

Case Nos: HQ16X01238, HQ17X02637 & HQ17X04248

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

The Rolls Building
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London EC4A 1NL

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Before:

MR. JUSTICE FRASER

ALAN BATES AND OTHERS

Claimants

- and -

POST OFFICE LIMITED

Defendant

**MR. PATRICK GREEN QC and MR. HENRY WARWICK and MR. OGNJEN
MILETIC (instructed by Freeths LLP) for the Claimants**

**MR. DAVID CAVENDER QC, MR. SIMON HENDERSON and MR. JAMIE
CARPENTER (instructed by Womble Bond Dickinson (UK) LLP) for the Defendant**

P R O C E E D I N G S

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(Recording only starts at 14:19)

A

MR. JUSTICE FRASER: That depends on there is a catchall error code, does it not?

MR. GREEN: It does and that may be one which either there is no error code or a catchall miscellaneous.

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MR. JUSTICE FRASER: Yes.

MR. GREEN: That, we say, is helpful information.

MR. JUSTICE FRASER: You do not get that.

MR. GREEN: Sorry.

C

MR. JUSTICE FRASER: You do not get to have that, because you do not know what the error codes are?

MR. GREEN: Precisely, exactly. My Lord, that is the broad position. May I go in reverse order?

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MR. JUSTICE FRASER: What about 12(m), perhaps that is not agreed, is it?

MR. GREEN: What they have done, they have put in paragraphs 10 to 12 of their schedule behind the Annex to their skeleton.

MR. JUSTICE FRASER: Sorry, Annex?

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MR. GREEN: They have Annex A which is their order. At the end of that, just after paragraph 15, is Schedule 1 to the defendant's draft order.

MR. JUSTICE FRASER: Yes.

MR. GREEN: At 10 to 12 they have made the provision that they agreed to make in respect of that section. What it captures is the policies and processes about database of ----

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MR. JUSTICE FRASER: Which number are you looking at?

MR. GREEN: At 10.

MR. JUSTICE FRASER: Yes.

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MR. GREEN: Policies and processes, including relating to the implementation of fixes that had the ability to impact upon branch accounts or transactions.

MR. JUSTICE FRASER: Yes.

MR. GREEN: Logs in Horizon of when database administrator access had been used and how it was used. Then documents containing lists of individuals who have or have had database administrator access to the audit store from 1999 to date.

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MR. JUSTICE FRASER: Which one is (k) and which one is (l)?

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MR. GREEN: They conflated all three to cover (k), (l) and (m) so, (l) is logs of when database administrator access has been used and how it was used in our proposal. They repeat that at 11, so that is fine.

MR. JUSTICE FRASER: So 10, 11 and 12 between them ----

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MR. GREEN: Cover (k), (l) and (m).

MR. JUSTICE FRASER: 12(k), 12(l) and 12(m).

C

MR. GREEN: Exactly. I think the only bit that is not covered is the end of 12(m), three lines up from the bottom: "and in what circumstances can those individuals have the ability to use such access?" To be fair that is actually more like a request for information than disclosure. If there is a document that explains that it would be helpful to have it disclosed.

MR. JUSTICE FRASER: Understood.

D

MR. GREEN: That is all there is between us on that. When we then look at the third parties point, if I can take that, that is 3 and 9.

MR. JUSTICE FRASER: Are you leaving custodians until later?

MR. GREEN: Straight after third parties, if I may.

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MR. JUSTICE FRASER: You can do it in whichever order that you want. So we are on to third parties.

MR. GREEN: Which is number 3 and number 9.

MR. JUSTICE FRASER: Yes, which I think you said an introductory only, you accept, could be more clearly defined.

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MR. GREEN: Yes, I mean, we took it from their pleading where they talk about transactions with third parties, that is fine.

MR. JUSTICE FRASER: I understand. Are you suggesting an alternative definition now that does more clearly refine it?

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MR. GREEN: I sought to try and explore that with my learned friend this morning and I think the defendant's position is that they do not agree to any of the third parties with whom they did transactions at all being included. But what we would say are third party clients with whom Post Office undertook transactions, e.g. Bank of Ireland because that is the example the parties have canvassed in correspondence as typifying that group.

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But that is opposed in principle by my learned friend on the basis that if a third party

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responds and said, "Look, we are a bit worried about the data that is coming back to us on these transactions, have you got a bug?", they say that will be captured by the custodians we have got for other documents. Our submission in answer to that is a very simple one. If my learned friend is right that it is captured anyway there is no additional burden.

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MR. JUSTICE FRASER: It depends if the capturing is a subset of the wider set which would be caught by the wording of the order.

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MR. GREEN: That is true. They certainly will not have to disclose anything more but the difficulty for us, and there is some concern, I will show your Lordship why in a minute, but we are still guessing, your Lordship helpfully made the order about four tiers management and we are still guessing at where this information would go within the Post Office.

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MR. JUSTICE FRASER: Understood.

MR. GREEN: Whereas they know.

MR. JUSTICE FRASER: Understood.

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MR. GREEN: So, that is why we are quite keen to try and make sure that if something more than a one-off is coming back from a client facing Post Office saying, "Have you got a problem with this?", we would like that document.

MR. JUSTICE FRASER: Understood, but whether disclosure is the right way to go about it is a mute point.

F

MR. GREEN: Precisely, because your Lordship is quite right, it may be a 35.9 point where they have got the information and we do not and they just tell us.

MR. JUSTICE FRASER: That is the definition of third parties. Is there anything else you want to add about that?

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MR. GREEN: No, that is it. That is the numbers 3 and 9.

MR. JUSTICE FRASER: And then custodians.

MR. GREEN: Then in relation to custodians those are 1(a) or number 1.

MR. JUSTICE FRASER: I think they are 1, 2, 7, 8, 10 and 13.

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MR. GREEN: Precisely. The custodians are defined, as your Lordship has seen there are three categories.

MR. JUSTICE FRASER: Where is the best place to look at this?

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MR. GREEN: At the front of this landscape document, your Lordship will see Category 1 Custodians.

MR. JUSTICE FRASER: Yes.

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MR. GREEN: It is based on the management structure that your Lordship ordered Post Office to provide in four layers. Category 1 Custodians is the Board of Directors or Group Executive which is the same layer or historic equivalent. Next is any Senior Leaders reporting to the Group Chief Information Officer identified at paragraph 4.6 for the management structure. So that is our best guess as to the reporting line in to the Group Chief Information Officer. I can show your Lordship the diagram if that would help.

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MR. JUSTICE FRASER: Yes.

MR. GREEN: It is in the hearing bundle and it is at tab 4 on page 113.

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MR. JUSTICE FRASER: That is not a diagram but it is the structure.

MR. GREEN: Yes.

MR. JUSTICE FRASER: Yes.

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MR. GREEN: Your Lordship sees there is the Board of Directors and Group Executive, so top two categories there. The Chief Information Officer is at 2.1.3. Your Lordship will appreciate, for example, 2.1.5 is Company Secretary and Group Legal Risk and Governance Director. We have not chosen that but it is difficult for us to know, for example, Chief Executive of Retail, for example 2.1.6, we are guessing really, we have to pick one to be focused but for the moment we are flying slightly blind on that. There are three Permanent Board Subcommittees. Of those the only one we think is relevant is the Audit Risk and Compliance Committee.

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MR. JUSTICE FRASER: Remuneration Committee cannot possibly ----

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MR. GREEN: Nor the nominations. The only one that is relevant in 3.1 is the Audit Risk and Compliance Committee. At the moment, we are not asking for anything from that either. We are trying to be as focused as possible but Senior Leaders are explained at 4 and who reports into where I am afraid the double-sided printing has left a blank page between each.

H

MR. JUSTICE FRASER: Right.

MR. GREEN: At 115 your Lordship will see who is reporting into whom effectively.

- A** MR. JUSTICE FRASER: Is that a new one (*unclear*) people are reporting to the Chief Information Officer?
- MR. GREEN: We have.
- MR. JUSTICE FRASER: Is that page 117?
- B** MR. GREEN: It is page 117, item 4.6, and that looks to us to be the most likely to be correct.
- MR. JUSTICE FRASER: What is FS?
- MR. GREEN: Financial Services I think; is that right? It is in one place it is Financial Services and I am not sure it is here.
- C** MR. JUSTICE FRASER: We will leave it for the moment.
- MR. GREEN: I am not sure that is right in this instance actually.
- MR. JUSTICE FRASER: Let us come back to it.
- MR. GREEN: In any event you will see there are a number of other areas upon which we could easily have alighted. We have not. We have tried, at least at this stage, to make a
- D** focused question and see what we get to try and hopefully hit the target flying blind.
- MR. JUSTICE FRASER: That may very well be the case. What do you have to say specifically in response to the point Mr. Cavender made which is, even on that basis you are asking in respect of at least 97 people and, based on their experience to date, it is
- E** going to be vastly disproportionate and expensive.
- MR. GREEN: My Lord, if you look at what they are proposing, they are also proposing ----
- MR. JUSTICE FRASER: Where should I be looking now?
- MR. GREEN: If you go back to Schedule 1 of their order that we looked at earlier, it is
- F** behind their skeleton and just behind Annex B.
- MR. JUSTICE FRASER: Yes.
- MR. GREEN: They define Senior Management as Post Office Board of Directors or Group Executive or historic equivalence which we have mirrored and then they have called
- G** Post Office's IT team, the Chief Information Officer and the Senior Leaders within Post Office's IT Team responsible for Horizon.
- MR. JUSTICE FRASER: Yes.
- MR. GREEN: Which is fine if there is any material difference between us.
- H** MR. JUSTICE FRASER: I thought there was a material difference on custodians.

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MR. GREEN: Well, the point is that the number of people that we understand to be talking about is a large number of those in any event are captured by their own definition.

MR. JUSTICE FRASER: That might be right, but that is not an answer to your point that your wording, according to Mr. Cavender, captures at least 97 people over a particular period of time.

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MR. GREEN: Yes.

MR. JUSTICE FRASER: One imagines, by definition, it does not otherwise he would not be suggesting that wording.

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MR. GREEN: My Lord, that is right but it is the imagines bit that we have a problem responding to because we do not know what they say it is captured by theirs and if the difference is between 91 and 97, then the decision proportionality is more marginal than if the difference is 20 to 97.

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MR. CAVENDER: If my learned friend reads paragraph 13 of my skeleton.

MR. JUSTICE FRASER: Paragraph 13?

MR. CAVENDER: Paragraph 13, my Lord, yes.

MR. JUSTICE FRASER: So it is ten plays 97, not 91.

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MR. GREEN: It was not clear to us reading that whether that is the position of how many there are today or whether it is apples and pears or apples and apples.

MR. JUSTICE FRASER: All right. I have that point. Is there anything else on custodians?

MR. GREEN: My Lord, yes, because we have got Category 3 Custodians who come in.

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MR. JUSTICE FRASER: Give me one second to navigate my way around.

MR. GREEN: That is the landscape one.

MR. JUSTICE FRASER: Category 3, that is a landscape, yes.

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MR. GREEN: On the top of page 2, shall mean: "Members of the Defendant's management teams responsible for drafting and implementing the Defendant's policies in respect of the recovery of branch account shortfalls from Subpostmasters, including members of the Counters Risk Management Committee and their functional equivalents." My Lord, this is to capture any changes to any consideration by that committee of difficulties with Horizon that were being reflected in the policies that Post Office was then applying to post masters.

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MR. JUSTICE FRASER: Category 3 I think applies in respect of 1(b).

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MR. GREEN: Correct.

MR. JUSTICE FRASER: 8(g).

MR. GREEN: Correct.

MR. JUSTICE FRASER: And (h). Any others? Yes, also 10(i).

MR. GREEN: Yes.

B

MR. JUSTICE FRASER: Effectively that seems to me on the face of what I have read and what you have just drawn my attention to, to be a difference in respect of how this class of custodian is described rather than -- I might be wrong, if I am one of you will correct me -- a disagreement in principle.

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MR. GREEN: I think they disagree with that category in principle but my learned friend perhaps can qualify. May I show your Lordship where we got it from because it is in tab 2 of the hearing bundle?

MR. JUSTICE FRASER: Yes.

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MR. GREEN: Your Lordship knows the genesis of these proceedings with very early correspondence, I think at the end of 2015, early 2016, on Friday before half term, 18th May, we received for the first time the document at tab 2 of the hearing bundle.

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MR. JUSTICE FRASER: I think the Friday was actually the 25th May, the Friday before half term.

MR. GREEN: Sorry, the one before that, yes, it is quite right.

MR. JUSTICE FRASER: Yes.

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MR. GREEN: On 18th May, in any event.

MR. JUSTICE FRASER: Yes.

MR. GREEN: The Post Office losses and ----

MR. JUSTICE FRASER: Where am I looking now?

MR. GREEN: I am so sorry, hearing bundle tab 2.

G

MR. JUSTICE FRASER: Yes, page?

MR. GREEN: Page 13.

MR. JUSTICE FRASER: The actual facing page, yes, losses and gains.

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MR. GREEN: This is the losses and gains policy within the Post Office agency network.

MR. JUSTICE FRASER: Yes.

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MR. GREEN: Which in a case about losses and gains policy within the Post Office necessary work and the Horizon system is obviously quite important.

MR. JUSTICE FRASER: Yes.

B

MR. GREEN: It introduces, it explains the guidance very pertinently on common issues as well because it recites the contractual position at one place and then later on said they are liable for all losses when they are actually doing the detailed guidance, not ones based on negligence. There is that side of it but it also explains the committee that is dealing with these guidelines themselves on page 17.

C

MR. JUSTICE FRASER: Page 17.

MR. GREEN: Which is a committee which until we saw this we were not aware of.

MR. JUSTICE FRASER: But count as risk management ----

MR. GREEN: Risk Management Committee.

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MR. JUSTICE FRASER: Hold on. So when you got this document you became aware that there is committee.

MR. GREEN: Indeed.

MR. JUSTICE FRASER: And did you have use that as a basis for drafting your Category 3.

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MR. GREEN: Yes.

MR. JUSTICE FRASER: Is that the short point?

MR. GREEN: Exactly, because what became apparent to us was, for example, this document, my Lord, provides for a right of a Postmaster to have an appeal in relation to any alleged loss.

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MR. JUSTICE FRASER: Yes.

MR. GREEN: Which they can request to be face-to-face, accompanied by a friend or a union rep.

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MR. JUSTICE FRASER: Understood.

MR. GREEN: It certainly did not happen in Mr. Bates' case.

MR. JUSTICE FRASER: All right, put that to one side for the moment.

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MR. GREEN: Yes, and we have what they disclose in the 2016 model, is that you can write in for an appeal and we will look at it. So, there has been quite a lot of changes shall we say.

MR. JUSTICE FRASER: Are there any others, this is 98, is it not, this document?

