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POST OFFICE GROUP LITIGATION
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BETWEEN:

ALAN BATES & OTHERS

Claimants

- and –

POST OFFICE LIMITED

Defendant

OPINION ON THE COMMON ISSUES

A: Introduction

1. This Opinion addresses Post Office's prospects of success on the 23 Common Issues that are due to be tried in November 2018. Those issues are identified in Schedule 1 to the First CMC Order, dated 25 October 2017. If we were to attempt to give a full explanation of the Common Issues and the context in which they arise, the Opinion would be inordinately long and excessively complicated. It is therefore drafted on the basis that the reader is familiar with the background, the pleadings and the Orders made in this case. It also focuses the major points, without exploring their wider implications or delving into all the sub-issues they raise.

2. As many of the Common Issues cover similar ground or involve similar arguments and evidence, we address them in groups. This Opinion is structured as follows:

   (a) **Contractual Construction** (Common Issues 8, 9, 14-16, 19 and 22-23) – paras 27 to 98 below.

   (b) **The "True Agreement"** (Common Issues 17-18) – paras 99 to 110 below.

   (c) **Implied Terms** (Common Issues 2 and 3) – paras 111 to 124 below.

   (d) **Relational Contract** (Common Issue 1) – paras 125 to 153 below.

   (e) **Agency and Duties to Account** (Common Issues 10-13) – paras 154 to 170 below.

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(f) **Supply of Goods and Services Act 1982** (Common Issue 4) – paras 171 to 183 below.

(g) **Onerous or Unusual Terms** (Common Issues 5 and 6) – paras 184 to 224 below.

(h) **Unfair Contract Terms Act 1977** (Common Issue 7) – paras 225 to 255 below.

B: Our conclusions

3. In our view, Post Office has the stronger arguments most of the Common Issues and we anticipate it succeeding on those issues. However, there are a number of reasons to be cautious.

4. First, there are some issues on which Post Office faces significant risk (most particularly, issues arising on: the question whether Post Office owed Subpostmasters a general duty of good faith; the true construction of the contractual provisions imposing liability on Subpostmasters for losses occurring in their branches; Post Office's right under the SPMC to terminate a Subpostmaster's appointment on 3 months' notice; Post Office's rights under the SPMC and the NTC to suspend Subpostmasters and the duration of and withholding of remuneration during their suspensions; the various discretionary powers that Post Office has under the PMC and NTC; and the question whether assistants have directly enforceable rights to training). More fundamentally, there are cases in which Post Office also faces a risk of being unable to show that its contractual procedures were adequate to incorporate the terms of the Subpostmaster contracts in the first place.[1] It would be wrong to assume that Post Office is likely to win on all these issues. Losing on some of them would be a significant set-back in the Group Litigation.

5. Second, it is important to recognise the significance of the implied terms that Post Office has (we consider rightly) admitted in its Generic Defence and Counterclaim (**GDXC**): see paras 119 to 122 below. Post Office will be relying on these implied terms (**the Stirling v Maitland** and **Necessary Cooperation Terms**) as strong reasons for rejecting the Claimants' case on many of the Common Issues. In some situations, those terms are likely to have a similar effect to some of the terms that the Claimants wish to imply into the Subpostmaster contracts. They will undoubtedly have a significant impact on questions such as (a) whether Post Office is obliged to provide Subpostmasters with adequate training;[2] (b) whether Post Office would be liable if Horizon injected false

[1] In that scenario, it may be that the Court would imply the sort of duties that agents generally owe their principals. It is not clear to us that the Claimants would necessarily welcome such a result: see, further, paras 163 *et seq*.
[2] See, further, para 79 below.

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transactions or figures into any branch accounts; and (c) what Post Office should do in contentious situations (e.g. where requests are reasonably made for access to transaction data or for assistance with investigations into disputed shortfalls). This matter will be explored in detail in the breach trial(s) that will take place later in the Group Litigation. Those trials will also consider issues of causation and loss, where it will be for the Claimants to show what they would have done with any further transaction data or assistance with investigations to which they say they were entitled and to show how this would have prevented shortfalls arising or allowed them to demonstrate that apparent shortfalls were not real. We raise the point now to highlight that the distance between Post Office's case and the case asserted by the Claimants may not, in practical application, be as great as it appears on the face of the Common Issues or in this Opinion. We do so also to highlight that the application of the results of the Common Issues trial to the population of claims is likely to be as important to Post Office as the establishment of express and implied legal duties.

6. Third, although the Claimants have produced long letters before action and substantial pleadings (Generic Particulars of Claim (**GPOC**), a Generic Reply, and most recently Individual Particulars of Claim (**IPOC**)), on a significant number of Common Issues the Claimants' case is surprisingly unclear, undeveloped and/or unconvincing. We must anticipate that they will improve their case by the time the trial starts. For example, they may identify rival interpretations of particular terms which we have not predicted and they may identify problems that have arisen in the operation of Horizon or in Post Office's transaction, accounting or reconciliation processes, or actions that Post Office has taken in relation to these matters. These points may give them a basis for arguing that Post Office's case on construction is too narrow or that the Stirling v Maitland or Necessary Cooperation Terms are not sufficient, making it necessary to imply some of the terms they allege in GPOC, para 64. We do not know the points the Claimants might raise or the difficulties which such matters might present for Post Office's case. Consequently, nor can we assess whether Post Office will be likely to persuade the Managing Judge to disregard potential problems which the parties would not have known about when they entered into their Subpostmaster contracts. These are areas of uncertainty which will not be revealed until the Claimants serve their evidence or possibly even until the trial starts. As matters stand, we cannot advise on all the arguments that the Claimants may advance at the Common Issues trial.

7. Fourth, we do not know how the Managing Judge intends to manage the trial. It is now clear that the Claimants will be seeking to adduce evidence intended to have a prejudicial on his mind, including evidence of high-handed or apparently unfair conduct by Post Office which the Claimants will say demonstrates a callous, uncaring or even hostile

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attitude towards Subpostmasters. The Claimants hope that the Managing Judge will see them as a vulnerable group of quasi-employees who need to be protected from a rapacious quasi-employer and that, in order to protect them, he will want to adopt an unusually creative or aggressive approach when interpreting the largely one-sided forms of contract which Post Office required them to sign.

8. It is a fact of life that, even though it may be irrelevant to the legal issues which a judge is required to decide, prejudicial evidence can have a major impact on the conclusions the judge ultimately reaches on such issues. We cannot predict with any degree of accuracy the extent to which the Managing Judge will allow the Claimants to rely on such evidence. Nor can we predict what the evidence will look like, whether Post Office will be in a position to produce satisfactory evidence in rebuttal, or how these matters will affect the Managing Judge's approach in deciding the Common Issues. In this respect, Post Office is in a difficult tactical position. It will obviously be helpful to keep as much prejudicial material as possible out before the trial starts. On the other hand, we do not think that Post Office will succeed in keeping all of it out and, if Post Office tries too hard to keep it out, this could itself have an adverse impact on the Managing Judge's perception as to where the merits lie.

9. Fifth, the quality of the drafting of what was once the primary Subpostmaster contract (the **SPMC**) is not high. It is a complex contract whose various provisions do not fit together neatly. Some of those provisions do not stand up well to close textual analysis (see, for example, paras 27 to 41 below, where we consider Section 12, clause 12 of the SPMC). Although the contract is detailed and it appears to have been professionally drafted, it will be difficult to portray it as the sort of contract in relation to which the Court should simply apply the contractual language used (see para. 118(b) below). Putting the point another way, the SPMC is drafted in such a way as to give the Claimants scope for arguing that weight should be given to the context in which individual contracts were entered into and to the practical consequences of adopting a literal interpretation and/or of not implying terms which substantially modify their effect. Once this point is recognised by the Managing Judge, it may affect the approach he adopts, not only to the SPMC but also to the NTC, whose drafting is much better.

10. The Subpostmaster contract is a business to business contract and Subpostmasters are not employees of Post Office. Nevertheless, as between prospective Subpostmasters and Post Office, there is (inevitably) a fundamental imbalance in bargaining position, in access to legal advice and in sophistication. Moreover, although there are important differences, it would be idle to pretend that there are no similarities of any kind between the Subpostmaster/Post Office relationship and an employment relationship. These points are compounded by the fact that, on the Lead Claimants' case, Post Office appears

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to have made little or no attempt before they accepted their appointments as Subpostmasters to explain or draw their attention to the practical effects of the main contractual terms which they are now objecting to. Indeed, some the Lead Claimants contend that that they were never even given a copy of those terms. Some also say that, at their initial interviews with Post Office, they were told that they would be "partners" with Post Office, they were given assurances about the nature and quality of the training and support they would receive and/or Post Office accepted that they would have security of tenure.

11. We do not expect the Claimants to succeed in persuading the Managing Judge to adopt the principles of interpretation and implication that would be adopted in an employment situation, but the factors we identify in the previous paragraphs may have an effect on how he approaches the Claimants' case on the interpretation of the Subpostmaster contracts and on the terms to be implied into those contracts. It is not possible to predict with complete confidence how great that effect will be.

12. Sixth, in relation to some of the arguments being run on the Common Issues, the law is in a state of development or is not entirely clear: see, in particular, paras 125 to 153 below (relational contract) and paras 171 to 183 below (Supply of Goods and Services Act 1982) and paras 77 to 88 (Contracts (Rights of Third Parties) Act 1999).

13. Seventh, we note in several places below that, although we think the Claimants' attacks on the contractual relationship are overblown, in relation to some contractual provisions some modest controls might be implied by the Court. We are currently considering whether Post Office should volunteer some limited implied terms addressing particular problems raised by particular provisions rather than rely on the fact that (unless and until the Court or the Claimants themselves raise the point) the Claimants have not identified such terms as a fall-back position: see, for example, paras 111 to 124 and 213 below. Our general preference is to suggest modest implied terms where we think these would prevent the Subpostmaster contracts operating in what the Court would be likely to think a harsh or uncommercial way.

C: Contractual Construction (Common Issues 8, 9, 14-16, 19 and 22-23)

Applicable legal principles

14. It has been repeatedly stressed by the Supreme Court that construing a contractual term is a "*unitary*" exercise aimed at ascertaining the "*objective meaning of the language which the parties have chosen to express their agreement*", considering the words of the term, the contract as a whole, any background (other than the parties' declarations of

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subjective intention) that may bear upon the meaning of the words used and the practical consequences of any rival interpretations: see **Wood v Capita Insurance Services**.[3] This unitary exercise is given shape by various well-established principles of interpretation.

15. First, where a term is drafted in unambiguous language, the Court must apply the meaning to be taken from that language: see **Rainy Sky SA v Kookmin Bank**[4] and **Arnold v Britton**.[5] It is only where there is more than one arguable meaning to the term that any more analysis is required. The parties are entitled to the enforcement of their agreement, even if it works harshly or unreasonably in the circumstances as they have turned out to be.[6]

16. Second, the natural meaning of the words that the parties used in the term can be expected to provide the strongest guide to its meaning. Lord Neuberger said as follows in **Arnold v Britton** at [17]:

> *First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.* (Emphasis added)

17. Third, while the Court may be assisted by considering the background to a contract, its apparent commercial purpose and others matters of context, it must be careful not to stray into rewriting the parties' agreement and replacing it with a bargain that it would regard as fairer, more commercial or more coherent. In **Arnold v Britton** at [19]-[20], Lord Neuberger cautioned against too lightly rejecting the natural meaning of the words chosen by the parties and straying into improving, rather than interpreting, the agreement:

> *...commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for*

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[3] [2017] A.C. 1173 at [10]-[13] *per* Lord Hodge (with whom Lords Neuberger, Mance, Clarke and Sumption agreed).
[4] [2011] 1 W.L.R. 2900 at [23] *per* Lord Mustill.
[5] [2015] A.C. 1619 at [19] *per* Lord Neuberger (with whom Lords Sumption and Hughes agreed).
[6] See, e.g., **BP Exploration Operating Company v Dolphin Drilling** [2010] 2 Lloyd's Rep. 192 (David Steel J) at [13].

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> *departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.*
>
> *...while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.* (Emphasis added)

18. However, as Lord Hodge emphasised in **Wood v Capita** at [10], ascertaining the objective meaning of the language which the parties have chosen to express their agreement is not a literalist exercise focused solely on a parsing of the wording of the particular clause. In reaching its view as to that objective meaning the Court will give weight to elements of the wider context "*depending on the nature, formality and quality of drafting of the contract*". At [11], he pointed out that, where there are rival meanings, the Court can give weight to the implications of rival constructions by forming a view as to which construction is more consistent with business common sense. And "*...in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause...*". And at [13], he said:

> *Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.*

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19. What this means in practice is that there is what might be called an "interpretative spectrum" of contracts, ranging from sophisticated contracts which have been carefully negotiated and professionally drafted at one end to informal and/or brief contracts which have not been carefully negotiated and professionally drafted at the other. The nearer the contract in question is to the former category, the greater the emphasis that is given to the natural meaning of the contractual words used; by contrast, the nearer the contract is to the latter category, the greater the emphasis that is given to the wider context and to the practical consequences of each asserted interpretation. And when a Court talks of giving emphasis to the wider context and to practical consequences, what it really means is that it is more willing to adopt a strained construction to the contractual words used in order to arrive at a fairer, more commercial or more coherent result.

20. Fourth, it is inappropriate to have regard, as an aid to construction, to any background fact that was not known (or reasonably available) to the parties at the time of the contract: see **Arnold v Britton** at [21] *per* Lord Neuberger and Lewison, The Interpretation of Contracts (6th Edition), at [3.17(d) and (e)].

21. Fifth, the above rule does not apply to knowledge of any "*clear and well known legal principles*" that are relevant to the parties' relationship and/or the transaction(s) at issue; contracts are to be construed in light of the relevant law, even if it was not known to the parties at the time of contracting, at least where the legal position was clear at that time. This was recently confirmed by the Court of Appeal in **First Abu Dhabi Bank v BP Oil International**[7], approving *dicta* of Vos J in **Spencer v Secretary of State for Defence.**[8]

The contractual construction issues

22. There are several respects in which, in our view, the Claimants' approach to construction is contrary to the principles set out above. We would anticipate persuading the Managing Judge that, in general, Post Office's approach to construction is far closer to the orthodoxy.

23. First, the Claimants do not set out (except in relation to section 12, clause 12 of the SPMC) how they contend the actual words used in the terms should be interpreted. On the Claimants' current case there is practically no engagement with the language of the contract.

[7] [2018] EWCA Civ 14 at [37(iii)] *per* Gloster LJ (with whom Patten LJ and Lord Briggs agreed).
[8] [2012] EWHC 120 (Ch) at [73]-[74].

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24. Second, the Claimants appear to rely on implied terms in construing express terms: see GPoC, para 49.3. The better view is that the Court must first construe the express terms before considering whether any (and, if so, which) terms should be implied.[9]

25. Third, the Claimants place undue weight on the *contra proferentem* principle of construction: see GPoC, para 49.2 and the IPOCs.[10] That principle applies only where the term is ambiguous and the ambiguity cannot be resolved through the application of the usual principles of construction; it should not be used for the purpose of creating an ambiguity but is, or is close to, a principle of last resort: see The Interpretation of Contracts, at [7.08(h)].

26. Fourth, the Claimants appear to argue that Post Office's strong bargaining position provides a reason to construe the terms against it. If a contract has not been the subject of a real negotiation between the parties, the Court will take this into account when determining where it lies along the "interpretative spectrum" discussed in para 19 above. It will also take it into account in deciding whether to apply the **Autoclenz** principle discussed in paras 99 to 110 below. Subject to these points, however, the fact that Post Office had the stronger bargaining position makes it less surprising that the terms of the contract are strongly in its favour: see, e.g., para 72(f) below.

Common Issue 8

What is the proper construction of section 12, clause 12 of the SPMC?

27. Clause 12 states as follows:

> *The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants. Deficiencies due to such losses must be made good without delay.*

28. Post Office contends that the true construction of clause 12 is that Subpostmasters are liable for all losses disclosed in their branch accounts, save for losses which were caused neither by (i) any negligence, any carelessness or any error on their part nor (ii) any act or omission on the part of their assistants: see GDXC, para 94.

29. The Claimants contend that clause 12 makes Subpostmasters liable only for "*actual losses*" caused by negligence, carelessness or error on the part of either the Subpostmaster or his assistant, with the contractual burden of proof being on Post Office: see GPoC, para 55. The Claimants also contend that the Subpostmaster would not be

[9] Lord Neuberger has expressed this view, and it appears to us to be correct as a matter of logic (given that the test for implied terms requires that they be necessary in light of, amongst other things, the express terms).
[10] See, e.g., Abdulla, para 97.

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liable for any loss that was "*caused or contributed to by the Defendant's own breach of duty*".

30. In our view, there are two points of construction that are reasonably clear.

31. First, the words of the clause draw a clear distinction between (a) liability for losses caused by the actions of assistants, where there is no fault requirement – using the words "*losses of all kinds caused by…Assistants*" – and (b) liability for losses caused by the actions of the Subpostmaster, where liability requires a degree of fault – using the words "*all losses caused through his own negligence, carelessness or error*". Any attempt to remove this distinction would do too much violence to the words of the clause and, in particular, the use of the words "*losses of all kinds*". The Claimants have not identified how they say the words of the clause should be read such that there is no distinction between liability for the actions of Subpostmasters and liability for the actions of assistants. The strict liability for losses caused by assistants is also consistent with other provisions of the contract: see, most notably, clause 15.2, final sentence – "*He will also be required to make good any deficiency, of cash or stock, which may result from his assistants' actions*".

32. This point is important in relation to the burden of proof and related issues: see paras 39 and 162 *et seq* below.

33. Second, although there is some scope for argument that the words "*carelessness or error*" are merely verbal surplusage or examples of negligence, in our view these words add something. It makes commercial sense to provide for liability where, although reasonable care and skill may have been used (and so there was no negligence), the loss resulted from an "*error*" in the sense of the Subpostmaster (a) failing properly to follow the procedures he has been instructed to follow and/or (b) simply mis-keying a transaction or making some other basic mistake (which could often be put down to "*carelessness*"). A rule providing for liability in those circumstances would not be surprising in the context of a principal/agent relationship. As an agent of Post Office, one would expect a Subpostmaster to be responsible for the transactions his branch does and for the cash and stock it holds on Post Office's behalf. A fiduciary is often liable for losses without proof of fault in the sense of negligence. It is unsurprising that a Subpostmaster should, unless entirely without fault, be required to make good any deficiency that results from any loss at his branch.

34. The Claimants will no doubt say that this is not what they subjectively expected when they entered into their Subpostmaster contracts. However, we anticipate that they would struggle when trying to persuade the Court that, looking at the matter objectively, they

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could not have expected to be responsible for losses caused by doing things that they had been instructed not to do or by failing to do things that they had been instructed to do.

35. A more difficult question is whether "*losses*" within the meaning of clause 12 must be "*real losses*" suffered by Post Office. In our view, the correct analysis is as follows:

    (a) Read on its own, the word "*losses*" in clause 12 could refer to any losses suffered by Post Office anywhere, including as a result of matters which have nothing to do with the operation of the Subpostmaster's branch. However, there are good reasons for thinking that, in the context of clause 12, the word has a narrower meaning. One of these is that the word "*losses*" in clause 12 appears to be the opposite of the "*surpluses*" referred to in clause 14. By clause 14, a Subpostmaster is entitled to withdraw such "*surpluses*", which suggests that they are surpluses arising in the Subpostmaster's branch, rather than surpluses arising elsewhere, e.g. in an account that Post Office maintains with one of its clients.

    (b) The next question is whether the word "*losses*" means losses assessed by reference to the transactions that were intended to be done at the relevant branch (i.e. intended by the relevant customer and the Subpostmaster or assistant dealing with him) or losses assessed by reference to the transactions that the relevant Subpostmaster or assistant has recorded on the Horizon system. Clause 14 sheds light on this question also. It requires a Subpostmaster who has withdrawn a surplus to make good "*any subsequent charge up to the amount withdrawn*". This suggests that the "*surpluses*" to which clause 14 refers are not just 'physical' surpluses but 'paper' surpluses too, i.e. surpluses that are disclosed in the Subpostmaster's branch accounts but are subsequently shown to be false, requiring a charge to be made to the branch account. Clause 14 addresses that situation by requiring the Subpostmaster to make the charge good, thereby bringing the branch account back into balance.

    (c) By parity of reasoning, one would expect the "*losses*" referred to in clause 12 to include 'paper' losses, i.e. losses disclosed in the relevant branch accounts. This expectation is reinforced the last sentence of clause 12, which does not require Subpostmasters to make good "*losses*" but instead requires them to make good "*[d]eficiencies due to such losses*". This suggests that the point at which clause 12 requires the Subpostmaster to discharge his responsibility for losses is when he has drawn up his branch accounts covering all transactions recorded the relevant accounting period.

    (d) There is scope for argument that "*losses*" in clause 12 are limited to 'physical' losses assessed by reference to the transactions that were intended to be done, rather than

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'paper' losses assessed by reference to the transactions appearing in the branch accounts, some of which may have been mis-keyed. Again, the Claimants will no doubt say that they only expected to be liable for physical losses. However, this approach would make clause 12 very difficult to operate in practice and it would mean that the clause has little practical utility in the context of a relationship in which a Subpostmaster, as agent, submits regular accounts to Post Office, as principal. In that context, our opinion is that the word "*losses*" means losses disclosed by those accounts – i.e. both physical losses of cash or stock in the Subpostmaster's branch and the results of erroneously performed transactions where they create a deficiency (such as mis-keying a bank deposit as £100, rather than £10, resulting in a loss of £90 relative to the position on the account).

