

Notes for recusal application

Subject matter	Scope of relevant/ admissible material	Improper findings	Attempted justifications, if any
Training	<p>The only way the training in fact received could be relevant to the implication of this term, or to any other Common Issue, is as factual matrix, insofar as the training was provided before entry into the relevant contracts.</p> <p>The findings which the judge made on contested issues regarding the factual matrix are listed at Judgment, para 569. He does not include in the factual matrix any findings on the quality of training received. He does record (at Point 70 of the Factual Matrix) that on “<i>the evidence of the six Lead Claimants, even when further training was specifically requested it was not provided, and in some cases the SPM was told there was no entitlement to it, even though it was specifically requested</i>”. It is not clear, though, what role this part of the factual matrix plays in any subsequent findings.</p>	<p>The Judge made findings on the adequacy of the training received by the LCs at Judgment, paras 193, 297, 346, 352, 437, 955.</p>	<p>No specific attempted justifications.</p> <p>Judge did stress, in oral argument, that PO had led some evidence on training. That was not surprising, in circumstances where there was some (very limited) potential relevance (as possible factual matrix).</p> <p>Led to this exchange:</p> <p><i>Page 32</i> <i>24 We also say it was somewhat cynical of the claimants</i> <i>25 to take this approach because there has not been full</i></p> <p><i>Page 33</i> <i>1 disclosure on either side dealing with the issues they</i> <i>2 now seem to want to be dealt with. In particular ,</i> <i>what</i> <i>3 we call the breach allegations , we only have a few</i> <i>4 documents that happen to be caught in the net of the</i> <i>5 word searches. Your Lordship should not think that</i> <i>we</i></p>