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MR. GREEN: This is November 98, page 14, we have at the moment, and we have not had time to get on top of them precisely.

MR. JUSTICE FRASER: Understood.

MR. GREEN: We have a series of some undated and differently titled documents bearing upon this issue.

B

MR. JUSTICE FRASER: Understood.

MR. GREEN: They have obviously got some relevance to the Common Issues Trial but at the moment we are just focusing on this for the purpose of to what extent the Counters Risk Management Committee were receiving information about errors of Horizon, that is all and that is why they are Category 3. I believe that category is disputed.

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MR. JUSTICE FRASER: Tell me if I am wrong, Category 3 is designed, is it, to capture a group of people outside and in addition to the members of this particular committee?

MR. GREEN: No, it is specifically targeting ----

D

MR. JUSTICE FRASER: Or is it specifically targeting the members of the committee?

MR. GREEN: The members of the committee only.

MR. JUSTICE FRASER: Because, there is not to criticise anyone's drafting ----

MR. GREEN: I think it is a fair criticism because we say, including but we do not ----

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MR. JUSTICE FRASER: It did not read to me when I first looked at it ----

MR. GREEN: I am sorry, yes, that is a totally fair point.

MR. JUSTICE FRASER: All right.

F

MR. GREEN: What we did not know is, we do not know what the committee has been called, we are guessing.

MR. JUSTICE FRASER: Understood, all right.

MR. GREEN: That is why we phrased it probably slightly ineptly in that way.

MR. JUSTICE FRASER: All right.

G

MR. GREEN: So that is the point on the custodians and that is really where we are on those.

MR. JUSTICE FRASER: Whether it achieves it or not as currently phrased, what your Category 3 is designed to do, so far as I understand it, is to capture documents of certain categories in so far as if they are held by or arise out of proportionate searches of custodians, those custodians being members of this committee or its equivalent because it might have changed its name over time.

H

A MR. GREEN: Precisely.
MR. JUSTICE FRASER: But no wider than that.
MR. GREEN: No wider than that.
MR. JUSTICE FRASER: I think that probably is a fair drafting comment. Is there anything
B else you want to say about custodians?
MR. GREEN: My Lord, no.
MR. JUSTICE FRASER: Is there anything else you want to say about disclosure?
MR. GREEN: No, that is it.
MR. JUSTICE FRASER: Right, thank you very much.
C Mr. Cavender?
MR. CAVENDER: My Lord, before I make detailed comments may I make a few general
points based on what we have just heard?
MR. JUSTICE FRASER: Yes.
D MR. CAVENDER: The first thing is to remind ourselves we are operating here under
Model C, you know, on the working committee trying to reduce huge burdens about
disclosure and they are meant to be focused requests and that is the context. We come to
E this issue also where Post Office have already disclosed some 180,000 odd documents
on Horizon before we even come to this.
MR. JUSTICE FRASER: I do not want to cut across your introductory comments, but that
number really does not make any difference one way or the other in the sense that it is an
F extensive case over a long period of years, cases generally in this building do have
documents of hundreds of thousand.
MR. CAVENDER: My Lord, of course, and I accept that obviously. The other point is they
have not been reviewed yet. All my learned friend, what he is, saying, a lot of it is
G untutored, particularly in relation to the expert, but I will leave that there.
MR. JUSTICE FRASER: We are not there yet, I do not think, on the expert.
MR. CAVENDER: No. Bear in mind also there is no pleading of any kind at all here, so,
again the normal disciplines about the expert issues, as informed by disclosure, is not
H there.
Notwithstanding those considerable difficulties Post Office have produced
Schedule 1 which we have seen. The defendants have taken this on and we have seen

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that in the schedule we have been going through. The first point in my submission is the one that my learned friend dealt with last and that is of custodians because that is a significant difference between us. As I said in my skeleton when you look at, and if you could now, my Lord, go to paragraphs 10 through 13, the definition of custodian used by the claimant is extremely wide, particularly the definition of Category 2.

B

As your Lordship questioning of my learned friend suggested, there is a huge difference from being 97 odd and Senior Management Team as a body and ten others, particularly when the focus of the enquiry surely is Horizon and bugs within it. So, in that context the Post Office's IT Team responsible for Horizon, together with the Chief Information Officer and you have seen who reports for him, you saw that in the document, virtually anyone who has anything to do with information, that is at page 117, to IT security, Chief Technology Officer, IT Programme Director et cetera.

C

D

MR. JUSTICE FRASER: You are looking at the people at 4.6.1 to 4.6.8?

MR. CAVENDER: I am, my Lord, yes.

MR. JUSTICE FRASER: Yes.

E

MR. CAVENDER: You cannot imagine that there will be a sniff on Horizon without one of those individuals being copied in and that being reported to the Chief Information Officer.

MR. JUSTICE FRASER: There will be issues that arise on Horizon that perhaps do not reach those people but the important issues will reach those people.

F

MR. CAVENDER: Exactly, together with, my Lord, the ten people involved in the Horizon IT Team, the Indian so to speak, that I have talked about in paragraph 13, the people doing the job.

MR. JUSTICE FRASER: The troops.

MR. CAVENDER: The troops, my Lord, yes.

G

MR. JUSTICE FRASER: That is perhaps a better way of putting it.

MR. CAVENDER: A better way of putting it.

MR. JUSTICE FRASER: In the sensitive, modern world.

H

MR. CAVENDER: My Lord, yes, in which we all live and enjoy living. The important point is that one cannot imagine that anything would happen if Horizon is not caught by those individuals. It is still an enormous task doing that, but we have offered to do that, that is

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sensible, reasonable and proportionate. In my submission you have heard nothing that could persuade a court, particularly given we are in Model C, particularly in a world where we do give stage disclosure, so, imagine a world in which I am wrong -- difficult

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to imagine but let us imagine it for a moment -- and my learned friend gets all these documents and he sees a "cc" or some other custodian that looks like a worthy source of documents, he would come and say, "Well, Mr. Cavender is wrong. Look at this person, look at these people." And, of course, I do not have not a leg to stand on and that will be a reasoned request based on some other person but at this stage, my Lord, in my

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submission, our points on custodians are really unanswerable given the distinction between that and some 97 odd people.

MR. JUSTICE FRASER: That is your Category 2?

MR. CAVENDER: My Lord, it is.

MR. JUSTICE FRASER: Yes.

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MR. CAVENDER: Category 1 there is nothing between us, because the Board is the Board as a body, what is given to it.

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Then we come to Category 3 and my learned friend brings out one of his favourite documents and it is obviously a nice document and it is obviously relevant, which is why it has been disclosed under the third CMC order already. If I take you to that and you see the text of it.

MR. JUSTICE FRASER: Is this the one under tab 2 of the hearing bundle at page 13?

MR. CAVENDER: Well, it is in the case management bundle, I think.

F

MR. JUSTICE FRASER: You mean the order?

MR. CAVENDER: The order, yes.

MR. JUSTICE FRASER: I am sorry, I thought you had taken me to the document, yes.

G

MR. CAVENDER: Which is case management bundle number 2, tab 9.2, the third CMC order.

MR. JUSTICE FRASER: Yes, 1st March 2018.

MR. CAVENDER: Indeed, and it is paragraph 21 of the table at the back. So, page 112, any written policies or process documents regarding recovery of shortfalls from Postmasters.

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MR. JUSTICE FRASER: Sorry, where are you?

MR. CAVENDER: Item 21, my Lord, on page 112.

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MR. JUSTICE FRASER: Sorry, I am looking at paragraph 20 of the order, yes, in the schedule, any written policies, yes, that is what that document is.

MR. CAVENDER: Indeed. That and obviously any other iterations of it. So, to then create a separate class, as we have done in custodians number 3, to capture the same documents, but by ----

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MR. JUSTICE FRASER: Why does this capture the same document?

MR. CAVENDER: Well, because ----

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MR. JUSTICE FRASER: As I understand the sequencing of this, I have to say you do have, well, it is probably correctly accepted by Mr. Green and his team when I made the obvious point that he seems to be seeking a further, wider group than just the committee members itself, although he has explained his intention is to restrict it to the members of that committee or its equivalent, whether the phrase functional equivalent is the best way of describing it is unclear at the moment. There are a number of, for example, different categories which currently have Category 3 in as custodians which would not necessarily capture this document but they would lead to, for sake of argument, notification to members of this committee of particular information which should be brought to their attention.

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At the moment it seems to me that there is an enormous range of drafting issues between the two of you but the substance of a lot of your objections are effectively, that this is far too wide, it is too unclear, it is non-exhaustive and it is going to lead to a massively disproportionate exercise.

F

To save you time I am broadly with you on those types of submissions because it has to be focused and it has to be proportionate. As far as the Category 3 Custodians point is concerned it seems to me -- having reminded myself of what the disclosure scope is already -- that there might be members of this committee or its successor if it had a fancy branded name change, say a high level report to members of the committee which are not currently caught somewhere. Am I right about that or are you saying it will all be caught where else already?

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MR. CAVENDER: Well, I think it will. If you look at the scope of what we are already offering and look at the scope of the custodians underneath the Chief Information Officer, and try and imagine a situation that would not be caught by one of those eight or

A ten categories, it is difficult to do so. The trouble is, it is a question of not doing a new document, but it is a question of searching exhaustively over twenty years for yet another category.

B That is why I am objecting, it is whether there is any kind of reasonable basis for thinking that is going to produce documents that are not caught elsewhere. Given
C that virtually anything that has information technology or defect or anything in relation to it, which is the working job of both the ten people working in Horizon and all the Senior Leaders reporting to the Chief Information Officer and then reporting to the Board, to then have a specific search necessary and all the costs involved of this committee, in my submission is unjustified.

If your Lordship thinks it is sensible then ----

MR. JUSTICE FRASER: On the whole, I am trying to think of the best way to express this.

D On the whole, Mr. Cavender, it seems to me that the Post Office generally is taking a constructive and co-operative attitude to disclosure for the most part. There is obviously, as a result of the way that some documents have emerged and the way that Model C has been adopted which means it is request led, there is a wider than
E understandable degree of suspicion on the part of some of the claimants, but by the same token transparency itself is generally something of an issue in this case.

F At the moment Category 3 arises in respect of, I think, five different categories of documents. If Category 3 is extracted from those different categories and a much more naturally focused request is made in respect of the members of this committee, I do not think that a specific search that is narrowly framed and focused would be disproportionate.

G It would also have the consequential advantage one hopes, although I might be being exceptionally naive, of demonstrating that there is no hidden agenda behind the scenes. I am not saying that that is a necessarily determinative factor in all issues or in all circumstances in this case, but this particular committee obviously is something which deals specifically with financial losses and the whole of this case concerns the way in which financial losses are dealt with.

H So, my view on Mr. Green's current custodian 3 is that the different categories which he has sort of tacked on to each of them is far too wide. There probably is scope

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for a single specific category that deals simply with a properly drafted Category 3, if I may say so, that makes it clear that it is only members of the committee. It is only -- I am not going to draft it for you -- but, for example, the phrase "high level documents, information, led to an agreement by Post Office that that class of documents could be disclosed" and that might not be the right phrase for reports to members of the committee but there has to be some scope for coming up with a more naturally defined, focused category of documents that is not, on the one hand, going to impose a wider disproportionate and expensive obligation on Post Office in a case where the costs are already making my eyes water, if I may say so, but at the same time producing in disclosure a relevant document that falls into that category. That is my view on custodians Category 3.

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MR. CAVENDER: My Lord, yes.

D

MR. JUSTICE FRASER: I have flicked through this before we came to court, although the reliance was not immediately apparent, partly because I had not read Category 3 as being expected to be understood in the way that Mr. Green contended against the safeguarding point.

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I also have to say the phrase "any functional equivalence" is far too woolly and it needs to be something that reflects a name change of this committee. I dare say its name will have changed. If that is going to lead to an enormously wide further tranche of disclosure, well, then you have liberty to apply and come back, but I cannot believe it would.

F

MR. CAVENDER: My Lord, yes, very well, I will leave that there.

MR. JUSTICE FRASER: That is the Category 3 point. It does not begin to resolve all the other points.

G

MR. CAVENDER: No. My Lord, very well, so, that is Category 3. We have dealt with 1 and 2. We now deal, through that prism, with the various breaches or the various sort of items in the schedule. May I return to that, it is the, as you say the landscape document.

MR. JUSTICE FRASER: Yes.

H

MR. CAVENDER: There are issues 1, 2, 7, 8, 10 and 13 which have been dealt with. That is custodian only. The ones I want to deal with now are 3, 5 and 9 where there are issues generally on 5 and 3 and 9 if you like ----

MR. JUSTICE FRASER: 3 and 9 go together.

MR. CAVENDER: Are the third party point. Let me deal with that. My learned friend and I did exchange emails this morning. We did try and I suggested some wording for him which I will show you in a moment. The point of principle here is this. Let us look at item number 3 for an example here. The focus here is the nature and extent of bugs or errors in Horizon and that indeed is what item 3 deals with.

MR. JUSTICE FRASER: Yes.

MR. CAVENDER: What item 3 and, indeed, item 9 deal with is third parties which itself is a horrible and ridiculous term in this context, but it is not just that because that may include Subpostmasters, it will certainly include the 90-odd people including Bank of Ireland and others who provide services which is a huge amount of documentation if you start introducing them.

The second point, of course, is that if you are Bank of Ireland, whilst you may feel there are discrepancies in the data between what Post Office is saying to you and what your own data says, and whilst you may report that to Post Office what you are not going to do is have any information about the nature and extent of bugs or defects in Horizon. You have no access to Horizon.

What you have is access to the effects on you, as Bank of Ireland, take that example and what you are seeing. So, if you have that situation Bank of Ireland, of course, will report that to the Post Office who will investigate the discrepancy and it will be within the Post Office that the bug or nature and extent of bugs or errors or defects will be investigated. Bank of Ireland, and the other 89 customers of the Post Office have nothing to say about the extent of bugs in Horizon. What they do have something to say about is if they had discrepancies in the data.

The suggestion that, and this is a huge category of documents, the third party, even if we exclude Subpostmasters and include all the third party customers like Bank of Ireland, you can imagine this is over twenty years, this is a huge population of documents.

MR. JUSTICE FRASER: Understood.

MR. CAVENDER: What I suggested in my email to my learned friend was extending, at the moment it talks about Fujitsu, extending that to Atos or any third party IT supplier,

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excluding individual contractors who was engaged by the Post Office to work primarily on the Horizon system, i.e. to capture not just Fujitsu but any other third party IT suppliers to look at it through the IT prism because they, of course, potentially could be involved with defects in the Horizon system but not for people like Bank of Ireland. The target is the wrong target. It is also a hugely expensive target which, you know, 90-odd people for twenty years, it is completely unjustified and unjustifiable given the other population of documents you are going to have.

