

Case No: HQ-16-X01238 and HQ-17-X02637

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Post Office Group Litigation

The Rolls Building
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London EC4A 1NL

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Before:

MR. JUSTICE FRASER

ALAN BATES AND OTHERS
- and -
POST OFFICE LIMITED

Claimants

Defendant

MR. PATRICK GREEN QC, MR HENRY WARWICK and MR. OGNJEN MILETIC
(instructed by **Freeths LLP**) for the **Claimants**
MR. CAVENDER QC, MR. OWAIN DRAPER and MR. GIDEON COHEN (instructed by
Womble, Bond Dickinson (UK) LLP) for the **Defendant**

PROCEEDINGS

[Prepared with limited access to cited case documents]

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A MR. JUSTICE FRASER: Yes, Mr. Green.
MR. GREEN: May it please your Lordship, as your Lordship knows this is the adjourned
CMC from last time. I hope your Lordship has had skeletons from both of us?
MR. JUSTICE FRASER: I have.

B MR. GREEN: And a one-page responsive note from us.
MR. JUSTICE FRASER: I did have a response.
MR. GREEN: It had two documents behind it.
MR. JUSTICE FRASER: Yes, I have that.

C MR. GREEN: I am most grateful. My Lord in or skeleton argument on page 2 ----
MR. JUSTICE FRASER: Skeleton argument for today?
MR. GREEN: I apologise.
MR. JUSTICE FRASER: No, there is a supplemental, but supplemental to the one in
January.

D MR. GREEN: Exactly.
MR. JUSTICE FRASER: You mean the supplemental one?
MR. GREEN: Yes. We identified at paragraph 4 there are really three issues to be dealt with
this morning., the outstanding generic Common Issues disclosure points on which
E actually a lot of progress has been made. Then the issues for the Horizon Issues trial.
MR. JUSTICE FRASER: And then Horizon directions.
MR. GREEN: Yes.

F MR. JUSTICE FRASER: You want to come back in April I think.
MR. GREEN: Indeed.
MR. JUSTICE FRASER: We will take them one at a time.
MR. GREEN: My Lord, yes, of course. There are some submissions which cut across all
three which I would be most grateful if I could make initially.

G MR. JUSTICE FRASER: Yes.
MR. GREEN: They spring from two particular paragraphs of the defendant's skeleton in
relation to which we put in our responsive note. Those paragraphs are paragraph 25 and
then paragraph 19. I have taken them in that order for reasons which will become
H apparent.
MR. JUSTICE FRASER: 25 on Horizon.

A

MR. GREEN: 25 is on the Horizon Issues and then 19 is in relation to the remaining disclosure points. They engage some points of principle which will inform all three of the points that your Lordship has to deal with today.

B

Paragraph 25, just taking it in stages refers to the table of Horizon Issues which we can look at in a minute. Paragraph 25(a) states that Horizon is designed to transfer and store the data put into it. It does not create shortfalls or reconcile errors. Pausing there for a moment.

C

MR. JUSTICE FRASER: That is one of the issues in the litigation.

MR. GREEN: Precisely. Starting with a premise that Horizon does not create shortfalls is effectively starting with the premise that they win on the point that is in issue.

D

MR. JUSTICE FRASER: That is undoubtedly the case but so far as case management is concerned, I am aware and I have reminded myself of this again, very recently, although it is obvious and I did not think Mr. Cavender would suggest otherwise, there are a whole raft of issues between the parties about what Horizon does/does not or how it should or should not do them.

E

MR. GREEN: Precisely. Pausing there, if your Lordship has the responsive note.

MR. JUSTICE FRASER: I do.

F

MR. GREEN: Behind the responsive note are two documents. These are two documents which we became aware of because Second Sight found them when they were conducting their report and their existence was therefore made known to us through Second Sight. We asked for them in pre-action correspondence and, to be fair to the Post Office they gave them to us in pre-action correspondence but we knew specifically that they existed.

G

I would like to take your Lordship to them briefly in turn. The appendix 1 document is a joint Post Office and Fujitsu document which, if your Lordship can take it from me, appears to be in sort of September 2010, although it is undated, and it appears to in fact follow on from the document we have at appendix 2. It is a joint meeting of PO and Fujitsu. Your Lordship can see the logos on left and right. It is titled Receipts/Payments Mismatch issue notes. You have repetitives from the PO and Fujitsu there, including Mr. Simpson from security, Mr. Winn from Post Office Limited Finance. It says, "What is the issue? Discrepancies showing at the Horizon counter

H

A disappear when the branch follows certain process steps, but will still show within the back end branch account. This is currently impacting 40 Branches since migration on to who are Horizon Online, with an overall cash value of circa £20k loss." It is important that your Lordship knows the net figures.

MR. JUSTICE FRASER: I understand.

B MR. GREEN: "This issue will only occur if a branch cancels the completion of the trading period, but within the same session continues to role into a new balance period.

At this time we have not communicated with branches affected and we do not believe they are exploiting this bug intentionally.

C The problem occurs as part of the process when moving discrepancies on the Horizon System into Local Suspense.

D When Discrepancies are found during stock unit rollover into a new Transaction Period, then the User is asked if the discrepancy should be moved to Local Suspense. If the branch presses cancel at this point the Discrepancy is zeroed on the Horizon System.

E Note at this point nothing is fed into POLSAP and Credence, so in effect the POLSAP and Credence shows the discrepancy whereas the Horizon system in the branch doesn't. So the branch will then believe they have balanced.

F If at the next screen the rollover is completely cancelled, then no harm is done. However, if the Rollover is re-attempted at this point, the rollover will continue without any discrepancy meaning Horizon doesn't Match POLSAP or Credence.

This has the following consequences:

* There will be a Receipts and Payment mismatch corresponding to the value of the Discrepancies that were 'lost'.

G Note the Branch will not get a prompt from the system to say there is Receipts and Payment mismatch, therefore the branch will believe they have balanced correctly."

MR. JUSTICE FRASER: Mr. Green, is it sensible for me just to read the whole document?

H MR. GREEN: The key bits are the impact part there which are pretty striking because the first one is the branch appears to have balanced, whereas in fact they could have made a loss or had a loss or a gain.

A MR. JUSTICE FRASER: I have seen that. It actually goes on over to the other page where
there are three alternative solutions proposed.

MR. GREEN: Precisely.

MR. JUSTICE FRASER: Arising out of Fujitsu writing a code fix to stop the discrepancy
disappearing from Horizon in the future.

B MR. GREEN: Precisely.

MR. JUSTICE FRASER: So, is it not easier ----

MR. GREEN: It may be easier for your Lordship to read that.

MR. JUSTICE FRASER: I will just read it.

C MR. GREEN: I am most grateful.

MR. JUSTICE FRASER: The relevance of it is not lost.

MR. GREEN: I am grateful.

MR. JUSTICE FRASER: *(Pause for reading)* Right. Your Appendix 2 document

D Correcting Accounts.

MR. GREEN: Appendix 2 is the Fujitsu internal document.

MR. JUSTICE FRASER: This is also September 10?

MR. GREEN: September 10, and this includes some comments and identifies how things are

E going wrong.

MR. JUSTICE FRASER: When were you given these documents?

MR. GREEN: We got these documents in 2016 because these were specific things that were
identified by Second Sight.

F MR. JUSTICE FRASER: That doubtless is something that was taken into account when you
were pleading out of your case on Horizon.

MR. GREEN: Precisely.

MR. JUSTICE FRASER: Okay.

G MR. GREEN: We had to have a proper foundation for making allegations, some of it was
anecdotal, some of it was factual.

MR. JUSTICE FRASER: Understood.

MR. GREEN: This document essentially underpins obviously the existence of the errors and
what they have described as peaks.

H MR. JUSTICE FRASER: And also bugs.

A

MR. GREEN: Exactly, but also your Lordship will see the discussion mirroring the possible solutions in the other document about whether they change it behind the scenes or how they do it.

MR. JUSTICE FRASER: Understood.

B

MR. GREEN: What it speaks to when we get back to the paragraph in the defendant's skeleton, it is pretty obvious, it speaks to (a) Horizon having the ability to create these discrepancies (b) a disparity of knowledge between the Subpostmasters and Post Office as to what is going on (c) Post Office's approach to sharing knowledge and (d) the ability remotely to alter data.

C

MR. JUSTICE FRASER: Understood, but all of that is in issue.

MR. GREEN: Absolutely. We were, I think, surprised both in the forensic sense and in the real sense to read what we read. As a premise for either narrowing what your Lordship could properly determine in a Horizon Issues trial to exclude the very things that appear to us to be an issue.

D

MR. JUSTICE FRASER: We are not yet at the state of addressing what issues are going to be dealt with in March 2019.

MR. GREEN: Indeed.

E

MR. JUSTICE FRASER: However, I have now seen these documents and they put into perspective the origin of your pleading on what I am loosely going to refer to as the Horizon Issues.

MR. GREEN: My Lord, yes.

F

MR. JUSTICE FRASER: So they came from a joint Post Office Fujitsu document and also some internal Fujitsu documents.

MR. GREEN: My Lord, yes, but the only thing I would caveat about that is, we do not have any visibility as to how individual ones occurred.

G

MR. JUSTICE FRASER: Mr. Green, I understand.

MR. GREEN: I just wanted to set out that. I know your Lordship has the point.

MR. JUSTICE FRASER: I am on top of the detail, let us put it like that.

MR. GREEN: I am grateful. When we look back at paragraph 25(a) ----

H

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

A

MR. GREEN: Of Mr. Cavender's skeleton, which was the departure point for this, the distinction that is sought to be made between accounting matters and IT matters is one that we are concerned may preclude us and possibly preclude the court from getting to useful answers because it is right to say, if there is any doubt about it, this case is not about Horizon or accounting errors that have no impact financially upon the claimants.

B

This case is about and only about errors that do both.

MR. JUSTICE FRASER: Not necessarily. It depends on the way you express it. Errors that do both could equally be said to be errors that have an impact upon individual claimants.

C

MR. GREEN: Indeed.

MR. JUSTICE FRASER: Any computer system might have errors.

MR. GREEN: Precisely.

MR. JUSTICE FRASER: In fact it appears to be almost widespread experience of anyone who does use a computer that most of them from time to time do.

D

MR. GREEN: Precisely.

MR. JUSTICE FRASER: It is the effect of the errors and what then happens.

MR. GREEN: Exactly.

E

MR. JUSTICE FRASER: I understand the point you are making that you say that the court should be astute to avoid an artificial distinction between on the one hand accounting matters and on the other hand Horizon Issues purely so-called.

MR. GREEN: Precisely.

F

MR. JUSTICE FRASER: I have that point.

MR. GREEN: I think your Lordship has the point already.

MR. JUSTICE FRASER: The Horizon Issues, just to help you and Mr. Cavender, are going to be formulated by reference to what is in issue on the pleadings.

G

MR. GREEN: Indeed.

MR. JUSTICE FRASER: Not by how Mr. Cavender puts it in his paragraph 25.

MR. GREEN: I am most grateful, my Lord. I can probably leave it there.

MR. JUSTICE FRASER: I think you can. So, your general submissions; is there anything else?

H

MR. GREEN: That was one broad area of disagreement, overarching.

MR. JUSTICE FRASER: Understood.

A

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

B

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

C

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

D

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

E

MR. GREEN: That does require the court to examine what each party knew, we say, in particular, the Post Office. The example my learned friend gives, I can go back to paragraph 19 for this one, paragraph 19(b) on page 7, it is the bottom of paragraph 19(b), just below the top hole punch, well, perhaps the criticism immediately above the top hole punch is half way across the page: "The Cs note that Post Office's pleading on this point makes reference to background facts" I will come back to that phrase "such as the Post Office's difficulty in knowing what explains any given loss. They argue that this justifies wide-ranging disclosure on related matters. That is wrong. The only matters relevant to the proper construction of the contract (as to burden of proof or anything else) are matters which were publicly known or 'crossed the line' between the parties – including what both parties knew about the difficulties for Post Office in determining the cause of a shortfall."

F

G

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

H

Pausing there, my Lord, simpliciter that is true but if it were one of two necessary parts to common factual facts known to both parties then it would assist. So, if both parties knew that it was difficult and they could not do it then that is, on my learned

A friend's orthodox test, an essential component of what he is trying to say. That is why, when he then goes on to say a converse example is completely wrong because he says at the bottom: "The converse is equally true – some internal Memorandum privately lauding the ease of investigating shortfalls would not assist the Cs' case on construction."

B If your Lordship is going to be asked to take into account in construing a contract, a common fact known to both sides, that it was very difficult for the Post Office to know what causes shortfalls, when in fact the Post Office knew exactly how it could do that and the Post Office did not share that factual knowledge, that would be wrong.

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

MR. GREEN: Precisely.

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

E MR. GREEN: Indeed.

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

F MR. GREEN: No doubt about it.

MR. JUSTICE FRASER: That does not mean, and I think the expression I used in the transcript two weeks go, but the expression I used perhaps over dramatically was a smoking gun, that does not mean that smoking gun-type documents are not disclosable because I have the ability to order documents of that nature, whether they are going to be relevant to the point of construction or not. I also thought I made it clear that they had to be narrowly focused requests and the existing requests were far too wide.

G MR. GREEN: Indeed.

H MR. JUSTICE FRASER: I have your point about the orthodox factual matrix. Mr. Cavender, to be fair to him, explained this very clearly on the last occasion. We did not

A go into the authorities but I thought I made it clear that his approach on construction was indeed correct.

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

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

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

MR. JUSTICE FRASER: But it does not matter.

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

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

MR. GREEN: Of course.

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

MR. GREEN: Indeed.

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

MR. GREEN: Indeed.

F MR. JUSTICE FRASER: However, on the last occasion as I understand it, as I recall it and as I remind myself of it, I made myself clear that Model C was being ordered and further requests would have to be narrowly focused. This is the point to ask you the question which is at the top of my list, because I have not got the exact amount, just give me, please, your ball park figure thus far for the claimants' costs in this case.

MR. GREEN: My Lord, I have not got those.

G MR. JUSTICE FRASER: The last notification I had was that it was about five point something million. You might just remind yourself of what that is. Mr. Cavender, I will be asking you the same.

MR. GREEN: Slightly below that figure, my Lord.

