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Claim No. HQ16X01238, HQ17X02637 & HQ17X04248

THE POST OFFICE GROUP LITIGATION
IN THE COURT OF APPEAL
ON APPEAL FROM
THE HIGH COURT OF JUSTICE (QBD)
BETWEEN:

ALAN BATES & OTHERS

Cs / Respondents

AND

POST OFFICE LIMITED

Defendant/ Appellant

DRAFT/ GROUNDS OF APPEAL

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1. Post Office Limited ("Post Office") seeks permission to appeal against the order on judgment of Mr Justice Fraser dated 15 March 2019 on the grounds identified below.

A. INTRODUCTION

2. These proceedings are the subject of a Group Litigation Order ("GLO"). Mr Justice Fraser ("the Judge") was appointed Managing Judge in 2017.

3. The 557 Claimants ("Cs") are, for the most part, former or current Subpostmasters ("SPMs"). SPMs run Post Office branches on its behalf and written contracts of agency. There are over 11,000 Post Office branches.

4. Cs allege, amongst other things, that Post Office breached various (implied) contractual obligations owed to them under the agency contracts. There are two main contracts at issue: first, the Subpostmaster Contract 1994 (as amended) ("SPMC") and the Network Transformation Contract ("NTC"), which entered into use from late 2011. Some of the claims date back to the 1990s.

5. The Judge split the litigation into a series of trials, the first of which took place in November 2018. It is the judgment and order following that trial that give rise to the

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present appeal. The purpose of the trial was to determine 23 issues concerning the contractual relationship between the parties - the "Common Issues". Most of these are matters of contractual interpretation (construction and implied terms).

6. There are, at present, two other stages in the Group Litigation for which the Judge has made detailed directions:

   (a) The "Horizon Trial". This concerns technical issues relating (in broad terms) to the functions and reliability of the electronic accounting system that SPMs are required to use in the operation of their branches and accounting to Post Office ("Horizon"). The Horizon Trial is part-heard (with expert evidence due to be heard in late May 2019).

   (b) The "Further Issues Trial". This concerns liability and breach issues in two lead claims. It is listed to be heard in November 2019.

7. The judgment on the Common Issues is referred as "Judgment No. 3" and has neutral citation [2019] EWHC 606 (QB) ("the Judgment"). The Judge concluded, amongst other things, (1) that the SPMC and NTC were "relational contracts" and, as an automatic result of this, they contained an implied term as to good faith, including duties of transparency, co-operation and trust and confidence and (2) because the contracts were "relational", they contained a further 17 implied terms, including restrictions on termination rights.

8. Post Office contends, for the reasons identified in these Grounds of Appeal, that the Judge erred in law, adopted an unfair procedure and made findings of fact that it was not open to him to make. This document comprises four further sections, as follows:

   (a) **Part B: Request for expedition and other directions.**

   (b) **Part C: Error of law grounds of appeal.**

   (c) **Part D: Procedural unfairness grounds of appeal.**

   (d) **Part E: Error of fact grounds of appeal.**

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B. REQUEST FOR EXPEDITION AND OTHER DIRECTIONS

Application for expedition

9. Post Office seeks expedition of this appeal on the following grounds.

10. First, the Judge's approach to the contracts in this case amounts to a radical departure from orthodoxy and would, if correct, dramatically alter contract law. For instance, under the Judge's approach: (1) any contract classified as "relational" automatically contains extensive implied duties as to good faith that can bring with them many "incidents" that control or even contradict the express terms and (2) an express right to termination on "*at least* [x] *months*" notice is to be read as creating a contractual discretion to terminate on an undefined period of notice (which must be x months or more), such discretion to be exercised in good faith. It is important for legal certainty that the Judge's approach be ruled upon by the Court of Appeal.

11. Second, the Judge's holdings as to the content and operation of the SPMC and the NTC have far-reaching and serious effects on the Post Office network of branches. Those holdings are not limited to Cs but also affect the contracts that Post Office has with the c. 11,000 SPMs currently in office. In particular:

    (a) The implication of extensive good faith obligations renders less certain the contracts between Post Office and serving SPMs (including because the nature and practical effects of the obligations remain unclear, save at the highest level of generality).

    (b) The Judge's holdings as to the nature and extent of the contractual agency undermine the legal basis on which SPMs hold cash and stock and effect transactions on behalf of Post Office (and, indirectly, Post Office's clients, including the Government and financial institutions).

    (c) The Judgment undermines Post Office's ability to rely as principal on the truth of monthly Branch Trading Statements submitted to it by SPMs (as the Judge concludes that Post Office is not entitled to rely on the principle of settled account).

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(d) Many of the terms implied by the Judge substantially restrict Post Office's ability to enforce its express contractual rights to protect the cash and stock in the network (for example, implied terms that (1) limit Post Office's right to suspend and terminate SPMs' appointment on suspicion of wrongdoing and (2) substantially constrain Post Office's ability to require payment in respect of shortfalls in branch accounts).

(e) The c.11,000 branches nationwide (1) hold approximately £643 million of cash belonging to Post Office, (2) process 47 million transactions every week and (3) produce 286 million cash declarations per month (on which Post Office ordinarily could rely to maintain appropriate oversight and control of its vast cash exposure).

12. Third, the Further Issues Trial to determine issues as to whether the duties found in the Judgment have been breached (and associated issues of limitation) is listed to be heard in November 2019. Expedition would enable the parties and the Court to avoid potentially wasted time and money on the Further Issues Trial. (The determination of the Common Issues does not – or at least should not – affect the ongoing Horizon Trial.)

Other directions

13. Post Office seeks permission to serve a Skeleton Argument in excess of 25 pages, pursuant to CPR PD 25C paragraph 31(1)(a) and having regard to the very large number of issues covered by the proposed appeal.

14. Post Office seeks the appointment of a different Managing Judge having regard to the extent of the errors of law set out at [...] the unwarranted findings of fact at [...] and the procedural unfairness at [...]. This order is sought under the Overriding Objective under which the Court is mandated to try cases "justly" and "fairly".

C. ERROR OF LAW GROUNDS OF APPEAL

15. Post Office seeks to appeal the Judge's holdings on the following Common Issues:

(a) **Common Issue 1: "Relational contract**" and implied duty of good faith - paras [...] below.

(b) **Common Issue 2: Implied terms: (A)** 17 terms implied on the "relational contract" basis - paras [...] below and **(B)** terms implied on the basis of necessity -

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paras [...] below.

(c) **Common Issue 3:** Good faith obligations implied into all **contractual discretions and powers** - see paras [...] below.

(d) **Common Issues 12 and 13**: **Obligations of SPMs as agents** and the nature of Branch Trading Statement - see paras [...] below.

(e) **Common Issue 8**: **Liability of SPMs for losses**: proper construction of section 12, clause 12 of the SPMC - see paras [...] below.

(f) **Common Issue 16: Termination on notice**: proper construction of section 1 clause 10 of the SPMC and part 2, clause 16.1 of the NTC, providing for termination on notice - see paras [...] below.

(g) **Common Issue 15: Termination for breach:** proper construction of section 1 clause 10 of the SPMC and part 2, clause 16.2 of the NTC - see paras [...] below.

(h) **Common Issues 17 and 18: The "true agreement**" argument as to termination under the SPMC and NTC (purporting to apply *Autoclenz Ltd v Belcher* [2011] 4 All E.R. 745) - see paras [...] below.

(i) **Common Issue 14: Suspension** under the SPMC and NTC - see paras [...] below.

(j) **Common Issues 5 and 6: Onerous and unusual terms** in the SPMC and NTC - see paras [...] below.

(k) **Common Issues 7, 19 and 20:** Unfair Contract Terms Act 1977, scope of damages - see paras [...] below.

(l) **Common Issue 23:** SPMs' responsibility to train assistants.

Common Issue 1: "Relational contract" and implied duty of good faith

16. The relevant holding is at paras 1122(1) and 738. The reasoning is at paras 702-741.

17. The Judge implied into the SPMC and NTC a duty of good faith prohibiting conduct "which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people" and extending to *"[t]ransparency, co-operation, and trust and confidence*": para. 738. This is referred to below as "the good faith term".

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18. The basis for implying this term was the classification of the contracts as "relational". The Judge erred in law, in the following respects.

19. First, the Judge implied the good faith term automatically from the classification of the contracts as "relational". That involves treating a term as to good faith as a term implied **by law**, which is wrong. Terms as to good faith are not implied by law into commercial contracts (even "relational" contracts). Good faith terms are implied into commercial contracts on a case-by-case basis, applying the test for terms implied in fact *Marks & Spencer v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 ("*Marks & Spencer*"). The good faith term would fail the *Marks & Spencer* test of necessity.

20. Second, the Judge was, in any event, wrong to classify the contracts as "relational" and/or to imply a good faith term, for the following reasons:

    (a) The Judge ought to have held that a long contractual duration is a necessary characteristic of a "relational" contract (if such classification is to contribute to implying a term as to good faith; Post Office's primary case being that it should not). The Judge ought to have concluded, as a matter of contractual interpretation, that the contracts were not long-term and therefore could not be "relational" in any relevant sense.

    (b) General implied terms should not ordinarily be implied into detailed commercial contracts that make express provision for the nature and scope of the parties' contractual obligations. The SPMC and NTC contain many detailed terms regulating the contractual relationship, including the parts of the relationship that would be regulated by a general obligation of good faith.

    (c) A term as to the general nature of the contractual relationship should not be implied where the parties have expressly chosen the legal nature of that relationship. The SPMC and NTC both expressly create a relationship of agent and principal, with all the common law duties inherent in that relationship. Cs admitted that SPMs owe fiduciary duties to Post Office as principal. The Judge erred in not recognising the significance of the express appointment of SPMs as agents and in ignoring the fiduciary obligations owed by SPMs to Post Office when deciding to imply a mutual (and weaker) obligation covering the same subject

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matter. The contracts create a fiduciary relationship (which was admitted by Cs and referred to fleetingly by the Judge at para. 785) pursuant to which the SPM owed a fiduciary obligation to Post Office in relation to the holding and handling of Post Office stock and money and the entering of transactions on the Horizon system. The Judge made no attempt to seek to reconcile that admitted fiduciary relationship with the supposed necessity of implying a duty of good faith in relation to the same subject matter.

(d) The Judge failed to give any real meaning and effect to the implied terms that were common ground, namely the Necessary Co-operation and *Stirling v Maitland* terms identified in para.698. These are powerful implied terms operating in close conjunction with the express terms. The Judge was wrong to treat the Necessary Co-operation term as inadequate because it only provided for such cooperation as may be necessary (which demonstrates a failure to apply the test in *Marks & Spencer*). He should have interpreted these implied terms in conjunction with the express terms and only then considered what if any (further) implied terms were necessary, applying *Marks & Spencer*. Despite accepting Post Office's submission that this is what he should do (para. 958), the Judge did not do it, dismissing reliance on the agreed implied terms as a "pleading point": see paras 740 and 741.

