/3/33},  
17 58.4, they are called out expressly for being evasive  
18 this respect. And then 58.5:

19 "The Claimants aver that to the extent that their  
20 pleaded implied terms are 'already governed' by the  
21 Stirling v Maitland Term and/or the Necessary  
22 Co-operation Term, these are in substance admitted by  
23 the Defendant, contrary to Response 61A."

24 So it was specifically saying, "If you're saying  
25 there are these overarching terms which already govern

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1 the very things we've set out, this is ridiculous".

2 My Lord, I'm sorry, we do say that is unreasonable,  
3 as was the pleaded case on special knowledge  
4 subpostmasters. The seeds were planted when they did  
5 the pleading; the harvest was taken in the Common Issues  
6 trial.

7 Those are my submissions.

8 Reply submissions by MR CAVENDER

9 MR CAVENDER: My Lord, in connection to that, do you want to  
10 look at {B7/7/13}, where the claimants admitted these  
11 implied terms unconditionally. So it's {B7/7/13}. It's  
12 number (2), in brackets:

13 "(For the avoidance of doubt, the implied terms  
14 admitted at Defence para 105 are agreed)"

15 MR JUSTICE FRASER: Thank you very much. Right.  
16 (3.00 pm)

17 (Ruling awaiting the judge's approval)  
18 (3.08 pm)

19 MR JUSTICE FRASER: I will put this in writing, but is that  
20 sufficiently clear for today's purposes and for drawing  
21 up the order?

22 MR GREEN: Yes.

23 MR JUSTICE FRASER: Right.

24 What is there now? Payment on account and whether  
25 a detailed assessment should commence now or not?

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1 Submissions by MR GREEN

2 MR GREEN: My Lord, yes. The short point is: those two  
3 points are interrelated. Payment on account would  
4 ordinarily be ordered. As your Lordship observed to me  
5 when I referred to the judgment of Lord Justice Coulson  
6 in --

7 MR JUSTICE FRASER: Which one?

8 MR GREEN: The one about the benefit of cost budgeting.

9 MR JUSTICE FRASER: Remind me of the name.

10 MR GREEN: That was in tab 23, it's MacInnes v Gross, and it  
11 was Mr Justice Coulson, as he then was. It's {J7/23/8}.

12 MR JUSTICE FRASER: Yes, you were taking me to paragraphs --  
13 I think it's 26 and 27 together, isn't it?

14 MR GREEN: Precisely.

15 So the two points are that in terms of budgeted  
16 costs, your Lordship effectively knows what they are  
17 already, and my learned friend Mr Warwick is going to  
18 deal with numbers and calculations, if he may, if that's  
19 helpful.

20 MR JUSTICE FRASER: Yes. So in terms of principle then, you  
21 would like a payment on account; the amount is going to  
22 have changed slightly, one imagines.

23 MR GREEN: My Lord, yes. My learned friend will --

24 MR JUSTICE FRASER: But you want a payment on account. You  
25 also want an order that the detailed assessment be

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1 commenced straightaway.  
2 MR GREEN: My Lord, yes. And there is a balance to be  
3 struck, because if the payment on account is a very  
4 substantial proportion of the costs, the interest in  
5 having a detailed assessment -- the balance to be struck  
6 by your Lordship is different.  
7 MR JUSTICE FRASER: Right. So when I observed just before  
8 the short adjournment, in a point to Mr Cavender, simply  
9 because he was on his feet, "Is there really any  
10 difference?", and he understandably said it's really  
11 a point for you --  
12 MR GREEN: Yes.  
13 MR JUSTICE FRASER: -- if you get a payment on account, is  
14 there really any difference?  
15 MR GREEN: My Lord, normally if the payment on account is at  
16 or about the budgeted costs plus a substantial  
17 proportion of the other costs, there may be no  
18 justifiable reason to go through the expense of detailed  
19 assessment now rather than later.  
20 MR JUSTICE FRASER: Right. But Mr Warwick is going to deal  
21 with the figures?  
22 MR GREEN: He will deal with the -- exactly.  
23 MR JUSTICE FRASER: All right. So is there anything else  
24 you want to add?  
25 MR GREEN: My Lord, not unless I can help you further.

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1 MR JUSTICE FRASER: Right. I will hear from Mr Warwick on  
2 the figures and then, Mr Cavender, I will come to you  
3 about both whether there should be a payment on account  
4 and, if so, how much.  
5 MR GREEN: I haven't really addressed what it should be,  
6 because it's for my learned friend to --  
7 MR JUSTICE FRASER: When you say "what it should be" ...?  
8 MR GREEN: Sorry, the issue of principle beyond just saying  
9 it's normally made, because of course the burden is on  
10 my learned friend.  
11 MR JUSTICE FRASER: Yes, understood.  
12 Mr Warwick.  
13 Submissions by MR WARWICK  
14 MR WARWICK: Yes, my Lord.  
15 MR JUSTICE FRASER: Am I right to look at paragraph 74 of  
16 your costs submissions {J1/1/17}?  
17 MR WARWICK: My Lord, yes, which is in terms the same as  
18 paragraph 5(a) {J1/3/3}, which I've been working from.  
19 MR JUSTICE FRASER: 5(a)?  
20 MR WARWICK: Yes.  
21 MR JUSTICE FRASER: I think I might have a different version  
22 of the document.  
23 MR WARWICK: It's found at {J1/3/3}, my Lord, under  
24 heading A.1.  
25 MR JUSTICE FRASER: No, I have it on the screen; I'm just

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1 looking in my hard copy document. Just give me one  
2 second.  
3 All right, yes.  
4 MR WARWICK: My Lord, if you'll forgive me, the figures have  
5 changed by reason of the deduction that you have  
6 applied --  
7 MR JUSTICE FRASER: I guessed that they would have done,  
8 because your figures I don't think had any adjustment.  
9 That's not to criticise you: you didn't know if there  
10 was going to be one and, if there was, what it was going  
11 to be.  
12 MR WARWICK: Indeed, my Lord.  
13 MR JUSTICE FRASER: So what are the figures now then?  
14 MR WARWICK: In the time available --  
15 MR JUSTICE FRASER: Incurred figures haven't changed?  
16 MR WARWICK: The incurred figures haven't changed, no.  
17 I beg your pardon, sorry. The budgeted costs, from  
18 which this is taken, were budgeted at £3,480,382.50.  
19 MR JUSTICE FRASER: And 3.1 had been incurred.  
20 MR WARWICK: And 3.1 has been incurred. Actually, on  
21 instruction, a little over that has been incurred: about  
22 £90,000 more. It has been rounded down for simplicity.  
23 MR JUSTICE FRASER: All right.  
24 MR WARWICK: I mention that, my Lord, because there is  
25 obviously a danger in this process in adding rounding