B

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My learned friend, again, when he gets these documents he needs to identify and point to documents and say, well, look, this is all that the Post Office say. I cannot get the full story about this, I think it is a good story, he can always come back but to ask for what is a hugely expensive and time consuming task, there is no way this kind of job could be done within the current timetable offering during July to provide this. This would be an enormous task in and of itself. That is what we say about ----

D

MR. JUSTICE FRASER: Third parties.

MR. CAVENDER: ---- third parties and that applies to 3 and 9. We are happy to offer up my wording. As I did to my learned friend by email today.

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MR. JUSTICE FRASER: Do you have a copy that you can hand up?

MR. CAVENDER: I have my copy.

MR. JUSTICE FRASER: Can I have your copy, it is not to get involved in any drafting, do you want to check there are no footers I should not see or anything?

F

MR. CAVENDER: There are not, my Lord.

MR. JUSTICE FRASER: All right. *(Same handed)* Thank you very much *(Pause)* FJI I assume is Fujitsu, is it, FJI?

MR. CAVENDER: My Lord, yes.

G

MR. JUSTICE FRASER: So that is the third party point. I think there is still point 5.

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MR. CAVENDER: There is point 5 which is a free-standing point in terms of scope. As we say, this request would require the Post Office to review the entire KLM peak system, over 10,000 entries, identify any entry that refers to a discrepancy, investigate each discrepancy to determine where the underlying causes were not determined and then disclose any relevant documents. Then, this is, in my submission, going too far, it is disproportionate compared to all the other information you have. It is the sort of thing

A

that might be the subject of a request, whether it be for information or further documents, but, given a staged approach, to ask us to do that at this stage again, in my submission, is not really appropriate, given the width of it and the amount of work that we required to do it.

B

Then we are left with codes which is number 4 which seems to be a spat over whether we do not have a, well, we say we do not have a list, we are happy to answer, if they want to know what a particular code is, to tell them, I do not know what else to say about that.

C

MR. JUSTICE FRASER: It not contained in any of the documents.

MR. CAVENDER: That is what I am instructed.

MR. JUSTICE FRASER: But you will get it from Fujitsu and provide it.

MR. CAVENDER: We will get ----

D

MR. JUSTICE FRASER: It seems to me whether it is a specific document or whether it is a series of documents, there has to be somewhere that the information, what in IT terms error code X, Y, Z, 1, 2, 3 actually means. I entirely understand on the basis of what I have read why you say you have not got it but I do not understand you to be objecting in principle to them having that information or do you?

E

MR. CAVENDER: No, not at all. Of course, I do not think they need it. It is a question of what form it comes in and what form it exists in really I think.

MR. JUSTICE FRASER: I understand what you have said in your, which number is this?

F

MR. CAVENDER: This is number 4, my Lord. Fujitsu, there is no list of error codes, not a single document owned by them or Horizon support staff. They have agreed to translate error codes upon request.

MR. JUSTICE FRASER: What does that mean?

G

MR. CAVENDER: I think if my learned friend says, what do the following twenty errors mean and Fujitsu will tell them what it means, this, that and the other. That is what I take it to mean. It may be a list can be produced by my learned friend. The trouble here, my Lord, there is no ----

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MR. JUSTICE FRASER: How many different ones are there?

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MR. CAVENDER: That is the question. I have no idea. None are pleaded. Normally we would have a pleading saying we think this, that and the other but my learned friend must have some sense of which ones he thinks need investigating.

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MR. JUSTICE FRASER: Mr. Green, how many different error codes are there, do you know?

MR. GREEN: We do not know, my Lord, and I have not got a feel for that. The difficulty with experts is that he sees something, it has got an error code and he does not know what ----

C

MR. JUSTICE FRASER: I understand the point.

MR. GREEN: He does not know whether it is even worth ringing up about.

MR. JUSTICE FRASER: He might not, but these different codes ----

MR. GREEN: I do not think there are going to be thousands.

D

MR. JUSTICE FRASER: Well, you never know. These different codes are scattered about and he does not know what they are.

MR. GREEN: Exactly.

MR. JUSTICE FRASER: All right.

E

MR. GREEN: He is trying to understand what he has to do.

MR. JUSTICE FRASER: Both experts need to know the information.

MR. GREEN: Precisely.

MR. JUSTICE FRASER: All right.

F

MR. CAVENDER: I would have thought this sort of thing between experts can be dealt with.

MR. JUSTICE FRASER: Will your expert know that?

MR. CAVENDER: He could certainly find out, could he not?

MR. JUSTICE FRASER: I think they both could find out. They will both need to know.

MR. CAVENDER: Quite.

G

MR. GREEN: My Lord, the other possibility is if the defendant's costs budget shows they spent £500,000 on another team of experts in the background, if they have them they could possibly give those to their Part 35 expert who has a duty to the court, he has not seen the information from them we understand, but if they have it they could provide it.

H

A

MR. JUSTICE FRASER: I am sure that some mechanism can be adopted to provide both the experts with an explanation of what the error codes mean. The Horizon trial itself is going to be, well, their expert reports are going to be ----

MR. CAVENDER: My Lord, it is just a question of ----

B

MR. JUSTICE FRASER: It is mechanics.

MR. CAVENDER: Exactly.

MR. JUSTICE FRASER: Fair enough.

MR. GREEN: My Lord, may I ----

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MR. JUSTICE FRASER: Hold on one second.

Right, Mr. Cavender?

D

MR. CAVENDER: My Lord, that is number 4. The last one I think, unless I am corrected, it is 12(m) and that is whether they are entitled to the last three lines of 12(m) and in what circumstances they can have the ability to use such access. My learned friend I think, almost caved in on that, he suggested it might be ----

E

MR. JUSTICE FRASER: He accepts it is more sensibly categorised as a request for information rather than disclosure.

MR. CAVENDER: Let him do that, my Lord, is my response to that. My Lord, I think that is the issues on disclosure. We then come to the question of the date.

MR. GREEN: Before we get to the date, may I just reply on the one point on the custodians?

MR. JUSTICE FRASER: Wait one second. By date, do you mean the date by which this can all be done?

F

MR. CAVENDER: Indeed.

MR. JUSTICE FRASER: I will come back to that in a moment. It obviously depends on what I am going to order.

G

MR. CAVENDER: I am obliged, indeed.

MR. JUSTICE FRASER: Right, Mr. Green?

MR. GREEN: My Lord, I do not want there to be any misunderstanding.

MR. JUSTICE FRASER: There seems to me to be really quite a lot of misunderstanding.

H

MR. GREEN: Just on Category 2 which my learned friend touched on which your Lordship has on the first page of that landscape document.

MR. JUSTICE FRASER: Yes.

A

MR. GREEN: My learned friend said that with their Category 1, we get the disclosure, if we find a document which clearly is relevant and, you know, should have been captured but was not by this, we can show it and in his words he has no leg to stand on.

B

MR. JUSTICE FRASER: I am not sure that is exactly what he said. That what is not what I understood him to say. What point do you want to make on ----

MR. GREEN: The short point is at tab 5 of the hearing bundle.

MR. JUSTICE FRASER: Yes.

MR. GREEN: It is the payments mismatch note that your Lordship saw previously.

C

MR. JUSTICE FRASER: Mismatch.

MR. GREEN: Which is, do you remember my learned friend's skeleton said Horizon does not make any mistakes that could have caused a shortfall.

D

MR. JUSTICE FRASER: Right, Mr. Green, really, let me be quite clear with both of you because I do think this bears repetition, all right? So far as case management, there is a vast gulf between the parties in the litigation. So far as case management is concerned, what might really be described as jury points or parti pris points are really quite unhelpful.

E

MR. GREEN: I am sorry if it sounded like that.

MR. JUSTICE FRASER: Well, it rather did.

MR. GREEN: I am sorry if it did.

F

MR. JUSTICE FRASER: Probably because of the way you expressed it which was that Mr. Cavender said, there was nothing wrong with Horizon at all. I do not think that that point will ----

MR. GREEN: No, no, no.

MR. JUSTICE FRASER: Let us get on with the actual ----

G

MR. GREEN: The short point is that this document, on page 121 in tab 5, lists the people from Post Office who attended that meeting and we do not believe that they are necessarily captured in Category 1 Custodians.

MR. JUSTICE FRASER: Right.

H

MR. GREEN: That is precisely why we have explained Category 2 custodians ----

MR. CAVENDER: Do you mean Category 2?

MR. GREEN: Sorry.

A

MR. CAVENDER: Do you mean these are caught within Category 2?

MR. GREEN: No, no.

MR. JUSTICE FRASER: These people would never be in Category 1, would they?

B

MR. GREEN: No. That is why we have to have Category 2 because we see a document here which is extremely pertinent which is why I did mention the context of it, which would not be caught by Category 1 alone. So, knowing that this document, having seen that document it is impossible not to say, "please, can we have disclosure of those management functions?" We tried to define it as closely as we can, not knowing how they are entirely described. The Post Office has not come back and said, "yes, what we call that is this and we can capture it narrowly". What we know is that this document, had we not had it before we would not get it from Category 1.

C

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So we then have Category 2. My Lord, I accept that we are in difficulties framing these things with the sort of precision the Post Office could because we have not got the internal visibility of the structure. I have to own that problem because it is a feature of the parties' respective position for the litigation.

E

The pertinence of the document is striking and the fact that such documents and similar would not be disclosed under custodians Category 1 is also pretty striking. That is why we specifically refer to that document in custodians Category 2.

I am sorry if I sort of have slightly taken that as read but it is probably right to draw your Lordship's attention to it.

F

MR. JUSTICE FRASER: I understood your objection to Category 2, which I think is why Mr. Cavender was sotto voce clarifying it with you, was that he understood the list of people, the attendees at this meeting and their successors, to be Category 2 people or Category 2 custodians; is that right?

G

MR. GREEN: The people listed here ----

MR. JUSTICE FRASER: This document is referred to in the category, Category 2.

MR. GREEN: Yes, exactly.

MR. JUSTICE FRASER: You are saying there has to be a category in addition to Category 1.

H

MR. GREEN: That would catch these individuals.

MR. JUSTICE FRASER: Or this type of individual?

A

MR. GREEN: Precisely.

MR. JUSTICE FRASER: None of the people shown as being at the meeting have are Category 1 people.

MR. GREEN: As far as we can tell, no. If they do all fall within Category 1 then it is imposing no additional burden on the defendant to disclose it.

B

MR. JUSTICE FRASER: They cannot fall within Category 1.

MR. GREEN: I do not think they can, that is why we are asking.

MR. JUSTICE FRASER: I do not understand Mr. Cavender to be saying that they are.

MR. GREEN: No.

C

MR. JUSTICE FRASER: Mr. Cavender, would you like to respond?

MR. CAVENDER: My Lord, my learned friend keeps saying Category 1, which of course is the Board. He must mean Category 2.

D

MR. JUSTICE FRASER: He does mean Category 2. Let me try and distill it down because it might help. Mr. Green hold on one second.

What Mr. Green is saying is, given Category 1 is just the Board ----

MR. GREEN: And Senior Leaders.

E

MR. JUSTICE FRASER: ---- there has to be another category in addition to Category 1 to capture these type of people. Is that what you understood him to be saying?

MR. CAVENDER: I did not understand what he was saying. Category 2 is accepted by us. We put forward, which is the Chief Information Officer, including all the people who report to them and the ten members of the Horizon IT Team. What one sees in document 121 seems to me to be a Horizon IT-type issue.

F

MR. JUSTICE FRASER: Would they be caught in your current wording?

MR. CAVENDER: In my submission they would because if you look at people here, you talk about IT.

G

MR. GREEN: I am sorry, my Lord, may I just clarify. Category 1 has two components to it.

MR. JUSTICE FRASER: No, no, no, we are talking about Category 2.

MR. GREEN: I understand that. Category 1 has two components, the Board and the Senior Leaders, A and B because there are two subparts to Category 1.

H

MR. JUSTICE FRASER: Yes, and they are the ones in paragraph 4.6 of the management structure.

- A** MR. GREEN: Exactly.
- MR. JUSTICE FRASER: Which is the document which is at, whatever the page is.
- MR. GREEN: Precisely, your Lordship is absolutely right. It has the Board and then those specific people at 4.6.
- B** MR. JUSTICE FRASER: Yes.
- MR. GREEN: Then Category 2 is the people, the individual people and/or that type of person totally separately, so that this document and types of similar document would be called.
- My learned friend says, he thinks they would be caught in Category 1.
- C** MR. CAVENDER: 2, I say 2.
- MR. GREEN: Right, then Category 2 is then necessary.
- MR. CAVENDER: I have agreed it is necessary.
- MR. GREEN: Then there is nothing between us if that is right, but I thought he just said, and
- D** I think the transcript may show, that he just said he thought they would be caught in Category 1. Anyway, so it is agreed Category 2 is necessary, I have nothing to add, my Lord. I completely misunderstood what his submission was.
- MR. CAVENDER: My Lord, Category 2, as we drafted it, the debate is what the content of Category 2 is.
- E** MR. GREEN: I, I ----
- MR. JUSTICE FRASER: Wait just one second. Your Category 2, as drafted, I think is Mr. Green's Category 1(ii); is that right.
- MR. GREEN: (b).
- F** MR. JUSTICE FRASER: Sorry?
- MR. GREEN: (b).
- MR. CAVENDER: Yes, I think this is right.
- MR. JUSTICE FRASER: Category 1(b).
- G** MR. CAVENDER: I have never contested that something in that space should not be ordered. The only question is scope. We have suggested and had the debate, I thought, about the proportionality of whether you have 97 or 10. We say you have the Chief Information Officer, which captures him, and all report to him, together with the ten
- H** people I was criticised for describing as the soldiers, doing the ----

A

MR. JUSTICE FRASER: No, you were not criticised. You were criticised for using probably a 19th century epithet referring to them as Indians.

B

MR. CAVENDER: Indeed and quite right too. I was told off about that. But, my Lord, that is a debate. So, the only thing between us is whether my definition of custodians, Category 2 as I call it, is right or wrong.

C

MR. JUSTICE FRASER: But this is the origin of the mismatches, you are calling it Category 2 but it is not Mr. Green's Category 2.

MR. CAVENDER: No.

MR. JUSTICE FRASER: It is his category 1(b).

MR. CAVENDER: Correct.

MR. JUSTICE FRASER: And you are calling it Category 2.

MR. CAVENDER: Indeed.

D

MR. JUSTICE FRASER: There is a degree of difference between you which is effectively the type of people on page 121 who are not people caught under paragraph 4.6 of the management structure but who, for example, as this document shows, were at a meeting doing these sort of things.