21. Third, the particular good faith term implied by the Judge is extremely broad and onerous. It goes well beyond cooperation and/or a requirement for honesty in relation to the contractual relationship. The Judge wrongly disagreed with *Chitty on Contracts (33rd Edition)* at para. 1-58 that the obligation as to good faith implied in *Yam Seng Ptd Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) required only honesty. The Judge wrongly departed from the approach that Leggatt J (as he then was) adopted in *Yam Seng* and implied an unjustifiably extensive term. The Judge used the implied obligation of good faith to circumscribe the exercise of express contractual rights, including Post Office's right to terminate the contracts in accordance with mutual terms permitting termination on written notice. The Judge construed the words "not less than [x] months notice" in the terms permitting termination on notice as creating for Post Office a contractual discretion, requiring it to decide (by reference to all relevant considerations) the appropriate length of the notice period. The Judge identified a non-

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exhaustive list of the factors to which Post Office would have to have regard in determining the notice period, in order lawfully to terminate the contract on notice.

22. Fourth, the Judge erred in law in reaching the holdings in Common Issue 1 in reliance upon large quantities of post-contractual evidence as to how the relationship between Post Office and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly: see Section D below.

Common Issue 2: Implied terms

23. There are two classes of implied terms – first, those implied by the Judge on the basis that the contracts were "relational" and second, those implied by the Judge on the basis of necessity. Some terms fall into both categories.

A. Seventeen terms implied because the SPMC and NTC contracts were "relational"

24. The relevant holdings are at paras 1122(2) and 1122(16). The reasoning is at paras 743 to 748 and 1117.

25. First, the Judge erred in law in holding that the classification of the SPMC and NTC as "relational contracts" justified implying seventeen further implied terms (whether as "incidents" of the good faith term or otherwise). This was an error of law, for the following reasons:

    (a) The contracts are not "relational" and, even if they were, they do not contain the good faith term: see Common Issue 1 above.

    (b) In any event, each implied term, whether or not described as an "incident" of the good faith term, ought to have been considered separately, applying the test of necessity in *Marks & Spencer*. The Judge wrongly treated the further implied terms or "incidents" as following necessarily from the classification of the contracts as "relational" and/or the implication of the good faith term (para. 757). If the correct test had been applied, none of the implied terms would have been implied.

    (c) The Judge failed to consider whether each of the implied terms or "incidents" was necessary in light of the agreed implied terms (Necessary Cooperation and *Stirling v Maitland*). None of them was necessary given the existence of such terms.

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(d) The Judge failed to consider each of the proposed terms separately and cumulatively, asking whether each proposed term was necessary having regard to the express terms, the agreed implied terms and such further terms (if any) as the Judge had already determined were necessary.

(e) None of the additional terms implied as "incidents" of the good faith term were in fact necessary incidents of that term[, with the exception of term (s) and part (i) of terms (n) and (o)]. None of the [others] followed logically from the implication of the good faith term, including because they were not obligations the breach of which would necessarily involve an absence of good faith.

(f) Further and in any event, the additional terms cannot be implied because they contradict the contract's express (and agreed implied) terms. For example:

(i) As to termination on notice specifically, the Judge erred in law in finding that the express provisions in the SPMC and NTC for termination on notice (3 months and 6 months, respectively) could only be exercised "in accordance with the implied duty of good faith".

(ii) The Judge failed to have any regard to legal certainty and the fact that termination on notice provisions are very common and are expected by commercial parties to be enforceable in accordance with their plain words. Subjecting such a right to an implied requirement of good faith undermines its clarity and commercial purpose.

(iii) He failed to have any regard to the fact that the termination on notice provisions in these contracts are, on their plain words, mutual rights and that the good faith implied term is itself mutual. He held only that Post Office's exercise of the termination right is subject to a requirement of good faith. This is incoherent and involves re-writing the commercial bargain.

(iv) He failed to provide any or any sufficient reasoning for his holding: see para. 1117.

(v) As to summary termination specifically, the Judge erred in law in finding that a summary termination under the SPMC was subject to the implied duty of good faith (para. 899). He also erred in finding (implicitly) that the summary

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termination provision in the NTC contract was, contrary to its clear words, subject to an implied duty of good faith.

26. Second, the Judge erred in law in making the holdings in Common Issue 2 (above) in reliance upon large quantities of post-contractual evidence as to how the relationship between Post Office and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

B. Terms implied into the SPMC and the NTC on the basis of necessity

27. The relevant holdings are at paras 1122(2). The reasoning is at paras 749 to 766.

28. The Judge said that seven of the terms which he implied because of his holding that this was a relational contract, could in the alternative be implied because they were necessary (implied terms (c), (d), (m) (parts (ii) and (iii)), (n), (o), (q) and (r)), and that a further three terms ((a), (b) and (t)) should be implied on the sole basis that they were necessary. Those holdings were wrong. None of those terms are necessary.

29. Implied terms (c) and (d) oblige Post Office properly and accurately to both "*effect, record, maintain and keep records of all transactions effected using Horizon*" and "*produce all relevant records and/or to explain all relevant transactions and/or any alleged or apparent shortfalls attributed to Claimants*".

30. Post Office is already required, by the Necessary Co-operation and Stirling v Maitland Terms not to prevent or inhibit, and to cooperate in, the discharge of the SPM's accounting obligations. This would include taking reasonable steps to retain accurate transaction records. Terms (c) and (d) exceed that purpose by creating absolute obligations that are unlimited in time or scope. The Judge erred in deciding that these terms were necessary.

31. Implied term (m) obliges Post Office:

> "*Not to seek recovery from Claimants unless and until: (i) the Defendant had complied with its duties above (or some of them); (ii) the Defendant has established that the alleged shortfall represented a genuine loss to the Defendant; and (iii) the Defendant had carried out a reasonable and fair investigation as to the cause and reason for the alleged shortfall and whether it was properly attributed to the Claimant under the terms of the Subpostmaster contract (construed as aforesaid).*"

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32. The decision to imply this term was wrong for at least the following reasons:

(a) On the Judge's construction of clause 12.12 of the SPMC (para. 646 and 653) and given his implication of the same term into the NTC (para.1103), the onus is on Post Office to demonstrate that the "losses" sought to be recovered were caused by the SPM's "own negligence, carelessness or error….". In those circumstances, it could not be necessary to imply this further restriction.

(b) Even if the Judge had construed clause 12.12 correctly (as advanced in para. […] below, such that there is no contractual allocation of burden of proof), it would still not be necessary to imply such a term, for the following reasons:

(i) The contracts work and have worked perfectly well without such a restriction for very many thousands of SPMs over 20 years. It is not necessary for the business efficacy of the agreement and cannot have gone without saying.

(ii) No commercial party would agree to its right of recovery (of *its* money) in an agency relationship being subject to such an onerous procedure. The implied term would prevent Post Office collecting even undisputed shortfalls until it had gone through a detailed procedure invented by Cs and adopted by the Judge.

(iii) There is no rational or commercial basis for implying a requirement that Post Office identify whether, by reference to its relationships with its clients (such as banks), it will ultimately suffer a "genuine loss" as a result of the shortfall in the SPM's branch. That introduces complexity and contingency into a simple accounting relationship. It is uncommercial, unnecessary and incapable of implicit agreement.

(c) Furthermore, the prohibition on recovering shortfalls until Post Office has complied "*with its duties above (or some of them)*" is uncommercial, unnecessary and cannot have been agreed implicitly. Those duties constituted all the other implied terms listed "above." That is each of implied terms (a) to (l). For example, this would mean that if Post Office was in breach of its obligations on training, it could therefore not recover shortfalls, no matter how they were caused.

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(d) Section 12, clause 12 of the SPMC and Part 2, para. 4.1 of the NTC both require that deficiencies be made good "*without delay*". The implied term is incompatible with those express terms.

33. Implied term (n) (as amended by the Judge) obliges Post Office not to suspend Claimants: "*(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 in respect of the matters which the Defendant considered gave it the right to suspend.*"

34. The contracts have express terms which specify the circumstances in which suspension is available. They make commercially and practically coherent provision for suspension (especially if read with Post Office's acceptance that it could properly be implied that the decision to suspend must be reasonably based on one of the grounds listed in the express terms). There is no room and no necessity to imply further restrictions on the power to suspend.

35. As to part (iii) specifically, there is nothing commercially or practically incoherent about a principal being able to suspend an agent who has possession and control of his cash and stock without regard to whether he may himself be in breach of the contract

36. Implied term (o) (as amended by the Judge) requires Post Office not to terminate Claimants' contracts: "*(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 in respect of the matters which the Defendant considered gave it the right to terminate*".

37. The contracts have express terms which specify the circumstances in which they can be terminated, either on notice or for breach. There is no room and no necessity to imply further restrictions on the power to terminate.

38. Implied terms (q) and (r) govern contractual discretions and powers, and specify that they must be exercised "*honestly and in good faith for the purpose for which [they were] conferred*", and cannot be exercised "*arbitrarily, capriciously or unreasonably*".

39. The Judge erred in implying these as blanket terms. It is impossible to determine what implied fetter may be appropriate without identifying the term(s) to which it is

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contended to apply. In the absence of any proper pleading from Cs on the point, Post Office itself undertook the task of identifying relevant contractual discretions and accepting that those discretions were subject to an implied restriction that they not be exercised dishonestly, arbitrarily, capriciously or irrationally. Post Office identified four such discretions in para 343 of its Written Closing Submissions[1] (reflecting its pleading) and, in para. 430, Post Office identified two other discretions or powers[2] that "*it might be argued with some force*" should be subject to that restriction.

40. Moreover:

(a) The use of the words "good faith" in term (q) should, even were that term implied, cover only the meaning of that term as set out in the case-law referred by the Judge in para. 759, and not the much broader conception of good faith implied by the Judge under Common Issue 1.

(b) The case-law to which the Judge refers cannot justify the implication, in term (r), of a requirement that discretions be exercised *"reasonably*" (as distinct from "*rationally*"). That restriction cannot be implied under the orthodox approach.

41. Implied term (a) obliged Post Office to "*provide adequate training and support for its SPMs when it imposed new working practices, but particularly new systems such as the Horizon system*". This term is not necessary for business efficacy. Post Office is already required by the Necessary Co-operation Term to provide such reasonable training as is necessary to the performance of the SPMs' obligations. The contracts do not lack practical or commercial coherence because of a failure to make provision for "*adequate*", rather than "*reasonable*", training.

42. Implied term (b) obliged Post Office to ensure that "*the Horizon system, which was provided by the Post Office, be reasonably fit for purpose, including any or adequate*

[1] Specifically, (1) section 1, clause 18 of the SPMC, governing changes to the contract and operational instructions made without the agreement of the SPMC, (2) Part 2, para 20.2 of the NTC, governing amendments to the contract on notice, (3) Part 3, para. 3.1 of the NTC, governing variations to the fees payable to SPMs, (4) Part 5, para 1.3 of the NTC, entitling Post Office to amend on notice the list of documents coming under the definition of "Manual" and to amend the content of those documents.

[2] Specifically, (1) section 19, clauses 4 and 5 of the SPMC and (2) Part 2, para. 15.2.1 of the NTC, relating in each case to withholding pay during a period of suspension.