H MR. JUSTICE FRASER: So about £4.9?

MR. GREEN: Something of that order.

A

MR. JUSTICE FRASER: £4.9 million. Mr. Cavender, do you have a figure?

MR. CAVENDER: £2.9 my Lord.

B

MR. JUSTICE FRASER: You are £2.9, right. That means that thus far, Mr. Green, the parties between them, having had one order from a master and three CMCs in front of me, have spent £8 million.

C

MR. GREEN: My Lord, yes. They have taken instructions, in the case of my instructing solicitors they have taken instructions from well over 500 individual people in individual cases.

MR. JUSTICE FRASER: I am not saying that the money ----

MR. GREEN: I take your point.

MR. JUSTICE FRASER: From the point of view of the managing judge of some group litigation who, I think I have made it clear, has the overriding objective very much in mind, a proportionate course has to be adopted.

D

MR. GREEN: Indeed.

MR. JUSTICE FRASER: Between you, you will have spent £15 million before you have any of these issues resolved.

E

MR. GREEN: My Lord, yes.

MR. JUSTICE FRASER: I take on board all of your general submissions. Do you have any more?

MR. GREEN: Yes.

F

MR. JUSTICE FRASER: How many, because at the moment I am struggling to see the relevance of them?

MR. GREEN: My Lord perhaps it is better in that case for us to focus on ... Your Lordship has the substance of the points that I wish to identify and I can deal with the others separately in relation to disclosure and Horizon Issues.

G

MR. JUSTICE FRASER: Let me tell you the way today is going to be approached.

MR. GREEN: I am grateful, my Lord.

MR. JUSTICE FRASER: Which are going to deal with disclosure completely in then Horizon Issues completely, although that is not going to take very long for reasons that will become obvious to both of you, and then Horizon directions.

H

MR. GREEN: I am grateful.

A

MR. JUSTICE FRASER: So far as disclosure is concerned I will give you my preliminary view and then we will have to go through it.

MR. GREEN: Indeed.

B

MR. JUSTICE FRASER: Mr. Cavender, I think, has got something of a point on the way in which the requests are still currently framed because I thought I made it clear last time what the approach of disclosure had to be. Some of the disclosure categories still sought by the claimants are far too wide. I apologise for the fact that the printing has not always necessarily reflected the colours that it might need to, where is the best place to use as an agenda for the contentious issues between the parties still as at today?

C

MR. GREEN: Does your Lordship have my learned friend's exhibit 1?

MR. JUSTICE FRASER: I do. That does however refer to colours, almost in a sort of negative default way because it says black but actually everything is black, not that I am criticising that.

D

MR. GREEN: If your Lordship has our draft order that was behind our skeleton.

MR. JUSTICE FRASER: Give me one second.

MR. GREEN: We did deliver coloured versions of that to the court.

E

MR. JUSTICE FRASER: Did you?

MR. GREEN: So that the printing issue ----

MR. JUSTICE FRASER: Do you know where they went or to whom they were delivered?

MR. GREEN: Simon LJ's clerk told us that she was very helpfully standing in for your Lordship's clerk.

F

MR. JUSTICE FRASER: Were they put in a supplemental bundle? I think somebody behind you might want to say something.

MR. GREEN: My Lord, we have a spare.

G

MR. JUSTICE FRASER: I am not saying it was not put in but I have not got it in colour.

(Judge handed spare copy) Thank you very much. This is your document?

MR. GREEN: That is our document.

MR. JUSTICE FRASER: That formed the basis for Mr. Cavender's exhibit 1.

H

MR. GREEN: Indeed.

MR. JUSTICE FRASER: Tell me what the colours mean if you would.

MR. GREEN: The colours in general mean that the red is disputed.

A

MR. CAVENDER: May I say that this is actually our document originally in black.

MR. GREEN: Yes.

B

MR. CAVENDER: We sent it to the other side and then the colours my friend will explain how the iterations came back. What our appendix, exhibit 1 was, was trying to cut through all that and the simple form but this is fine in terms of you can see how it developed by looking at this.

C

MR. JUSTICE FRASER: Would it be unfair of me to understand part of the third column as being a transposition into the Model C of some categories which have appeared in the Model D suggestion last time?

MR. GREEN: That is true to some extent.

MR. JUSTICE FRASER: I thought it was, but I looked at it and it seemed to me that it was.

D

MR. GREEN: What it does not show, it does not super clearly come out of my learned friend's skeleton, is that in bundle 3 there is the original long list where items were removed by us ----

MR. JUSTICE FRASER: I know, but, Mr. Green, this is I think now at least the second and possibly the third hearing about contentious disclosure.

E

MR. GREEN: Indeed.

MR. JUSTICE FRASER: I know the parties have both changed their positions.

MR. GREEN: Yes.

F

MR. JUSTICE FRASER: Where is the up-to-date position for where we are today in terms of what is in issue on Model C disclosure? Is it this?

MR. GREEN: This illustrates it most clearly because it is in colour but exhibit 1 has the defendant's comments so it may be exhibit 1 to defendant's skeleton has the defendant's comments in relation to each item.

G

MR. JUSTICE FRASER: I see, so actually the column in Mr. Cavender's schedule that says claimants' additional requests which were objected to by the defendant ----

MR. GREEN: Are the red ones.

H

MR. JUSTICE FRASER: ---- is going to be same text as the red ones. Right. Am I right, therefore, just flicking through Mr. Cavender's schedule which goes from "a" through to "o" -- and my grasp of the alphabet is slim but I think it is going to be high teens, if not exactly twenty -- twenty contested requests?

A MR. GREEN: Yes.
MR. JUSTICE FRASER: Which letter in the alphabet is O, just out of interest? Does anyone know?

B MR. GREEN: J is ten, so 15.
MR. JUSTICE FRASER: 15, right. So mid teens, not high teens. They all need resolving because the parties cannot agree them; is that correct?

C MR. GREEN: Yes.
MR. JUSTICE FRASER: Let us start, I am going to do one after the other, I am going to hear from you, I am going to hear from Mr. Cavender. I am afraid you are not going to get a detailed judgment.

D MR. GREEN: My Lord, we completely understand.
MR. JUSTICE FRASER: You are going to get a summary and in some cases it might be very short.

E MR. GREEN: My Lord, we completely understand.
MR. JUSTICE FRASER: So, number 1, which is Request a.
MR. GREEN: Number 1, you will see Request a, just so your Lordship knows how it refers back to ours, is ----

F MR. JUSTICE FRASER: I do not need to know. I can read it. I can read what it says.
MR. GREEN: I am grateful.
MR. JUSTICE FRASER: It is internal Post Office policies, manuals, process documents that set out procedures that are applied between the Post Office and the clients by which it really means, I think, branches.

G MR. GREEN: No, no, no, it is their third party clients.
MR. JUSTICE FRASER: Who are they then?
MR. GREEN: The banks, they are getting Camelot and so forth.

H MR. JUSTICE FRASER: For dealing with discrepancies?
MR. GREEN: Yes, sort of the back end of the transaction.
MR. JUSTICE FRASER: You say that is relevant and on each of those I am going to ask you the same question, Common Issues or relevance in any event?

MR. GREEN: Yes.
MR. JUSTICE FRASER: Which?

A MR. GREEN: Both.

MR. JUSTICE FRASER: You say both.

MR. GREEN: We say both.

MR. JUSTICE FRASER: You have a couple of minutes to tell me why then I will hear from

B Mr. Cavender. If there are 15 of these this is going to take us two hours so you had better get a move on.

MR. GREEN: I will be very quick. The short point on this one is that your Lordship can see that numbers 1 and 2, of which that was number 3, refer to the products and services offered by those people.

C MR. JUSTICE FRASER: Yes.

MR. GREEN: And the written policies and process documents relating to those products and services, all these deal with is the specific matters between them and the clients.

MR. JUSTICE FRASER: Understood.

D MR. GREEN: Which specifically relate to the subject matter in respect of which the Common Issues has been resolved. That is my submission.

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

MR. CAVENDER: My Lord, I have some concern with the way this hearing is progressing.

E I have not been able to make any general submissions ----

MR. JUSTICE FRASER: No, what I was about to say to you is you have got an opportunity to make general submissions. As I understand all of those in red your position is set out in the skeleton. It is either disproportionate, not relevant to Common Issues or should

F not be ordered at this stage and is far too wide a request.

MR. CAVENDER: My Lord, that is certainly right, but on my learned friend's soliloquy about reconciliation, it is quite important to understand the Horizon Issues because it comes in actually on this first one, what we are talking about here. The Horizon

G computer is, as said in my skellie, it does record data, it transfers data. It does not create shortfalls. That happens when you get the data from Horizon and it is then processed by Post Office by comparing that data with other data from people like the Bank of Ireland in relation a cashpoint. So the Horizon system does not, there is no reconciliation within

H that. It does not produce shortfalls. It may be the cause potentially of a shortfall later. That is really important.

A Your Lordship said, well, clients here must be the other branches.

MR. JUSTICE FRASER: That was obviously a misunderstanding.

B MR. CAVENDER: It was, my Lord, but the extent of the mistake or misunderstanding is important. There are some 100 products that the Post Office provides.

MR. JUSTICE FRASER: Understood.

C MR. CAVENDER: If you were going to try and reconcile all those products, it will be a massive accounting process. My learned friend misunderstands, I think. If I go to that and show you how we plead it all out very clearly. My learned friend says he is surprised, I am surprised they have not yet understood that basic distinction. It is only important in terms of case management, it does not matter what you call it, the Horizon Issues, the question is know what you are biting off at any given stage.

D MR. JUSTICE FRASER: Well, Horizon Issues is a shorthand term which I think I first used at the last case management conference which was designed to encompass the following, issues that required expert evidence that could be resolved by me in March without the need for any evidence of fact.

E MR. CAVENDER: Correct.

MR. JUSTICE FRASER: I think I got the pleadings out and I looked at them and I said, some of them are bugs, some are, you know, IT specific expert issues and that is the mark.

F MR. CAVENDER: Exactly.

MR. JUSTICE FRASER: I have seen both sides' drafts and we have not got on to that yet.

MR. CAVENDER: Quite.

MR. JUSTICE FRASER: So far as this is concerned, well, finish making your general submissions.

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

MR. JUSTICE FRASER: Understood.

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

A

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

B

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

MR. JUSTICE FRASER: I understand that.

C

MR. CAVENDER: And not say, "oh, well", in some sort of vague way "I can justify that on some other basis I am not going to tell you about" which, by the way, he has not, what the other base is even though he claims it for item a.

MR. JUSTICE FRASER: You are saying because of the way that the thing is structured, these are to be relevant to the Common Issues or they are not disclosable now.

D

MR. CAVENDER: Exactly. You have already made an order, my Lord, for disclosure by stages.

MR. JUSTICE FRASER: I understand.

E

MR. CAVENDER: We have already got Model C. If you look at Model C it talks about narrow classes of documents.

MR. JUSTICE FRASER: Understood.

MR. CAVENDER: All this has been decided. This is like Groundhog Day going through this. With those perhaps intemperate remarks, let us go to the detail of what is here.

F

MR. JUSTICE FRASER: I do not think number 3 in red of Request a needs to take you very long.

MR. CAVENDER: We are dealing with it.

MR. JUSTICE FRASER: Yes.

G

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

H

You talk about costs. The costs of disclosing these documents on this scale, my learned friend seems to have no idea what he would get if the court ordered this.

A What would he do with it? My Lord, this is a theme, it will be my last general submission I make, unless the court grips this case now on disclosure the next stage is witness statements in August.

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

B MR. CAVENDER: I am obliged.

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

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

D My Lord, remember, we have Schedule 1, Part 1 and Part 2. We have already got hundreds of thousand of documents that almost certainly will be irrelevant to the process already in play, even before we start on item a. My Lord, with those submissions, let us look at a, and then we will go through ----

E MR. JUSTICE FRASER: Deal with a first, I will give you the answer and we will go on to b.

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

MR. JUSTICE FRASER: No, you cannot just yet. I want Mr. Cavender to deal with a.

F MR. CAVENDER: What we are giving already is in the left-hand column which is the background documents, so the court gets a sense of the context in which it is construing the provision.

MR. JUSTICE FRASER: Yes.

G MR. CAVENDER: There is no basis and none has been suggested for why documents as to procedures applied between Post Office and the Bank of Ireland or Camelot or anyone else for dealing with the accounting function. Discrepancies and shortfalls will bear upon how you construe the obligations in the contract.

H The dichotomy we make in our comment if you look under request a in the second part, the request also relates to the financial reconciliation process and other operational activities undertaken by Post Office, that is the bright line. Is this

A

operational Post Office stuff after the event, not known by either party? Answer, yes, it is. My Lord, that is why I say that items 1 and 2 are more than sufficient for the court to have the background to determine the products and services issue in the left-hand column.

B

MR. JUSTICE FRASER: Thank you very much. Mr. Green?

MR. GREEN: I am sorry, I have to do this now. May I take your Lordship please ----

MR. JUSTICE FRASER: No, I will tell you where you can take me. The only place you can ----

C

MR. GREEN: ---- to the defence.

MR. JUSTICE FRASER: No, no, no, the only place you can take me, please, is to the list of Common Issues. Tell me where that is.

MR. GREEN: My Lord, may invite your Lordship to reconsider that? I am happy to take your Lordship to that ----

D

MR. JUSTICE FRASER: No, well, you ----

MR. GREEN: CMB 2 at tab 7.

MR. JUSTICE FRASER: Hold on one second. Case management bundle 2, tab 7.

MR. GREEN: So it is tab 7 page 67. This is a list of Common Issues.

E

MR. JUSTICE FRASER: I know it is, that is why I asked you to take me to it. Which issue does this go to?

MR. GREEN: In relation to the implied terms ----

F

MR. JUSTICE FRASER: No, no, just tell me which issue does it go to?

MR. GREEN: Implied terms.

MR. JUSTICE FRASER: Implied terms. Which one?

MR. GREEN: There is a long list of those ----

MR. JUSTICE FRASER: No, no, I know, but ----

G

MR. GREEN: Also the burden of proof. I will take a simple one, my Lord, the burden of proof, liability for alleged losses, numbers 8 and 9.

MR. JUSTICE FRASER: Yes. You give that the shorthand "burden of proof" but they are both proper construction of clauses of the contract.