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1 down upon rounding down.  
2 MR JUSTICE FRASER: Well, there might be, but I'm afraid  
3 that's the best that anyone can do.  
4 MR WARWICK: Pausing there for a moment, my Lord, I do also  
5 wish to add that of course there's no difference of  
6 principle between us about your approach to this, my  
7 Lord, save only that Lord Justice Christopher Clarke  
8 observed in Excalibur {J7/22/1}, quite rightly, that you  
9 shouldn't be looking to find the irreducible minimum;  
10 it's rather based on --  
11 MR JUSTICE FRASER: No, I understand that.  
12 MR WARWICK: Indeed, my Lord.  
13 So that figure would fall to £2,790,000 with the  
14 application of a 10% discount.  
15 MR JUSTICE FRASER: Well, hold on one second. At the moment  
16 we're looking at costs from the costs management order  
17 date onwards.  
18 MR WARWICK: Yes.  
19 MR JUSTICE FRASER: So that can purely have a percentage  
20 reduction applied to it --  
21 MR WARWICK: Absolutely.  
22 MR JUSTICE FRASER: -- because I haven't given an indemnity  
23 costs assessment, so there's no detailed assessment.  
24 MR WARWICK: Quite. Quite.  
25 MR JUSTICE FRASER: So what does 3.1 go to?

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1 MR WARWICK: £2,790,000 my Lord. Correspondingly, VAT down  
2 to £558,000.  
3 MR JUSTICE FRASER: VAT to what? £558,000?  
4 MR WARWICK: Correct, my Lord, yes.  
5 MR JUSTICE FRASER: Yes.  
6 MR WARWICK: And the allowance for budgeting costs is  
7 reduced to £27,900 from £31,000.  
8 MR JUSTICE FRASER: That's just a 1%.  
9 MR WARWICK: It's just a 1%, yes. My Lord, you may recall  
10 there is a split approach to that. The initial  
11 preparation of budgets is subject to a cap of 1%.  
12 MR JUSTICE FRASER: Yes.  
13 MR WARWICK: Further cost management costs, which are not  
14 insignificant in a case like this -- there have been  
15 several hearings since April; although I should add,  
16 my Lord, you have made one costs order in respect of one  
17 of those hearings. But nevertheless, they are a large  
18 sum. And just for ease of rounding --  
19 MR JUSTICE FRASER: Can I just check though: this does not  
20 include any of the £300,000 in respect of the consent  
21 order for the recusal?  
22 MR WARWICK: Not at all. That's correct, yes, my Lord.  
23 MR JUSTICE FRASER: Understood.  
24 MR WARWICK: But just making that point good, my Lord, just  
25 1% has been applied as a blanket for the purposes of

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1 estimation, rather than breaking it down.  
2 MR JUSTICE FRASER: Understood.  
3 MR WARWICK: If I may have a moment to reach a total for  
4 that, now that your adjustment has been added. (Pause)  
5 I make that, my Lord, £3,375,900 on the budgeted  
6 costs element.  
7 MR JUSTICE FRASER: Well, all of those figures can be  
8 checked afterwards. But it is incurred costs --  
9 MR WARWICK: Yes.  
10 MR JUSTICE FRASER: -- up to 13 April 2018, which requires  
11 a little bit more analysis, doesn't it?  
12 MR WARWICK: It does, yes. Subject of course, my Lord, to  
13 not applying an approach that would look to find  
14 an irreducible minimum.  
15 MR JUSTICE FRASER: Yes.  
16 MR WARWICK: And those have been taken --  
17 MR JUSTICE FRASER: But your total, or the balance, is what?  
18 It was originally 3.284 and you were looking for  
19 an interim payment of 60% of that --  
20 MR WARWICK: That's right, my Lord.  
21 MR JUSTICE FRASER: -- to reflect your recovery on  
22 a detailed assessment --  
23 MR WARWICK: That's right, my Lord.  
24 MR JUSTICE FRASER: -- and the fact it's not a full  
25 indemnity.

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1 MR WARWICK: That's correct, my Lord, yes.  
2 MR JUSTICE FRASER: Yes.  
3 MR WARWICK: Built into it though, I have to say, my Lord,  
4 was an element of rounding down, because how that figure  
5 has been reached, if I may explain very briefly, is to  
6 take the total incurred costs from the costs budget,  
7 which was £6,142,540.08, and strip out some things that  
8 the costs --  
9 MR JUSTICE FRASER: Well, however it was reached,  
10 Mr Warwick, that's the figures that you've ended up  
11 with --  
12 MR WARWICK: That's right, my Lord, yes.  
13 MR JUSTICE FRASER: -- where you explain what the balance  
14 is, having removed the costs management order budgeted  
15 costs --  
16 MR WARWICK: Yes.  
17 MR JUSTICE FRASER: -- and applying 60% to that.  
18 MR WARWICK: That's right.  
19 MR JUSTICE FRASER: But your 2.384 takes no account, so far  
20 as I can tell, of any percentage reduction for your  
21 recovery, but you say it does take account of the fact  
22 you're not going to recover everything on a detailed  
23 assessment.  
24 MR WARWICK: That's right, my Lord. Yes, it does.  
25 MR JUSTICE FRASER: It does.

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1 MR WARWICK: That proposition is correct.  
2 MR JUSTICE FRASER: But your 2.384 includes VAT on the 1%?  
3 MR WARWICK: It does, my Lord, yes.  
4 MR JUSTICE FRASER: Is there any reason why you have not  
5 given me those figures separately? I'm not saying  
6 I need them separately; I'm just curious.  
7 MR WARWICK: In the skeleton argument, for simplicity, they  
8 are there as just figures; but in the correspondence to  
9 which it refers, they are set out in a little more  
10 detail.  
11 MR JUSTICE FRASER: Yes, all right. Okay.  
12 Is there anything you would like to add on the  
13 figures?  
14 MR WARWICK: My Lord, if I could say: in support of the sum  
15 claimed for incurred costs, as if to stress-test the  
16 figure, one could also look at the period of time that  
17 elapsed since the first CMC. For very obvious reasons,  
18 what is sought here would go back beyond the first CMC  
19 to the time when, for example, the Common Issues were  
20 negotiated and agreed and put into an order and so  
21 forth. They have been in issue since a very early  
22 stages of these proceedings.  
23 But what is interesting to note is that under  
24 your Lordship's costs reporting requirements, first  
25 imposed in fact by the Senior Master under the GLO and

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1 latterly by your Lordship, there have been letters  
2 informing of costs updates along the way, and the  
3 increase between the first CMC before you in  
4 October 2017 and for 13 April 2018 was roughly  
5 £2 million, and that broadly aligns with the underlying  
6 figure that's being claimed here.  
7        Wo whichever way one looks at it, there is support  
8 for that figure in round terms, my Lord.  
9 MR JUSTICE FRASER: So far as your stress test is concerned,  
10 doesn't there have to be some application to your  
11 current paragraph 74(b) in the costs submission  
12 {J1/1/17}, the version that I'm using, to reflect the  
13 90% point?  
14 MR WARWICK: On budgeted costs, my Lord.  
15 MR JUSTICE FRASER: No, no, I'm not --  
16 MR WARWICK: Your 90% that you've just applied in making the  
17 costs order you have, my Lord.  
18 MR JUSTICE FRASER: Right. At the moment, Mr Warwick, your  
19 costs, for understandable reasons, have been dealt with  
20 post-13 April 2018 because they're subject to the costs  
21 management order.  
22 MR WARWICK: Yes.  
23 MR JUSTICE FRASER: And I entirely understand the way you've  
24 taken me through the figures. You applied a reduction  
25 of 90% to the £3.1 million to get to 2.79; yes?