(e) There is nothing in the wording of the clause to link this concept of "*losses*" to any ultimate economic detriment to Post Office (if this is what is meant by "*real loss*"). In the example given above, the error recording the bank deposit generates a liability from Post Office to its client bank that is not offset by the money received (to Post Office's account) by the Subpostmaster. We do not regard this as an easy question but, on balance, our view is that the word "*losses*" mean losses suffered at branch level and that, in the situation described above, there is a "*loss*" within the meaning of clause 12. We do not think that the words of the clause, construed objectively, would require a further enquiry to establish whether or not a loss is "*real*", not least because the question whether Post Office ultimately suffers an economic detriment resulting from the loss will depend on its relationship with the relevant Post Office client in which the Subpostmaster has no involvement.

36. However, we should make two points clear.

37. First, if Post Office becomes aware that a transaction has been mis-keyed at a Subpostmaster's branch, the Stirling v Maitland and/or Necessary Co-operation Terms would require Post Office to inform the Subpostmaster of this fact and to allow his branch account to be corrected accordingly. This would be consistent with the process for correcting false surpluses that is discussed in sub-para 35(b) above. Pursuant to the Stirling v Maitland and Necessary Cooperation Terms, Post Office could not close its eyes to mistakes that are exposed as part of the reconciliation processes that it operates with its various clients. The Court may well take the view that the Stirling v Maitland and Necessary Cooperation Terms require Post Office to have systems designed to identify and resolve transactions that have been entered incorrectly. As we understand it, Post Office does have such systems in place, but we know almost nothing about them or about how they operate, because this aspect of Post Office's business has not been raised, either in the Common Issues trial or the Horizon Issues trial. How extensive the

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systems would need to be and how rigorous the procedures followed by the staff operating them are questions on which it is difficult to advise without knowing more facts. For present purposes, we would simply say that such systems would not have to be perfect or error-free.

38. Second, where an apparent loss does not result from any activity at the branch but is generated by an error in the Horizon system (including by reason of a bug in the Horizon software) it is arguable that this would not be a "*loss*" within the meaning of clause 12. Other things being equal, it would be surprising for a fictitious entry in a branch's accounts to be regarded as a "*loss*" for which a Subpostmaster is liable in circumstances where that entry does not reflect anything done at the relevant branch. To this extent, the Claimants may be right to say that the loss must be "*real*". But in that situation, the loss would not have been caused by the Subpostmaster's negligence, carelessness or by his assistants, and so would not be caught by clause 12 in any event – unless, perhaps, the Subpostmaster was aware of the error, could easily have remedied it but failed to do so. We can see scope for arguing that the Subpostmaster ought to be liable under clause 12 in that limited situation, but this another issue on which it is difficult to advise without knowing how and in what circumstances the situation could arise in practice (these matters are not due to be explored until the Court orders a full trial of all the issues based on Lead Cases).

39. This last point is perhaps of less practical significance than may first appear. Once a Subpostmaster has submitted his branch account to Post Office, he will ordinarily be bound by that account. He may subsequently correct the account because it contains an error, but in that scenario our view is that he bears the burden of proving that the relevant entry was erroneous: see paras 162 *et seq* below. If he contends that the account contained a fictitious entry (and so there is not a "*real loss*"), it will be for him to identify that entry and show it to be fictitious.

40. Lastly, it is important to note that clause 12 establishes on its clear words an obligation to make payment in respect of "*deficiencies*" (or, in our preferred terminology, shortfalls), rather than losses, but only where such deficiencies are "*due to…losses*". If a shortfall (rather than a loss) were to be generated by an error in Horizon, it would not result from losses within the meaning of clause 12, and the Subpostmaster would not be liable. We stress this point because we are aware of the possibility of a bug generating shortfalls, rather than losses.

41. In our view, therefore, Post Office will succeed on the major issues arising on the construction of clause 12.

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Common Issue 9

What is the proper construction of Part 2, paragraph 4.1 of the NTC?

42. Para 4.1 states as follows:

> *The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (howsoever this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise, or as a result of any breach of the Agreement by the Operator) except for losses arising from the criminal act of a third party (other than Personnel) which the Operator could not have prevented or mitigated by following [Post Office's] security procedures or by taking reasonable care. Any deficiencies in stocks of products and/or resulting shortfall in the money payable to [Post Office] must be made good by the Operator without delay so that, in the case of any shortfall, [Post Office] is paid the full amount when due in accordance with the Manual.*

43. Post Office contends that the true construction of para 4.1 "*imposed on Subpostmasters responsibility for losses at their branches*": see GDXC, para 93. Post Office has no more detailed pleading on para 4.1. This is because there was no detailed plea within the GPoC to which Post Office was required to respond.

44. The Claimants' case is that para 4.1 should be construed so as to have the same meaning as clause 12 of the SPMC (discussed above): see GPoC, para 55, referring to "*similar clauses said to impose such liability*".

45. The wording of para 4.1 is very different from that of clause 12. In one respect, it is an improvement on clause 12, because it makes it clear that there is no requirement that losses must be the result of any fault on the part of Subpostmasters or their assistants:

    (a) The words in parentheses begin with the word "*howsoever*". The use of this word provides a strong indication that the paragraph covers losses which have <u>any</u> cause other than the causes expressly excluded (criminal acts of third parties which the Subpostmaster could not have prevented or mitigated etc).

    (b) The words following "*howsoever*" describe two types of loss that, at first blush, might seem to describe (and delimit) the losses covered by the term. The use of the word "*whether*" is consistent with this idea in that it might appear to suggest that there are two (and only two) types of loss at issue. However, a careful reading of the first sentence of para 4.1 makes clear that these two types of loss described between the parenthesis do not function to limit the scope of liability:

        (i) First, the words describing the two types of loss follow the words "*howsoever this occurs <u>and</u>*" (emphasis added). The choice of the conjunctive "*and*" suggests that what follows will be consistent with what came before (i.e. the

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breadth of the phrase "*howsoever this occurs*" is not being cut down but only unpacked).

(ii) Second, the first type of loss that follows "*and*" is itself exhaustive – it refers to losses resulting from negligence but also those resulting "*otherwise*" than from negligence. The use of the very general word "*otherwise*" reinforces the strong indication created by the use of the word "*howsoever*".

(iii) Third, the words under consideration are placed within parenthesis, which is consistent with explaining or unpacking, rather than changing dramatically, the meaning that the preceding words would otherwise have. If the words in parenthesis are removed, para 4.1 would refer simply to "*any loss…or…damage…except for*" the narrow category of third-party loss described thereafter, which would be entirely consistent with our wide interpretation of the words in parenthesis discussed above.

(c) It is consistent with this construction for the exception following the word "*except*" to be relatively narrow. The exception is limited to losses that satisfy three cumulative criteria: the loss (i) must result from the criminal act of a third party other than personnel working at the relevant branch, (ii) must not have been capable of prevention or mitigation by the Subpostmaster following Post Office's security procedures and (iii) must not have been capable of prevention or mitigation by the Subpostmaster taking reasonable care.

(d) This last point is significant in the context of the Claimants' contention that para 4.1 applies only to losses that result from negligence. If this were right, the use of a negligence criterion in the exception would be inexplicable because the Subpostmaster would not be liable for non-negligent loss, even without the exception. This provides a further indication that the Claimant's construction is wrong.

46. However, in another respect, para 4.1 is not an improvement because its focus on "*loss or damage to Post Office Cash and Stock*" gives the impression that, in relation to losses of cash and stock occurring at a Subpostmaster's branch,[11] it is only concerned with physical losses and not with paper losses of the sort described in para 35 above. This impression is reinforced by the para 4 heading ("*Liability for Post Office Cash and Stock*") and by para 4.2, which provides that the Subpostmaster's responsibility for cash and stock commences when he receives them and ends when he gives them to customers,

[11] Para 4.1 contains no words limiting the scope of the Subpostmaster's liability to cash and stock of held at his branch, but this must be implicit: the scope of his liability would be impossibly wide otherwise.

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returns them to Post Office or (in the case of cash and financial instruments) hands them over to a cash in transit provider or pays them into a bank. On closer analysis, however, and not without some hesitation, we think that this is too narrow a view, for the following reasons:

(a) First, construing para 4.1 narrowly so that it makes a Subpostmaster liable for physical losses of cash or stock but not paper losses would some require surprising distinctions to be drawn, between errors in performing transactions and errors in recording them. For example, it would mean that the Subpostmaster would have a £90 liability where a customer withdraws (say) £10 from his bank account and the assistant mistakenly pays him £100 while the Subpostmaster would have no liability at all if the customer deposits £10 in his bank account and the assistant mistakenly keys in a £100 deposit. Both of these errors are capable of causing the same loss to the branch and to Post Office. Construing para 4.1 in such a way as to impose a liability which does not (or does not necessarily) reflect the shortfall disclosed in a Subpostmaster's accounts would make the para hard to apply in the context of a relationship in which the Subpostmaster submits regular accounts to Post Office.

(b) Second, the last sentence of para 4.1 provides that any shortfall[12] should be made good without delay so that Post Office is paid the full amount of the shortfall "*when due in accordance with the Manual*". This appears to be an allusion to the process by which Subpostmasters are required to submit their accounts to Post Office. The sentence has arguably been drafted on the footing that the amount being to paid to Post Office is the amount of the shortfall disclosed in those accounts.

(c) Third, para 4.3 provides that the Subpostmaster will retain financial responsibility following the termination of his appointment, stating that he "*will be required to make good any losses (including losses arising from Transaction corrections and stock losses) ... which may subsequently come to light*". But losses that arise from transaction corrections are accounting losses, not physical losses. In other words, if the Subpostmaster's para 4.1 liability applied only to physical losses, it is difficult to think of any losses to which the words in brackets could apply – i.e. it is difficult to think of any losses that could be described as "*arising from Transaction corrections*". The fact that para 4.3 uses this description indicates that the person who drafted para 4.1 proceeded on the basis that the para applied to losses disclosed in a Subpostmaster's accounts.

[12] The term "*resulting shortfall*" is used, which suggests that the last sentence was concerned only with shortfalls resulting from losses of deficiencies of stock. However, it is hard to see why shortfalls resulting from losses of cash should be excluded.

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47. We therefor conclude that, in relation to paper losses, para 4.1 operates in a way which is similar to that described in paras 35 to 39 above.

48. With the benefit of hindsight, it is regrettable that para 4.1 is so focused on losses of and damage done to the physical cash and stock held by a Subpostmaster that it fails to legislate in clear words for all the losses that can cause deficiencies or shortfalls in branch accounts. This makes it necessary to argue for a construction of para 4.1 which the Claimants may argue is not the natural interpretation of the contractual words used. The Claimants have not (or not yet) articulated the narrower interpretation but it tends to assist their case that they are only liable for "*real losses*" suffered by Post Office. Our argument against this interpretation is described above. It is not straightforward.

Common Issue 14

On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled to suspend pursuant to SPMC Section 19, clause 4 and Part 2, paragraph 15.1 NTC?

49. Section 19, clause 4 SPMC provides as follows:

> *A Subpostmaster may be suspended from office at any time if that course is considered desirable in the interests of [Post Office] in consequence of his: (a) being arrested, (b) having civil or criminal proceedings brought against him, (c) where irregularities or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of [Post Office], or are admitted, or are suspected and are being investigated.*

50. Part 2, para 15.1 NTC provides as follows:

> *[Post Office] may suspend the Operator from operating the Branch (and/or acting reasonable, require he Operator to suspend all or any of its Assistants engaged in the Branch from working in the Branch) where [Post Office] considers this to be necessary in the interests of [Post Office] as a result of: (15.1.1) the Operator and/or any Assistant being arrested, charged or investigated by the police or [Post Office] in connection with any offence or alleged offence; (15.1.2) civil proceedings being brought against the Operator and/or any Assistant; or (15.1.3) there being grounds to suspect that the Operator is insolvent, to suspect that the operator has committed any material or persistent breach of the Agreement, or to suspect any irregularities or misconduct in the Branch, the Basic Business or any Post Office® branches with which the Operator and/or any Assistant is connected (including any financial irregularities or misconduct.*

51. Post Office has as yet no pleaded case on the precise meaning and effects of either term. This is because the Claimants failed to plead a generic case on the construction of these terms, such that there was nothing to which Post Office was required to respond in the Generic Defence.

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52. The Lead Claimants now contend in their IPOC[13] that, on their proper constructions, each of these terms creates a power to suspend that is limited in the following ways:

    (a) Post Office could not suspend Subpostmasters (i) "*arbitrarily, irrationally or capriciously*", (ii) "*without reasonable and proper cause*" and/or (iii) "*in circumstances where the Defendant was itself in material breach of duty*".

    (b) Post Office could not *suspend* on a "*knee jerk*" basis.

    (c) Post Office could not suspend without first giving "*fair consideration to all relevant circumstances and to whether or not to suspend the Claimant even if the threshold for doing so was established*".

53. For the most part, we consider that the Claimants' case on construction here is weak. It involves no attempt to make sense of the words used by the parties in the contracts. Specifically:

    (a) Each of the terms identifies in detail the circumstances in which the power to suspend arises, rather than establishing a generic test of "*reasonable and proper cause*". There is no room for that general approach in the contractual words used. That said, we think that there is a real risk that a court would find (based on an analogy with the employment cases) that there was an implied term the effect of which would be to limit the exercise of the right to suspend to cases where there was a reasonable basis for suspension on one or more of the grounds identified in the express terms. In **McLory v Post Office**[14] (a case involving suspension on grounds of suspected misconduct by an employee postman) Neuberger J rejected a phalanx of detailed implied terms importing notions of fairness into the express right to suspend of a sort put forward by the Claimants here. However, he was willing to import a limited implied term that Post Office could only suspend if it had "*reasonable grounds*" to do so and could only continue the suspension for so long as those reasonable grounds continued. To be clear, what the Court would be testing in the circumstances of this case is whether the suspicion of misconduct or other contractual trigger for suspension was genuine, and whether Post Office's belief that the trigger justified suspension in its interests was reasonable, rather than the suspension being based on a whim or malice and only nominally related to one of the triggers (or grounds) set out in the express term. Whilst **McLory** was a decision in the employment context and was based on a differently worded contract, we nonetheless think there must be a real risk, if not a likelihood, that a court would

[13] See, e.g., Abdulla, para86.
[14] [1992] ICR 758 (applied more recently by the Court of Appeal in **Watson v Durham University** [2008] EWCA Civ 1266.

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import a similar approach here. One of the reasons that the Managing Judge might be emboldened to extend this thinking outside the pure employment law context is the power not to pay the Subpostmaster during the period of suspension, which is in and of itself a significant matter on which Neuberger J placed some reliance. On its face, this is an unbridled power although, as we explain below, it is likely to be subject to control as a contractual discretion.

(b) As to the contention set out in para 52(a)(iii) above, there are no contractual words referring to Post Office's own conduct, let alone to any "*material breach*" on its part. Any restriction on the power to suspend as a result of Post Office's own conduct would have to be implied, rather than forming part of the express terms properly construed. In any event, as a matter of the commercial sense of the agreement, it is difficult to see why Post Office should lose the power to suspend merely because it is itself in breach of contract, given that such breach could be entirely irrelevant to the circumstances of the intended suspension. In our view, that is a very unlikely agreement for the parties to have made, bearing in mind the potentially disastrous consequences to Post Office of a rogue Subpostmaster remaining in post.

(c) It is important to emphasise that, while a Subpostmaster remains in post, he has control of Post Office cash and stock; he has the right to enter into transactions on its behalf; and, in the locality of his branch, he is the 'face' of the Post Office brand. Given the wide rights that he enjoys, and the substantial damage that he could do if he misconducts himself, it is to be expected that Post Office should be able to suspend him from his post in circumstances where it no longer has faith in his willingness or ability to do his job properly. This would include situations where it has suspicion of wrongdoing. But again, that suspicion of wrongdoing may well need to be based on reasonable grounds, and not a whim.

(d) Similarly, there is nothing in the contractual words used to suggest that Post Office would have a duty to give "*fair consideration*". On the contrary, the words used indicate that Post Office is (merely) required to reach a view that suspension is "*desirable*" in its interests (under the SPMC) or "*necessary*" in its interests (under the NTC), for one or more of the stated reasons. Further, a requirement that the process of consideration be fair would introduce a degree of uncertainty that is unlikely to have been acceptable to Post Office. It is, for example, unclear what factors would be relevant to the fairness of any given process of consideration.

(e) We can see no reasonable basis on which the suspension provisions could be read as requiring Post Office to give fair consideration to whether or not to suspend where

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the threshold for suspension is met. The terms themselves define the threshold for suspension as being, in summary, that Post Office considers suspension to be desirable or necessary in its interests. This being the test, it would make little sense for Post Office to then to be required to ask itself whether it has fairly considered all the relevant circumstances. Given that suspensions may sometimes need to be decided quickly (e.g. where Post Office cash appears to be at risk), it is inherently unlikely that Post Office would agree a mechanism under which it is essentially required to ask itself the same question twice. If, on the other hand, the mechanism were to require Post Office to ask itself a different question, there is nothing in the contract to identify that question: see sub-para (d) above.

(f) We consider that commercial good sense and the relevant factual matrix both tell strongly in favour of rejecting most of the limitations for which the Claimants contend. It would, for example, be commercially absurd for Post Office to be unable to suspend a Subpostmaster whom it suspected (on reasonable grounds) of having stolen its cash or stock merely because it had not yet been able to carry out the kind of investigation and consideration that the Claimants contend was required. Post Office is unable to supervise Subpostmasters on a day-to-day basis. It is unsurprising that Post Office should insist upon a right to suspend on suspicion alone, given the obvious need to preserve its cash and stock and, more generally, the integrity of its business.

54. Even if the Court were <u>not</u> to imply a term as to the reasonableness of a decision to suspend:

(a) It is nonetheless possible that the Court may narrow down the right to suspend by treating it as (or as analogous to) a contractual discretion which is subject to an implied term that it may not be exercised arbitrarily, irrationally or capriciously. In **British Telecommunications v Telefonica O2 UK**,[15] Lord Sumption said at [37]**:**

> *As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously: Abu Dhabi National Tanker Co v Product Star Shipping Ltd (No 2) [1993] 1 Lloyd's Rep 397, 404, per Leggatt LJ; Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299, para 67, per Mance LJ and Paragon Finance plc v Nash [2002] 1 WLR 685, paras 39–41, per Dyson LJ. This will normally mean that it must be exercised consistently with its contractual purpose: Ludgate Insurance Co Ltd v Citibank NA [1998] Lloyd's Rep IR 221, para 35, per Brooke LJ and Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, per Lord Steyn, and p 461, per Lord Cooke of Thorndon*

[15] [2014] Bus LR 765.

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(b) The terms of the suspension provisions make it clear that Post Office is entitled to act in its own interests and is under no duty to attempt to balance its interests against those of the Subpostmaster. In these circumstances, there is little scope for implying a term which would impose the substantial constraints on the power to suspend that the Claimants propose. The suspension provisions specify the conditions that have to be met for a right to suspend to arise, rather than providing that Post Office has a discretion to choose from a range of options or to make an overall assessment taking into account the interests of both parties. The latter, but not the former, would involve kind of decision-making that invites the implication of a term to prevent irrationality and capriciousness (see the distinction drawn by Jackson LJ in **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland**[16] at [83]-[96]).

(c) Finally, there is scope for argument that the parties must have intended the power to suspend to be exercised in pursuit of Post Office's legitimate commercial aims. On this basis, a term could be implied which would prevent Post Office suspending a Subpostmaster for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance those interests. A modest implied term of this sort was recently applied by the Court of Appeal in **Property Alliance Group v The Royal Bank of Scotland**.[17] In our view, there is little need for such a term. Post Office could not suspend a Subpostmaster maliciously: one or more of the specified grounds for suspension would have to be satisfied and – this point is worth emphasising – Post Office's decision to suspend would in any event have to be based genuinely on those grounds. The Claimants are not arguing for such a term, but it could be helpful in persuading the Managing Judge that he should reject their attempt to impose greater constraints on the right to suspend. We doubt that it would make much practical difference to Post Office's ability to decide whether to suspend in any case.

55. For completeness, we should mention that Post Office has a discretion under section 19, clauses 5 and 6 SPMC to pay a Subpostmaster the remuneration which is required to withheld during his suspension and a discretion under and Part 2, para 15.2 NTC to withhold a Subpostmaster's remuneration during suspension. There are reasons for thinking that these discretions would be subject to an implied term to prevent irrationality and capriciousness of the sort discussed in **British Telecommunications** and **Mid Essex Hospital Services**. Moreover, given the serious harm that could be suffered by a Subpostmaster as a result of his not being paid remuneration during a

[16] [2013] EWCA Civ 200.
[17] [2018] EWCA Civ 355 at [161]-[169].

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lengthy period of suspension, a term could also be implied requiring Post Office to act with reasonable expedition in conducting any investigation and taking any other steps necessary to decide whether to remove the suspension or to terminate the Subpostmaster's appointment. Indeed, the factor of non-payment during suspension was one of the specific grounds which persuaded the Judge in **McClory v Post Office** to impose the "reasonableness" implied term. We understand that this term could create difficulties for Post Office as our instructing solicitors have seen a number of cases where suspensions seem to have continued for very long periods for no discernible reason, which is concerning. These are not Common Issues and the point does not directly arise in any of the Lead Claimants' cases, but as preparations for the Common Issues trial progress we should consider whether and to what extent Post Office should suggest implied terms along these lines on the basis that they may be of help to persuade the Managing Judge not to adopt an interpretation or to impose implied terms which would significantly restrict the right to suspend.

Common Issue 15

On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled summarily to terminate?