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error repellency". That term is too specific to be necessary. A contract that required that the system be reasonably fit for purpose (in the round) would not lack practical or commercial coherence. If the system were to lack adequate error repellence but were to deploy measures that corrected for all the errors that it failed to repel, it would be fit for the purpose of effecting and recording transactions accurately, notwithstanding that it was lacking in one technical respect.

43. Implied term (t) (as amended by the Judge) requires Post Office to "*take reasonable care in performing its functions and/or exercising its functions within the contractual relationship (and therefore liability for alleged shortfalls)*".

44. The term is unjustified and logically incoherent: if a party fails to comply with his contractual obligations, he has breached the contract, irrespective of whether or not he took reasonable care; if a party fails to take reasonable care but does not breach any contractual obligation, the absence of reasonable care is immaterial and does not sound in damages. A contract does not lack practical or commercial coherence because it requires the parties to comply with their express and implied obligations without super-adding a general requirement that each must perform his "functions" (a vague term, unless it means "contractual obligations") with reasonable care.

45. The Judge erred in law in making the holdings in Common Issue 2 (above) in reliance upon large quantities of post-contractual evidence as to how the relationship between Post Office and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

Common Issue 3: Discretions and powers subject to an implied requirement of good faith (and other fetters)

46. The Judge errs in law in holding that all powers and discretions in the SPMC and NTC are subject to the good faith term and (it appears) otherwise controlled by the implied terms in (q), (r), (s) and (t).[3] He failed to apply the test of necessity under *Marks & Spencer*. Had he done so he would not have held that it was necessary to imply these blanket terms.

[3] The reference to para. 2(a) in para. 768 appears to be a typographical error.

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47. The Judge erred in law in making the holdings in Common Issue 3 in reliance upon large quantities of post-contractual evidence as to how the relationship between Post Office and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

Common Issues 12 and 13: Obligations of SPMs as agents and the nature of the Branch Trading Statement

48. The relevant holdings are at paras 1122(12) and (13). The reasoning is at paras 782 to 853.

49. First, the Judge erred in law at para. 789 in holding that "it is relevant to consider the conduct of the parties and all the circumstances of the relationship" to determine "the full extent of the agency". SPMs are expressly appointed as agents under commercial contracts. It was not relevant to consider post-contractual matters to determine the terms or extent of that agency relationship.

50. Second, the Judge erred in law at paras 819 and 1122(10) in rejecting Post Office's case (correctly recorded at para. 800) and holding that the normal common law principles applicable to agents were somehow excluded by the contracts, notwithstanding that under both the SPMC and the NTC the SPMs were expressly appointed as "agents."

51. Third, the Judge erred in law at para.798 in holding (as a matter of construction) that the (implicitly, only) purpose and content of the express appointment of SPMs as "agent" (in both the SPMC and the NTC) was to distinguish them from "employees".

52. Fourth, the Judge erred in law at para. 1122(13) in holding that SPMs did not bear any burden of proof relating to the Branch Trading Statement, an accounting statement provided by the SPM to Post Office at the end of each month (or 6 weeks) setting out the state of its accounts and accompanied by a declaration of truth ("BTS"). Specifically:

    (a) The Judge correctly stated the principle applicable to the BTS at para. 820: that the BTS would not be subject to the ordinary principles applicable to an account *in respect of the discrepancies notified to the Helpline* as being the subject of a dispute. His approach in other paras of the Judgment is inconsistent with this principle.

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(b) The Judge erred in law para. 842 in holding that the Post Office cannot hold the SPMs to the contents of BTS. He should have held that:

(i) In relation to BTS submitted to Post Office that were *not* subject to a dispute (notified via the Helpline), this was in law an account stated so that if the SPM wished to subsequently dispute its contents the burden was on the SPM to demonstrate a mistake requiring correction (or otherwise show it to be appropriate to re-open the account). The common law principles set out in paras 835 to 840 applied.

(ii) In relation to BTS submitted to Post Office that *were* subject to a dispute (notified via the Helpline), this was in law an account stated with the same result as in (i), save that those parts of the BTS that were subject to the notified dispute were not subject to the principle of account stated.

53. The Judge erred in law and/or reached findings that were not open to him in the course of making the errors identified above, as follows:

(a) The Judge wrongly concluded that amounts disputed by SPMs via calls to the Helpline remained part of the BTS for the purpose of the principle of account stated (para. 831). As to this:

(i) The Judge wrongly focussed on how disputes may have been dealt with in fact and in specific cases (without regard to the fact that Post Office may have made errors and/or failed to comply with the contractual scheme). This is all post-contractual and inadmissible as to the agreed accounting relationship.

(ii) In any event, the true position on the facts was set out in Appendices 3 and 4, which were agreed between the parties. The disputed amount is taken out of the BTS because it is recorded as being in dispute. As such, it was no longer part of the account declared to Post Office and it could not, under the contract, be recovered pending resolution of the dispute. It was common ground that the trading position must be set to zero to commence the next trading period (i.e. to "rollover"). It follows that disputed amounts were, by definition, not included in the account stated.

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(iii) Contrary to para. 35 of the Judgment, the parties had before trial agreed in the Revised Factual Matrix document the truth of the matters in paras 32, 36, 37 and 44 of that document. They only did not agree as to whether those matters were relevant matrix. These included the production of BTS and that the only way to register disputes at the time of submitting a BTS was via the Helpline. It was not open to the Judge to find that there was a factual dispute where there was none (and such finding cannot, in any event, justify reference to and reliance on post-contractual facts).

(b) The Judge proceeded on the erroneous basis that Post Office argue that the "account stated" was represented by the BTS *even in respect of* items that had been notified to Post Office as being in dispute via the Helpline (paras 525 and 834). The Judge ignored that Post Office's case was, in fact, as correctly summarised at para. 829.

(c) The Judge's error was to confuse the agreed contractual status of the BTS (as above) with questions as to the post-contractual treatment in fact of specific discrepancies or other accounting entries: see para. 834. He confused how Post Office may have behaved in relation to a particular disputed discrepancy with the contractual status of discrepancies under the contracts. Post Office's case on the latter issue was clear.

54. Moreover, the Judge was wrong to hold, in the alternative, that an SPM could discharge the burden of showing the BTS to be incorrect simply by showing that he had "*contacted the Helpline in respect of shortfalls, discrepancies and/or TCs, in any particular branch trading period*" (para. 853). That could not apply to a telephone call unless in that call the SPM disputed a particular item in the BTS, which remained in dispute as at the time of the BTS's submission.

55. The Judge also erred in holding that the principle that presumptions of fact should not be made against an agent who deliberately rendered a false account should be disapplied when there was a dispute as to any item in the relevant BTS. The relevant principle has nothing to do with the honest inclusion of disputed amounts in the BTS. It relates to the situation in which an SPM deliberately falsifies the accounts and so deprives Post Office

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(and the Court) of the evidential value of honest accounts when it comes to determining any dispute between the parties.

Common Issue 8: Liability of SPMs for losses: proper construction of section 12, clause 12 of the SPMC

56. Section 12, clause 12 of the SPMC ("Clause 12.12") provides 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."*

Construction of Clause 12.12 generally

57. The Judge erred in law in construing Clause 12.12 as if it placed an express burden on Post Office to demonstrate that the SPM had been negligent, careless or had made an error before a SPM was liable for "losses": see paras 646 to 647 and 653. The words of the clause impose no such burden.

58. The Judge also erred in failing to separate out the question of the meaning of the clause, on the one hand, and the incidence of the burden of proof, on the other. Post Office's case was that, if at a subsequent trial on breach an SPM put the accuracy of the Horizon system in issue in relation to a particular "discrepancy", Post Office would have at least an evidential burden (as part of the law of evidence) to show that the "discrepancy" or "loss" was not caused by a bug in Horizon. The Judge erred in law in his treatment of this issue, as follows:

(a) The Judge erred in law (at para. 671) in finding that Post Office's argument was "both circular, and is an overly intricate attempt to sow confusion and obscure the true issues in the case". It is neither circular nor intricate and was advanced properly.

(b) The Judge wrongly had regard to what happened in fact and post-contractually (see the fourth and final sentences of para. 670 and para.675, respectively) in order to determine a question of the construction of the clause. The Judge considered Post Office's argument to be circular because he was confusing what happened in fact with the objective meaning of the contractual words.

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(c) The Judge's holding (indeed the whole of para. 670) confuses the meaning of the clause (and the conditions for imposing liability), on the one hand, and the respective positions of the parties as to whether those conditions have been met in any particular case, on the other. The latter is not relevant to the former. The final sentence of para. 670 and para. 674 illustrate this error of law. It is true but irrelevant to contractual construction that Post Office seeks to use the clause to recover losses even where SPMs assert that the losses are caused by errors in Horizon but Post Office disagrees with that assertion.

(d) The Judge mis-stated Post Office's case in relation to the evidential burden. Post Office accepted at trial that, if at any future breach trial an SPM disputed that there was a "loss" or "deficiency due to such losses" (because of an alleged bug in Horizon creating an "apparent loss/ deficiency"), Post Office would have an evidential burden of showing that there was in fact a "loss" within the meaning of the clause, rather than only a Horizon-generated "apparent loss/ deficiency". As a matter of law, such "apparent losses/deficiencies" fall outside the clause and the SPM is *not* liable for them. The Judge quotes from Post Office's submissions at para. 651 but then mis-states those submissions in paras 652 and 653.

(e) Contrary to para. 676, Post Office had not done a "volte face" in relation to the (non-)application of Clause 12.12 to apparent losses or discrepancies caused by bugs in Horizon. The Judge mis-states Post Office's pleaded case on this. The Judge quotes paragraph 94(2) of the Generic Defence (para. 673) which refers to "losses" for the purposes of Post Office's construction of Clause12.12 being "*(as defined at paragraph 41 above)*". The Judge ignores the definitions in para. 41 of the Generic Defence. Those definitions make clear that "discrepancy" and "loss" for the purpose of Clause 12.12 do not include what is defined separately in para. 41 as a "Horizon generated shortfall" because the pleaded concepts of "loss" and "discrepancy" rely on there being a difference between (1) the actual cash and stock in the branch, and, (2) the figures for cash and stock shown on Horizon where those figures are "*...derived from transactions input by branch staff into the branch's terminals*" (i.e. not where those Horizon figures have been affected by a bug or error).

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Liability of SPMs under Clause 12.12 for losses caused by assistants

59. The Judge erred in holding that Clause 12.12 imposed liability on SPMs for losses caused by acts of their assistants only where Post Office could show that such losses were caused by the "negligence, carelessness or error" of the assistants. Specifically:

    (a) The Judge's construction is contrary to the plain words of the clause. The clause uses the phrase "losses of all kinds" in contrast to the phrase "losses caused through negligence …etc" that delineates the SPM' s personal liability in the first line of the clause. The Judge failed to give any or full effect to the words "of all kinds".

    (b) The Judge failed to give any or any proper consideration to the facts that Post Office selects, trains and supervises the SPMs that it appoints, whereas SPMs decide whether to employ assistants, whom to employ and how much training and supervision to provide. There was a clear commercial rationale for the difference in treatment between losses caused by SPMs and those caused by assistants.