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1 MR WARWICK: Yes, my Lord. Yes.  
2 MR JUSTICE FRASER: Costs incurred up to 13 April, you had  
3 taken a balance and you had applied 60%, but there had  
4 been no 90% analysis because you didn't know I was going  
5 to make a 10% reduction.  
6 MR WARWICK: That's right, my Lord, yes.  
7 MR JUSTICE FRASER: Did you want to tell me what the figures  
8 are with the 10% reduction?  
9 MR WARWICK: Yes. So the figures --  
10 MR JUSTICE FRASER: Because even the most optimistic counsel  
11 I don't think would be maintaining recovery of  
12 an interim payment on account in the same amount as  
13 before they had their costs reduced by 10%.  
14 MR WARWICK: That's well understood, my Lord. Yes, of  
15 course.  
16        So the total of incurred costs that would be said to  
17 be recoverable, but to which I will apply your 10%  
18 reduction, was to be £3,284,835, would now be  
19 £2,956,351.50, to which the 60% is applied, leading to  
20 £1,773,810.90, meaning that the total sought is ...  
21 MR JUSTICE FRASER: Can you just give me the product when  
22 you apply the 60% again, because I didn't note it down.  
23 MR WARWICK: Yes, it is £1,773,810.90.  
24 MR JUSTICE FRASER: Yes.  
25 MR WARWICK: So taken together with the reduced budgeted

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1 costs, that would come to just over £5 million, so 5 --  
2 MR JUSTICE FRASER: No we haven't got there yet. At the  
3 moment we're at £1,773,810, which I think --  
4 MR WARWICK: Yes, my Lord.  
5 MR JUSTICE FRASER: -- doesn't have VAT, does it?  
6 MR WARWICK: I'm so sorry. I beg your pardon. I will just  
7 add that in.  
8 MR JUSTICE FRASER: I want to know what the figures are like  
9 with like. I can only compare them if you do them on  
10 the same basis.  
11 MR WARWICK: Indeed. So the VAT would be reduced to  
12 £354,762.18. And the 1% budgeting figure --  
13 MR JUSTICE FRASER: That's going to be £17,738, isn't it?  
14 MR WARWICK: Indeed, my Lord, yes. £17,738.10.  
15 MR JUSTICE FRASER: I don't think you need to worry about  
16 the 10 pence.  
17        So the total of those three is, please?  
18 MR WARWICK: The total of the VAT and the 1%, or all  
19 underneath that line?  
20 MR JUSTICE FRASER: The £1.773 million plus the VAT plus the  
21 1%.  
22 MR WARWICK: Is £2,146,311.  
23 MR JUSTICE FRASER: All right. Thank you very much.  
24        So your submissions seeking payments on account have  
25 changed, as a result of my 90% ruling, to be £3,379,500

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1 for budgeted costs and £2,146,311 for incurred costs up  
2 to 13 April?  
3 MR WARWICK: That's correct. So the budgeted cost is in  
4 fact £3,375,900.  
5 MR JUSTICE FRASER: £3,375,900? I'm sorry.  
6 MR WARWICK: Correct.  
7 MR JUSTICE FRASER: All right. That's very useful. Thank  
8 you very much. I'm now going to hear from Mr Cavender.  
9        Mr Cavender, I wanted to do that in detail first so  
10 you could see what figures are that are being claimed  
11 against you now, as opposed to the ones claimed against  
12 you in the skeleton.  
13        Submissions by MR CAVENDER  
14 MR CAVENDER: Indeed. Can we go to my skeleton though,  
15 because that outlines what we understood was going on  
16 here and why there are difficulties particularly with  
17 the approach and the incurred costs.  
18        So we outline at 42(a) and (b) {J1/4/14} what we  
19 understood the position to be. This is before the 10%  
20 reductions. But they wanted 100% of budgeted costs and  
21 60% of pre-budget costs.  
22        Then we outline the approach at paragraphs 45 and 46  
23 {J1/4/15} and we rely particularly, where a costs  
24 management order was in place for the budgeted costs,  
25 that 90% of budgeted costs has been awarded in a couple

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1 of cases.  
2 MR JUSTICE FRASER: Yes.  
3 MR CAVENDER: So that is the basis on which we are  
4 proceeding.  
5 Let's take budgeted costs first. 90% of the  
6 £3.1 million - odd plus VAT gives you the 3.3348 figure.  
7 You then have to reduce that by 10% to reflect the  
8 discount of the success.  
9 MR JUSTICE FRASER: The order I've made this afternoon, not  
10 the 90%.  
11 MR CAVENDER: Correct.  
12 MR JUSTICE FRASER: Yes.  
13 MR CAVENDER: So you need to take 90% of --  
14 MR JUSTICE FRASER: The 90%.  
15 MR CAVENDER: Correct. So 90% of the £3,348,000, which  
16 comes to £3,013,200.  
17 MR JUSTICE FRASER: So in other words, the figures that  
18 Mr Warwick has given me don't take account of the 10%  
19 Cleveland Bridge/MacInnes reduction.  
20 MR CAVENDER: Correct.  
21 MR JUSTICE FRASER: And it has to be done as well.  
22 MR CAVENDER: Indeed.  
23 MR JUSTICE FRASER: And if it is, budget costs go to  
24 £3.013 million.  
25 MR CAVENDER: Correct.

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1 MR JUSTICE FRASER: And that extra 90% doesn't really apply  
2 to incurred costs up to April 2018 because they're done  
3 in the old-fashioned way, which Mr Warwick has explained  
4 was a 60% reduction.  
5 MR CAVENDER: My Lord, he does. But the trouble is, and the  
6 trouble with incurred costs, if you look at  
7 paragraphs 49 and 50 of our skeleton {J1/4/16} -- this  
8 is a point we raised in our submissions, served some  
9 weeks ago, but unfortunately it has not been dealt with,  
10 so there's a hole in the information. If you go to  
11 {J1/2/8}, which is our costs submissions, paragraphs 22  
12 and 23, if you could read those.  
13 MR JUSTICE FRASER: Is this the original submissions on  
14 29 March?  
15 MR CAVENDER: Exactly.  
16 MR JUSTICE FRASER: Yes, I have those. Just give me one  
17 second.  
18 MR CAVENDER: So paragraphs 22 and 23 outline that there  
19 can't be any costs of the Common Issues in advance of  
20 the Common Issues being ordered. That was ordered on  
21 25 October 2017. There were quite a lot of costs before  
22 that.  
23 MR JUSTICE FRASER: They were ordered in October which year?  
24 MR CAVENDER: 2017. But all the stuff before that are  
25 general costs of the action that are not generally