<p>So the adequacy of the training which the 6 LCs in fact received was not relevant to the Common Issues Trial (“CIT”).</p> <p>The adequacy of training will however be relevant to future breach trials, as follows.</p> <p>The Cs allege (at para 64.1 of the Amended Generic Particulars of Claim (“AGPoC”)) that there was an implied term that PO was obliged to provide “adequate training and support”.</p> <p>Part of the function of the CIT was to decide whether this term should be implied. He decided it should be: Judgment, paras 750 (where he tweaked the wording from the Cs’ pleading slightly, perhaps by accident); 1122(2).</p> <p>Additionally, the Cs allege (at para 63A of the AGPOC) that when PO supplied training regarding Horizon or the Helpline in the course of its business, there was a term implied (by statute) that Post Office would do so with reasonable care and skill.</p>	<p>6 have full disclosure on all these issues . We do not. 7 And the real temptation here is to think you have and to 8 draw inferences from an incomplete documentary record, 9 incomplete evidence, which would in my submission be 10 obviously wrong. 11 So, for instance , your Lordship should not be fooled 12 into thinking there has been anything like proper 13 disclosure on allegations as to training or shortfalls 14 or investigations . Your Lordship did not order such 15 disclosure , there has not been such disclosure , and 16 Post Office has not led evidence on those issues . My 17 learned friend has put questions on those areas - - 18 MR JUSTICE FRASER: You have led evidence on training . 19 MR CAVENDER: My Lord, only very, very high level . I think 20 it was a couple of paragraphs -- 21 MR JUSTICE FRASER: Quite a lot of your evidence was high 22 level in some areas, and I ’ m not criticising , I ’ m 23 observing, but you did lead evidence on training . 24 MR CAVENDER: My Lord, only just high level evidence. If 25 you wanted evidence on training , we would have evidence Page 34 1 from trainers and the proper documentary record of the</p>
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	<p>The Judge found that (a) there was no need for this term because of his finding as to the more general implied term requiring training (para 771), (b) no term should be implied pursuant to statute, and (c) that the provision of materials as part of the training process fell within the more general term re training which he had already implied (para 781).</p> <p>The AGPOC alleges, at para 92, that PO breached its duties by providing inadequate training.</p> <p>So the adequacy of training will be an issue at future breach trials.</p>	<p><i>2 plans et cetera . All we did was have a few slides , that</i> <i>3 wasn't proper evidence.</i> <i>4 The other thing about training of course is it is</i> <i>5 wholly irrelevant . Why? Because my learned friend's</i> <i>6 case is that all the contracts were made in advance of</i> <i>7 even initial training , let alone subsequent training , so</i> <i>8 the whole question is wholly irrelevant .</i> <i>9 MR JUSTICE FRASER: The irrelevance point I understand, but</i> <i>10 it is wrong to submit you didn't put in any evidence on</i> <i>11 training - -</i> <i>12 MR CAVENDER: We didn't put any proper evidence on</i> <i>13 training - -</i> <i>14 MR JUSTICE FRASER: Mr Cavender, there is no distinction</i> <i>15 between putting in evidence and putting in proper</i> <i>16 evidence. You might have a point that it could have</i> <i>17 been more comprehensive --</i> <i>18 MR CAVENDER: There has been no disclosure on training.</i> <i>19 MR JUSTICE FRASER: There might not have been. But you did</i> <i>20 put in evidence on training because some passages of</i> <i>21 your witness statements expressly deal with training .</i></p>
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			<p>22 MR CAVENDER: My Lord, yes, there is a paragraph or two in</p> <p>23 Mrs Van Den Bogerd's statement that on a very high level</p> <p>24 says . But not evidence of training where your Lordship</p> <p>25 can make any finding. Her evidence is about what could</p> <p>Page 35</p> <p>1 have been known or anticipated at the date of inception,</p> <p>2 that is what her evidence goes to if you look at it , not</p> <p>3 the actual experience of training , how good or bad it</p> <p>4 was, were shortfalls dealt with in sufficient detail ,</p> <p>5 which is the point my learned friend wants it for.</p> <p>6 MR JUSTICE FRASER: By "date of inception " , do you mean ...</p> <p>7 MR CAVENDER: The contractual date.</p> <p>8 MR JUSTICE FRASER: The contractual date.</p> <p>9 MR CAVENDER: Indeed. That is why it is so general.</p>
Helpline	<p>It is difficult to see how the quality of the service in fact provided by the Helpline could be relevant to the implication of any term, or to any other Common Issue.</p> <p>The only legitimate relevance could be to determine whether provision of the Helpline was part of the general provision of Horizon.</p>	<p>The Judge made findings on how the Helpline in fact operated, including whether it was of an adequate quality as experienced by these LCs, at paras</p>	<p>The Judge's position appears to be that all of this evidence is relevant to answer Common Issue 13: see Judgment, paras 54, 55, and para 569 Factual Matrix Point 32.</p> <p>Common Issue 13 is "Did Subpostmasters bear the burden of proving that any Branch Trading Statement account they signed and/or returned to the Post Office was incorrect?"</p>

	<p>That came through in the judge's analysis as follows.</p> <p>As noted above, the Cs allege, at para 63A of the AGPOC, that when PO supplied the Helpline to SPMs in the course of its business, there was a term implied (by statute) that Post Office would do so with reasonable care and skill.</p> <p>The Judge found (at para 777) that this term should not be implied by statute.</p> <p>However, he also found, at para 778, that "<i>the Helpline is an integral part of Horizon</i>", and that provision of the Helpline therefore fell within the scope of the term which he had implied at para 749: "<i>To provide a system which was reasonably fit for purpose, including any or adequate error repellency.</i>"</p> <p>(He also found, in the alternative, that a term should be independently implied that the Helpline should "<i>be operated with reasonable care and skill</i>" (paras 779-780).)</p>	<p>248, 249, 303, 357, 556, 558.</p>	<p>A Branch Trading Statement is what the Subpostmaster submits at the end of each trading period to show his trading figures. It is generated through Horizon. If he disagrees with any apparent shortfall appearing in the statement, he needs to register that dispute with the Helpline. The procedure which is supposed to be followed is agreed: see Appendix 3 to the Judgment.</p> <p>The Judge says that, to answer Common Issue 13, he needed to know how the Helpline operated in practice. This is part of his more general contention that how Horizon operated in fact (within which he included the operation of the Helpline) was part of the factual matrix: Judgment, para 55.</p> <p>But that is wrong. At most, the structure of how registering a dispute was supposed to work could be relevant matrix. How the Helpline in fact interacted with individual LCs could not be.</p>
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	<p>But making those findings only required analysis of what the Helpline was at a very high level – it did not require going in to the detail of the quality of service experienced by particular LCs.</p> <p>The service in fact provided by the Helpline is, however, relevant to the Cs’ allegations of breach.</p> <p>They say that PO breached its obligations by (a) generally providing poor quality support through the Helpline (AGPOC, para 30 taken with para 93) and (b) telling Cs, including through the Helpline, that there were no problems with Horizon (AGPOC, para 103).</p>		
Post Office’s knowledge of problems with Horizon	<p>It is an important part of Cs’ case on breach that PO knew of problems with Horizon, and made misrepresentations in that regard: AGPOC, para 115. Denied in Defence and Counterclaim, para 156.</p> <p>It is difficult to see how Post Office’s alleged knowledge could be relevant to any Common Issue. At para 569, Factual Matrix Point 61 the Judge said that “<i>The Post Office has on</i></p>	The Judge made findings as to Post Office’s knowledge at paras 348, 541, 543.	