56. Section 1, clause 10 SPMC states (as relevant):

> *The Agreement may be determined by [Post Office] at any time in case of Breach of Condition by [the Subpostmaster] or non-performance of his obligation or non-provision of Post Office Services…*

57. Part 2, para 16.2 NTC provides (as relevant):

> *… [Post Office] may terminate the Agreement immediately on giving written notice to the Operator if the Operator:*
>
> *16.2.1 commits any material breach of the provisions of the Agreement or any other contract or arrangement between the Parties and fails to remedy the breach (if capable of remedy) within 14 days of written notice from [Post Office] specifying the breach and requiring the same to be remedied. Any references in these Standard Conditions to a breach of a particular obligation by the Operator being deemed to be material and/or irremediable are not intended to be exhaustive and shall not prevent [Post Office] from exercising its rights under this clause in respect of any other breach of the Agreement which is material and/or irremediable;*
>
> *16.2.2 fails to provide the Products or Services to the standards required by [Post Office] as set out in the Manual and fails to remedy the failure (if capable of remedy) within 14 days of a written notice from [Post Office] specifying the failure and requiring the same to be remedied; …*
>
> *16.2. 6 fails to pay any sum due to [Post Office] under the Agreement by the due date.*

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58. Post Office contends that these terms permitted summary termination for cause, subject only to the limitations identified in the express words of the terms: see GDXC, para 100(2). Beyond this, Post Office does not yet have a pleaded case on the construction of these terms. This is because the Claimants failed to plead a generic case on the construction of these terms.

59. The Claimants now contend in their IPOC[18] that, on their proper constructions, each of these terms creates a power to terminate that is limited in the following ways:

    (a) Post Office could not terminate (i) *"arbitrarily, irrationally or capriciously"*, (ii) *"without reasonable and proper cause"* and/or (iii) *"in circumstances where the Defendant was itself in material breach of duty"*.

    (b) Post Office could not terminate on a *"knee jerk"* basis.

    (c) Post Office had to consider conscientiously whether or not to terminate.

60. The Claimants' case here is unclear, largely because the IPOC plead summary termination for cause and termination on notice without cause together and without proper differentiation. It is particularly unclear what is meant by an assertion in the IPOC that the words *"may be determined"* in clause 10 SPMC *"imported the foregoing"*, where *"the foregoing"* appears to be the Claimants' pleaded case on the true construction of the terms governing both kinds of termination and also their case on the **Autoclenz** principle (discussed below). The same point applies as to the import of the words *"may terminate"* in para 16.2 NTC.[19]

61. In relation to clause 10 SMPC, the short answer to the Claimants' argument is that a clause which entitles a party to terminate a contract if the other party commits any breach of the contract is in general interpreted as being limited to repudiatory breaches: Lewison, The Interpretation of Contracts at [17-16]. In our view, that is the proper interpretation of clause 10 (it is supported by the clause's use of the phrase *"Breach of Condition"*).[20] That being so, there is no basis, and no room, for interpreting the clause in the way suggested by the Claimants. Nor is there any necessity to subject it to implied terms of the same effect.

62. As regards the right to terminate provided for in para 16.2, the grounds of termination are exhaustively set out in paras 16.2.1 to 16.2.16. Para 16.2 is the sort of clause, and it is

[18] See, e.g., Abdulla, para87 (referring in error to GPoC, para 64.13; the reference should be to para 64.14).
[19] See, e.g., Dar, para 103.1.
[20] The phrase is not defined in the SPMC and it appears to be used in its technical sense of a term of which any breach gives the innocent party the right to terminate.

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drafted in a way, that one frequently sees on commercial contracts. Subject to one question arising on para 16.2.2, para 16.2 is clear on its face, and the Claimants' case involves an attempt to re-write its terms to coincide with their perception of fairness, rather than to discern the meaning of the contractual words used. The Claimants have not identified any ambiguity in those words used in the terms and there is no basis, no room and no necessity for subjecting them to the constraints they suggest.

63. The question that arises on para 16.2.2 is whether the general principle referred to in para 61 above applies, with the result that the para is limited to failures to comply with the standards set out in the Manual which constitute a repudiatory breach of the NTC. In our view, that principle does not apply, for reasons similar to those given by Court of Appeal in **Leofelis v Lonsdale Sports**[21] (another case where the innocent party was required to give the party in breach the opportunity to remedy the breach).

64. In **Lomas v JB Firth Rixon Inc**,[22] Longmore, Patten and Tomlinson LJJ said:

> *The right to terminate is no more an exercise of discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as a repudiation of a contract. We have already commented that the specific right to terminate makes theoretical the question whether an Event of Default constitutes a repudiation of the contract which can be accepted by the innocent party as bringing the contract to an end. But no one would suggest that there could be any impediment to accepting repudiatory conduct as a termination of the contract based on the fact that the innocent party can elect between termination and leaving the contract on foot. The same applies to elective termination.*

65. Furthermore, in **ENE Kos 1 v Petrolino Brasiliero (No. 2)**,[23] Lord Sumption said:

> *There is no legal policy specific to termination rights restricting their availability or the consequences of their exercise more narrowly than the language of the contract or the general law.*

66. For these reasons, we consider it unlikely that the Claimants will persuade the Court to read in the limitations that they propose, either a matter of construction or by way of an implied term. We would add that if some term were to be implied, we would not expect that term to extend beyond paras 16.2 and 16.2.6 NTC and we would expect it to a relatively modest term, such as a term of the sort discussed in para 54(c) above.

Common Issue 16

On a proper construction of the SPMC and NTC, in what circumstances and/or on what basis was Post Office entitled to terminate on notice, without cause?

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[21] [2008] ETMR 63. This case is discussion in Lewison, The Interpretation of Contracts at [17.16].
[22] [2012] EWCA Civ 419.
[23] [2014] 4 All ER 1.

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67. Section 1, clause 10 SPMC states (as relevant):

> *The Agreement... may be determined by [Post Office] on not less than three months' notice.*

68. Part 2, para 16.1 NTC provides (as relevant):

> *... The Agreement will continue until: (16.1.1) either Party gives to the other not less than 6 months' written notice (unless otherwise agreed between the Parties in writing), which cannot be given so as to expire before the first anniversary of the Start Date...*

69. The parties' respective cases on these provisions mirror those in relation to summary termination. The Claimants do not differentiate between the two kinds of termination, save that they contend that the notice periods set out in the SPMC and the NTC are absolute minima, apparently on the basis that those minimum periods will not be sufficient in some cases. They contend as follows:

    (a) In the SPMC, the phrase "*not less than three months' notice*" imposed on Post Office a requirement "*conscientiously to consider what period of notice to give*".[24]

    (b) In the NTC, the phrase "*not less than 6 months' notice*" imposed on Post Office a requirement "*conscientiously to consider what period of notice to give*".[25]

70. We can see no properly arguable basis to read in those requirements, either in the words of the terms, the commercial sense of the agreements or the matrix of fact. As noted above, we do not consider that the Court should, as a matter of construction, read in a requirement that Post Office undertake a process of consideration going beyond that required by the words of the clauses (not least because there is no basis on which to identify the factors that Post Office would have to take into account). If the Court were to read in such a requirement in the SPMC and the NTC, it is difficult to see why it would not read in the same requirement in the many other contracts which use similar language.

71. We do, however, have considerable discomfort with the 3-month notice period provided for in the SPMC and we would expect the Court to share that discomfort. A 3-month notice period is very short for an agreement of this kind, bearing in mind (amongst other things) the extent to which the parties would be expected to make substantial financial and other investments in the relationship on the footing that they would recover their investments in the years that followed. We are also struck by the fact that in former years, new Subpostmasters were required to pay Post Office a "fee" in return for their

[24] See, e.g., Abdulla, para 88.2.
[25] See, e.g., Stockdale, para102.2.

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appointment, in the form of a 25% deduction from their first year's remuneration. Can the parties to any SPMC have contemplated that Post Office could give 3 months' notice of termination the day after the relevant SPMC was signed? The notice period provided for in the NTC (6 months' notice, but not expiring before the end of the first year) reflect much more closely the kind of period that would be anticipated in an agreement of this nature. We do not see any real force in the Claimants' attack on the notice provision in the NTC.

72. In the circumstances, it would not be surprising if the Court were inclined to moderate by some means the *prima facie* effect of the words of clause 10. It is, however, far from clear that this can properly be done in construing the clause, for the following reasons:

(a) The words of the clause are clear. There is no ambiguity in the language.

(b) It is the sort of language that is not uncommon in commercial contracts.

(c) There are reasons why Post Office would want the right to terminate a Subpostmaster's contract after only 3 months. As already noted, while a Subpostmaster remains in post, he has control of Post Office cash and stock, he has the right to enter into transactions on its behalf and, in the area covered by his branch, he is the 'face' of the Post Office brand. If for any reason not involving a ground of summary termination Post Office no longer has trust and confidence in a particular Subpostmaster, one can see why it would have a legitimate commercial desire to bring his appointment to an end as quickly as possible.

(d) It is true that the clause says "*not less than*", such that it is open to Post Office to provide more than 3 months' notice if it chooses to do so.[26] But it is a leap of reasoning to take from this freedom that Post Office had, in effect, a discretion as to the notice period, such discretion to be exercised "*conscientiously*". It is far more likely that the meaning of the words is simply to grant Post Office a right in its own interests to terminate on any period of notice, provided that such notice be no less than 3 months (for the distinction between discretions and rights, see para 54(b) above).

(e) The Claimants' proposed restrictions on the power to terminate on 3 months' notice are objectively unlikely terms for the parties to have agreed. Given that the SPMC and the NTC have provisions dealing with summary termination for cause, any suggestion that the right to terminate on notice is subject to an implied requirement of reasonable cause is unreal. And as Richard Salter QC pointed out in **Monde**

[26] Post Office could of course do so by *ad hoc* agreement even if the term mandated 3-months' notice and no more (although that would be a curious agreement to reach).

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Petroleum v WesternZagros[27] at [272], the purpose of a contractual right to terminate is to give the party on whom that right is conferred the power to bring the contract to an end. It is a right to bring an end to the parties' shared endeavour. It is unlikely that the hypothetical reasonable commercial man or woman would expect the party exercising that right to be obliged to consult anyone's interests but its own.

(f) Furthermore, at least in the absence of any clear criteria against which to measure the appropriateness of any proposed notice period on the facts of any given case, a requirement to give "*conscientious*" consideration would appear both vague and potentially onerous to Post Office and would give relatively little comfort to any prospective Subpostmaster, whilst undermining legal certainty on both sides. In the context of Post Office's relative bargaining strength, a 3-month notice period is not an unlikely bargain: Post Office was, in effect, able to dictate whatever notice period it wanted. Post Office could defend the short notice period by pointing out that it was mutual (see immediately below).

(g) Subpostmasters could also terminate on 3 months' notice: see the first sentence of clause 10. There are objective advantages to both sides in being able quickly to extricate themselves from the relationship should it prove not to work as well as anticipated (especially given that many Subpostmasters would have no prior experience of operating a Post Office branch or any other business). It is not a commercially absurd notice provision, notwithstanding that it is shorter than might be expected and could work harshly.

(h) Even though Post Office could in theory give 3 months' notice of termination very soon after a Subpostmaster is appointed, in practice we believe that it would be unlikely to do so. As we understand it, Post Office it also invests significant amounts in new Subpostmaster relationships and, having gone through the processes of approving and training a new Subpostmaster and enabling him to operate within the Post Office system, in all probability it will continue his appointment unless it has a reason for not doing so. This point could give practical assurance to any Subpostmaster who was concerned by the short notice period. However, it could also create a difficulty for our analysis of the relational contract issue discussed below, where the short notice period is an important building block in the analysis that this is <u>not</u> a relational contract: we will need to consider further whether and, if so, how to run it at the Common Issues trial.

73. Our view is that the terms of the SPMC and NTC permitting termination on notice will be construed in accordance with their plain meaning and so provide a contractual right to

[27] [2017] 1 All E.R. (Comm) 1009.

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terminate on 3 months and 6 months' notice, respectively (save, in the latter case, that the period of notice cannot expire within the first 12 months of appointment). Our view is also that there is no basis for implying terms restricting the right to terminate on notice in the way that the Claimants allege

Common Issue 19

On a proper construction of the SPMC and NTC, where Post Office lawfully and validly terminated a Subpostmaster's engagement, on notice or without notice for cause, was the Subpostmaster entitled to any compensation for loss of office or wrongful termination?

74. It appears from the IPOC[28] that this issue no longer arises. The Claimants apparently intend to rely only on their arguments in relation to Common Issues 5-7 (i.e. the terms in question were not properly incorporated and/or fall foul of UCTA – as to which, see paras 184 to 255 below). No construction issue arises on the Individual Particulars of Claim.

Common Issue 20

On a proper construction of the SPMC and NTC, in what, if any, circumstances are Subpostmaster's breach of contract claims for loss of business, loss of profit and consequential losses (including reduced profit from linked retail premises) limited to such losses as would not have been suffered if Post Office had given the notice of termination provided for in those contracts?

75. The position here is the same as for Common Issue 19. The Claimants appear to have dropped their construction argument (if they ever had one).[29]

Common Issue 21

On a proper construction of the SPMC and NTC, what if any restrictions were there on Post Office's discretion as to whether or not to appoint as a Subpostmaster the prospective purchaser of a Subpostmasters' business?

76. The Claimants rely on the implied terms that they allege at GPoC, paras 64.15 to 64.19.[30] There is no construction issue on the Individual Particulars of Claim, only an implied term issue (as to which, see paras 111 *et seq* below).

Common Issue 22

Did SPMC section 15, clause 7.1; NTC, Part 2, clauses 2.3 and 2.5 and/or any of the implied terms contended for by the parties and found by the Court purport to confer a benefit on

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[28] See Abdulla, para 91; Bates, para 114; Sabir, para 93; Stockdale, para 105; Stubbs, para 117 and Dar, para 106.
[29] Ibid.
[30] See Abdulla, paras 92-93; Bates, paras 115-116; Sabir, paras 94-95; Stockdale, paras 106-107; Stubbs, paras 118-119 and Dar, paras 107-108.

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Assistants for the purposes of section 1 of the Contracts (Rights of Third Parties) Act, and if so which of these terms did so?

77. We believe (but are not entirely sure) that section 15, clause 7.1 was introduced into the SPMC in July 2006. It provides as follows:

> *[Post Office] will:*
>
> *7.1.1 provide the Subpostmaster with relevant training materials and processes to carry out the required training of his Assistants on the Post Office ® Products and Services;*
>
> *7.1.2 inform the Subpostmaster as soon as possible where new or revised training will be necessary as a result of changes in either the law or Post Office ® Products and Services; and*
>
> *7.1.3 where appropriate... update the training materials (or processes) or provide new training materials (or processes) to the Subpostmaster. However, it is the Subpostmaster's responsibility to ensure the proper deployment within his Post Office ® branch of any materials and processed provided by [Post Office] and to ensure that his Assistants receive all the training which is necessary in order to be able to properly provide the Post Office ® Products and Services and to perform any other tasks required in connection with the operation of the Post Office ® branch.*

78. Part 2, clauses 2.3 and 2.5 state as follows:

> *2.3 Where [Post Office] considers it necessary, it shall initially train the first Manager and such number of Assistants as [it] shall determine, in the operation of the System at the Branch.*
>
> *2.5 [Post Office] may require the Manager and/or the Assistants to undertake further training at any reasonable location and time during the Term if [Post Office] (2.5.1) reasonably considers such training to be essential; or (2.5.2) wishes to train them in new and improved techniques which have been devised and which the Operator will be required to use in operating the System.*

79. Common Issue 22 also refers to implied terms, but it is unclear what, if any, of the implied terms might be alleged to purport to confer a benefit on assistants for the purposes of the Act. Post Office would accept that, in the absence of any express term (i.e. in the period prior to July 2006), the Stirling v Maitland and/or Necessary Cooperation Terms required Post Office to provide Subpostmasters with the training that they needed, both to operate Horizon themselves[31] and to train their assistants to do so.[32] But neither these terms nor the implied terms alleged by the Claimants identifies

[31] This is not a Common Issue.

[32] See para 61A of Post Office's Response to the Claimants' first Request for Further Information and paras 1-4 of its Response to their Second Request for Further Information. For completeness, we note that it appears to have been Post Office's practice to send prospective Subpostmasters a document indicating that it would provide all training necessary, both for him and his staff.

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assistants as the beneficiary and none of them seems a stronger prospect than the express terms considered below. In **RBS v McCarthy**,[33] Picken J stated at [150] that reliance on section 1(1)(b) of the Act "*is all the harder when what is being considered is an implied term*". In our view, this may understate the position.

80. Section 1 of the Contracts (Rights of Third Parties) Act 1999 provides, in relevant part, as follows:

> *(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if —*
> *(a) ...*
> *(b) subject to subsection (2), the term purports to confer a benefit on him.*
>
> *(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.*
>
> *(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.*
>
> *(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.*

Purports to confer a benefit

81. For the purposes of section (1)(b), it is not necessary that conferring the benefit on the third party be predominant purpose or intent of the term: **Prudential Assurance Co v Ayres** [2007] EWHC 775 (Ch; Lindsay)[34] at [28]. However, the fact that the existence of the term will, in practice, be beneficial to the third party does not in itself mean that the term purports to confer a benefit on that person: see, for example, **Broughton v Capital Quality**[35], where an obligation owed by party A to party B to "*ensure assessments are allocated promptly, fairly and appropriately with minimum risk*" did not purport to confer a benefit on a third party, C, who was an assessor. Assessors stood to benefit from prompt, fair and appropriate allocation of assessments (this being paid work for them), but the term was to the benefit of party B, who wished the assessments to be carried out.

82. In **Dolphin Maritime & Aviation v Sveriges Angartygs Assurans Forening**,[36] Christopher Clarke J gave at [74] the following explanation as to the meaning of section 1(b):

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[33] [2015] EWHC 3626 (QB).
[34] Reversed on a different point by the Court of Appeal: [2008] 1 All E.R. 1266.
[35] [2008] EWHC 3457 (QB; HHJ Seymour QC).
[36] [2009] EWHC 716 (Comm).

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> *A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the term purporting to "*confer*" a benefit seems to me to connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party.* (Emphasis added)

83. In the **Dolphin** case:

    (a) Party A was under an obligation to pay Party B.

    (b) Dolphin was identified in the relevant term as the agent of Party B to whom payment should be made.

    (c) The Judge reasoned that Dolphin was not the "*intended beneficiary of the promise*" (at [75]). He said that this would be the case even if Dolphin was entitled to a commission on the payment.

Not intended to be enforceable

84. If the test in section 1(b) is met, it is then for the defendant to show that the parties did not intend the term to be enforceable by the third party in order to rely on section 1(2): **Nisshin Shipping Co v Cleaves & Co**[37].

85. The SPMC does not, in our view, contain any obligation on Post Office as to training assistants that falls within section 1 of the Act:

    (a) Post Office does not in section 15, clause 7.1 promise to confer any benefit on assistants; it merely promises to provide materials and processes to the Subpostmaster, who is responsible for the provision of training. Any benefit to the assistant is intended to result from performance by the Subpostmaster, rather than performance by Post Office. The purpose of the term was to benefit the Subpostmaster, by enabling him better to discharge his responsibilities as to training. The term makes this clear in its final sentence.

    (b) In any event, the final sentence in our view suffices to demonstrate that the parties did not intend the obligations on Post Office in this clause to be enforceable by an assistant, such that Post Office could rely on section 1(2). The contractual intention is clearly for the responsibility as to training assistants to rest with the Subpostmaster alone. It would be commercially absurd for Post Office to be at risk of a claim from an assistant for a failure to provide adequate training materials in circumstances where Post Office would not be in a position to know what, if any,

[37] [2003] EWHC 2602 (Comm; Colman J).

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training a particular assistant may require and what training had been provided by the Subpostmaster (and/or could be provided without the benefit of materials or processes from Post Office).

86. The position is less clear in respect of the NTC:

(a) "*Assistants*", "*the first Manager*" and "*Manager*" amount to sufficiently clearly defined classes for the purposes of section 1(3) of the Act. Paras 2.3 and 2.5 identify them expressly.

(b) It is clear that the training provided by Post Office to (or for the benefit of) assistants and managers is not for the ultimate purpose of benefitting those assistants or managers. It is also clear that Post Office's contribution to the training of assistants and managers is intended to enable Subpostmasters better to discharge their duties in operating the branch and, more specifically, to discharge their responsibilities in relation to assistants and managers (including training).

(c) Nonetheless, it is of benefit to an assistant and a manager to receive the training and the training is provided by Post Office directly. That direct benefit is not purely incidental or secondary; it is perhaps better described as instrumental or as a means to an end.

(d) In relation to assistants, however, that benefit is potential, in that the class of assistants who receive this benefit depends upon decisions made by Post Office and by the Subpostmaster who employs them. It is for Post Office to determine under para 2.3 whether or not to train (i) any assistants at a given branch and (ii) if so, how many assistants (in addition to the first manager of the branch). And if Post Office decides to train only some of the assistants at the branch, informing the Subpostmaster of the number, we infer that the Subpostmaster then decides which particular assistants receive the training. We are not aware of any caselaw on whether a potential or conditional benefit of this kind would qualify under section 1. In our view, a benefit of this kind could in principle qualify, including because it could be re-cast as the benefit of being considered for training, as could para 2.5.

87. Nevertheless, on balance our view is that paras 2.3 and 2.5 do not purport to confer a benefit on assistants or managers. Although there is significant scope for argument, we do not regard it as a purpose of the bargain that assistants and managers receive training from Post Office. The purpose of the training provision is to ensure that the branch be run effectively, including through the use of competent assistants. That is the context in which the promises made by Post Office in paras 2.3 and 2.5 are made to Subpostmasters, who are the intended beneficiaries. This is a very difficult point, but we

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consider that the marginally better view is that any benefit obtained by assistants and managers is best seen as "*incidental*" in the sense in which that term is used in **Dolphin**. They are, in effect, the conduit for a benefit passing to the Subpostmaster.

88. We are less tentative in our view that Post Office would be likely to show, in paras 2.3 and 2.5, there was no intention that an assistant or manager be entitled to enforce the obligation, bearing in mind the following points:

    (a) As regards assistants, the clause 2.3 obligation confers no direct practical benefit on any particular assistant. At best it creates an expectation that the number of assistants to be trained will be considered by Post Office. In our view, it is highly unlikely that effective enforcement of such expectation by a particular assistant could have been contemplated.

    (b) The context for Post Office's decision as to whether training is necessary must be the interactions between Post Office and the relevant Subpostmaster, who is the person who stands to benefit from any entitlement to training and who can be expected to enforce the promise.