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1 currently in play. We asked: if they want to seek  
2 these, they ought to produce us with a figure.  
3 MR JUSTICE FRASER: Yes.  
4 MR CAVENDER: Without a figure, we can't do it. But that  
5 was months ago. We still don't have that figure. We  
6 record that at paragraphs 49 and 50 --  
7 MR JUSTICE FRASER: Of your skeleton?  
8 MR CAVENDER: -- of our skeleton {J1/4/16}.  
9 So quite what to do, it's very difficult to know  
10 whether to put anything in here, because we don't want  
11 to guess. But you're going to have to, in my  
12 submission, if you want to do it on a rough and ready  
13 basis, apply some kind of discount to reflect that lack  
14 of knowledge, that those costs can't be Common Issues  
15 costs.  
16 MR JUSTICE FRASER: And you'd be happy for me to do that in  
17 an impressionistic rather than  
18 a mathematical/arithmetical way, would you?  
19 MR CAVENDER: Well, I'm not very happy about it.  
20 MR JUSTICE FRASER: No, no.  
21 MR CAVENDER: I'd rather get the information. I've ask my  
22 costs junior, who knows about these things, "Come on,  
23 can't we have a stab at it?", but he's very reluctant.  
24 So that's where we --  
25 MR JUSTICE FRASER: Some account will have to be taken of

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1 that.  
2 MR CAVENDER: Or whether you say: well, they've put nothing  
3 in to allow you to do it, so you have no real judicial  
4 basis to do it. It might seem somewhat harsh, on one  
5 view: there must be some costs. But I think you should  
6 be super-cautious about it. If you are going to go down  
7 the route and say, "Well, there must be some costs", you  
8 should reduce it by a margin to ensure that you cover  
9 this degree of uncertainty.  
10 MR JUSTICE FRASER: But remember, this would be a payment on  
11 account of a detailed assessment for costs in that  
12 period, wouldn't it?  
13 MR CAVENDER: Yes, I think that's true. There would be  
14 a detailed assessment in that period.  
15 MR JUSTICE FRASER: Yes. So it doesn't necessarily have  
16 potentially unfair consequences, but it has to be taken  
17 into account in fixing what's a payment on account of  
18 a detailed assessment.  
19 MR CAVENDER: Indeed.  
20 MR JUSTICE FRASER: Understood. All right.  
21 MR CAVENDER: The danger is an overpayment that we might  
22 struggle to get back. This is always the problem.  
23 They have had a fair chance to do this; they haven't  
24 done it. I'm not being unrealistic about it. But I'm  
25 not sure that they haven't done that should be visited

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1 on my client, the uncertainty.  
2 MR JUSTICE FRASER: Understood. All right.  
3 MR CAVENDER: So I hazard to give you a figure that would  
4 encompass that.  
5 MR JUSTICE FRASER: No, I understand that.  
6 MR CAVENDER: My Lord, I have asked to leave it to you  
7 to ...  
8 MR JUSTICE FRASER: Thank you very much.  
9 Anything else?  
10 MR CAVENDER: I think that was all that was in issue,  
11 wasn't it?  
12 MR JUSTICE FRASER: Yes, it was just to -- all right. Thank  
13 you very much.  
14 MR WARWICK: My Lord, might I say one thing as a point of  
15 principle that has arisen out of that?  
16 MR JUSTICE FRASER: Of course you can. I was going to come  
17 back to you on that anyway.  
18 MR WARWICK: I'm very grateful, my Lord.  
19 Reply submissions by MR WARWICK  
20 MR WARWICK: There are just two points here: the Cleveland  
21 90% if I can call it that, and then the pre-first CMC  
22 issue.  
23 The Cleveland 90% has not been applied. But  
24 I should point out, if it hasn't been seen already from  
25 when my learned leader took your Lordship to the case on

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1 which it's based, which was the judgment of  
2 Mr Justice Coulson in MacInnes, at paragraph 28 in that  
3 judgment, which is found at {J7/23/8} --  
4 MR JUSTICE FRASER: Yes, I have that judgment open.  
5 MR WARWICK: It's important to bear in mind in this  
6 analysis, my Lord, that the 90% applied by then  
7 Mr Justice Coulson is regarded as the maximum deduction  
8 that's appropriate in a case where there is an approved  
9 costs budget.  
10 The same reasoning was applied in the later case to  
11 which you have been referred in writing and orally, the  
12 Cleveland Bridge case {J7/27/1}, where Ms Joanna Smith  
13 QC, sitting under section 9, followed then  
14 Mr Justice Coulson's approach pretty much verbatim in  
15 her judgment. I needn't trouble your Lordship by taking  
16 you through that.  
17 MR JUSTICE FRASER: No, I don't think you need to.  
18 MR WARWICK: The point to make here, my Lord, is that my  
19 clients have come in under. So they have come in  
20 significantly -- indeed, more than 10% -- under the sum  
21 that this court has already found to be reasonable and  
22 proportionate for the purposes of costs budgeting. In  
23 my submission, my Lord, there is no basis to apply  
24 a Cleveland 90% reduction in this situation. It would  
25 be for little, if anything.

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1 MR JUSTICE FRASER: I think the real answer is in  
2 paragraph 25 of that case {J7/23/8}, where it said:  
3 "In my view, the ... approved costs budget is the  
4 appropriate starting point for the calculation of any  
5 interim payment on account of costs. CPR 3.18 ... [if]  
6 there is an approved or agreed costs budget, when costs  
7 are assessed on a standard basis at the end of the case,  
8 'the court will ... not depart from such approved or  
9 agreed budget unless satisfied that there is good reason  
10 to do so.' The significance of this rule cannot be  
11 understated."  
12 MR WARWICK: Indeed.  
13 MR JUSTICE FRASER: However, in this case the "good reason"  
14 is the fact that I've only award you 90%.  
15 MR WARWICK: Yes, in a sense the reasoning here is the idea  
16 that somehow the seal has been broken. But the point is  
17 that my clients have come in at 10% below --  
18 MR JUSTICE FRASER: No, no, I understand that. I do  
19 understand that.  
20 MR WARWICK: Yes.  
21 MR JUSTICE FRASER: That is a point -- I'm not sure,  
22 Mr Green, that Mr Warwick is necessarily going to find  
23 it useful to listen to you when he's supposed to be  
24 listening to me, but I might be wrong. You can have  
25 a moment in a second.

