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Filed on behalf of the: Defendant
Witness:
Statement No.: First
Date Made: 16 March 2019

Claim Nos: HQ16X01238, HQ17X02637 & HQ17X04248

POST OFFICE GROUP LITIGATION
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION

B E T W E E N:

ALAN BATES AND OTHERS

Claimants

AND

POST OFFICE LIMITED

Defendant

[XTH] WITNESS STATEMENT OF ANDREW PAUL PARSONS

I, Andrew Paul Parsons of Oceana House, 39-49 Commercial Road, Southampton, SO15 1GA WILL SAY as follows:

1. I am a partner at Womble Bond Dickinson (UK) LLP, solicitors for the Defendant (**Post Office**) in the above proceedings. I am duly authorised to make this statement in support of Post Office's application for an order that the Honourable Mr. Justice Fraser be recused as the Managing Judge of the Post Office Group Litigation. The facts set out in this statement are within my own knowledge.

2. In this statement I refer to documents which are contained in the trial bundle for the Horizon Issues Trial in the form {**Section / Tab / Page**}. Alternatively, where from documents are extracts lengthy, they have been included in the enclosed Annex to this witness statement and are referred to in form {**Annex, XX to XX**}. **[Counsel query – would this be a better layout rather than all the extracts in the body of the statement?]**

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3. These proceedings are being managed in stages and since the claim was issued in April 2016 there have been numerous Case Management Conferences (**CMCs**) and applications heard before the Honourable Mr. Justice Fraser. For the purposes of this application, the relevant CMCs and hearings are those which were held on [Dates], as well as the Common Issues Trial (as defined below).

4. This statement covers those matters determined at these CMCs and hearings by reference to either the Claimants' Skeleton, Defendant's Skeleton, or the transcript.

5. The matters that were determined at these CMCs / hearings and which are covered by my witness statement fall into two categories:

   5.1 Scope of witness evidence (which is dealt with in Section [2] below); and

   5.2 Disclosure (which is dealt with in Section [3] below).

6. Section 4 of my statement concerns the findings which were made at the Common Issues Trial (as defined below).

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SECTION 1: BACKGROUND

[Should we also include other procedural events in this section – ie. service of pleadings / factual matrix documents / witness statements for CIT?]

7. On 22 March 2017, a Group Litigation Order (**GLO**) for the management of these proceedings was made.[1] Pursuant to paragraph 10 of the GLO, the Honourable Mr. Justice Fraser was nominated as the Managing Judge.

8. The first CMC was held on 19 October 2017, pursuant to Directions Order No 1.[2]

9. By an Order dated 27 October 2017, it was ordered by the Honourable Mr. Justice Fraser that there *"shall be a trial of common issues, to determine issues relating to the legal relationship between the parties".*[3] A list of the common issues was annexed at Schedule 1 to this Order. This trial became to be known as the **Common Issues Trial** and was heard between 7 November and 6 December 2018. The Common Issues Trial is the first of (at least) three trials being heard in respect of these proceedings. On 15 March 2019, the Honourable Mr. Justice Fraser handed down Judgment (No .3) "Common Issues" (the **Judgment**).

10. By way of an Order dated 27 October 2017 a *"further trial of substantive issues between the parties in the Group Litigation to be set down on to be listed for 20 days, commencing Monday 11 March 2019."*[4] The issues to be determined at this trial were ordered on 23 March 2018, being matters which relate to the operation of the Horizon (Post Office's electronic point of sale IT system).[5] This trial is known as the **Horizon Issues Trial**. The list of issues to be determined at the Horizon Issues Trial is at Schedule 1 of the Order dated 23 March 2018.[6] The Horizon Issues Trial began on 11 February 2019, before the Judgment was handed down, and is due to conclude on 8 May 2019.

11. A third trial was listed by way of an Order dated 3 January 2019.[7] Pursuant to an Order dated 20 February 2019, this third trial is due to determine issues relating to limitation and measure of loss in the circumstances where a Claimants contract was terminated in breach by Post Office.[8] This trial is known as the **Further Issues Trial.**

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[1] {C7/3/1}
[2] {C7/4/1}
[3] [XX]
[4] {C7/7/10}
[5] [XX]
[6] (C7/14/3}
[7] {C7/36/1}
[8] {C7/39/1}

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12. A fourth trial is expected to be held in spring 2020, but has not yet been listed although the parties are beginning preparations for this trial.[9]

SECTION 2: SCOPE OF EVIDENCE FOR THE COMMONS ISSUES TRIAL

19 October 2017 - Case Management Conference

13. The scope of the Common Issues Trial was focussed on determining the contractual relationship between Post Office and the Claimants. The issues to be resolved were largely questions of contractual interpretation and the evidence before the Court was to be limited in such a way.[10] The Honourable Mr. Justice Fraser therefore ordered (by an Order dated 27 October 2017, paragraphs 8 and 10) that the statements of case and witness evidence should be specifically "*in relation to the Common Issues*".[11]

14. On numerous occasions, prior to the beginning of the Common Issues Trial, Post Office brought to the Honourable Mr. Justice Fraser's attention the risks of taking into account evidence which was outside the scope of the Common Issues Trial and the concerns held by Post Office that the Claimants were looking to serve evidence which went beyond the scope of that which was permissible at the Common Issues Trial.[12] These risks were understood by Post Office to have been appreciated by the Honourable Mr. Justice Fraser.[13]

15. The first CMC after the GLO had been made was held on 19 October 2017. One of the purposes of this CMC was to determine what preliminary issues could be determined at the first trial in these proceedings.

16. Mr de Garr Robinson QC appeared for Post Office and raised with the Honourable Mr. Justice Fraser on numerous occasions his concerns that matters which relate to breach and liability were being relied upon by the Claimants to determine matters of construction and interpretation, as set out in paragraphs [15.1] to [15.5] below.

    16.1 Mr de Garr Robinson QC stated:

    "MR. DE GARR ROBINSON: My Lord, it's agreed in principle but your Lordship does need to be aware of potential difficulties that could arise in

[9] See paragraphs 13 to 17 of the Order dated 20 February 2019 {C7/39/5}.
[10] A list of the Common Issues to be determined is at Schedule 1 to the CMC Order dated 27 October 2017 {C7/7/13}.
[11] {C7/7/4-5}
[12] [XX to best example]
[13] [XX to best example]

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this case as it goes further. As a result, amongst other things, of the reply, it appears that ***there are a number of factual claims that are being relied upon by the claimants in support of their case on construction and some of those factual claims appear to be actual liability claims.***

MR. JUSTICE FRASER: Yes.

MR. DE GARR ROBINSON: Whether one calls these issues "preliminary issues" or "common issues" the same problem arises, which is it is always a difficulty in cases where the court is deciding how to dice and slice a given piece of litigation. ***There's always a difficulty if substantial amounts of evidence are called at the first determination of matters that are actually going to be decided as part of a subsequent determination****, for example"*

MR. JUSTICE FRASER: Well, that's undoubtedly the case. That's why the difference between whether they're preliminary issues or whether they are common issues is important.

MR. DE GARR ROBINSON: Well, in my respectful submission it's important whether one calls them preliminary issues or common issues----

MR. JUSTICE FRASER: If they are preliminary issues as properly described It doesn't arise because they will only usually be ordered if they are on agreed or assumed facts.

MR. DE GARR ROBINSON; Well, in ordinary inter partes litigation that is true. In group litigation it might be slightly different.

MR. JUSTICE FRASER: Well, that's why in group litigation they are common issues.

MR. DE GARR ROBINSON: But, my Lord, the reason why I rise to my feet is simply to make it clear that your Lordship may decide on full consideration of the pleadings or having seen the parties' attempts to agree statements of fact which leave over large amounts of issues which actually are liability issues and there is then an argument as to whether the liability issues are admissible as an aid to construction. Your Lordship may take the view that there's a ***danger that so much liability material is going into the trial of the construction of the contract it would be tying your Lordship's hands when your Lordship comes to try liability in a way that would be most unsatisfactory****. In those circumstances your Lordship may find it appropriate not to order a splitting up of issues in this way.*

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MR. JUSTICE FRASER: What, at all?

MR. DE GARR ROBINSON: My Lord, yes. That would be one of the reasons for not directing--

MR. JUSTICE FRASER: That's rather contrary to what I understood your position to be.

MR. DE GARR ROBINSON: Yes. We on this side of the court are agreed in principle that it's worth going for this procedure. However, we are concerned that unless there is discipline in both parties as to the amount of evidence, the amount of factual claims that they seek to rely on in the preliminary issues trial--

MR. JUSTICE FRASER: They are not preliminary issues. They are common issues.

MR. DE GARR ROBINSON: Your Lordship is quite right. ***Unless there is discipline on both the parties as to the evidence that is adduced at the next trial there's a danger that it may actually tie your Lordship's hands when it comes to trials of liability*** *and whether this trial is called a preliminary issues trial ----* [14]

(emphasis added)

[Can someone please delete the lines below and above]

16.2 Mr de Garr Robinson QC then explained that his concerns arose from the way in which the Claimants had pleaded their case.

MR. JUSTICE FRASER: Right. Your point is, I think, that ***because of the nature of the facts that feed into resolving that group of issues at this earlier stage there may prove to be some difficulties later.***

MR. DE GARR ROBINSON: Yes.

MR. JUSTICE FRASER: Right. Well, tell me what those difficulties could be.

[14] Page 7, Section G to Page 9, Section A {C8.2/3/3-4}

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MR. DE GARR ROBINSON: I need to take your Lordship through the pleadings--

MR. JUSTICE FRASER: All right.

MR. DE GARR ROBINSON: -- and if your Lordship wants me to I will but in simple terms if you read the pleadings carefully you see that--

MR. JUSTICE FRASER: What do you mean "if"?

MR. DE GARR ROBINSON: I'm so sorry. When one reads the pleadings one sees that what ***the claimants appear to rely on in support of their case on construction of their relevant obligations are all sorts of things that are actually matters of breach: how the Post Office did this; how the Post Office did that; the way that the system worked in practice; and how the Post Office treated various people. Now, if I may call them this they are breach issues. Whether the Post Office did actually do x or y is a matter of hot dispute and the danger is that the claimants are insufficiently disciplined in the evidence they seek to adduce in order to make out their case on true construction of the agreement*****---"***

MR. JUSTICE FRASER: They may go outside the scope of the issues which have been agreed or ordered to be decided. Is that your point"?

MR. DE GARR ROBINSON: Precisely.

MR. JUSTICE FRASER: Right.

MR, DE GARR ROBINSON: And one can only see that after one has seen the pleadings really, the proper pleadings of the case, and where the facts that are specifically relied on in construction are clearly identified in that way because the generic pleadings don't do it in that way. [15]

16.3 Mr Green QC's (who appeared for the Claimants) position was explained as being:

"My Lord, I think it's always right when the court makes an order of this type to be careful about the scope of factual evidence which is considered and that's true on the preliminary issue when evidence is called because, of course, your Lordship—…

[15] Page 10, Section D to Page 11, Section B {C8.2/3/4}

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…So my learned friend is absolutely right. You have to be careful. I think your Lordship would be entitled to expect that we would be careful and, in any event, what we have done, we have proposed two things which directly address hopefully the substance of what my learned friend is suggesting."[16]

16.4 In response to the concerns being raised by Mr de Garr Robinson QC, the Honourable Mr. Justice Fraser responded:

"*Well, it may prove to be a real problem but it seems to me whether it is a real problem or not won't necessarily be known until your evidence is served because Mr. de Garr Robinson seems to be worrying that the evidence itself will go far wider than that anticipated by the order or will make resolution of the issues identified in the order more difficult if not perhaps impossible based on the scope of your evidence but if we haven't got your evidence it's a bit difficult in the abstract to—"*[17]

Mr Green QC's response confirmed that: *"Now, my Lord,* ***just because the court hears evidence from Mrs. Miggins that "x" happens does not mean that the court needs to determine finally whether "x" did happen*** *but the court is perfectly able to determine these issues on a footing informed by such findings as the court finds it necessary to make in relation to any of those disputed facts which we think will be a secondary category of evidence. So I accept that there's a theoretical risk but I do regard it at the moment as a secondary if not tertiary issue because of the way we've sought to structure the approach and because these are largely purely questions of either contractual interpretation simpliciter or contractual interpretation in a context which at least is largely common ground."*[18]

(emphasis added)

16.5 Mr de Garr Robinson went on re-emphasize:

MR. DE GARR ROBINSON: That's probably my fault. Probably, I was going too fast and I was taking my learned friend and your Lordship out of turn. What I was trying to convey was the importance of the subsequent processes and, in particular, the importance of a CMC at which a review can be taken of the facts that have been alleged in the relevant pleadings and of the attempts, whether successful or not, of the parties to agree a schedule of facts which then can be used as a basis for the trial. If it turns out the parties because of various reasons agree a set of facts but it becomes clear that they then want to adduce lots more evidence on all

[16] Page 11, Sections C to D {C8.2/3/4}
[17] Page 11, Section H to Page 12, Section A {C8.2/3/4}
[18] Page 12, Section E to Section G{C8.2/3/4}

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> *sorts of what we would characterise as breach type issues, my Lord, that would be—*
>
> *MR. JUSTICE FRASER:* ***If they go to breach and breach isn't mentioned in sch I it wouldn't be relevant evidence anyway.*** *So this is wrong.*

MR, DE GARR ROBINSON: Well, unfortunately, the way that the claim is pleaded in the particulars of claim and the reply breach type allegations are directly relied upon as aids to construction. That's the problem and that's why I'm hoping that the pleading process that my proposed order provides for will iron out that problem, I having raised it at this hearing and having heard my learned friend say reassuring things."[19]

(emphasis added)

17. One of the concerns at the CMC on 19 October 2017 was the lack of clarity which had been provided by the Claimants in response to a Request for Further information dated [x]. At page 18 of the transcript[20] Mr de Garr Robinson QC explains that the Claimants case is that the factual matrix to be relied upon by the Claimants is *“"All facts pleaded including those at paras.12 to 39 and 41 to 45 and 81."*

18. Mr de Garr Robinson QC then went onto make further warnings to the Judge about:

    18.1 the risks of the case; and

"MR DE GARR ROBINSON; My Lord, I would not say may well be. I'm hoping that by virtue of making the directions that are being sought in my proposed order they make it much less likely that a car crash will happen when one gets to the trial of these issues. It's a discipline on both parties to ensure that they pull their horns in and they're not too ambitious and too extravagant in the kind of evidence (inaudible) factual claims they seek to rely on as an aid to construction. My learned friend has very helpfully said in his submissions already that the parties will be sensible and they won't be too extravagant, as I understand it. If that's the case then there would be no risk of the court finding that really it's not possible after all but I'm simply saying that unless the court recognises there's a possibility that that might happen - in my respectful submission it would hopefully be a very unlikely possibility - then there is a danger that too much evidence will be led, which will require a much longer trial and will require you as the judge to decide all

[19] Page 14, Section F to Section G {C8.2/3/5}
[20] Page 12, Section B to Section H {C8.2/3/6}

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sorts of breach issues which would be very awkward in circumstances where questions of breach aren't before you."[21]

"MR. DE GARR ROBINSON: The difficulty is the concern that there is indiscipline and, again, I'm not pointing fingers on either side, about evidence which one side or the other then wants to reply to or perhaps issues about the sheer quantity of evidence, perhaps the amount of breach evidence that's going in and objection, should It be struck out, should the court make a direction that the court will only take account of certain passages and soon. My Lord, those kind of issues could require more time and there isn't much slippage between the middle of September and the beginning of November."[22]

18.2 taking into account breach evidence

> *"MR. DE GARR ROBINSON: The difficulty is the concern that there is indiscipline and, again, I'm not pointing fingers on either side, about evidence which one side or the other then wants to reply to or perhaps issues about the sheer quantity of evidence, perhaps the amount of breach evidence that's going in and objection, should It be struck out, should the court make a direction that the court will only take account of certain passages and soon. My Lord, those kind of issues could require more time and there isn't much slippage between the middle of September and the beginning of November.*
>
> *MR. JUSTICE FRASER: You're right. It's true. There is no provision in the timetable as currently suggested for interlocutory litigation warfare. There is no provision in it for that.*
>
> *MR. DE GARR ROBINSON: What concerns me most - and I say "me" - is the possibility that one side or the other says, having seen witness statements, "I want to put in some evidence in reply."*
>
> *MR. JUSTICE FRASER: Yes. There's still between September and November though.*
>
> *MR. DE GARR ROBINSON: That's true.*
>
> *MR. JUSTICE FRASER: There will be a pre-trial review. There will be another hearing between September and November as well.*
>
> *MR. DE GARB ROBINSON: Well, my Lord, I can hear where your Lordship's coming from.*

[21] see page 21, Section C to F {C8.2/3/7}
[22] see page 77, Section H {C8.2/3/21)

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MR. JUSTICE FRASER: No. To be perfectly honest I was half expecting to... I mean there's not an enormous amount of difference between November and January. I mean for personally involved litigants it seems like a long period of time but there's probably not that much. There's only about four or five court weeks, really. I suppose November has the advantage that counsel won't have it hanging around over the Christmas, whereas January they would but vice versa for the judge.