    (c) The Judge should have held that to avoid liability under the clause, the SPM would first have to show that the loss was not caused by an assistant.

60. The Judge erred in law in making the holdings in Common Issue 8 (above) in reliance upon large quantities of post-contractual evidence as to how the relationship between PO and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

Common Issue 16: Termination on notice of the SPMC and NTC

61. The relevant holding is at para. 1122(16). The reasoning is at paras 892 to 902.

62. The Judge erred in law in holding that the words of section 1, clause 10 of the SPMC ("*may be determined by [Post Office] on not less than 3 months' notice*") did not create a legal right to terminate, but instead created a contractual discretion which had to be exercised by Post Office in good faith, such exercise said to include a range of factors, including whether the SPM lived at the premises, his period of service and many other factors. Specifically:

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(a) The plain words create a right to terminate on 3 months' notice or on any notice greater than 3 months, not a contractual discretion to which a fetter is to be implied.

(b) The Judge was wrong to conclude that the words "not less than" would be deprived of meaning unless they created a discretion as to how much notice to provide. The Judge should have held that the plain meaning of the contractual words was that 3 months written notice would always be sufficient, although longer notice could be given at will.

(c) The phrase "…not less than" in termination provisions is a legal device of long standing to avoid the problems that had been historically experienced in giving notice which had to end on a precise date. Such wording is used in a large number of commercial contracts. Its objective meaning is well-established and clear.

(d) The Judge was wrong to imply an obligation of good faith into the express rights of termination on notice.

63. The Judge erred in law in holding (para. 901) that the words "not less than 6 months" in Part 2, para. 16.1 of the NTC created a contractual discretion as to the notice period, such discretion to be exercised in good faith, for the reasons given above in relation to section 1, clause 10 of the SPMC.

64. The Judge erred in law in making the holdings in Common Issue 16 (above) in reliance upon large quantities of post-contractual evidence as to how the relationship between PO and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

Common Issue 15: Termination for cause of the SPMC and the NTC

65. The relevant holding is at para. 1122(15). The reasoning is at paras 896 to 908.

66. The Judge correctly held (para. 898) that the proper construction of section 1, clause 10 of the SPMC limits the ability of Post Office to terminate summarily to circumstances of repudiatory breach.

67. The Judge erred in law by implying into this clause a duty on Post Office to act in good faith (para. 899). The test for repudiatory breach is an objective one. There is no warrant

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for introducing by implication any further restriction. This introduces uncertainty and is unnecessary, irrespective of whether the SPMC is a "relational contract".

68. The Judge erred in holding (para.907) that the proper construction of Part 2, para. 16.2 of the NTC limits the ability of Post Office to terminate to circumstances of repudiatory breach. The plain words of para. 16.2 state that the contract can be terminated for material breach.

69. To the extent (which is unclear) the Judge intended his holding at para. 899 to apply to the NTC as well as the SPMC, he erred in law, for the reasons given in para. 67 above.

70. The Judge erred in law in making the holdings on Common Issue 15 (above) in reliance upon large quantities of post-contractual evidence as to how the relationship between Post Office and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

Common Issue 17 and 18: The "true agreement" on termination

71. The Judge erred in law in holding (in the alternative) at para. 925 that, if the point arose for determination, the "true agreement" principle applied to the SPMC and NTC and the express written notice periods should be replaced with a longer period of notice – up to 12 months (or longer for the SPMC), reflecting the "true agreement". Specifically:

    (a) The principle in *Autoclenz Ltd v Belcher* [2011] 4 All E.R. 745 is exceptional. It has no application to ordinary commercial contracts such as the SPMC and the NTC. The principle is limited to sham contracts and contracts that, although not shown to be shams in the strict legal sense, do not amount to any genuine record of the parties' agreement, particularly as regards the status of one contracting party as an employee or a worker or a self-employed contractor.

    (b) The Judge erred in holding that the *Autoclenz* principle is an application of the ordinary approach set out in *Secret Hotels2 v HMRC* [2014] UKSC 16 (para. 922).

    (c) There was no evidence whatever of another practice or "true agreement" to replace the express agreement set out in the express terms of the SPMC and NTC. There was no evidence to justify a finding of a period of notice of 12 months or any other period as a "true agreement". Such finding would have been perverse,

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including because Cs' case is that Post Office did in fact terminate contracts in accordance with the written terms of the contracts.

72. It is not clear whether the Judge found that the other elements of the 'true agreement' alleged by the Claimants (as set out at para. 925) were also, in the alternative, made out. Those elements were that Post Office could not terminate on notice without "*substantial cause or reason*"; or if it was in material breach of contract, or "*in response to reasonable correspondence (of the kind engaged in by Mr Bates) about the difficulties of working with, and the shortcomings in, the Horizon system*". There was no basis for finding that any of these were part of any 'true agreement'. If the Judge held otherwise, he erred.

Common Issue 14: Suspension under the SPMC and NTC

73. The relevant holding is at para. 1122(14). The reasoning is at paras 872 to 878, 881 and 885.

74. Section 19, clause 4 of the SPMC provides for suspension where:

> *"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 or made 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 being investigated."*

75. The Judge held that under the SPMC, a decision to suspend an SPM had to be shown to be (1) necessary, (2) in accordance with the implied term of good faith and (3) a proper exercise of a contractual discretion (to which an implied fetter applied).

76. The Judge erred in law in each of those three respects. Specifically:

(a) To construe the clause as requiring that suspension be "necessary" is contrary to its plain words and is wrong. The clause expressly identifies the conditions in which Post Office may suspend the SPM.

(b) There is no justification for implying a requirement of good faith into this right of suspension (para.885). No such implication is necessary.

(c) Post Office conceded that the reason for suspension would need to be "reasonably and properly related to one or more grounds for suspension." Contrary to para.

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880, that is not the same as a concession that the right to suspend was a contractual discretion; it is not a contractual discretion. The Judge does not identify any reason to conclude that a more substantial implied restriction is necessary.

77. The Judge held that, despite the different wording of Part 2, para. 15.1 of the NTC dealing with suspension, the result was the same as for the SPMC (para.872). The Judge further held (as for the SPMC) that the right to suspend had to be exercised in accordance with the implied term of good faith, and also on the basis that the power to suspend was not a right but a discretion (para. 878). The Judge erred in law. Specifically:

(a) The plain words of the clause limit the exercise of the right to circumstances "*where [Post Office] considers this to be necessary in the interests of [Post Office] as a result of*" one or more of the grounds set out in the clause. The Judge wrongly fails to give effect to those plain words and the conditions that they establish.

(b) The points made above in relation to the SPMC apply also to the NTC.

78. The Judge erred in law in holding (para. 881) that the powers to suspend under the SPMC and the NTC were also subject to the further restriction Post Office was not entitled to use those powers in any case where it was itself, "*in material breach in respect of the matters which the Defendant considers give it the right to suspend*". The Judge erred in holding that this caveat arose "*as a matter of construction of the clause in its commercial context*". Specifically:

(a) This is not a proper construction of the contracts. There are no words in the SPMC or the NTC which the Judge construes to reach this result.

(b) The restriction is uncommercial and would not have been agreed by any party in Post Office's position. The purpose of suspension is to protect the cash and stock and the branch's position such that deficiencies or conduct issues can be investigated without further loss or damage. That may also be to the SPM's advantage if one of his assistants is, unbeknown to him, stealing from him or there is some other undetected problem that should not go unchecked. The fact that the

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SPM and Post office are also in dispute about deficits and discrepancies (in a manner which might arguably put Post Office in material breach of its obligations), provides no commercial justification for removing the right to suspend.

79. The Judge erred in law in making the holdings on Common Issue 14 (above) in reliance upon large post-contractual evidence as to how the relationship between Post Office and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

Common Issues 5 and 6: Onerous and unusual terms in the SPMC and NTC

80. The relevant holdings are at paras 1122(5)-(6). The reasoning is at paras 957 to 1062.

81. The Judge erred in law in holding (para. 1007) that Part 2, para. 4.1 of the NTC was onerous and unusual. Specifically:

(a) It is not onerous or unusual for an agent to be responsible for losses without proof of fault or error.

(b) Post Office has to prove that any such loss is 'real', as opposed to an apparent loss generated by a computer bug or error. The SPM will therefore not be liable for such apparent losses.

(c) Liability can only be anticipated where there is some error on the part of the SPM or an assistant, which makes it very similar in practical effect to Clause 12.12 of the SPMC (a clause that the Judge did not hold to be onerous and unusual).

82. The Judge erred in law in holding (para.1007(2)) that Part 2, para. 13.1 of the NTC was onerous and unusual. It provides that SPMs are liable for, "*all losses, claims, demands…incurred by [Post Office] as a result of …. any negligence or breach of the Agreement by [SPM] or its Personnel; and/or (13.1.3) any claim brought under the [Equality Act] and/or its regulations in respect of the Branch*". It is not onerous or unusual, not least given that the contractual liability is broadly consistent with what the common law would impose. The Judge's reasoning at para. 1011 would, if correct, result in many standard commercial terms being considered onerous and unusual.

83. The Judge held (para. 1023) that section 19, clauses 5 and 6 of the SPMC and Part 2, paras 15.2 and 15.3 of the NTC were onerous and unusual. These clauses permit Post

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Office to withhold payment to SPMs during a period of suspension. The Judge erred in law. Specifically:

(a) The SPM is not running the branch in this period. It is therefore unsurprising that he should not be paid.

(b) The SPM cannot be suspended on a whim. Post Office has to decide to suspend an SPM, under the SPMC, in light of (i) him being arrested, (ii) him having civil or criminal proceedings brought against him, or (iii) Post Office having established, or being in the process of investigating, irregularities or misconduct at the SPM's branch: section 19, clause 4 SPMC. Under the NTC, the criteria are (i) him being arrested, charged or investigated for a criminal offence, (ii) him having civil proceedings brought against him, (iii) him being insolvent, (iv) there being grounds to suspect that he has committed a material or persistent breach of the agreement, or to suspect irregularities or misconduct in his operation of the branch, any other branch with which he or his assistants are connected, or the independent business which the SPM operates alongside the Post Office branch: Part 2, para 15.1 NTC.

(c) Post Office is obliged, under both contracts, to exercise its discretion to back-pay the withheld remuneration after the period of suspension by reference to all the circumstances of the case. In the premises, an innocent SPM who is wrongly suspended will receive back-pay.

84. The Judge erred in law (para. 1039) in holding that if the 3 months' written notice provision in section 1, clause 10 of the SPMC took effect in accordance with its terms, it would then be onerous and unusual. Mutual rights to terminate on notice are very common in commercial contracts and are neither unusual nor onerous.

85. The Judge erred in law in holding, in the alternative to his holding that the NTC could only be summarily terminated for a repudiatory breach, that the summary termination provision would be onerous and unusual. The Judge said that, if his construction was wrong, it would follow that the NTC (or, theoretically, the SPMC, in respect of which it was common ground that a repudiatory breach was required) could be terminated for any breach, no matter how minor. That is wrong. In accordance with its plain words, the NTC can be terminated for a material breach. Termination for a material breach is not onerous and unusual.