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1 But the essential point is, isn't it, that in the  
2 case of MacInnes the judge was dealing with what the  
3 correct interim order should be on account of costs,  
4 taking into account the costs budgeted figure, where  
5 there had been an order for costs?  
6 MR WARWICK: Yes.  
7 MR JUSTICE FRASER: In this case there is an order you get  
8 90% of the Common Issues costs, so there has to be  
9 an adjustment. That's the "good reason", isn't it?  
10 MR WARWICK: My Lord, that's certainly the "good reason" to  
11 apply the adjustment that your Lordship has ordered  
12 should be applied. There is no good reason, in my  
13 respectful submission, to apply a further 10% discount  
14 or deduction I should properly say on the  
15 MacInnes/Cleveland basis, my Lord.  
16 MR JUSTICE FRASER: I think what you are saying is that the  
17 figures you have given me achieve it because you have  
18 done the 90% analysis that I took you through 15 minutes  
19 ago.  
20 MR WARWICK: They do my Lord, yes, and for the further  
21 reason that my clients anyway came in 10% under budget.  
22 MR JUSTICE FRASER: I understand. All right. So you are  
23 under budget.  
24 What about Mr Cavender's point? What I will do is I  
25 will just hear from you on this point, then I'm going to

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1 give the shorthand writers a break and then I'm going to  
2 come back in.  
3 MR WARWICK: Very grateful. The pre first CMC point  
4 my Lord. It is true that at the first CMC before you in  
5 October 17 --  
6 MR JUSTICE FRASER: There were no common issues.  
7 MR WARWICK: The common issues were ordered at that point,  
8 but they have an extremely long history my Lord. They  
9 go right back to pre-action correspondence. If it  
10 assists the court I can take you to where that is found  
11 in the defendant's letter of response.  
12 MR JUSTICE FRASER: It doesn't assist me, but I think your  
13 answer to the point is what?  
14 MR WARWICK: My answer to the point is that on detailed  
15 assessment, as my learned friends rightly identified in  
16 their skeleton, this would be something argued at  
17 detailed assessment, but it would be argued very  
18 strongly by the claimants too that the Common Issues  
19 were a core feature of this litigation, always have  
20 been, and that a substantial proportion of pre-October  
21 2017 costs are entirely referable to that element of the  
22 case.  
23 But if it assists your Lordship's decision-making on  
24 this, as I have already pointed out when I made  
25 reference to a stress-testing process, the increasing

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1 costs which the claimants have incurred between  
2 October 2017 and the cut-off date for these incurred  
3 costs, namely 13 April 2018, was a whisker over  
4 £2 million and that £2 million now roughly aligns and  
5 now exceeds the figure that I gave your Lordship of  
6 £1,773,810, which was the 60% discounted figure.  
7 Therefore, looked at either way, that figure should  
8 properly be regarded as reasonable and proportionate as  
9 an estimate of Common Issues costs that were incurred as  
10 at 13 April. The final point to make my Lord is just to  
11 repeat again that we are not looking to strip everything  
12 out and achieve an irreducible minimum which appears to  
13 be the gravamen of my learned friend Mr Cavender's  
14 submission that we should have nothing for this period  
15 since there are doubts.  
16 Inevitably, my Lord, there are doubts because we are  
17 not at detailed assessment and the production of a  
18 detailed bill of costs in this will be a lengthy  
19 exercise and we are working only with estimated figures.  
20 I have one further point if I may.  
21 MR JUSTICE FRASER: Yes.  
22 MR WARWICK: My learned leader is right to point out that  
23 under first the Senior Master's cost reporting regime  
24 and latterly your cost reporting regime, information  
25 about the level of costs has been reported throughout.

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1 I understand on both sides there has been some wobbles  
2 about that over the last few months --  
3 MR JUSTICE FRASER: What do you mean by wobbles?  
4 MR WARWICK: I'm afraid I don't have full instructions but  
5 I do understand there have been some periods of time  
6 when the parties have not written strictly to the  
7 letter --  
8 MR JUSTICE FRASER: Originally they were supposed to notify  
9 me every time their costs went up by £250,000. Then  
10 they were writing so often that that was changed to half  
11 a million. The most recent letter I received was one  
12 from the Post Office which told me that their costs were  
13 £12.8 million. That was earlier this month but it  
14 didn't include, so far as I know, the £300,000 that was  
15 agreed and the consent order for today about the recusal  
16 costs.  
17 So I'm anticipating another letter very soon about  
18 that and it won't reflect any orders I make today. They  
19 won't be taken into account.  
20 MR WARWICK: I'm grateful my Lord. If I can come good on  
21 that submission by injecting a little more precision --  
22 not -- than your Lordship's summary, I mean in the  
23 submission I made so far. Under the GLO the regime  
24 required a statement of costs to be produced shortly  
25 before the first CMC. That was produced identifying the

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1 claimants' costs at just over £4 million, 4.15 in round  
2 numbers.  
3 MR JUSTICE FRASER: Yes.  
4 MR WARWICK: Through costs reporting letters in the  
5 intervening period running up to 13 April 2018 ongoing  
6 costs were reported first at £250,000 increments and  
7 I think at the very end, perhaps on the first of the  
8 £500,000 increments, I'm afraid I'm not sure but I do  
9 not think anything turns on it.  
10 MR JUSTICE FRASER: I don't think either, I only mentioned  
11 it because you mentioned it.  
12 MR WARWICK: Indeed my Lord. Then when one looked at the  
13 cost budget, one sees the £6.15 million total incurred  
14 cost figure. The difference between the two is  
15 £2 million. In short, my Lord, the claimants had to go  
16 through £2 million during that period in any case and  
17 that is the figure that in fact exceeds the figure that  
18 your Lordship has been given as part of my calculation  
19 after the various deductions today. If your Lordship  
20 forgives the convoluted way of explaining that, that is  
21 my point on it.  
22 MR JUSTICE FRASER: Insofar as I understand that, thank you  
23 very much.  
24 I'm going to rise for ten minutes purely for the  
25 shorthand writers because they are entitled to a break.

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1 I will come back in and give you the brief ruling on  
2 figures on amount, of payments on account, and then we  
3 will deal with the one final outstanding matter which is  
4 whether there should be a detailed assessment ordered to  
5 take place straight away or whether it should wait. So  
6 I will come back in at 3.45.

7 (3.39 pm)

(A short break)

9 (3.51 pm)

10 MR CAVENDER: My Lord, before you rule on that, can I raise  
11 one point. We can check the transcript to make sure  
12 I am right. I was a bit confused about my learned  
13 friend's submissions as to the costs for the incurred  
14 period.

15 On the transcript at page 143, line 9, it is  
16 recorded as my learned friend saying that their incurred  
17 costs at the date of the first CMC was £4.1 million.  
18 I ask: is that right, because if so, that's a much  
19 bigger problem than I anticipated for that uncertain  
20 period.

21 MR JUSTICE FRASER: That would be the first CMC in front of  
22 me which was October --

23 MR CAVENDER: 17.

24 MR JUSTICE FRASER: Okay.

25 MR CAVENDER: I don't know if he misspoke. I thought the

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1 amount would be very much smaller and so I was being  
2 quite relaxed about it. If it was £4.1 million of the  
3 6-odd and we have no detail about it, that becomes a bit  
4 more of a serious problem.