MR. DE GARR ROBINSON: My Lord, I think it probably goes without saying that the clients on both sides of the court and the legal teams on both sides of the court would rather have a trial in November and that's the truth,

MR. JUSTICE FRASER: Well, I'm going to assume the guise of an early Father Christmas and give you your trial in November then. That can always be adjusted, whether it's by movement of two weeks or anything like that.

MR. DE GARR ROBINSON: Well, my Lord, could I ask this? My learned friend used the word "exhortation" before. Could I perhaps put down this marker? If your Lordship would exhort the parties to be disciplined in their approach to evidence--

MR. JUSTICE FRASER: You're going to get the second telling-off/lecture at the end of the day, the counterpart to the one I gave you at the beginning, but it is a counterpart and if there has to be some sensible adjustment to the trial date as a result of what happens in the summer that can be addressed In September.

MR. DE GARR ROBINSON: I'm obliged. The nightmare scenario, for example, would be a scenario where a claimant starts relying on conversations, on things that were done in the year 2000 and Post Office has to scurry off and find someone who once worked who stopped working there ten years ago.

MR. JUSTICE FRASER: Yes.

MR. DE GARR ROBINSON: That kind of thing could completely sabotage the entire process and that's the sort of concern that Post Office has.

MR. JUSTICE FRASER: All right. Did I say the week commencing 5th or 6th November just before the short adjournment? I'm going to set it down for twenty days from Monday, 5th November 2018.

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MR. DE GARR ROBINSON: My Lord, those are my submissions.

MR. JUSTICE FRASER: Thank you very much. Monday, 25° November 2018. Just so that, Mr. de Garr Robinson, you feel that I have taken it on board because I have, everything that you've said, at that CMC which is going to happen in September two things are going to happen. One is you will be given a half-day pre-trial review at some stage in October and you are now, please, boils obliged to remind me at that CMC that that's one of the things I told you was going to happen in the unlikely event I forget. That will only be necessary if there's still things to be done. The second is if due to the way the case is conducted or there are developments there has to be some adjustment to this I will take account of that and I am not implacably opposed to modest adjustments that have to be made but I think the important thing today is a milestone is put in the future of when the hearing is going to be and I think it's also difficult to justify to members of the public or claimants who sit here in October 2017 being told that it's simply not possible to get something ready until 2019. "

2 February 2018 – Case Management Conference

19. At the CMC on 2 February 2018, the Honourable Mr. Justice Fraser ordered that by 4 May 2018, the parties were required to file at Court either a single set of facts that the parties agree may form the basis upon which such issues of contractual interpretation will fall to be determined; or a single document setting out the extent of agreement, if any, and the facts to be relied upon by each party for that purpose.[23]

20. This was explained in the transcript as being *"I am however going to make another order. I am going to make another order now concerning the factual matrix within which each party submits the contractual relations between the parties falls to be construed as a matter of law. I am going to hear you about dates for that. The idea is that they can be as clearly as possible, this is not to replace the pleadings, it is going to be a useful working list, Mr. Green, and this is what my intention is. I will give you the wording and then I am going to ask you about dates. I would like eventually for there to be either an agreed document or a document with each party's position set out, which is going to be the factual matrix within which each party submits the contractual relations between them fall to be construed as a matter of law."*[24]

[23] C7/11/5
[24] Page 27, Section C {C8.3/3/27}

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21. At this CMC, Mr Cavender QC sought a steer from the Honourable Mr. Justice Fraser on the scope of matrix:

"MR. CAVENDER: Just to rattle through the custodians point and to wash out any difficulty arising from your Lordship's ruling today being implemented. On that, we do need a steer from your Lordship as to the scope of matrix, because my learned friend after today and after my invitation saying if he wants to add categories to my schedule, fill your boots. If after today he comes back with another 20 bullet points, effectively rehashing the content of his schedule 2, then we will be in difficulty because we will not be agreeing that. Because there is still a fundamental dispute as to the proper scope of the factual matrix. If your Lordship could give some kind of indication to help us because we are going to have to try and agree that, unless my learned friend is accepting my schedule 2 or your Lordship ordering that.

MR. JUSTICE FRASER: I do not see how facts that are not known -- well ----"[25]

22. This document was filed on [x], however the extent of the agreement between the parties was limited. [Explain limitations on this document? Dave thinking about.]

5 June 2018 CMC

23. At the CMC on 5 June 2018, which concerned [x], Mr Cavender QC once again raised the issue with the pleadings for the Common Issues Trial containing matters of breach.

" 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.

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?

[25] Page 30, Section C {C8.3/3/30}

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

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 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.

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.

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

MR. CAVENDER: Exactly. " [26]

24. There was subsequently a discussion between Mr Green QC and Fraser J about the scope of admissible evidence at the Common Issues Trial.

"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.

[26] C8.5/3/53-54

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MR. GREEN: Yes.

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.

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.

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.

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.

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.

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."

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

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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.

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 ----

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.

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.

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.

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

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

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

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

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

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.

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.

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.

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?

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.

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.

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

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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.

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.

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.

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.

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 ----

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.

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.

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

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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.

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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 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.

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.

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.[27]

24 July 2018

25. On 24 July 2018, in a letter to the Honourable Mr. Justice Fraser confirming that the CMC listed for Wednesday, 25 July 2018 could be vacated, the parties requested that Costs and Case Management Conference currently listed for one day on 19 September 2018 be extended to two days. [28]

26. This extension was sought on the basis that: *"Post Office proposes this increase in order to allow time for its anticipated application to strike out parts of the Claimants' evidence for the Common Issues Trial on grounds of inadmissibility and / or to give other directions related to this topic. This issue has been canvassed on several occasions before the Court. In Post Office's submission, it would be sensible to make provision for a longer hearing now given the limited time available between witness statements being exchanged (in August) and the trial (in November). Whilst the listing can be revisited later should the application prove unnecessary, this is a matter for the Court. The Claimants do not accept*

[27] C8.5/3/57 - 62
[28] XX to letter

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that extra time will be required for any strike out application in relation to their evidence, but they consider that further time may be required in September in any event. They consent to the increase to two days, should the Court be able to accommodate this and be minded to list the hearing on this basis. "

27. This request was not granted by the Court.

28. On [x] POL made an application to strike out parts of the Claimants' evidence.

11 September 2018 – Case Management Conference (application to strike out parts of the Claimants' witness evidence)

29. At a hearing on 11 September 2018 the Honourable Mr. Justice Fraser summarised Post Office's strike out application, as follows: *"Because for a long time the Post Office have been saying whatever they have been saying about it, and I have made certain observations on more than one occasion, and on the 5th they put their money where their mouth is, having seen your evidence, and have decided "We will strike the parts of it out"."*[29]

30. Mr Draper then took the Honourable Mr. Justice Fraser through the history of this matter and how the parties had now reached the current position.

"MR DRAPER: Yes. Your Lordship was maybe a bit more optimistic than we were at that stage about the claimant's evidence. As I say, we have been certain, or practically certain, for a long time that we were going to be here because of the indications given in their pleadings and in correspondence as to the tack they intended to take in relation to admissibility.

So if I can move then to deal with the suggestion that something has changed and this is all new. We do not accept that at all. None of that, we say, has any force whatsoever. If I could just take your Lordship through the chronology of how we got here, I will do it quickly and hopefully without reference to documents. You will recall the CMC in June where you correctly observed, my Lord, that this issue had been raised several times before, both in correspondence and before you, and gave what was, in my submission, the stark warning that this would have to

[29] C8.8/1/4

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come back before the court if the evidence indeed spread across all the kind of matters that we were concerned it might.

MR JUSTICE FRASER: I think what I said was that Mr Cavender would have a choice. He could either just say he was not going to cross-examination on it, or he could issue an application.

MR DRAPER: Yes. That is a point we will obviously deal with in the substantive application itself, as to why it would not be an appropriate course just to say to the Post Office, "Well, you steer your ship however you see fit". We say that would not be appropriate, but that is really trespassing on the substance of the application."[30]

31. Post Office's approach to the application to strike out parts of the Claimants' witness statements was summarised during the course of this CMC:

"MR JUSTICE FRASER: The first couple of sentences of paragraph 53: "There were ten other new sub post masters on the training course we were working on dummy Horizon terminals." Paragraph 54: "The training was quite general. Topics were covered like road tax", etc, etc. The first line of paragraph 56: "I expected any shortfalls which might arise to be relatively modest. I thought they would be able to trace the problem. You are seeking to strike out those passages, those two observations. I am not making any findings at all or anything of that nature.

MR DRAPER: Yes.

MR JUSTICE FRASER: You are seeking to strike out those passages. Firstly, you are seeking to strike them out. You say they are inadmissible. Then, when one looks at the reasons why you might be striking them out, it is not clear to Mr Warwick or those who instruct him why you are trying to strike them out. Just having read them out now and looking at it in a real-world sensible way, I accept that goes to training (and you have a point ----

MR DRAPER: Post contractual.

MR JUSTICE FRASER: Training or post-contractual, which may or may not be a good point. One is likely to spend far longer arguing about whether that is admissible than actually it takes to read and/or potentially ignore them if you are right. Usually, in the larger commercial-type cases ----

[30] C8.8/1/12

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MR DRAPER: Yes.

MR JUSTICE FRASER: - that approach is adopted, which is "Well actually, rather than have satellite litigation, we will make submissions at the trial". Mr Warwick does not know whether you are trying to strike them out to avoid adverse publicity; whether you were trying to strike them out because they are post-contractual or (inaudible); or whether you are trying to strike them out for one of your other two reasons. Your application will obviously be heard, but he needs to know, does he not, which of your categories applies to which of the different paragraphs, because, if one counted through the 196 pages here, some paragraphs are likely to fall into some categories; some are likely to fall into others. He might take a pragmatic view on some of them and say, "Well all right, we shouldn't have included it".

MR DRAPER: Yes.

MR JUSTICE FRASER: Look at page 116, for example.

MR DRAPER: Yes.

MR JUSTICE FRASER: Paragraphs 88 - 90.

MR DRAPER: Yes.

MR JUSTICE FRASER: Some of those are so general and innocuous as failing to warrant consideration at all. The fact the Post Office had delivered labels and other forms in advance to set up a counter. Well, fascinating. Paragraph 90 falls into a slightly different category because this witness says there was a shortfall even when the Post Office first was entering into it, so that falls into a different category.

MR DRAPER: Yes.

MR JUSTICE FRASER: And then paragraph 91 relates to fixing problems and providing training.

MR DRAPER: Yes.

MR JUSTICE FRASER: Now different considerations might apply to each of those three different paragraphs. I would have thought, without advance notification of what they are, it is likely to be a four-day hearing, is it not?

MR DRAPER: To an extent, my Lord. We say this is vastly over-blown. My learned friend knows why we object to this evidence, and it is really simple. It is

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inadmissible for the purposes of any of the common issues. It is post-contractual. It relates to matters to do with breach, liability failings on the Post Office's part. That applies to all of it. It is also in breach of your Lordship's order there that evidence be in relation to the common issues. The other points Mr Parsons makes are essentially practical ones as to why your Lordship ought to grant our application, further to the fact that this evidence is inadmissible. It is inadmissible and for strong practical reasons it ought to be struck out now.

MR JUSTICE FRASER: The practical reason really that appears on the face of Mr Parsons' ninth statement ----

MR DRAPER: Yes.

MR JUSTICE FRASER: - seems to be the wish, or Mr Warwick will say, the wish to avoid what people describe as adverse publicity, is it not?

MR DRAPER: No, not at all, my Lord. The reasons why ----

MR JUSTICE FRASER: Why is it practical for me to strike out the paragraph that says that the Post Office delivered labels and other stock?

MR DRAPER: If that passage were on its own, we would never be here. We would not be here if it were not for the fact that almost practically half of their evidence is inadmissible. Much of it is evidence that we cannot possibly test. If we were required to test it, we would be needing … We have given disclosure. They have given disclosure. We would be needing all sorts of evidence on our side that they would be uncomfortable with because it would go into the honesty of their accounts and their conduct. All of these matters are simply outwith scope.

Your Lordship is quite right to say that, in the usual case of contractual construction and similar issues, there are inadmissible pieces of evidence on the margins - the odd line here or there in paragraphs of a witness statement - but everyone just reads over them or deals with them in submissions. But the principal difference here is just one of scale. Almost the bulk of some of these witness statements (Ms Stubbs springs to mind) is inadmissible. It goes into, if it were to be taken, if it were even to be read by the court, it is obviously there in an attempt to prejudice your Lordship, consciously or subconsciously.

MR JUSTICE FRASER: Well I am sorry. I simply do not accept that that can be a valid ground to either reduce the evidence or for you to try and strike it out. Subconscious prejudice of a judge dealing with a class action in group litigation is really not a valid ground to strike it out.

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MR DRAPER: No, we ----

MR JUSTICE FRASER: What has to be borne in mind is -- and I am going to make these observations and I am going to give some directions about how we are going to deal with your application.

MR DRAPER: Yes.

MR JUSTICE FRASER: What has to be borne in mind is that these are six lead claimants. Witness statements are supposed to be in their own words.

MR DRAPER: Yes.

MR JUSTICE FRASER: And they will undoubtedly, although guided by the solicitors, in order to provide a coherent story as a lead claimant for what is the first trial of highly emotive issues ----

MR DRAPER: Yes.

MR JUSTICE FRASER: They will undoubtedly want, or have included reference to some matters which in legal terms are not strictly admissible to the construction of the contract. I do not really consider it sensible to suggest that resolution of those contractual issues is going to be subconsciously prejudiced against the Post Office unless the passage is struck out, because I will probably end up reading the passage with more care because it is the subject of a strike out application than if it just stood on a witness statement.

MR DRAPER: As I say, our principal point is simply about the scale of this. The court cannot sensibly adopt the usual approach of just reading over it or saying, "We'll deal with it when it arises", because, for some of them, the bulk of their case is effectively things like: "A shortfall occurred in my branch. I have no idea why. It must have been Horizon, and I had some problems with Horizon. I've got disclosure from Post Office and I think there are problems with Horizon" - really issues for next March.

MR JUSTICE FRASER: I understand that, but evidence of that nature is not going to impact upon an analysis in my first judgment of what the scope and the extent of the contractual obligations is, is it, really? I mean, you have just summed up, very pithily, almost their entire case on Horizon in terms of burden of proof and in relation to contract, etc. Your application is going to have to be dealt with.

MR DRAPER: Yes.

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MR JUSTICE FRASER: And what I am going to do is I am going to give you some directions.

MR DRAPER: If I could just make a submission on timing before you do.

MR JUSTICE FRASER: Yes.

MR DRAPER: The Post Office's position, as I have said at the outset, is that we accept that it cannot all be heard on the 19 th if you extend it.

MR JUSTICE FRASER: Yes.

MR DRAPER: What we would say is, if that is the concern - time - we would be comfortable with our security for costs application being pushed to a later date because it does not impact on the trial in the same way; whereas there is a big difference, in my respectful submission, between a determination at the CMC in ten days' time and a determination in 20-odd days' time in the lead up to trial.

MR JUSTICE FRASER: Why?

MR DRAPER: Because, say, for example, your Lordship were to take a different view from us around the edges. Take training, for example. You went to post-contractual training, but only shortly post-contractual. Say, for some reason -- in our submission it would be wrong, but say, for some reason, you were to say that is within scope; that that is permissible ----

MR JUSTICE FRASER: Why within the scope, do you mean?

MR DRAPER: It is evidence in relation to the common issues.

MR JUSTICE FRASER: Admissible in relation to the common issues.

MR DRAPER: Yes; one can describe it either by reference to the language of your Lordship's order that the evidence has to be in relation to the common issues ----

MR JUSTICE FRASER: The evidence does have to relate to the common issues.