    (c) The contract as a whole makes clear that assistants, managers and their training are the responsibility of Subpostmasters. By para 2.4, Subpostmasters are required to ensure that the first manager cascades the training provided for in para 2.4 to all other assistants and to any replacement manager in order to ensure that they receive sufficient initial training. And by para 2.6, Subpostmasters are required to ensure that managers and assistants attend the training provided for in paras 2.3 and 2.5. In our view, it would cut across the contractual scheme to generate a directly enforceable right for an assistant against Post Office, and indeed against Subpostmasters.

Common Issue 23

What was the responsibility of Subpostmasters under the SPMC and the NTC for the training of their Assistants?

89. Post Office's case is that the SPMC and the NTC make clear that the Subpostmaster was ultimately responsible for providing or procuring the provision of such training as was necessary to enable the assistant to assist the Subpostmaster in discharging his obligations to Post Office: GDXC, para 95(4). If the Subpostmaster became aware of any further need for training, he needed to inform Post Office and provide or procure further training.

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90. There is no proper pleading in the GPoC or Generic Reply as to the content of the contractual duties in relation to training assistants. In their IPOC, the Lead Claimants contend as follows:[38]

> *...the responsibility of the Claimant to train Assistants, this was qualified by the implied terms alleged by the Claimants and/or admitted by the Defendant and should be construed by reference to the commercial implications of the constructions for which the parties respectively contend.*
>
> *In result, the obligations on the Claimant to train Assistants cannot be construed to require the Claimant to have been better able to train Assistants than the Defendant's own professional team or beyond the training provided to the Claimant himself.*

91. Unhelpfully, the Claimants do not identify the implied terms that they contend qualify the obligations to train assistants. The Claimants' case is again very unclear.

92. The most obviously relevant express terms are quoted at GPoC, para 56 and include the following:

(a) In the SPMC (1994-2006), section 15, clause 2 provides: "*Assistants are employees of the Subpostmaster*". We also note that section 7 of the Operations Manual states that Post Office will complete "*initial training of the Operator or the first Manager and a certain number of Assistants*".

(b) In the SPMC (as amended in July 2006), section 15, clause 7.1 provides: "*...it is the Subpostmaster's responsibility to ensure the proper deployment within the Post Office ® branch of any materials and processes provided by [Post Office] and to ensure that his Assistants receive all the training which is necessary in order to be able to properly provide the Post Office ® Products and Services...*". Clause 7.3 provides that Post Office may require Subpostmasters to "*conduct specific training...in relation to certain Post Office ® Services (such as, but not limited to, money laundering).*".

(c) In the NTC: in addition to paras 2.3 and 2.5 of Part 2 (quoted above), clause 2.4 provides: "*The Operator shall ensure that the first Manager cascades the training to all other Assistants and to any replacement Manager in order to ensure that all subsequent Managers and all other Assistants receive sufficient initial training from properly trained Managers.*"

93. It is regrettable that the terms do not state in clearer terms the responsibilities of Subpostmaster as regards the training of their assistants. We cannot identify any express term that can be construed as requiring the Subpostmaster to train his assistants.

[38] See, e.g., Abdulla, paras 95-96.

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94. In our view, however, this is not altogether surprising. The contracts make clear that a Subpostmaster need not rely on assistants to operate the branch but that, if he does, they are his employees and he is responsible for any losses that they cause. In that context, it follows that, to the extent that an assistant cannot perform properly his duties without training, it is incumbent on the Subpostmaster to provide or procure such training.

95. The commercial sense of that position is obvious. Post Office is not in a position to identify what, if any, training or further training may be required to enable an assistant to discharge his duties and, in turn, assist the Subpostmaster in discharging his obligations to Post Office. Furthermore, assistants' wages are paid by the Subpostmaster who may not wish to incur the costs of sending assistants on training courses.

96. In this context, our view is that the "obligations" that Post Office pleads at GDXC, para 95(4) follow logically from the Subpostmaster's contractual obligations to Post Office, rather than arising directly as a matter of the construction of the express terms of the agreement. It is possible to conceptualise them as implied terms, but the better analysis is likely to be that they are not contractual obligations *per se* but necessary incidents of other contractual obligations. If a Subpostmaster engages an incompetent assistant, he will be required (as a practical matter) to provide or procure training for him, in order to put himself in a position to comply with his obligations to Post Office and avoid liability arising from the actions of the incompetent assistants; but the Subpostmaster has not promised to provide training to his assistants.[39]

97. We see the force of an argument that, if the training that Post Office provided to a Subpostmaster's assistants was deficient (in the sense that it did not enable reasonably competent assistants to carry out their functions properly), and if the Subpostmaster was in consequence subjected to liability as a result of the assistants not carrying out those functions properly, the Subpostmaster could in some circumstances have a claim against Post Office. The claim would be for breach of the Stirling v Maitland and/or the Necessary Cooperation Terms and it would be for the amount of the liability to which the Subpostmaster was exposed as a result of the deficient training. Furthermore, it could be set off against Post Office's claim in respect of the Subpostmaster's liability, effectively cancelling that liability out.

98. In this group litigation, the possibility of claims of this kind represents a significant exposure for Post Office in particular cases. However, notwithstanding the "*cascade*" language in Part 2, para 2.4 NTC, we do not see any scope for a construction (or, on a more credible analysis, the implication of a term) along the lines set out in para 90

[39] By analogy, if Party A agrees to set foot on the moon, he will obviously be required (as a practical matter) to obtain transit on a space shuttle, but he has not promised to do so.

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above. The agreements work perfectly well without it. It should be noted that Subpostmasters will often be in a position to know whether their assistants' training is deficient or whether their assistants are for any other reason incapable of following it. When this is the case, they should provide better training themselves and/or they should notify Post Office with a view to procuring better training from that source. If they fail to do so and allow the assistants to continue working at their tills, they could themselves be in breach of the Stirling v Maitland and Necessary Cooperation Terms for which Post Office would have a claim of its own.

D: The "True Agreement" (Common Issues 17-18)

(17) Do the express written terms of the SPMC and NTC between Post Office and Subpostmasters represent the true agreement between the parties, as to termination (in this regard, the Claimants rely on Autoclenz v Belcher [2011] UKSC 41)?

(18) If not, was the "true agreement" between the parties as alleged at GPOC, para 71?

99. In **Autoclenz v Belcher**,[40] 20 individuals who had been engaged as car washers alleged that they were "workers" under the National Minimum Wage Regulations 1999 and the Working Time Regulations 1998 and were entitled to the minimum wage and paid holiday. They were required to sign written contracts in which they were described as sub-contractors, were responsible for paying their own tax and national insurance and were entitled to provide a substitute to carry out the work. The contracts also stated that they were not obliged to work and that the car wash company did not undertake to provide them with work. However, the company in fact told them how to carry out the work, provided the cleaning materials, determined the rate of pay, prepared their invoices and required them to give prior notification if they were unable to work. The Supreme Court held that the written contracts did not reflect what had actually been agreed between the parties, and that under their "true agreement", the car washers were workers.

100. The Claimants argue that the same approach should be adopted in this case. They plead that the "true agreement" under the Subpostmaster contracts was that there could be no termination:[41]

(a) "*without substantial cause or reason, established after a fair investigation and consideration*";

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[40] [2011] ICR 1157.

[41] See GPoC, para 70. The precise words of the pleading are that "*neither party intended that the Claimants' investments in goodwill or otherwise in the business should or would be forfeited on 3 months' notice*" in the circumstances then set out, but this makes little sense given that what is in issue is the right to terminate, rather than any forfeit of goodwill or investment. We consider that the Claimants must intend to argue that termination was not permitted in these circumstances.

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(b) *"if the Defendant was itself in material breach of contract;*

(c) *"vindictively, capriciously or arbitrarily";*

(d) *"in response to reasonable correspondence about (i) any apparent breach by the Defendant, or (ii) alleged shortfalls and the difficulties faced by Subpostmasters in investigating alleged shortfalls."*

101. The Claimants also contend, further or in the alternative, that the "true agreement" was that termination had to be on reasonable notice (being never less than 12 months): see GPoC, para 71. It seems to be contended that if the above conditions are not met, the agreement could be terminated at will, but only on at least 12 months' and possibly even more notice. The pleading as to "true agreement" does not seem to address summary termination.

102. Post Office pleads that, in the language of Lord Clark's judgment in **Autoclenz**, the SPMC and NTC are "*ordinary contracts*" or "*commercial contracts*" and are to be construed and enforced in the usual way: see GDXC, para 110. Post Office points out that the Claimants have not, in any event, pleaded any shared intention to be bound by different terms from those set out in the written contracts: see para 111(3).

103. The decision of the Supreme Court in **Autoclenz** is a difficult one:

(a) In cases not constituting a sham, [42] any suggestion that Court look beyond the written terms signed by the parties to find their "true agreement" would ordinarily be rejected as contrary to principle. But **Autoclenz** provides for an exception.

(b) The precise scope of the exception is somewhat unclear. The Supreme Court was obviously concerned to limit its breadth and practical effects: see [21], where Lord Clark said: "*Nothing in this judgment is intended in any way to alter those principles, which apply to ordinary contracts and, in particular, to commercial contracts. There is, however, a body of case law in the context of employment contracts in which a different approach has been taken*".[43] Post Office relies on these paragraphs in arguing that the Subpostmaster relationship is not amenable to a "true agreement" analysis because the Subpostmaster contracts are "*ordinary*" or "*commercial*" contracts.

(c) Since **Autoclenz**, the "true agreement" analysis has typically been applied in work and services cases where it is alleged that the true relationship between the parties is

[42] i.e. a contract which is intended by both parties to paint a false picture as to the true nature of their respective obligations.
[43] Lords Hope, Walker, Wilson and Collins agreed.

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one of employment,[44] and there is some support for the idea that this is the full extent of its application: see, e.g., **Pimlico Plumbers v Smith**[45] at [104] *per* Sir Terence Etherton MR.

(d) It is, however, not clear that the **Autoclenz** principle may only be relied upon to show that, in a contract concerning work and services, the true relationship was one of employer/employee. At [30]-[35], Lord Clarke cited with approval a passage from the judgment of Aikens LJ in the Court of Appeal in which he said:

> *I respectfully agree with the view ... that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so*

In these circumstances, we cannot rule out the application of the **Autoclenz** principle to the Post Office/Subpostmaster relationship. The Claimants of course contend that the relationship is very similar to an employment relationship.

104. Notwithstanding this uncertainty, our overall view is that Post Office is likely to succeed on the true agreement issue, for the following reasons.

105. First, it is likely that the principle in **Autoclenz** is of limited application (if any) outside the context of disputes as to employment status. Since **Autoclenz**, the Supreme Court has applied the orthodox approach outside the employment context:

> *"Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of the relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless is established that it constitutes a sham"* (**Secret Hotels2 v HMRC** [2014] UKSC 16, at [31] *per* Lord Neuberger[46])

106. Second, in our view the Subpostmaster contracts probably qualify as "*ordinary contracts*" or "*commercial contracts*" for these purposes. There was a disparity in bargaining power and Post Office was able to able to dictate the terms of these contacts, but that is true of many truly commercial situations. The contracts are business to business agreements entered into in the expectation of a commercial relationship aimed

[44] Or where it is argued that someone is a "worker".
[45] [2017] EWCA Civ 51.
[46] Lords Sumption, Reed, Hughes and Hodge agreed.

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at profit. If the Autoclenz principle were applied to here, this would represent a major development in the law and could open the floodgates to "true agreement" arguments in the sort of situations that Lord Clark was anxious to avoid.

107. Third, the Claimants have not pleaded any express agreement as to different terms as to termination. They must therefore intend to rely on an implication from the parties' conduct.

108. Fourth, it is difficult to see how the Claimants could seek to prove that the termination provisions only (but not the rest of the written contract) did not represent the "true agreement". If the contracts generally reflect what was actually agreed, on what basis can the Court reach the conclusion that this was not true of the termination provisions? In our view, the principle in **Autoclenz** would no usually be applied so as to pick and choose which parts of a written agreement represent the "true agreement".

109. Fifth, it would be difficult for the Claimants to identify any conduct[47] on the part of Post Office from which it could sensibly be inferred that the true agreement was as they alleged:

(a) The Claimants in fact contend that Post Office's conduct in relation to termination was consistent with the terms set out in the written agreements, rather than being consistent with the terms that they now allege: see GPoC, para 99.

(b) We understand that Post Office will often pay compensation to Subpostmasters when for its own policy or operational reasons it chooses to close their branches or to require them to agree different contracts (e.g. in its network transformation program). However, we also understand that Post Office did, at least sometimes, behave consistently with the existence of a right to terminate on notice without compensation. It did terminate Subpostmasters' appointments on that basis. There is no analogy with the stark contrast between the **Autoclenz** case between the written terms and the facts on the ground.

(c) Even if the Claimants were to plead and prove that Post Office did not enforce the termination provisions as drafted,[48] this fact would also be consistent with Post Office adopting an informal practice that was more favourable to Subpostmasters than the terms agreed between the parties: see, by analogy, **Pimlico Plumbers** at [88]. As we understand it, any conduct on which the Claimants can rely is likely to be equivocal. At least in an ordinary commercial context, the fact that one or more of the parties acted more generously than it was entitled to under the terms of a

[47] See **Secret Hotels2** at [33].
[48] See, for example, Bates, para 27.

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written agreement that, on its face, governs the relationship does not show that those terms were not part of the true agreement; such conduct could simply involve a breach of the written terms; or it could evidence a variation of those terms (see **Secret Hotels2** at [44]); or it could result from one of the parties electing, in some cases, not to rely on its strict contractual rights, for whatever reason. If Post Office often or sometimes did not use its right to terminate on notice without cause (or gave longer notice), that could well be because it preferred to adopt a more benevolent attitude where it could easily do so, rather than because it never had the disputed contractual right in the first place.

110. There is some risk (although we consider it relatively small) that the Court will treat **Autoclenz** as justifying a departure from the written terms even in a commercial contract such as the SPMC and the NTC, relying on the factors emphasised by Lord Clark in **Autoclenz** at [30]-[35]. If the Court adopts that approach, it is hard to predict what terms might replace those set out in the agreements. We would, however, still expect the "true agreement" not to include the alleged term quoted at para 100(d) above; that term is the result of an obvious attempt to draft a term which is far too specific ever to have been agreed implicitly or by conduct, rather than any genuine attempt to discern any agreement from all the circumstances of the contractual relationship between Post Office and Subpostmasters generally.

E: Implied Terms (Common Issues 2 and 3)

Applicable legal principles

111. There are two types of implied term. In **Geys v Société Générale**[49], Baroness Hale explained the two types at [55]:

> *In this connection, it is important to distinguish between two different kinds of implied terms. First, there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them: see Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 . Such terms are only implied where it is necessary to give business efficacy to the particular contract in question. Second, there are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it: see Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555 , Liverpool City Council v Irwin [1977] AC 239.* (Emphasis added)

[49] [2013] 1 A.C. 523.

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112. In this Opinion, we refer to these two types of implied term as "terms implied in fact" and "terms implied in law". As to terms implied in law, Baroness Hale went on to say at [56]:

> *A great deal of the contractual relationship between employer and employee is governed by implied terms of the latter kind. Some are of long-standing, such as the employer's duty to provide a safe system of work. Some are of more recent discovery, such as the mutual obligations of trust and confidence. This was referred to by Dyson LJ in Crossley v Faithful & Gould Holdings Ltd [2004] ICR 1615 as an "evolutionary process". He also described the "necessity" involved in implying such terms as "somewhat protean", pointing out that some well-established terms could scarcely be said to be essential to the functioning of the relationship. At para 36, he said:*
>
> > *"It seems to me that, rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations."*
>
> *There is much to be said for that approach, given the way in which those terms have developed over the years.*

113. The principles governing the implication of terms in fact are stricter than this. As explained immediately below, a term said to be implied in fact will only be implied where this is necessary for the commercial or practical coherence of the contract. It is important to note that the implied terms advanced by the Claimants are (with the possible exception of the good faith term addressed below) alleged as terms to be implied in fact.

114. In **Marks and Spencer v BNP Paribas Securities Services**,[50] the Supreme Court affirmed the high threshold for implying a term in fact. Lord Neuberger, with whom Lords Sumption and Hodge agreed, clarified that the process of implication is distinct from the construction/interpretation of the contract properly-so-called. He said, at [29]:

> *...the process of implication involves a rather different exercise from that of construction. As Bingham MR trenchantly explained in the Philips case [1995] EMLR 472, 481:*
>
> > *"The court's usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."*

[50] [2015] 3 WLR 1843.

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115. Lord Neuberger also emphasised that the test for the implication of a term in fact, no matter precisely how that test is expressed, always requires that the term be necessary, rather than merely reasonable, fair or appropriate. He said at [21] and [23]:

> *... a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.*
>
> *... the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy... The first proviso emphasises that the question whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459 that a term will be implied if it is essential to give effect to the reasonable expectations of the parties as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that "The legal test for the implication of ... a term is ...strict necessity", which he described as a stringent test.)*

116. His Lordship went on at [21] to hold that where it is argued that a term ought to be implied for reasons of "business efficacy", the hurdle is a high one:

> *It is rightly common ground on this appeal that the test is not one of absolute necessity, not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simons second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.* (Emphasis added)

117. In the same paragraph, he set out the overarching principles of implication as follows (formatting and underlining provided):

> *In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the BP Refinery case 180 CLR 266 as extended by Bingham MR in the Philips case [1995] EMLR 472 and exemplified in The APJ Priti [1987] 2 Lloyd's Rep 37.*
>
> *First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408 , 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with*

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that of notional reasonable people in the position of the parties at the time at which they were contracting.

Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.

However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable.

Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 , para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied.

Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09.

Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

118. There are several other important principles that restrict the implication of terms in fact:

(a) A term will not be implied where it would be inconsistent with the express terms of the contract. In the Court of Appeal in **Autoclenz**,[51] Aikens LJ expressed the principle as follows at [88]:

> *Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.* (Emphasis added)

(b) There is a strong presumption against implying terms where the agreement is a detailed written contract that appears to represent a complete bargain and, in particular, to cover the subject matter in relation to which it is argued a term should

[51] [2009] EWCA Civ 1046. Affirmed by the Supreme Court: [2011] ICR 1157.

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be implied. In **Greatship (India) v Oceanografia SA de CV**,[52] Gloster J said at [41]:

> *Moreover, there is real difficulty in seeking to imply a term into a detailed standard form contract such as the Supplytime 1989 form, where the strong presumption is likely to be that the detailed terms of the contract are complete; see A-G of Belize v. Belize Telecom [2009] 1 WLR 1988 per Lord Hoffmann at paragraphs 17-27; and Mediterranean Salvage v. Seamar Trading [2009] EWCA 531 per Lord Clarke MR. at paragraphs 10, 15-18.* (Emphasis added)

Dyson J made essentially the same point in **Bedfordshire CC v Fitzpatrick Contractors**:[53]

> *... the court should in any event be very slow to imply into a contract a term, especially one which is couched in rather general terms, where the contract contains numerous detailed express terms such as the contract in this case. In my judgment, in such a case, the court should only do so where there is a clear lacuna. The parties in this case took a great deal of trouble to spell out with precision and in detail the terms that were to govern their contractual relationship. The alleged implied term is expressed in broad and imprecise language. I can see no justification for grafting such a term onto a carefully drafted contract such as this.* (Emphasis added)

(c) A term will not be implied merely because, had the parties considered the subject matter of the alleged implied term, they would have made some provision for that subject matter; it must be shown that the implied term put forward is the very term that they would necessarily have chosen (rather than one or other of the various possible terms). Sir Thomas Bingham MR expressed this principle as follows in **Phillips Electronique Grand Public v British Sky Broadcasting**:[54]

> *... it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was one contractual solution or that one of several possible solutions would without doubt have been preferred.* (Emphasis added)

Common Issue 2

(2) Which, if any, of the terms in the paragraphs listed below were implied terms (or incidents of such implied terms) of the contracts between Post Office and Subpostmasters?
(i) GPOC, para 64
(ii) Reply, para 96.1

119. We do not set out here all 21 of the implied terms alleged at GPoC, para 64 and the Reply, para 96.1. The barrage of terms asserted in these paragraph ranges from the very

[52] [2012] EWHC 3468 (Comm).
[53] [1998] 62 Con LR 64.
[54] [1995] EMLR 472 at 481.

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general to the very specific, and different considerations apply to each of them. We briefly address the principal terms in para 122 below.

120. Post Office denies the alleged terms. It does, however, accept that the agreements contained the following two implied terms:

(a) Each party would refrain from taking steps that would inhibit or prevent the other party from complying with its obligations under or by virtue of the contract (**the Stirling v Maitland Term**).

(b) Each party would provide the other with such reasonable cooperation as was necessary to the performance of that other's obligations under or by virtue of the contract (**the Necessary Cooperation Term**).

As can be seen from the provision relating to Common Issue 2 in Schedule 1 to the First CMC Order, the Claimants have agreed that these terms are to be implied into the Subpostmaster contracts.

121. Post Office contends that these two implied terms render it unnecessary to imply any further terms – any gaps in the agreements that must be filled for commercial or practical coherence are filled by these two implied terms. It is important to recognise that both terms, and the Necessary Cooperation Term in particular, impose substantial obligations on the parties. Post Office has identified in Responses to Requests for Further Information dated 13 September 2017 and 9 February 2018 the broad areas in which it contends these implied terms operate.