H

A

MR. GREEN: Yes. Pausing there, I would like to be told by my learned friend or would like my learned friend to tell the court whether he is formally abandoning paragraphs 76, 85 and 93 of the defence?

MR. JUSTICE FRASER: Take me to those, please.

B

MR. GREEN: They are in case management bundle number 1, tab 4 is the generic defence and the first of them is on page 36.

MR. JUSTICE FRASER: Give me the list again, please.

MR. GREEN: They are numbers 76, 85 and 93.

C

MR. JUSTICE FRASER: Just one moment.

MR. GREEN: My Lord, shall I tell you which bits of those I would like your Lordship to look at?

MR. JUSTICE FRASER: No, you can give me a chance to actually read my way through them.

D

MR. GREEN: I am most grateful.

MR. JUSTICE FRASER: *(Pause for reading)* Mr. Green, I have had a look at those.

MR. GREEN: I am grateful.

E

MR. JUSTICE FRASER: How do the documents that you are seeking in Request a go, please, to the proper construction of section 12, clause 12 of the SPMC(?) and part 2, paragraph 4.1 of the MTC(?)

F

MR. GREEN: One of the issues between the parties on the pleadings is the defendant's case which, unless this is struck out, this is going to be entitled to be advanced before your Lordship in November, that paragraph 76, the Post Office's case -- it is my learned friend's pleading, it is not my pleading.

MR. JUSTICE FRASER: No, I have asked you how it is relevant to the proper construction ----

G

MR. GREEN: I am trying to answer that point.

MR. JUSTICE FRASER: Actually, Mr. Green, with respect, you are not actually. What you are doing is you are making forensic points on the case generally. My question is a specific one.

H

MR. GREEN: Well, I ----

A MR. JUSTICE FRASER: Will you please just listen. I have a question which I would like you to address with particularity, how do the documents that are policies and manuals about the procedures between Post Office and its clients relevant to the proper construction of section 12, clause 12 of the SPMC and Part 2, paragraph 4.1 of the MTC?

B MR. GREEN: My Lord, yes ----

MR. JUSTICE FRASER: How?

MR. GREEN: The answer is in three parts.

MR. JUSTICE FRASER: Give me the three parts.

C MR. GREEN: The first part is that the Common Issues relates to a contractual term between the parties about the burden of proof. That is point 1.

MR. JUSTICE FRASER: It is construction of the contractual term.

D MR. GREEN: Yes, construction. It relates to construction of a contractual term of the contract between the parties, point 1.

E Point 2, the defendant advances as its case in particular the point at 76.4 to 6 and contends that those are important aspects of the factual matrix against which the contract should be construed. That is the defendant's case. Those items at 4 to 6 are the following. The Post Office's inability to monitor at first hand the transaction undertaken in branches. Number 5, Post Office unable to monitor at first-hand the customer use of property, leave that aside for the moment. Particularly, number 6, Post Office relies on the accurate reporting by Subpostmasters of accounts, transactions of cash (*unclear*)

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

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

H clarify some of those points, they have not answered it yet but an answer will hopefully come", that is a different situation.

A

At the moment, my Lord, I am dealing, I am facing a pleading which expressly advances that point as a point relevant to construction. These documents, the absence of those documents will deprive the court of the opportunity to construe, not only deal with the points the defendant takes in the defence which are pleaded points but also the general point that the court should try and give the contract commercially sensible meaning.

B

C

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Unless you have the backward facing part of that on the specific issue we are only asking, my learned friend says it is all terribly big and difficult, that there is not some standard form in relation to how you deal generally with transaction discrepancies and reconciliations seems to me to be wholly unrealistic. It probably will not be identical across 100 people but the arguments conceal the fact that when you look at what we are asking for we are specifically asking for generic documents which are the procedures between Post Offices and clients, specifically in relation to discrepancies, shortfalls and losses. Nothing else. We do not want a huge disclosure of things.

E

F

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

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

MR. GREEN: That is the submission.

G

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

H

MR. CAVENDER: I am grateful.

MR. JUSTICE FRASER: I am not persuaded, although you say that is how Mr. Cavender is going to be arguing on the proper point of construction of section 12 and part 2

- A paragraph 4.1, he would necessarily get very far actually having argued that this category is not relevant to the Common Issues, he is going to have ----
- MR. GREEN: An up hill struggle.
- MR. JUSTICE FRASER: ---- a bit of an up hill struggle ----
- B MR. GREEN: Your Lordship understands my anxiety.
- MR. JUSTICE FRASER: ---- I have the point. We have the transcript. You can come back at some stage in the future but it has to be a more narrowly focused request.
- MR. GREEN: I am grateful.
- C MR. JUSTICE FRASER: That is the answer on a, let us go to b please. So b, c and d, can they be taken together?
- MR. GREEN: They can be still taken together. What is agreed is 3, 4, 5, 6 and 7.
- MR. JUSTICE FRASER: What does the green mean, by the way, in your document?
- D MR. GREEN: It is probably better for your Lordship to look at my learned friend's exhibit 1 just to deal with it. I am going to deal with exhibit 1 to my learned friend ----
- MR. JUSTICE FRASER: Understood but on yours some of it is in green, I wondered what the green was.
- E MR. GREEN: That is agreed.
- MR. JUSTICE FRASER: Okay.
- MR. GREEN: That is what we suggested and they agreed. In fact on the one that is listed at number 5 in ours, the red has gone as well, because that is a qualification that has since been agreed between the parties.
- F MR. JUSTICE FRASER: On yours I am looking at 9, 10 and 11 which is b, c and d; is that right?
- MR. GREEN: Indeed. That wording has been, the parties have moved towards a
- G compromise in relation to the wording of b because it originally said actual or potential impact. Your Lordship will see what we are actually asking for at this stage is minutes of management meetings. We have tried to focus specifically on generics. We are not interested in individual cases.
- H All we are interested in is the sort of overarching documents like the ones we accompanied with the responsive note. We do not know what they are called so we have asked for minutes of management meetings to discuss variation of Postmasters contracts

A

nationally. In so far as the variations that were being contemplated concerned or impacted on the operation of Horizon branch accounts and/or discrepancies, shortfalls that may arise therein, we specifically look at disclosure relating to variation of contracts which is driven by considerations relating to the generation of these discrepancies or shortfalls. It is a specific focus.

B

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

C

MR. JUSTICE FRASER: Yes.

D

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

MR. JUSTICE FRASER: Understood.

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MR. GREEN: Specifically relates to that liability for alleged losses, burden of proof point in the Common Issues. This is their specific pleading on it. They say that the truth lies peculiarly within the knowledge of Subpostmasters and it is unjust for the Post Office to be required to prove matters that fall peculiarly within their knowledge and subject to fiduciary obligation. Ignore the third one. It is those two in (b) which they have specifically put in issue. The idea that the court in resolving the Common Issues is going to be looking at only one side of the fence that happens to favour them and for us to be precluded from investigating specific matters which are obviously relevant to their pleading, we respectfully say would be completely unfair.

F

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I understand your Lordship's concerns about staging this and proportionality. Your Lordship is not going to have any complaint from me if some sort of nuanced approach or iterative approach or cautious approach is taken but it is right that your Lordship knows why we are asking this. Your Lordship could have got the impression that we had gone away and gone, "oh, we will just ask it anyway". That is not what happened. We went back to the pleadings. We said, "well, hold on a second, how is the court going to be fairly appraised of both sides?" This is something that goes through everything, including when we get to Horizon discretions. Experts are only invited on

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their case to look at how it works from the Subpostmasters' side and not see how it works from the Post Office side. The idea that the court should do this with one eye closed, we say, is a wrong approach fundamentally.

B

That is why we are asking for it. We are specifically concerned with references to contractual variations which speak to the knowledge the Post Office has in relation to how these matters were arising. If it needs to be more focused, my Lord, or we need to revisit it after we have had some initial disclosure I am sure we are prepared to do that. I make it absolutely clear, I do not want to put an undue burden on them.

C

MR. JUSTICE FRASER: Understood.

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

MR. JUSTICE FRASER: Mr. Cavender?

D

MR. CAVENDER: My Lord, I don't understand this request. How possibly can minutes of management meetings, i.e. the Post Office view of the operation of its contract, be relevant to the construction of it at an earlier stage? Also, with the managers and what they say and what they do not say. I cannot imagine any commercial case where you have a contract where the judge would have any truck with information at all. This is a whole species of information, minutes of management meetings, standard advice et cetera, how on earth is that going to be relevant to construction of the contract that has, by definition, been reached? On basic principles it is inadmissible.

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F

Then when you look at the type of people, what does it matter one manager says at a meeting about contractual terms? He might be right, wrong or indifferent. It will not inform the construction of that term. We make the point in our comments as well. In so far as there were, if you like, legal-type discussions, then the certainty of a lawyer being there for the Post Office is almost certain in which case such document would be privileged in any event.

G

H

Bear in mind, my Lord, one has to in each case, what we are giving. Look in the left-hand column, we are giving suite of contractual documents, suite or product of service specific contracts we have added in, contractual variations, written policies and process, standard and template documents. We are giving all of the potentially relevant

A but very, very broadly relevant material. Is the court being to be helped by minutes of meetings after the event about operation of that contact? No, it is not.

MR. JUSTICE FRASER: Right. I do not consider these three categories, may I just check, I am trying to do it cross referenced against the numbers, Mr. Green, in your column and

B Mr. Cavender's letters. Is 9 Request b, 10 Request c and 11 Request d?

MR. GREEN: Indeed.

MR. JUSTICE FRASER: I do not consider these items to be relevant to the Common Issues trial. Even if they were it seems to me, this is no criticism of you Mr. Green because

C you do not know what they are called, but the term management meetings or the term within a very large organisation such as Post Office management is simply too vague. However, I appreciate that you have simple difficulty because you do not necessarily have the exact descriptor.

D Mr. Cavender, so far as these categories are concerned I am not ordering them to be disclosed but I am going to order the Post Office to provide a list, please, of hierarchy of the correct description of the different layers of management within the Post Office. If at some point there is a disclosure request along different lines the claimants

E will at least know the correct layer of management that they are seeking. I am not going to order disclosure of that. It might be from the kerfuffle behind Mr. Cavender that I am going to be told that that has been done anyway.

MR. CAVENDER: No, are you asking for over the whole of 20 years because obviously it changes management?

F MR. JUSTICE FRASER: All I am identifying ----

MR. CAVENDER: From 1999 onwards.

MR. JUSTICE FRASER: For example, if it were a company it would be a board of directors,

G and executive management committee or whatever the next layer down is. If it has changed over 20 years, it is not going to be very difficult, so it is the Post Office board, senior managers, whatever. It is simple identification of hierarchy.

MR. CAVENDER: Down it to what layer though?

H MR. JUSTICE FRASER: I would have thought probably the top four layers is sufficient for the moment. That is not the sort of information that ought in any way to be controversial.

A

MR. CAVENDER: It is not controversial, no. It is just the changing of title. If you ask me today, that would be easy, I think, but it is tracking it and how the things will ----

MR. JUSTICE FRASER: Why do you not start with it now and see how far back you need to go? I have some general comments to make at the end of today about case management.

Next number?

B

MR. GREEN: e my Lord.

MR. JUSTICE FRASER: Which is your number 20?

C

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

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

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MR. GREEN: They fall, I would say, possibly more into that category but because of the way that the case has been pleaded, one is always anxious as your Lordship will remember, from being here looking towards the bench, when parties are entitled to pursue the case they have actually pleaded and there are sort of forensic points one can take about the extent to which they might be able to do that and one can hold up the transcript later, but that is their pleaded case. That is why I am anxious my Lord, I can being open about the anxiety because your Lordship is absolutely right they more naturally fall into the Horizon disclosure but, of course, they could be ordered in that disclosure anyway.

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

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

A

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

B

MR. GREEN: Yes. The difficulty in relation to narrowing by date range is that we have 500 people starting at different times.

MR. JUSTICE FRASER: I know that. Mr. Green, that does not mean that every request or category has to be dealt with across 20 years.

C

MR. GREEN: I accept that.

MR. JUSTICE FRASER: For a start you have an anchor for a date range, you have actually got two documents that fall into this category that are both dated September 2010.

MR. GREEN: Indeed.

D

MR. JUSTICE FRASER: If it is going to be narrowly focused, done on a date range, whatever that date range is.

MR. GREEN: Yes, and we could start with a narrow one perhaps.

MR. JUSTICE FRASER: I think that would be a good idea on the basis that Model C has been adopted. That may or may not then generate some documents.

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MR. GREEN: Indeed.

MR. JUSTICE FRASER: And that may or may not then generate a slightly wider date range.

MR. GREEN: Indeed.

F

MR. JUSTICE FRASER: It is not Common Issues.

MR. GREEN: Your Lordship knows why ----

MR. JUSTICE FRASER: I know.

G

MR. GREEN: I am concerned about the overlap into Common Issues given the way they have pleaded their case. I have your Lordship's observations which are all on the transcript. Perhaps it is better to leave that for Horizon.

MR. JUSTICE FRASER: I think it is. I am not going to ask Mr. Cavender about them.

MR. GREEN: I am content with that.

H

MR. JUSTICE FRASER: Whether you are or not, that is what is happening. So where is the next one? Is it number 25?

MR. GREEN: Yes, we have f and g.