5 MR JUSTICE FRASER: I understand. That can't possibly be  
6 right.

7 MR CAVENDER: I would not have thought so.

8 MR JUSTICE FRASER: What was the page of the transcript,  
9 Mr Cavender?

10 MR CAVENDER: Page 143, line 9. It is not a perfect bit of  
11 the transcript because they have yet to complete it.

12 MR JUSTICE FRASER: All right. Thank you very much.

13 MR CAVENDER: I am sure my learned friend must know what the  
14 costs were at the first CMC because he told us.

15 MR WARWICK: Yes, my Lord, I do. I'm looking at a copy  
16 here. It is not in your bundle my Lord but a copy of  
17 the statement or cost summary that was produced pursuant  
18 to paragraph 35 of the GLO and it was sent to the  
19 defendant, I believe, shortly after 2 October 2017 when  
20 it was prepared and the grand total is £4,180,803.35 --

21 MR JUSTICE FRASER: 4-point ...? We are talking millions?

22 MR WARWICK: Yes, my Lord. £4,180,803.35.

23 MR JUSTICE FRASER: As at October 2017?

24 MR WARWICK: It included estimated costs for the first CMC  
25 as well that was then just about to happen. The major

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1 point that I'm asked to point out which is absolutely  
2 right is that it includes a significant sum for  
3 preparation of the statements of core information which  
4 your Lordship will remember were prepared for each of  
5 the 550, perhaps 560 at that stage, claimants in  
6 considerable detail and at considerable length. That is  
7 a figure that's been mentioned in court previously --

8 MR JUSTICE FRASER: Therefore, it may not make any  
9 difference but I am going to go back to Mr Cavender in  
10 a moment, if I look in paragraph 74 of your skeleton,  
11 74(a) and (b) reading together has a total figure of  
12 £6.384 million. Now, obviously, there will be some  
13 costs prior to the first CMC that aren't Common Issues  
14 costs.

15 MR WARWICK: Yes, my Lord.

16 MR JUSTICE FRASER: But the costs information that you have  
17 already provided to WBD is that 4.1 of the total, which  
18 obviously is going to be bigger than the 3.2 and the  
19 3.1, 4.1 of that had been incurred as at the date of the  
20 first CMC on 2 October?

21 MR WARWICK: Yes, my Lord, although of course including the  
22 then estimated costs of the first CMC itself.

23 MR JUSTICE FRASER: I understand that, some of those will be  
24 Common Issues costs and some won't.

25 MR WARWICK: That is right, my Lord.

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1 MR JUSTICE FRASER: I understand.

2 There you go, Mr Cavender.

3 MR CAVENDER: My Lord, I just reiterate the point about the  
4 uncertainty. We have pointed this out and now we are  
5 talking about £4 million-odd. Maybe some of it is  
6 related partly to Common Issues. Even if you take  
7 £1 million of that, you have £3 million. In my  
8 submission you should be a lot more careful about that  
9 element rather than waiving it through on the basis of  
10 the other amounts we have information about.

11 MR JUSTICE FRASER: When you say waiving it through?

12 MR CAVENDER: Making an interim payment in relation to it.

13 MR JUSTICE FRASER: But it is an interim payment -- the  
14 interesting thing or -- I don't know maybe the  
15 Post Office will decide they would like to start  
16 a detailed assessment sooner rather than later -- but  
17 for this period it is a payment on account of a detailed  
18 assessment.

19 MR CAVENDER: Correct.

20 MR JUSTICE FRASER: Which on the figures that Mr Warwick has  
21 taken me through takes what they say are their common  
22 issues costs up to that date, multiplied by 60% because  
23 of his -- let me think of a neutral way of putting it --  
24 "we are never going to recover everything it's a  
25 taxation point"; to which I then asked him to apply

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1 a further 10% deduction. But you are saying I think  
2 that you don't know how much of those could be  
3 potentially not Common Issues costs.  
4 MR CAVENDER: Correct.  
5 MR JUSTICE FRASER: Up to the date of the first CMC, is that  
6 right?  
7 MR CAVENDER: It is. I have no idea and I shouldn't have  
8 an idea frankly given what we said in our costs  
9 submissions.  
10 MR JUSTICE FRASER: You don't know the precise figure but on  
11 the basis that there is to be a detailed assessment at  
12 some point, which I haven't yet decided, that will all  
13 come out in the detailed assessment.  
14 MR CAVENDER: Of course. It is a timing point but it is  
15 also a cash flow point and trying to get the money back  
16 and those kinds of issues.  
17 MR JUSTICE FRASER: Understood.  
18 MR CAVENDER: If we just sort of -- back of a fag packet  
19 approach -- unfortunately we are in here for reasons  
20 that are not due to my client -- even if you did a --  
21 say 1 million odd of them were definitely related to  
22 Common Issues because they are drafting the statements  
23 of individual particulars etc, you still have a chunk of  
24 costs there whose -- the generation of which is at best  
25 unclear and may not be recoverable at all in this

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1 process.  
2 MR JUSTICE FRASER: Just for precision terms, I don't think  
3 this is back of a fag packet.  
4 MR CAVENDER: It is in the absence of information I mean.  
5 MR JUSTICE FRASER: Well, the information available is,  
6 I think, based on what they have submitted, is that the  
7 total of their Common Issues costs up to 13 April 2018  
8 is £3.2 million. That is the extent of the information,  
9 isn't it? You are saying there should be a delineation  
10 within that of costs as at the first CMC because they  
11 can't possible be Common Issues costs?  
12 MR CAVENDER: Correct.  
13 MR JUSTICE FRASER: I understand.  
14 MR CAVENDER: That's the point and it is a better point when  
15 you realise at that date there is a 4.1 incurred they  
16 say. So it becomes a bigger point. I thought it would  
17 be a little local difficulty. It turns out it is quite  
18 a sizeable point. In my submission you should reflect  
19 that in reducing the interim payment in relation to the  
20 incurred costs to reflect that.  
21 MR JUSTICE FRASER: I understand.  
22 MR CAVENDER: I'm obliged.  
23 MR JUSTICE FRASER: Thank you very much.  
24 MR WARWICK: My Lord, I appreciate you won't want  
25 submissions tennis on this. But with the greatest

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1 respect to my learned friend, it is a better point by  
2 reason of that £4 million figure because between that  
3 figure and the date on which incurred costs ended on  
4 13 April was almost entirely Common Issues work in the  
5 case. Your Lordship will remember that some directions  
6 have been given for Horizon issues matters --  
7 MR JUSTICE FRASER: That's what you say costs £2 million.  
8 MR WARWICK: Indeed, my Lord. In fact very little Horizon  
9 Issues work had been done. There had been limited  
10 disclosure. My learned leader and my learned friend  
11 Mr Cavender had been ordered to meet to agree some  
12 issues. There had some limited disclosure of dimensions  
13 documents --  
14 MR JUSTICE FRASER: What you say is, on the basis of that  
15 information you have read out, one, in broad brush  
16 terms, would take £2 million off the 3.2 and that shows  
17 about 1.2 of the 4.1 had been incurred at the first CMC.  
18 MR WARWICK: Indeed my Lord.  
19 MR JUSTICE FRASER: But whatever it is, this is only  
20 a payment on account.  
21 (3.58 pm)  
22 (Ruling awaiting the judge's approval)  
23 (4.06 pm)  
24 MR JUSTICE FRASER: So is the only outstanding point  
25 therefore whether there should be a detailed assessment