	<p><i>occasion detected that Horizon generated errors caused the appearance of shortfalls and errors which the Claimants themselves had not been able to identify as the cause of those apparent shortfalls.” It is not clear though why that would be relevant factual matrix. In any event, the findings made in the Judgment (see next column) go beyond this.</i></p>		
Causes of shortfalls	<p>What caused particular Cs’ shortfalls will obviously be the heart of future breach trials, and is also at the heart of the current ongoing trial, which focuses on whether and to what extent problems with Horizon existed).</p> <p>The Cs will say that their apparent shortfalls were in fact generated by Horizon. PO will say that is extremely unlikely. See AGPOC para 24.2; Defence and Counterclaim, paras 16 and 55.</p> <p>Notably, the Judge accepts, at para 569, Factual Matrix Point 41, that it “<i>is a matter for the Horizon Issues trial whether it would be right to infer or presume that a shortfall and loss was caused instead by a bug or error in Horizon.</i>”</p>	<p>The Judge makes comments/ findings which go to the cause of the LCs’ shortfalls (in particular, accepting Claimant evidence that the shortfalls appeared inexplicable, that they took all possible measures to work out what could have caused them, etc) at paras 170, 172, 219, 302, 309, 311.</p>	<p>As above, the Judge’s position is that all this material is relevant to answering Common Issue 13, because it informs his analysis of the status of a Branch Trading Statement: Judgment, para 55.</p> <p>But it is very difficult to see how individual experiences could, or should, affect that analysis. This just seems to be a lot of post-contractual evidence, none of which can legitimately be part of the factual matrix.</p>

	<p>He also accepts, at para 569, Factual Matrix Point 79: <i>“Whether losses in branches arise in the ordinary course of things without fault or error on the part of Subpostmasters or their assistants can only be determined after the Horizon Issues trial. This is dependent upon the answers to the Horizon Issues, as the Horizon system is used by SPMs in “the ordinary course of things”.”</i></p> <p>So effectively, he accepts that the cause of particular shortfalls was not within the scope of the CIT.</p> <p>Oddly, he goes on to include in the Factual Matrix, at Point 60, that <i>“There is no evidence available to demonstrate that any SPM has, to date, ever been able to establish to the Post Office’s satisfaction that an alleged shortfall was the result of a Horizon bug or error.”</i> (emphasis in original) It is difficult to see how this could be relevant matrix.</p>	<p>This links also to more general findings he made on what Horizon did and did not allow the Cs to do, as part of the list of Factual Matrix Points at para 569. See Points 34, 50-51, and 54-57. See also para 824.</p> <p>These points are all squarely within the current (Horizon) trial.</p>	
Post Office’s investigation	<p>Cs allege, at AGPOC para 64.7, that there was an implied term obliging Post Office to <i>“make reasonable enquiry, undertake</i></p>	<p>The Judge made findings/ observations on</p>	