122. There can be no guarantees about how the Managing Judge will approach each and every implied term alleged by the Claimants. Moreover, as we explain in para 5 above, until we have seen all the Claimants' evidence and arguments, we cannot rule out the possibility of problems being raised which are not sufficiently addressed by the Stirling v Maitland and Necessary Cooperation Terms and could justify the implication of some of the terms the Claimants allege. And even as matters stand, in a few cases the arguments are quite finely balanced. But in general, we think that the implied terms alleged by the Claimants are not necessary (as opposed to reasonable or desirable from a Subpostmaster's perspective) and we also think that several of them would contradict express terms of the Subpostmaster contracts. In broad summary:

(a) It is not commercially necessary for Post Office to be under an obligation to provide "*training and support*" beyond (1) the express provisions of the contract and (2) the requirements of the Stirling v Maitland and Necessary Cooperation Terms. Pursuant to these requirements, Post Office must provide such training and support as is

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necessary to enable Subpostmasters to perform their functions. There is thus no need to imply the slightly wider requirements of the term alleged in GPoC, para 64.1. The Claimants rely at para 65 on the existence of more specific obligations as to training in relation to mailwork and the express requirements placed on Post Office under franchise agreements.[55] We do not think these matters provide any support for the alleged implied term. On the contrary, the fact that express provision was made for more limited training and support makes it harder to imply a general obligation; the fact that Post Office agreed extensive express terms as to training in a different agreement is, at best, neutral.

(b) Similarly, the Subpostmaster contracts work perfectly well without any need to make specific provision for the quality of the Horizon system. This addresses the term alleged at GPoC, para 64.1A (a good example of a term that might be reasonable but would not fill a gap that, unless filled, leaves the contract without commercial or practical coherence). If Post Office were to provide a system that was so inadequate as to prevent Subpostmasters being able to comply with their duties to account (for example, by inserting false transactions or entries into branch accounts), it would be in breach of the Stirling v Maitland Term and/or the Necessary Cooperation Term. We do not see why any more stringent standard should be implied unless this is required by statute, which we do not accept, either: see paras 171 *et seq* below.

(c) The terms alleged at GPoC, para 64.2-64.11 would provide for a detailed scheme of obligations in relation to accounting and to dealing with and disclosing problems with Horizon. In our view, this scheme cannot credibly be described as having gone without saying in circumstances where the parties had in place detailed contracts which included Stirling v Maitland and Necessary Cooperation Terms and they also had operations manuals covering much of this ground. And it could not be said that Post Office would necessarily have agreed to such obligations had the parties addressed their minds to these precise issues.

(d) The Court may well infer that the parties would have assumed honesty from each other and that they would have assumed that important information would not be withheld if it was needed to allow proper accounts to be drawn up and submitted.

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[55] We note that the Claimants make no specific allegation seeking to impose a duty on Post Office to properly assess (on an individual basis) potential Subpostmasters as to their individual level of expertise and training requirements; nor do they contend that Post Office had an obligation to test whether, after training, such individuals are capable of being competent Subpostmasters. We say this because, reading between the lines, this might well be the case the Claimants want to articulate. Such a case, if run, would need to be based on an implied term and so face all the difficulties set out in relation to the other implied terms discussed.

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But this is very different from it being necessary to imply a series of highly specific terms dealing with technical issues encountered with Horizon that would not have been known to the Subpostmaster at the time of contracting.[56] Having said that, we should make clear that in some situations practical obligations similar to some of those alleged at GPoC, paras 64.2-64.10 could potentially be imposed by the Stirling v Maitland and/or Necessary Cooperation Terms. For example, Post Office could be obliged to provide and/or not conceal relevant information, if and to the extent that this is truly necessary for the accounting process to work properly.

(e) We see little basis for implying a term preventing Post Office from seeking recovery from the Claimants except in the limited situations mentioned in GPOC, para 64.12. For Post Office to seek recovery of an amount which it does not believe to be due would be one thing: one can see why it might have been assumed (and Post Office might if asked have agreed) that the sanctions at its disposal to enforce payment without recourse to legal proceedings would not be applied to shortfalls which it knows to be false. But seeking recovery of a shortfall which Post Office had not proved to be true to a Subpostmaster's satisfaction or which it had not investigated as thoroughly as he might like would be a recipe for paralysis. To our minds, it is difficult to see how a party in Post Office's position would ever agree to pre-conditions which could have this effect.

(f) The obligations proposed in relation to suspension and termination are inconsistent with the express terms of the Subpostmaster contracts: see paras 49 to 66 above. This covers the terms alleged at GPoC, paras 64.13 and 64.14.

(g) In principle, the obligation that is pleaded to mirror the employer/employee relationship is inappropriate because the parties did not choose an employment relationship: see GPoC, para 64.15. In a business to business relationship, the Necessary Cooperation Term should usually be enough. However, we see scope for argument about the term alleged in para 64.15, not least because an agency relationship is commonly seen as a paradigm example of a relationship requiring trust and confidence.[57] Given the need for mutual dealings, mutual reliance and the mutual exchange of information in the Subpostmaster/Post Office relationship, the Court might think it a small step to find that there is a mutual duty to maintain trust and confidence.[58]

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[56] Some Claimants entered into their Subpostmaster contracts before Horizon was up and running, when those features did not exist or at least had not been encountered.
[57] [1998] Ch. 1 at 18.
[58] However, importantly, the duty owed by an agent to his principal is distinct from the duty of trust and confidence implied into employment contracts, which is much wider and has been used as a platform in

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(h) We can see that it will often be appropriate to control the arbitrary and/or capricious exercise of any relevant contractual discretions and even to ensure that the discretion is not abused: see the discussion of contractual discretions at para 54 above. However, in GPoC, paras 64.16 and 64.17 the Claimants have not identified any relevant discretions and we strongly suspect that, if and when it is fully articulated, their case will ignore the critical distinction between contractual discretions on the one hand and contractual rights on the other discussed in para 54(b) above. Moreover, we do not see that any further restraint on contractual discretions are necessary, such as the restraints imposed by the term alleged in GPoC, para 64.18. This term raises the wider issues discussed in paras 125 *et seq* below in relation to Common Issue 1.

(i) There is, in our view, no proper scope for a broad contractual duty of reasonable care alleged at GPoC, para 64.19. If a party fails to perform his express and implied contractual obligations (including the Stirling v Maitland and the Necessary Cooperation Terms), there is a breach of contract. We would expect the Claimants to find it difficult to persuade the Court that a party in Post Office's position would put itself under a wide and powerful requirement to exercise reasonable care in preference to agreeing a more specific provision to address specific any specific problems identified in the contract.

(j) The term alleged at Generic Reply, para 96.1 has no foundation in any credible argument as to necessity or obviousness. It appears to be put forward on the basis that it would be consistent with Subpostmasters being required to make good shortfalls "*without delay*" for Post Office to be debarred from recovering in respect of such shortfalls unless it did so "*within a reasonable time of discovery or the date by which, with reasonable diligence, Post Office could have made such discovery*". In our view, there is no proper basis for arguing that the parties implicitly agreed a bespoke limitation regime, let alone the precise regime that the Claimants put forward. Given that recovery is subject to the usual limitation rules, we see no gap that has to be filled, and it is unclear why any party in Post Office's position would agree the dramatic curtailment of its right to recover that is alleged here.

Common Issue 3

If the terms alleged at GPOC, paras 64.16, 64.17, 64.18 and/or 64.19 are to be implied, to what contractual powers, discretions and/or functions in the SPMC and NTC do such terms apply?

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employment disputes to regulate a whole range of terms, most recently involving the awarding of discretionary bonus payments: see Chitty Vol 2 at [40-152].

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123. We do not consider that any of the terms to be construed in the Common Issues Trial provide for contractual discretions of the kind to be controlled by the implied terms discussed in para 54 above. There are of course many discretions that could be identified across the suites of contractual documents (including the Operating Manual), and some of those discretion may be of some relevance to the Common Issues (see, for example, the discretion to award a Subpostmaster remuneration during the period of his suspension). But apart from the right to suspend and terminate (which are not contractual discretions), no specific discretions have been identified by the Claimants.

124. Outside the area of contractual discretions and subject to the points we make about the right to suspend in para 54 above and the duty of good faith in paras 125 *et seq* below, we are not aware of any relevant rights or functions to which the implied terms alleged at GPOC, paras 64.16-14.16 would properly apply.

F: Relational Contract and the Good Faith Term (Common Issue 1)

Was the contractual relationship between Post Office and Subpostmasters a relational contract such that Post Office was subject to duties of good faith, fair dealing, transparency, co-operation, and trust and confidence (in this regard, the Claimants rely on the judgment of Leggatt J in Yam Seng Pte v International Trade Corp [2013] EWHC 111)?

125. On a strict reading, this issue is limited to the Claimants' contention that the alleged term (referred to for convenience as the "good faith term")[59] is to be implied simply by reason of the SMPC and/or NTC being "relational contracts". On that analysis, Post Office would succeed on this issue unless the Claimants were able to show that the good faith term is to be implied into all relational contracts (or perhaps all relational contracts that do not expressly exclude such a term), presumably on the basis that it is implied in law, rather than in fact. For the reasons set out below, we consider that the Claimants are unlikely to succeed in that argument.

126. However, Post Office should proceed on the assumption that the Claimants will be permitted also to argue that the good faith term should be implied for reasons including that the SPMC and/or NTC should be classified as relational contracts, using that classification as a building block in a broader argument as to the necessity of implying the term in fact.

127. It would be difficult to argue that the good faith term should be implied even if the contracts are not relational, and the Claimants do not appear to advance any such

[59] It is worth noting that the term that the Claimants seek goes beyond the core obligation of good faith that is championed in **Yam Seng**. It is a very ambitious term. We consider in this Opinion the possibility of any broad and general term as to good faith being implied.

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argument. We do not consider that possibility further in this Opinion. In our view, the following questions arise:

(a) Are the SPMC and/or the NTC properly classified as relational contracts?

(b) If so, does it follow from this classification that the good faith term should be implied in law?

(c) Alternatively, in all the circumstances should the good faith term be implied in fact?

128. Before addressing these questions, it is important to understand that, traditionally, the Courts in England have been hostile to attempts imply duties of good faith into contracts, particularly commercial contracts. One area where some level of acceptance has been achieved is in certain types of informal joint venture relationships.[60] However, in **Yam Seng Pte v International Trade Corp**,[61] Leggatt sought to open a new chapter in the law by suggesting that there are certain sorts of contract, which he called "relational contracts", in which it may be appropriate to imply a duty of good faith. Since handing down his decision in Yam Seng in 2013, Leggatt J (and now Leggatt LJ) has with considerable enthusiasm sought to apply and even expand his doctrine of relational contracts. A few judges have applied his approach, but several have preferred not to. We believe it is fair to say that the Court of Appeal has not exhibited a positive attitude to the doctrine, but neither has it explicitly rejected it. The law is in a state of development and it is not possible to predict with complete confidence where it will end up. However, it is important to bear in mind that the Courts continue to emphasise that there is no general duty of good faith in contract. This can be seen from the cases referred to in paras 146, 147 and 150 below.

Question (a): Are the SPMC and/or the NTC relational contracts?

129. At trial, Post Office could seek to downplay the significance of this question and focus on the other two questions. We could argue that the Court does not need to determine whether the agreements are relational contracts because, even if they were, the good faith term would not be implied. It is likely, however, that the Court will want to hear full argument on the classification of the contracts. This is the approach that has generally been adopted at first instance since **Yam Seng**.

130. There is relatively little case law that can assist in assessing whether or not a contract falls to be categorised as relational. Our discussion proceeds almost entirely on the basis

[60] See, e.g., **Ross River v Waveley Commercial** [2014] 1 BCLC 545. In that case, the argument in favour of a good faith obligation proceeded on the basis that the parties were in a fiduciary relationship.
[61] [2013] 1 CLC 662.

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of Leggatt J's reasoning. It is right to note that his reasoning appears to be developing and, in our respectful view, losing coherence.

131. In **Yam Seng**, Leggatt J referred to contracts that do not involve a "*simple exchange*" but involve instead a "*longer term relationship between the parties [to? / under?] which they make a substantial commitment*" (at [142]). He stated that such relational contracts may "*require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence*" and "*involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements*".

132. This suggests that there are three relevant categories or contract:

(a) Contracts that involve a "*simple exchange*". This seems to be intended to include many or most agreements for the supply of goods and services.

(b) Long-term agreements that involve the parties making substantial commitment(s) to the contractual relationship. It would appear from **Yam Seng** that all such contracts could be termed "relational".

(c) There appears to be a sub-category of relational contracts that require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence. This is the category that invites the implication of a term as to good faith. The Judge gave examples of such contracts as including some joint venture agreements, franchise agreements and long-term distributorship agreements.

133. However, other parts of the reasoning in **Yam Seng** seem to imply that the good faith term should typically be implied into all relational contracts (i.e. those falling within category (b) above). On the basis of **Yam Seng**, it is unclear what, if anything, in addition to (i) a long duration and (ii) substantial commitments to the contractual relationship is necessary to qualify an agreement for the implication of a good faith term (or at least to make it a strong candidate for such implication).

134. Unfortunately, the case-law that has followed **Yam Seng** has not shed much light on this point:

(a) There are cases in which first instance judges have identified the agreements before them as "relational" and have determined that it would be appropriate to imply a

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good faith term on that basis, but the reasoning in those cases adds little to the analysis in **Yam Seng** itself.[62]

(b) In **Al Nehayan v Kent** [2018] EWHC 333 (Comm) at [167], Leggatt LJ (sitting as a first instance judge) revisited **Yam Seng** and gave a new and (in our view) different definition of relational contracts:

> *I have previously suggested in Yam Seng Pte Ltd v International Trade Corp [2013] EWHC 111 (QB), at para 142, that it is a mistake to draw a simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith.* (Emphasis added)

(c) On this reasoning, any contract that is classified as relational invites the implication of a good faith term. There is an element of circularity, however, in that the definition of a relational contract now includes matters going to the necessity of implying a term, e.g. the absence of any attempt to specify in the contract the ways in which cooperation and collaboration will be required. It would appear that an agreement must be subject to detailed analysis before it can be seen to be relational (rather than, for example, this categorisation turning on basic objective characteristics of the agreement, such as its duration and/or whether it is (or is similar to) a franchise or joint venture agreement).

135. The SPMC and NTC clearly have several of the characteristics of relational contracts (whether under the formulation in **Yam Seng** or that in **Al Nehayan)**, namely:

(a) Under these contracts, the parties make substantial commitments to the contractual relationship.

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[62] In **D&G Cars v Essex Police Authority** [2015] EWHC 226 (QB), Dove J considered a contract that, it was common ground, contained an implied term requiring good faith, honesty and integrity in its performance. He nonetheless went on to consider the basis on which he would imply such a term: see [171] – [176]. His reasoning was very specific to the context of the agreement before him. In **Bristol Groundschool v Whittingham** [2014] EWHC 2145 (Ch), Richard Spearman QC found that the agreement before him, which he described as "*akin to a joint venture agreement*", was relational and did contain a good faith implied term: see [196].

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(b) It might be anticipated that the agreements would typically be of long duration, and we note that one of the Lead Claimants alleges that he discussed his desire for security at his initial interview with Post Office.[63] (As noted below, however, we consider that, on a proper analysis, this is not a point in favour of characterising the agreements as relational.)

(c) It is common ground that the operation of the contracts requires a degree of cooperation that is not spelled out exhaustively in the express terms, as is recognised by Post Office's pleading of an implied term as to necessary cooperation. Also, we note that several Lead Claimants allege that they were told that they would be in partnership with and/or would be given considerable support by Post Office.[64] (Note, however, that the existence of a limited term of cooperation could be used to argue against the contracts being relational in the sense that term is used in **Al Nehayan**: see further below.)

136. It follows that there is a substantial risk that the Court may determine that the SPMC and the NTC are relational contracts, at least in the sense that term is used in **Yam Seng**.

137. However, there are good reasons for thinking that the SPMC and NTC are not relational contracts.

138. First, express terms of the Subpostmaster contracts are extensive. They set out the basic nature of the parties' contractual relationship and, in particular, the type of "*collaboration*" that is required, namely a relationship of principal and agent under which the latter is to account to the former. These are not agreements in which the parties "*have not tried to specify*" the essential nature of their relationship (**Al Nehayan**); the parties' relationship is "*legislated for in the express terms of the contract*" (**Yam Seng** at [142]). It is notable that **Al Nehayan**, by contrast, was a joint venture case in which the parties "*did not attempt to formalise the basis of their cooperation in any written contract but were content to deal with each other entirely informally on the basis of their mutual trust and confidence that they would each pursue their common project in good faith*". It was, on its facts, a strong case for the implication of terms, including terms as to the nature of the contractual relationship and the basic duties implicit in that relationship. The agreement in **Yam Seng** was similarly "*skeletal*", and Leggatt J distinguished it from "*detailed and professionally drafted contracts*", into which it is more difficult to imply terms: see at [161].

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[63] Abdulla, para. 10.

[64] For references to partnership, see Abdulla, para 10 and Dar, para 9. Other Lead Claimants refer to expectations and/or promises of support: see Stubbs, para 5 and Bates, para 4.

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139. Second, the express terms of the Subpostmaster contracts are supplemented by the implied terms that are common ground: the Stirling v Maitland Term and, more relevantly, the Necessary Cooperation Term. Thus, the contracts cannot be said to fail to specify the nature and extent of collaboration/cooperation required of the parties. There is no gap that needs to be filled.

140. Third, whatever the parties' subjective expectations as to duration may have been, the fact that the agreements are terminable on relatively short notice prevents them being long term agreements in the relevant sense. In **Hamsard 3147 v Boots UK**,[65] Norris J found that the agreement at issue, which was terminable on reasonable notice,[66] was not a relational contract, including because it was not a "*long-term arrangement*". Similarly, in **Acer Investment Management v The Mansion Group**,[67] Laing J found that the agreement before her was terminable on a "*relatively short period of notice*" and that this was a reason (amongst others) to reject the submission that it was a relational contract: see [109].[68] Assuming Post Office succeeds on the "true agreement issues" as we expect, on these authorities this is a powerful point in its favour.

141. In our view, on the authorities Post Office has the better of the argument on the relational agreement question. However, this is a developing area of law. Given the imbalance in bargaining position and sophistication between the parties, given that the SPMC is not well drafted, and given the way in which the Subpostmaster relationship operates in practice, with each party being dependent on the close cooperation of the other, there is a real possibility that the Managing Judge may be resistant to this view.

Question (b): If the SPMC and the NTC are relational contracts, does it follow from this classification that the good faith term should be implied?

142. If, contrary to our conclusion, the Court finds that the Subpostmaster contracts are relational contracts, our view is that it would not follow that the good faith term should automatically be implied, for the following reasons.

143. In **Yam Seng** itself, Leggatt J recognised that the parties could, by the express terms of their agreement, exclude the implication of the duty as to good faith (or at least elements of it). He appears to have had in mind clauses expressly referring to and excluding duties of this kind. But it must follow from his reasoning that the good faith duty could also be excluded by necessary implication from the express terms, simply as a matter of

[65] [2013] EWHC 3251 (Pat). This case concerned an agreement under which a retailer had outsourced the supply of own-brand children's clothes for sale in its stores
[66] Norris J found that the notice that was in fact given, 9 months, was reasonable: see [78].
[67] [2014] EWHC 3011 (QB). This case concerned an agency agreement for the sale of financial investment products.
[68] The notice period was implied, rather than express: see **Acer** at [87].

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construction because the parties reached express agreement on the matters in relation to which that duty might otherwise operate.

144. Furthermore, at a more basic level, the good faith term is, in our view, a term that can only be implied in fact and so only where it is necessary on the facts of the specific agreement at issue. The question of implying a term in fact is not a matter that can be resolved through a process of classification. The following points indicate that the good faith term is to be implied in fact, rather than in law:

145. First, Leggatt J appeared to accept this in **Yam Seng** itself at [131]:

> *Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.* (Emphasis added)

146. Second, the Court of Appeal has, in response to Leggatt J's reasoning in **Yam Seng** and other cases, emphasised that English law does not recognise any general principle of good faith in contract, which is difficult to reconcile with the implication in law of a wide requirement of good faith in contractual performance:

(a) In **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland**,[69] Jackson LJ said at [105]: "*…I start by reminding myself that there is no general doctrine of "good faith" in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract: see Horkulak at paragraph 30 and Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB) at paragraphs 120-131. If the parties wish to impose such a duty they must do so expressly*" (Emphasis added).[70] The reference to **Yam Seng** includes the passage quoted immediately above, where Leggatt J accepted that implication in law was limited to employment contracts and fiduciary relationships.

(b) In **Globe Motors v TRW Lucas Varity Electric Steering** at [67]-[68],[71] Beatson LJ stated (obiter)[72] as follows:

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[69] [2013] EWCA Civ 200.
[70] Lewison LJ agreed with Jackson LJ's reasoning: see [132]. Beatson LJ agreed as to the outcome and provided reasoning of his own, not touching on this specific point.
[71] [2016] EWCA Civ 396.
[72] Underhill and More-Bick LJJ agreed with Beatson LJ but made no reference to his comments on implying duties of good faith.

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> *One manifestation of the flexible approach referred to by McKendrick and Lord Steyn is that, in certain categories of long-term contract, the court may be more willing to imply a duty to co-operate or, in the language used by Leggatt J in Yam Seng PTE v International Trade Corp Ltd [2013] EWHC 111 (QB) at [131], [142] and [145], a duty of good faith. Leggatt J had in mind contracts between those whose relationship is characterised as a fiduciary one and those involving a longer-term relationship between parties who make a substantial commitment. The contracts in question involved a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and expectations of loyalty "which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements". He gave as examples franchise agreements and long-term distribution agreements. Even in the case of such agreements, however, the position will depend on the terms of the particular contract. Two examples of long-term contracts which did not qualify are the long-term franchising contracts considered by Henderson J in Carewatch Care Services Ltd v Focus Caring Services Ltd and Grace [2014] EWHC 2313 (Ch) and the agreement between distributors of financial products and independent financial advisers considered by Elisabeth Laing J in Acer Investment Management Ltd and another v The Mansion Group Ltd [2014] EWHC 3011 (QB) at [109].*
>
> *This is not the occasion to consider the potential for implied duties of good faith in English law because the question in this case is one of interpretation or construction, and not one of implication. It suffices to make two observations. The first is to reiterate Lord Neuberger's statement in Marks and Spencer PLC v BNP Paribas Security Services Trust Co (Jersey) Ltd (see [58] above) that, whatever the broad similarities between them, the two are "different processes governed by different rules". This is, see the statement of Lord Bingham in Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472, at 481 cited by Lord Neuberger, because "the implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision". The second is that, as seen from the Carewatch Care Services case, an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract.* (Emphasis added)

(c) In **MSC Mediterranean Shipping Co v Cottonex Anstalt**,[73] Moore-Bick LJ (with whom Tomlinson LJ and Keehan J agreed) said as follows at [45], addressing the approach taken by Leggatt J at first instance:

> *The judge drew support for his conclusion from what he described as an increasing recognition in the common law world of the need for good faith in contractual dealings. The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to*

[73] [2016] 2 C.L.C. 272.