MR DRAPER: Which we say vast swathes of it do not. Questions like: Did the Post Office conduct an audit properly three years after I was appointed? Did the Post Office treat me badly during my termination? These things have got nothing at all to do with the common issues. We say that that is the problem. I am repeating myself to an extent. It is the scale. It really is egregious. Normally, you would not even be anywhere near this in a case of this kind. A claimant would

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never deal with matters four/five years after the conclusion of a written contract and say that somehow ought to influence the construction of the provisions, or to justify an implied term. Returning to timing, we say if the problem is simply fitting things in, then security for costs is not a problem. It is money. We would much rather have it sooner than later. But, in terms of our trial preparations, if we get this determined relatively soon, it may be that there are things that can be done urgently to reduce any prejudice the Post Office considers it might suffer.

MR JUSTICE FRASER: You cannot strike out … It is not a valid ground to strike out evidence that it prejudices you. A valid ground to strike out evidence is that it is inadmissible.

MR DRAPER: Yes, forgive me. I am distinguishing here between, if you like, my Lord, the legal grounds for strike out which are inadminissibility ----

MR JUSTICE FRASER: The grounds I am going to be applying.

MR DRAPER: Yes. And they are inadmissibility in every case - the same proposition for every single paragraph that you see indicated in yellow. It is all inadmissible. That is our simple submission.

MR JUSTICE FRASER: Obviously, because, if it were not, you could not be applying to strike it out.

MR DRAPER: Quite, quite.

MR JUSTICE FRASER: You have to explain why it is inadmissible. Mr Parsons comes up with four reasons.

MR DRAPER: No; he deals with why it should be struck out. So it is inadmissible, but, in the ordinary case - the kind of case we have been discussing; the typical contract case where there is some inadmissible stuff - the court will just say "Well it doesn't matter. Let's leave it in there for now and deal with it, if we must, at trial." The reasons Mr Parsons gives about practical prejudice, the fact we simply cannot deal with this material; that we could not cross-examine on it if we wanted to other than just to make serious but very general allegations about the claimants' conduct, those points are as to why your Lordship needs to grasp the nettle; why this is not the usual case and it cannot just be left over to some future date and dealt with on a sort of ad hoc basis."

32. Mr Draper continued:

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"*MR DRAPER: Yes, but you will have heard what we say about the possibility of dealing with this additional material on which they intend to rely ----*

MR JUSTICE FRASER: If you cross-examine on it, obviously -- it is an obvious point -- there will be more time taken at the trial on cross-examination if you want to cross- examine on it.

MR DRAPER: Yes.

MR JUSTICE FRASER: On the basis of your primary position that it is not their best point, any cross-examination will be limited.

MR DRAPER: Yes. We could not in fact properly deal with it. We could not test it in a way that we would say is fair without disclosure, for example.

MR JUSTICE FRASER: Well I am not sure whether that is correct, but, either way, if it is not struck out and you say it is inadmissible ----

MR DRAPER: Yes.

MR JUSTICE FRASER: - your cross-examination on it would be more limited than otherwise.

MR DRAPER: Yes; that is right.

MR JUSTICE FRASER: It is going to be, and it will obviously impact upon, the length of the trial by some degree. On the face of these two wholly inaccurate proposals, there is a two-day difference.

MR DRAPER: Yes. Your Lordship will have seen that we would say their proposal is just entirely unrealistic if any of this were within scope. They can only be assuming we are not going to challenge it, and I say that for a reason that I can make here on the basis of the pleadings, which is that their pleaded case is that the Post Office is now debarred from advancing any case in relation to the material that we say is inadmissible. So it will come to the surface, my Lord.

MR JUSTICE FRASER: Sorry, I do not understand what you mean.

MR DRAPER: You will recall the way the individual pleadings went is essentially … The individual particulars of claim canvass the whole of the claimants' experience.

MR JUSTICE FRASER: The individual claimants. By individual claimants ---

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MR DRAPER: So the Bates pleading, for example. Mr Bates' individual particulars of claim

MR JUSTICE FRASER: Right.

MR DRAPER: - goes from the pre-appointment stage, through all of his problems, the shortfalls, up to his termination.

MR JUSTICE FRASER: And as you would expect for an individual claim, but I am dealing with common issues.

MR DRAPER: Quite, and you made an order that these matters - the pleadings, evidence, disclosure - all be limited to the common issues. One way to test whether they have tried to comply with any of that is to ask what more would Mr Bates say before the trial of his claim, and the answer is nothing.

MR JUSTICE FRASER: But what has that got to do with this, Mr Draper?

MR DRAPER: What that has got to do with this ----

MR JUSTICE FRASER: You will not be cross-examining on the whole of his witness statement if we are dealing with common issues, but you say … I think what you are saying is (and if I have misunderstood it, please tell me) Mr Bates' actual individual particulars of claim deal with the whole of his experience with the Post Office.

MR DRAPER: Yes.

MR JUSTICE FRASER: We are dealing with common issues. His witness statement goes more to his individual particulars of claim than it does to the common issues and it should be restricted to the common issues and so everything else should be struck out.

MR DRAPER: Yes.

MR JUSTICE FRASER: And that is the basis of it.

MR DRAPER: It is. It is. I was taking you to the pleadings for the point that I use to make good my submission that this would become a circus. If your Lordship were to say, "Let's deal with it all in argument", sort of as we go along ----

MR JUSTICE FRASER: Very few trials, if any, before me become a circus.

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MR DRAPER: I am quite sure. It would risk going that way until you pulled it into order is perhaps the highest the submission ought to be put, but it will create difficulty that we really could do without.

MR JUSTICE FRASER: I understand that, but, on the face of these two proposals, you are saying, or your solicitors are saying, that the amount of time required for cross- examination would be increased if it were not struck out.

MR DRAPER: Yes.

MR JUSTICE FRASER: I have that point.

MR DRAPER: Our evidence, in fact, and I would, by way of submission, make the same point: we could not do it in the time available. There is already quite a lot.

MR JUSTICE FRASER: You could not do what?

MR DRAPER: We could not cross-examine in any meaningful way on the inadmissible material in addition to the admissible material, which is already fairly substantial. There is quite a large amount of evidence from both sides on the appointment process in each case. My learned friend referred to the number of our witnesses. That is because, say, in relation to particularly the claimant's appointment, he had a meeting with three different people. We have very short statements from the people whom he met saying what they said or did not say to him at that pre-contractual meeting. So there is a fairly substantial amount of evidence before the court on admissible matters. You will have seen that also from the witness statements. There is a lot of pre- contractual material here. We have not tried to strike out those bits where they are inadmissible. We have adopted a broad-brush approach and said, effectively, to use colloquial language, "If it's not bonkers, we'll leave it in for now and deal with it as we go along". It is only the really obviously inadmissible material to do effectively with breach that we are seeking to strike out.

My point on the pleadings, my Lord, if I return to it, is … So the story with the pleadings goes: full pleadings, effectively, from the individual lead claimants. The Post Office responds by saying "We're going to plead back to your case on the common issues, which will involve pleading back to pre-appointment matters, including (although it is probably inadmissible) things like subjective expectation and so on, but we're not going to plead back to everything you say about shortfalls - problems with Horizon, insufficiently detailed advice from helpline operators, us being unfair during audits" - all of that. "We're just not going to deal

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with it because it's inadmissible". So that was the pleading that comes back from the Post Office.

The replies from the claimants include, effectively, applying all the inadmissible material, making further points they would like to make, and also a plea that the Post Office ought to be -- I think the phrase would be estopped, but really debarred from advancing any positive case in relation to any of the admissible material.

MR JUSTICE FRASER: Any of the inadmissible material.

MR DRAPER: So their case is effectively: because we complied with your Lordship's order -

MR JUSTICE FRASER: That might have been an optimistic plea, and it may or may not have any legs, but what does that actually matter so far as what is being addressed this morning is concerned?

MR DRAPER: Because that is the background to the claimants' proposals on things like how long cross-examination will take. They think the Post Office just has not to accept, but not address by way of a positive case, anything they say in relation to the inadmissible material. So that it seems they, like we, think the scope is going to be limited, because otherwise cross-examination and in fact the evidence itself will just last too long, but they seek to justify that on what we say is a perverse basis. So it is just a further reason for saying that, unless this nettle is grasped now and the material is just out, we are going to have real difficulty trying to deal with it as we go along.

10 October 2019 – Strike Out Application Hearing

33. Post Office's application for parts of the Claimants' witness evidence to be struck out was heard on 10 October 2019.

34. Post Office's skeleton for this hearing explained the issues faced with the Claimants' evidence:

"The problem can be stated shortly. Cs have served many pages of evidence that do not relate to the Common Issues but instead involve allegations that Post Office breached obligations that Cs claim it owed to them. Much of that evidence strays into issues that are properly the subject of trials to be heard at later stages in these proceedings, including issues as to the reliability of and the information available from the Horizon IT system. In compliance with the Court's orders for pleadings and evidence "in relation to the Common Issues", Post Office has not served equivalent evidence and has not given

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or received adequate disclosure on the breach issues. A party serves evidence for a trial so that it can be answered and tested at the trial and can be the subject of findings in the judgment. However, Post Office cannot fairly answer or test Cs' evidence on these issues at the Common Issues trial, and it notes Cs' assertion that it is estopped from challenging it. At the same time, Cs insist that the Court can and should make findings on those issues in its Common Issues judgment, including findings on issues that will be the subject of the Horizon Issues trial, generating a risk either of tying the Court's hands at that trial or of irreconcilable judgments."[31]

35. Post Office's skeleton for this hearing also addressed the matter of whether Post Office would suffer prejudice. [32]

"Second, Mr Hartley says that Post Office can simply choose not to cross-examine on any inadmissible and irrelevant material. He points out that no findings of breach, causation or loss will be made. The simple answer is that the evidence, if irrelevant and inadmissible, is not properly before the Court. Further:

(a) Post Office should not be put at any potential disadvantage as a result of Cs' decision to disregard the proper bounds of evidence for the trial. Yet the current state of the evidence puts it at substantial disadvantage. Because Post Office it has sought to comply with the Court's directions, Post Office is not in a position properly to answer or test the evidence to which it objects and in relation to which Cs will argue findings of fact should be made. This would be grossly unfair to Post Office.

(b) Post Office will inevitably object to any and all cross-examination and argument by Cs that is based on the inadmissible material. It is much more efficient, and in both sides' interests, to have the issues of admissibility and relevance determined in one go, rather than essentially the same arguments cropping up repeatedly in the course of the trial.

Third, Mr Hartley appears to suggest that Post Office, like Cs, should have prepared evidence to cover the facts of each Lead Claim from appointment to termination and so put itself in a position to seek findings as to matters including the causes of the shortfalls in their branches, the consequences of false accounting, the content and reliability of audits, the content of training and calls made to the Helpline over the years. If Post Office is right as to inadmissibly and relevance, it cannot be criticised for refraining from preparing evidence that could only be relevant in later trials. ***The Court ordered a staged process****."*

[31] C8.10/2/2
[32] C8.10/2/29

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(emphasis added)

36. At the hearing, Mr de Garr Robinson QC explained the background to this application.

MR. de GARR ROBINSON: My Lord, could I start by telling your Lordship what this application is not about?

MR. JUSTICE FRASER: What it is not about?

MR. de GARR ROBINSON: It is not about preventing the claimants from putting their full case at the appropriate time. It is not about preventing the claimants from putting their case on the common issues at the common issues trial. Nor is it about preventing your Lordship from knowing the nature and scope of the wider claims, the wider issues raised by the claimants in the context of this claim for the purposes of the common issues trial.

Your Lordship may recall that at the first CMC where I appeared I suggested to your Lordship that there should be full pleadings so that your Lordship, although deciding the common issues, would have a sense of the allegations that were being made and would therefore have some context within which to make your decisions on the common issues.

Your Lordship was not persuaded that it would be helpful to do that, but I do need to make it clear that it is no part of the purpose of this application to prevent your Lordship being aware of what allegations are being made. Nor, and this is perhaps the most important point, is it about inducing your Lordship to make findings on those wider issues in the defendant's favour at the common issues trial. Indeed, the whole purpose of this application is the opposite. It is to ensure that no findings are made on the wider issues at the common issues trial on either side's evidence."[33]

37. Mr de Garr Robinson QC went on to explain:

"The problem is that a very substantial portion of the witness statements of the claimants are drafted with a view to proving the truth of the claimants' complaints about Horizon and their complaints about their treatment once they were appointed as Postmasters by Post Office. It is full of attacks on the quality of their training, attacks on the reliability of Horizon and the information available from Horizon; attacks on the quality of the help given by the Helpline in relation to Horizon. There is page after page attacking particular transaction corrections issued in particular branches. There are attacks on the quality of audits and

[33] C8.10/3/2

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investigations and detailed evidence as to the circumstances in which contracts were terminated and parties were suspended.

This evidence accounts for over a third of the claimants' witness statements. It is around 68 pages, my Lord, of 185 pages. It is not about meeting or responding to Post Office's own evidence. It looks like the lead claimants' evidence on liability. It is on how Post Office is alleged to have breached the duties that Post Office is alleged to owe them. It creates a number of fundamental problems.

First of all, Post Office has no evidence in answer to this material. It has not adduced any evidence addressing any alleged breaches in this case. It could not have adduced such evidence if it had wanted to, quite apart from, as I shall show your Lordship, the order your Lordship made restricting the evidence to the common issues.

It has not searched for or been ordered to disclose the documents that would bear on the issues that are now being raised in the witness statements. It is important to note the disclosure that your Lordship ordered in this case in relation to the common issues, all of those orders – there were three orders – initial disclosure; stage 1 disclosure; stage 2 disclosure; all of those orders were made before pleadings were even exchanged in the common issues trial. The custodians of that who were chosen for the purposes of that disclosure, are largely contract custodians, if I can call them that. Your Lordship, I am sure, will understand what I mean; custodians concerned with formation of the contract, that kind of thing. Fifty-three custodians were chosen, as I understand it, mainly by the claimants. Those custodians were not selected to capture the people at Post Office who had involvement in the matters of which complaint is now made in the witness statements. So those people could not have been selected for the purposes of seeing what documents they were and seeing what the truth of particular allegations were.

My Lord, six people are mentioned in the witness statements who were not even named as custodians. Of course, many more custodians would need to be found in order to get the documents, to delve deeply into Post Office's documents in order to shed light on the claims that are now being made in the claimants' witness statements."[34]

[Consider whether these comments should be moved to disclosure section or just cross referred].

38. DGRQC continued:

[34] C8.10/3/4

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"So for all of those reasons, Post Office has no evidence in answer to this mass of evidence containing complaints about breaches that Post Office is alleged to be responsible for. In my respectful submission, the inevitable consequence of that fact on its own is that your Lordship cannot fairly make findings on that evidence at the common issues trial.

MR. JUSTICE FRASER: I am only making findings at the trial in respect of the common issues. Those are the only issues I am trying.

MR. de GARR ROBINSON: My Lord, my submission is that if your Lordship were to allow this evidence in, which I say does not relate to the common issues, the inevitable effect would be your Lordship would be faced with a one-sided picture and would not be able to make a determination of the truth of the matter. Your Lordship simply will not have heard evidence. It is worth noting, of course, that in their replies, it is alleged that Post Office is actually estopped or debarred from even disputing the claims that are now made in their evidence.

The burden of my submission is that there cannot be a proper enquiry into the issues which are sought to be raised in the claimants' evidence. There cannot be a fair enquiry, an enquiry that is fair to Post office. My Lord, that is the first problem."[35]

39. DRQC went on to raise the issue that due to way in which pleadings and evidence had been ordered by the judge in a restricted way: *" My Lord, that is an important point. I was suggesting that it might be helpful to your Lordship at the common issues trial to at least know what the wider allegations were so you have a sense of what the practical impact is alleged to be. At the bottom of page 62 your Lordship will see I immediately made it clear, however, that the court should not make findings on them; it should just know about them."*[36]

40. DRQC was in particular concerned *"to prevent the common issues trial being hijacked into an exercise in which evidence as to underlying breach is investigated with the concomitant risk of findings being made on that evidence in the common issues judgment. It is the investigation of that evidence asking cross-examination questions, submissions being made, "Well, there is no evidence from Post Office opposing that. How can your Lordship make any finding other than this?"*

The risk that findings will be made on those issues, that would be, first of all, grotesquely unfair to Post Office for the reason I have already submitted, but it

[35] C8.10/3/5
[36] C8.10/3/8

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would also be trespassing upon the order your Lordship has already made about subsequent trials, in particular the trial of the Horizon issue."