- A MR. JUSTICE FRASER: 25 and 26.
- MR. GREEN: My Lord, I think we can perhaps treat those in the same way, treat those as Horizon Issues rather than Common Issues.
- MR. JUSTICE FRASER: Again, just observations on the nature of the request. There is no date range. Who are managers?
- B MR. GREEN: My Lord, the thing is that this is a subject matter request. We do not know who they are and we will be ----
- MR. JUSTICE FRASER: I do not mean in terms of identity but the hierarchy is going to help you.
- C MR. GREEN: Absolutely, it is going to be much easier with greater visibility. It is a focused request on the availability provision of transaction information of Postmasters. The part of their defence which I have taken your Lordship to takes the point of peculiarly within their knowledge.
- D MR. JUSTICE FRASER: I know. On Common Issues, unless you were meeting that pleading with, it is not peculiarly within Post Office's knowledge, it is also within our knowledge, then it cannot be common knowledge.
- E MR. GREEN: No, there is a difference, they are contending that the fact that something, well, say the parties go into contract and they both know that a nuclear reactor takes a long time to build, there is a twenty-year lead time on being a nuclear reactor, they know that for example. Or, they know that it is very difficult to get reliable geological surveys in a particular area of the Antarctic, that is a fact which you do not need to know what
- F the information of the geological survey in the Antarctic is but you can have a fact that is about the state of knowledge of the particular parties or the difficulty of doing something. That is how they are putting their case. They are saying that the parties knew a fact which was that other information lay peculiarly within the knowledge of the
- G Subpostmasters.
- MR. JUSTICE FRASER: I know.
- MR. GREEN: And that is capable of being a fact itself, they advance that case ---
- H MR. JUSTICE FRASER: Mr. Green, if that is part of their case and let us put analogies about nuclear reactors and geological information to one side, if that is their case this information is peculiarly within the knowledge of the branch Postmasters.

- A MR. GREEN: Yes.
- MR. JUSTICE FRASER: Your case is, "no, it is not", although a finding will have to be made as to whether that is a common fact, will it not? Is it part of the factual matrix against which the contract falls to be construed or is it not?
- B MR. GREEN: Yes, but the problem is that when we actually get to November we look back at the hearing, your Lordship is going to be asked to determine whether it was a fact common to both parties.
- MR. JUSTICE FRASER: Yes.
- C MR. GREEN: That information about transactions lay peculiarly within the knowledge of Subpostmasters.
- MR. JUSTICE FRASER: Yes, if that is in issue I will have to make a finding on it.
- D MR. GREEN: Yes, but your Lordship at the moment, on my learned friend's approach, is going to be deprived of any evidence, so are we, of any evidence that shows you whether or not Post Office believe that themselves. All you are going to have is the Post Office sitting on their hands silently, "oh, yes, we thought it was peculiarly within the knowledge of the Subpostmasters. That was our belief and that was known to us, was it known to you as well?" And it was, it was a common fact, then your Lordship must
- E construe the contract on that basis. If we can show on the basis of the evidence which we are asking for, that they did not think that at all, then deprives them of the chance of establishing common fact that they seek to pray in aid. That is why ----
- F MR. JUSTICE FRASER: Pausing there. Which one are we looking at? Is it f?
- MR. GREEN: Well, I was dealing with ----
- MR. JUSTICE FRASER: No, no, it is worth actually looking at that submission in the light of the request that is currently being sought.
- G MR. GREEN: Yes.
- MR. JUSTICE FRASER: How does a written instruction to a trainee about the availability of transactional information to Postmasters advance that particular point you have just explained?
- H MR. GREEN: Those documents are highly likely to shed light on what knowledge the Post Office had of the information and the relative availability of such information as

A between Post Office and the Subpostmasters. It is specifically what is unpinning the
 issue your Lordship will have to decide on that fact.

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

MR. GREEN: No.

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

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

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

MR. GREEN: No.

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

D Mr. Cavender, it seems to me on the basis of, for example, however one might
 put it, a potential dramatic change ----

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

E MR. JUSTICE FRASER: Yes.

MR. CAVENDER: Yes, so internal/externally produced management information reports,
 briefing papers, dealing with volume, nature of transaction, corrections since 1999.
 What that goes to, as we say, appears to be where things have not gone right, so it is a

F breach potentially? We have done something other than that which we should have done

MR. JUSTICE FRASER: I think actually when I say there is a kernel within the chaff of g
 some high level summary information about the number and value of the transaction or
 corrections on an annual basis could be said potentially to be relevant. I have come to

G that conclusion separately but then looking in your column g, purely coincidentally it
 seems great minds might think alike, you say in the first three lines of your second
 paragraph that the Post Office is open to considering whether the information sought
 could be provided through another means and you then talk about raw transaction.

H MR. CAVENDER: Indeed.

A

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

B

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

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

MR. CAVENDER: There is not.

C

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

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

D

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

E

MR. CAVENDER: My Lord, yes.

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

F

Where are we now? Is it h?

MR. GREEN: My Lord, we are now on ----

MR. JUSTICE FRASER: Your number 27, h.

G

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

H

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

A

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

B

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

C

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

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

D

MR. JUSTICE FRASER: These are Horizon Issues though.

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

E

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

F

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

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

G

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

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

MR. GREEN: I know.

H

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

A

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

B

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

C

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

D

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

MR. GREEN: The construction of the disclosure process that the parties originally agreed
was, we do the individual claimants and then there is also a generic level of disclosure
which helps to give the context to those individual sets of facts so they are not in isolation.

E

If we look at (i), which is the one which your Lordship asked me about, it is
relating specifically to the ability of Post Office/Fujitsu remotely to detect the
occurrence of shortfalls, branch discrepancies.

F

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

G

I simply cannot see how my learned friend can suggest for one second that that
cannot be relevant. It is obviously relevant. There is extreme concern on our side that it
is not just the burden of producing the documents that is a disincentive. That often
happens in litigation, people are suspicious. I am not making any criticisms. I am just
saying that we have not chosen to put that in issue, the defendant has. For the defendant
to sort of finesse it in the skeleton saying, well, we mentioned some matters of

H

A background and then make submissions that I have the wrong end of the stick when all I am doing is reading out to the court the express terms of their own pleading, we respectfully say it is not really a well-founded position for the defendant to adopt.

MR. JUSTICE FRASER: Yes.

B MR. GREEN: My Lord, that is my answer in relation (i) which you asked me about.

MR. JUSTICE FRASER: Sorry, which is (i)?

MR. GREEN: h(i). Your Lordship asked me specifically about ----

MR. JUSTICE FRASER: I was using the numbers.

C MR. GREEN: I am so sorry, the ability of Post Office ----

MR. JUSTICE FRASER: (i) became (a), all right, understood.

MR. GREEN: It was originally (a), it became (i) in the table. The ability of Post Office 27(a), the ability of Post Office remotely to detect, it is absolutely directly relevant. The ability to conduct transactions remotely, also I accept that is adjacent to the first point and I accept that it also obviously falls into Horizon.

MR. JUSTICE FRASER: Which ones do you accept is Horizon?

MR. GREEN: 27(b).

MR. JUSTICE FRASER: Is Horizon?

E MR. GREEN: Falls into Horizon but we respectfully say would inform the court's approach to the pleading that they actually advanced and the extent to which they actually authorise things to be changed and how the court is supposed to resolve their contention that the causes of shortfalls were matters that lay peculiarly within the knowledge of the Postmasters, without having sight of documents which might show they were actually doing them manually, is bizarre. Let alone the plea that it would be unjust for Post Office to prove things that fall peculiarly in the Postmaster's knowledge. It just seems extraordinary.

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

H

A contract which are specifically in the Common Issues. Your Lordship has my submission.

MR. JUSTICE FRASER: I have your point.

MR. GREEN: If someone manually creates a shortfall and they have authorised it ----

B MR. JUSTICE FRASER: Mr. Green, I have the point.

MR. GREEN: Right, that is my submission.

MR. JUSTICE FRASER: Yes, Mr. Cavender?

C MR. CAVENDER: My Lord, my learned friend, if he looks at the pleading carefully, can we go back to my pleading which seems to excite him a great deal and paragraph 76, factual matrix. What we have set out there are the ingredients of the fact that the Postmasters run and occupy the Post Office. They, if you like, are the front line. They do the doing. We do not have cameras in there. We do not, you know, operate the terminals ourselves. There are agents and they are responsible. All it is is a legalise way, 76, of doing that. If

D you just cast your eye over 76 and the subparagraphs there.

To build this sort of mountain of submissions upon that, all we are saying is it is a balance of power-type point. It is a relationship point.

E MR. JUSTICE FRASER: It goes to whether it is a relation or contract.

MR. CAVENDER: Or a commercial contract which, as your Lordship identified, in my submission correctly last time, is at the heart really of all the implied terms that are put forward. That is not a very good point. We are just setting out that which we say,

F people do not often plead, good people do plead and your Lordship actually last time made an order, if you recall, as to what factual matrix people are contending for.

The same can be said of the other paragraph, 93. All which are saying is that having regard to this relationship the Postmaster runs the thing, he operates the system, he is our agent so, in the first instance he is responsible. If you want to call that burden

G of proof then you can.

MR. JUSTICE FRASER: Yes, but, Mr. Cavender, the difficulty with that submission is that paragraph 76.6 does not say in the first instance who is responsible, should I say he or she is responsible, it actually says that it would be impossible or excessively difficult.

H MR. CAVENDER: Quite.

- A** MR. JUSTICE FRASER: In so far Mr. Green has a point at all it seems to me, looking at Request h ... by the way whose phrase is a "process document"? What does that mean, process document?
- MR. CAVENDER: Where is your Lordship reading that?
- B** MR. JUSTICE FRASER: I am looking at Request h.
- MR. CAVENDER: h(i) I think.
- MR. JUSTICE FRASER: h(i), so it is written policy and process documents and I think it is a phrase which those instructing you must understand was meant by it because in come of your columns there is some suggested alternative wording that also uses written policies or process documents.
- C** MR. CAVENDER: This wording arises, I think, from Mr. Green, this is his addition.
- MR. JUSTICE FRASER: I understand that but if you look, this is admittedly a different request, but if you look under Request i in your third column, your last paragraph you say, it is a different request but it goes to the phraseology. The request could be agreed if narrowed in scope using the following wording -- and this has been rejected by the claimants -- any written policies or process documents.
- D** MR. CAVENDER: Yes.
- E** MR. JUSTICE FRASER: I would just like that know in outline description terms what is a process document? I know what a policy is obviously.
- MR. CAVENDER: Quite. It is a formal document outlining what the Post Office process is.
- F** MR. JUSTICE FRASER: It is a high level understood term between both parties?
- MR. CAVENDER: I am not sure about between both ----
- MR. JUSTICE FRASER: Mr. Green started with it.
- MR. CAVENDER: He did.
- G** MR. JUSTICE FRASER: It seems to be understood by him.
- MR. CAVENDER: That seems to be right, my Lord, yes. The question really is what is relevant and particularly how is this going to be narrowed, if you see what we say in Request i.
- H** MR. JUSTICE FRASER: I am still on h at the moment.
- MR. CAVENDER: h is the introduction if you see what I mean.
- MR. JUSTICE FRASER: I thought that h was a separate request.

A

MR. CAVENDER: Quite, yes, but it breaks down into five bits and we have concentrated mainly on the first.

MR. JUSTICE FRASER: I think it is seven bits; is it?

B

MR. CAVENDER: Yes, indeed. The trouble is that it is so wide in terms of shortfalls, bugs, the idea that we could do a narrow search on this in the way it is framed ----

C

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

D

E

Whether it seems sensible, having listened to you both about it and looked into it simply to say, well, we will deal with that in the long to medium grass by dealing with Horizon Issues or I just go ahead and order it now, it does not seem to me sensible to come back and have an argument all over again.

F

MR. CAVENDER: I agree.

MR. JUSTICE FRASER: I will give you a minute because I know you need to take instructions on it.

G

MR. CAVENDER: *(Counsel takes instructions)* My Lord, there are two things I want to say. This is clearly Horizon related, obviously this is the meat and drink of Horizon, that is the first point.

H

MR. JUSTICE FRASER: Yes.

MR. CAVENDER: The second point, so far as the operation of this in a general sense for the purpose of construction, is if you look at request 10, 11 through 14 et cetera of the schedule, you will see this information of the type needed to construe a contact is being given.

MR. JUSTICE FRASER: When you use those numbers ----

A

MR. CAVENDER: It is in my schedule, my Lord, in exhibit 1, the left hand column, third column from the left, 10 is technical documents regarding Horizon stored by Fujitsu.

MR. JUSTICE FRASER: So you are saying it would fall been those anyway.

MR. CAVENDER: And error log, that has been a big thing my learned friend is after, branch operating manual, operating instructions, minutes of board of directors.

B

MR. JUSTICE FRASER: Minutes of the board.

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

C

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

D

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

E

MR. CAVENDER: Indeed.

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

F

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

MR. JUSTICE FRASER: I understand.

G

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

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

H

MR. CAVENDER: My Lord, yes.

MR. JUSTICE FRASER: All right.

A

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

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

MR. CAVENDER: No, my Lord.

B

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

D

It is also subject to the imposition within written policy and process documents of a date range, I am not going to tell you what the date range is. The two of you can seek to agree it. You are coming back anyway, rather sooner than you were expecting, and if the date range has not been agreed I will decide the date range then. So far as i is concerned, Request i, that is too wide. I am not going to order that. I am, however, going to use the wording suggested by Mr. Cavender's schedule and his junior which is any written policies or process documents regarding recovery of shortfalls from Postmaster.

E

F

I have taken that, Mr. Cavender, from the last column of your exhibit under Request i, last three lines.

MR. GREEN: My Lord, may I address you on j.

MR. JUSTICE FRASER: Yes, which one is j?

G

MR. GREEN: j is, we actually for our own use tried to match them back to the numbers but I am sorry, so, j is minutes of meetings, memoranda, reports relating to Post Office network wide approach, it is 29 I think.

MR. JUSTICE FRASER: Is not 29, i?

H

MR. GREEN: No, 29 is j.

MR. JUSTICE FRASER: What is i then?

A

MR. GREEN: i is, I think it is now agreed, is it not? In relation to i your Lordship, we put in network wide instructions.

MR. JUSTICE FRASER: 28 on my schedule is in green which I understood meant it was agreed.

B

MR. GREEN: Yes.

MR. JUSTICE FRASER: Is that wrong?

MR. GREEN: Funnily enough, my learned friend complains that it is wide in his tables, I am not quite sure, we thought that was agreed subject to use of network wide which is ---

C

MR. JUSTICE FRASER: I have just ordered the work against i suggested by Mr. Cavender of written policies or process documents regarding recovery of shortfalls from Postmasters.

MR. GREEN: Yes.

D

MR. JUSTICE FRASER: On the basis that I have not gone further than process documents, the issue of instructions does not arise, so whether there are instructions or network wide does not matter.