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86. The Judge correctly held, in respect of the NTC, that the fact that the contract was signed by the SPMs meant that any onerous and unusual terms were incorporated in any event. However, he erred by not making the same holding in respect of the SPMC, for those SPMs who signed contractual documentation incorporating the full terms of the SPMC. That contractual documentation incorporated the SPMC, and signing it constituted signing the SPMC.

87. Moreover, the Judge erred, in any event, by holding that receipt of the contractual documentation (making reference to the full SPMC contract) did not constitute sufficient notice that the SPM was bound by the full terms of the SPMC contract:

(a) Paragraph 6 of Mr Bates' "Conditions of Appointment" contained the following words:

"*You will be bound by the terms of the standard Subpostmasters Contract for services at scale payment offices, a copy of which is enclosed*"

(b) Beneath paragraph 6 was the following declaration, which Mr Bates signed and dated:

"*I fully understand and accept these conditions and agree to avail myself of the pre-appointment introductory training*"

(c) Whether or not the "*Subpostmasters Contract for services at scale payment offices*" was included in the envelope, someone in Mr Bates' position had sufficient notice of the terms of the Subpostmasters' contract. The Judge should have so found.

88. Moreover, the Judge erred by not holding that, in any event, insofar as SPMs referred to, operated under and relied upon the detailed terms of the SPMC, they were bound by it.

89. The Judge erred in law in making the holdings on Common Issues 5 and 6 (above) in reliance upon post-contractual evidence as to how the relationship between Post Office and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

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Common Issues 7 and 19: Unfair Contract Terms Act 1977 ("UCTA"); scope of damages

90. The relevant holdings are at paras 1122(7), (19) and (20). The reasoning is at paras 1063 to 1110.

91. The Judge erred in law in holding (para. 1075) that the SPMC and NTC were Post Office's "written standard terms of business" for the purposes of UCTA. Specifically:

    (a) The Judge failed to correctly identify what the "business" of Post Office was beyond that it includes "running a large number of branches".

    (b) The Judge was wrong to (impliedly) conclude that the "business" of Post Office was engaging SPMs. He was wrong to distinguish *Commerzbank AG v Keen* [2006] EWCA Civ 1536 in this regard.

    (c) The Judge should have held that the business of Post Office, for the purposes of UCTA, was the selling of postal, financial, insurance and foreign currency and associated products and the provision of banking and other services to members of the public. Post Office determines how to structure and operate that "business", and it chooses to do so, in part, by appointing agents. This does not make such appointments the Post Office's "business" for the purposes of UCTA.

    (d) Thus, the Judge ought to have held that neither contract was subject to UCTA.

92. The Judge erred in law in holding that the terms of the contracts set out at para. 1084 entitle Post Office to render a contractual performance "substantially different" from that which was reasonably expected of it, or in respect of the whole or part of any part of its contractual obligation to render no performance at all. The Judge misapplied s.3(2)(b) UCTA as follows:

    (a) He did not identify any relevant expectations, reasonable or otherwise.

    (b) Reasonable expectations have to be grounded in either other terms of the relevant contract, or (arguably) pre-contractual representations. No examples of either type were identified here. It follows that, for the purposes of UCTA, there is no discrepancy, let alone a substantial discrepancy, between what the relevant contract

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clauses said and what the SPMs' reasonable expectations (as grounded in other contractual clauses/ pre-contractual representations) would have been.

(c) Further and in any event, none of the relevant terms concern how Post Office renders its contractual performance:

(i) The clauses as to SPMs' liability for losses set out the conditions under which SPMs are liable for losses. They are to do with the SPM's liabilities, not Post Office's performance. The Judge states (correctly) that Post Office would be "entitled to claim payment" under these clauses. The clauses do not involve Post Office rendering contractual performance.

(ii) The clauses dealing with termination on notice set out the rights of both parties to terminate the contract on notice. They do not relate to Post Office's performance under the contracts; they are mutual and govern the duration of the contract.

(iii) The clauses dealing with suspension set out the rights of Post Office to suspend SPMs in certain defined circumstances. They do not involve Post Office rendering contractual performance substantially different to that reasonably expected. Suspension of remuneration is consequential on suspension of the contractual services provided by the SPM.

(iv) The clauses giving Post Office the ability to change contractual terms and operational instructions and do not relate to Post Office's performance of the contract or involve it rendering contractual performance "substantially different" from that reasonably expected. Furthermore, Section 10, clause 18 of the SPMC is, on its plain words, limited to changes in the performance required of SPMs, not Post Office. Part 2, para. 1.1 and Part 5, para. 1.3 of the NTC (together) require SPMs to comply with the "Manual", the content of which Post Office may change, again affecting the performance required of SPMs, not Post Office.

(v) The clauses that the Judge construes as excluding a right to compensation for "loss of office" in the SPMC (section 1, clause 8) and the NTC (Part 2, para. 17.11) do no not operate to exclude liability for breach of contract, let alone to change the performance expected of Post Office. They merely confirm that the

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SPM will not obtain any compensation if the contract is terminated on notice or otherwise terminated in accordance with its terms.

93. The Judge erred in law in holding (para. 1102) that Part 2, para. 4.1 (SPM responsibility for losses) and Part 2, para 13.1 (SPMs to reimburse Post Office for losses caused by negligence, etc) NTC failed the test of reasonableness in s.11(1) of UCTA. See, *mutatis mutandis*, paras 80 and 82 above.

94. The Judge erred in law in holding (para.1107(5)) that the provisions of the SPMC (section 19, clauses 5 and 6) and the NTC (Part 2, paras 15.2 and 15.3) dealing with withholding payment during suspension fail the test of reasonableness in s.11(1) UCTA. See, *mutatis mutandis*, para. 83 above.

95. The Judge erred in law in holding that, if construed so as to permit termination for anything other than a repudiatory breach, the rights of termination for breach failed to meet the test of reasonableness under s.11(1) UCTA. See para. 85 above.

96. The Judge erred in law in holding that, if Post Office had no good faith obligations in respect of termination on notice, the relevant terms failed to meet the test of reasonableness under s.11(1) UCTA:

    (a) There is nothing unreasonable about a mutual right to terminate a contract of this kind on notice (and even on relatively short notice): see para. 84 above.

    (b) As to the NTC specifically, there is nothing unreasonable in a mutual right of 6 months' written notice to terminate, which notice cannot expire before the end of the first year of the agreement. The Judge was wrong to hold that a right that was (1) mutual and (2) not onerous and unusual (as he held at para. 1040) was nonetheless not reasonable within the meaning of s.11(1) UCTA.

97. The Judge erred in law in holding that the clauses in the NTC and SPMC providing that a SPM was not entitled to compensation if his contract was lawfully terminated were not reasonable. Those clauses did no more than confirm that lawful termination could not give rise to a claim for loss of office or unlawful termination. That is not unreasonable.

98. Accordingly, the Judge also erred in law by holding that Common Issue 19 should be answered on the basis that "*the relevant clauses do not form part of the contracts between the Post Office and the SPMs*" (para. 1110).

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99. The correct analysis was that those clauses ought to be construed, in accordance with their plain words, as validly confirming that no compensation would be owed following a valid termination. The Claimants did not ultimately submit otherwise (arguing instead that the terms were not valid and/or not incorporated).

100. As to Common Issue 20 specifically (which asks "*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 the Post Office had given the notice of termination provided for in those contracts?*"), the Judge answered the question by saying (para. 1122(20)) that "*The clauses relied upon by the Post Office in respect of removing or excluding any rights to recover compensation for loss of office fail the test of reasonableness in UCTA, regardless of whether such clauses were in each case as a matter of fact drawn to the specific attention of the incoming SPM. The heads of loss identified in this Common Issue are not therefore limited as the Post Office contends.*"

101. Insofar as (as appears) the Judge was limiting himself to a holding on UCTA, he erred for the reasons given above.

102. Insofar as the Judge was seeking to answer the more general question, of legal principle, as to the circumstances in which losses claimed arising from termination of SPMs' contracts will be limited by reference to the contractual notice provisions (which falls within the question set down for determination as Further Issue 2 for the Further Issues Trial scheduled for November 2019; namely, "*In any case where a Claimant's contract's termination may be determined to have involved a breach of duty by Post Office, what is the correct measure of loss?*"), he erred, and should have held that damages in that scenario would be limited by reference to the minimum contractual notice period (whatever that period was). That limitation arises from the proper application of the relevant test, which asks what damages the relevant SPM sustained because Post Office acted unlawfully, which he would not have sustained had Post Office acted lawfully.

103. The Judge erred in law in making the holdings on Common Issues 7, 19 and 20 in reliance upon post-contractual evidence as to how the relationship between Post Office

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and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

Common Issue 23: SPM's responsibility to train assistants

104. The Judge correctly found that SPMs were responsible for their assistants (including the assistants' training). He then erred, however, by imposing "*qualifications*" or limitations on the SPMs' responsibility to train their assistants: that the SPMs "*could not be expected, nor were they contractually required, to train [their assistants] to a level above that which they had themselves received and achieved*": para. 1122(23); see also para. 956. He reached this conclusion as a matter of construction or pursuant to an implied term: para. 952.

105. That decision was wrong.

106. First, it cannot be a matter of construction. There are no words in the contract that can be read to achieve that outcome.

107. The Judge referred to the use in Part 2, para. 2.4 of the use of the word "cascade":

> *...Post Office's case ignores what the word "cascade" in Part 2 Paragraph 2.4 of the NTC must connote. This must mean passing down of the training or knowledge acquired during training, and that training (or acquired knowledge) was to be provided by, originate with, and come from the Post Office.* (para. 951)

108. That cannot do the work that the Judge's analysis requires:

    (a) It could only ever apply to the NTC. There was no similar term under the SPMC.

    (b) As regards the NTC, the scope of this particular obligation is limited. Part 2, para 2.3 makes clear that Post Office will provide training to any manager (and, if it so determines, other assistants) where it "*considers it necessary*". Para. 2.4 obliges the SPM to ensure that the manager (a senior assistant) then "*cascade*" that Post Office training to other assistants. The clause does not even relate to the SPM's own responsibility for training his assistants (including any manager).

    (c) That does not qualify or restrict the SPM's general obligation to "*ensure that there is always a trained Manager and/or sufficient trained and experienced Assistants to operate the Branch to the standards required by Post Office Ltd and to meet the demand for the Products and Services*" (Part 2, para 2.9.1).

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109. The limiting principle therefore requires the implication of a term. The test in *Marks & Spencer* is not met. The argument for the necessity of such an implied term does not withstand scrutiny.

110. The Judge's reasoning at para. 952 is that the "*there is no way that a SPM could, on Horizon, train his or her assistants to a higher level of competence than the Post Office's own training had given that SPM*". That is wrong:

(a) The obligation to train assistants is not limited to the operation of Horizon. It is not clear why the Judge's reasoning is limited in this way.