MR. JUSTICE FRASER: I understand that submission. Where would you place that risk in terms of percentage likelihood?

MR. de GARR ROBINSON: My Lord, my first submission is not an answer to your Lordship's question but, in my submission, the defendant should not be faced with that risk at all.

MR. JUSTICE FRASER: I understand that. You say that risk should be zero and that is why you want to strike it out. But as a submission which underpins what you say I should do today or shortly after today, which his strike it out: are you making that submission from the background of there is an appreciable risk that this court will make findings on issues which are not included in Schedule 1 to the order of October '17?

MR. de GARR ROBINSON: My Lord, there is an appreciable risk, first of all, that my learned friend will seek to investigate the evidence at the trial and put it to my clients and will make submissions on the basis that Mr. Cavender has not challenged any of this evidence. He cannot; there are no questions he can ask. He does not have any coconuts to lob at the relevant witnesses. That is, if I may say so, 100% likelihood. Having been involved in hearings with Mr. Green previously, I feel rather sure that Mr. Green will attempt to play that game – and I do not mean any discourtesy to him to use the word "game" ---- [37]

41. DRQC summarised the Claimants case as: *" The claimants' essential case at the common issues trial will be, the court cannot decide what the contract means and the other associated questions without making findings as to the quality of Horizon, the quality of the training, the quality of the Helpline, the comparative information that is available and so on and so forth. My Lord, that is practically their entire case."*

42. In relation to the evidence which relates to the Horizon Issues Trial.

"MR. de GARR ROBINSON: So a very large proportion of the ***challenged evidence directly addresses Horizon issues.*** *My learned friend is suggesting that your Lordship has to make findings on those issues in order to decide the common issues. I say that he is wrong. If he were right, your Lordship would not have been able to direct the trial of the common issues that your Lordship did. That was never the intention.*

[37] C8.10/3/10 - 11

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MR. JUSTICE FRASER: I would not be ordering another trial to deal with issues which are an essential component of the first trial.

MR. de GARR ROBINSON: No. My Lord, bearing in mind the Horizon issues are, as your Lordship has already indicated, essentially expert issues ----

MR. JUSTICE FRASER: Yes.

MR. de GARR ROBINSON: ---- ***your Lordship would not be proceeding upon an inquiry into the reliability of Horizon and the relative availability of information from Horizon with respect to Postmasters and with respect to Post Office without expert evidence.***

MR. JUSTICE FRASER: ***That is, of course, correct****, but that is not to say that there will not be some relevant factual evidence of fact in relation to the Horizon issues.*

*MR. de GARR ROBINSON: I am not addressing that. I am simply addressing the fact that my learned friend is going to be testing the evidence. He is going to be putting questions to Post Office's witnesses and he is going to be invit****ing your Lordship to make findings which bear directly on Horizon issues which, as your Lordship has already found, ought to be tried by reference, mainly, to expert evidence.***

MR. JUSTICE FRASER: Yes.

MR. de GARR ROBINSON: That is not right. That threatens the integrity of the entire trial process that your Lordship has directed. That is why Post Office has not adduced evidence on them. It would not be right to. ***It could not adduce evidence on them, my Lord."***[38]

(emphasis added)

43. DRQC added:

"We say it is necessary to maintain discipline in the evidence that is adduced. I remind your Lordship that at the first CMC hearing in response to concerns that I raised about the potential scope of the evidence, I recall my learned friend indicating there would be discipline from the claimants' side. But, my Lord, it is important to maintain discipline for at least three reasons. One is to maintain the integrity of the staged nature of this piece of group litigation. Two, because relevant evidence bearing on those breach issues, evidence to challenge those

[38] C8.10/3/21

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breach issues, is not before the court and could not properly be brought before the court in time so as to enable a fair trial of the relevant issues. Three is to keep this common issues trial within manageable proportions, not beset by argument after argument.

My Lord, it may be too obvious for words, but I do submit that it was always intended that the wider liability issues and Horizon issues would not be the subject of investigation and findings at the common issues trial. The scope of the common issues trial was carefully limited to what was relevant to the common issues trial. "[39]

44. DRQC raised with the judge his concerns that he would make findings which interlinked with the Horizon Issues Trial:

"MR. de GARR ROBINSON: …Let me make it absolutely clear to your Lordship: Post Office at the common issues trial will not be inviting your Lordship to make any finding as to how reliable Horizon was.

MR. JUSTICE FRASER: I do not intend to ----

MR. de GARR ROBINSON: Well, of course.

MR. JUSTICE FRASER: ---- because it is not included in Schedule 1 to the October 17 order.

MR. de GARR ROBINSON: I took you to paragraph 76 because my learned friend seeks to rely on it as some kind of a joker card which allows him to make what he claims, is what we say, is matrix evidence. The evidence he wants to put in is all about Horizon. My Lord, paragraph 6 is not about that, it is about accurately typing in the transactions that you do.

MR. JUSTICE FRASER: I do have that point.

MR. de GARR ROBINSON: It is as simple as that. It would be wrong to try and expand, use subparagraph (6) as a Trojan Horse to crowbar in the entire case for the purposes of the common issues trial. I repeat a submission I made a few minutes ago which is if my learned friend is right about that, then we might as well abandon the common issues trial and just have one big trial of everything.

MR. JUSTICE FRASER: Well, we are not going to be doing that."[40]

45. Further DRQC points:

[39] C8.10/3/22
[40] C8.10/3/31

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"MR. de GARR ROBINSON: My Lord, that is absolutely right. If I can make it clear, I really am putting what your Lordship said in different words. The defendant is not suggesting that the claimants should be prevented from making their case on breach at the right time. They will have their day in court. There will be a series of trials. They will be able to run their arguments about Horizon at the Horizon trial and they will be able to run their own experience of Horizon at their own breach trials.

But, my Lord, it is important to maintain discipline in this very complex structured litigation. For that purpose it is important that paragraph 10 of your Lordship's order is properly respected.

MR. JUSTICE FRASER: Yes.

MR. de GARR ROBINSON: There is another point that I would like to make clear to your Lordship. The defendant will not be inviting your Lordship at the common issues trial to make findings which bear on the Horizon issues or which bear on breach.

MR. JUSTICE FRASER: Understood

MR. de GARR ROBINSON: It will be inviting your Lordship to proceed on the basis that the claimants' case on the Horizon issues and the claimants' case on breach is not being accepted or rejected. That is the basis upon which the common issues trial will proceed. It is important and the purpose of this application is to ensure that no findings at all are made about any of these things.

MR. JUSTICE FRASER: Yes.."[41]

46. In relation to evidence on post contractual matters and Horizon considerations DGRQC stated:

" My Lord, there is one extraordinary argument that I would, with your Lordship's permission, like briefly to deal. It is based upon the assertion that although you cannot give evidence as to post-contract matters, what you can do is you can tell the court what you expected, then tell the court what happened after the contract, and then finish up with a sentence, "That is not what I expected at all". It is suggested that giving the evidence as to what happened and then saying, "I am truly astonished, shocked and appalled by that", that makes it admissible because it is corroborative of the initial statement as to what was expected. My Lord, that is a licence for an unprincipled pleader to get around all sorts of rules as to

[41] C8.10/3/40

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admissibility. If the witness has an assertion that they expected something to happen, they are allowed to say it. There are many passages in the witness statements where they do say that. Some of the paragraphs which my learned friend took your Lordship to, include statements where witnesses said what they expected at the beginning and then delete the passages where they then talk about what happened to them after the contract was entered into. My Lord, one cannot somehow make that admissible by saying it and then adding at the end, "That completely surprised me. That was not what I expected."

Because the issue is what you expected at the beginning and that is something you can say and the witnesses did say. My Lord, in order to preserve this common issues trial, in my submission, it is important that both parties recognise that the court is not in a position to make any sort of finding or proceed on any kind of assumption as to how reliable Horizon was. Your Lordship will be aware from the generic pleadings, in paragraph 16 of the generic defence in particular, it is accepted that Horizon is not a perfect system. No IT system is. No one is suggesting that Horizon is perfect.

My Lord, the reliability of Horizon is not discussed in any of the witness statements – your Lordship will see from footnote 22 in Ms. Van Den Bogerd's witness statement – because that is a matter for the Horizon trial. It is simply not addressed by the witnesses because it is a matter for the Horizon trial. Perhaps I should take your Lordship to that. It is in the Defendant's Witness Statements Bundle.

MR. JUSTICE FRASER: You are now taking me to a footnote?

MR. de GARR ROBINSON: My Lord, it is footnote 22. It is at page 28 of the witness statement behind divider 2. "I do not take into account in what I say here the claimants' allegation regarding defects in Horizon because I understand that these are not within the scope of the common issues trial."

My Lord, the witnesses tried to stay away from those issues. To the extent that my learned friend has identified passages in their evidence which could be construed as straying into those issues, that is unintentional. I can assure your Lordship, your Lordship will not be invited to proceed upon the basis of findings of fact that are inconsistent with the issues that remain to be resolved at the Horizon issues trial."[42]

Judgment No 2

47. The judgment in relation to Post Office's strike out application was handed down on 15 October 2018.

[42] C8.10/3/84

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48. In this judgment, the Honourable Mr Justice Fraser stated:

"He also submitted in his written skeleton that the application "appears to be an attempt by Post Office to secure an advantage at the Common Issues Trial by selectively tailoring the evidence which the Court is to consider." I accept that submission too; the application certainly gives that appearance."[43]

49. The Honourable Mr Justice Fraser then went onto find:

> *"In respect therefore of the five different grounds relied upon by Mr De Garr Robinson identified at [20] above, the first – that the court had ordered that evidence be served restricted to the Common Issues – is answered by my finding that the evidence is relevant to the Common Issues as I have explained."*

50. In relation to the scope of disclosure which had been ordered, it was found that:

> *" The first is that no disclosure was ordered that went to such matters. I reject that, for two reasons. Firstly, Mr Green identified in the actual disclosure order itself where such disclosure was ordered. Secondly, for the most part, the Lead Claimants are in many of these passages actually giving evidence in respect of documents and so on given in disclosure by the defendant that specifically relates to them. That disclosure has been given in this Group Litigation by the defendant. The suggestion that no disclosure is available on these matters is not sound."*

51. Iin respect of the Court not making findings on matter of breach:

" It is worth expanding on this point made by the defendant, which is relied upon in favour of allowing this application. It is that as a result of admitting this evidence (by which the defendant means failing to find it inadmissible and striking it out) the court will either find itself asked, or will make, findings on matters that are in reality to be dealt with in the Horizon Issues trial, or in the later trials that are to deal with specific breach, loss and damage alleged by the individual Lead Claimants. I do not accept that there is such a risk. The trial that is about to commence on 5 November 2018 is to deal with the Common Issues. Those Common Issues number 1 to 23. They are attached to Schedule 1 of the Directions Order of 19 November 2017. They are the agenda for that trial. There is no such risk of the court making findings on the Horizon Issues, or of the court making findings on breach. Judges are expected to be able to consider relevant matters pertaining to different issues, keeping them compartmentalised where necessary. What is relevant for one issue may not be relevant to another. A trial of this nature is not similar to a trial before a jury, where the risk of prejudice sometimes outweighs what might be called issues of strict admissibility (or probative value). Even jury trials admit evidence –

[43] C7/27/12

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for example admissions by co-defendants – where the jury will be directed that such evidence is admissible for certain limited purposes, but is not to be taken into account for others. I consider this point to be an exceptionally weak one. The court will not find itself making findings almost by accident, which is what the defendant came perilously close to submitting."[44]

52. Finally, the judge made a comment at the end of his judgment on the termination of Claimants. At this stage, the judge had not seen evidence from Post Office about the circumstances of the Claimants terminations.

"Finally in terms of the tenor of this litigation generally, I make the following observation. Some passages of the Lead Claimants' evidence relate to the circumstances in which their engagement with the defendant was terminated. These terminations, for some Lead Claimants, occurred before other claimants in the Group Litigation (who are not Lead Claimants) contracted with the defendant. The Lead Claimants complain that such terminations were abrupt, came out of the blue, accused them of falsifying accounts and made other statements that were not factually accurate, and also that the defendant's approach (and that of its solicitors) was generally heavy handed. I have read some of this correspondence, as it was exhibited to the witness statements. The tone of some of it is undoubtedly aggressive and, literally, dismissive. I make no findings about any of this at this stage, nor do I even consider whether such an approach was, or was not, justified in any particular individual case at the time. However, regardless of any rights and wrongs of such an approach then, with the Lead Claimants individually in that correspondence, I wish to make one point entirely clear, so that this cannot be misunderstood. An aggressive and dismissive approach to such major Group Litigation (or indeed any litigation) is entirely misplaced. I repeat that such litigation has to be conducted in a cooperative fashion and in accordance with the overriding objective in the CPR."[45]

Common Issues Trial

53. In its written opening submissions Post Office sought to remind the Court that (at paragraphs 29-31):

> *"29. This trial is the first stage in the resolution of the issues in the group litigation. It necessarily precedes the determination of issues as to the functions and reliability of the Horizon system and the determination of matters going to breach of contract and liability in individual cases.*
>
> *30. The Court confirmed in Judgment No. 2 that it would not be drawn into "making findings on the Horizon Issues, or…making findings on breach" at the*

[44] C7/27/19
[45] C7/27/20

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present trial (para. 52). Post Office welcomes that ruling. Post Office anticipates that Cs' case on the supposed relevance of its breach allegations to the Common Issues will become more fully articulated at trial.

31. In any event, it will be important for the parties not to stray into issues that fall to be determined at the Horizon trial and/or issues as to breach. The Court will recall that Post Office has not adduced any evidence at this trial to make good its case on Horizon; nor has it sought to address in evidence the various breach allegations that appear in Cs' witness evidence. Post Office has not prepared for a trial on Horizon or a trial on breach. The function of this trial is not to reach any findings on those issues, or on facts that go to those issues."

54. This position was reiterated in oral opening submissions (Page 165 to 166):

"You will see what we said in our written opening about things that it would be useful -- findings to make and not to make. In your number two judgment you made it clear you are not making findings on the breach allegations or allegations about Horizon.

MR JUSTICE FRASER: Everyone is agreed about that

MR CAVENDER: See paragraph 52. What I also ask that you don't do is make any findings of fact that go to -- are ancillary to those breach allegations or Horizon allegations , rather than the Common Issues. Otherwise, again , you have the difficulty of overlap and arguments about issue estoppel and all these kinds of things .

MR JUSTICE FRASER: It depends what you mean by findings of fact that go to breach. I imagine, if there are any necessary findings of fact at the end of the evidence in terms of disputes of fact as to whether Mr Bates got document X, you won't want me to leave that floating in the air , will you?

MR CAVENDER: My Lord, no. That goes to my first category of --

MR JUSTICE FRASER: I know that and I haven't yet bottomed that out with Mr Green. Because, on one view, a finding of fact that goes to breach could involve any finding of fact in relation to the contractual relationship , couldn't it ?

MR CAVENDER: But what I am talking about is downstream. So the training wasn't good enough, that they didn't have sufficient report writing , that they didn't have enough help with investigations ; all those things that are downstream. Potentially breach. We haven't brought the evidence to the trial to deal with it . There hasn't been full disclosure on some of these issues . So we won't be

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dealing -- and this has been our persistent position -- obviously this is a trial about the contract and the relationship . Those are my submissions. Obviously the court will do what it will do."

55. Post Office also highlighted in its Written Openings the findings which may made in Judgment No.2:

"The Court confirmed in Judgment No. 2 that it would not be drawn into "making findings on the Horizon Issues, or…making findings on breach" at the present trial (para. 52). Post Office welcomes that ruling. Post Office anticipates that Cs' case on the supposed relevance of its breach allegations to the Common Issues will become more fully articulated at trial.