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> *it in order to decide the outcome of the present case. It is interesting to note that in the case to which the judge referred as providing support for his view, Bhasin v Hrynew 2014 SCC 71; [2014] 3 SCR 494, the Supreme Court of Canada recognised that in Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland [2013] EWCA Civ 200 this court had recently reiterated that English law does not recognise any general duty of good faith in matters of contract. It has, in the words of Bingham LJ* in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433, 439, preferred to develop 'piecemeal solutions in response to demonstrated problems of unfairness', although it is well-recognised that broad concepts of fair dealing may be reflected in the court's response to questions of construction and the implication of terms. In my view the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some 'general organising principle' drawn from cases of disparate kinds. For example, I do not think that decisions on the exercise of options under contracts of different kinds, on which he also relied, shed any real light on the kind of problem that arises in this case. There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction, against which the Supreme Court warned in* Arnold v Britton [2015] UKSC 36; [2015] AC 1619. (Emphasis added)

147. Third, several first instance Judges have taken a similar approach and stated that **Yam Seng** does not reflect any general principle requiring the implication of good faith obligations in commercial agreements: see **Hamsard 3147 v Boots UK**[74] (Norris J) at [86]; **Greenclose v National Westminster Bank**[75] (Andrews J) at [150]; **Carewatch Care Services v Focus Caring Services**[76] (Henderson J) at [108], **Myers v Kestrel Acquisitions**[77] (Sir William Blackburne) at [40], [43] and [50] and **Monde Petroleum v WesternZagros**[78] (Richard Salter QC).

148. We should stress, however, that in spite of all these points, Leggatt LJ recently said as follows, in **Al Nehayan** at [174]:

> *In the circumstances the contract made between these parties seems to me to be a classic instance of a relational contract. In my view, the implication of a duty of good faith in the contract is essential to give effect to the parties' reasonable expectations and satisfies the business necessity test which Lord Neuberger in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742, [2015] UKSC 72 at paras 16 to 31 reiterated as the relevant standard for the implication of a term into a contract. I would also reach the same conclusion by applying the test adumbrated by Lord Wilberforce in Liverpool City Council v Irwin [1976] AC 239 at 254 for the implication of a term in law, on the basis that the nature of the contract as*

[74] [2013] EWHC 3251.
[75] [2014] EWHC 1156.
[76] [2014] EWHC 2313.
[77] [2015] EWHC 916.
[78] [2017] 1 All E.R. (Comm) 1009.

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a relational contract implicitly requires (in the absence of a contrary indication) treating it as involving an obligation of good faith. (Emphasis added)

149. At the Common Issues trial, we will invite the Court to differ from Leggatt LJ's reasoning in the underlined passage and to hold that relational contracts do not invite the implication in law of a term requiring good faith. We would anticipate succeeding in this argument:

(a) The views of the Court of Appeal are tolerably clear from the passages above and, in our view, represent the law.

(b) It would be a very significant departure from orthodoxy for English law to recognise the good faith term as one to be implied in law in a new (and loosely defined) category of commercial agreement.

(c) It is doubtful that "relational contracts" is a sufficiently clear category of agreement to attract terms implied in law: see the discussion in Lewison, The Interpretation of Contracts at [6.02], beginning "*It must be recognised...that the relationship giving rise to the implication of a term as an incident of that relationship must be defined with care.*"[79]

(d) Leggatt LJ's own view is that, where a duty of good faith is implied into a relational contract, the content of the duty can vary considerably. In **Yam Seng** at [142]-[150] he indicated that, although it comprises at least a "*core requirement to act honestly*", it can sometimes include a duty of fair dealing and/or a duty to share information. At [148], he said that "*the content of the duty is heavily dependent on context and is established through a process of construction of the contract*". Little or no guidance has been given in the cases as to the particular contexts and constructions that would justify the implication of particular duties.[80] We find it difficult to reconcile this approach with a general principle requiring such duties to be implied in relational contracts.

(e) In our view, the persuasive value of Leggatt LJ's reasoning on this point in **Al Nehayan** is reduced by his failure to make reference to the relevant parts of the

[79] We note the refusal to imply a term in law as a necessary incident of a section 106 agreement in **Hampshire County Council v Beazer Homes** [2010] EWHC 3095 (QB) because, although there may be similarities between section 106 agreements, all such agreements are specific to the requirements of the parties and the circumstances of the development project at issue (judgment at [65]).

[80] In **Al Nehayan** at [175], Leggatt LJ refused to spell out what the duty of good faith involved. However, at [167] he indicated that it was concerned with integrity and a spirit of cooperation and at [170] he referred (with implicit approval) to Beatson LJ's characterisation of the duty of good faith in **Globe Motors** as "*essentially a duty to cooperate*".

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Court of Appeal's analysis in the cases cited above,[81] by his failure to address the reasoning of the first instance Judges in the cases cited above and by his failure to recognise that it reverses his own conclusion as to implication in law at [131] in **Yam Seng**, quoted above. His reasoning appears to have no juridical basis. It is difficult to resist the inference that, in **Al Nehayan**, he was overcome by enthusiasm for his relational contract doctrine.

(f) Finally, Leggatt LJ's statement that a good faith term may not be implied into a relational contract where there is "*contrary indication*" in the agreement is inconsistent with implication in law (if we assume that a "*contrary indication*" can be found in something less than clear exclusion by the express words of the contract). Terms implied in law are implied as "*necessary incidents*"/ "*legal incidents*" of specific types of legal relationships and so fall to be implied in all such contracts unless expressly excluded: see **Geys** (quoted above), **Photo Productions v Securicor Transport** [1980] A.C. 827 at 848 *per* Lord Diplock and The Interpretation of Contracts at [6.01] and [6.02]. By contrast, there are terms that may often, but not always, be implied into particular types of contract; whether or not such terms are implied depends on the express terms and context of the particular agreement at issue; and they are, even if very frequently implied, nonetheless implied in fact and so only where strictly necessary: see, e.g., **Clin v Walter Lilly & Co**[82] *per* Lindblom LJ at [26][83]. The bulk of Leggatt LJ's reasoning is far more consistent with the good faith term being of the kind discussed in the **Clin** case, rather than a term to be implied in law.

150. In **Monde Petroleum,** Richard Salter QC said at [249]: "*...A duty of good faith is implied by law as an incident of certain categories of contract... However, in all other categories of contract...such a duty will only be implied where the contract would lack commercial or practical coherence without it and where all the other requirements for implication are met*". We agree.

Question (c): Should the good faith term be implied in fact?

151. For many of the reasons set out above, our view is that it would be wrong to imply a term as to good faith into the SPMC and the NTC. The strongest considerations are, in our opinion, as follows:

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[81] Leggatt LJ referred to Beatson LJ's judgment in **Globe Motors**, saying that he had "*endorsed the view that, in certain categories of long-term contract of the kind mentioned in the Yam Seng case, courts may be more willing to imply a duty of good faith*": see [170]. With respect to Leggatt LJ, that is not a fair or accurate summary of the relevant part of Beatson LJ's judgment.
[82] [2018] EWCA Civ 490.
[83] Flaux and Davis LJJ agreed.

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(a) The parties have set out the nature and extent of their legal relationship in the express terms of the agreements and, in particular, by choosing a relationship of principal and agent (with the common law incidents of that relationship). There is, unlike in **Yam Seng** and **Al Nehayan**, no clear gap to be filled by the implication of a general term as to the nature of the contractual relationship.

(b) The contracts do not lack practical or commercial coherence without the implication of the alleged term (**Marks and Spencer**), and the term cannot be said to be necessary, applying any of the other well-established tests. For example, it is far from clear that, had the question of including such a term been raised with the parties, either of them would have accepted such a general obligation, rather than seeking to incorporate the principle of good faith by more specific express provision, including so as to make clear how it would operate with and alongside the detailed express terms.

(c) The consideration of the "good faith" implied term would take place against the backdrop that the Stirling v Maitland and Necessary Cooperation Terms are already incorporated into the contract. The Necessary Cooperation Term, in particular, covers some of the same ground as the good faith implied term would cover, making it much harder to justify the additional implication of a good faith term.

152. This is a developing area of law in which one judge in particular appears to have made it his mission to establish a doctrine of good faith in relational contracts whose scope is uncertain but potentially very wide. The SPMC and NTC are not contracts between sophisticated commercial parties negotiating at arm's length and enjoying the benefit of legal advice. What is more, the Subpostmaster/Post Office relationship include features which have been said in the cases to be relevant to determining whether a relational duty of good faith is to be implied. In these circumstances, there is a risk that the Managing Judge may find that the SPMC and NTC are contracts into which such a duty should be implied. On the authorities, our view is that this is unlikely. But even if the Managing Judge were to imply a duty of good faith, there is scope for argument as to precise content of that duty, in particular how far it extends beyond what Leggatt J has described as "*the core obligation to act honestly*".

153. In light of the cases cited above, we would anticipate seeking (and obtaining) permission to appeal to the Court of Appeal were the Managing Judge to imply a duty of good faith. Conversely, the Claimants may well seek permission to appeal if he refuses to do so.

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G: Agency and Duties to Account (Common Issues 10 - 13)

Common Issues 10 and 11

(10) Was Post Office the agent of Subpostmasters for the limited purposes at GPOC paragraphs 82 and 83?

(11) If so, was the Defendant thereby required to comply any or all of the obligations at GPOC paragraph 84?

154. The Claimants contend at GPoC, para 82 that Post Office was their agent "*for the purposes of rendering and making available accounts and/or was under an equitable duty to render accounts*". They go on to plead, in the alternative, that Post Office acted both for itself and, simultaneously, as agent for the Claimants in "*effecting, reconciling and recording transactions*" (para 83). The Claimants plead various duties that Post Office is therefore alleged to have to owed to them as a result of the agency relationship (para 84).

155. Post Office contends that the contracts make clear that Subpostmasters were agents of Post Office, and they owed Post Office the contractual, fiduciary and other duties that accompany that status. They were under a duty to account to Post Office, not the other way around. Post Office pleads that it did not agree to act as agent of Subpostmasters for any purpose and that it did not effect transactions on their behalf or commit them to transactions with third parties. Post Office did not undertake any of the characteristic duties of an agent and did not agree to be subject to any of those characteristic duties.

156. In our view, these issues are relatively straightforward. Essentially for the reasons that Post Office has pleaded, we do not consider the Claimants to have a good prospect of succeeding on these issues.

157. We consider the following to be clear:

    (a) Absent an express agreement to act as agent for Subpostmasters, Post Office will not be treated as an agent (and so will not be fixed with the duties of an agent) unless it has, as a matter of substance, undertaken one or more of the characteristic functions of an agent. This is an objective question – it is irrelevant that a Subpostmaster may have thought Post Office was undertaking such functions if it was not in fact doing so.

    (b) The defining characteristic of a fiduciary is that, within the scope of the relationship, he is required to subordinate his own interests and to act solely in the interests of his principal: see Snell's Equity, [7-005]- [7-006].

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(c) Such a relationship of subordination may arise where the putative fiduciary undertakes to act on behalf of another person (the putative principal) in the sense of assuming responsibility for that other person's affairs. A classic example of this is where an agent is authorised to enter into agreements that bind his principal (and not himself) or otherwise to conduct his principal's business (by, for example, selling goods that belong to his principal).

158. The situation here is very different. Post Office did not agree at any point to subordinate its own interests to those of the Subpostmasters. Post Office maintained accounts and reconciled and recorded transaction data because the accounts in question were the accounts of its own business, conducted through the agency of the Subpostmaster but involving its own transactions with third parties, its own stock and its own cash. It did not do any of these things on behalf of the Subpostmaster or for his benefit; it makes no sense to describe Post Office as conducting the affairs of the Subpostmaster or subordinating its interests to those of the Subpostmaster in circumstances where the business is Post Office's business.

159. The Claimants can argue that they trusted and relied upon Post Office properly to effect and record transactions for which they may be held responsible as agent. But it is not enough unless the Claimants can show that Post Office undertook to carry out those activities on their behalf, subordinating its interests to theirs. If Subpostmasters had contracted for the provision of accounting data storage services from a company in the business of providing such services, that service provider would not be an agent.

160. Further, the express appointment of Subpostmasters as agents to Post Office makes it more difficult to impose a fiduciary relationship in the opposite direction, in relation to similar and even overlapping functions (most obviously, accounting). Anything in the contractual relationship that might otherwise provide some support for the idea that Post Office was undertaking functions that may be characteristic of a fiduciary has to be read in light of the parties' express choice of a relationship of principal-agent in the other direction. It is, in our view, very difficult to argue that the proper analysis of the parties' relationship (including, crucially, the express terms of their contract) is that Post Office was undertaking to act on behalf of the Subpostmaster, subordinating its interests to theirs.

161. It would follow that Post Office was not under any of the obligations identified at GPoC, para 84.

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Common Issues 12 and 13

(12) Was the extent and effect of the agency of Subpostmasters to Post Office such that the principles of agency alleged at Defence 91 and 93(2) and (3) applied as Post Office contends?

(13) Did Subpostmasters bear the burden of proving that any Branch Trading Statement account they signed and/or returned to Post Office was incorrect?

162. In its GDXC, Post Office relies on the following principles:

(a) As its agents, Subpostmasters owed fiduciary duties to Post Office and a duty to account to Post Office (GDXC, para 91).

(b) Where an agent renders an account to his or her principal, he is bound by that account unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account that he should be permitted to correct (GDXC, para 93(2)).

(c) Where an agent deliberately renders a false account to his or her principal, in relation to the matters covered by that account the Court should make all presumptions of fact against that Subpostmaster as are consistent with the other facts as proven or admitted (GDXC, para 93(3)).

163. The Claimants contend, amongst other things, that these principles of agency and accounting do not apply because "*the relationship was quite distinct from the factual premise which has historically given rise to the application of*" those principles: Generic Reply, para 60.1. They plead in the Individual Particulars of Claim that the "*analogy with traditional accounting by an agent…is misplaced*": see, e.g., Abdulla, para 83. They accordingly deny that they were under a duty to account to Post Office.

164. The starting point is that these principles are well-established. As to the first principle – the agent is bound by his account unless he discharges the burden of showing it to be wrong - see Bowstead & Reynolds on Agency (20th Edition), at [6-097] and **Post Office v Castleton**.[84] As to the second principle, see Snell's Equity (33rd Edition), at [20-018] and, more generally, the discussions in **Malhotra v Dhawan**[85] and **Zabihi v Janzemini & Ors**.[86]

165. The Claimants do not appear to dispute that these principles apply where an agent accounts to his principal. Instead, the argument is that there are factors in the present

[84] [2007] EWHC 5 (QB).
[85] [1997] 8 Med. L.R. 319.
[86] [2009] EWCA Civ 851.

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case that make the application of these principles inappropriate. Abdulla, para 82 identifies the following matters:

(a) "*Subpostmasters were required to submit accounts to the Defendant in circumstances in which they were unable to ascertain the cause (or reality) of apparent shortfalls and the Claimant did so....*".

(b) "*Subpostmasters were sometimes told to sign off accounts which did not reflect their contemporaneous understanding...*"

(c) "*The Defendant's employees posted transactions within the Branch which directly affected the Branch accounts...*".

166. We do not believe that these allegations, even if made good, could lead to the total exclusion of the principles on which Post Office relies, for the following reasons.

167. First, it is strongly arguable that the Claimants' basic approach is misconceived:

(a) In our view, the question is not whether the principles of agency law are, in some loose sense, appropriate to be applied in this case. It is common ground that Subpostmasters are agents to Post Office and were liable to account to Post Office. The principles on which Post Office relies are incidents of that expressly chosen relationship.[87] The question is therefore whether the parties, despite choosing a relationship of agent/principal, nonetheless excluded the principles that flow from that choice as incidents of the legal relationship, whether expressly or by implication.

(b) The Claimants have not identified anything in the contracts that excludes or modifies the ordinary incidents of the agent/principal relationship that the parties chose. In fact, the contracts are (at least generally) consistent with and reflect the common law principles as to accounting (it is not only agents who owe a duty to account). There is nothing in the Subpostmaster contracts to support an argument that the parties chose to exclude the ordinary principles of agency and accounting.

168. Second, in our view, the fact (if true) that Subpostmasters were sometimes told to sign off accounts that did not reflect their contemporaneous understanding would be taken into account in the operation of the principles, but only in the particular instances where this had occurred. Post Office could hardly contend than presumptions should be drawn against an agent who signs off on false accounts in circumstances where it told him to

[87] To the extent relevant, the contracts are to be interpreted in the light of the principles of law discussed above: see paras 20 to 21 above in relation to matrix of fact.

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sign the accounts in the knowledge that they were false. But that is a matter of applying (or not applying) a general principle taking into account the particular facts of a particular dispute, and we do not see why the need to make due allowance for unusual facts should alter the analysis in the ordinary case. The same can be said of the fact (if true) that Post Office employees sometimes secretly posted transactions within the Branch – if the Subpostmaster was unaware of this, it could be a relevant factual circumstance and might lead to one or other of the principles having no effective application to the disputed accounts and/or specific disputed entries. But we do not agree that this should prevent the operation of the principle in cases where Post Office had not posted transactions within the branch.

169. Third, the principles of agency law on which Post Office relies are not inconsistent with the principles by which factual disputes are determined in commercial litigation outside the agency law context. As a general rule, a party cannot lightly call into question the accuracy of a document that it has earlier verified to be true. Similarly, a party can expect to face an uphill battle where its own dishonest (or deliberate) conduct has made a factual dispute difficult or practically impossible to determine. The agency principles on which Post Office relies are consistent with the usual principles and intuitions that guide judicial fact-finding more generally. The Court will not, in our view, regard them as inappropriate to the Post Office/Subpostmaster relationship merely because the circumstances of that relationship differ (to some extent or sometimes) from a "traditional" accounting relationship.[88]

170. We therefore think it likely that Post Office will succeed on these issues. It will, of course, be a more difficult question how precisely to apply the principles to difficult facts (such as, for example, where a Subpostmaster submits an account that is expressly said to be subject to a dispute or he otherwise seeks to qualify his confirmation of the account).

H: Supply of Goods and Services Act 1982 (Common Issue 4)

Did Post Office supply Horizon, the Helpline and/or training/materials to Subpostmasters (i) as services under "relevant contracts for the supply of services" and (ii) in the course of its business, such that there was an implied term requiring Post Office to carry out any such services with reasonable care and skill, pursuant to section 13 of the Supply of Goods and Services Act 1982?

171. Section 13 of the Supply of Goods and Services Act 1982 provides as follows:

[88] We think the Claimants may well overstate the extent to which the accounting relationship in this case differs from the norm. We are not persuaded that it is very unusual for an agent to rely in preparing his account on information and cooperation provided by the principal. This is a point on which further research may be useful.

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> *"In a [relevant contract for the supply of a service] where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill."*

172. The relevant part of the statutory definition is as follows, at section 12:

> *"(1) In this Act a "[relevant contract for the supply of a service]" means, subject to subsection (2) below, a contract under which a person ("the supplier") agrees to carry out a service [, other than a contract to which Chapter 4 of Part 1 of the Consumer Rights Act 2015 applies.] ...*
>
> *(3) Subject to subsection (2) above, a contract is a [relevant contract for the supply of a service] for the purposes of this Act... whatever is the nature of the consideration for which the service is to be carried out."*

173. The core definition ("*a contract under which a person ("the supplier") agrees to carry out a service*") does not advance matters greatly.[89]

174. However, case law has established that contracts will only fall within this provision insofar as they involve one party selling a service to another party (although, pursuant to section 12(3) of the Act, there are no limits as to what the consideration provided in exchange for the service has to be).

175. **Euroption Strategic Fund v Skandinaviska Enskilda Banken**[90] involved a claim brought by an investment fund against its bank. The fund failed to deposit a contractually mandated margin payment, following which the bank exercised its contractual right to close out the fund's portfolio. The fund contended that the bank had carried out the close-out negligently. One issue was whether, in carrying out the close-out, the bank was bound by a term implied pursuant to section 13 of Act.

176. At [111]-[113], Gloster J concluded that no such term should be implied:

> *111 In my judgment, SEB's rights under the Mandate to impose limits on Euroption's activities under clause 6, to close out Euroption's positions under clause 11, or to refuse instructions under clause 12 (c) cannot be characterised as "services" within the definition contained in section 12 (1) of the Act. The definition in section 12(1) of "contract for the supply of a service" is (subject to exclusions) "a contract under which a person ('the supplier') agrees to carry out a service". Thus the "implied term about care and skill" imposed by section 13 of the Act only applies to services agreed to be provided under a contract for services and not to all rights and obligations under such a contract. Section 13 provides:*

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[89] Benjamin's Sale of Goods, [14–120], notes that the "*precedent set by the 1982 Act*" is not to "*define a "contract for a service" beyond stating that it does not include a contract of employment or apprenticeship.*" See also Chitty, [38–528].
[90] [2012] EWHC 584 (Comm).