<p>of apparent shortfalls</p>	<p><i>reasonable analysis and even-handed investigation, and give fair consideration to the facts and information available as to the possible causes of the appearance of alleged or apparent shortfalls (and the cause thereof)</i>". They also allege related or associated obligations at paras 64.4 and 64.5.</p> <p>And they allege, at para 64.6, an implied term obliging PO to "<i>disclose possible causes of apparent or alleged shortfalls (and the cause thereof) to Claimants candidly, fully and frankly</i>".</p> <p>The Judge agreed that all of these terms should be implied: Judgment, paras 746, 1122(2).</p> <p>It follows that it will have to be determined, at future breach trials, to what extent, if any, PO breached those obligations, by failing to investigate adequately and/or failing to disclose what it knew to the Cs as they were investigating the apparent shortfalls. As to breach allegations, see AGPOC paras 94, 96 and 98.</p>	<p>the quality of Post Office's investigations at paras 115, 165, 208, 557.</p> <p>The Judge also made findings about Post Office not assisting LCs' own investigations by disclosing things that PO knew at paras 217(2) and 223.</p>	
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	<p>As far as relevance to the CIT goes, the Judge, as noted above, found as part of the matrix (para 569, Factual Matrix Point 61) that PO sometimes knew that errors were caused by Horizon. But even if that was relevant matrix, it still does not extend to (a) disclosure of what PO knew, or (b) the quality of PO's own investigations of shortfalls. Neither is suggested to be part of the matrix.</p>		
Whether suspensions/ terminations were lawful	<p>Cs alleged, at AGPOC 64.13, an implied term that they could not be suspended (a) arbitrarily, irrationally or capriciously, (b) without reasonable and/or proper cause, and (c) in circumstances where PO was itself in material breach of duty.</p> <p>Similarly, Cs alleged an implied term that their contracts could not be terminated (a) arbitrarily, irrationally or capriciously, (b) without reasonable and/or proper cause, and (c) in circumstances where PO was itself in material breach of duty.</p> <p>The Judge implied these terms, with the qualification that he limited part (c) to "<i>circumstances where the Defendant was itself in material breach of duty in respect of</i></p>	<p>The Judge made findings/ observations on the reasonableness of PO's behaviour in suspending/ terminating these LCs at Judgment, paras 20, 263-264, 402-403, 479-480, 514-515, 723(2).</p>	

	<p><i>the matters which the Defendant considered gave it the right to suspend” or terminate: Judgment, paras 747, 748.</i></p> <p>How PO in fact acted on particular occasions when it suspended/ terminated cannot be relevant to whether a term of this kind should be implied.</p> <p>Cs then allege that PO breached its obligations in the circumstances/ manner in which it suspended/ terminated the Cs: AGPOC, para 99. This includes, for example, the allegation that PO suspended/ terminated “<i>without investigating and/or giving reasonable consideration to the circumstances giving rise to</i>” losses.</p> <p>Obviously that question will have to be determined at future breach trials.</p>		
Harassment	<p>Cs allege that PO committed this tort. The harassment is said to consist of actions including demanding payment of shortfalls (AGPOC, para 119).</p> <p>It is difficult to see how this could be relevant to the CIT.</p>	<p>The Judge made findings on PO demanding payment at Judgment, paras 222, 327, 462,</p>	<p>The Judge did include in the factual matrix (para 569, Factual Matrix Points 35 and 40) findings that PO pursued debts from the Cs without regard to whether they were disputed.</p> <p>He justified this, in part (i.e. referring to Point 35, but not Point 40) by saying that it was</p>

		516, 517, 723(1), 723(4).	relevant to Common Issue 13 whether a disputed Branch Trading Statement was still treated as binding by PO. But how PO behaved in fact cannot be relevant to the objective legal analysis of the Branch Trading Statement's status. If PO wrongly relied on a Branch Trading Statement in one circumstance, that cannot affect what its legal status, as a matter of contract and/or agency law, is.
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