In any event, it will be important for the parties not to stray into issues that fall to be determined at the Horizon trial and/or issues as to breach. The Court will recall that Post Office has not adduced any evidence at this trial to make good its case on Horizon; nor has it sought to address in evidence the various breach allegations that appear in Cs' witness evidence. Post Office has not prepared for a trial on Horizon or a trial on breach. The function of this trial is not to reach any findings on those issues, or on facts that go to those issues." [46]

56. Post Office's closing written submission following the Common Issues Trial made a number of points on the scope of the Common Issues Trial – see paras 31 to 51 and paras 126 to 131 of the Defendant's Written Closings. In particular,

56.1 *" It remains acutely important not to stray into issues that fall to be determined at the Horizon Trial and/or future trials on breach and liability. The Court will recall that Post Office has not adduced any evidence at this trial to make good its case on Horizon; nor has it sought to address in evidence the various breach allegations that appear in Cs' witness evidence. Post Office has not prepared for a trial on Horizon or a trial on breach. It has not, for example, led expert evidence on Horizon, and it has not provided anything like the accounting evidence that it would lead at a liability trial. The function of this trial is not to reach any findings on those issues, or on facts that go to those issues."*[47]

56.2 *" In this context, it was wholly unfair and unattractive for Cs to criticise Post Office's witnesses for having failed to address irrelevant material in their witness statements: see, e.g., the implied criticism of Ms Van Den Bogerd for not having addressed in her witness statement various internal Post*

[46] C8.11/2/11
[47] C8.11/8/18

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Office documents that have been disclosed {Day8/165:12}, despite the fact that such documents are irrelevant to the Common Issues and any evidence in relation to them would be inadmissible. Ms Van Den Bogerd's witness statement was of course prepared in light of the limited permission to file and serve evidence "in relation to Common Issues": see para. 10 of the First CMC Order {B7/7/5}. She makes clear in the witness statement itself that her evidence is limited to matters that she considers could have been known or anticipated by an applicant SPM at the time of contracting: see, e.g., para 64 (in relation to the operation of an agency branch) {C2/1/17}, paras 91-98 (in relation to Horizon) {C2/1/27}, paras 114-115 (in relation to further training and support) {C2/1/32} and para 116 (in relation to retail "shrinkage") {C2/1/33}. She was careful not to trespass onto the Horizon Issues: see, e.g., Fn. 22 and 24 {C2/1/23}. It is perverse to criticise a witness for seeking to comply with a direction as to the scope of evidence and for limiting herself to admissible evidence. Ms Van Den Bogerd of course had the benefit of advice as to the proper scope of her evidence: {Day9/73:7} to line"[48]

[Make sure include XX to this quote in section relating to witness slating]

57. Finally it was addressed in oral closing submission:

Day 14, page 27

18 MR JUSTICE FRASER: And you don't take post-contractual

19 matters into account on either footing .

20 MR CAVENDER: Or hindsight or views from hindsight. You

21 have to ask the right question. The right question is

22 not: well , is it reasonable? You don't ask: well , what

23 term should be implied in light of what happened in

24 fact ? That is the mistake made in Bou Simon by the

25 First Instance that the Court of Appeal identified . And

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1 there is a real risk of doing that here - -

[48] C8.11/8/18

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2 MR JUSTICE FRASER: I don't think there is .

3 MR CAVENDER: It's an easy mistake to make as Bou Simon

4 shows. There is a lot of evidence here of that nature.

5 My learned friend has put his case both in

6 cross-examination and his closings on that basis . So

7 you have a yawning invitation to make a mistake and it

8 is my job to try and prevent that happening and I intend

9 to try and do that . But in doing that , you have to be

10 very careful what question you ask and what evidence you

11 have regard to when you ask it .

12 I will just divert a moment and put some skin on

13 those bones. When you are looking at implied terms

14 particularly , my learned friend is fascinated by doing

15 it in the guts of the dispute and the thing going wrong.

16 When you know a lot more detail - - and at that stage you

17 would be able to identify certain cardinal obligations

18 and things that have gone wrong and try and put them

19 right . "Tempting but wrong", in the words of M&S.

20 At the stage you're contracting you know very much

21 less . You have a very high level view of what you

22 expect. So the very notion of being able to imply

23 precise terms dealing with suggested infelicities or

24 difficulties down the line is itself wrong headed

25 because you wouldn't be able to do that .

...

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24 We also say it was somewhat cynical of the claimants

25 to take this approach because there has not been full

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1 disclosure on either side dealing with the issues they

2 now seem to want to be dealt with. In particular , what

3 we call the breach allegations , we only have a few

4 documents that happen to be caught in the net of the

5 word searches. Your Lordship should not think that we

6 have full disclosure on all these issues . We do not.

7 And the real temptation here is to think you have and to

8 draw inferences from an incomplete documentary record,

9 incomplete evidence, which would in my submission be

10 obviously wrong.

11 So, for instance , your Lordship should not be fooled

12 into thinking there has been anything like proper

13 disclosure on allegations as to training or shortfalls

14 or investigations . Your Lordship did not order such

15 disclosure , there has not been such disclosure , and

16 Post Office has not led evidence on those issues . My

17 learned friend has put questions on those areas - -

18 MR JUSTICE FRASER: You have led evidence on training .

19 MR CAVENDER: My Lord, only very, very high level . I think

20 it was a couple of paragraphs --

21 MR JUSTICE FRASER: Quite a lot of your evidence was high

22 level in some areas, and I ' m not criticising , I ' m

23 observing, but you did lead evidence on training .

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24 MR CAVENDER: My Lord, only just high level evidence. If

25 you wanted evidence on training , we would have evidence

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1 from trainers and the proper documentary record of the

2 plans et cetera . All we did was have a few slides , that

3 wasn't proper evidence.

4 The other thing about training of course is it is

5 wholly irrelevant . Why? Because my learned friend's

6 case is that all the contracts were made in advance of

7 even initial training , let alone subsequent training , so

8 the whole question is wholly irrelevant .

9 MR JUSTICE FRASER: The irrelevance point I understand, but

10 it is wrong to submit you didn't put in any evidence on

11 training - -

12 MR CAVENDER: We didn't put any proper evidence on

13 training - -

14 MR JUSTICE FRASER: Mr Cavender, there is no distinction

15 between putting in evidence and putting in proper

16 evidence. You might have a point that it could have

17 been more comprehensive --

18 MR CAVENDER: There has been no disclosure on training.

19 MR JUSTICE FRASER: There might not have been. But you did

20 put in evidence on training because some passages of

21 your witness statements expressly deal with training .

22 MR CAVENDER: My Lord, yes, there is a paragraph or two in

23 Mrs Van Den Bogerd's statement that on a very high level

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24 says . But not evidence of training where your Lordship

25 can make any finding. Her evidence is about what could

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1 have been known or anticipated at the date of inception ,

2 that is what her evidence goes to if you look at it , not

3 the actual experience of training , how good or bad it

4 was, were shortfalls dealt with in sufficient detail ,

5 which is the point my learned friend wants it for .

6 MR JUSTICE FRASER: By "date of inception ", do you mean ...

7 MR CAVENDER: The contractual date.

8 MR JUSTICE FRASER: The contractual date.

9 MR CAVENDER: Indeed. That is why it is so general .

...

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7 In my submission, the court should be focusing its

8 findings on the date of contracting , we just touched on;

9 what each lead claimant knew or could be taken to have

10 known at the date of contracting through his or her own

11 due diligence and through the interview process;

12 findings as to what a reasonable person in the position

13 of the claimant would have understood about

14 the relationship as at the date of contracting ; and

15 points of credibility going to lead claimants where they

16 bear on any of those earlier points .

...

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24 MR JUSTICE FRASER: I understand your submission: you are not,

25 because of the nature of the peculiar situation in which

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1 the claimants find themselves, inviting me to make

2 adverse findings on their credibility .

3 MR CAVENDER: Correct.

4 MR JUSTICE FRASER: Is that right ?

5 MR CAVENDER: It is.

6 MR JUSTICE FRASER: So when you put to at least some of

7 them, I think , that they weren't telling me the truth ,

8 do you want me to ignore their answers?

9 MR CAVENDER: My Lord, it is really a matter for you at the

10 end of the day, what you think is proper. What I am

11 saying is that there has not been full disclosure on

12 those matters, that the reason that it was put was to

13 seek to undermine the impression they had given in their

14 witness statements that they were telling the full

15 story . So what we are left with, my Lord, in my

16 submission, is , you should treat their witness evidence

17 with caution , because you have seen that not in every

18 respect has their account of the way things worked out

19 been full or sometimes fair .

...

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23 MR JUSTICE FRASER: So far as the claimants' evidence is

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24 concerned, therefore , you say treat it all with caution

25 for all the reasons you have gone through, but you are

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1 inviting me not to make any findings on their

2 credibility .

3 MR CAVENDER: Indeed.

4 MR JUSTICE FRASER: Any adverse findings on their

5 credibility , is that right ?

6 MR CAVENDER: Yes, because to do so you would have to make

7 findings as to the accounting system, to the TCs, what

8 happened in fact , and you haven't had full evidence on

9 that by any means.

10 You can test it in this way: these are questions of

11 breach, this is a classic question of breach. This is

12 what they will be if there is a breach trial in October,

13 or whenever it is going to be, that will be exactly what

14 these witnesses will be putting forward. But then with

15 the benefit of the judgment here as to what the rules

16 are , and with Horizon and how good or bad that is . But

17 this will be the meat and drink of that breach trial .

18 Now, what has happened in this court in the last

19 four weeks is a fact . It has been recorded, it is in

20 the transcript . Those witnesses can of course be taken

21 back to that evidence during the breach trial and it

22 will be surprising if they were not. So it is not

23 wasted, it is in the can ... It is still as a matter of

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24 record it is there . But for you to make findings on it ,

25 my Lord, we go further , for the same reason you

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1 shouldn't make findings on the accounting processes

2 generally and all these other matters that have come in

3 by a side wind but there has not been full disclosure

4 on.

...

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2 MR CAVENDER:The

3 bright line I am making is issues of breach really .

4 MR JUSTICE FRASER: You are saying don't go near findings

5 that relate to breach, is that right ?

6 MR CAVENDER: Indeed.

7 MR JUSTICE FRASER: Is that the best way of summarising it?

8 MR CAVENDER: It is, and we said that at the beginning. And

9 your Lordship said in judgment 2 you are not going to

10 make findings on breach, and I said good, obviously, but

11 also don't make findings of fact leading to those

12 questions of breach. Not obviously whether there is

13 a contract or not, you could - - if you took that too

14 far . But not in directly leading up to findings on

15 breach, or would do. Platforms of fact that would lead

16 to that .

17 MR JUSTICE FRASER: Understood.

...

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11 MR CAVENDER: So in summary on important points of this
12 introduction in terms of scope, the court should not
13 have regard to post-contractual evidence, evidence of
14 breach, for two distinct reasons: firstly , to do so
15 would involve a basic error of law, and, secondly, would
16 involve a serious procedural irregularity . It would do
17 the second because the orders of the court setting out
18 the issues for trial and the issues on which evidence
19 were to be admitted is set out in the Common Issues.
20 The Statements of Case have been ordered to be limited
21 to those issues , see paragraph 8, and the witness
22 statements were limited to those issues , see
23 paragraph 10. That is the trial Post Office has
24 attended and involved itself in . It has not engaged in
25 wide-ranging evidence on breach, which the claimants

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1 have, and so not only would it be an error of law to
2 have regard to it , it would also be procedurally unfair
3 for that reason. Because in the absence of full
4 disclosure on matters such as the dispute , Horizon,
5 accounting, procedures, deficits , training and Helpline ,
6 without full evidence and disclosure on all those
7 points , the court should not engage in inferential
8 findings or comments along the way. It shouldn't do so
9 as a matter of procedural fairness but also particularly

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10 given there are two other trials that have been loaded

11 in the system effectively on Horizon and on breach,

12 where on those very matters there will be full

13 disclosure , there will be full evidence and there will

14 be determinations.

15 The other point I mentioned I think earlier was

16 whether you should also be careful because of the nature

17 of the way it has been set up - - we had a humorous

18 debate about whether it was odd or not, but whether you

19 should make comments as well about "be careful to ",

20 because, otherwise, an independent observer might think,

21 wrongly obviously, that the comments you make are

22 a route along the way to reaching a particular view or

23 a finding , which you would then have to find in judgment

24 two or three - - sorry , in trial two or three . So again

25 there is that sensitivity , which your Lordship no doubt

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1 will obviously have in mind.

58. Following the conclusion of the Common Issues Trial, the Defendant's Counsel provided the Court with a document which summarised Post Office's proposed approach to findings of fact. [49]

[Anything else to say about this?]

[49] C8.11/18

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SECTION 3: SCOPE OF DISCLOSURE

2 February 2018 – Case Management Conference

59. The second CMC was held on 2 February 2018, for the primary purpose of resolving the scope of disclosure to be given by the parties. It was common ground between the parties that *"disclosure for the purpose of the Common Issues trial should be designed to assist the parties and the Court in resolving the Common Issues."*[50]

60. Post Office's position was therefore *"Stage 2 disclosure* ***should not extend beyond that which can be expected to provide relevant evidence on those issues****. As noted above, the* ***Common Issues are largely matters of contractual construction,*** *although certain of them may require a slightly broader consideration of the nature of the legal relationship between the parties. The* ***parties must therefore keep in mind the fairly limited scope of factual evidence that will be admissible at the trial of the Common Issues and the effect that this has in terms of limiting the disclosure that is necessary and proportionate.*** *The Court will not, in resolving issues of contractual construction (including whether terms are to be implied into the agreements 5), go beyond admissible matrix of fact evidence."*[51]

(emphasis added)

61. Post Office also raised its concerns that "*the Claimants have not taken on board the limited scope of evidence (and therefore disclosure) that will be admissible in relation to the Common Issues."*[52] and repeated its issue that the Claimants had been unwilling to identify the facts on which they would rely for the purposes of construing the agreements.[53] The position remained that "*The Claimants refuse in that paragraph to limit themselves to the matrix of fact that they have identified clearly in the pleading, which leaves Post Office in the position of not knowing what facts the Claimants may seek to prove and rely on for the purposes of construing the agreements."*

62. Where the Claimants has identified specific paragraphs in the GPOC "*many of those paras plead facts that are not even arguably matrix of fact for the construction of the contracts (or even, to the extent this is different, facts that may be relied upon in determining the nature of the legal relationship between the parties). See, for example, paras 14, 19, 22-27, 29-30, 32, 34-35 and 38-39 at*

[50] Post Office's Skeleton Argument, page 4 to 5, paragraph 12 {C8.3/2/4-5}
[51] Ibid
[52] Post Office's Skeleton Argument, page 5, paragraph 13 {C8.3/2/5}
[53] Post Office's Skeleton Argument, page 5, paragraph 14 {C8.3/2/5}

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[CM/V1/B3]. Many of these paras do not relate to the content of the parties' agreement or even to facts and matters that were known to the parties at the time of contracting and which might in principle be admissible background for the construction of the agreements; they relate instead to what in fact happened after the contracts were entered into. Many of them are advanced in support of allegations of breach, rather than duty."

63. The Claimants had justified their approach to disclosure on the basis of seeking documents showing what actually happened and being documents which post-dated the entering into of the contract. This disclosure would be inadmissible at the Common Issues Trial.[54]

64. As explained at paragraph 22 of POL skeleton: *"Thirdly, insofar as any broader factual enquiry may be justified by the inclusion of Common Issues 17 and 18, such enquiry is limited to evidence going to the "true agreement"9 between the parties in relation to the circumstances in which Post Office could lawfully terminate the agreements: see paras 69-71 of the AmGPoC [CM/V1/A3/39]. It cannot justify opening up the question of "what actually happened" in relation to the provision of training, the conduct of audits, enquiries and investigations, the operation of suspense accounts, etc."*

65. Post Office raised specific issues with *"the main burden of the disclosure sought by the Claimants would be aimed at the investigation of post-contractual facts that were known only to Post Office, e.g. Post Office's contemporaneous knowledge of any supposed deficiencies in its training processes that may be revealed by internal emails etc. Documents of this kind might ultimately be relevant to liability issues, which are to be determined in the Lead Cases, but they cannot provide material for the construction of the contracts in the Common Issues tria1.10 The Common Issues trial is limited to questions of contractual construction and the identification of the legal relationship between the parties."* (Para 23(a)).

66. At this CMC, Fraser J summarised the position:

MR. JUSTICE FRASER: Mr. de Garr Robinson and, indeed, Mr. Cavender are adopting a conventional, he was and Mr. Cavender is adopting a conventional approach as set out in the authorities, which Mr. Cavender has helpfully reminded me of, such as Arnold v Britton, et cetera, which is the extent to which factual matters can or should be taken into account or are even admissible on the construction of the contractual provisions.

[54] Post Office's Skeleton Argument, pages 8 to 11, paragraphs 21 to 24 {C8.3/2/8 - 11}

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MR. GREEN: Indeed.

MR. JUSTICE FRASER: When this discussion/dispute arose at the last CMC, you addressed me shortly on why there was the need for factual evidence at all on the common issues, which you effectively said it is to put the contractual relations in context. I am giving you a shorthand, but that is more or less what it is. At that point Post Office were saying that they were very worried, because until they saw your witness statements they did not know the scope to which you were perhaps going outside the envelope with that admissibility to include an enormous amount offactual matters which simply will not be relevant or will not need to or, indeed, ought to be considered when I deal with common issues in November.