E

MR. CAVENDER: My Lord, providing you are satisfied that some of the people, that the kind of quality of person in my Category 2 would be there, and I think you can be assured of that given the nature of the meeting together with the Post Office IT Team of which there will be ten of them, would also have been at the meeting. Whatever you call them, these things change over time.

F

MR. JUSTICE FRASER: You say that the ten people on page 121 would be caught within your Category 2, Mr. Green's category 1(b).

MR. CAVENDER: Correct.

G

MR. JUSTICE FRASER: Whether that is correct or not ----

MR. CAVENDER: It terms of the quality of debate and the subject matter I say that.

MR. JUSTICE FRASER: If I make a category, which I am about to do, Mr. Green category 1(b) which effectively you concede I think, well, actually that is not right, you don't. How do you express your Category 2?

H

MR. CAVENDER: Express it.

MR. JUSTICE FRASER: Is the skeleton the best place?

A

MR. CAVENDER: It is in the order, page 25 of Schedule 1 to my order, page 25.

MR. JUSTICE FRASER: I am afraid I have that without those page numbers on it. I have only got the pages of the bundle.

MR. CAVENDER: You have Annex A, my Lord?

B

MR. JUSTICE FRASER: I do have Annex A.

MR. CAVENDER: Yes, and it should have 25 in terms of from my printer literally.

MR. JUSTICE FRASER: No, it does not. It just has page numbers 389, 390, 391.

MR. CAVENDER: Someone has kindly removed those. It is Schedule 1 to the defendant's draft order.

C

MR. JUSTICE FRASER: Let me find that, Schedule 1.

MR. CAVENDER: To the defendant's draft order. First this is Senior Management.

MR. JUSTICE FRASER: Wait one second. I have that. In fact that should be page 25, should it not?

D

MR. CAVENDER: Indeed, my Lord, yes.

MR. JUSTICE FRASER: Where is the ----

MR. CAVENDER: The definition. What we do is define the custodians up front, so

E

"Senior Management" shall mean the Post Office Board of Directors or Group Executive or historic equivalent." I do not think there is any need for debate about that.

MR. JUSTICE FRASER: That was Mr. Green's category 1(a).

MR. CAVENDER: And also it is what I call Category 1.

MR. JUSTICE FRASER: I know that. I am trying to match them.

F

MR. CAVENDER: Match them, my Lord, yes.

MR. JUSTICE FRASER: Match your nomenclature to his.

MR. CAVENDER: Indeed.

MR. JUSTICE FRASER: Right, then the next one would be ----

G

MR. CAVENDER: Is what I call Category 2.

MR. JUSTICE FRASER: And he calls category 1(b).

MR. CAVENDER: Exactly.

H

MR. JUSTICE FRASER: You say that wording will capture the ten people at page 121.

A

MR. CAVENDER: People of that species, yes, because I say we had the Post Office Chief Information Officer or the historical equivalent and the Senior Leaders within Post Office responsible for Horizon, that is the nine or ten people I refer to in my skeleton.

B

MR. JUSTICE FRASER: They are also the ones who are identified in paragraph 4.6 of the management structure; is that right?

MR. CAVENDER: They are within that structure, my Lord. The ten odd people I refer to in my skeleton are the IT people who deal with Horizon on a day-to-day basis.

C

MR. JUSTICE FRASER: I understand but in terms of how I match, or how the parties match, my order to the existing information that is in play, each of you in your submissions took me to the management structure under tab 4 and I was looking in particular at page 113.

MR. CAVENDER: And 117.

D

MR. JUSTICE FRASER: And 117. They are included, are they, in your definition?

MR. CAVENDER: May I take instructions for one moment, my Lord?

MR. JUSTICE FRASER: Yes, do.

E

MR. CAVENDER: *[Pause for counsel to take instructions]* Any of them theoretically but principally, 1 to 3 and 5 are the ten odd people I have referred to and would be in those categories. This is Horizon IT Team.

MR. JUSTICE FRASER: I am afraid, Mr. Cavender, I do not entirely follow this, try again.

F

MR. CAVENDER: So, 4.6, page 117, he had the following role to report to the Group Chief Information Officer. I have said the people running the Horizon IT system, you have asked me where they fit within this. My answer is, they fit across the eight categories, but particularly categories 4.61, 4.62, 4.63 and 4.65.

G

MR. JUSTICE FRASER: I have that point but, as I understood you earlier, and it might be I have misunderstood, is each of those descriptive terms at 4.61 to 4.68 are, so far as you are concerned, the Post Office is concerned, included within the expression on page 25 of the schedule, the order, as being Post Office's IT Team responsible for Horizon; is that right?

H

MR. CAVENDER: They fit in, the Horizon IT Team responsible for Horizon fit within the category 4.6, in particular in the four paragraphs I have identified.

A

MR. JUSTICE FRASER: I understand that, but what I am trying to do, if I may, is just to be completely certain so that there is no misunderstanding, because at the moment I have a detailed management structure which was provided pursuant to one of the earlier orders.

MR. CAVENDER: Indeed.

B

MR. JUSTICE FRASER: It set them out with particularity. The wording in the draft order at the moment does not do so by reference to that paragraph. It does so by using a new expression which is Post Office's IT Team responsible for Horizon.

MR. CAVENDER: Correct.

C

MR. JUSTICE FRASER: I am just attempting to be clear to satisfy myself that all of the roles, obviously there is a particular point that you made about four of them but that all of the roles at 4.61 and 4.68 would be caught by or fall within the umbrella terms IT Team responsible for Horizon.

D

MR. CAVENDER: That would fall within, my Lord, Post Office Chief Information Officer. So all those people who report to him, so all that information will be caught before it gets to this debate because it goes to the Group Chief Information Officer. It is caught there first and the Senior Leaders within the Horizon IT Team, i.e. the ten.

E

MR. JUSTICE FRASER: I might be being particularly dumb but 4.6 says, "The following roles report to the Group Chief Information Officer".

MR. CAVENDER: Correct.

F

MR. JUSTICE FRASER: It is correct that the first part of Post Office's IT Team uses the expression, Post Office Chief Information Officer, rather than group but let us put that to one side. It then uses an expression Senior Leaders within that team, it does not define them by only those people who report to the Group Chief Information Officer.

MR. CAVENDER: My Lord, it is "and" remember so it is not "or". It is not sub-limiting that. The searches are "of the Post Office Chief Information Officer and".

G

MR. JUSTICE FRASER: So if there is clarificatory wording added to that that pins it by reference to the management chart as well, it will, on its face, catch all the people at 4.6, on its face, in other words, not requiring an explanation from you that, yes, these people are Senior Leaders.

H

MR. CAVENDER: My Lord, yes.

A

MR. JUSTICE FRASER: The problem is the drafting has gone from being done really quite precisely by reference to the management structure and then in a rather more vague way, although I accept the intention is the same; is that right?

MR. CAVENDER: My Lord, yes, may I take instructions?

B

MR. JUSTICE FRASER: Yes, why don't you.

C

MR. CAVENDER: *[Pause for counsel to take instructions]* My Lord, there are really two points. One is, yes, we can redraft it to make it more succinct, the problem with that, however, is that there is a role covered by the job in 4.6 in the subparagraphs that changes over time. So if you did have an IT Programme Director, there may not have been one five years before and it may be called something different. There is a problem with ----

D

MR. JUSTICE FRASER: That is a drafting point.

MR. CAVENDER: It is, but it is quite a drafting point, over twenty years. You have to be clear about what it is we are capturing in terms of ideas as opposed to just the function of the person. My Lord, we could certainly have a go at that obviously.

E

MR. JUSTICE FRASER: It seems to me, so far as this particular category is concerned, that with some changes to the wording of what is currently your Category 2 to make a 4.6 point, together with specific reference to the ten attendees at the meeting at page 121, in so far as they may not be covered within your existing wording, sorry, the slightly tweaked wording of your Category 2, then that is sufficient to do two things. One is to provide a first round of disclosure on this subject. Second, to do so in so far as, for example, Mr. Wynn, he might be called as the wording currently used under 4.6, but if he is not he will be with particularity because of the way the order is drafted and that is going to provide a more narrowly focused order which does not impose an onerous obligation on you. It can even be, and probably ought to be, defined so far as these ten attendees, by a reasonable period of time at or about or following the meeting itself. That will provide sufficient documentation for the claimants to then come back under another Model C request if they do find the smoking gun, without imposing a wide-ranging ridiculous exercise on you.

H

MR. CAVENDER: My Lord, I hear that.

MR. JUSTICE FRASER: You say these ten are included within the ----

A

MR. CAVENDER: Not those individuals but people of that, being with those responsibilities. Remember, quite a few people are Fujitsu people so you are not intending to give disclosure against ----

MR. JUSTICE FRASER: That is a drafting point, is it not?

B

MR. CAVENDER: It is scope point.

MR. JUSTICE FRASER: Scope or drafting, they are two sides of the same coin.

MR. CAVENDER: My Lord, is not the ----

MR. JUSTICE FRASER: Are the top six people all Post Office people?

C

MR. CAVENDER: My Lord, we think so, yes.

MR. JUSTICE FRASER: If it is related to those six people in so far as they are not caught within the generic term, which is going to be tweaked in terms of Senior Leaders, paragraph 4.6 et cetera, and narrowly defined by a bracket of months either side of the relevant meeting and under Model C that is the whole idea, it gives your opponents in the litigation enough material to be getting on with, it is a much more narrowly focused search. If they do find something they can make another request.

D

At the moment I think, I am not criticising anybody but in terms of the shift of nomenclature between Category 2, category 1(b), your wording on Post Office IT Team, plus the management structure, there has been scope for some misunderstanding if I may say so.

E

MR. CAVENDER: Your Lordship, we obviously hear what you say. We will try and do something around that.

F

MR. JUSTICE FRASER: Does that deal with all the issues on custodians?

MR. GREEN: My Lord, yes.

MR. CAVENDER: I think that was my learned friend's reply, was it not technically, sort of?

MR. GREEN: Yes, it was reply on custodians exactly, my Lord, yes.

G

MR. JUSTICE FRASER: Well, it was actually me trying to decide what I am going to do on custodians.

MR. GREEN: Indeed.

MR. JUSTICE FRASER: That is on custodians.

H

MR. GREEN: Indeed.

A

MR. JUSTICE FRASER: Are there any outstanding issues on custodians I have not dealt with in the dialogue with counsel?

MR. GREEN: No, I do not think so, my Lord.

MR. JUSTICE FRASER: Okay.

B

MR. GREEN: May I for the sake of clarity?

MR. JUSTICE FRASER: Yes.

MR. GREEN: On the landscape version we had specifically referred to the Senior Leaders reporting to the Group Chief Information Officer identified at paragraph 4.6.

C

MR. JUSTICE FRASER: That is the point that I have just been exploring with Mr. Cavender.

MR. GREEN: Exactly.

D

MR. JUSTICE FRASER: What is going to have to happen now is that the wording that Mr. Cavender has, on his page 25, which does say Senior Leaders within Post Office and IT Team.

MR. GREEN: Yes.

MR. JUSTICE FRASER: That wording is going to have to be changed to incorporate the reference to 4.6.

E

MR. GREEN: Indeed. So long as it is clear, I am grateful.

MR. JUSTICE FRASER: I am clear.

MR. GREEN: I am clear now.

F

MR. JUSTICE FRASER: That has only dealt with custodians I think.

MR. GREEN: Indeed.

MR. CAVENDER: My Lord, just so that I am clear, we are not trespassing on having at least 97 people.

G

MR. JUSTICE FRASER: No.

MR. CAVENDER: No.

MR. JUSTICE FRASER: I rather thought that I had dealt with that.

MR. CAVENDER: I thought so too, I wanted to remind my friend because he sometimes forgets some part of the story and concentrates on other bits, but I am obliged.

H

MR. JUSTICE FRASER: Right. Third parties, it seems to me, Mr. Green, that Mr. Cavender's suggested word to include Atos and third party IT suppliers is necessary.

A

MR. GREEN: My Lord, we agree that that is necessary and helpful. What it does not deal with is any, your Lordship will see, excluded emails or anything like that.

MR. JUSTICE FRASER: No, no, I do, I have seen that.

B

MR. GREEN: It is just if Bank of Ireland, for example, send a report back to them because the concern is, we have seen what was in this document, the payments mismatch document; the concern is not where everything is followed through and made correct and no problem is ultimately sustained by anyone, the concern is that where there is a suspicion of a problem and it is not acted upon.

C

MR. JUSTICE FRASER: What you are going to have to do, I think, is redraft your current Category 3.

MR. GREEN: Refine that.

D

MR. JUSTICE FRASER: At the moment, if you look at it, it is so wide ranging, nature and extent of bugs, errors or defects not limited to software that have the potential to impact branch cancel transactions. That is a very wide-ranging category. If it is a report back from Bank of Ireland it can be drafted in a much more focused way.

MR. GREEN: Yes. We do not know who.

E

MR. JUSTICE FRASER: Well, start with Bank of Ireland, they must be one of the biggest customers, are they not?

MR. GREEN: Yes.

MR. JUSTICE FRASER: One would imagine.

F

MR. GREEN: We will make a more focused request on that basis and try and work out ----

MR. JUSTICE FRASER: If the biggest ----

MR. GREEN: We will provide a short list of six or ten.

G

MR. JUSTICE FRASER: Well, nine is in respect of necessary or recommended measures for preventing fixing of bugs and developing the system. That is going to be caught within Mr. Cavender's IT supply wording, is it not?

MR. GREEN: If it is acted on.

MR. JUSTICE FRASER: What, do you mean if it is acted on at the time?

H

MR. GREEN: It only gets into the hands of Fujitsu or Atos or one of the subcontractors if Post Office receives something from Bank of Ireland saying, "look, a bit concerned here,

A there seems to be a pattern" and Post Office then says to Fujitsu, "yes, under the
 agreement we have with you, can you please address this?", and it actually gets acted on.
MR. JUSTICE FRASER: Let us examine that analysis with a bit of care.
MR. GREEN: Yes.

B MR. JUSTICE FRASER: If you draft a much more focused category and restrict it in the
 first instance, for example, for the sake of argument to the Bank of Ireland, the Bank of
 Ireland report back to Post Office saying we are noticing an enormous number of X, Y,
 Z and whatever it is, that will be caught.

C MR. GREEN: That will be caught, exactly. Your Lordship is absolutely right about that.
MR. JUSTICE FRASER: So whether it is acted on or not at the moment under Model C,
 really at the moment it does not much matter.

 MR. GREEN: That is right, whatever we narrowly ask will catch that.

D MR. JUSTICE FRASER: Good, because it has to be a narrow request in the first instance ----
MR. GREEN: Exactly, precisely.

 MR. JUSTICE FRASER: ---- given the length of time and the number of customers they
 have.