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

E

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

MR. GREEN: We have not dealt with j. You will see in my learned friend's table he says a narrower formulation of this request can be found at 25, 26 and 27. Although these documents may still be inadmissible the defendant is prepared to disclose them as part of stage 2 disclosure because they are narrowly defined. He is talking about 25, 26 and 27. If your Lordship goes on his table, over the page to 25, 26 and 27 I am afraid it is the one side of the fence point again. He says a narrower formulation because what he is offering to disclose at 25, 26 and 27 is only what Post Office said to Postmasters, not the internal documents relating to their approach. It is completely one sided, my Lord. It is a short point.

F

G

MR. JUSTICE FRASER: Yes. Mr. Cavender?

H

MR. CAVENDER: My Lord, this is lifted, I can give you the reference, Model D. This has literally been lifted and you can tell why, because it is so wide it has no relevance at all to the construction of the contract. Why the minutes of a meeting as to breach, that is what this is about, and difficulties with operating the contract is operational, why

A because a contract may or may not be difficult to operate by Post Office and its
knowledge of that, affect the construction of that contract at an earlier stage? It is totally
irrelevant. There is no case on rectification. There is no case here on variation by
conduct. It is a straightforward issue of construction. The idea of over the twenty-odd
B year period, slightly less, all minutes of meetings, memoranda relating et cetera, I keep
pinching myself, we are talking about Model C request of narrow classes of documents,
is what the things says. This is a million miles from that.

MR. JUSTICE FRASER: Yes.

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

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

F MR. CAVENDER: Would your Lordship hesitate to suggest what date range you think
might be proportionate?

MR. JUSTICE FRASER: You are coming back anyway and you have to agree a date range
on one of the others, you will have to agree a date range. If you can't agree the date
range, I will decide the date range, but it has to be specified by date range, but date range
G does not mean the whole twenty-year period.

MR. CAVENDER: My Lord, I am obliged.

MR. JUSTICE FRASER: If there are such documents it will probably turn out only to be half
a dozen of them but their disclosable. That is j, where are we now?

H MR. GREEN: k.

MR. JUSTICE FRASER: Yes.

A

MR. GREEN: May I show your Lordship straightaway my learned friend's proposed wording?

MR. JUSTICE FRASER: I have it. It is in his third column under the heading Request k. Which of your numbers am I looking at?

B

MR. GREEN: So k is our request 22.

MR. JUSTICE FRASER: No, it is not.

MR. GREEN: I am so sorry. That is our version of their 22 which is number, well, let me get this out, my Lord, because Mr. Warwick very kindly matched the numbers from my learned friend's table become onto the issues. Let me get that right now. It is 32.

C

MR. JUSTICE FRASER: 32. The only bit that is controversial is internal guidance and briefing notes; is that right? That is the bit that is red on your 32.

MR. GREEN: Yes, it is narrower now if you look at my learned friend's position. He says he would be content with Post Office written policies and process documents, informal internal guidance documents, not emails regarding the issues of transaction corrections.

D

My Lord, we are content with that.

MR. JUSTICE FRASER: All right, good. That is very sensible because in the email world if it includes emails, goodness, you are going to have half a million, if you are lucky.

E

MR. GREEN: I know. So, l and m are policies, instructions and guidance notes issued network wide to trainers relating to training on Horizon ----

MR. JUSTICE FRASER: Which number do I look at?

MR. GREEN: Those are numbers 39 and 40.

F

MR. JUSTICE FRASER: Yes.

MR. GREEN: May I explain to your Lordship why we put the word network wide in?

MR. JUSTICE FRASER: Yes.

G

MR. GREEN: It was not so that they would have a wider search, it was so as to limit the documents to only those that were the formal thing that was sent out network wide. All the other stuff we were not asking for. If there has been any misunderstanding between the parties about that we were not saying we want you to look network wide for such documents. We were trying to focus on only the documents that were promulgated across the entire network, so the most standard basic things that they were sent out in relation to training and Horizon online.

H

- A MR. JUSTICE FRASER: Yes.
- B MR. GREEN: And the relevant course materials because those obviously inform your Lordship's appraisal of how in practice the Horizon system works late at Horizon but is much more relevant to understanding the position of the parties in the contractual context of Common Issues you have to resolve. Of course the guidance note that the Post Office issued were of contractual effect. That is common ground on the pleadings.
- C MR. JUSTICE FRASER: Yes.
- D MR. GREEN: That is the short point on that.
- E MR. JUSTICE FRASER: Right. Mr. Cavender.
- F MR. CAVENDER: My Lord, on this you can see what we are giving already, which is the sensible things, the written policies and process documents that I think my friend talked about last time, the written policies, training materials and the rest of it.
- G What my learned friend is getting at here, he almost averred to this, he is talking about when things go wrong effectively and dealing with discrepancies and materials focusing on that and network wide instructions. As we say in our notes, which I am sure your Lordship has read, given that the vast majority of operations are conducted through Horizon this is effectively a request for all policies over 18 years, which would be an extremely wide and unnecessary category.
- H Remember what one is being asked to do in the Common Issues trial on this. You are not being asked to decide whether the train was good or bad that is a question of breach. That is what this goes into. You are just being asked to decide what the nature of the relationship between the parties was, having regard to the fact that there was training, there was a help line in these other things. You are not being asked to decide at the Common Issues trial whether or not the Post Office was in breach in any particular way and so all this information may well be relevant for what I call the lead cases trial down the road. To burden a hearing dealing with the contract and its construction, when you have all the other material in the left-hand 28 to 31 is itself a huge amount of documentation.
- MR. JUSTICE FRASER: I understand.
- MR. GREEN: What added benefit do you get from, you know, these extra policies, notes, and these materials focusing on particular things. In my submission, all you get is a load

A of documents which have no relevance at all to the question of construction of the relationship between the parties, what do these clauses mean? If you ask yourself whether you had a policy or instruction or guidance note in 2004, how does that begin to help you construe the burden of proof or the relationship or the reporting lines or anything like that.

B MR. JUSTICE FRASER: I agree. However, there is one part of one of these requests which in my judgment goes to the first part of Common Issue 4 and it is, and I am going to use both of your numbering and Mr. Cavender's lettering, I think it is Request n for Mr. Cavender and it is your 42. Network wide instructions is, however, too broad a term and
C Mr. Cavender also has a very good point which is that the term instructions is likely to include emails.

MR. GREEN: I take your Lordship's points.

D MR. JUSTICE FRASER: A document, well, I will not use the word instruction because I have just said what the problem is with it, to Post Office trainers and how to train a Postmaster to deal with and dispute a shortfall is going to be ordered. If with your joint knowledge of way the business is structured you can come up with the most suitable term for what that direction or document could be called, then that is what I am going to
E order. It needs brackets afterwards, please, to specify "(but not emails)" and that is the only one of these that I am prepared to order. I am not going to order l and I am not going to order m.

F MR. CAVENDER: My Lord, we do not know the answer now whether there is such a document.

G MR. JUSTICE FRASER: That is another point that probably when you come back, if you have not been able to identify specifically the correct title of it then I will come up with one of my own based on what you each have to tell me. Just so that it is absolutely clear, it is the high level instructive document to the trainers in how they train Postmasters to deal with a disputed shortfall, almost the manual if there is such a thing. That then takes us to o I think.

H MR. GREEN: We would be content with an equivalence for the instructions to help lines on that point.

MR. JUSTICE FRASER: Where is that?

- A MR. GREEN: That is o, and then we are done.
- MR. JUSTICE FRASER: We have not done o yet so you are not necessarily going to get o but let us have a look.
- MR. GREEN: No, no, but my Lord, it is simply saying the same thing, the same as m but in relation to help lines.
- B MR. JUSTICE FRASER: So, there are two parts of this that are in issue, are there, or controversial? The phrase, "But not limited to" and the part at the end; is that right? I have some in black, some in green and some in red.
- C MR. GREEN: Yes. I am trying to short circuit it simply, my Lord, by saying that we would obviously need something that captures, well, the difficulty is that we do not know what they call their documents, whether they call them directives, instructions and I understand the difficulty with the word "instructions" but the documents that instruct or the policies or procedures instructing the help lines about who to deal with shortfalls including those two items, because this is a narrow one. It is the mirror of m which we have just dealt with but within that specific category we have spelt out two particular things that we want to make sure are covered to be helpful, but that is not because the category is wide.
- D
- E MR. JUSTICE FRASER: The operation of the escalation process and effectively the manual to the people at the help line; is that right?
- MR. GREEN: Exactly that. There are two specific points. I think we are perfectly content to limit it as we did with m to whatever we come up with for instructions but does not use the word, on those two points. We are obviously not including emails about it.
- F MR. JUSTICE FRASER: Understood.
- MR. CAVENDER: My Lord, if I can reply on that.
- G MR. JUSTICE FRASER: You do not need to. This relates to paragraph 61 of the defence which does not arise in the Common Issues at all so I am not going to give disclosure of category.
- So that is disclosure. I do not know which poor junior is going to be tasked with this but obviously someone is going to have to draw up an order.
- H Horizon Issues? Mr. Green?

A MR. GREEN: I did not quite understand that last decision and I know that is not a popular thing for counsel to say.

MR. JUSTICE FRASER: You show me, it might be I missed it because I did quickly go through it ----

B MR. GREEN: Because then ----

MR. JUSTICE FRASER: Mr. Green, please! Show me in relation to which Common Issues paragraph 61 of the defence is identified.

MR. GREEN: I was going to do something different, my Lord.

C MR. JUSTICE FRASER: Maybe you will in a minute but first of all show me where paragraph 61 is in the Common Issues. Paragraph 61 of the defence, is it there? It might be that I have missed it.

MR. GREEN: It is not identified.

MR. JUSTICE FRASER: Thank you.

D MR. GREEN: It is not identified as defining an issue.

MR. JUSTICE FRASER: Right.

MR. GREEN: My Lord, the concern is that there are two parts to that one that we were asking for. The part that is defined by reference to paragraph 61 of the generic defence is only the bit in green. The other bit is the mirror of the one you have ordered on m.

E MR. JUSTICE FRASER: No, but it is about the help line.

MR. GREEN: Yes.

MR. JUSTICE FRASER: I do not see that it is a mirror.

F MR. GREEN: It is quite difficult to see how your Lordship can construe the things that the defendant has raised on the pleadings without the information about what they are told to tell them.

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

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

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

- A** MR. GREEN: ---- what should have happened.
- MR. JUSTICE FRASER: Either what happened or what should have happened is not relevant to construing the Common Issues.
- MR. GREEN: It is probably me, my Lord.
- B** MR. JUSTICE FRASER: I think it is you.
- MR. GREEN: But it may not be so I am going to make the submission and you can tell me if it is me. If we order category n, category n is network wide instructions to Post Office trainers and how to train a Postmaster to deal with a shortfall. So that is what they are told, generally this is what you should do. Then the corollary of that ----
- C** MR. JUSTICE FRASER: Why do you think that is relevant to Common Issues?
- MR. GREEN: Your Lordship has just ordered it.
- MR. JUSTICE FRASER: (a) because I have ordered it and (b) because it is common knowledge because the Post Office know what the trainers are supposed to do and
- D** because, in theory, that is what the Subpostmasters or branch post officers are told. So, it is common knowledge. It is therefore directly relevant to construing the contract.
- MR. GREEN: That is the second half of 46.
- E** MR. JUSTICE FRASER: No, incorrect. That is what actually happens in fact if there is a shortfall. It goes to breach.
- MR. GREEN: My Lord, the existence for an apparent shortfall is not anything to do with breach necessarily. My learned friend seeks to conflate before your Lordship two different points with respect and that was his submission to your Lordship which led to
- F** this. If I have it wrong I apologise.
- MR. JUSTICE FRASER: Right, Mr. Green, you can argue for as long as you like. This arises from paragraph 61 of the defence which does not arise at all on the Common Issues, I have now said that three times, please do not waste any more time about it. I
- G** am not ordering it.
- Horizon Issues please.
- MR. GREEN: Your Lordship said that is going to be quicker for reasons that you have explained.
- H** MR. JUSTICE FRASER: It is going to be quicker. Can you just take me to, please, the place where the two separate lists are? Is it exhibit 2 of Mr. Cavender's skeleton?

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MR. GREEN: We have our proposed Horizon Issues behind our draft order.

MR. JUSTICE FRASER: Are they the same ones that have been reproduced in exhibit 2?

MR. GREEN: Yes, your Lordship should have had from us in colour a copy of my learned friend's exhibits 2 on to which we have transposed the numbers of the issues. I can give your Lordship ----

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MR. JUSTICE FRASER: I do have one which is in colour but there is not very much colour on it.

MR. GREEN: Very little. It should just be hash tag number 10.

MR. JUSTICE FRASER: I do have that.

C

MR. CAVENDER: This is my exhibit 2, is it?

MR. GREEN: Yes.

MR. JUSTICE FRASER: I think it might be a tweaked version of your exhibit 2.

MR. GREEN: We have put those on to my learned friend's exhibit 2 to try and be helpful.

D

MR. JUSTICE FRASER: Does Mr. Cavender have a copy of this?

MR. GREEN: Yes, we sent it to him and Mr. Draper very graciously thanked us.

MR. CAVENDER: My learned friend, having thought about it, having served our respective lists, then introduced another issue, issue 9.

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MR. GREEN: Correct.

MR. CAVENDER: Which is not in exhibit 2. That is why the numbers are out.

MR. GREEN: Correct.

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MR. CAVENDER: That is the background to the numbers. So, exhibit 2 is all very good except that it misses out my learned friend's new issue 9.

MR. GREEN: Yes, exactly what I was about to point out.

MR. JUSTICE FRASER: Where is your number 9? Is that the one that begins "what information was practically available?"

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MR. GREEN: No, my Lord. Behind our skeleton argument there is our draft order and number 9 is there on page 12.

MR. JUSTICE FRASER: This is your draft order for directions.

MR. GREEN: My Lord, yes. It is Schedule 3.

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MR. JUSTICE FRASER: Hold on a second. Where is Schedule 3?

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MR. GREEN: Behind our draft order. So our skeleton was filed with the draft order behind it and the schedules, three schedules are at the end of the draft order.

MR. JUSTICE FRASER: That is not the form I have it in. I have an Appendix 2 which was your draft order.

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MR. GREEN: Yes, so, in the draft order that is appended to your skeleton ----

MR. JUSTICE FRASER: It is under Appendix 2.

MR. GREEN: Indeed. At the back of that.