MR. GREEN: Indeed.

MR. JUSTICE FRASER: That disagreement bubbles on is now is leaking into the disclosure field. Is that it in a nutshell?

MR. GREEN: Yes. Your Lordship appreciates orthodoxy I would also claim for myself.

MR. JUSTICE FRASER: Yes, Mr. Cavender has an associated sort of concern/point about the extent to which whatever facts you are going to be relying on are identified in advance within the framework of your pleading-type point, but that is really the battleground. Is that right, Mr. Cavender?

MR. CAVENDER: My Lord, yes, that summarises it.[55]

67. Mr Cavender summarised that the issue with the disclosure sought by the Claimants was that it *"The next big picture point is, my learned friend seems to not understand the difference between factual matrix and evidence of that, even in a broad sense, and evidence of breach. If you go through, as I will in a moment, schedule 2, part 2, very much of the schedule is identifying where Post Office is allegedly not following its polices in breach of them. That can not begin, in my submission, to be admissible on the question of the duties under the contract. It shows whether or not they have been breached. You do not go and look at how badly, how often a party has breached a contract in order to determine its terms. It is fundamental and obvious."*[56]

68. Mr Fraser summarised the position as being *"At the moment, as I understand your position, it is that the documents currently crafted in the indicative table is far*

[55] Page 5, Section F to Page 6, Section C {C8.3/3/5}
[56] Page 20, Section C, {C8.3/3/20}

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too wide and does not go to common issues."[57]

69. Overall, the outcome of the matters discussed at this CMC were summarised in Post Office's skeleton for the strike out application as consisting of: [58]

69.1 *"Post Office contended that many of the matters on which Cs apparently intended to rely for the purposes of construction could not be admissible because they were not known, believed or anticipated by the parties at the time of contracting:*

> *"Many of these paras [in the AGPOC] do not relate to the content of the parties' agreement or even to facts and matters that were known to the parties at the time of contracting and which might in principle be admissible background for the construction of the agreements; they relate instead to what in fact happened after the contracts were entered into. Many of them are advanced in support of allegations of breach, rather than duty." (original emphasis)"*

69.2 *"The Court gave a clear indication that the Common Issues trial would not involve the determination of any issues as to whether and to what extent Horizon "threw up errors"."*

69.3 *"Cs argued that the Court should nonetheless not "be deprived of the eloquence of a measure of generic reality as to what was going on", but they did not appear to object to the basic point that Horizon Issues were to await the Horizon Issues trial and so could not be the subject of evidence in the Common Issues trial.*

69.4 *It is worth noting that, if Post Office had anticipated that the Common Issues trial would involve an investigation of issues as to alleged breaches, it would have argued for a very different disclosure regime. However, the hearing proceeded on the opposite basis, as did the restored hearing on 22 February 2018."*

22 Feb 18 CMC

70. A subsequent CMC was held on 22 February 2019 to [x]. As summarised in the Cs supplemental note *"One particular point of contention is the Defendant's insistence that certain categories of documents should not be disclosed because*

[57] Page 22, Section C, {C8.3/3/22}
[58] C8.10/2/5

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they relate either (a) to breach issues, or (b) to the subjective intention and/or knowledge of the Defendant." [59] Post Office has set out its objections to the Claimants disclosure request in WBD's letter of 13 Feb 18 which enclosed a document setting out comments upon the categories of document forming the subject of the Model C Request.

71. Post Office's position was explained in its Skelton argument for the CMC: *"should be limited to documents that may provide admissible evidence for the resolution of the Common Issues, principally matrix of fact evidence. It relied on the well-established orthodoxy as to admissibility of evidence for the purposes of contractual construction.*

The Cs sought much broader disclosure, to be given in accordance with Model D, arguing that the disclosure should cover not only the terms of the parties' agreement but also what in fact happened in the course of their relationship. Cs invited the Court to order broad generic disclosure that would bring a "measure of generic reality as to what was going on"[60]

Further, *"Post Office made clear at the last hearing that this disclosure would likely extend well beyond those documents that would be admissible for the purposes of contractual construction but that it had sought to reach a pragmatic compromise in light of Cs' extremely broad requests and the current absence of any proper pleading as to matrix of fact. The Cs will receive very large quantities of documentation, which will fully cover any matters which could even arguably constitute part of the factual matrix (and some matters which could only have, at best, forensic relevance and which will be inadmissible at the Common Issues Trial)."* [61]

72. Post Office disclosed [xxx,xxx] documents under Stage 2 disclosure, which was documents for the purpose of the CIT. As explained in the POL's skeleton for the CMC on 22 Feb:

"Under its Schedule 2 proposals, Post Office would anticipate disclosing, in addition to the documents relating to the Lead Claimants under Schedule 1, around 100,000 — 200,000 documents. This is an extraordinary amount of disclosure to be provided for the purposes of determining the nature and content of the parties' contractual relationship (being principally matters of contractual construction), taking into account the following:

[59] Para 22 {C8.4/1/5}
[60] Para 6(a) to 6(b) {C8.4/2/2-3}
[61] Para 16, {C8.4/2/2}

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a. For almost all of the issues, any evidence as to what in fact occurred after the agreement was entered into (or, where relevant, varied) will be inadmissible: see, for example, Arnold v Britton [2015] A.C. 1619 at [21] per Lord Neuberger. Post Office anticipates that much of the evidence that the Cs may wish to lead will be inadmissible and liable to strike-out.

b. It is true that there are Common Issues that go beyond matters of contractual construction. But they are very limited in scope: see Common Issues 17 and 18, relating to the "true agreement" between the parties as to the circumstances in which Post Office could lawfully terminate the agreements. The Court in November will not be concerned with the facts as to what happened in terms of training, the operation of the Helpline, the discovery and investigation of shortfalls, the operation of Post Office's financial systems and client accounting, etc.

c. The Common Issues trial is a trial of Lead Claims. In the unlikely event that any broader disclosure might shed light on the construction of the Lead Claimants' contractual relationships with Post Office, such disclosure is to be provided in any event under Schedule 1."[62]

73. The dispute between the parites at this CMC was summarised in POL's skeleton as:

"(a) The proper scope of factual matrix disclosure should not be in doubt (and if there was any doubt, it ought to have been removed by the discussion at the last hearing). Matters which occurred after the entry into, or (where relevant) variation of, the relevant contracts cannot be relevant to their proper construction. Similarly, no material which was only within the purview of one party to a contract can be relevant to its interpretation. The purpose of the Common Issues Trial is to establish, in the context of the upcoming Lead Claimants' trial, the meaning of the relevant contracts. The disputed requests have no relevance to that exercise; as opposed to, for example, the subsequent exercise of determining whether there was breach of the obligations as determined in the Common Issues Trial.

(b) In their letter of 19 February, the Cs suggest that disclosure going beyond the factual matrix is required. They observe that one issue in the Common Issues trial will be as to the 'burden of proof', i.e. whether, under the relevant contracts, the Post Office is entitled, in the absence of evidence to the contrary, to treat any shortfall as being the responsibility of the relevant Subpostmaster. The Cs note that Post Office's pleading on this point makes reference to background facts such as the Post Office's difficulty in knowing what explains any given loss.. They argue that this justifies wide-ranging disclosure on related matters. That is wrong. The only matters relevant to the proper

[62] Para 17, {C8.4/2/2}

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construction of the contract (as to burden of proof or anything else) are matters which were publicly known or 'crossed the line' between the parties — including what both parties knew about the difficulties for Post Office in determining the cause of a shortfall. But if some internal Memorandum at Post Office lamented how difficult it was to determine the cause of a shortfall, that would not be a reason for construing the contracts in the way that Post Office submits they should be construed, i.e. with 'burden of proof' on Subpostmasters. The converse is equally true — some internal Memorandum privately lauding the ease of investigating shortfalls would not assist the Cs' case on construction."[63]

74. Post Office went on to bring the specific requests to the Court's attention:

> *(a) Requests c and d cover documents that could only shed light on Post Office's subjective views as to the construction of a contractual provision. Such evidence would be inadmissible and is irrelevant.*
>
> *(b) Request e relates to discussions between Post Office and Fujitsu as to bugs, errors or defects in Horizon. It is entirely irrelevant to the construction of the parties' agreements.*
>
> *(c) Request f is extremely broad (covering all "instructions", irrespective of the class of document in which such instructions might be provided) and relates in any event to accounting operations in practice, rather than shedding any light on the construction of the agreements. Similar comments apply to request 37.*

(d) Request i proceeds on a fundamental misunderstanding of Post Office's case on the burden of proof: see paragraph 19(b) above."[64]

75. Post Office's approach to disclosure was to *" scope the disclosure by reference to the evidence that might plausibly be admissible and useful in the resolution of the Common Issues. It has focussed on disclosure that might plausibly bring to light documents that could assist in identifying facts known to the parties at the time of agreeing the contractual documents (and variations to those documents) and that might assist in construing the express terms of the agreements and/or determining whether or not an alleged implied term is necessary. In doing so, Post Office has already gone beyond what is admissible evidence at the Common Issues trial and has volunteered disclosure of other classes of documents where they can be narrowly defined."*[65]

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[63] Para 19 {C8.4/2/7}
[64] Para 20 {C8.4/2/7}
[65] Para 21 {C8.4/2/8}

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76. The Claimants submitted a responsive to note to Post Office's skeleton which stated *" The Defendant's Skeleton Argument (particularly at §25, on Horizon Issues; and, more generally, at §19 to §21) requires two points to be made against two documents already disclosed by the Defendant: (1) the factual assertions in §251 are unsupported in evidence and do not sit well with the revelations on the face of the appended documents; and (2) the effect of the Defendant's selective approach to the factual matrix is apparent from those documents."*[66] In relation to point (2) the Claimants gave an example that *" whether facts 'only within the purview of one party can be relevant' [§19(a)] and whether the facts which Post Office has expressly pleaded to be 'important' to construing the contract [GDef §76] can now be finessed as only 'background' [§19(b)] and disregarded in construing the contract."*[67]

77. At the CMC on 22 Feb 18:

" MR. GREEN: The second broad area of disagreement goes back to some submissions your Lordship heard about the orthodoxy and relevance of factual matrix matters. May I make this point, that there remains a difference in principle about the relevance of Post Office knowledge.

MR. JUSTICE FRASER: That I am aware of from reading the documents for today but it surprises me, given what I said last time.

MR. GREEN: My Lord, may I say this. There are two points which we respectfully say are inescapable. (1) if the court is going to be asked, what was knowledge common to both parties, not just communicated by one to the other necessarily, but common to both parties, let us take for example ----

MR. JUSTICE FRASER: Hang on, finish the submission, knowledge common to both parties is a concept I can grasp without an example.

MR. GREEN: That does require the court to examine what each party knew, we say, in particular, the Post Office. The example my learned friend gives, I can go back to paragraph 19 for this one, paragraph 19(b) on page 7, it is the bottom of paragraph 19(b), just below the top hole punch, well, perhaps the criticism immediately above the top hole punch is half way across the page: "The Cs note that Post Office's pleading on this point makes reference to background facts" I will come back to that phrase "such as the Post Office's difficulty in knowing what explains any given loss. They argue that this justifies wide-ranging disclosure on related matters. That is wrong. The only matters relevant to the proper

[66] C8.4/3/1
[67] Ibid

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construction of the contract (as to burden of proof or anything else) are matters which were publicly known or 'crossed the line' between the parties – including what both parties knew about the difficulties for Post Office in determining the cause of a shortfall."

This is his specific example. He says then: "But if some internal Memorandum at Post Office lamented how difficult it was to determine the cause of a shortfall, that would not be a reason for construing the contracts in the way that Post Office submits they should be construed, i.e. with 'burden of proof' on Subpostmasters."

Pausing there, my Lord, simpliciter that is true but if it were one of two necessary parts to common factual facts known to both parties then it would assist. So, if both parties knew that it was difficult and they could not do it then that is, on my learned friend's orthodox test, an essential component of what he is trying to say. That is why, when he then goes on to say a converse example is completely wrong because he says at the bottom: "The converse is equally true – some internal Memorandum privately lauding the ease of investigating shortfalls would not assist the Cs' case on construction." If your Lordship is going to be asked to take into account in construing a contract, a common fact known to both sides, that it was very difficult for the Post Office to know what causes shortfalls, when in fact the Post Office knew exactly how it could do that and the Post Office did not share that factual knowledge, that would be wrong.

MR. JUSTICE FRASER: Mr. Green, by definition it is not common knowledge.

MR. GREEN: Precisely.

MR. JUSTICE FRASER: This is, with respect, rather off the point for this reason. I thought I made this crystal clear last time but I appear not to have done so I am going to repeat myself, so far as resolving the Common Issues which are, and I have reminded myself what they are, purely points of construction.

MR. GREEN: Indeed.

MR. JUSTICE FRASER: On the authorities the only factual matrix which is relevant to construe the meaning of those contracts in law is common knowledge. That is without doubt orthodox and the correct way of doing it.

MR. GREEN: No doubt about it.

MR. JUSTICE FRASER: That does not mean, and I think the expression I used in the transcript two weeks go, but the expression I used perhaps over dramatically was a smoking gun, that does not mean that smoking gun-type documents are

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not disclosable because I have the ability to order documents of that nature, whether they are going to be relevant to the point of construction or not. I also thought I made it clear that they had to be narrowly focused requests and the existing requests were far too wide.

MR. GREEN: Indeed.

MR. JUSTICE FRASER: I have your point about the orthodox factual matrix. Mr. Cavender, to be fair to him, explained this very clearly on the last occasion. We did not go into the authorities but I thought I made it clear that his approach on construction was indeed correct.

MR. GREEN: Well, my Lord, yes ----

MR. JUSTICE FRASER: We are not arguing the point now for decision.

MR. GREEN: No, we are not argue the point now for decision; that is quite right. I just wanted to highlight specifically the question, I mean, this is the precise example that my learned friend relies on.

MR. JUSTICE FRASER: But it does not matter.

MR. GREEN: As to which a lot of our requests go.

MR. JUSTICE FRASER: Mr. Green, it does not matter for this reason. You might have a good case for an order for disclosure of certain documents anyway, whether they go to Common Issues or not.

MR. GREEN: Of course.

MR. JUSTICE FRASER: But that does not at this point and it might be when we go through the tendentious task of looking at your requests, that some of them are disclosable anyway, whether they are going to Common Issues or not.

MR. GREEN: Indeed.

MR. JUSTICE FRASER: I might choose to order them.

MR. GREEN: Indeed.

MR. JUSTICE FRASER: However, on the last occasion as I understand it, as I recall it and as I remind myself of it, I made myself clear that Model C was being ordered and further requests would have to be narrowly focused."[68]

[68] Pages 7 to 10 transcript {C8.4/4/7-10}

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78. My Canverde for Post Office explained in response POL's position:

"MR. CAVENDER: This is disclosure in relation to the Common Issues of construction, that is what this schedule is about, nothing else.

MR. JUSTICE FRASER: Understood.

MR. CAVENDER: This idea that, is it for the Common Issues or is it for something else, I have deep concerns about.

MR. JUSTICE FRASER: The reason I asked that question, Mr. Cavender, and I want to be completely clear with you because it might help, is it seemed to me that some of these could not possibly be said to go to the Common Issues trial, which is why I wanted Mr. Green to tell me if he was seeking in this schedule for Common Issues or for some other purpose. That demarcation seems to me sometimes to be blurred."

MR. CAVENDER: My Lord, it does, but surely the focus must be here relentlessly on the Common Issues. If he wants to put another request in for some or reason, let us see it.

MR. JUSTICE FRASER: I understand that.[69]

79. Mr Cavender continued

"My Lord, this is a theme, it will be my last general submission I make, unless the court grips this case now on disclosure the next stage is witness statements in August.

MR. JUSTICE FRASER: Mr. Cavender, the court fully intends to grip the case.

MR. CAVENDER: I am obliged.

MR. JUSTICE FRASER: I would like to think it has been gripped anyway.