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1 now?  
2 MR GREEN: My Lord, I'm not going to invite you to do that  
3 in light of the interim payment ordered.  
4 MR JUSTICE FRASER: Let me ask Mr Cavender.  
5 Mr Cavender, do you want one to be ordered now  
6 because unless I order one I do not think the claimant  
7 is obliged to agree.  
8 MR CAVENDER: We don't want one now, my Lord.  
9 MR JUSTICE FRASER: Therefore it is unnecessary in this  
10 order to say anything about the time for a detailed  
11 assessment. Is there anything else?  
12 MR GREEN: My Lord, the only thing is the costs of today.  
13 I don't know how your Lordship would like to dispose of  
14 those. I was going to venture to suggest that they  
15 should be claimants' costs in the case.  
16 MR JUSTICE FRASER: Well you have not succeeded on  
17 everything.  
18 MR GREEN: Not on everything, no.  
19 MR JUSTICE FRASER: So why should they be the claimants'  
20 costs in the case?  
21 MR GREEN: Because half the hearing was the permission --  
22 MR JUSTICE FRASER: Some of them would be costs in an appeal  
23 if an appeal happened, wouldn't they?  
24 MR GREEN: I'm in your Lordship's hands.  
25 MR JUSTICE FRASER: Well what costs order are you

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1 suggesting?  
2 MR GREEN: I was suggesting claimants' costs in the case but  
3 if your Lordship orders costs in the case --  
4 MR JUSTICE FRASER: Let me hear from Mr Cavender.  
5 Mr Cavender, what do you want to do about costs today,  
6 what are you asking me?  
7 MR CAVENDER: I rather thought they would be costs in case,  
8 that's what I would expect.  
9 MR JUSTICE FRASER: I think the sensible and fairest thing  
10 is to make them costs in case.  
11 MR CAVENDER: The other thing is the date of payment of the  
12 interim payment. Is it normally 28 days?  
13 MR JUSTICE FRASER: No, it is normally 14.  
14 MR GREEN: My Lord, that is what was agreed with recusal as  
15 well.  
16 MR CAVENDER: Can we ask for 28? I have been asked to seek  
17 28 days, so an extra 14 days. I'm not sure that there's  
18 any real prejudice to the claimants. It is a question  
19 of arranging the funds I suppose and talking to our  
20 shareholder about it.  
21 It is only going to sit in the -- this is another  
22 point I should raise, it is only going to sit in because  
23 they have undertaken to keep it in the solicitor's  
24 client account. So there's that point.  
25 Allied to that, in my learned friend's order, so we

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1 are clear, which is attached to his skeleton, in  
2 relation to that he has a recital that the claimants  
3 agree to hold and not disperse. I spoke to my learned  
4 friend about this, he is happy that that be the  
5 solicitors --  
6 MR JUSTICE FRASER: A fair copy of the order is going to  
7 have to be drawn up by both of you reflecting everything  
8 I have done and I was not necessarily going to, unless  
9 it was agreed, make recitals in the form sought by  
10 either party to be honest because I am going to look at  
11 the recitals in detail, but you would rather that be the  
12 claimants' solicitors?  
13 MR CAVENDER: Yes, it has to be --  
14 MR GREEN: My Lord, the claimants were going to hold it by  
15 their solicitors retaining it.  
16 MR JUSTICE FRASER: So that is a non-point. Time for  
17 payment you want 28 days?  
18 MR CAVENDER: My Lord, yes.  
19 MR JUSTICE FRASER: Mr Green?  
20 MR GREEN: My Lord, I'm not going to quibble --  
21 MR JUSTICE FRASER: You are either going to agree 28 days or  
22 you would like to stick with 14 and then I will decide.  
23 MR GREEN: I would like to stick with 14.  
24 MR JUSTICE FRASER: All right. You can have 21 days  
25 Mr Cavender.

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1 MR CAVENDER: I'm obliged.  
2 Finally I'm instructed to ask for permission to  
3 appeal against the ruling that costs not be reserved;  
4 just that element. I do so on the basis, really two  
5 bases, one is your Lordship identified a distinction  
6 that applied to group litigation --  
7 MR JUSTICE FRASER: Just before you do this, can I just make  
8 an observation?  
9 MR CAVENDER: Yes.  
10 MR JUSTICE FRASER: You haven't had my detailed reasons. If  
11 you make this application now your time will start  
12 running to make the application to the Court of Appeal.  
13 I'm very happy to hear you now.  
14 If you wait until you have had the detailed reasons,  
15 then you would be able to make the application in view  
16 of the detailed reasons and your time would then run  
17 from whenever you make that application. But if you  
18 would like to make the application now I will hear you  
19 now.  
20 MR CAVENDER: It is just a question whether your Lordship is  
21 right about that because you have given reasons. You  
22 are going to give --  
23 MR JUSTICE FRASER: All right. If you want to make it now  
24 that's fine.  
25 MR CAVENDER: I'm instructed to carry on with it. Two

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1 bases, one was the group litigation was different in  
2 some way and my analogy of preliminary issue was not  
3 apposite and was not appropriate. In my submission  
4 there is a real prospect the Court of Appeal may  
5 disagree with that.  
6 Whilst group litigation is a great thing and it gets  
7 Common Issues together and it is a great vehicle and  
8 there are special rules about it, they don't apply to  
9 whether the incidents of costs should go one way or the  
10 other in advance when that would appear to be dependent  
11 on how you group the issues.  
12 What it will do, if it is right, is it will put  
13 enormous premium in the future on agreeing particular  
14 issues being hived off because parties won't want to  
15 agree say just deciding the question of interpretation  
16 if they think well they might lose on that but they win  
17 on breach.  
18 There will be an unhelpful tension in group  
19 litigation and in people agreeing sensible things if  
20 there is a massive cost consequence depending how you  
21 parcel them. That's point 1.  
22 Point 2 is that your Lordship relied on the Court of  
23 Appeal in the David de Jongh Weill case and relied upon  
24 that. If we can return to that which is in bundle 1,  
25 tab 7, paragraph 33. The thing about that that

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1 your Lordship certainly emphasised but is important is  
2 that that principle applied, if you look at 33:  
3 "The fact that only nominal damages are awarded  
4 after a single trial of the issues of liability ... "  
5 {J7/7/10}. It is envisaging a case where liability  
6 has been determined. There has been no liability  
7 determined in this case at all, any liability. There  
8 has just been a determination of the contract. So to  
9 therefore elide the two and say that's authority for the  
10 situation is, in my submission -- is a real prospect on  
11 that and so for those reasons in my submission this is  
12 a case where there is a real prospect.