MR. CAVENDER: That does not have your new 9 on it.

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MR. GREEN: Yes, it does.

MR. CAVENDER: Your new 9?

MR. GREEN: Yes, oh, you have taken it out of the bundle. That is the bundle page.

MR. CAVENDER: Where is your new issue 9?

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MR. GREEN: It was the new issue that we sent you.

MR. CAVENDER: It is not in this document.

MR. GREEN: That is because you have put two different documents together.

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MR. JUSTICE FRASER: Hold on one second. Gentlemen, this really is getting out of hand. When there are a large number of disputes to be resolved at a case management hearing, any judge needs in one place to be able to compare what he is being asked to decide. I have a Schedule 3 which goes to, I think, 17 issues; is that correct? Is that how many it should have?

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MR. GREEN: Yes.

MR. JUSTICE FRASER: In the document that was produced that is partly in colour it goes to 16.

MR. GREEN: That is because it misses out number 9.

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MR. JUSTICE FRASER: It misses out number 9?

MR. GREEN: Misses out the one that is on, it is number 9 of the 17.

MR. JUSTICE FRASER: Has been removed?

MR. GREEN: No, number 9 was added after my learned friend's ----

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MR. JUSTICE FRASER: Which came first, Schedule 3 or the colour table?

MR. GREEN: The colour table came second because the colour table inserted ... My Lord, what happened was, we had a list of issues. We added in an additional one at 9.

- A** MR. JUSTICE FRASER: Is that on Schedule 3?
- MR. GREEN: That is on Schedule 3 and that is why your Lordship's Schedule 3 has 17 issues.
- B** MR. JUSTICE FRASER: Hold on a second, let us look at that? The one it has added is, "Were Subpostmasters notify of bugs, errors or defects once they been identified by or to Post Office"?
- MR. GREEN: Yes.
- MR. JUSTICE FRASER: That is not in the colour table. Is that right?
- C** MR. GREEN: It is not in the colour table. It is the only one that is not there.
- MR. JUSTICE FRASER: So the one I need to you use is your Schedule 3.
- MR. GREEN: Indeed.
- MR. JUSTICE FRASER: Against which should I compare what?
- D** MR. GREEN: Against the colour table because the colour table has ----
- MR. JUSTICE FRASER: The defendant's issues in the colour table?
- MR. GREEN: Exactly.
- MR. JUSTICE FRASER: Mr. Cavender has proposed 11; is that right?
- MR. GREEN: Indeed.
- E** MR. JUSTICE FRASER: And you have proposed 17?
- MR. GREEN: Indeed. My Lord, a lot of these are straightforwardly informed by the more general submissions I made to your Lordship at the outset.
- F** MR. JUSTICE FRASER: Yes.
- MR. GREEN: The reconciliation exercise not being a Horizon process, is, we say not a ----
- MR. JUSTICE FRASER: No, we are not going through them one after the other.
- MR. GREEN: No, but your Lordship will see ----
- G** MR. JUSTICE FRASER: You have two different lists.
- MR. GREEN: We have to different lists. My learned friend's exhibit 2 puts them side by side.
- MR. JUSTICE FRASER: Some of them because his exhibit 2 does not have ----
- H** MR. GREEN: Apart from number 9. Your Lordship will see that my learned friend's issue number 1, I am not doing it seriatim, I am just giving your Lordship an example of difference of approach.

A MR. JUSTICE FRASER: Yes.

B MR. GREEN: My learned friend says issue number 1: Is Horizon robust and extremely unlikely to be the cause of shortfalls in branches? We respectfully say that whilst that is an assertion made by the defendant in their pleading it is broadly meaningless and the answer to that question, yes, its robust, will not actually help the court resolve the issues in the case. Not least because it would not anyway but not least because in our reply we specifically plead that their suggestion that there is a low likelihood of errors being generated but there are millions and millions of transactions, is completely consistent with the level of erroneous shortfalls for which the claimant contends.

C The idea that your Lordship should be invited to consider issue number 1 a helpful approach to resolving the real dispute in this case, we say is totally fanciful. The broad submission on our list is that ours are more carefully drafted to generate meaningful answers regardless of criticisms that might be levelled at the questions themselves.

D MR. JUSTICE FRASER: Thank you very much.

E Mr. Cavender, is there anything you would like to add by way of general submissions on Horizon Issues?

F MR. CAVENDER: My Lord, yes, there is a real difference here ----

G MR. JUSTICE FRASER: Oh right.

H MR. CAVENDER: ---- in the whole submission. I had understood, your Lordship last time, our joint position was, if you are going to take the Horizon Issues, not in the technical computer sense but the surrounding architecture by which I mean the training, the help line, the accounting function that attaches to the output of the data from Horizon including the 100 odd parties who provide services, third parties to this whole arrangement, you would bite off much more than you could chew. You would need lead cases, you would need a lot of disclosure. That is not my understanding of what you wanted.

My understanding was that you wanted a computer centric investigation looking at Horizon, the main thrust of the case is Horizon does not work or does not work properly for these individuals so you thought once you sort out the common issues and what the relationship was and the incidence of burden of proof and such like, you

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then say this is what the computer system does, it sets you up then for the lead cases trial. There will be other issues that come into that obviously but the main thrust of the computer would have been sorted out. That was my understanding.

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What we have tried to do, my learned friend talks in his skeleton about, oh, we would use this kind of wording and that kind of wording, every single issue has been derived from the pleadings. The point for your Lordship, which I do find rather extraordinary just in terms of big picture point here, is my learned friend's case as set out in his skeleton that it is not in issue that it is extremely unlikely that Horizon was the cause of the shortfalls.

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MR. JUSTICE FRASER: That is an issue.

MR. CAVENDER: My learned friend seems to say in his skeleton that it is not an issue.

MR. JUSTICE FRASER: Take me to the part of the pleading, I do not have the reference.

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MR. CAVENDER: In terms of his note, what he says is -- it is part of the point he has just made -- that we are asking for things, well, look at the skeleton, his paragraph 34 d, he makes various points, some of them are blusterous or tendentious which is nonsense, of course, because they are all pleaded.

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He says at issue i, "Whether Horizon is 'extremely unlikely' to cause shortfalls is not in issue". That is a pleaded issue. We say it is extremely unlikely for millions of transactions for thousands of people. What he seems to be saying here is it is not an issue because he agrees that. It is a very odd case.

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It might be as well for him to clarify that because you are about to order, well I think you maybe (*unclear*) hearing on a computer where his own case appears to be -- may be I have misunderstood this -- that it is extremely unlikely that Horizon was a cause of the potential or the actual shortfalls. They are my big picture points.

G

Whatever the answer to that may be, to have a trial in March/April, whenever your Lordship is persuaded to put it off to, following on the heels of the hearing of a Common Issues trial at the back end of this year, judgment may be December, it may be January, to embark upon the broad exercise my learned friend anticipates, which is looking at the back end of it, not just Horizon but reconciliation, shortfalls et cetera as opposed to, this is the computer, there are bugs, there are issues with it. This potentially could cause shortfalls, potentially, because there is something wrong with the widget.

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That, in my submission, is within the four corners, not to go on and then work out in terms of accounting and then match up with the data from the Post Office's third party providers whether in fact it did cause a shortfall. That is the bright line, in my submission, between the two. The latter is a huge exercise and not capable of being done within the time at the time.

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The computer-type narrow focused issues that I thought your Lordship had ordered is possible and we tried to obviously you are open to suggestions on the issues but we tried to identify what could be dealt with by experts alone.

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MR. JUSTICE FRASER: It is very unusual in case management to find oneself having constantly to try and put either one or other party back on track for cost-effective resolution of serious disputes. I reminded myself, again by reference to the actual transcript, of what I said last time, although I had a pretty clear recollection, that what I was going to be doing in March was to deal with expert issues that were present on the pleadings concerning Horizon which I described generically as the next big issue. I wanted the parties to agree or each propose an isolated number of issues on the pleadings related to Horizon that would involve expert evidence but not evidence of individual cases.

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I obviously was not sufficiently clear so I am going to make it clear now. My intention is in March to resolve the Horizon Issues that observe the follow three criteria. Issues regarding the Horizon system that arise on the pleadings, that is first one; second, that can be resolved on the expert evidence; third, do not require evidence of fact or if they do require the very barest evidence of fact.

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What I am about to do in case management terms is very unusual. It requires a degree of co-operation between counsel, I am going positively to order counsel in this case, please, to meet in person, not by email, within the next two weeks which means by date of, whatever it is, 7th or 8th March, I think it is the 8th March, to seek to agree a single list of Horizon Issues that observes those three criterion.

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If that cannot be done a single list is to be produced. It simply cannot be the case that you cannot agree it. A single list is to be produced and you are going to have to come back. It surely cannot be the case that I have to draft one for you. If, when you come back, having had your meeting and tried to thrash it through with a degree of good

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sense, you genuinely cannot, then I will draft it for you and I will penalise both sides in costs very substantially because actually it should not be necessary. That is how the Horizon Issues are going to be dealt with.

MR. CAVENDER: My Lord, may I ask for one point of ----

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MR. JUSTICE FRASER: I just have one thing to add and then you can. Of the two lists of issues that have been produced the one which I am leaning more towards at the moment is Mr. Cavender's rather than yours. However, that is because his seems to observe my third criteria, not requiring substantial evidence or any evidence of fact, which I accept I was potentially unclear about last time because I used the phrase evidence of individual cases. You are to go away and you are to agree it. If you cannot, I will do it and I am afraid you are just going to have to come back.

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Now, Mr. Cavender?

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MR. CAVENDER: My Lord, yes. The major difference between us are little differences and I can imagine sitting down with my learned friend that what we will not be able to agree on at the moment is this whole idea of where you want the line to be. Now, lines, it is just a matter of what you put in the parcel and it is matter of what are Horizon Issues? What do you really expect? Am I right in my understanding that it was about the computer system?

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MR. JUSTICE FRASER: Yes.

MR. CAVENDER: As opposed to the effects of that down stream?

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MR. JUSTICE FRASER: Yes.

MR. CAVENDER: I am obliged.

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MR. JUSTICE FRASER: Mr. Green, I do not want to hear from you any more about this and this is directed to everybody, right? At the moment, as identified about two hours ago, both parties have spent a very sizeable amount of money. It is easy to forget that there are very real people who either need to know they have a good case or they do not. The Post Office has got better things to do with its management time and fighting litigation and this case has to be resolved. I have given everyone in writing a relatively stern telling off last year. I do not want BAILII to be crowded with Bates No. 1, Bates No. 2, Bates No. 3 all on case management, without even getting to resolve any substantive issues. I thought there was a degree of co-operation which actually there was last time.

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- A MR. CAVENDER: My Lord, there has been.
- MR. JUSTICE FRASER: There has, and that is a welcome change but further co-operation is required otherwise you will be back here so often I can assure you I will get bored of it a lot more quickly than you do but in the end everyone will be terminally bored with it and it costs a fortune and it has to stop. Agreeing a list of issues should be something that
- B you should be able to accomplish. So that is on the Horizon Issues.
- We are obviously going to have a date for when you are going to come back and I will deal with that in a minute.
- The next item on the agenda ----
- C MR. CAVENDER: The other thing, my Lord ----
- MR. JUSTICE FRASER: Yes, Mr. Cavender.
- MR. CAVENDER: Was the Horizon timetable, again it is a difference in approach. We
- D wanted to batten it all down so that these experts that are expensive and whatever, can know in their diaries and my learned friend was, well, lets not do that, let us come back and decide it later.
- MR. JUSTICE FRASER: In terms of battening it down, the hearing date is already battened down.
- E MR. CAVENDER: The one you originally identified.
- MR. JUSTICE FRASER: Correct and that is the one that I am going to adhere to. I know Mr. Green wants to address me on why it should be moved slightly, so I will hear from him about that.
- F MR. CAVENDER: I am obliged.
- MR. GREEN: My Lord, the defendant's position is that it should start later in March I think and we are respectfully seeking 29th April.
- G MR. JUSTICE FRASER: What date is it currently set down for?
- MR. GREEN: It is currently set, I think it is mid March, the 11th. My learned friend is asking for late March and we are respectfully asking for 29th April.
- MR. JUSTICE FRASER: What is it set down for in March?
- H MR. GREEN: It is set down for four weeks. Your Lordship will appreciate from your time at the bar what goes into the preparation for that, but there is also a mediation to try to

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see if issues can be narrowed. The Horizon Issues trial may be considerably narrowed by the parties taking a realistic view of the outcome of the Common Issues.

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MR. JUSTICE FRASER: I know, but I dealt with this last time, Mr. Green. The timetable of resolving the dispute, although it would be delightful for everybody involved, not least all the parties, it cannot be programmed in the expectation or hope that there will be a settlement.

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MR. GREEN: No, not hope of settlement, that was not the premise. The premise is simply that there is obviously a chance there might be but we cannot bank on that, but the other factor in a mediation is that there may be matters, issues which can sensibly be resolved in the light of your Lordship as findings on common issues going forward as to what is still at large thereafter in the proceedings.

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MR. JUSTICE FRASER: There might be, but that is going to have to be done in parallel with a trial in March.

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MR. GREEN: Totally in parallel, my Lord. We accept in parallel, we are just concerned about the timings of taking stock of the outcome of the common issues trial if your Lordship, for example ----

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MR. JUSTICE FRASER: So this is the same point that was dealt with last time about taking stock, was it not? I think last time you used exactly that phrase when you were seeking to have no substantive hearing at all in 2019, the phrase "taking stock" was used.

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MR. GREEN: No, no, no, my Lord. My taking stock is only about not having it straightaway in March because if we get a judgment in mid January, for example, I do not know how long it will take your Lordship to write up the judgment after a four-week trial. If we get a judgment in mid to late January and we have the trial starting five weeks later, there is going to be no realistic chance of having a meaningful mediation. We can forget it. That opportunity to resolve or narrow down these proceedings and resolve them efficiently is lost. That is my submission.

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MR. JUSTICE FRASER: All right, thank you very much.

Mr. Cavender, is there anything you want to say about that?

MR. CAVENDER: My Lord, I am agnostic about this. I do think there is something in what my learned friend is saying in the sense of it depends when the judgment comes out in January and, of course, your Lordship is not going to confine himself or say now. My

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suggestion is to put it back a bit, although we run into Easter. Easter is 19th April I think in 2019.