E MR. GREEN: My Lord, I accept that.
MR. JUSTICE FRASER: All right. That disposes of both of the third parties ----
MR. GREEN: 3 and 9 and they may be answered together.

 MR. JUSTICE FRASER: They might be but one never knows. It is best not to.

F MR. GREEN: Quite.
MR. JUSTICE FRASER: I did rule on the Model C approach in principle some months ago.
MR. GREEN: Indeed.

 MR. JUSTICE FRASER: And that is the correct way to do it.

 MR. GREEN: Indeed.

G MR. JUSTICE FRASER: All right.
MR. GREEN: I am grateful.

H MR. JUSTICE FRASER: What or where or at which point did we reach in respect of error
 codes? It is accepted in principle that the information needs to be provided to both
 experts. One way, and this is thinking on the hoof, in which that could be done is to
 make an order that the experts jointly draw up a list of error codes in respect of which

A

they require description by date X. I can't order Fujitsu to do any testimony because Fujitsu are not before the court. As Mr. Cavender says, Fujitsu are the people who have to apply the information.

B

MR. GREEN: I think the position is that Fujitsu are prepared to respond to questions about it. It may be that there is not one physical list but it could be extracted from the system. The idea that in a system of that type there is not somewhere a database which identifies what the errors codes are or some way of putting that list together seems unrealistic, otherwise a new employee at Fujitsu would not know what to do unless it was by folklore.

C

MR. CAVENDER: My Lord, from our side we are happy with your suggestion, that seems sensible.

MR. JUSTICE FRASER: All right, pick a date, please, either of you which is reasonable for me to impose on the experts for them to provide a joint list.

D

MR. GREEN: Perhaps three weeks, my Lord.

MR. JUSTICE FRASER: Which date is that?

MR. GREEN: It is going to be the 26th.

E

MR. JUSTICE FRASER: Okay. This is my suggestion drafting on the hoof, please tell me if you want any changes. The two IT experts, jointly to compile a list of error codes, to be provided to Fujitsu for a description/translation of what those error codes mean, that list to be provided to the solicitors of both parties by 4pm on 26th June.

F

Mr. Cavender, do you have anything to say about that?

MR. CAVENDER: My Lord, no.

MR. JUSTICE FRASER: Do you have anything to say about that, Mr. Green?

MR. GREEN: No.

G

MR. JUSTICE FRASER: So that is error codes. There is then the catch all, where the underlying cause is not determined, is there not?

MR. GREEN: My Lord, yes.

H

MR. JUSTICE FRASER: In a way that depends on what Fujitsu come back with on their error codes, does it not? Because if one of them is not identified that rather answers the point.

A

MR. GREEN: Yes, it is only where, I think, my Lord, where we find data that does not have an error code.

MR. JUSTICE FRASER: Is that right?

B

MR. GREEN: Then we are not sure what was the ultimate thought about that. I am not in a position to venture forth to what extent that is frequent or infrequent.

C

MR. JUSTICE FRASER: At the moment Mr. Cavender's objection to that category, that it is excessively wide, is one with which I have great sympathy. It seems to me that if there is going to have to be an order for disclosure of something recording instances where issues are reported but the underlying cause is not determined, is going to have to be, for example, if it appears once in 100 times the situation is going to be rather different than if 60 or 70 out of 100 they cannot determine the cause.

D

MR. GREEN: Right. It might be, as your Lordship says, easier once the experts are refined what the error codes mean and then they can then ----

MR. JUSTICE FRASER: I am not making any ruling at the moment on that.

MR. GREEN: I am grateful.

MR. JUSTICE FRASER: Is that everything on Horizon disclosure?

E

MR. GREEN: My Lord, yes.

MR. JUSTICE FRASER: Apart from the dates?

MR. GREEN: My Lord, yes.

MR. JUSTICE FRASER: Let me hear from Mr. Cavender now, please.

F

Yes, Mr. Cavender?

MR. CAVENDER: My Lord, yes. My learned friend describes a helpful comparison.

MR. JUSTICE FRASER: Is this the colour-coded one with the red on?

MR. CAVENDER: Mine is not but I think his was, yes. This is the table with the two orders in it.

G

MR. JUSTICE FRASER: Yes, four pages.

MR. CAVENDER: Indeed, and we say, we are the defendant obviously on the right-hand side.

H

MR. JUSTICE FRASER: You want 17th July?

MR. CAVENDER: And he wants 29th June which, of course, is obviously less than three weeks or something.

A MR. JUSTICE FRASER: You are prepared to make reasonable endeavours to do some of it
by the end of June.

MR. CAVENDER: Exactly.

MR. JUSTICE FRASER: All right.

Mr. Green.

B MR. GREEN: My Lord, the only concern we have is the next morning from 17th July is 18th
July and that is when Mr. Coyne and I completely accept it is a provisional document
and it is indicative and so forth. Your Lordship has ordered Mr. Coyne to provide a
provisional indicative document about what concerns of Horizon there are on the 18th.

C MR. JUSTICE FRASER: It obviously cannot be on the 18th, Mr. Cavender has the 17th.

MR. GREEN: Precisely.

MR. JUSTICE FRASER: So pick a few days later that you want for that.

D MR. GREEN: I think he is going to need two weeks because he is going to get all these
documents on the 17th.

MR. JUSTICE FRASER: He is not going to get all of them on the 17th. He is going to get
quite a lot by 29th June and then he is going to get some of them by the 17th.

MR. GREEN: That has not uniformly been our experience.

E MR. JUSTICE FRASER: I know, but that is what I am ordering today.

MR. CAVENDER: He has also got 150,000 at the moment, has he not?

MR. GREEN: Quite, he has had a whole tranche just now which my learned friend says I
can't possibly look through in time, so it is quite onerous.

F MR. JUSTICE FRASER: All right, you sit down.

Mr. Cavender, if you have until the 17th, what date do you accept that Mr.
Coyne can have? Currently looking at the 18th is perhaps a likely ----

G MR. CAVENDER: Another week to complete, because obviously he will be preparing this
now one assumes.

MR. JUSTICE FRASER: What day of the week is 17th? It is a Tuesday I think. He can
have until a week the following Friday.

MR. CAVENDER: My Lord, yes, that is ten days or so.

H MR. JUSTICE FRASER: The 17th is a Tuesday, I am pretty sure, the 27th is a Friday, so
you have until the 27th.

A

MR. GREEN: My Lord, you will not know what the errors are by then.

MR. JUSTICE FRASER: I have not made an order about that yet because that is coming from Fujitsu.

MR. GREEN: No, no, of course, but it is not easy for him ----

B

MR. JUSTICE FRASER: That is understood. Right, the date for them to do their joint list of error codes is coming back to the 19th June. If you have to come back in July and say, he can't make the 27th before then, you will just have to come back.

MR. GREEN: I am grateful. We will obviously try.

C

MR. JUSTICE FRASER: Obviously it is a moving target.

MR. GREEN: Yes.

MR. JUSTICE FRASER: That is everything on Horizon, disclosure, including logistics such as dates.

D

MR. GREEN: Indeed.

MR. JUSTICE FRASER: Is any adjustment to any other dates needed as a result of giving Mr. Coyne the 27th?

MR. GREEN: My Lord, I do not think so.

E

MR. CAVENDER: My Lord, no.

MR. JUSTICE FRASER: Good, that is Horizon disclosure. What else on Horizon? We have the two points of ----

F

MR. GREEN: The other point is Mr. Coyne and I have got a proportionate proposal given the time to how to deal with Mr. Coyne. He has made his requests. He has done so in accordance with your Lordship's order reminding the parties and the experts, the experts, your Lordship asked us specifically to include that in the order.

MR. JUSTICE FRASER: Which part of the order are we talking about?

G

MR. GREEN: So, if your Lordship turns to the case management bundle 2.

MR. JUSTICE FRASER: Yes.

MR. GREEN: It is at tab 9.2 on page 106.

MR. JUSTICE FRASER: Yes, I have that.

H

MR. GREEN: It is paragraph 13.

MR. JUSTICE FRASER: Of the order itself.

A

MR. GREEN: Of the order itself and your Lordship asked us to include in the order, which we obviously did, that the parties ----

MR. JUSTICE FRASER: So they can ask for directions.

MR. GREEN: Exactly.

B

MR. JUSTICE FRASER: Yes.

MR. GREEN: Precisely.

MR. JUSTICE FRASER: Strictly speaking not necessary in the order but they have the right ----

C

MR. GREEN: Exactly. Does your Lordship have the hearing bundle handy just so that I can show your Lordship very quickly the genesis of the request. If your Lordship turns first to the hearing bundle at tab 16, what happened was, if your Lordship looks at 232, well, if we start on 231 briefly at paragraph 3.

D

MR. JUSTICE FRASER: Sorry, 231?

E

MR. GREEN: 231, tab 16, this is a letter from Womble Bond Dickinson: "Your client's expert, Jason Coyne very helpfully led the meeting by setting out lines of enquiry he would like to explore in relation to each of the agreements agreed Horizon issues." He made the point and he read out the points that he had identified. "A list was not provided in advance nor in writing at the meeting but from our notes we estimate around 60 lines of enquiry." So there was a sort of discussion at that point. That is a point that post officers are making by way of context.

F

If your Lordship goes forward to paragraph 9 there was the discussion about the inspection of certain aspects and then five lines down about an inch in from the left-hand margin: "It may be your intention that these individuals are available not just to explain how to access and navigate those systems but to answer unspecified questions about what might be found including questions about how Horizon worked 18 years ago. As you may appreciate, if this were your intention it would cause our clients serious concern. In effect, your clients have the ability to interrogate potential witnesses about all manner of issues of which our client would have no warning and over which we would have no control."

H

That is the objection. Mr. Coyne wants to try and understand how the system works and has worked because of course the static version he is looking at now is not the

A version that we are dealing with and on which he has to report. What is suggested over
the page at 233 under the heading information, "Regarding the provision of information
more generally at last week's meeting, Mr. Coyne requested access to Fujitsu personnel"
this is picking up the same point "in effect it means by which information could be
B communicated so that we can discuss things and say, well, how does this work, what
was the system and so forth. Dr. Worden's view is that information is best provided in
writing. In this regard we refer you to CPR 35.9" which they then set out. Dr. Worden's
preferred approach is at paragraph 14.

C That is then picked up, if we go forward quickly to tab 20, bottom hole punch:
"We understand that Dr. Worden will be responding to Mr. Coyne direct to progress
D matters. In the meantime we must point out Mr. Coyne has used the phrase 'the experts
need' or 'the experts require' on 26 occasions and there has not been any such
convergence of their views. Further, following the 11th April meeting, and your second
23th April letter, we were expecting Mr. Coyne to set out the information documents and
access that I will require in order properly to investigate the issues to enable him to form
his expert opinion."

E So that is the background. He has done that. It is his document. Your
Lordship can probably tell it is his drafting, not ours.

MR. JUSTICE FRASER: Where am I looking now?

MR. GREEN: This is the document at the front of the hearing bundle. It is in tab 1.

MR. JUSTICE FRASER: This is under 1(a); is that right?

F MR. GREEN: Yes. The first document under tab 1 I think should be him sending it around
to the parties on 18th May in draft. Then he sends it to the court in compliance with
35.14 and paragraph 13 of the third CMC order on page 12(a) on 29th May. He has
made a number of requests for information. One can short circuit this, my Lord, because
G although in the Post Office skeleton -- your Lordship need not go there because it is all
repeated in the skeleton now.

MR. JUSTICE FRASER: Go where?

H MR. GREEN: You do not have it keep that bundle open, I just wanted to show you the dates.

MR. JUSTICE FRASER: I want to keep it open.

MR. GREEN: I did not say you could not, I just said you would not need to necessarily.

A

MR. JUSTICE FRASER: I am glad about that because I am keeping it open!

MR. GREEN: In skeleton ----

MR. JUSTICE FRASER: In Mr. Cavender's skeleton?

MR. GREEN: Mr. Cavender's skeleton, although there is a long complaint about this ----

B

MR. JUSTICE FRASER: Some further information was provided.

MR. GREEN: They have not actually provided it but it has been agreed to be provided, quite a lot of it.

MR. JUSTICE FRASER: I misunderstood that. I thought it had been provided.

C

MR. GREEN: No, no, from paragraph 16 onwards.

MR. JUSTICE FRASER: Of his skeleton?

MR. GREEN: Of his skeleton, there is a reasonably robust ----

MR. JUSTICE FRASER: No, no, I have read it.

D

MR. GREEN: ----- criticism with some quite florid language, I have to say I pinched myself reading it, including the correspondence. Then at 25 it picks up the fact that they are preparing a table identifying where their expert agrees and disagrees and there may be no difficulty in providing information and there is no need for an order.

E

So, what that then leads to is a document that I think was sent by Mr. Parsons possibly to the court yesterday.

MR. JUSTICE FRASER: Yes, I think it was sent late yesterday but I am afraid, because my clerk has changed ----

F

MR. GREEN: We understood, we did not know.

MR. JUSTICE FRASER: No, do not worry. I did get it before the hearing and I have had a quick look at it but I did not look at it in enormous detail.

MR. GREEN: Of course, my Lord, we only received it yesterday afternoon. That document, I do not know if your Lordship has a copy of that.

G

MR. JUSTICE FRASER: I have not printed it off.

MR. GREEN: We have a copy we can hand up.

MR. JUSTICE FRASER: *(Same handed)* Thank you very much. Where are we now?

H

MR. GREEN: As of yesterday afternoon we have this table which actually, in quite a lot of places, says you are not entitled to it and then goes, "but without prejudice to that we are giving it to you". So there is quite a lot of agreement to provide it which is helpful.

A

Then there are a number of repeated phrases resisting provision of the information. There are some sort of common threads. What I was proposing my Lord, was, because it is quite a long document and having a look at the time, what I was proposing was, on the basis that if Post Office do not provide what they have agreed to provide.

B

MR. JUSTICE FRASER: Which it sounds as if they probably are.

C

MR. GREEN: There need not necessarily be any order reflecting that, subject to the dates which I will come back to. What I was proposing was that I could just briefly address your Lordship on some of these sort of overarching points that they keep repeating. If your Lordship gave an indication on those points as to where the court sympathies might lie, the parties could possibly reflect on the outstanding ones and see if they could be resolved.

D

MR. JUSTICE FRASER: I am going to hear from Mr. Cavender first before I decide what I am going to do.

MR. GREEN: Of course, my Lord, yes.

MR. JUSTICE FRASER: All right, Mr. Cavender?

E

MR. CAVENDER: My Lord, I hope it was not florid or whatever else my learned friend said about it.

MR. JUSTICE FRASER: Robust.