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> *"In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill."* (Emphasis added)
>
> *112 The Mandate contemplated that two types of services might be provided by SEB. These were set out at clause 6 (subject to the provisions of clause 7) as follows:*
>
> > *i) advisory services regarding dealing in exchange traded futures and options (and securities where the securities transaction in question was ancillary to a transaction in futures or options); and*
> >
> > *ii) settlement and exchange services whereby SEB acted as clearing broker for trades executed by or on behalf of Euroption.*
>
> *These services were to be provided in the course of SEB's business and, accordingly, section 13 of the Act would have applied to the provision of them.*
>
> *113 However, there is no basis in the Act or otherwise to suggest that a similar implied term applied to SEB's right to impose limits, its right to refuse instructions, or its right to close out, since these were not on any basis services which SEB had agreed to carry out under the Mandate. First, it is difficult to see how, in ordinary language, the exercise of such rights by SEB, at its discretion, for the purposes of protecting its own position, could be characterised as a "service" being provided "to" Euroption. Even if, contrary to my view, the exercise of such rights could arguably be so characterised, since SEB had not agreed under the Mandate, to provide any such "service", it is difficult to see how rights exercisable at SEB's discretion could be said to be "services" for the purpose of section 13.* (Emphasis in original)

177. Field J reached a similar conclusion in **Marex Financial v Creative Finance**.[91] That case involved a broker seeking money due on its account with the defendant. The broker had closed out the defendant's account, and, again, one issue was whether in carrying out the close-out, the bank was bound by a term implied pursuant to section 13 of the Act. Field J said at [70]-[71]:

> *70 Mr Cox argued that s. 13 is not confined to the performance of "primary" services to be supplied under the contract but applies also to services that are ancillary to the primary subject matter of the contract, whether that subject matter concerns the sale of goods or the provision of a service. In his submission, the closing out of positions forms part of the wider process by which Marex provided its clients with access to the FX markets. Positions that were built up also need to be closed out, whether forcibly or otherwise. It is artificial to sever the close-out from the parties' wider relationship.*
>
> *71 I decline to accept Mr Cox's submissions. In my judgement, the implication under Section 13 is in respect of the particular service which the supplier has agreed to carry out pursuant to the contract, and the exercise by Marex of its right to close out the Defendants' positions was not a "service" that Marex had agreed to carry out for*

[91] [2013] EWHC 2155 (Comm).

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> *the Defendants. Rather, it was a right that Marex elected to exercise in its own interests and for its own protection. This was the view of Gloster J in Euroption (paras 111, 113 and 114) and I agree with her analysis.* (Emphasis added)

178. In **DC Accountancy Services v Education Development International**,[92] the question was what duties were owed by a company (EDI) which awarded qualifications when it carried out assessments of (and imposed sanctions on) a business school (DAS). Andrews J held at [31]-[32]:

> *31 ... Section 13 applies only to the services that one party agrees to provide to the other contracting party, so I have to ask myself: "Was the Recorder wrong in his analysis that no service was provided under this contract to DCAS?" Well, what service was? On one view the provision of a certificate and even the registration might be regarded as a service, but no complaint is made about those matters. The complaint is about the manner in which EDI exercised its regulatory functions. The regulatory functions were something that there was already an obligation to carry out, as a result of the Code being imposed upon EDI, and therefore the obligation arose regardless of, and independently of, any contract with DCAS. EDI were not providing any service in relation to the supervising and regulation of accredited bodies such as DCAS.*
>
> *32 Moreover, even if their regulatory obligations could be so characterised, they were not supplying those services to DCAS or equivalent bodies. If they were supplying "services" to anybody, which is highly questionable, it would be to the regulator. But they were not being paid by DCAS for sending out verifiers to make sure that the people they accredited were doing what they were supposed to be doing, and that aspect of EDI's function was no part of the parties' contractual bargain. That is a plain and short answer to the contract point.* (Emphasis added)

179. The essence of the reasoning in these cases appears to be that the party seeking to imply a term pursuant to section 13 must identify relevant provisions in the contract by which the other party has specifically agreed, in exchange for consideration, to assume the obligation to provide a relevant service to and for the benefit of the first party. It is necessary to "*plead and prove a contract under which the Defendant has agreed to provide a service that included the provision of*" the relevant service: **Finch v Lloyds TSB Bank**[93], *per* HHJ Pelling QC at [49].

180. GPoC, para 63A is arguably deficient in this regard. It does not plead any particular provision of any contract in which Post Office assumed an obligation to provide any service, whether in relation to Horizon, the helpline or training / materials. This omission is particularly striking in relation to the NTC, as Part 2, paras 1.6.1 is an

[92] [2013] EWHC 3378 (QB).
[93] [2016] EWHC 1236 (QB).

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obvious candidate to be argued to amount to an obligation to provide a service, namely the Helpline.[94]

181. Notwithstanding that clause, on balance our view is that these contracts should not be classified as contracts under which Post Office has agreed to provide the alleged services to Subpostmasters. Ultimately, the test is impressionistic. In relation to Horizon, training and the Helpline, our view is that it is not an accurate characterisation of the contractual bargain to see Post Office as providing services to Subpostmasters, for the following reasons:

    (a) The putative "services" provided by Post Office are not an ultimate outcome or objective of the commercial bargain at large – they are not what Subpostmasters are contracting for at a commercial level.

    (b) The putative "services" are merely facilitative of the more substantial exchange under which it is Subpostmasters that provide the services and Post Office that pays the remuneration. Their essential function is to operate as part of a mechanism that enables Subpostmasters to fulfil their side of the contractual bargain.

182. We stress that none of the authorities cited above deals with a situation that is closely analogous to that here. There is significant scope for argument in relation both to the NTC and the SPMC. It follows that there is significant risk to Post Office on this issue.

183. However, we consider that a principle may be drawn from the cases. Under that principle, the question is whether Horizon, the Helpline and training were services which, in return for consideration, Post Office assumed a contractual obligation to provide. On balance, our view is that they are not.

I: Onerous or Unusual Terms (Common Issues 5 and 6)

(5) Were any or all of the express terms in the GPOC paragraphs listed below onerous and unusual, so as to be unenforceable unless Post Office brought them fairly and reasonably to the Subpostmasters' attention?

para 51.1 and 51.3 (rules, instructions and standards);

para 52.1 and 52.3 (classes of business);

para 54.1 and 54.3 (accounts and liability for loss);

para 56.1.a. and 56.2.a (assistants);

para 60.1 and 60.3 (suspension);

[94] See also Part 2, paras 2.3 and 2.5, which deal with the training of assistants (considered in paras 77 to 88 above). There are also terms requiring Post Office to provide the use of equipment, including the Horizon equipment (which it also promises to maintain): see Part 4.

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para 61.1 and 61.3 (termination).

para 62.1 and 62.3 (no compensation for loss of office)

(6) If so, what, if any, steps was Post Office required to take to draw such terms to the attention of the Subpostmaster?

184. The essential question under Common Issues 5 and 6 is whether, in order for Post Office to be entitled to rely on the relevant clauses of the SPMC and NTC, it needed to draw those clauses and/or their effect to the attention of prospective Subpostmasters before they entered into their contracts with Post Office. In summary, the clauses in question:

    (a) Give Post Office broad discretion to add to the Subpostmasters' obligations (the clauses listed at GPOC, paras 51.1(d), 51.3(b), 51.3(c), 52.1 and the latter part of 51.3(e)).

    (b) Identify large numbers of documents containing further terms with which the sub-postmasters are obliged to maintain familiarity (para 51.3(a)).

    (c) Impose broad liability for the actions of those working under the Subpostmasters (paras 54.1(b) and (c), 54.3(b), (d) and (e), 56.1(a) and 56.2(a)).

    (d) Give Post Office wide-ranging powers to suspend or terminate Subpostmasters' appointments without paying compensation, and to withhold or forfeit Subpostmasters' remuneration (paras 60.1, 60.3, 61.1, 61.3(b), 62.1 and 62.3).

185. The Claimants contend that, in accordance with the principle discussed and applied in **Interfoto Picture Library v Stiletto Visual Programmes**,[95] each of the above terms was onerous and unusual and so unenforceable unless brought fairly and reasonable to their attention: see GPoC, para. 66.

186. Post Office contends that none of the terms have that character, that the **Interfoto** principle has no application to them (because they form part of a written contract entered in a business to business context and in anticipation of a commercial relationship) and that it is a matter for any Claimant to prove that he did not obtain or have access to the written terms: see GDXC, para. 108.

187. To some extent, the analysis will depend on the individual circumstances of each Claimant. In our view, however, it is likely that Post Office will be able to rely on the relevant clauses if it provided the relevant Claimants with copies of their Subpostmaster contracts before they entered into them. If it did not do so, matters are less straightforward.

[95] [1989] QB 433.

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Principles of law as to incorporation and enforceability

188. In general, a party will be bound by the terms of the contract which he has signed. However, complications arise where (a) other terms, not present in the primary document he has signed (generally one party's standard terms), are incorporated by reference, and/or (b) onerous and unusual terms are purported to be included in the contract.

189. The analysis proceeds in three stages. First, one asks whether, applying ordinary principles of construction, the given terms are incorporated. Next, one asks whether, on the premise that the given terms are incorporated, any of those terms are sufficiently onerous and unusual so as to require special notice to have been given to the counterparty affected by them. Third, if the answer to both of the first two questions is 'yes', one asks whether adequate notice of the onerous and unusual terms was in fact given. Only the second and third questions are squarely raised by Common Issues 5 and 6, but to keep the analysis coherent all three questions must be considered.

190. The first question is answered by applying conventional principles of construction. As Toulson LJ put it in **Rooney v SCE Bournemouth**,[96] the ultimate question is how "*reasonable people, i.e. in the position of the parties, would understand the words used*" (at [15]; see also Arden LJ at [25]). Per Christopher Clarke J, in **Habas Sinai v Sometal**,[97] what matters is what the parties, "*on ordinary principles of construction…would be taken to have agreed*" (at [46]).

191. This construction exercise is context-specific. Nonetheless, some general observations can be made about the approach to construction in particular scenarios. The starting point is that "*the clear rule of English law is that clear words of reference suffice to incorporate the terms referred to*": **Circle Freight International Ltd v Medeast Gulf Exports Ltd**[98], per Bingham LJ at p.435. In the same case, Taylor LJ said, at p.433, that:

> *… it is not necessary to the incorporation of trading terms into a contract that they should be specifically set out provided that they are conditions in common form or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and they are available on request. Other considerations apply if the conditions or any of them are particularly onerous or unusual.*

192. So (for terms which are not onerous and unusual) it will generally be enough to clearly state that the terms apply, in particular if those terms are available upon request. This

[96] [2010] EWCA Civ 1364.
[97] [2010] EWHC 29 (Comm).
[98] [1988] 2 Lloyd's Rep 427.

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also applies if the terms are available on a website: **Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd**,[99] per Teare J at [16].

193. On the other hand, this starting point can be departed from. In **Machenair Ltd v Gill and Wilkinson Ltd**,[100] a statement that the terms applied, and were available upon request, was not sufficient. Jackson J found, at [31], that the terms would not have been incorporated, because the terms were "*extensive*", "*not one of the standard forms used within the industry*", were never in fact supplied, and were not summarised in the primary document.

194. Similarly, in **Goodlife Foods Ltd v Hall Fire Protection Ltd**[101] HHJ Stephen Davis said, *obiter* at [38], that had the terms not been sent to the counterparty at the time that the contract was entered into they would not have been incorporated (notwithstanding a statement that they applied):

> *(a) there was no previous contact of any kind between the parties, let alone contact in the course of which Hall Fire had made it clear that it would only deal on its standard terms and conditions or provided a copy to Goodlife; (b) Goodlife was not engaged in the fire protection business; (c) the standard terms and conditions referred to are not industry standard terms; (d) the standard terms and conditions are lengthy and wide-ranging in their subject matter, and include a widely-drafted exclusion clause to which no express reference was made in the quotation. Whilst I accept that Hall Fire had made it clear that it intended to rely on the standard terms and conditions by stating at the end of the quotation that "standard HFS terms and conditions apply", in my view that by itself was not sufficient notice of those standard terms and conditions. At the very minimum the quotation should have made it clear that the standard terms and conditions contained important terms and conditions and either that Goodlife could obtain a copy upon request or a copy was available for view on Hall Fire's company website.*

195. These authorities indicate that the safest method is to send a copy of the terms at the time that the contract is entered into. Beyond that, even for terms which are not onerous, each case must be considered by reference to the particular clause and the particular words of incorporation. By reference to one of the criteria cited in **Machenair**, we note that, at least in some cases, Post Office provided summary documents highlighting key terms before the contracts were entered into: see, e.g., the short conditions of appointment document provided to Alan Bates on 30 March 1998 – Bates, para 12. Mr Bates claims that he believed that these conditions represented the full terms of his contract with Post Office, which is not helpful. However, we note that they included a condition that "*You will be bound by the standard Subpostmasters Contract for services at scale payment offices, a copy of which is enclosed*". Even if that standard Subpostmaster contract was

[99] [2015] EWHC 25 (Comm).
[100] [2005] EWHC 445 (TCC)
[101] [2017] EWHC 767 (TCC)

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not enclosed, a reasonable Subpostmaster might be expected to have satisfied himself as to the content of that document, by requesting a copy.

196. One other feature in certain cases makes incorporation less likely. As HHJ Havelock-Allan QC said in **Sterling Hydraulics Ltd v Dichtomatik Ltd**[102] at [19], "*in appropriate cases words of reference...are capable of incorporating standard terms which are to be found elsewhere*", and "*are more likely to do so in a commercial or business context*". However, as he noted there, it counts strongly against incorporation (indeed, in his, perhaps overstated, words, is "*an end of the matter*") if terms are stated to be included and are in fact not.

197. The case in which this conclusion is most robustly stated (arguably overstated) is **Cubitt Building and Interiors Ltd v Richardson Roofing (Industrial) Ltd**[103] per Akenhead J at [56]:

> *The fact that the pro forma part of the order stated that the Cubitt standard terms were "attached" and they were not attached, point conclusively, simply as a matter of construction, to the proposition that the parties objectively did not intend that those standard terms should be incorporated.* (Emphasis added)

198. The same conclusion was stated, slightly more moderately, in **Poseidon Freight Forwarding Co Ltd v Davies Turner Southern Ltd**.[104] That case involved terms printed on the back of a document which were not transmitted when that document was faxed. Leggatt LJ said, at p.1266, that "*what is more significant is that there was no attempt made to send the [terms], which may be supposed to have been on the back of the document of which the facsimile was sent.*" He also said, at p.1270, that it was significant (and a key point of distinction from other authorities) that the terms were not said to be available upon request. And, at p.1271:

> *This is not a case where a party declares that the terms are available for inspection. It is a case where, on documents sent by fax, reference is made to terms stated on the back, which are, however, not stated or otherwise communicated. Since what was described as being on the back was not sent, it was a more cogent inference that the terms were not intended to apply.*

199. A similar conclusion was reached, on similar facts, by Ramsey J in **P4 Ltd v Unite Integrated Solutions PLC**[105] at [53] to [54].

200. A counterweight to these cases is **Barrier Ltd v Redhall Marine Ltd**.[106] In that case, the relevant terms were stated to be on the back of a specified purchase order, but they

[102] [2006] EWHC 2004 (QB).
[103] [2008] EWHC 1020 (TCC).
[104] [1996] CLC 1264.
[105] [2006] EWHC 2640 (TCC).

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were not printed on that particular order (although they were printed on others). Nonetheless, HHJ Behrens said, at [27]:

> *I am content to assume (without deciding) that the purchase order sent to Barrier had no conditions on the back. For some unexplained reason the wrong copy was sent or given to Barrier. However a reasonable person reading clause 10 of the subcontract would have no doubt that CIL's standard terms were incorporated. The fact that they were not on the back of the purchase order does not affect this. It would, at all times have been open to Barrier to request a copy of the terms if they had wanted to.*

201. The judge did not cite the previous authorities (especially **Poseidon** and **Cubitt**) that appear to contradict this result. It is of course possible that the same or similar contractual terms can apply differently in different factual contexts, but the judge here did not indicate that there was anything particular to the facts of this case which led him to his conclusion: he simply referred to "*a reasonable person*". If necessary, we will seek to rely on this case, although it appears to run counter to the weight of the authorities. In any event, it can be argued with some force that the Subpostmaster context is a stronger context, given the value and importance of the Subpostmaster contract to the Subpostmaster and given the fact that the Subpostmaster/Post Office relationship is not capable of being governed by a summary conditions of appointment document.

202. In conclusion, if terms are not set out in the primary document signed, and are not unusual and onerous, they will generally be incorporated if they are provided at the time of contracting or are stated to be available upon request. They will often not be incorporated if they are, incorrectly, stated to be enclosed with the primary document. In that situation, a range of other, more-nuanced factors may need to be considered on a case-by-case basis.

203. The next question is what difference it makes if the terms in question (whether included in a separate document, or in the primary contractual document) are unusual and onerous. The relevant principle is set out in Chitty on Contracts [13–015]:

> *Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention.*

204. If the party tendering the document cannot show this, the clause in question will either be found never to have formed part of the contract, or (what amounts in practice to the same

[106] [2016] EWHC 381.

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conclusion) the other party will be relieved from liability under that clause: **Kaye v Nu Skin**,[107] per Kitchin J at [20].

205. The application of the two elements of the test – (i) whether a term is "*onerous and unusual*"[108] and (ii) whether it has been brought "*fairly and reasonably*" to another party's attention – is fact-specific.[109]

206. Moreover, the "*fair and reasonable*" standard as to notice is a flexible one in that the more onerous and unusual the clause is, the more notice is required: see **Thornton v Shoe Lane Parking**,[110] per Megaw LJ at pp.172-173; **Interfoto**, per Bingham LJ at p.433; and **O'Brien v MGN**,[111] per Hale LJ at [23] ("*the words 'onerous or unusual' are not terms of art. They are simply one way of putting the general proposition that reasonable steps must be taken to draw the particular term in question to the notice of those who are to be bound by it and that more is required in relation to certain terms than to others depending on their effect*"). Denning LJ expressed the point as follows in **Spurling (J) v Bradshaw**,[112] at p.466:

> *...the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.*

207. To similar effect, in **Allen Fabrications** v **ASD**,[113] HHJ Waksman QC said, at [61]:

> *The assessment of fairness and reasonableness here is clearly fact-sensitive and regard must be had in particular to (a) the nature of the clause (b) what actual steps were taken to draw it to the other party's attention (c) the character of the parties and (d) their particular dealings.*

208. It is highly relevant that these clauses arise in a purely commercial context. In **Sumukan** v **Commonwealth Secretariat**,[114] the Court of Appeal was faced with the submission that "*it would be an unusual and onerous term in a contract that an arbitration be conducted by a panel wholly appointed by one side and under statutes capable of being changed at any time by that one side*", and that "*such terms would not be of contractual*

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[107] [2009] EWHC 3509 (Ch).
[108] A term that is merely unusual is not sufficient to engage the rule: **HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co** [2001] EWCA Civ 735, *per* Rix LJ at [211].
[109] But see Lawson, Exclusion Clauses and Unfair Contract Terms (12th Edition), at p.26: "Although each case must be judged on its individual facts, the trend has been to find that a disputed clause is not unusual or onerous".
[110] [1971] 2 QB 163.
[111] [2001] EWCA Civ 1279.
[112] [1956] 1 WLR 461.
[113] [2012] EWHC 2213 (TCC).
[114] [2007] EWCA Civ 1148.

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affect if they were not drawn to Sumukan's attention" (at [9]). Waller LJ dismissed this argument in the following terms:

> *This was a commercial contract. True, Sumukan had no choice as to the terms of the contract so far as arbitration was concerned but that is a common feature of and the reality of many commercial contracts. Sumukan are not a consumer with the protection of consumer legislation and are bound by the terms of the contract they made.*

209. Similarly, in **Carewatch Care Services** v **Focus Caring Services**,[115] Henderson J said as follows, at [84]:

> *The relevant principle of law is that it may in certain circumstances be unfair or unreasonable to hold a person bound by a written contractual term of an unusual and stringent, or particularly onerous, nature, unless it has fairly been brought to that person's attention: see Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] 1 QB 433 (CA) at 438F-439A per Dillon LJ and 439H-445C per Bingham LJ. Questions of this nature typically arise in a consumer context, where the offending provision is hidden in the small print and the consumer has no option but to contract on the proffered terms. The issue may, however, arise in other types of contract, although it is always necessary to have full regard to the context and the respective bargaining positions of the parties.*

210. Against that background, the argument that these terms, or at least some of them, were too onerous to be incorporated (or enforceable against the Subpostmaster) is not hopeless. The Claimants will rely heavily on the inequality of bargaining power, sophistication and access to legal advice between themselves and Post Office, which are strong points in their favour. Overall, however, we do not consider that the Claimants are likely to succeed in the argument, essentially because, even if between parties of uneven bargaining power, the context is nonetheless one of an important business to business relationship.

211. More specifically, there is nothing obviously surprising or onerous, in a commercial context, about requiring compliance with a large body of rules, or about updating those rules from time to time: see, for example, **Stretford v Football Association**,[116] per Sir Andrew Morritt at [16]. Nor is it surprising or onerous that an agent should be required be required to familiarise himself, and keep himself up-to-date, with such rules that govern the day to day operation of the branch and the business.[117]

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[115] [2014] EWHC 2313 (Ch).
[116] [2006] EWHC 479 (Ch).
[117] On Post Office's right to change the terms of its relationship with Subpostmasters, it is worth mentioning that, in our view, such a right would be subject to an implied term of the sort discussed in paras 54 to 55 above. Consideration should be given to conceding this at the Common Issues trial, since it would obviously mitigate much of the harshness or unfairness which the Claimants might otherwise be able to assert.

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212. The same may be said for terms making a Subpostmaster, as agent to Post Office, responsible for losses caused by those working in his employ and under his day to day supervision. Given that a Subpostmaster can be expected to retain a good degree of control over whom to employ in his branch, it does not seem surprising or onerous that he should be responsible for the actions of his subordinates (not least given that those subordinates have no contractual relationship with Post Office and Post Office will know relatively little about them). There is nothing inherently onerous in an agent undertaking responsibility to his principal for losses that were caused by persons that he chose and that he gave access to the principal's cash and stock. It is not unusual to make an agent liable in this way, and a commercially conventional allocation of risk will not be onerous: **Do-Buy 925 v National Westminster Bank**,[118] per Andrew Popplewell QC at [93]. If any particular Subpostmaster lacks the knowledge, skill or diligence necessary to recruit and/or supervise appropriate subordinates, that cannot make the imposition of liability onerous (or unusual); it merely indicates that the Subpostmaster in question should not have agreed to operate a branch that requires the use of assistants.