13 Group litigation seems to be on the increase. There  
14 is a point of principle there about group litigation  
15 costs and whether they in fact -- the way in which  
16 issues are parcelled can affect incidents of costs and  
17 the policy is: that's tough because group litigation is  
18 there, it is all about cashflow and funding and that  
19 should take precedence over absolute fairness. That's  
20 the competition. In my submission that is  
21 an interesting point and we should have permission on  
22 it.

23 MR JUSTICE FRASER: Thank you very much. I'm not going to  
24 give you permission. So the order for today will also  
25 say permission to appeal -- I think Mr Cavender you were

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1 just seeking it in respect of that part of the costs  
2 order that declined to reserve the costs, is that right?

3 MR CAVENDER: That is my Lord but of course the other points  
4 are parasitic on that but we don't specifically say you  
5 got anything wrong assuming you haven't reserved costs.

6 MR JUSTICE FRASER: The order will have to make reference to  
7 the paragraph higher up the order where I declined to  
8 reserve costs.

9 Anything else?

10 MR GREEN: My Lord, one point of finesse --

11 MR JUSTICE FRASER: Would you like permission to appeal in  
12 respect of anything, is that what you are asking?

13 MR GREEN: My Lord, no, that's my learned friend's --

14 MR JUSTICE FRASER: You are not winning everything Mr Green.  
15 Are you asking me -- what are you asking me for?

16 MR GREEN: I was just trying to clarify one point on  
17 drafting the order.

18 MR JUSTICE FRASER: Go on.

19 MR GREEN: In relation to, our draft of the order envisages  
20 the claimants, by their solicitors, holding the money on  
21 account pending determination of the application for  
22 permission to appeal to the Court of Appeal. That's the  
23 issue. It is not in perpetuity, obviously, and that is  
24 reflected in our order. I wanted to say that clearly  
25 this open court.

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1 MR CAVENDER: My Lord that's absolutely right.

2 MR GREEN: I just want that clear. It is not a solicitor's  
3 undertaking by them, it is solicitors agreeing to  
4 perform that function at the claimants' behest.

5 MR JUSTICE FRASER: If there's any wrinkles on the actual  
6 wording of those important parts of the order that you  
7 can't sort out between yourselves, you can of course  
8 come back and ask me.

9 MR CAVENDER: My Lord, the final thing, could I ask for  
10 an extension of time for 21 days from when we get your  
11 written reasons to go to the Court of Appeal so we can  
12 marry up. I have made my submissions based on your  
13 summary reasons. They are probably better if I could --  
14 for the purposes of the Court of Appeal deciding it and  
15 the skeleton, because if the skeleton is at the same  
16 time as the grounds now, if we have an extension of time  
17 for 21 days, when we get your full reasons then that  
18 will be procedurally more sensible.

19 MR JUSTICE FRASER: Just remind me of the rule?

20 MR CAVENDER: You can give permission --

21 MR JUSTICE FRASER: I know I can extend time I would just  
22 rather do it by reference to the specific rule. It is  
23 the same rule that I gave you an extension of time on  
24 the --

25 MR CAVENDER: It is. It is 52.

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1 MR JUSTICE FRASER: The easiest thing might be to look at  
2 the order where I gave you the extension of time in the  
3 Common Issues.

4 MR CAVENDER: 52.12.2, my Lord.

5 MR JUSTICE FRASER: Let me have a look. 52.12.2 (a).

6 MR CAVENDER: Indeed.

7 MR JUSTICE FRASER: All right.

8 MR CAVENDER: We ask for 21 days from the date we receive  
9 the written reasons.

10 MR JUSTICE FRASER: Extension of time to the Post Office to  
11 make an application to the Court of Appeal to 21 days,  
12 starting with the date upon which the managing judge  
13 hands down his written reasons for his costs orders  
14 today.

15 MR CAVENDER: It is on the reservation. I don't know if you  
16 intend to extend beyond that.

17 MR JUSTICE FRASER: Hands down written reasons on his order  
18 declining to reserve the costs on an issues trial. So  
19 that needs to go into today's order, yes? Everywhere is  
20 nodding enthusiastically and between you I am sure that  
21 you can produce a composite order that reflects  
22 everything. Mr Warwick are you about to ask me  
23 something?

24 MR WARWICK: No, my Lord, just to say yes --

25 MR JUSTICE FRASER: All right.

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1 MR CAVENDER: I'm being asked very enthusiastically --  
 2 MR JUSTICE FRASER: Yes, and I think perhaps wrongly but  
 3 I will let you tell me what you are wanting to ask me.  
 4 MR CAVENDER: Whether we ought to try -- and I am not sure  
 5 we can do this actually --  
 6 MR JUSTICE FRASER: Whether we ought to try?  
 7 MR CAVENDER: And extend because you are going to produce as  
 8 I understand it some written reasons as to why you are  
 9 turning down permission on the main appeal.  
 10 MR JUSTICE FRASER: Correct.  
 11 MR CAVENDER: The question is -- because at the moment we  
 12 are under 21 days starting today for the main appeal.  
 13 MR JUSTICE FRASER: You are.  
 14 MR CAVENDER: The question is whether we can it is possible  
 15 to or whether the court should give us 21 days from the  
 16 date when you give your written reasons for refusal or  
 17 not.  
 18 MR JUSTICE FRASER: I have already extended you time.  
 19 MR CAVENDER: No, exactly. I'm not sure you can actually --  
 20 MR JUSTICE FRASER: Go on.  
 21 MR CAVENDER: Whether you can only do it at the time of  
 22 the --  
 23 MR JUSTICE FRASER: I can do it but I can only do it within  
 24 the period prior to expiry. Rather than getting into  
 25 extended tendencious and overly technical debate about

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1 whether it's expired already or not, I would not be  
 2 minded given the two months extension you have already  
 3 had to further extend time.  
 4 MR CAVENDER: No. The only reason to do it in terms of  
 5 procedure is in terms of trying to marry what you say  
 6 and make sure --  
 7 MR JUSTICE FRASER: I understand.  
 8 MR CAVENDER: But nothing is perfect.  
 9 MR JUSTICE FRASER: The written reasons for refusing you  
 10 permission to appeal have got to go in the form that  
 11 I referred to this morning N460.  
 12 MR CAVENDER: Quite, which are quite brief anyway.  
 13 MR JUSTICE FRASER: Exactly. All right. Anything else?  
 14 MR CAVENDER: I do not think so, my Lord, no.  
 15 MR JUSTICE FRASER: Anything else?  
 16 Thank you all very much. Until 4 June, although  
 17 I imagine not all of you will be here then, but that's  
 18 when this case will next sit. It is 4 June, isn't it?  
 19 MR GREEN: My Lord, yes.  
 20 MR JUSTICE FRASER: Thank you all very much.  
 21 (4.19 pm)  
 22 (The court adjourned until Tuesday, 4 June 2019)  
 23  
 24  
 25

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