F

MR. CAVENDER: Robust. There is a real problem with the procedure adopted here. I know we are in uncharted waters but the idea of, as I said, which was perhaps florid, weaponising your expert in this way, it is potentially difficult because what it does it puts his independence potentially in issue because he generates his own lines of enquiry, he is then attacked by me for that, tries to justify them and then report on them. I am raising a little flag there in relation to that.

G

There is a real problem also with, effectively, interrogating the Post Office about Horizon generally, which is what this really does without any sort of focus, without any pleaded case to justify that and what you do with the answers, what does the Post Office have to do because in many cases my friend will touch on this, one of my major objections is the very, very broad request for information over 20 years.

H

A

My learned friend seems to assume that the Post Office has this information, a little silo somewhere in a little file as opposed to having itself to go and interrogate this business over twenty years to say, "Have you done this? Have you done that? Have you seen this happen or that happen?" The Post Office obviously have not got that information, it would be enormously onerous and, furthermore, what is the quality of the answer? Is that going to be evidence in a trial? What is the status of it? There were real problems there. I do not resile from that for a moment. We have tried to be sensible and reasonable and where we can to say we will provide it or say Fujitsu will within a certain period of time. We say, go away, have that information, look at the disclosure, and if, having looked at all that, you have a number of focused requests, then come back. That is what we have suggested and that is what I recommend.

B

C

D

E

MR. JUSTICE FRASER: My view generally is as follows. I am going to explain it to you because there is actually a judgment which is currently under embargo and in draft in a case called *ICI v. Merit No. 2* quantum which deals with that and it is going to be handed down at some point next week. It does within it deal with experts who stray outside their independent role and become enmeshed in disclosure. It does not deal with an application to the court for directions. I have very little direct experience of experts applying to the court for directions as I am sure those at the bar do, because it is hardly ever done, hence recourse(?) to authority on it.

F

G

It seems to me that the experts ought to be able to agree between themselves what further information is required by both in order properly to apply and to compile their reports. Therefore, the only order I am going to make in this respect today is the following one, subject to the dates. It is going to be that the IT experts jointly to compile a list of information that either of them or both consider they each require in order properly to opine on the Horizon issues by, then we will have a date in a minute. That list is to identify whether either or both experts agree information in particular categories required in order to compile their reports.

H

You might need to tweak the wording on that very gently but they need to agree themselves. One point which is clear on the correspondence, because I have come across this in another case, you cannot have a single expert, for example, at Fujitsu seeking information which will, of course, be given to him, I am sure, by a specialist, if

A

the other one is not there, unless a very comprehensive note is taken or a recording, because otherwise they are not working on the same information. They have to have the same information.

B

The starting point is for them to agree between themselves. Whatever else has happened before I see there is some information in here. I have not gone through it in detail. I do not think either of you are suggesting I make an order in respect of it and I do not intend to. If you do you can always come back, but that order is going to be included today because otherwise it is unmanageable.

C

I am sure it will give Mr. Cavender a very enjoyable half-day cross-examination but it is not going to help resolve the issues.

MR. GREEN: Only so it is on the transcript, your Lordship will have picked up the objection to the reference to weaponising the expert.

D

MR. JUSTICE FRASER: Well, I have ----

MR. GREEN: Both the suggestion there is any activity on our part that has led to that and also the impugning of the expert's integrity, it is right that I just put down a marker to that effect.

E

MR. JUSTICE FRASER: I am sure if any of that is going to be pursued it will have to be properly put and the right place to put it is when the experts are cross-examined. It may turn into a runner, it may not.

MR. GREEN: I am grateful.

F

MR. JUSTICE FRASER: That is the Mr. Coyne situation; is that right?

MR. GREEN: My Lord, I think we are nearly there. I think there is one on page, on the red and black order comparison table, the defendant has not included paragraph 7 which we have included which seems to us to be obviously sensible and totally consonant with the order that your Lordship's just made for them to agree what information they need. They should seek to agree, the parties should seek to agree arrangements for further access as the parties' IT experts may reasonably require in order to prepare their reports and joint statements.

H

MR. JUSTICE FRASER: This is not necessarily captured on paragraph 6. Is it not sensible for the defendant's expert to be there at the same time?

MR. GREEN: Yes, I think they should both be there.

A

MR. JUSTICE FRASER: Do either of you intend or expect Mr. Coyne to go there on a frolic of his own and just, is it Dr. Worden?

B

MR. GREEN: Dr. Worden. It is obviously a good idea if they are both there already. What we have been told is that Mr. Coyne has been provided with broadly the same information as Dr. Worden because Mr. Coyne was concerned about that but not exactly. It was definitely right they should be reporting on the basis of the same information.

C

MR. JUSTICE FRASER: At the moment you have the potential for Mr. Coyne to go off to Bracknell on his own without Dr. Worden, have you not? I am not saying that he might not have things he can do when he is there, but they also need to go jointly, do they not?

MR. GREEN: They do.

MR. JUSTICE FRASER: I do not think that is currently on the CMS order.

MR. GREEN: That may not be fully captured in the paragraph that we have sort of agreed on.

D

MR. JUSTICE FRASER: Let me hear from Mr. Cavender.

Right, Mr. Cavender.

E

MR. CAVENDER: My Lord, I agree, my experience of these in engineering disputes certainly is that there is no point in having one expert there doing tests and seeing things.

MR. JUSTICE FRASER: I agree.

MR. CAVENDER: So we could endorse that and we would alter maybe paragraph 5 or 6 depending on whose version you are looking at, to have both experts there.

F

Does my learned friend not like that?

MR. GREEN: I am very happy about it. Its a great idea.

MR. CAVENDER: Okay. So, let us do that then.

MR. JUSTICE FRASER: Most of my ideas are, not all of them!

G

MR. CAVENDER: We seem to have skipped over item 5.

MR. JUSTICE FRASER: I am going to go back to that in a minute. The reason for going to this is that it dealt with Mr. Coyne's working practices or approach. The wording needs to be changed. Before we go back to 5, Mr. Cavender, your column does not have number 7 in it at the moment.

H

MR. CAVENDER: No, because the idea is, they will hopefully behave like experts with their duty to the court and collaborate. The thing we have experienced in this, if we put

A

something like 7 in, then the claimant uses it like a warrant card to say, "well, we are entitled to do this, this is reasonable", whereas if you leave nothing obviously if they feel they have not had enough on their first visit or whatever, and in some world we say no, they can obviously apply to the court and I would be told off. The idea that you have, if you like 7 is a light trigger almost.

B

MR. JUSTICE FRASER: Well, if it is worded to make it clear that it refers to joint access as the parties' experts may reasonable require.

MR. CAVENDER: My Lord, yes.

C

MR. JUSTICE FRASER: All right we put the word "joint" in, "further joint access" in paragraph 7 and the dates.

MR. GREEN: My Lord, on paragraph 5 in our draft order, all we have done is make a provision for how any request ----

D

MR. JUSTICE FRASER: Mr. Cavender wants a cut off date, does he not, which is what it comes down to?

E

MR. GREEN: Yes. We are the ones who have a case about our clients not having known what was going on. We are trying to find out and what is being suggested is that an open ended rule that allows experts to ask when they find out something they need to know, should be artificially capped on 19th June in two weeks time for a trial in March.

MR. JUSTICE FRASER: By 19th June.

MR. GREEN: It is absolutely absurd.

F

MR. JUSTICE FRASER: Right, Mr. Cavender?

G

MR. CAVENDER: My Lord, the date may now be out of date in light of the other things that have gone on but the question is one of principle. Do we dovetail this? The answer, in my submission, is obvious, to the filing of the joint statement and the filing of the expert reports; yes we do. As opposed to my learned friend's example where you could make these requests for ever with no indication of when and within 14 days of making a request at any time and that is, in my submission, slightly unhinged. We have to get the whole thing dovetailed together to make sure that the requests are by a certain time to feed into the other steps. That is a simple point.

H

MR. JUSTICE FRASER: Is the second CMC order the one that is at paragraph 9.1 of volume 2 of the case management bundle?

A

MR. CAVENDER: My Lord, yes.

MR. JUSTICE FRASER: This is effectively the Model C approach, is it not?

MR. CAVENDER: My Lord, it is.

B

MR. JUSTICE FRASER: What the effect of your wording would be Mr. Cavender is that no Model C, or whatever the date is, is that all Model C requests would have to be done by a date in June, whether it is 19th or whether it is later.

MR. CAVENDER: The object, my Lord, is to prevent ----

MR. JUSTICE FRASER: I understand the object.

C

MR. CAVENDER: Yes. I understand your Lordship's point, it is a question of how best to manage that, you know, the cut off date so to speak. In the way of the world one can always apply for, you know, if things turn out different. All one is trying to do is create a structure which will drive us to trial in a sensible and efficient way.

D

MR. JUSTICE FRASER: I will tell you what I am going to do because it is quite difficult to deal with this in the abstract. What each of these is trying to do is they are trying to constrain the current widely-drafted simple liberty to apply that is in all the CMC order, so, I am not putting either of those paragraphs in. You have liberty to apply. You are both sensible and grown up. If you make a Model C request that is a valid one; Mr. Cavender says, "well actually it should have been made a month ago", well, then you can both take a sensible view. If you really want to come back and fight it out on that basis, well, you can. I will be delighted to see you both.

E

F

At the moment you have wide-ranging liberty to apply. It is not usual to constrain liberty to apply.

MR. GREEN: My Lord, we were only trying to get ----

MR. JUSTICE FRASER: I am not criticising you for putting it in, but neither of those paragraph 5s are going in.

G

MR. GREEN: I am grateful.

MR. JUSTICE FRASER: That, I think, then just takes one on to, there is still some, there is a common issues case management issue; is there not?

H

MR. CAVENDER: There are also information requests, my Lord, if you turn over the page.

MR. GREEN: We have 8, 9 and 10 to deal with.

MR. JUSTICE FRASER: Let us do that. Oh, pages of red.

A

MR. GREEN: 8 and 9 of IT experts requests. This is trying to give some structure to how those will be dealt with if their other requests are made just to try and get some time table. It may be that your Lordship is reminded that the experts' rule is in the order, the rule is there and it can be used without constraint. You will see what the defendant was trying to do was to say any requests by Mr. Coyne. He is not even getting documents until ----

B

MR. JUSTICE FRASER: This has been overtaken by events in terms of the order that I have made about drawing up a joint list.

C

MR. GREEN: Precisely.

MR. CAVENDER: My Lord, I am happy with that.

MR. JUSTICE FRASER: All right. Your 8 and 9 is out and Mr. Cavender's 6, 7, 8 and 9 is out.

D

MR. GREEN: I am grateful. Then on witness statements the difference between us is that we suggested that any witness statements of fact, there should be no more than three on the limited basis your Lordship indicated in relation to Horizon should be served by 28th September 2018. Plenty in advance, so that both experts can look at any, maybe they do not serve any but they can look at any relevant evidence of fact and take that into account in providing their expert's report.

E

What the defendant says is any such evidence to be served at the same time as their respectful experts first report which simply means ----

F

MR. JUSTICE FRASER: You will have two rounds. I have the point.

MR. CAVENDER: My Lord, there are two points here. The first is, may I take you to my skeleton at paragraph 33 to remind your Lordship what you said I have extracted the ----

MR. JUSTICE FRASER: Yes, about limited ----

G

MR. CAVENDER: Exactly, this is meant to be an expert trial.

MR. JUSTICE FRASER: It is an expert trial. The issues have been defined.

MR. CAVENDER: Exactly. Factual evidence, if any, effectively to be very limited. It is trying to police that.

H

MR. JUSTICE FRASER: It is very similar to the different but associated point that is made in respect of common issues in factual matrix.

A

MR. CAVENDER: It is, so one has a concern that we do not live in the same world. It is being cautious saying, well, when the judge said limited evidence, what he meant was, and obviously this is my understanding, that if the expert needs factual evidence on which to base his opinion, then you will need that factual evidence to be adduced to validate that opinion, not an opportunity to bring in individual claimant cases and complaints about Horizon and all the rest of it, which is what one suspects.

B

C

All we did in our wording was talk about generic evidence rather individual claimant evidence, we say in our drafting. Second, we suggested that it be served at least no later than the service of expert reports because by definition this is its justifying ordinance in terms of introduction. They are the two points we make.

D

MR. JUSTICE FRASER: It is rather putting the cart before the horse I think to refer to evidence of fact which an expert might need to underpin their opinion. Their opinion is really going to have to be or ought to be made on what the evidence of fact is rather than underpin their own opinion by having evidence of fact served which they require to support their opinion or have I misunderstood your submission?

E

MR. CAVENDER: My Lord, I think you have. You have instances where an expert asks various questions and is given answers and on that basis he proceeds along with his enquiry and gives opinion. He cannot give obviously factual evidence about those underlying matters and will often require a witness statement from someone involved and if it was the Post Office someone from the Post Office.

F

MR. JUSTICE FRASER: If that is correct, I mean, let us explore that. Let us say evidence of that nature comes from Mr. and Mrs. X about Fujitsu. His opposite number should know what that is, should he not, before he serves his report? Otherwise, there is the risk of spending a lot of time and effort up one particular avenue in the discussion or consideration or opinion when actually, when he gets Mr. or Mrs. X's evidence from Fujitsu he realises he has misunderstood something.

G

H

MR. CAVENDER: My Lord, yes. I am not wedded to the serving with the expert report point, you know, it is more the type of evidence. My learned friend just says three witness statements from anyone.

MR. JUSTICE FRASER: I know. I understand that point because you are pinning that back to the debate that has already been had once. Actually it has been had twice, I think.

A

MR. CAVENDER: Indeed. I am looking at witness statements and the way they look at them is rather different. I am just trying to say, "well, look, this is what the judge said". If you look at our wording, my Lord, on the scope point, all we say generically is what it should contain. In respect of Horizon issues, if you look at the table, my Lord, the parties have permission to file some witness evidence of any witness of fact whose generic evidence gateway number 1 -- explaining what that means -- in distinction to claimant specific evidence, is necessary for the termination of such issues. Whether it be served at the same time of the expert's report, I am agnostic I understand your Lordship's point and you may well be right about that. So, if you want to have it, some other trigger for that, I am content with that.

B

C

I think we should have some discipline to reflect your Lordship's comment when you set this boat off, the expert boat, to make sure that there is something, not any three witness statements of fact, but it is generic and it is tied to the expert issues.

D

The trouble is, my Lord, if people serve evidence in the debate over the common issues thing, people serve witness evidence then you have to test it, it is a natural instinct.

E

MR. JUSTICE FRASER: We are going to come on to that in more detail. Strictly speaking, if evidence is not relevant, it is not admissible.

MR. CAVENDER: Quite.

MR. JUSTICE FRASER: If it is not relevant to the Horizon issues it is not admissible anyway. We are going to come to that in a bit more detail for common issues.