MR. CAVENDER: My Lord, yes, but my learned friend keeps coming back with more and more wide requests. Your Lordship has made yourself absolutely clear on the last occasion, but he seems not to understand the meaning of "no", and saying "yes" or "may be" in my submission is not going to be helpful to him or the management of this case. Otherwise, you are going to get witness statements that deal with the whole story, we will apply to strike them out largely and the whole November trial and process will be infected by all these documents, we have already got."[70]

[69] C8.4/4/16
[70] C8.4/4/18

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80. At the CMC the Court went through each of the disputed disclosure requests: for example:

"MR. CAVENDER: My Lord, no, it is obviously dealing with, how on earth can you deal with shortfalls and discrepancies, i.e. the accounting function with the Bank of Ireland or with Camelot, have anything at all to do with the issues of construction you are tasked to deal with. It is unbelievable that this request is being made really."[71]

" MR. CAVENDER: There is no basis and none has been suggested for why documents as to procedures applied between Post Office and the Bank of Ireland or Camelot or anyone else for dealing with the accounting function. Discrepancies and shortfalls will bear upon how you construe the obligations in the contract. The dichotomy we make in our comment if you look under request a in the second part, the request also relates to the financial reconciliation process and other operational activities undertaken by Post Office, that is the bright line. Is this operational Post Office stuff after the event, not known by either party? Answer, yes, it is. My Lord, that is why I say that items 1 and 2 are more than sufficient for the court to have the background to determine the products and services issue in the left-hand column."[72]

> *" MR. JUSTICE FRASER: How do the documents that you are seeking in Request a go, please, to the proper construction of section 12, clause 12 of the SPMC(?) and part 2, paragraph 4.1 of the MTC(?)"*
>
> *" MR. GREEN: The answer is in three parts.*
>
> *MR. JUSTICE FRASER: Give me the three parts.*
>
> *MR. GREEN: The first part is that the Common Issues relates to a contractual term between the parties about the burden of proof. That is point 1.*
>
> *MR. JUSTICE FRASER: It is construction of the contractual term.*
>
> *MR. GREEN: Yes, construction. It relates to construction of a contractual term of the contract between the parties, point 1. Point 2, the defendant advances as its case in particular the point at 76.4 to 6 and contends that those are important aspects of the factual matrix against which the contract should be construed. That is the defendant's case. Those items at 4 to 6 are the following. The Post Office's inability to monitor at first hand the transaction undertaken in branches. Number 5, Post Office unable to monitor at first-hand the customer use of property, leave that aside for the moment. Particularly, number 6, Post Office relies on the accurate reporting by Subpostmasters of accounts, transactions of*

[71] C8.4/4/17
[72] C8.4/4/18

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cash (unclear) branch. Should Subpostmasters not accurately report these things it would be impossible or alternatively excessively difficult to determine if a shortfall has occurred, when it occurred or why it occurred.

We do not believe that is factually true and that is supported by questions we have asked our expert. On the basis of that one of the things that the court will need to do is to look at whether there is any truth in that if that is the defendant's case. If they want to abandon their case, and say, "yes, we admit we knew perfectly well, we had lots of access to the background documents, we have served a notice to admit which may clarify some of those points, they have not answered it yet but an answer will hopefully come", that is a different situation.

At the moment, my Lord, I am dealing, I am facing a pleading which expressly advances that point as a point relevant to construction. These documents, the absence of those documents will deprive the court of the opportunity to construe, not only deal with the points the defendant takes in the defence which are pleaded points but also the general point that the court should try and give the contract commercially sensible meaning. Unless you have the backward facing part of that on the specific issue we are only asking, my learned friend says it is all terribly big and difficult, that there is not some standard form in relation to how you deal generally with transaction discrepancies and reconciliations seems to me to be wholly unrealistic. It probably will not be identical across 100 people but the arguments conceal the fact that when you look at what we are asking for we are specifically asking for generic documents which are the procedures between Post Offices and clients, specifically in relation to discrepancies, shortfalls and losses. Nothing else. We do not want a huge disclosure of things.

The idea that there is not some common template for what should happen in relation to discrepancy, shortfalls and losses seems to us to be absurd. In fact when you look at it, it is narrow. Second, it specifically goes to their pleading. Thirdly, paragraph 85 repeats the fact that they are going to rely on those points in relation to construction of the contracts. Fourthly, paragraph 93 goes to considerable detail of the fact that other matters that they will rely on, which are now of course disavowed so that the defendant can try to avoid potentially damaging documents, are all hugely burdensome disclosure. One or the other, we do not know which?

MR. JUSTICE FRASER: Is there anything you would like to add?

MR. GREEN: That is the submission.

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MR. JUSTICE FRASER: Right, I am not going to order this category. It is too wide and in my judgment it will be disproportionate at this stage. You are, however, permitted, after you have your first draft of your expert's report, to make a more narrowly focused request. It is to be more narrowly focused than this."[73]

81. Another request which was considered was [x]:

"All we are interested in is the sort of overarching documents like the ones we accompanied with the responsive note. We do not know what they are called so we have asked for minutes of management meetings to discuss variation of Postmasters contracts nationally. In so far as the variations that were being contemplated concerned or impacted on the operation of Horizon branch accounts and/or discrepancies, shortfalls that may arise therein, we specifically look at disclosure relating to variation of contracts which is driven by considerations relating to the generation of these discrepancies or shortfalls. It is a specific focus.

My Lord, I am not going to repeat the submissions I have made on the first one, but your Lordship will understand why the submissions are made. I did not go into the detail at paragraph 93, I am going to now. Your Lordship may remember from the last hearing that 93(b)(ii) says that it would be unjust for the Post Office to be required to prove allegations relating to the matter that fall particularly within the knowledge of the Subpostmasters. So 93.1(b) has three parts to it.

MR. JUSTICE FRASER: Yes.

MR. GREEN: And specifically relates to the legal burden ----

MR. JUSTICE FRASER: Understood.

MR. GREEN: Specifically relates to that liability for alleged losses, burden of proof point in the Common Issues. This is their specific pleading on it. They say that the truth lies peculiarly within the knowledge of Subpostmasters and it is unjust for the Post Office to be required to prove matters that fall peculiarly within their knowledge and subject to fiduciary obligation. Ignore the third one. It is those two in (b) which they have specifically put in issue. The idea that the court in resolving the Common Issues is going to be looking at only one side of the fence that happens to favour them and for us to be precluded from investigating specific matters which are obviously relevant to their pleading, we respectfully say would be completely unfair. I understand your Lordship's concerns about staging this and proportionality. Your Lordship is not going to have any complaint from me if

[73] C8/4/21 - 22

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some sort of nuanced approach or iterative approach or cautious approach is taken but it is right that your Lordship knows why we are asking this. Your Lordship could have got the impression that we had gone away and gone, "oh, we will just ask it anyway". That is not what happened. We went back to the pleadings. We said, "well, hold on a second, how is the court going to be fairly appraised of both sides?" This is something that goes through everything, including when we get to Horizon discretions. Experts are only invited on their case to look at how it works from the Subpostmasters' side and not see how it works from the Post Office side. The idea that the court should do this with one eye closed, we say, is a wrong approach fundamentally. That is why we are asking for it. We are specifically concerned with references to contractual variations which speak to the knowledge the Post Office has in relation to how these matters were arising. If it needs to be more focused, my Lord, or we need to revisit it after we have had some initial disclosure I am sure we are prepared to do that. I make it absolutely clear, I do not want to put an undue burden on them.

MR. JUSTICE FRASER: Understood.

MR. GREEN: But I also put my duty to over 500 claimants to try and make sure that the court sees both sides of the fence, so that is my submission on it.

MR. JUSTICE FRASER: Mr. Cavender?

MR. CAVENDER: My Lord, I don't understand this request. How possibly can minutes of management meetings, i.e. the Post Office view of the operation of its contract, be relevant to the construction of it at an earlier stage? Also, with the managers and what they say and what they do not say. I cannot imagine any commercial case where you have a contract where the judge would have any truck with information at all. This is a whole species of information, minutes of management meetings, standard advice et cetera, how on earth is that going to be relevant to construction of the contract that has, by definition, been reached? On basic principles it is inadmissible. Then when you look at the type of people, what does it matter one manager says at a meeting about contractual terms? He might be right, wrong or indifferent. It will not inform the construction of that term. We make the point in our comments as well. In so far as there were, if you like, legal-type discussions, then the certainty of a lawyer being there for the Post Office is almost certain in which case such document would be privileged in any event.

Bear in mind, my Lord, one has to in each case, what we are giving. Look in the left-hand column, we are giving suite of contractual documents, suite or product of service specific contracts we have added in, contractual variations, written

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policies and process, standard and template documents. We are giving all of the potentially relevant but very, very broadly relevant material. Is the court being to be helped by minutes of meetings after the event about operation of that contact? No, it is not.

MR. JUSTICE FRASER: Right. I do not consider these three categories, may I just check, I am trying to do it cross referenced against the numbers, Mr. Green, in your column and Mr. Cavender's letters. Is 9 Request b, 10 Request c and 11 Request d?

MR. GREEN: Indeed.

MR. JUSTICE FRASER: I do not consider these items to be relevant to the Common Issues trial. Even if they were it seems to me, this is no criticism of you Mr. Green because you do not know what they are called, but the term management meetings or the term within a very large organisation such as Post Office management is simply too vague. However, I appreciate that you have simple difficulty because you do not necessarily have the exact descriptor."[74]

82. Mr Fraser also considered documents which relate to Horizon:

"MR. GREEN: Is our number 20. This is a request to which great objection is taken, although the objection is the one that is repeat the seriatim in a number of cases, but this is the category into which the documents that we attached to our responsive note would have fallen. I do not have to give your Lordship a theoretical example of what the court would be deprived of seeing. It is specifically focused on minutes between Post Office and Fujitsu and specifically focused on those meetings where known or suspected bugs, error or defects were considered or discussed, specifically to provide the sort of background context that is equally provided by the documents which we attached to our responsive note. So, a pretty vivid illustration of what we will not be getting if that is not provided. Your Lordship has my point on that. I have your Lordship's observations about what I may be able to say in due course about ----

MR. JUSTICE FRASER: They are Horizon expert issues really, though, are they not?

MR. GREEN: They fall, I would say, possibly more into that category but because of the way that the case has been pleaded, one is always anxious as your Lordship will remember, from being here looking towards the bench, when parties are entitled to pursue the case they have actually pleaded and there are sort of

[74] C8.4/4/26

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forensic points one can take about the extent to which they might be able to do that and one can hold up the transcript later, but that is their pleaded case. That is why I am anxious my Lord, I can being open about the anxiety because your Lordship is absolutely right they more naturally fall into the Horizon disclosure but, of course, they could be ordered in that disclosure anyway.

MR. JUSTICE FRASER: They do fall into the Horizon disclosure, subject to one point of narrowing which is that you have to have a date range.

MR. GREEN: Yes, I think it has been implicit from the generation of the generic disclosure.

MR. JUSTICE FRASER: That might be right, but, so far as admissibility on Common Issues it seems to me, although on its face a potentially relevant category, it needs to be narrowed by reference to date range and it is a Horizon Issue; it is not a Common Issues category."[75]

83. Mr Fraser was also required to consider the topic of common knowledge:

"MR. JUSTICE FRASER: I know. On Common Issues, unless you were meeting that pleading with, it is not peculiarly within Post Office's knowledge, it is also within our knowledge, then it cannot be common knowledge.

MR. GREEN: No, there is a difference, they are contending that the fact that something, well, say the parties go into contract and they both know that a nuclear reactor takes a long time to build, there is a twenty-year lead time on being a nuclear reactor, they know that for example. Or, they know that it is very difficult to get reliable geological surveys in a particular area of the Antarctic, that is a fact which you do not need to know what the information of the geological survey in the Antarctic is but you can have a fact that is about the state of knowledge of the particular parties or the difficulty of doing something. That is how they are putting their case. They are saying that the parties knew a fact which was that other information lay peculiarly within the knowledge of the Subpostmasters.

MR. JUSTICE FRASER: I know.

MR. GREEN: And that is capable of being a fact itself, they advance that case ---

MR. JUSTICE FRASER: Mr. Green, if that is part of their case and let us put analogies about nuclear reactors and geological information to one side, if that is

[75] C8.4/4/27

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their case this information is peculiarly within the knowledge of the branch Postmasters.

MR. GREEN: Yes.

MR. JUSTICE FRASER: Your case is, "no, it is not", although a finding will have to be made as to whether that is a common fact, will it not? Is it part of the factual matrix against which the contract falls to be construed or is it not?

MR. GREEN: Yes, but the problem is that when we actually get to November we look back at the hearing, your Lordship is going to be asked to determine whether it was a fact common to both parties.

MR. JUSTICE FRASER: Yes.

MR. GREEN: That information about transactions lay peculiarly within the knowledge of Subpostmasters.

MR. JUSTICE FRASER: Yes, if that is in issue I will have to make a finding on it.

MR. GREEN: Yes, but your Lordship at the moment, on my learned friend's approach, is going to be deprived of any evidence, so are we, of any evidence that shows you whether or not Post Office believe that themselves. All you are going to have is the Post Office sitting on their hands silently, "oh, yes, we thought it was peculiarly within the knowledge of the Subpostmasters. That was our belief and that was known to us, was it known to you as well?" And it was, it was a common fact, then your Lordship must construe the contract on that basis. If we can show on the basis of the evidence which we are asking for, that they did not think that at all, then deprives them of the chance of establishing common fact that they seek to pray in aid. That is why ----

MR. JUSTICE FRASER: Pausing there. Which one are we looking at? Is it f?

MR. GREEN: Well, I was dealing with ----

MR. JUSTICE FRASER: No, no, it is worth actually looking at that submission in the light of the request that is currently being sought.

MR. GREEN: Yes.

MR. JUSTICE FRASER: How does a written instruction to a trainee about the availability of transactional information to Postmasters advance that particular point you have just explained?

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MR. GREEN: Those documents are highly likely to shed light on what knowledge the Post Office had of the information and the relative availability of such information as between Post Office and the Subpostmasters. It is specifically what is unpinning the issue your Lordship will have to decide on that fact.

MR. JUSTICE FRASER: Is there anything further you want to say about number 25?

MR. GREEN: No.

MR. JUSTICE FRASER: Is there anything want to say further about number 26?

MR. GREEN: Let me check. Those submissions apply to both.

MR. JUSTICE FRASER: But is there anything you want to add?

MR. GREEN: No.

MR. JUSTICE FRASER: I am not going to order 25. It seems to me that a far more narrowly focused request within the framework of 26 could potentially be relevant, subject to hearing what Mr. Cavender has to say, which I imagine he will do now, and I am not going to draft a request for you. At the moment it is defective, with respect, because it is far too widely crafted. Mr. Cavender, it seems to me on the basis of, for example, however one might put it, a potential dramatic change ----

MR. CAVENDER: Is your Lordship looking at g because my numbering does not seem to be the same?

MR. JUSTICE FRASER: Yes.

MR. CAVENDER: Yes, so internal/externally produced management information reports, briefing papers, dealing with volume, nature of transaction, corrections since 1999. What that goes to, as we say, appears to be where things have not gone right, so it is a breach potentially? We have done something other than that which we should have done ----

MR. JUSTICE FRASER: I think actually when I say there is a kernel within the chaff of g some high level summary information about the number and value of the transaction or corrections on an annual basis could be said potentially to be relevant. I have come to that conclusion separately but then looking in your column g, purely coincidentally it seems great minds might think alike, you say in the first three lines of your second paragraph that the Post Office is open to

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considering whether the information sought could be provided through another means and you then talk about raw transaction.

MR. CAVENDER: Indeed.

MR. JUSTICE FRASER: It seems to me that on the basis of the issues between the parties on transactional corrections, the claimants are entitled to some documents or a document which identifies at a high level the number and as a result of them on an annual basis.

MR. CAVENDER: As we said in our comment, we can try and do that. I think I am being told that there is not, if you like, a report.

MR. JUSTICE FRASER: No, no, it may be there will not be.

MR. CAVENDER: There is not.

MR. JUSTICE FRASER: It may be there will not be because often systems have to be asked to present information in a particular way and they just do.

MR. CAVENDER: Or they do or they cannot or they do it in some other way.

MR. JUSTICE FRASER: I am not going to order it now, but what I am going to say is this Request g has to be more narrowly focused, it is to be tightly defined by reference simply to that high level information and it certainly is not going to be "internally and externally produced management information, reports of briefing papers" containing information and data because that is just far too widely worded. If it is more narrowly focused in the specific way I have identified and Post Office takes a pragmatic view to it, it ought not to be controversial.

MR. CAVENDER: My Lord, yes.