MR. JUSTICE FRASER: Yes.

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MR. CAVENDER: We get three and a half, almost four weeks. My learned friend's date is after Easter, it is the Monday following. I would argue against that. I mean the reality is you are never going to have too much time and an extra three or four weeks in terms of preparation coming out of the Common Issues trial is unlikely to be wasted in the scheme of things in terms of coming before the court in an organised way. I would not argue against my friend on that and I can see the good sense in a slightly later date, it is only a month or six weeks and would allow more preparation time.

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One's experience of these things, you get the experts together and the issues start coming out. They are not going to get any easier. This trial will not be any easier and remember that this is being done at the same time as the Common Issues trial. With the greatest respect to my friend and your Lordship's comments I am agnostic but I would slightly favour a bit more time providing it is not going to delay it massively.

Those are my submissions.

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MR. JUSTICE FRASER: Right. As I said last time, on page 106 of the transcript, I am not going to be vacating the March 2019 date and neither am I going to moving it. It is over a year away at the moment. The reason that I identified Horizon Issues is that it seemed to me that the experts could be getting on with their preparation now entirely uninfluenced by anything that is going on in the Common Issues trial. They are going to have to be done in parallel, that is the only way that a very large number of issues in this case is going to be resolved. There is no doubt that there is going to be quite a bit of pressure on me to produce my Common Issues judgment which I will obviously do as quickly as I can.

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It also seems to me that if the evidence of fact in the autumn of this year is kept within proper admissible grounds, it will not be a four-week trial and some of that time may also be available. I am afraid there are two factors which overwhelmingly dictate that it is required to be in March. One is judicial availability generally. The second is I take the view that a substantive hearing in this case is going to be required practically every term from now on until it is sorted out. That is why I set March down a

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the second tranche. I think twelve months is more than ample and it is going to have to be kept.

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That is where we are. Both of you have very good points about why it could or should usefully be later but if that approach is adopted this case will go on for a decade and I am determined that it is not going to. It is going to be 11th March 2019 for four weeks for the Horizon Issues.

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MR. GREEN: In relation to directions which is the only outstanding matter, directions for that trial, as we are going, hopefully, to agree the Horizon Issues I think your Lordship has indicated we are coming back anyway for other purposes.

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MR. JUSTICE FRASER: You have to come back for two reasons. One is Horizon Issues, the other is you still have not agreed all the outstanding things on disclosure so there has to be the ability to come back when you do not agree your date range.

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MR. GREEN: What I was going to suggest, the difference between the parties is not simply what my learned friend indicated about battening down, the difference on the proposed directions at the moment, who hopefully some progress might be made, is that my learned friend, his directions require us at a very early stage without the benefit of the sort of insight that we reasonably require for our expert, to set out, well, he calls it a provision document, identifying the alleged errors.

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Effectively what we are being asked to do is fire blind and then doubtless in some way subsequently be held to those issues when the entire premise of the case is, we do not know what the bugs and difficulties in the system are and your Lordship has seen two documents this morning that show that Post Office has not been perhaps always as forthcoming about what they are to the Subpostmasters.

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There is that fundamental difference as well of us being asked, with an asymmetry of information still unaddressed, to set out some provisional document in the name of focus. What it actually does or would do is to give a massive advantage to Post Office, because we are being asked to specify things before we can possibly have a reasonable comprehensive view of them.

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MR. JUSTICE FRASER: I think you have both lodged directions, have you not?

MR. GREEN: We did. Our draft directions are the ones your Lordship has been looking at, Schedule 3 appears at the back of ours.

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MR. CAVENDER: My Lord, my order is at hearing bundle 3, tab 13. It is a rather fuller order and what it does, it does what I say it does, which is try and batten everything down in good time. My learned friend is quite right to say we have put in, if I can take you to it, paragraph 5 and paragraph 8 where we seek to give some focus to the experts' enquiry.

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MR. JUSTICE FRASER: Where is yours, Mr. Green?

MR. GREEN: Your Lordship was looking at Schedule 3 and that was behind our draft directions.

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MR. JUSTICE FRASER: Is it in volume 3?

MR. GREEN: We also provided it behind our skeleton argument. You have a copy in volume 3 and tab 12. The Horizon Issues trial ----

MR. JUSTICE FRASER: Where are they?

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MR. GREEN: ---- direction are on page 2. You are really comparing tab 12, page 2 with tab 13, page 12.

MR. JUSTICE FRASER: Which paragraph is it in your order?

MR. GREEN: It is paragraph 4.

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MR. JUSTICE FRASER: Well, it would be 3, 4, to where?

MR. GREEN: Down to 7, which provided for a CMC on 20th April to take forward further directions in the light of the progress we have made at that point. We think we will make very substantial progress. I will explain the architecture of those directions to your Lordship but we have a date ----

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MR. JUSTICE FRASER: I have read them. They seem fairly, there is this issue about a demonstration which I will put off to one side for the moment.

MR. GREEN: The contrast is my learned friend's at page 12.

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MR. JUSTICE FRASER: So page 12, paragraph 3 through to paragraph 12.

MR. GREEN: Effectively, all the way through to pre-trial review in February 2019 at paragraph 17.

MR. JUSTICE FRASER: Yes, all right. We will have to go through these in detail, we will do that at two o'clock.

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MR. GREEN: I am grateful.

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MR. JUSTICE FRASER: I have a meeting in the RCJ at half past three so you have one hour and it will be solely to do with the Horizon Issues.

MR. GREEN: I am grateful.

(Adjourned for a short time)

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MR. JUSTICE FRASER: Yes.

MR. GREEN: We were at directions, my Lord, in bundle 3 I think comparing tab 12, page 2 with tab 13, page 12.

MR. JUSTICE FRASER: Yes. Obviously Schedule 3 is going to be required at some point when we come back, Schedule 3, your paragraph 3, the issues.

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MR. GREEN: Indeed, my Lord. Obviously we will return to that. My Lord, in relation to the date on the meeting of my learned friend and I and the actual agreement, I know your Lordship said two weeks from today.

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MR. JUSTICE FRASER: Yes.

MR. GREEN: Could we make it two weeks from Monday only because I am away next week in Argentina. If we meet next week, possibly more than once, two weeks from Monday would be a help.

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MR. JUSTICE FRASER: What date is that?

MR. GREEN: Two weeks from Monday is the 12th.

MR. JUSTICE FRASER: What date is it today?

MR. GREEN: It is the 22nd.

F

MR. JUSTICE FRASER: Yes.

MR. GREEN: Hopefully we can get things agreed and that will be easier.

MR. JUSTICE FRASER: That is not the date you are coming back?

MR. GREEN: No, no, the date for agreement.

G

My Lord, on the topic of dates not in any sense are the parties being presumptuous but trying to be facilitative, you will notice that both parties have a date for a CMC on 20th April.

MR. JUSTICE FRASER: Yes.

H

MR. GREEN: Provisionally in their draft orders, that is a date on which counsel for both parties are available if that were convenient to the court.

MR. JUSTICE FRASER: The only problem with that date is that it is a Friday.

- A** MR. GREEN: Applications day.
- MR. JUSTICE FRASER: Which is applications day. How long do you want?
- MR. GREEN: An hour and a half/two hours if possible.
- MR. JUSTICE FRASER: This is for another CMC.
- B** MR. GREEN: My Lord, I think it is going to be quite narrow and I can explain to your Lordship why but it will also be informed. The scheme of our proposed directions is allowing our experts to get ----
- MR. JUSTICE FRASER: No, no, I understand that, I have read them both.
- C** MR. GREEN: ---- a provider insight leading up to your Lordship giving directions on 20th April.
- MR. JUSTICE FRASER: We will refer to that date at the end because I am not necessarily going to adopt that approach in terms of directions. You have to come back anyway later in March as a result of what happened this morning.
- D** MR. GREEN: If everything is agreed, my Lord.
- MR. JUSTICE FRASER: We will deal with Horizon directions and then we will come to the question of date.
- E** MR. GREEN: I am grateful.
- MR. JUSTICE FRASER: Some of your orders are agreeing, they are just in a slightly different order.
- MR. GREEN: Indeed.
- F** MR. JUSTICE FRASER: I am going to pose topics to you and you can tell me if there is anything controversial on them.
- MR. GREEN: I am grateful.
- MR. JUSTICE FRASER: It does not look to me like there is, apart possibly from dates on some of them. The demonstration and the early disclosure of particular documents
- G** seems to me to be broadly similar; is that correct?
- MR. GREEN: It is similar but different in the following respects. The defendant as I understand it, does not agree paragraphs 4(a)(ii) and (iii) because that is said to go to breach.
- H** MR. JUSTICE FRASER: Hold on one moment 4(a)(ii) and (iii) not agreed. The principle of a demonstration is accepted though, I think.

- A MR. GREEN: Yes.
- MR. JUSTICE FRASER: It is 4(a)(ii) and (iii)?
- MR. GREEN: Yes.
- B MR. JUSTICE FRASER: That is on demonstration. Mr. Cavender wants some sort of sequential exchange and also some early notification of a case which is not on your order because I understand that is not controversial.
- MR. GREEN: Not controversial. Also, my Lord, we have a slight difficulty with the early request for technical documents, paragraph 4(c)(i) of his. Just in terms of sequencing, we do not want to be required to shoot our bolt on which documents ----
- C MR. JUSTICE FRASER: You are not shooting your bolt but you want that later, do you not? You want 23rd March.
- MR. GREEN: Indeed.
- MR. JUSTICE FRASER: That is a date point.
- D MR. GREEN: It is a date point, it is a sequencing and date point, exactly. The reason for the date is sequencing rather than calendar, if you see what I mean, not least because there is a call(?) between Fujitsu, Post Office and my instructing solicitors on 1st March about how the known error log is going to be provided to the experts and so forth. We would like to make an informed ----
- E MR. JUSTICE FRASER: Maybe if I was to have a look at your 4(a)(ii) and (iii). Apart from the point you have made about dates/sequencing, Mr. Cavender's 4(a), 4(b) and 4(c) is agreed apart from the sequencing date point.
- F MR. GREEN: Exactly.
- MR. JUSTICE FRASER: And the fact that you want two more subparagraphs.
- MR. GREEN: Exactly.
- G MR. JUSTICE FRASER: Right. Give me a second, let me read those subparagraphs.
- (Pause for reading)* Do you mean (ii) and (iii) or do you mean (iv) as well?
- MR. GREEN: (iv) is agreed, so (ii) and (iii) are the only two in dispute.
- MR. JUSTICE FRASER: When you say it is agreed, it is not in Mr. Cavender's ----
- MR. GREEN: No, at the end of his skeleton he says 4(iv) is agreed.
- H MR. JUSTICE FRASER: Okay. You want (ii) and (iii), for what reason?

A

MR. GREEN: We want those because our expert needs to understand how Horizon works in identifying apparent alleged shortfalls and how it compares et cetera own transaction records against corresponding record. The whole point of this is to work out how errors and apparent discrepancies arise.

B

MR. JUSTICE FRASER: All right. Mr. Cavender, do you have anything to say on that one?

C

MR. CAVENDER: The reason that (ii) and (iii) are not relevant at this stage is that this is the whole bright line I was trying to describe this morning, of having the accounting process. So, (ii) and (iii) are not involving Horizon. What they are saying, if you look at them, how the Post Office identify shortfalls in (ii) and (iii) is looking at the Post Office client, so the third parties, that is comparing the data, say, of Bank of Ireland and Post Office, it is going to those two areas.

D

It has nothing at all to do with the operation of the computer system of Horizon. Both (i) how it operates, he clearly needs to know that, he does not need for the purposes of before breach because (ii) and (iii) go to breach and (iv) is a hobby horse of my friend about, we do not think it is relevant and we say not. In the skellie we say "fine, if you want it, you seem quite excited about it, you can have it". That is no reason to go down the slippery slope of just throwing everything in and (ii) and (iii), in my submission, falls very clearly the other side of the line.

E

MR. JUSTICE FRASER: In (iii), its own transaction record, is that Horizon records; do I read that correctly?

F

MR. CAVENDER: No, I do not think it is limited to that, is it? It is not Horizon, if you look at (i) it is talking about operating Horizon system. This is the operational side of the Post Office. What it does, when it receives the Horizon data in order to compare it to, say, the data, take the example of the Bank of Ireland. The Bank of Ireland is connected at the terminal to the Horizon system it is operated by the Postmaster. That will generate to Post Office some data, £100 to be taken out. The Bank of Ireland will also send to Post Office data from that cashpoint saying £100 was taken out. That is the operational side of the Post Office, nothing to do with Horizon. The data is generated through Horizon because the Bank of Ireland terminal is connected to it.

H

Then (ii) and (iii) both go to corrections problems and the corresponding Post Office clients. It is nothing at all to do with the operation of the Horizon system

- A** simpliciter. It is the operational side, as I tried to explain this morning, which in my submission is outwith what your Lordship, as I understand, intended by the Horizon computer trial.
- MR. GREEN: My Lord, your Lordship is not going to be able to resolve the question we posted this morning then?
- B** MR. JUSTICE FRASER: Which question was that?
- MR. GREEN: The question my learned friend is focusing on, which is whether there were errors, bugs or defects in the Horizon system which could potentially cause shortfalls. We are not going to invite your Lordship to do ----
- C** MR. JUSTICE FRASER: I understand.
- MR. GREEN: ---- an audit of every error in the system.
- MR. JUSTICE FRASER: I understand.
- MR. GREEN: There has to be some focus ---
- D** MR. JUSTICE FRASER: I understand. It would speed things up if I did not have to say it three times. I have the point.
- MR. GREEN: I am grateful.
- MR. JUSTICE FRASER: You are not going to have your subparagraph (iii) but
- E** subparagraph (ii) you can have, although I am rewording it and it will say, and this is to be included in the demonstration, "Whether the Horizon system enables Post Office to identify apparent or alleged shortfalls ..." that is a relevant question for the expert. That is actually going to be really very straightforward because on one party's case it cannot
- F** do that, on the other party's case it can.
- MR. GREEN: My Lord, the only anxiety ----
- MR. JUSTICE FRASER: I am not interested in your anxieties, I am really not.
- MR. GREEN: It was a point I could not make because your Lordship said you had this and I
- G** had not finished it.
- MR. JUSTICE FRASER: No, no, but I am not interested in your anxieties Mr. Green.
- MR. GREEN: It is not an anxiety, I was putting it politely, my Lord, it was a substantive submission I wanted to make.
- H** MR. JUSTICE FRASER: Go on then.