F

I will just remind you both, I am sure you have these dates at the forefront of your mind or maybe with time they have been changed, but in the order in the case management bundle volume 2 at 9.2 in paragraphs 17 and 18 the dates for the IT expert reports are staggered. It is the claimants have to serve their report by 14th September and the defendant has to serve its by 2nd November. Have those dates been extended or are they the dates as at today still?

G

MR. CAVENDER: They are still the same.

MR. JUSTICE FRASER: They are still the dates.

H

Mr. Green, you said 28th September, at the moment that is two weeks after your own IT expert's report.

A

MR. GREEN: Yes, it needs to be before.

MR. JUSTICE FRASER: It needs to be before.

MR. GREEN: Yes.

MR. JUSTICE FRASER: If that is made ----

B

MR. GREEN: Or we could put it ----

MR. JUSTICE FRASER: If that is made the 14th and the IT expert's date changes to
28th September.

MR. GREEN: Yes, my Lord, I was thinking exactly that.

C

MR. JUSTICE FRASER: Then Mr. Cavender's IT expert can have another week to go to the
9th. What paragraph 10 is going to read is as follows: "In respect of the Horizon issues
the parties shall have permission to file and serve witness statements of any witnesses of
fact upon which that party wishes to rely for the determination of the Horizon issues at
the Horizon Issues Trial." The date for service of that evidence is 14th September 2018,
subject to anything you have to say.

D

MR. CAVENDER: My Lord, there is one point, because of this world which we live in
where there are no pleadings, when we paying out evidence of fact we do not know what
issues we are preparing in relation to, all we will have is some general high level
statement.

E

MR. JUSTICE FRASER: You do know the issues. The issues are Horizon issues.

MR. CAVENDER: No, in terms of evidentially, what evidence issues, we do not know the
level of detail required so we will need evidence on this or that or the other in terms of
factual evidence. So if we are going to have an order of that type, would it be a good
idea to have some provision for any reply witness evidence?

F

MR. JUSTICE FRASER: Yes.

MR. CAVENDER: The first time that we see it ----

G

MR. JUSTICE FRASER: That is a perfectly fair point. I do not think there is any issue with
having supplementary evidence of fact. Give me a date, Mr. Cavender.

MR. CAVENDER: Two weeks after the date provided.

MR. JUSTICE FRASER: Mr. Green?

H

MR. GREEN: My Lord, I want to make sure that that is all.

MR. JUSTICE FRASER: That would be after, no, actually, that would on the same date.

A

MR. GREEN: Could we put ours back by seven days from then?

MR. JUSTICE FRASER: I am slightly concerned, for this reason. The timetable that was set the time before last was done to reflect Mr. Cavender's point about the pleading and to give his IT expert a reasonable period of time to assess your IT expert's report. That as a principle has to remain.

B

MR. GREEN: That is totally fair.

MR. JUSTICE FRASER: Also on the 4th or 5th November, I think the 5th, the Common Issues Trial is going to start.

C

MR. GREEN: Yes.

MR. JUSTICE FRASER: What I am going to do on this is leave it like this. Today's order is going to have service of witness evidence, which I suggest is the 14th, provision for the claimants' IT expert to be given some time after that, provision for supplementary evidence to be served as Mr. Cavender suggested and you both agree, and then the date for Mr. Cavender's IT expert. Those dates are going to have to be agreed between you because there are four of them. You are going to want to take into account the date of 5th November. I am sure you will not fall out about it but if you do you have liberty to apply, you can come back.

E

MR. GREEN: I am sure it can be agreed.

MR. JUSTICE FRASER: Mr. Cavender, does that seem sensible?

MR. CAVENDER: My Lord, yes, that is fine, thank you very much.

F

MR. JUSTICE FRASER: Is that everything on Horizon?

MR. GREEN: My Lord, I think that is everything.

MR. JUSTICE FRASER: There is a threshold for reporting costs.

MR. GREEN: Yes, but that is a costs point.

G

MR. JUSTICE FRASER: It is a simple point and it is not relevant to the cost management order scenario.

MR. GREEN: The short point is we suggest that £500,000 is a reasonable compromise.

MR. CAVENDER: Fine.

H

MR. JUSTICE FRASER: Delighted though I am to get such regular updates, because I get them as well, £250,000, with hindsight, has proved too low, so it is £500,000. That I think has now given you or should have given you sufficient to deal with all the case

A

management issues except for common issues and evidence of fact which we are going to deal with.

Inevitably by the way costs budgeting is going to have to wait for another occasion.

B

Right, Mr. Cavender?

MR. GREEN: May I start that, my Lord?

MR. JUSTICE FRASER: Well, not yet because I just want to ask Mr. Cavender.

MR. GREEN: I am so sorry.

C

MR. CAVENDER: My Lord, as I said in my skeleton, this is an issue that has been rumbling, as your Lordship recognised, since October. It was obviously going ----

MR. JUSTICE FRASER: It actually rose its head right at the very beginning under Mr. De Garr Robinson who made very similar points.

D

MR. CAVENDER: Exactly, they have been put off for various reasons. They arise again in the case management context because one of the points on witness statements is, you spent almost £1 million in individual costs and you want to spend another £500,000 in the Common Issues Trial, you know, what is all this on? It deeply worries me, not just because of the amount of costs but also, what on earth the claimant thinks the scope of the evidence is. You have six representative ----

E

MR. JUSTICE FRASER: There are six lead claims.

F

MR. CAVENDER: Exactly. The issue is what they did to enter into a contract with the Post Office really, what the factual matrix to that was, what they understood, those kinds of things which are normally reasonably straightforward. Certainly the kind of witness statements one expects would be relatively short focused on what they were told, what they sign, those kinds of things.

G

Given the amount of expense that has been expended and also given the pleadings we have seen recently, the individual particulars of claim, they go into all manner of breach, performance.

MR. JUSTICE FRASER: The pleadings do?

H

MR. CAVENDER: They do, about how Mr. X or Ms. Y, you know the training was not very good, or this was not very good, or they were told that, these kind of things, during the currency of their quite long relationships. What I fear is witness statements that match

A that. We have all this evidence about breach in a trial that is deemed construction and implied terms.

B The only time it broadens out at all on my learned friend's case on *Autoclenz* is his point about the period of notice for termination where he says that did not represent the true agreement and there is an issue about that. That is the only exception to what is a normal commercial contract and the factual matrix that can be adduced which is relatively limited. I have two concerns really, one is the idea of adducing witness evidence which would then have to be tested, at least in some ways because I guess a lot of it might be thought to be prejudicial or telling the story. That is the first thing.

C The second thing is the timing to do this. If those six individuals serve witness statements that talk to the pleadings in full by what happened to them, their expectations, training, all the rest of it, help line, then if that is going to be tested and there is a fact-finding trial in relation to that, we have not got the time to have six of those trials in D the four weeks, plus the quite complex legal debate over very many terms of that contract. The whole trial would become subsumed in a morass of fact. Unless your Lordship says, well, they may have served all this evidence but I am not going to test it in this trial.

E MR. JUSTICE FRASER: I am not testing it at all.

MR. CAVENDER: My Lord, no. What I am saying at this stage is, well, let us not waste the costs and time in serving it now. This is the wrong time to be serving evidence about breach.

F MR. JUSTICE FRASER: You, or rather the Post Office has now made the same point four times.

MR. CAVENDER: Exactly.

MR. JUSTICE FRASER: Let me hear from Mr. Green.

G Right, Mr. Green?

H MR. GREEN: My Lord, there is and a priori point which I was going to make which actually logically is anterior to the point about the factual matrix which is that your Lordship will remember there was an order for the RFI to be answered as to what their case was on the implied terms. That is at page 87, tab 9.1 in case management bundle volume 2.

MR. JUSTICE FRASER: Which page? Sorry tab?

A

MR. GREEN: It is tab 9.1.

MR. JUSTICE FRASER: Page or paragraph?

MR. GREEN: It is paragraph 1 on page 87.

MR. JUSTICE FRASER: That is just the order saying about the RFI.

B

MR. GREEN: Yes. So that was our second RFI on the same point.

MR. JUSTICE FRASER: About the implied terms.

MR. GREEN: About the implied terms and your Lordship will remember that the pleading was that some of them are either governed by or covered by other terms, and they give an example of one. That is what the whole Common Issues Trial is about.

C

MR. JUSTICE FRASER: The Common Issues Trial is actually about the Common Issues as drafted and appended to the order.

D

MR. GREEN: Precisely, and a big chunk of which is what the implied terms were or were not. Just so that it is clear and the reason we have an order in the end was to avoid what the defendant is proposing, which is that we learn in submissions in November what their position is in relation to the specific pleaded terms, implied terms. They, for example, concede the *Stirling v Maitland* term, the necessary cooperation term, but what we do not know is whether the ones we pleaded at paragraph 64 are of pleading ----

E

MR. JUSTICE FRASER: Do not take me to the pleading, take me to the list of Common Issues if you would, which I think is under tab 9.1, is it?

MR. GREEN: I think it is behind tab 7, Mr. Warwick helpfully tells me, and Common Issues are at page 67.

F

MR. JUSTICE FRASER: Yes.

MR. GREEN: Implied terms is on page 67 and it is issues 2, 3, I think 4 is actually supply of goods and services.

G

MR. JUSTICE FRASER: It is still an implied term.

H

MR. GREEN: Yes, it is, exactly. Your Lordship will note the wording in paragraph 2 is, "which, if any, of the terms of the paragraphs listed below were implied terms (or incidence of such implied terms) of the contracts between the Post Office and Subpostmasters." It is going to be totally ridiculous if what we have at pages 35 and 36 of the case management bundle 1, the pleadings on paragraph 64, if we all prepare for this huge trial in November and then, on day 1 Mr. De Garr Robinson or my learned

A

friend, whoever is doing it, stands up and says, well, we accept that some of these subparagraphs are incidents of the necessary co-operation term.

MR. JUSTICE FRASER: What has this got to do with the extent and scope of your witness evidence?

B

MR. GREEN: Because in terms of what is outstanding for the Common Issues Trial the first point is that we have still not yet defined what the defendant's case is in relation to the implied terms.

C

MR. JUSTICE FRASER: Mr. Green, I am not sure I really follow this at all in terms of your addressing the point about the extent and scope of the witness evidence. In paragraph 64 there are twenty different implied terms, are there not?

MR. GREEN: Indeed, and we have made it clear that we say that it may well be that it is very likely that some but not all, for example, if the court finds it is a relational contract ----

D

MR. JUSTICE FRASER: I know that but how does the scope of your witness evidence affect your discovering Mr. Cavender's case on which, if any, of those twenty implied terms are incorporated in the contract?

E

MR. GREEN: It does not directly bear on that point. It is a point anterior to the discussion of factual matrix and distinct. Save that the issue of whether there is a relational contract or not is one as to which the factual matrix is likely to be wider. I was not making submissions in relation to the factual matrix point. The point of submission I was making was, before we even get to the question of what the factual matrix is in relation to the Common Issues Trial, we have to actually define what the Common Issues are ----

F

MR. JUSTICE FRASER: The Common Issues are defined. They are in the schedule.

G

MR. GREEN: My Lord, the Common Issues ... sorry, define what the parties' case is in relation to those are, without waiting for November. What I was going to suggest, my Lord, is we are going to have one last try because the order that was made in the order that I took your Lordship to at paragraph 1 on page 87 in tab 9.1, there is a significant difference as your Lordship will appreciate. There is a difference between an order that a defendant answer a request and an order that the defendant provide the information requested.

H

A

MR. JUSTICE FRASER: Right, Mr. Green, I am now going to change the scope of this to a question and answer session.

MR. GREEN: I am grateful.

B

MR. JUSTICE FRASER: Right. Post Office has made the point now four different times over a period of many months that they have picked up enough smoke signals to be able to anticipate that you are likely to serve far wider ranging evidence of fact for the Common Issues Trial and is necessary to determine and decide the Common Issues.

MR. GREEN: Yes.

C

MR. JUSTICE FRASER: I have revisited my notes from earlier occasions, it actually arose the very first time when the debate was "how long should the Common Issues Trial be set down for".

MR. GREEN: Yes.

D

MR. JUSTICE FRASER: Mr. De Garr Robinson said it did not need to be as long as four weeks. I went for four weeks, I think he might have been originally seeking slightly longer than that but whatever the background your answer on each occasion has been, it is to put things in their factual context.

E

MR. GREEN: It is a bit more ----

MR. JUSTICE FRASER: No, let me deal with it on that basis. Whatever the factual evidence upon which you seek to rely it has to be relevant to the Common Issues.

MR. GREEN: Correct.

F

MR. JUSTICE FRASER: If it is not relevant to the Common Issues it is not admissible.

MR. GREEN: Absolutely right, there is no dispute, to uncertainty about that.

MR. JUSTICE FRASER: In those circumstances it is difficult based on reading the authorities to see for example, to use Mr. Cavender's example, how evidence of breach could remotely be relevant to the Common Issues Trial.

G

MR. GREEN: We have at some length sought to explain that in correspondence.

MR. JUSTICE FRASER: Would you like to explain it to me?

MR. GREEN: Certainly.

H

MR. JUSTICE FRASER: Perhaps not at some length but just relatively succinctly.

MR. GREEN: The characterization of matters being matters that go to breach is the defendant's characterisation of those matters.

A

MR. JUSTICE FRASER: I do not understand that submission for a moment I am afraid simply as a matter of English.

B

MR. GREEN: Someone says, "I was provided with this training which I found inadequate and it did not help me do X", let us assume that is going to be the evidence. Now, my learned friend says that is evidence that goes to breach, but that is wrong analytically.

MR. JUSTICE FRASER: Show me which Common Issues it would go to.

MR. GREEN: May I take it in stages?

MR. JUSTICE FRASER: Yes.

C

MR. GREEN: The first point is that on Common Issues number 1, relational contract the court has to decide that by looking at the nature of the contract.

MR. JUSTICE FRASER: Correct.

MR. GREEN: As in fact it worked in practice to see whether or not it was a contract which requires the parties ----

D

MR. JUSTICE FRASER: I do not think one looks at the nature of the contract as it worked in practice. One looks at the nature of the relationship between the parties to the contract to see if the necessary ingredients, or if there are any new ones which have not yet been subject to authority. Whatever the necessary ingredients are for a relational contract are, print or not.

E

MR. GREEN: Correct. Then we reformulate it to say, was the contract one which in practice required the fair dealing and good faith requirement et cetera in the ----

MR. JUSTICE FRASER: That does not require breach.

F

MR. GREEN: No, but, my Lord, my learned friend has captured the language, we say, quite wrongly. There are two points, contractual orthodoxy from which we do not depart at all. The first point is that when you are looking at the construction of a contract you look only at the evidence as it was when the parties contracted. We are not going to invite your Lordship to look at any evidence after the parties contracted to construe the agreement that they entered into on that date.