213. In our view, the most problematic clauses are those containing the broad rights in the SPMC to suspend without remuneration and to terminate on 3 months' notice; the rights in the NTC to suspend and discretion to withhold remuneration are also open to objection. From the perspective of an unsophisticated Subpostmaster who has invested considerable amounts in order to secure his appointment and who will be dependent on his income from Post Office, these clauses could be considered onerous, even if many Subpostmasters might receive some remuneration from temporary Subpostmasters working at their branches. Suspension could push an innocent Subpostmaster into bankruptcy, as could giving 3 months' notice of termination in the early days of an appointment. However, we note that the power to suspend may well be subject to a requirement of reasonable grounds as explained in para 53(a) and we also note that the discretion under the NTC to withhold remuneration during suspension and the discretion under the SPMC to make a back-payment of remuneration at the end of suspension could be controlled by implied terms of the sort discussed in para 55 above.

214. On balance, we do not think that the Court will treat these clauses as too onerous to have been incorporated or to be enforceable, particularly if they are controlled by implied terms of the sort referred to above. It is also worth noting that (albeit in a very different factual context) a term which was updated to strip a doctor of his right to appeal against dismissal was not considered onerous: **Chan v Barts & The London NHS Trust**,[119] per Burnton J at [130]. The **Chan** case shows that a term that may operate harshly from the

[118] [2010] EWHC 2862 (QB).
[119] [2007] EWHC 2914 (QB).

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prospective of one party will not necessarily be considered onerous, even if it has potentially disastrous consequences for that party's career.

215. As to whether the clauses are unusual, they arise in the unique context of the relationship between Post Office and Subpostmasters. There are no close parallels in other industries against which this context could be compared. In that sense, it is difficult to apply the test of usualness.

216. However, looser parallels suggest that, at least arguably, it would not be unusual for a large, public-facing institution such as the Post Office to develop a large body of rules governing its relationship with its agent Subpostmasters, and to retain substantial freedom to vary those rules from time to time. Nor would it be unusual to impose responsibilities for the actions of subordinates. For example:

(a) Large employers, perhaps especially in the public sector, often have in place extensive and detailed rules and procedures that employees are required to follow.

(b) An agent or employee will typically be required to follow the reasonable directions of his principal or employer.

(c) A franchisor may also typically require franchisees to comply with a large body of (changing) rules imposed for the purpose of maintaining or improving the franchise's image and market position.

(d) A contractor is typically liable for the acts of any sub-contractors that he may engage.

(e) An employer is often liable for the acts of his employees.

217. None of these provide an exact analogy. But they do demonstrate that terms of roughly this kind are not outlandish. These points are worth making at the Common Issues trial and consideration should be given as to whether evidence will be needed for any of them.

218. The breadth of aspects of the suspension, withholding of remuneration and 3-month termination clauses strikes us as more likely to be unusual. Consideration should be given as to whether further investigation of any (even loosely) analogous industries might help to confirm that this is so.

219. Even if some or all of these clauses are considered onerous or unusual, that would not automatically invalidate them. It would merely mean that Post Office would have been obliged to bring those clauses to the Subpostmasters' attention at or before the time of contracting: hence Common Issue 6. This can only be determined on a case-by-case basis.

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220. Post Office will be in a much stronger position where the term at issue was contained in a contractual document that was signed by the Subpostmaster: see **Do-Buy**, *per* Andrew Popplewell QC at [91]; **Bankway Properties** v **Pensfold-Dunsford**[120] per Arden LJ at [41]; and **Ocean Chemical Transport** v **Exnor Craggs**[121] per Evans LJ at [48].[122] Even if it does not guarantee incorporation, signature is a strong indicator that the relevant Subpostmaster was aware (or could easily have made himself aware) of the relevant clauses, and made a commercial choice to sign the contract. See also **Amiri Flight Authority v BAE Systems**[123] per Mance LJ at [16]:

> *Normally, in the absence of any misrepresentation, the signature of a contractual document must operate as an incorporation and acceptance of all its terms. Here, we are concerned with a written contract which Amiri had the opportunity to read and consider overnight before signing. In the absence of any suggestion that BAE in any way misrepresented the nature or effect of clause A.10 of Appendix C, I find it difficult to see the relevance of the principle* in *Interfoto in the present case.*

221. More generally, provision of the relevant clauses, and giving the recipient good time to read them, is likely to be sufficient: see **Do-Buy** at [92] and **Stretford** at [17]. That is particularly so when the contracts in question were relatively short, and their content was both comprehensible and legible: **Shepherd Homes** v **Encia Remediation**,[124] *per* Christopher Clarke J at [69]. In principle, the same may be argued where the key parts of the contract are relatively clear and short – a party contracting on a business to business basis might not be expected to read carefully every schedule and seek out every document incorporated by reference in order to identify any onerous and unusual terms, but he can be expected to read through those parts of the document setting out the core commercial terms, at least as long as those parts are fairly easily identifiable.

222. Ultimately, if the Claimants knew, or could easily have informed themselves, about the clauses of which they are complaining (or even just knew that a clause of this type would likely be included), that should be an end to the matter: see **Allen Fabrications**, at [62] to [63]. In our view, none of the clauses in question required the "*red hand*" to which Denning LJ referred. In the main, the Claimants do not appear to deny that they were provided with copies of or at least had access to the relevant contractual documents. In the commercial context of this case, and to the extent that these clauses are deemed onerous and unusual, we consider that sufficient notice is likely to have been given where the document was provided to, or was available to, the Subpostmaster at the time

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[120] [2001] EWCA Civ 528.
[121] [2000] 1 All ER (Comm) 519
[122] See also Lawson, Exclusion Clauses and Unfair Contract Terms at p.31: "*Although the point has not been authoritatively decided, it appears to be the case that the Interfoto principle will apply to signed documents only in extreme cases.*"
[123] [2003] EWCA Civ 1447.
[124] [2007] EWHC 70 (TCC).

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of signature. We do not consider that Post Office was required specifically to point out the terms (as in **Bankway Properties** v **Pensfold-Dunsford**[125] *per* Arden LJ at [41]). Nor do we consider that Post Office was required to explain the meaning and potential effects of the terms, as alleged in the Individual Particulars of Claim.[126]

223. Different considerations arise where the Claimants were not given any proper opportunity to identify and consider the relevant terms. We note that some of the Lead Claimants deny ever seeing any contract document until after they had accepted their appointments – see Stubbs, for example, who says that she was not aware of the standard Subpostmaster contract and did not see them until after her termination. Careful consideration will need to be given of the documents which were provided to them. At least in the past, Post Office's procedures for informing Subpostmasters about the terms and conditions they are signing up to has been far from ideal. Often, the most helpful information seems to have been provided after they accepted their appointments. This is too late.

224. It will clearly be difficult to argue that the Subpostmaster was given adequate notice of any onerous and unusual terms in circumstances such as those alleged at Stubbs, paras 5-8. But subject to these difficult cases, our general view is that Post Office has a strong case that the disputed clauses were incorporated and are enforceable.

J: Unfair Contract Terms Act 1977 (Common Issue 7)

Were any or all of the terms [identified in Common Issue 5] unenforceable pursuant to the Unfair Contract Terms Act 1977?

225. The Claimants contend that all the terms identified in Common Issue 5 are unenforceable except in so far as they satisfy the requirement of reasonableness pursuant to ss. 3(2) and 17 UCTA: see GPoC, para 68. Each of the Lead Claimants contends that the terms do not meet the test of reasonableness: see, for example, Stubbs, para 100.

The UCTA reasonableness test

226. Section 3 of UCTA provides, in material part, as follows:

> *(1) This section applies as between contracting parties where one of them deals...on the other's written standard terms of business.*
>
> *(2) As against that party, the other cannot by reference to any contract term—*
>
> *(b) claim to be entitled—*
>
> *(i) to render a contractual performance substantially different from that which was reasonably expected of him, or*

[125] [2001] EWCA Civ 528.
[126] See, e.g., Abdulla, para. 72.

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> *(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,*
>
> *except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.*

227. If a term is subject to the reasonableness test, the burden of proof to establish reasonableness lies on the party seeking to rely on the term: see Chitty, [15–100].

228. The Claimants must satisfy two threshold requirements in seeking to rely on section 3. First, they must establish that they were dealing on Post Office's written standard terms of business. Secondly, they must show that the clauses complained of purport to entitle Post Office to render either a contractual performance substantially different from that which was reasonably expected of it, or no performance at all. Our view is that the Claimants face very significant difficulties on both of these points.

229. As to the written standard terms of business, it is true that the contracts in question were produced, in a standard, non-negotiable form, by Post Office. However, this is not sufficient to fall within section 3. In **Commerzbank AG v Keen**,[127] the Court of Appeal was faced with a clause in a banker's employment contract which required recipients of a discretionary bonus scheme to be employed by the bank at the time of distribution. It was submitted that this clause fell within section 3 of UCTA, on the basis that the bank was "*claiming to be entitled to render a contractual performance substantially different from that which was reasonably expected of it*": *per* Mummery LJ, at [77]. Mummery LJ rejected that submission at [104]:

> *the relevant business…in this case, is the business of banking. The terms as to the payment of discretionary bonuses were not the standard terms of the business of banking. They were the terms of the remuneration of certain employees of the Bank, such as Mr Keen, who were employed in part of the Bank's business.*

230. Similarly, at [115] Moses LJ said:

> *I wish to lend emphasis to Mummery LJ's reasons for rejecting the application of the 1977 Act to Mr. Keen's contract of employment. It is all too easy in analysing authority and discussion of the application of the 1977 Act to contracts of employment to overlook the impact of the words "consumer" and "business" used in Sections 3 and 12 of the Act…A bank's business is not entering into contracts of employment with its employees.*

231. Mummery LJ approved a similar holding of Morland J in **Brigden v American Express Bank** (14 October, 1999). That case also concerned a bank employee's contract. Morland J said that he had difficulty in:

> *…accepting that the section applies as between the Claimant and the Defendants where the Claimant deals on the Defendants' written standard terms of business. The*

[127] [2006] EWCA Civ 1536.

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> *Defendants' business was banking not that of an employment agency. Although the hiring and firing of labour is almost inevitably an activity within any business it is not except in the case of an employment agency its business. It should be noted that the statute does not say standard form of contract or standard terms in a contract which would cover the Claimant's contract.*

232. Post Office did not engage the Subpostmasters on employment contracts, but the same analysis should apply by close analogy. Post Office's business is the provision of services to customers. It is not the engagement of Subpostmasters. The Claimants might argue that, in circumstances where they are on the "front line" providing services to the public, Post Office's true business is indeed engaging them. This would seem to us to be misconceived because the Subpostmaster, as agent to Post Office, is conducting transactions on its behalf and so enabling Post Office to conduct its business with customers. The contract with the Subpostmaster facilitates Post Office's conduct of its business, rather than itself representing the conduct of that business.

233. The next question is whether, under the clauses identified in Common Issue 5, Post Office is entitled either to render a contractual performance substantially different from that which was reasonably expected of it, or to render no performance at all.

234. As to the clauses imposing obligations on the Claimants (i.e., insofar as relevant, those referred to in paras 184(a), 184(b) and 184(c)) those are not dealing with Post Office's contractual obligations at all. They deal with Post Office's contractual *entitlements* (i.e. to impose further obligations on Subpostmasters; to hold Subpostmasters liable for the acts of their subordinates), but that is not the same thing.

235. On this point, the Court of Appeal's judgment in **Paragon Finance v Nash**[128] is instructive. Dyson LJ considered whether UCTA section 3(2)(b)(i) applied to a provision which gave a lender an entitlement to vary the rate of interest payable on a loan. At [75] to [77], he said as follows:

> *...there is no relevant obligation on the claimant, and therefore nothing that can qualify as 'contractual performance' for the purposes of section 3(2)(b)(i). Even if that is wrong, by fixing the rate of interest at a particular level the claimant is not altering the performance of any obligation assumed by it under the contract. Rather, it is altering the performance required of the defendants.*

236. In 1999, the editors of Chitty on Contracts, 28th edition offered this view, at [14–071].

> *Nevertheless it seems unlikely that a contract term entitling one party to terminate the contract in the event of material breach by the other (e.g. failure to pay by the due date) would fall within paragraph (b), or, if it did so, would be adjudged not to satisfy the requirement of reasonableness. Nor, it is submitted, would that provision extend to a contract term which entitled one party, not to alter the performance expected of himself but to alter the performance required of the other party (e.g. a term by which*

[128] [2002] 1 WLR 685.

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> *a seller of goods is entitled to increase the price payable by the buyer to the price ruling at the date of delivery or a term by which a person advancing a loan is entitled to vary the interest payable by the borrower on the loan).*

237. In our opinion, this passage accurately states the law. The contract term must be one which has an effect (indeed a substantial effect) on the contractual performance reasonably expected of the party who relies on the term. The key word is "performance". An example of what would come within the scope of the statute was given in the 1999 edition of Chitty at [14-070]. The authors postulated a person dealing as a consumer with a holiday tour operator who agrees to provide a holiday at a certain hotel at a certain resort, but who claims to be entitled, by reference to a term of the contract to that effect, to be able to accommodate the consumer at a different hotel, or to change the resort, or to cancel the holiday in whole or in part. In that example, the operator has an obligation to provide a holiday. The provision of the holiday is the "contractual performance" required of the party seeking to rely on the disputed term.

238. This reasoning applies straightforwardly to the terms referred to in paras 184(a), 184(b) and 184(c) above. Post Office does not, by placing obligations on Subpostmasters, or by holding them responsible for the actions of their subordinates, perform any of its contractual obligations differently or provide no performance at all. The contractual obligations in question are those of the Subpostmasters.

239. The status of the terms referred to in para 184(d), which entitle Post Office to suspend, terminate or withhold remuneration is less clear. In principle, those clauses do appear to pertain to Post Office's performance of its obligations. If Post Office suspends or terminates the Claimants' entitlements under the contracts, it is thereby absolving itself of the need to perform its own obligations *in toto*. That would seem to involve either offering no performance at all or offering a substantially different performance from that which would be expected of it.[129]

240. However, Chitty, at 15–086 of its current edition, comments as follows:

> *...it seems unlikely that a contract term entitling one party to terminate the contract in the event of a material breach by the other (e.g. failure to pay by the due date) would fall within paragraph (b), or, if it did so, would be adjudged not to satisfy the requirement of reasonableness.*

241. The case law is not conclusive. We doubt that the point turns on whether the right to terminate is a right to terminate on breach or a right to terminate at will, on giving notice.

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[129] Post Office could still argue that, even if these clauses pertain to the performance of its obligations, relying on them does not entitle it to offer a performance substantially different from that which would be expected of it. But if such an argument succeeded, in practice we would expect it to be on the basis that the clauses are not unreasonable. In that scenario, Post Office would succeed in any case in meeting the reasonableness test, so this would not change the outcome.

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In **Timeload v British Telecommunications**,[130] BT gave the claimant one month's notice to terminate the contract relating to a particular telephone number. BT relied upon a clause of its standard terms which provided that it could terminate the contract at any time on one month's notice. The claimant applied for an interlocutory injunction to prevent termination. One of its arguments was that, if the relevant clause should be construed as giving BT an unfettered right to terminate, then it fell within section 3(2) of UCTA, and was unreasonable.

242. Sir Thomas Bingham MR said that the question whether section 3(2) applied was a difficult one and at p.468 stated as follows:

> *Mr Hobbs submits that the subsection cannot apply where, as here, the clause under consideration defines the service to be provided and does not purport to permit substandard or partial performance. He says that the customer cannot reasonably expect that which the contract does not purport to offer, namely enjoyment of telephone service under a given number for an indefinite period. That may indeed be so, but I find the construction and ambit of this subsection by no means clear. If a customer reasonably expects a service to continue until BT has substantial reason to terminate it, it seems to me at least arguable that a clause purporting to authorise BT to terminate without reason purports to permit partial or different performance from that which the customer expected.* (Emphasis added)

243. Given the application before it, the Court did not need to reach a concluded view on this point.

244. In **Paragon v Nash**, Dyson LJ distinguished **Timeload**, but, at [75], did not express any view on whether the submission addressed by Sir Thomas Bingham MR was, in fact, correct.

245. In **Hadley Design Associates v The Lord Mayor and Citizens of the City of Westminster**,[131] HHJ Seymour QC, somewhat surprisingly, expressed the view that the "*provisional view, at any rate, of Sir Thomas [Bingham MR] seems to have been that the exercise of a right of termination did not fall within the subsection [3(2)]*": at [76]. He went on to say, at [85], that he was:

> *...inclined to think that the doubts of Sir Thomas Bingham as to whether the terms of Unfair Contract Terms Act 1977 s 3(2)(b)(i) could apply in any event to a determination of a contract in accordance with a power contained in the contract were also well-founded, for it is very difficult to see how the issue of what was the duration of the performance of a contractual obligation which could reasonably be expected could be determined other than by reference to the terms of the contract as to duration.*[132] (Emphasis added)

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[130] [1995] EMLR 459.
[131] [2003] EWHC 1617.
[132] Compare Bridgen, per Morland J: "*The clause "an employee may be dismissed by notice and/or payment in lieu of notice during the first 2 years of employment, without implementation of the disciplinary*

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246. The authorities are thus mixed on the question whether termination can fall within section 3(2). On the face of it, HHJ Seymour's analysis should apply to suspension because it is the obligations of both parties that fall away for a time, rather than one party restricting its performance while demanding the same performance of the other. However, we can see that it could persuasively be argued that, if termination is saved from pertaining to contractual obligations only because it defines the duration of the contract, suspension should be treated differently.

247. The case that withholding remuneration during suspension falls within the subsection seems stronger. That does not define the duration of the contract, even temporarily; it simply entitles Post Office not to perform what would otherwise be its obligations. In our view, the term in the SPMC requiring remuneration to be withheld during suspension and the term in the NTC permitting Post Office to withhold remuneration would fall within section 3(2).

248. If and to the extent that the Subpostmaster contracts fall within section 3(1) and the clauses under consideration fall within section 3(2), they can only survive if they are reasonable. The test for reasonableness is set out in section 11(1) of UCTA:

> *the term shall have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.*

249. Schedule 2 to UCTA sets out further guidelines for assessing reasonableness. These are, on their face, relevant only to the sale, hire-purchase or supply of goods, but they have been treated as having more general application: see, for example, **Goodlife Foods Ltd v Hall Fire Protection Ltd**[133] per Judge Stephen Davies at [76].

250. The guidelines which are potentially relevant in the context of this case are:

(a) the relative strength of the parties' bargaining positions;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term; and

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any course of dealing between the parties).

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procedure", although expressed in negative terms, is a clause setting out the Claimant's entitlement and the limits of his rights. In my judgment it is not a contract term excluding or restricting liability of the Defendants in respect of breach of contract or entitling the Defendants to render a contracted performance substantially different from that which was reasonably expected of them or to render no performance in respect of any part of their contractual obligation."

[133] [2017] EWHC 767 (TCC).

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251. As to these factors:

(a) Post Office was in a much stronger bargaining position than each individual Claimant. That is an important factor upon which the Claimants will place much weight. While potentially significant, however, it is not enough by itself to render a clause unreasonable.

(b) The same can be said for whether the Claimants had the opportunity to enter into a similar contract with anybody else. In this case, it is at least strongly arguable that the Claimants had no such choice, at least not unless the term "*similar*" is stretched quite far: the only way to become a Subpostmaster was to contract with Post Office. The Claimants did not, so far as we are aware, receive any inducement to agree to any of the disputed terms.

(c) For the reasons given in paras 219 to 224 above (in the discussion of whether adequate notice was given of these clauses), in our view the Claimants ought generally to have known of these clauses' existence. We repeat our caveat that this will not apply where the Subpostmaster was not provided with the standard terms.

252. Given the fact-specific application of the test, it is dangerous to reason from previous decisions on reasonableness (Chitty, 15–101). However, it is relevant that this is a genuinely commercial context (notwithstanding the imbalance in the parties' bargaining position). In **Watford Electronics v Sanderson CFL**,[134] Chadwick LJ said, at [55]:

> *Where experienced businessmen representing substantial companies of equal bargaining power negotiated an agreement, they may be taken to have had regard to the matters known to them. They should, in my view, be taken to be the best judges of the commercial fairness of the agreement which they have made; including the fairness of each of the terms of that agreement.*

253. This statement has mixed implications for this case. Standing back, the question will be whether there is a cogent (and reasonable) commercial reason for including the relevant clauses.[135] There are good commercial reasons for structuring the clauses dealing with the Claimants' obligations/ responsibility for subordinates in the way that they are. Indeed, it is difficult to see what else a large organisation in the position of Post Office could do.

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[134] [2001] EWCA Civ 317.

[135] See **Oval (717) v Aegon Insurance Co (UK)** [1997] 85 BLR 97. In principle, the answer could be different for each Claimant. However, it would be easier for the Judge to hold that clauses are reasonable for all Claimants, rather than to (a) hold that they are unreasonable across the board, which is likely to be difficult if Post Office can point to some commercially sophisticated Claimants, or (b) devise a test, generalisable from the Lead Claimants, to identify those Claimants for whom these clauses should be treated as unreasonable.

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254. In our view (once again) the likeliest problematic clauses are those dealing with suspension, withholding remuneration and 3-month termination. These are the clauses which give the most appearance of Post Office using its stronger bargaining position to impose its will upon the Claimants, denying them any "job security". It is notable, however, that Subpostmasters enjoyed equivalent rights to terminate on notice.

255. In all the circumstances, the reasonableness determination for those clauses is likely to be quite finely balanced. Some of the arguments could be difficult for Post Office.

ANTHONY DE GARR ROBINSON QC

DAVID CAVENDER QC

OWAIN DRAPER

GIDEON COHEN

10 May 2018