(b) The SPM's responsibility to train his assistants is not one that he must discharge personally. He must ensure that his assistants are properly trained. He can do that by himself providing training or by procuring training from another source, including from Post Office.

(c) An SPM may have been running a branch for many years, having learned how to do so well through a combination of training provided by Post Office, self-education through manuals, advice from others including the Helpline, assistants and other SPMs and finally his own hands-on experience. It does not make sense to say that that SPM's responsibility was somehow restricted to passing on his training from Post Office, rather than also passing on the benefit of the know-how that he has gained through other routes. A restriction of that kind is artificial, far from obvious and makes no commercial sense.

111. As the clauses set out above make plain, training assistants was the SPM's responsibility. It would not have gone without saying that this responsibility was in effect to defer in some way to Post Office's training. The SPM's responsibility was to do whatever was necessary to train any assistants he chose to employ. That is what would be expected.

D. PROCEDURAL UNFAIRNESS

112. Post Office contends that the Common Issues Judgment was subject to serious procedural irregularities, so as to render unjust (a) the Judge's extensive findings on post-contractual matters that are irrelevant to the issues in the Common Issues trial; and (b) the Judge's findings on the Common Issues, which rely on his findings on post-contractual evidence.

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113. Post Office therefore seeks that those findings be quashed.

The scope of the Common Issue Trial

114. The Common Issues Trial was to determine 23 Common Issues, which are listed at para. 45 of the Judgment. The Common Issues are described, in para 1 of the Order of 27 October 2017, as "*issues relating to the legal relationship between the parties*".

115. They can be organised under the following headings:

(a) Issues as to contractual construction/ implication of terms (Issues 1 to 4, 8, 9 and 14 to 23);

(b) Mixed issues of construction and common law, as to whether and to what extent agency principles apply to SPMs and/or Post Office (Issues 10 to 13).

(c) Issues as to the status of various terms, i.e. whether they are onerous and unusual and/ or invalid under the Unfair Contract Terms Act (Issues 5 and 7).

(d) If and insofar as any terms are found to be onerous and unusual, what steps Post Office needed to take to bring them to SPMs' attention (to be considered by reference to six Lead Claimants) (Issue 6).

116. In that context, disclosure and evidence was limited to what was relevant to the Common Issues.

(a) At the hearing of 22 February 2018, Fraser J approached disclosure on the basis that Cs had to make clear whether and how the material sought was relevant to the Common Issues.

(b) Similarly, evidence was ordered by reference to the Common Issues: see para. 10 of the Order of 27 October 2017.[4] Evidence of the factual matrix as at the time the contracts were entered into was relevant. Also relevant was evidence of whether the six SPMs designated as Lead Claimants for the Common Issues Trial received adequate notice of any onerous and unusual terms – specifically, when they received or saw various pieces of contractual documentation, and what they were told at pre-contractual interviews.

[4] {ref}

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117. Post Office stressed in its written and oral opening and closing submissions that the court must not make findings on issues that would only fall to be determined at the Horizon or subsequent trials.[5]

118. In its written closing submissions, Post Office identified the limited points of Claimant-specific factual dispute on which it was actually seeking findings:

(a) Mrs Stockdale: Post Office did not dispute her evidence as to whether she signed her contract, and what was said at interview.[6] No findings were sought that she gave incorrect evidence.

(b) Mrs Dar: Post Office did not dispute her evidence as to whether she signed her contract, the only dispute being as to whether the documents in question were "confusing".[7]

(c) Mr Bates and Mrs Stubbs: In respect of these Lead Claimants, Post Office sought findings that their evidence of when and whether they received their contracts was, or was likely to be, mistaken. It did not seek any finding that they had deliberately misstated their recollections.[8]

(d) Mr Sabir: Post Office submitted that Mr Sabir's evidence that he had not received his contract was not credible, and invited the Court to reject it, without expressly seeking any finding that he had deliberately not told the truth.[9]

(e) Mr Abdulla: Post Office submitted that Mr Abdulla gave untrue evidence as to whether he received his contract, and as to what was said at his interview.[10]

119. That was the scope of the relevant factual disputes. For two of the Lead Claimants (Mr Abdulla, and to an extent Mr Sabir) credit (in the sense of whether they were truth-

[5] Post Office's Written Opening Submissions, paragraph 31: {ref}; Transcript, Day 1, p.165 (line 1) to p.166 (line 10) {ref}; Transcript, Day 14, p.27 (line 18) to p.28 (line 25) {ref}; p.32 (line 24) to p.35 (line 9) {ref}; p.46 (line 6) to p.47 (line 4) {ref}; p.52 (lines 2 to 17) {ref}; p.63 (line 11) to p.64 (line 14) {ref}.

[6] See Written Closing Submissions, paras 597 to 598 {ref}

[7] See Written Closing Submissions, para 599 {ref}

[8] Mr Bates, see Written Closing Submissions, para 577(b) {ref}; for Mrs Stubbs, see Written Closing Submissions, para 581 {ref}, and cross-examination Day 2, p.170 {ref}.

[9] See Written Closing Submissions, para 589 {ref}.

[10] See Written Closing Submissions, paras 592 to 594 {ref}.

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tellers) was in issue. Following closing submissions, and at the Court's request, Post Office submitted a note setting out its position as to the range of material which the Judge should consider as potentially going to the credit of witnesses.[11]

120. Post Office's position was that, in considering whether certain witnesses were telling the truth about whether they received their contracts, the Court could take into account whether they had told the truth about other (irrelevant) matters if, and only if, the relevant evidence did **not** risk "*trespassing on a future trial or trials*".[12]

The Judge's findings on post-contractual issues

121. In the paragraphs of the Judgment identified below, the Judge made findings, or gave clear indications of his concluded views, on a large number of matters which are outside the scope of the Common Issues trial. Those findings and indications relate to matters which fall to be decided, in the light of full evidence and disclosure, at the Horizon Issues trial, or at future breach trials. Post Office did not lead evidence on these matters, and there was not proper disclosure on them:

(a) SPMs' experiences of using Horizon and the functionality of Horizon. See, in particular, paras 172, 217, 219, 302, 309-311, 569, 819, 824, 852.

(b) Post Office's alleged knowledge of problems with Horizon. See, in particular, paras 541, 543, 1115.

(c) The quality and operation of the Helpline. See, in particular, paras 248-249, 303, 328, 357, 556, 558.

(d) The quality of Post Office investigations into shortfalls. See, in particular, paras 115, 165, 208, 217(2), 223, 557.

(e) The ways in which Post Office allegedly harassed SPMs. See, in particular, paras 222, 327, 462, 569, 723(1), 723(4).

(f) How Post Office behaved when suspending or terminating SPMs. See, in particular, paras 20, 263-264, 402-403, 479-480, 514-517, 519, 723(2).

[11] {ref}.

[12] Paragraph 3(c) {ref}.

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(g) The adequacy of training. See, in particular, paras 104-105, 142, 193, 246-247, 297, 346, 352, 437, 569, 955.

122. Taking these in turn, SPMs' experiences of Horizon and its functionality fall squarely within the Horizon Issues. Those experiences cannot be relevant to construing the contractual relationship.

123. Whether Post Office employees knew about alleged problems with Horizon might be relevant to Cs' allegations of deliberate concealment (key to the limitation questions scheduled to be tried in November 2019) or deceit. But Post Office's internal knowledge would not be common knowledge. It therefore is not relevant matrix.

124. The adequacy of post-contractual training, the functioning of the Helpline, the quality of Post Office's investigations into shortfalls, Post Office's pursuit of debts and threats of legal action, and how Post Office behaved when suspending and terminating SPMs ae all post-contractual. They cannot be relevant matrix.

125. The findings set out above at para. 111 were improperly made and should be quashed. Such findings were not necessary for the Judge to perform his judicial function in the Common Issues Trial. It was obviously unfair for him to do so given that there had not been disclosure or witness evidence from Post Office on these issues. As such, it was inappropriate for the Judge to make any findings or express any concluded views upon this material.

The Judge's reliance on post-contractual matters in deciding the Common Issues

126. The Judge relied on irrelevant and incomplete evidence in deciding Common Issues 1 to 3, 5 to 7, 8, 9, 12, 13, 14 to 16, 19 and 20, and so his conclusions on those Common Issues are unjust for reasons of procedural unfairness, as well as being made in error as a matter of law.

127. First, the Judge held the following post-contractual matters to be relevant factual matrix for the purpose of the Common Issues (retaining the numbering from para. 569 of the Common Issues Judgment):

(a) 31. "*When there were discrepancies between trial balances generated by Horizon and the physical cash and stock in hand which appeared to show less cash or*

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stock in hand than shown on Horizon ("an apparent shortfall" or an "alleged shortfall"), the Post Office did require Claimants to make good the amount at the time of balancing, unless 'other arrangements are agreed'. The only "other arrangements" of which evidence was given in this trial is a SPM was given time to pay, or in isolated cases (such as Mr Bates) amounts were written off."

(b) *33. "Claimants who contacted the Helpline were in any event required to settle any disputed amounts centrally. This meant that the disputed amounts were treated by the Post Office as debts to be recovered."*

(c) *34. "Claimants were themselves unable to carry out effective investigations into disputed amounts because of the limitations on their ability to obtain the necessary information from Horizon."*

(d) *35. "...amounts that were disputed [under the process set out in Appendices 3 and 4 of the Judgment] were treated by the Post Office as debts owed by the SPM."*

(e) *40. "The Defendant in fact sought recovery from the Claimants for apparent shortfalls. I would also add that on the evidence the Post Office did this regardless of whether disputes had been reported to the Helpline or not. This was accepted by all the Post Office witnesses, and occurred whether the SPM in question was appointed under the SPMC or the NTC, even though the terms of those contracts were different. It was also done regardless of any analysis of any causative fault on the part of SPMs. It was also done when the SPM in question had been told that no action would be taken in respect of a disputed shortfall."*

(f) *42. "The Post Office required Claimants to accept changes to records of branch transactions… unless the Claimant was effectively able to prove that the Transaction Correction was not correct."*

(g) *43. "The Post Office did sometimes issue Transaction Corrections after the end of the branch trading period in which the transaction had taken place. There was only limited evidence before me about whether this was also done after the 42/60 day period during which Claimants could generate (limited) reports using Horizon. However, for some of the examples used in evidence, this time limit was not observed by the Post Office."*

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(h) *50. "The introduction of Horizon limited the Claimants' ability to access, identify, obtain and reconcile transaction records."*

(i) *51. "The introduction of Horizon limited the Claimants' ability to investigate apparent shortfalls, particularly as to the underlying cause thereof…"*

(j) *54 to 57. "…it is clear that Fujitsu were able to obtain greater information about a particular branch's transactions than either the Post Office or the SPM."*

(k) *59. "… there was discussion internally at the Post Office about the altering of branch transaction data directly, and also of the Post Office and/or Fujitsu carrying out changes to Horizon and/or transaction data which could affect branch accounts. Mrs Van den Bogerd accepted this could be done…"*

(l) *60. "There is no evidence available to demonstrate that any SPM has, to date, ever been able to establish to the Post Office's satisfaction that an alleged shortfall was the result of a Horizon bug or error. There is however evidence that the Post Office has, on occasion, 'written off' sums which it had initially claimed were due to it. This happened in Mr Bates' case. However, there is no explanation available for why that was done."*

(m) *61. "The Post Office has on occasion detected that Horizon generated errors caused the appearance of shortfalls and errors which the Claimants themselves had not been able to identify as the cause of those apparent shortfalls…"*

(n) *70. "On the evidence of the six Lead Claimants, even when further training was specifically requested it was not provided, and in some cases the SPM was told there was no entitlement to it, even though it was specifically requested."*

(o) *76 and 77. "… the Post Office has greater knowledge of the record of transactions undertaken in branches on its behalf, in relation to which it is liable to its clients, as these are performed using the Horizon system and the Post Office has a greater access to the information contained in that system than the SPMs."*

128. All these findings were on irrelevant matters, and they were all based on partial and incomplete evidence and disclosure. Given that they were found to be matrix of fact, they formed part of the Judge's conclusions on all the issues of construction and implied terms.