G

MR. JUSTICE FRASER: Good, because that would be inadmissible.

MR. GREEN: Of course. I am trying to clear the ground where the dispute is.

H

MR. JUSTICE FRASER: By definition the breach must happen after the contract ----

MR. GREEN: Of course, we are not talking about ----

A

MR. JUSTICE FRASER: My question to you was predicated specifically by reference to breach.

B

MR. GREEN: Breach assumes one has identified what the legal obligation is first which we have not even done, that is what the Common Issues Trial is about. My learned friend's characterisation is speculative.

C

MR. JUSTICE FRASER: I will tell what you I am going to do about this because I am have grave difficulty in following it, but it is also undoubtedly the case that there are bear traps left, right and centre in my attempting to identify in advance ----

MR. GREEN: Precisely.

D

MR. JUSTICE FRASER: ---- when you can and cannot do in your evidence. So this is what I am going to do. I am going to express myself very clearly. If you serve evidence of fact which includes passages which are plainly not relevant and, hence, not admissible, Mr. Cavender is going to have a choice. He can either simply say, "I am not going to be cross-examining at all" or he is going to issue an application to have it struck out. If he does issue an application to have it struck out and that application is effective, it will involve the court going through it and simply striking out large amounts.

E

The court will make time to do that but cringing costs consequences will follow. Although I imagine there are only likely to be six witness statements, are there, one from each, or there might be more?

F

MR. GREEN: Yes.

MR. JUSTICE FRASER: There will be six or thereabouts.

MR. GREEN: Yes.

MR. JUSTICE FRASER: It is an exercise which will be very tedious and expensive and it will take a day or two but it can be done.

G

MR. GREEN: Yes. My Lord, we expect all of that. That is what we expect but we also note that my learned friend having initially opposed this point conceded it before you in the transcript, we can find a reference if you want, that each time Post Office exercises its entitlement to vary the contractual relationship or the contractual obligations of Subpostmasters, that falls to be construed as the position is known to the parties at that time.

H

MR. JUSTICE FRASER: Of course, that is contractual orthodoxy.

A

MR. GREEN: Precisely, that is all ----

MR. JUSTICE FRASER: But it does not open the door and it might be that this is all a concern without any real substance. It does not open the door to wide-ranging evidence of fact which appears to be Post Office's concern, that cannot possibly form part of the factual matrix.

B

MR. GREEN: Precisely. We have taken that on board, I hope.

MR. JUSTICE FRASER: I know, you always do say you take it on board and you all say that you are following contractual orthodoxy. It might be that you are.

C

MR. GREEN: I am grateful.

MR. JUSTICE FRASER: At the moment, without the documents in front of you to be able to look at it with any sort of concrete analysis, it is difficult for me to do any more. To continue the quasi military analogies from earlier this afternoon, a very powerful shot has now been fired across your bows on two occasions and I do not mean by Mr. Cavender or Mr. De Garr Robinson; I mean by me.

D

MR. GREEN: My Lord, yes.

MR. JUSTICE FRASER: If it comes to a contested application of that nature, well, that is what will happen. Please do not try and explain it to me by reference to finding out what their case is because that does not make any sense at all.

E

MR. GREEN: My Lord, I was not actually trying to do that task. I was simply trying to address a point which I thought was actually logically anterior to getting on to what people are saying about the Common Issues which is that I am still in a position today

F

MR. JUSTICE FRASER: That is fascinating but so far as I am concerned, absent an application to do anything about it, it does not affect the scope of your evidence of fact at all.

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MR. GREEN: All I can say is, a large number of implied terms were conceded ----

MR. JUSTICE FRASER: Then your evidence of fact would be narrower.

MR. GREEN: So it does affect.

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MR. JUSTICE FRASER: No, it does not, because at the moment the pleading is fairly clear. You are just, I think what you are doing forensically is saying, actually when you look at these twenty they are only numbered up to 19 but there is a 1(a), so there are twenty.

MR. GREEN: Yes.

MR. JUSTICE FRASER: One expects a number of them should not really be controversial.

MR. GREEN: Or may be subsumed in other things.

MR. JUSTICE FRASER: Maybe, but you unless and until that happens I do not think you could be criticised for addressing a specific area which is currently in issue.

MR. GREEN: I understand, I am grateful.

MR. JUSTICE FRASER: It is not relevant to the Common Issues, it is not admissible.

MR. GREEN: The only area which I have not raised is the extent to which, so the two points of contractual orthodoxy, the first one I have identified as you look precisely at the time that the contract was made. The second is to try and construe the contract in a way that makes commercial business sense which is also an orthodox principle of contractual interpretation. That is the second. The question is when we got 561 people across 20 years, how is the court going to reach an informed view, and I am not talking about putting in lots of florid evidence about complaints and what happened to me and so forth, but as, how is the court going to reach an informed view about what makes commercial business sense without having an understanding of a relevant part of the period as to how it worked when all these people are entering into these contracts across that period.

MR. JUSTICE FRASER: Can I just suggest that in addition to all the usual cases such as *Credit Suisse v Titan Europe*, *Investors Compensation Scheme*, *Chartbrook*, *Rainy Sky Sigma Finance*, *Arnold v Britton*, *Wood v Capita*, the parties also remind themselves of the dicta of Leggatt J as he then was in paragraphs 9 and 10 in the *Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm) which makes it clear that what is said during the negotiation of the contracts, not admissible for the purposes of interpretation and evidence of the subsequent conduct of parties is also inadmissible. If those very well-known principles are borne in mind there will not be a problem. If they are not, I imagine delightful though it is, we have a contested application in store.

MR. GREEN: My Lord, the only question that I am trying to establish, because I am perfectly happy to go along with any clear view expressed by the court. Of course I am obliged to do so, but let us assume that an event takes place on Monday with claimant

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number 1 and on Wednesday Post Office enters into the contract with claimant number 3.

MR. JUSTICE FRASER: It cannot be evidence that is known by both parties, can it?

MR. GREEN: That is the issue.

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MR. JUSTICE FRASER: It might be and, Mr. Green, I am sure you are not expecting me to, but just for the sake of argument I will make it clear for sake of clarity, I am not going to direct in advance the approach you should take on your witness statement other than to say it has to be relevant to the Common Issues.

C

MR. GREEN: I am grateful, my Lord.

MR. JUSTICE FRASER: If it is not relevant it is not admissible and I do not think this is going to be an isolated passage here or there. I imagine Mr. Cavender is going to get your two lever arch files, or however many they are, blow a gasket, his blood pressure will go through the roof but he and his solicitors are likely to issue an application. If he issues one it will have to be fought out line by line. I do not propose to say any more about the subject, unless I have missed something.

D

MR. CAVENDER: My Lord, may I say one thing, look at the pleadings for two minutes so that you see the basis of my, it is not just smoke, it is actually words. So you look at trial bundle 1(a), individual pleadings, you take the first pleading, Nashul Abdulla(?) and go to page 8, paragraph 22 under training. This is a pleading in the Common Issues Trial and it deals with all different issues.

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MR. JUSTICE FRASER: Which paragraph?

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MR. CAVENDER: It is paragraph 23.

MR. JUSTICE FRASER: Yes.

MR. CAVENDER: "Training was insufficiently detailed and did not cover accounting" et cetera, not sufficient detail.

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If you turn over the page to page 28, the defendant did not provide further detailed relevant trading after transfer. If you go over the page to help line advice, 36, sought advice from the help lines six or seven times a month, only able to get through less than half. All sorts of complaints of Horizon shortfalls. It goes into the particular shortfalls as individual and their experience and their first complaints about things. All

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this is not admissible to the idea of a contract. This is the performance and the breach and the complaints of this individual.

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MR. JUSTICE FRASER: The issues that are being resolved in the Common Issues Trial are appended to the order and they are quite clearly drafted, they were also drafted by agreement. If evidence of fact does not go to one of those issues in the common issues of agenda for trial, effectively, it is not going to be admissible.

MR. CAVENDER: You can see all the pleadings drafting, which are drafting defences at the moment ----

C

MR. JUSTICE FRASER: As I have said, I understand the point. It is not a new one but in the absence of the actual evidence itself I do not understand that the court can actually do any more than it is.

MR. CAVENDER: My Lord, no.

D

MR. JUSTICE FRASER: If the two of you want to continue your squabble about it outside, the building is open probably until seven o'clock.

MR. GREEN: My Lord, the only thing I do notice, we have continued our squabbles on other matters such that my learned friend Mr. Warwick is ----

E

MR. JUSTICE FRASER: It always happens, Mr. Warwick is going to have to come back I am afraid.

MR. GREEN: There is one point which I think he is quite keen to canvass.

MR. JUSTICE FRASER: He might be, is it a costs management appointment? I am not going to take them in isolation.

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MR. GREEN: It is as to what happens between now and coming back.

MR. JUSTICE FRASER: Right.

G

MR. WARWICK: Yes, may it please, your Lordship, you might have seen from the skeleton arguments that a quarrel has developed about the nature of the costs budgets that have been filed, particularly the defendant's costs budget.

MR. JUSTICE FRASER: There are lots of squabbles, are there not, about costs budgets?

H

MR. WARWICK: Indeed, my Lord, on the detail there are quarrels on the point, helpfully those have narrowed by the agreement of certain phases and I take it from the indications given that those are a matter for another day, but there is one point of principle which it may be sensible to raise at this stage.

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MR. JUSTICE FRASER: I am aware of the point of principle. I am not going to be able to resolve it now on the basis of I am at least 15 minutes late for a meeting which I was supposed to have been at at half past four. So far as directions are concerned between now and your coming back, whether it is Mr. Cavender or one of his front rank team, are you asking for any directions now?

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MR. WARWICK: My Lord, yes.

MR. JUSTICE FRASER: What direction are you asking for?

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MR. WARWICK: We are asking for a direction that the Post Office be required to file and serve an amended form of its Precedent H that conforms to the layout adopted by claimants.

MR. JUSTICE FRASER: This is the two different word streams point?

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MR. WARWICK: Indeed, my Lord. The reason for troubling you with this now, at 16:45 I see on the clock, is because thinking efficiently if this is going to go off to another day ----

MR. JUSTICE FRASER: It has to go off to another day.

E

MR. WARWICK: Then the better and more proportionate consequence will be to mop that issue up now rather than hold a yet further hearing ----

MR. JUSTICE FRASER: I cannot mop it up now though, with respect, because that is a fundamental point of difference between the parties about how they have gone about producing their budgets.

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MR. WARWICK: Indeed, I remember well, my Lord in which case I would make these points on another date.

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MR. JUSTICE FRASER: I think so. Cost management hearings are thrillers and at the risk of being satellite litigation I am anxious to avoid satellite litigation where possible but it does not appear to be possible and I am equally not going to encourage it by giving you an enormous length of time next time. I am minded, subject to anything from any of you, because I do not know if Mr. Cavender is dealing with it or one of his team, to set this down only for one hour. Is that wildly ----

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MR. CAVENDER: I think that is satisfactory. The issues are pretty clear.

MR. WARWICK: The issues are pretty clear and I gather that a set of documents were served yesterday indicating the extent of agreement and that is, certainly on the

A claimants' budget there are only three phases that are neither incurred nor agreed and they all fall under Common Issues Trial ----

MR. JUSTICE FRASER: Is there any scope from either party for further point of agreement to be reached before the next time get to see you on costs budgeting?

B MR. WARWICK: That is possible, my Lord, but ----

MR. JUSTICE FRASER: That is all I need to know. That is going to enable me to make some directions.

MR. WARWICK: I am grateful, my Lord, although I should flag, because it will be remiss of me not to, that there is a fundamental point of principle about the usefulness of

C budgeting a document like the defendant's budget which will have to be addressed.

MR. JUSTICE FRASER: I am aware of that.

MR. WARWICK: I am grateful.

MR. JUSTICE FRASER: I am going to give the following directions. Can someone remind

D me of the date? Is it the 5th?

MR. WARWICK: The 5th.

MR. JUSTICE FRASER: I am not going to invite submissions on these directions because they are basically standard, they are just going to, they set out the framework for you to

E try and reach agreement. At paragraph 1, "the parties are to continue to seek to agree their respective costs budgets by" then please put in the date, seven days from today. In so far as elements of either costs budget remain not agreed by that date, each party to

F exchange and lodge with the court no later than 4pm on Friday, 15th June their points of disagreement, and serve those points of disagreement on each other and lodge them with the court.

The points of disagreement are to include the following: (1) points of principle; (2) point of detail concerning amounts; (3) any other points of disagreement not include in (1) or (2), a Costs Management Conference is to be set down for the week

G commence the 18th, a time estimate one hour. I will have to give you a date for that, it might be at 9.30 if court has something else and then we will deal with the Costs Management Order on that occasion. All right.

H MR. WARWICK: I am grateful, my Lord.

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MR. JUSTICE FRASER: On a more logical point, by clerk has now changed. It is no longer Ann Harries, it is Madeline Collins, her email address is Madeleine.Collins@justice.gov.uk. Please no longer feel the need to copy in Mrs. Harries, who will be distraught that she no longer gets any Bates documents and Ms. Collins now has that delight.

B

MR. CAVENDER: My Lord, will you issue a date within that week?

MR. JUSTICE FRASER: I will but I am not able to do it now, I will go back to my desk and I will send you the date straightaway.

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MR. CAVENDER: I am obliged.

MR. JUSTICE FRASER: Are you going to need another case management hearing this side of the long vacation at the end of July?

MR. CAVENDER: My Lord, have we done then? There is no more one can say about Common Issues and factual matrix, we have done that now?

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MR. JUSTICE FRASER: You can say as much as you like. I do not see in advance of seeing a witness statement how it is possible for the court to do anything other than express itself the way it has, but are you going to need a case management hearing?

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MR. CAVENDER: I do not think so. That was the only, I do not anticipate ----

MR. GREEN: I do not think we are, my Lord.

MR. JUSTICE FRASER: You are then going to enter a two-month period of darkness when you will not be able to trouble the court with any disagreements. May be you would like to reflect on it. If you think you might, simply let Ms. Collins know within the next week. I will try and carve out an hour or something.

F

MR. CAVENDER: It may not be a bad idea because we can always let it go rather than, well, it is harder to slot it in.

G

MR. JUSTICE FRASER: Otherwise you will ----

MR. GREEN: It might be sensible maybe in early July or something.

MR. JUSTICE FRASER: Well, think about it between yourselves and if you think it would be sensible send my clerk a note, please. You need one hour costs case management. Is there anything else?

H

MR. CAVENDER: My Lord, no, thank you very much.

MR. GREEN: No.

MR. JUSTICE FRASER: Thank you all very much.

I sense a palpable disappointment has settled on the entire room when you realised there was not going to be enough time for costs budgets.

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