MR. JUSTICE FRASER: Right. There is going to be no order about it. It may be that it ends up going more to Horizon than Common Issues, but at the moment I consider it is peripherally relevant on Common Issues even as they are currently understood to be."[76]

84. Horizon Issues Disclosure

MR. JUSTICE FRASER: Your number 27, h.

MR. GREEN: Yes, h which is the ability remotely to detect the counsel's shortfalls and so forth. Obviously this overlaps with Horizon which we completely accept for the avoidance of any doubt.

[76] C8.4/4/32

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MR. JUSTICE FRASER: It might be said to be a complete subset of Horizon rather than an overlap. An overlap suggests it is partly in Common Issues and it is partly Horizon. It is really a different way of putting the same information, is it not, that is sought in Request e?

MR. GREEN: I have made your Lordship aware of the anxiety on the pleadings of express pleas that the contractual terms should be construed by reference to the follow things set out in 76, that assertion is repeated in 85 and then 93. Your Lordship has the point.

Your Lordship has assisted me by saying that I can go back to the transcript on this. I have explained to the court that I have residual anxiety where what we are talking about is Post Office, the burden of proof is probably one of the biggest things in the entire trial, possibly. On that specific matter they contend that ----

MR. JUSTICE FRASER: This is the same point that you have explained?

MR. GREEN: It is. Your Lordship will understand the anxiety of an advocate faced with an express and repeated pleading. In their defence there has been no application to amend since I drew the court's attention to these paragraphs last time we were here.

MR. JUSTICE FRASER: These are Horizon Issues though.

MR. GREEN: My Lord, with respect they are not. As I showed your Lordship in relation to the burden of proof, I am sorry to repeat it but it is not correct to say they are Horizon Issues. In the defence 93.1(b) specifically deals with the burden of proof. (b) is about and only about the burden of proof. The burden of proof is Common Issues 8 and 9.

MR. JUSTICE FRASER: Common Issues 8 and 9 I know you used the short term "burden of proof "but it is actually about the proper construction of those two provisions of the two contracts.

MR. GREEN: Which are mainly the burden of proof. Those are the clauses that say the Subpostmasters are responsible where it is their fault.

MR. JUSTICE FRASER: I know that. Let us just look at the first of your subsets of 7(a). Let us for a moment consider that Post Office and Fujitsu have between them come up with a system where there is no ability whatsoever to detect shortfalls.

MR. GREEN: I know, but that is their case.

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MR. JUSTICE FRASER: I know it is, but you have already got two documents.

MR. GREEN: I know.

MR. JUSTICE FRASER: Let us say that is their case and I am not making any findings I am just exploring it in argument. How will a note or memorandum on your 27(a) or h(a) assist with me coming up with the proper construction in law of section 12 clause 12?

MR. GREEN: The answer to that is that I win on the argument that they deploy at 93(b). That is a pleaded issue, it goes directly to the Common Issues identified and I win on it. We quite like winning on these issues ----

MR. JUSTICE FRASER: Whether you win on it is not in any way, I imagine, going to depend on whether there is a note or a memorandum appearing where this topic is discussed.

MR. GREEN: Hold on a second. My Lord, let us look at what we are talking about. h says written policy or process documents, guidance notes and memoranda relating to, well, this is at a general level. We have not asked in relation to individual cases.

MR. JUSTICE FRASER: I know it is at a general level, I think that is part of the issue under Model C.

MR. GREEN: The construction of the disclosure process that the parties originally agreed was, we do the individual claimants and then there is also a generic level of disclosure Which helps to give the context to those individual sets facts so they are not in isolation. If we look at (i), which is the one which your Lordship asked me about, it is relating specifically to the ability of Post Office/Fujitsu remotely to detect the occurrence of shortfalls, branch discrepancies.

When we look back at 93.1(b) they say this is because the truth of the matter lies peculiarly within the knowledge of the Subpostmasters. Let us assume the note that we are asking for says, "The truth of the matter lies peculiarly within the knowledge of Post Office because this was a Horizon problem, as we have seen already in one of the documents attached to the responsive note". If it says that we win on a pleaded assertion which they have repeatedly said is relevant to the construction of the contract and a clause of the contract which your Lordship has identified for determination in November as a Common Issue. That is why we say we would like those documents, please.

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I simply cannot see how my learned friend can suggest for one second that that cannot be relevant. It is obviously relevant. There is extreme concern on our side that it is not just the burden of producing the documents that is a disincentive. That often happens in litigation, people are suspicious. I am not making any criticisms. I am just saying that we have not chosen to put that in issue, the defendant has. For the defendant to sort of finesse it in the skeleton saying, well, we mentioned some matters of background and then make submissions that I have the wrong end of the stick when all I am doing is reading out to the court the express terms of their own pleading, we respectfully say it is not really a well-founded position for the defendant to adopt."[77]

84.1 Mr Green continued:

> *"MR. GREEN: It was originally (a), it became (i) in the table. The ability of Post Office 27(a), the ability of Post Office remotely to detect, it is absolutely directly relevant. The ability to conduct transactions remotely, also I accept that is adjacent to the first point and I accept that it also obviously falls into Horizon.*
>
> *MR. JUSTICE FRASER: Which ones do you accept is Horizon?*
>
> *MR. GREEN: 27(b).*
>
> *MR. JUSTICE FRASER: Is Horizon?*
>
> *MR. GREEN: Falls into Horizon but we respectfully say would inform the court's approach to the pleading that they actually advanced and the extent to which they actually authorise things to be changed and how the court is supposed to resolve their contention that the causes of shortfalls were matters that lay peculiarly within the knowledge of the Postmasters, without having sight of documents which might show they were actually doing them manually, is bizarre. Let alone the plea that it would be unjust for Post Office to prove things that fall peculiarly in the Postmaster's knowledge. It just seems extraordinary.*

Even more extraordinary in light of the specific documents which your Lordship obviously did not have at the last hearing but do show this is not a fanciful fishing expedition. This is having seen specifically what they have in fact done which we only know about because Second Sight chanced upon it. That is the thinking that is matching what we specifically know, there is a proper foundation for it, matching that to specific pleas made that the defendant has chosen to make about specific terms in the contract which are specifically in the Common Issues. Your Lordship has my submission."[78]

[77] C8.4/4/34
[78] C8.4/4/35

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85. Fraser limited disclosure: *"MR. JUSTICE FRASER: I agree with you about that and I am not going to order it in the way it is framed, but rather than spring it on you like a rabbit out of a hat, let me be quite clear, written policy and process documents fall into a different category to guidance notes or memoranda. There cannot be any possibility of my ordering guidance notes or memoranda as a narrowly focused request but it seems to me written policy and process documents relating to those at (i), those at (ii) and those at (vii) are going to be really either for the Common Issues or as Horizon Issues. If written policies and process documents are a sufficiently high level of document created at a high management level in the Post Office, that would be a narrowly defined request if it had a date range, which I do not believe it does."*[79]

86. And order disclosure which concerned the Horizon Issues Trial: *"MR. CAVENDER: (Counsel takes instructions) My Lord, there are two things I want to say. This is clearly Horizon related, obviously this is the meat and drink of Horizon, that is the first point. MR. JUSTICE FRASER: Yes."*[80]

MR. CAVENDER: In terms of you want some definite vision for the purposes of Common Issues you have got it. The idea of going into the detail of, again, discrepancies, that we do under h, in my submission is unnecessary. Also you are going into this idea of shortfalls again. You are going into the accounting part. This is Fujitsu plus sorry, it is Horizon plus. It goes beyond the Horizon Issues and is objectionable for that reason too.

In order to find a shortfall, as I said, you need to process the Horizon data, go into the Post Office systems, compare it with other data it is getting from its 100 third party contractors, analyse it and decide whether there is a shortfall and why. For all those reasons, the idea that this is relevant material to construe a contract ----

MR. JUSTICE FRASER: I think you accepted, as sensibly you have to, they are prima facie Horizon-based issues.

MR. CAVENDER: Indeed.

MR. JUSTICE FRASER: I do not think there can be any objection in principle to requests that deal with shortfalls because when we come to some of the later ones the term shortfalls is either suggested or used in request that is agreed.

MR. CAVENDER: There is potential my Lord, this is the point. The question is, will assist Horizon potentially, is there a defect or something wrong with it?

[79] C8.4/4/38
[80] C8.4/4/38

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MR. JUSTICE FRASER: I understand.

MR. CAVENDER: As opposed to saying this is a shortfall because that is an accounting matter. You can say this system, there is a problem with it, there is an issue, there is a bug or whatever, which, as we saw in the examples, potentially could cause a shortfall.

MR. JUSTICE FRASER: Is it the lack of the word potential that you think is necessary when shortfalls are referred to?

MR. CAVENDER: My Lord, yes.

MR. JUSTICE FRASER: All right.

MR. CAVENDER: Unless you are going to decide breach which is another question ----

MR. JUSTICE FRASER: No, I understand that. Thank you very much, is there anything you would like to add in?

MR. CAVENDER: No, my Lord.

MR. JUSTICE FRASER: I am making it clear that I am going to order parts of this request, notwithstanding that they seem to me fundamentally to be Horizon Issues but I have changed the wording. I am going to read it out as Request h all right. Written policy and process documents is fine, guidance notes or memoranda has to be deleted, relating to and then I am going to order category (i) -- but it needs to say potential shortfalls, not shortfalls -- (ii) and (vii). That order is made without in any way accepting that any of the contents of these documents are going to be relevant to construction of the contract but it seems to me they are documents which would be sensible and proportionate to order now."[81]

86.1 And limited request (j):

"MR. GREEN: I am grateful. In relation to j, j is number 29.

MR. JUSTICE FRASER: Yes, we have not dealt with j yet.

MR. GREEN: We have not dealt with j. You will see in my learned friend's table he says a narrower formulation of this request can be found at 25, 26 and 27. Although these documents may still be inadmissible the defendant is prepared to disclose them as part of stage 2 disclosure because they are narrowly defined. He is talking about 25, 26 and 27.

[81] C8.4/4/40

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If your Lordship goes on his table, over the page to 25, 26 and 27 I am afraid it is the one side of the fence point again. He says a narrower formulation because what he is offering to disclose at 25, 26 and 27 is only what Post Office said to Postmasters, not the internal documents relating to their approach. It is completely one sided, my Lord. It is a short point.

MR. JUSTICE FRASER: Yes. Mr. Cavender?

MR. CAVENDER: My Lord, this is lifted, I can give you the reference, Model D. This has literally been lifted and you can tell why, because it is so wide it has no relevance at all to the construction of the contract. Why the minutes of a meeting as to breach, that is what this is about, and difficulties with operating the contract is operational, why because a contract may or may not be difficult to operate by Post Office and its knowledge of that, affect the construction of that contract at an earlier stage? It is totally irrelevant. There is no case on rectification. There is no case here on variation by conduct. It is a straightforward issue of construction. The idea of over the twenty-odd year period, slightly less, all minutes of meetings, memoranda relating et cetera, I keep pinching myself, we are talking about Model C request of narrow classes of documents, is what the things says. This is a million miles from that.

MR. JUSTICE FRASER: Yes.

MR. CAVENDER: My Lord, you know, you talked about proportionality earlier and the costs et cetera, this is the classic example where this stuff would not be helpful and would be enormously difficult to find, to calculate, to then review and disclose for no purpose at this stage.

MR. JUSTICE FRASER: I agree, save for one narrowing of it. Minutes of meetings, you are not going to have; memoranda you are not going to have; reports you are not going to have but, and I am taking this from an agreed category earlier up the list, reports to Post Office's board of directors between (date range) relating to Post Office network wide approach et cetera. That is a specific narrow category of document. Mr. Cavender has a degree of law behind him when he talks about admissibility of the construction of the contract. It is, however, a highly relevant category of document and I am going to order it now. It is only reports to the Post Office board."[82]

87. Disclosure in relation to the helpline was not ordered: *" MR. JUSTICE FRASER: You do not need to. This relates to paragraph 61 of the defence which does not*

[82] C8.4/4/42

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Claim No:

arise in the Common Issues at all so I am not going to give disclosure of category."[83]

88. Fraser J continued:

"MR. JUSTICE FRASER: Not that I need to explain in any great detail because we have spent two hours on disclosure, the instructions that I have given to the Postmaster in terms of dealing with and disputing a shortfall within category m because that comes from the training. What in fact then happened, if any of the claimants phone the help line, goes to breach, does it not?

MR. GREEN: My Lord, we are not asking for what happened, we are just asking -

MR. JUSTICE FRASER: Okay, how those calls ----

MR. GREEN: ---- what should have happened.

MR. JUSTICE FRASER: Either what happened or what should have happened is not relevant to construing the Common Issues.

MR. GREEN: It is probably me, my Lord.

MR. JUSTICE FRASER: I think it is you.

MR. GREEN: But it may not be so I am going to make the submission and you can tell me if it is me. If we order category n, category n is network wide instructions to Post Office trainers and how to train a Postmaster to deal with a shortfall. So that is what they are told, generally this is what you should do. Then the corollary of that ----

MR. JUSTICE FRASER: Why do you think that is relevant to Common Issues?

MR. GREEN: Your Lordship has just ordered it.

MR. JUSTICE FRASER: (a) because I have ordered it and (b) because it is common knowledge because the Post Office know what the trainers are supposed to do and because, in theory, that is what the Subpostmasters or branch post officers are told. So, it is common knowledge. It is therefore directly relevant to construing the contract.

MR. GREEN: That is the second half of 46.

MR. JUSTICE FRASER: No, incorrect. That is what actually happens in fact if there is a shortfall. It goes to breach.

[83] C8.4/4/46

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Claim No:

MR. GREEN: My Lord, the existence for an apparent shortfall is not anything to did with breach necessarily. My learned friend seeks to conflate before your Lordship two different points with respect and that was his submission to your Lordship which led to this. If I have it wrong I apologise.

MR. JUSTICE FRASER: Right, Mr. Green, you can argue for as long as you like. This arises from paragraph 61 of the defence which does not arise at all on the Common Issues, I have now said that three times, please do not waste any more time about it. I am not ordering it."[84]

89. In summary, the outcomes from the CMC Hearing were set out in Post Office's Skeleton argument for the strike-out application as being: [85]

89.1 *"The Court refused a number of disclosure requests from Cs that were, in essence, aimed at proof of post-contractual facts. For the purposes of the Common Issues trial, the Court refrained from ordering any disclosure as to the causes of shortfalls, problems with Horizon or any other fact-specific issues as to post-contractual events.*

89.2 *The Court made clear that many of the matters that Cs wanted to investigate through disclosure were properly matters for the Horizon Trial.*

89.3 *Cs' disclosure requests were founded on Post Office's pleaded case in paras 76 and 93 of its GDXC. However, Post Office explained that its pleas in those paras were not intended to encompass any post-contractual facts but were conventional averments as to the background to the agreements, including notably the shared anticipation that Subpostmasters (whether themselves or by assistants) would actually be present in the branch, would have possession of Post Office's cash and stock and would have conduct of the transactions effected in their branches. Post Office's explained that its factual case was limited to matters that were known or anticipated by the parties at the time of contracting"*

SECTION 4: COMMON ISSUES TRIAL JUDGMENT

90. [Counsel / WBD to insert sections of the judgment which we are going to take issue with, which should cover:

90.1 **Witnesses -** Criticisms of POL's witnesses which is going to have an impact on future trials;

[84] C8.4/4/47 - 48
[85] C8.10/2/6

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90.2 **Findings -** Findings which have been made but where full disclosure or evidence has not been given since the finding is outside of CIT. Emphasise on point that judge has caused this issue by the way in which he ordered staged trials and Model C disclosure. Show that biased as stuck with these decisions going forward.

90.3 **PGQC XX -** Examples where he has not stopped PGQC with out of scope XX.

90.4 **Disclosure -** Examples where narrow disclosure and then made findings on this – ie. helpline and Horizon investigations features, knowledge of problems with Horizon]

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

Signed: .....

Date: .....

POL00364151

Filed on behalf of the: Defendant
Witness:
Statement No.: First
Date Made: 16 March 2019

Claim Nos: HQ16X01238, HQ17X02637 & HQ17X04248

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

B E T W E E N:

POST OFFICE LIMITED

Defendant

AND

ALAN BATES AND OTHERS

Claimant

[X] WITNESS STATEMENT OF [X]

WOMBLE BOND DICKINSON

Womble Bond Dickinson (UK) LLP
Oceana House
39-49 Commercial Road
Southampton
SO15 1GA

Tel: GRO
Fax:
DX: 38517 Southampton 3

Our Ref: AP6/ALP1/364065.1369

Solicitors for the Defendant