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129. In addition, in deciding Common Issue 1, the Judge details four "*examples*" of how he says "*there is a lot to be desired from the Post Office's behaviour*", all of which concerned allegations as to Post Office's post-contractual conduct.[13] This is despite the fact that the Judge rejects at paragraph 722 the proposition that this is relevant to the question of whether the contract is relational.

130. In deciding Common Issue 2, the Judge implied terms specifically referring to the Horizon system, when that system was not even anticipated at the time when some SPMs contracted with Post Office – see in particular the implied terms at (b) (where the Judge held "*a system*" must be understood as the Horizon system: see para.749).

131. Finally, in deciding Common Issues 12 and 13, the Judge:

    (a) at paragraph 806, improperly relied on the evidence of Mr Bates and Mrs Stubbs as to "*the ability of an SPM to consider and investigate shortfalls and discrepancies*" in the Horizon system, all of which was post-contractual;

    (b) at para. 819, improperly made and relied on findings that SPMs "*could not identify discrepancies or shortfalls, or understand the basis on which TCs with which they disagreed were issued*", all of which was post-contractual;

    (c) at para. 824, improperly made findings about Mr Bates' inability to identify the source of a discrepancy;

    (d) at para. 826, improperly made findings about Mrs Stubbs' experience of using the Helpline;

    (e) at para. 852, improperly made findings about "*how Horizon worked*" including how Mr Bates, Mrs Stubbs and Mrs Stockdale's attempted to discover the cause of discrepancies. Although the Judge stated that these post-contractual events were "*not an answer to construction*", the Judge does in fact rely on them, saying "*it is telling that the Post Office argue for a construction that would impose an impossible burden upon SPMs.*"

132. For the reasons given above, Post Office contends that the Judge's findings on post-contractual matters and the Judge's conclusions on the Common Issues are unjust for reasons of procedural unfairness, and should be quashed.

[13] Para.723.

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E. ERRORS OF FACT

Findings as to Mr Bates' receipt of his contract at the time of appointment

133. Post Office seeks to appeal the finding as to when Mr Bates received his contract because it was not open to the Judge on the evidence and/or was perverse.

134. The Judge found (para.91) that Mr Bates did not receive of a copy of the SPMC on 31 March 1998 at the time he was appointed. That finding was contrary to the inherent probabilities and flatly incompatible with a contemporaneous letter between the parties that, read in accordance with its only reasonably available meaning, was determinative of the point. It was not reasonably open to the Judge.

135. First, the starting point must be Post Office's evidence that it had a good system for sending out documents at this time, that the SPMC would ordinarily have been included with the letter of appointment and that, had it not been, this would been obvious to the person preparing the letter and sending it out.

136. Second, the events in question occurred 21 years ago. A witness cannot sensibly have any genuine and firm recollection of receiving or not receiving a particular document on a given day. Any assessment on the balance of probabilities should be based (at least largely) on other evidence, principally relevant documents, and an assessment of the inherent probabilities. It was therefore wrong for the Judge to couch his ultimate finding on the basis of simply preferring Mr Bates' evidence (paras 99 and 385).

137. Third, the Judge's interpretation of the contemporaneous documents, and their relevance to the question of whether Mr Bates received the SPMC, was manifestly erroneous.

    a. Mr. Bates contended that he eventually got a copy of the SPMC **in response to** a query he raised by letter of 4 August 1998 about holiday allowances (5 months after he was appointed as SPM). The letter included the following passage:

> *".... I **consulted my contract**, Section 4 – "Absence on holiday – holiday substitution allowance" and unless it is **hidden away elsewhere in the contract** then there is no mention at all about outstanding holiday being lost if not taken within a holiday cycle. The **whole section on holidays** is not only **very wordy but is extremely vague in its content**, and would certainly not win any awards with the Plain English Campaign".* (emphasis added)

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b. The terms of the letter make clear that the writer must have already seen the SPMC by the time he wrote it. First, he says in the letter that he had "*...consulted*" his contract. Second, the passage set out above shows a detailed knowledge of the actual provisions of the SPMC and in particular clause 4.1 dealing with "*holiday substitution allowance.*" The references to something being "*hidden away elsewhere in the contract*" and to reviewing "*the whole section*" that was "*very wordy*" only make sense if the writer is referring to a long and detailed contract in his possession, such as the SPMC.

138. It was not open to the Judge to find (para. 91) that Mr. Bates **could** have written that letter based on an earlier summary document (entitled "*SERV 135*") that he had been sent in May 1998 (let alone that he in fact did so), for two reasons: (1) the SERV 135 only contained the heading and very brief summary of the provision and reference to that document could not rationally explain the words in the letter emphasised above and (2) Mr Bates did not consider the SERV 135 to be his contract (and could not sensibly have done so given its content) so cannot have been referring to it in the letter, using the words "*I consulted my contract*".

139. The Judge's alternative holding that, even if Mr Bates did have a copy of the SPMC when he wrote the 4 August 1998 letter, "*this post-dated contract formation*" (para. 91) misses the point. Mr Bates did not suggest that he got the contract at some time between being appointed on 31 March 1998 and August 1998. If Mr Bates had the contract on 4 August 1998 (which he clearly did), the only available conclusion was that he received it with the letter of appointment on 31 March 1998 (as set out in the "*Conditions of Appointment*" which he dated and signed).

140. Fourth, the Judge was wrong to reject Post Office's argument that, had Mr Bates in fact not received that contract, he would have drawn this to Post Office's attention at the time. The Judge records this argument at para. 90. His rejection of it was based on an obviously erroneous interpretation of the relevant documents:

(a) The Conditions of Appointment document that Mr Bates received on 30 March 1998 stated "You will be bound by the **terms of the standard Subpostmasters Contract** for services at scale payment offices**, a copy of which is enclosed**." The Judge quotes from this document at paras 85-86.

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(b) The Judge found that "*a reasonably diligent person…could quite easily have mistaken the reference to the* "standard Subpostmasters Contract" *as being either*" of two documents that Mr Bates said he did receive, those two documents being two and four pages long, respectively: para. 91.

(c) That is wrong. The four-page document to which the Judge referred is the Conditions of Appointment document that Mr Bates signed. It contains the reference to the "*standard Subpostmaster Contract…., a copy of which is enclosed*": see subpara. (a) above.

(d) The two-page document:

(i) It was headed "CONDITIONS OF APPOINTMENT FOR CRAIG Y DON SUB POST OFFICE". It was, even a cursory reading, clearly **specific** to Mr Bates' branch, rather than amounting to a "*standard Subpostmasters Contract*".

(ii) It did not specify the remuneration to which the SPM would be entitled. It made no provision for the termination of the agreement. It did not set out the nature of the relationship or the main rights and obligations of each party. No reasonably diligent person could confuse it for a standard form contract intended to govern an important commercial relationship.

(iii) It was, in almost all respects, identical to the Conditions of Appointment. It would make no sense for that document to refer to (and incorporate by reference) an almost identical document provided with it. Any reasonably diligent person would not have thought this to be the case.

(iv) Mr Bates, an intelligent man with a "*high degree of attention to detail*" (para. 824), was unable to explain how he could have thought the two-page document to be the standard terms, saying only that the conditions of appointment in that document were perhaps "*standard for my branch*".

141. Finally, during the time of his appointment as an SPM, Mr Bates engaged in extensive and sometimes ill-tempered correspondence with Post Office. The Judge refers to some of this at paras 108 to 114. In all the correspondence, Mr Bates never once complained that he had not been provided with his contract at the outset of his appointment. In light

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of the content and tone of that correspondence, the strong inference is that Mr Bates would have raised this had it been the case.

142. The Judge's finding on this point was contrary to the contemporaneous documents and perverse.

Findings on Post Office's behaviour (and that of its witnesses) which were unjustified and unwarranted

143. The following findings by the Judge were not open to him on the evidence and/or were perverse. They were relied upon by the Judge to justify his reasoning/conclusions and/or are relied upon by the Cs to seek indemnity costs.

(a) Post Office's supposed "*volte face*" on the accounting processes

144. The Judge erred in fact in finding at para. 834 that Post Office had performed a "*volte face*" in its case on the operation of the accounting system. The Judge made a number of allied findings on this subject at paras 227-230, 251, 271-272, 298-301 and 553, which are challenged on the same basis.

145. The Judge uses the supposed "*volte face*" and/or supposed confusion in relation to its subject matter to justify his decision to make findings and comments on inadmissible post-contractual material. In fact, if there was a confusion, it was that of the Judge alone, and in the event, the matters supposedly in dispute were capable of simple agreement, as is clear from paras 271 and 272 of the Judgment.

146. First, Post Office's position was in fact clear from the outset and did not change, and is set out at Generic Defence and Counterclaim paras 39(5), 43 and 44, Appendices 3 and 4 to the Judgment (which were agreed) and paras 32, 36, 37 and 44 of the Revised Factual Matrix document (the truth of which were, again, agreed).

147. Second, it was not open to the Judge to find (para.301) that "*settle centrally*" "*...was used by the Post Office for the majority of the Common Issues trial at least as though it was synonymous with disputing a transaction correction in some way...*". Specifically:

(a) The Judge does not refer to any submissions made by Post Office to that effect. No such submissions were made. Post Office's position (which was correct) had been set out in the Generic Defence and Counterclaim in July 2017. The meaning of "*settle centrally*" was clear from paras 39(5) and 43(2) of that pleading.

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(b) The perversity of the Judge's finding is demonstrated by the cross-examination that the Judge quotes in para. 299, which shows that Post Office's case was that "*settle centrally*" did not involve disputing the transaction.

(c) The Judge misunderstood the cross-examination of Mr Abdulla (extracted at para. 227). The point put to Mr Abdulla in cross-examination was that despite having to "*Accept*" a transaction correction at the first stage of the process (by pressing that button on the screen) and either paying or settling centrally at the second stage (by pressing the relevant button on the screen), the SPM always had the contractual option of disputing the amount in question through Helpline. That is and always was common ground. The position apparently taken by Mr Abdulla (which was contrary to the common ground) was that *"...even if it is in dispute, you cannot roll over until you have sorted it out before branch transfer period*". There was, on the pleadings and on the agreed facts, no need to resolve the dispute prior to rollover. The Judge failed to understand this – see the end of para. 230.

148. Third, the precise detail of the accounting procedure was not an issue before the Court. There had been no disclosure in relation to it and Post Office did not lead evidence on, for example, the detail of the procedures on Horizon from time-to-time (with the relevant manuals and other guidance relevant to those procedures). The only contentious issue between the parties at trial was whether Post Office in fact followed the contractual process as regards disputed debts in relation to Mrs Stubbs and perhaps Mr Abdulla, but that was a question of breach, and so was not properly before the Court.

(b) Post Office's supposed "*volte face*" on the construction of Clause 12.12

149. The Judge erred in fact in finding at para. 676 that Post Office had radically changed its case and performed a "*volte face*" on its construction of section 12, clause 12 SPMC. Such finding was not open to the Judge on the facts and/or was perverse, for the following reasons.

150. First, this finding is contrary to the finding of at para. 651 that "*Upon consideration, however* [Post Office's case] *had not changed at all*". The Judge appears to have become confused on this point.

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151. Second, the root of the Judge's confusion appears to have been in his failure to understand the difference between the legal conditions necessary for liability (on the one hand) and the evidence necessary to establish liability (and from which party that evidence would come) on the other: see paras [...] above.

(c) Relevance of evidence and findings sought by Post Office

152. This challenge overlaps with Post Office's challenge on procedural fairness grounds – see Section D above. It relates to the Judge's decision to reach findings and settled conclusions on post-contractual material that was not properly before him and on which there had not been proper disclosure or evidence from Post Office.

153. The Judge justified that approach, at least in part, through serious criticism of Post Office's position on issues of admissibility. In the course of that criticism, the Judge made factual findings that were not reasonably open to him and were perverse.

154. The Judge erred in fact in finding (para. 21) that Post Office wanted "*...findings on that only if they were in the Post Office's favour. This is a peculiarly one-way approach by any litigant*".

155. There was nothing one-sided about Post Office's approach:

(a) Post Office's stance precluded its own reliance on post-contractual material.

(b) Post Office made clear that the purpose of its cross-examination on post-contractual events was to make sure that the Court was not left with a false impression, this being in circumstances where the Cs refused to articulate a proper or any case as to relevance.

(c) Post Office submitted in oral closing that that the Judge should not make findings against the Lead Cs based on allegations relation to false accounting, on the basis that this was post-contractual and would be the proper subject matter of later trials. Post Office also made clear that such findings would not be fair on the Lead Cs, given the state of the evidence. This was not a one-sided approach.

156. During oral closing, the Judge directed that Post Office provide a summary of its position on the findings that he was entitled to make. Post Office provided such a summary.[14] No fair reading of that document is consistent with a conclusion that Post Office only wanted findings in its favour.

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(d) Criticism of evidence given by Mr Beal

157. The Judge erred in fact in finding (paras 373, 376 and 544) that Mr Beal was seeking to mislead the Court with his evidence that, from his perspective, the introduction of the NTC contract did not change the core principles of the contractual relationship, including that SPMs were liable for losses. This finding was not open to the Judge on the evidence and/or was perverse.

158. Mr Beal is not a lawyer. His views on any differences between the liability clauses in the NTC and the SPMC were irrelevant and inadmissible.

159. Moreover, Mr Beal's answer in cross-examination was in favour of Cs, not Post Office. It is Cs' pleaded case that the two clauses have the same proper construction. The Judge must, therefore, logically have considered that Mr Beal was deliberately misleading the Court in order to support Cs' case and undermine Post Office's case. That is inherently unlikely, and the Judgment does not contain any explanation as why an intelligent witness would choose to give misleading evidence in support of the other side's case.

160. In any event, it is a rational view for a lay person to hold that the NTC and the SPMC liability provisions are similar in their effects and/or reflect the same "*core principle*" of SPM responsibility for losses. It was accordingly perverse to find that Mr Beal cannot honestly have believed the two clauses to both give effect to the core principle that SPMs are liable for losses.

161. Lastly, from the exchange quoted at para. 372 it is clear that:

    (a) Mr Beal did **not** say what the Judge attributes to him in para. 544, namely that "*the drafting of the NYC was designed to replicate a SPM's responsibility for losses under the SPMC*".

    (b) Mr Beal in fact said that the core principle of the agent having **liability for losses** remained the same under the two contracts. That much is common ground.

162. The finding that Mr Beal was trying to mislead the Court on this issue was not reasonably open to the Judge.

[14] [Ref*].

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(e) Criticism of evidence given by Ms Van Den Bogerd

163. As with the finding challenged under heading (c) above, this challenge overlaps with Post Office's challenge on procedural fairness grounds – see Section D above. There are several findings challenged under this sub-heading.

164. First, the Judge erred in fact in finding (para. 416) that Ms Van Den Bogerd's evidence displayed an entrenched refusal to "*consider to be the common themes connecting all these claims…*"

165. Ms Van Den Bogerd said: "*although a number of cases do have some features in common, Post Office's assessment is that each case is demonstrably different and influenced by its own particular facts…*"

166. The Judge's characterisation of Ms Van Den Bogerd's evidence here was not open to him on the evidence and/or was perverse. Specifically:

(a) The Judge had only seen the facts of the six Lead Claims. There are over 550 claims the facts of which he is largely unaware. The witness has been involved in investigating and responding to claims by SPM for many years and has a much broader understanding of the whole population of such claims and their features.

(b) The Judge (at para.546) mis-stated the witness's evidence as having been that "*none of the different claims by the 589 Claimants have common issues or themes between them, and every single case is simply factual different, with no connection between them*". Ms Van Den Bogerd in fact accepted that "*...a number of cases do have some features in common…*"

(c) Post Office's pleaded case is that the claims, when subjected to detailed analysis (for example through the Mediation Scheme) have proven to turn on fact-sensitive disputes as to problems with individual Post Office products and services and alleged deficiencies in training and guidance in relation to those products and services. It is only if Post Office turns out to be fundamentally wrong on that point (on which issue the Judge cannot properly have formed any view) that Ms Van Den Bogerd could fairly be criticised for holding the view that she does.

167. Second, the Judge erred in fact in finding (para. 418) that Ms Van Den Bogerd was trying to "*...mislead*" him when asked about detailed points of loss involved in the case

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of Mr Abdulla. The finding was not open to the Judge on the evidence and/or is perverse.

168. The witness did not come to court to deal with the accounting details and losses of any particular Claimant. Her evidence for the Common Issues trial was generic, as was appropriate for a trial of issues of contractual interpretation and other legal issues. Questions about how Mr Abdulla in practice accounted to Post Office, or how Post Office dealt with problems that he encountered, were irrelevant and were not matters that the witness had prepared to address at the trial.

169. The Judgment records the witness as having said that she made a "*mistake*" in saying "*that she was coming **to the matter** cold*" (para. 418, emphasis added). It is clear that the "*mistake*" to which Mrs Van Den Bogerd referred was the suggestion that she had come to a specific *spreadsheet* cold (as it was one she had referred to in her Horizon Issues witness statement), rather than the general issue of Mr Abdulla's alleged problems with Horizon. It was unsurprising that Ms Van Den Bogerd might have forgotten the detail of the spreadsheet, even assuming that she had looked it in detail before.

170. Third, the Judge erred in fact in finding (para.425) that Mrs Van Den Bogerd's witness statement showed her to be "*an extremely poor judge of relevance...*" The Judge said this in relation to the lack of evidence in her witness statement dealing with difficulties with Horizon over the years. The finding was not open to the Judge on the evidence and/or was perverse.

171. Any issues relating to problems, bugs or errors in Horizon were not issues to be determined at the Common Issues trial, and the only direction for evidence at the trial was for evidence "*in relation to the Common Issues*". It is perverse to criticise a witness for failing to give irrelevant evidence for which there was no permission.

(f) Post Office's supposed improper redaction of documents

172. The Judge erred in fact in finding (paras 560(5) and 561) that there was no "*sensible or rational explanation*" for the redaction of emails concerning the termination of Mr Bates' appointment. That is a serious criticism to level at the solicitors involved in the disclosure process. There was no proper basis for it.

173. As was pointed out to the Judge (on receipt of the draft Judgment):

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(a) The documents had been disclosed by Mr Bates, not Post Office. They were disclosed by him in redacted form.

(b) The documents had been obtained by Mr Bates years ago, before these proceedings, under a Freedom of Information Act request.

(c) The documents contained the criticised redactions when they were provided in response to the FOIA request. It is neither unusual nor suspicious for personal details (e.g. addressees of emails) to be redacted from documents provided in response to a FOIA request.

174. In those circumstances, the Judge's finding that there cannot be *"...a sensible or rational explanation*" for the redactions was not available on the evidence and/or is perverse.

(g) Unjustified criticisms of Post Office's conduct in the litigation

175. The Judge erred in fact in finding (para. 14) that Post Office has "*...resisted timely resolution of this Group Litigation whenever it can... A good example of this is the fact that for these Common Issues, the Post Office submitted in paragraph 24 of its Opening Submissions that the six Lead Claimants' cases should not be treated as representative of the other Claimants*". This finding was not open to the Judge and/or is perverse.

176. As to the suggestion that Post Office has "*resisted timely resolution.... whenever it can*", there is no proper basis for that finding. The Judge does not identify any such basis, aside from the "*example*" he gives, relating to the status of "*representative*" Claimants. Reliance on this example was perverse:

(a) As a simple factual matter, the Lead Claimants are not "*Test Claimants*" within the meaning of CPR, Part 19; nor are they "*representative*" of the other 550-odd other Cs. The Lead Claimants were chosen (3 by each party) to cover the SPMC and NTC contract periods. This was all made clear at the time of selection. The point made in opening was merely to emphasise that the Lead Claimants were exemplars and were not chosen to be typical or representative as regards facts of breach or loss, i.e. the matters that were not properly before the Court.

(b) This is readily apparent on reading the submissions themselves: see paras 23-28 of Post Office's written opening submissions.[15]

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(c) Post Office did not say anything to the effect that the Judge should **not** make "*findings…of general application*". In the paras cited above, Post Office expressly invited the Judge to make findings that would assist in the resolution of all the claims, even if this meant indicating what his conclusions on legal issues would be on hypothetical facts (e.g. whether the outcome would be the same if a certain contractual document, which the Judge found had been received, if fact had not been received).

177. For similar reasons, the Judge erred in fact in finding (para.544) that Post Office was determined to make the resolution of the dispute, "*as difficult and expensive as it can*". That finding was not open to the Judge and was perverse. In addition to the points above, this is difficult and extensive litigation, requiring intelligent and thoughtful case management. The Judge again identifies no examples of Post Office having done anything improper in this regard. If Post Office had in fact adopted the approach that the Judge finds, there would be a catalogue of failed applications and severe costs orders to which the Judge could refer as evidence of a concerted attempt to drive up costs. There is not.

[15] [Ref*].