A

MR. GREEN: The point is this. That the ability of the expert to identify what potential effect an error would have.

B

MR. JUSTICE FRASER: I understand that but if after having this demonstration, which is in any case an introductory demonstration, your expert needs to have further information about how it works.

MR. GREEN: I am grateful.

MR. JUSTICE FRASER: You can just come back.

MR. GREEN: I am grateful.

C

MR. JUSTICE FRASER: The next point I have on my little note here is technical documents sequencing and date.

MR. GREEN: My Lord, yes.

MR. JUSTICE FRASER: Is this Mr. Cavender's 4(c) and your 5?

D

MR. GREEN: Indeed. We have the sequencing in our paragraph 5 so that it comes after the demonstration.

MR. JUSTICE FRASER: You want it after the demonstration.

MR. GREEN: We can have an informed request with some insight into how the system work.

E

MR. JUSTICE FRASER: Understood. That is what you mean by sequencing rather than calendar date.

MR. GREEN: Exactly.

F

MR. JUSTICE FRASER: It is not necessarily the date and the month; it is just that the chap want to see the introduction demonstration first.

MR. GREEN: He need to see it so that he can know what to ask for.

MR. JUSTICE FRASER: Mr. Cavender?

G

MR. CAVENDER: My Lord, yes, that is sensible.

MR. JUSTICE FRASER: Therefore, in terms of dates the introductory demonstration is going to be by 16th March. Mr. Green suggests a date that is a sensible period of time after that.

H

MR. GREEN: The one we have in paragraph 5 is 6th April, we respectfully suggest that.

MR. JUSTICE FRASER: By 6th April.

Mr. Cavender, anything to observe about 6th April?

A

MR. CAVENDER: By 6th April shall provide disclosure by 23rd March.

MR. GREEN: We have the same provision as my learned friend. He says in paragraph 4, "by 16th March shall provide it" and then at (c), by 2nd March.

B

MR. JUSTICE FRASER: I am going to suggest a different wording. I am not going to draft it for you. The next paragraph in the order needs to say, rather than working backwards, by date X, Mr. Green you can now please suggest to me a date X that postdates 16th March.

MR. GREEN: Two weeks, say 30th March.

C

MR. JUSTICE FRASER: Right, 30th March, claim claimants request 141303 disclosure for the technical documents et cetera.

The next point. The Post Office to use reasonable endeavours to have them disclosed by date, Y. Are you still seeking 6th April Mr. Cavender, do you have a problem?

D

MR. CAVENDER: 6th April.

MR. GREEN: Easter, in fairness, intervenes, my Lord, on 1st April.

MR. JUSTICE FRASER: It does.

E

MR. GREEN: It might be fair to afford them longer.

MR. JUSTICE FRASER: Pick a date in April.

MR. CAVENDER: Add a week to the 6th so, 13th April?

MR. JUSTICE FRASER: Yes, which I think might be a Friday. 13th April, can someone check that that is a Friday?

F

MR. CAVENDER: I am told it is, my Lord.

MR. JUSTICE FRASER: I think it is Friday the 13th seems to be a suitable date for the disclosure steps in this action. Your wording is exactly the same, well, it is not actually, but the suspension behind Mr. Green's 5(c) and Mr. Cavender's 4(c)(iii) is broadly the same.

G

MR. GREEN: My Lord, yes.

MR. JUSTICE FRASER: All right. Is that everything about early disclosure of technical documents?

H

MR. GREEN: It is, my Lord.

MR. JUSTICE FRASER: Then we get to Mr. Cavender's point which I will let him lead on.

- A MR. CAVENDER: I am grateful.
- MR. JUSTICE FRASER: Which is early notification of case, sequential exchange, et cetera which I suppose starts with, really, the fact that you want directions now. Mr. Green wants to put them off to later.
- B MR. CAVENDER: There are two points, there is now, later and then there is whether we need it at all. Dealing with whether we need it at all, if you remind yourself, my Lord, and look at the generic pleadings in volume 1 of the case management bundle.
- MR. JUSTICE FRASER: Yes.
- C MR. CAVENDER: As far as we have got on my learned friend's case on this, it is tab 3 of that bundle, paragraph 22 of the pleading. Would you read paragraph 22 to yourself?
- MR. JUSTICE FRASER: *(Pause for reading)* Yes.
- D MR. CAVENDER: That is not a particularly inspiring start to a claim that is based on a computer causing these losses but that aside, we now go into the stage where we are going to test, effectively, this computer by reference to the allegations. Whichever version of the issues me and my friend come up with, they are going to be very broad. They can be categories of their investigation. This is not a public enquiry, it is litigation. At the moment we have no sense of within those broad issues that we will agree
- E hopefully, what my learned friend is tilting at with his expert.
- Unless some kind of particularisation is given before the service of expert reports, the first time you will get any indication of what they say is wrong with the system is in their expert report which is far too late and wasteful. What we have done is
- F try and put two triggers in the order, one is at paragraph 5 which is clearly a provision all document, i.e. almost the kind of thing this is looking at, the kind of thing this is directing his enquiries to he thinks there may be an issue with. That is the first stage. Then paragraph 8 ----
- G MR. JUSTICE FRASER: Did you say paragraph 5?
- MR. CAVENDER: 5, my Lord, yes. Does my Lord have that?
- MR. JUSTICE FRASER: I do but just give me a second because I closed it.
- H MR. CAVENDER: In bundle 3, tab 13.
- MR. GREEN: I have mine loose so that it is easier.
- MR. JUSTICE FRASER: Yes.

A

MR. CAVENDER: Paragraph 5, I am happy to change the wording, it is just to give us some direction. By mid July, setting out the nature of the allegation in relation to Horizon Issues. So, if you look at Horizon as I am sure your Lordship has, they are very broad. This is not an enquiry. It is a piece of litigation that one side says that certain things are broke or do not work in a particular way. In my submission it is not satisfactory to embark upon that with just paragraph 22 of the pleading. Something more is required, not in some Chancery pleading sense, in terms of focusing the minds of the experts rather than wander all over the piece, directing their minds within the Horizon Issues as to where they think the problems or issues may be.

B

C

MR. JUSTICE FRASER: Yes.

MR. CAVENDER: That is why we say we need something.

MR. JUSTICE FRASER: Right, Mr. Green?

D

MR. GREEN: My Lord, two bits to the case. One is the allegation of the errors which we do not know about and the other is the assertion by the defendant that they have robust control measures in place to detect when they happen. We are in a situation, and I understand what my learned friend says, and it is not wholly without merit, but we are in a situation where, for many years Post Office and/or Fujitsu have been monitoring which errors occur.

E

F

They are not volunteering to help us identify or narrow the scope of the errors that they say might conceivably be said to cause shortfalls. They are not volunteering anything so we are being asked to make a shot in the dark and which are certainly being asked to do it at a stage far earlier than we will be able to do it on a basis that will not inevitably change. It is extremely unsatisfactory for that reason.

G

Once we have had the ability to interrogate the system there is absolutely no problem and indeed, the court will expect before experts, and this is why we have made what we thought was sensible provision for a staged approach to this, because I will be in a much better position to page informed submissions to the court about how we should go about it once I have the information were our expert and he understands ----

H

MR. JUSTICE FRASER: When you say interrogate the system though, that stage I do not think, unless I have missed it, is on either order at the moment.

MR. GREEN: Not yet.

- A** MR. JUSTICE FRASER: No, not yet; either the order has ----
MR. GREEN: It has not.
MR. JUSTICE FRASER: Just tell me what you mean by that.
MR. GREEN: I was slightly using too broad a term. I certainly mean the minimum is to
familiarise ourselves with the system.
- B** MR. JUSTICE FRASER: That is the demonstration of the technical documents?
MR. GREEN: Yes, we have to get demonstration of technical documents, then we are getting
some disclosure if parallel on Horizon and it is from that including the sorts of
- C** documents your Lordship saw this morning, that we are going to then be able to try to
identify and focus on which errors and bugs we think are most likely to have been such
as to cause the appearance of shortfalls. We will not know whether the presentation of
data in particular ways may mismatch with the client's data being sent back.
- D** MR. JUSTICE FRASER: When are you getting the disclosure on the Horizon documents?
MR. GREEN: We have got, I think it is staged actually. There is a telephone conference on
1st March about how the known error log is going to be provided, for example. So,
some of those matters are unknown. We do not even know whether they will have ----
- E** MR. JUSTICE FRASER: There must be some sort of an outline intention about whether it is
going to happen?
MR. GREEN: Yes.
MR. JUSTICE FRASER: Surely.
- F** MR. GREEN: At the moment it is envisaged to be in May. You will see, my Lord, our
difficulties with shooting in the dark at the end of March.
MR. JUSTICE FRASER: Right. Is there anything you want to add, Mr. Cavender?
MR. CAVENDER: My Lord, my learned friend is talking about timing, I am reasonably
agnostic about the precise dates.
- G** MR. JUSTICE FRASER: I think, Mr. Green, if I can summarise what I understand his
position to be, is your point about sequencing is not without merit but he does not want
to have to nail his experts' colours even half to the mast before they have had a chance to
look at it properly. That is probably a fair summary.
- H** MR. CAVENDER: That deals with paragraph 5.

A MR. JUSTICE FRASER: That is a little bit shorter. The actual three steps which are
necessary for the expert to have something of an outline view and, of course, look at the
early disclosure of technical documents, see the demonstration of the system or have a
demonstration performed and then consider the Horizon disclosure documentation which
B is intended to come some time in about May. Let us say, for the sake of argument those
three steps I decide ought to be taken, it then really just becomes dates.

MR. CAVENDER: Exactly. Maybe we can live without the provisional thing and go for
18th July. The reality is, if you then look how this fits into the expert reports, my
learned friend does not do that because he says he does not want to ----

C MR. JUSTICE FRASER: I know but I am doing that today.

MR. CAVENDER: So you can see, I could live I think with 18th July which is sufficiently
far from the expert report exercise.

D MR. JUSTICE FRASER: You are talking about paragraph 8.

MR. CAVENDER: Correct. That does not have the same objection as 30th March date. It is
provisional anyway. If the experts are sensible and talk to each other hopefully they will
get an idea, you know, what my learned friend's expert is actually tilting at anyway, but
E was going to formalise it, maybe that is too early. Certainly by mid July, given the
direction that have to follow, given that we have a trial on 11th March, we must surely
have some focus.

MR. JUSTICE FRASER: Yes. Is there anything wrong with that?

F MR. GREEN: No.

MR. JUSTICE FRASER: Right, I am going to give you the framework and I will leave you
to sort out the dates because I think I am not going to order Mr. Cavender's paragraph 5.
I am, however, going to order a sequential exchange but building on Mr. Cavender's
G paragraph 8 is actually going to have that date but it is going to say, "The claimant's
expert shall serve a provisional/outline document setting out the nature of the allegations
in relation to Horizon Issues". I am going to have sequential exchange of main reports
but then we are going to have supplementary reports anyway. Those dates, it seems to
H me, subject to a bit of tweaking, Mr. Green, if you tell me 31st August is too soon after
16th July. That could go into September.

MR. GREEN: I would be grateful.

A

MR. JUSTICE FRASER: Choose a Friday part way through September.

MR. GREEN: I think it is the 14th September.

MR. JUSTICE FRASER: Friday, 14th September and, Mr. Cavender, do you then want your expert reporting in very early November?

B

MR. CAVENDER: My Lord, I do, yes.

MR. JUSTICE FRASER: All right, choose the first Friday in November, please, somebody and tell me what the date is. There is going to be liberty to apply.

MR. CAVENDER: I am being told we are in trials in November, we will be in and out of trials.

C

MR. JUSTICE FRASER: I know, that is why I said very early. What is the first Friday?

MR. CAVENDER: The 2nd.

MR. JUSTICE FRASER: So 2nd November.

MR. CAVENDER: How long does that give us?

D

MR. JUSTICE FRASER: It gives you eight weeks I think, given it is sequential exchange it ought to be more than enough.

E

You have already got permission for these experts anyway. I am now reverting to Mr. Cavender's order. Paragraph 6, apart from subparagraph (c) which can come out because it is unnecessary to order it specifically, does the principal of such a meeting, is that controversial?

MR. GREEN: My Lord, no, I think it might be more helpful to do it later.

F

MR. JUSTICE FRASER: Very sensible. Is 6th April a good date?

MR. GREEN: I think it would be helpful to do it a tiny bit later given the sequencing we have of all the information.

MR. JUSTICE FRASER: Choose a date.

G

MR. GREEN: I think two weeks later will be good which will be the 20th.

MR. JUSTICE FRASER: Mr. Cavender, is there anything about the 20th that you would like to observe?

H

MR. CAVENDER: Only that that is the date of the CMC at the moment as the date we wanted, but I think your Lordship ----

A MR. JUSTICE FRASER: This is the date, I think the meeting has to happen by then so it should not be a problem. I will tell you what, I will make it the 19th so that you can give me an update.

MR. CAVENDER: My Lord, yes, I have no comment on an extra two weeks.

B MR. JUSTICE FRASER: May I remind everyone, and this does not need to go into the order, that under CPR 35.14, well, actually, let us put it in the order in a paragraph that says the following: "The parties are reminded that under CPR 35.14 the experts have the ability to file written requests for directions from the court."

Would somebody now like to tell me where we have reached?

C MR. GREEN: We have got up to paragraph 12, my Lord of my learned friend's order now on page 13.

MR. JUSTICE FRASER: Hang on a second. Paragraph 12.

MR. GREEN: Yes, sorry, we skipped over 9 I think, my Lord.

D MR. JUSTICE FRASER: That is why I asked where we are.

MR. GREEN: Yes, which is the experts shall meet to discuss re a list of questions.

MR. JUSTICE FRASER: I am not ----

MR. GREEN: I think they can do that anyway without ----

E MR. JUSTICE FRASER: They should be dealing with the expert issues.

MR. GREEN: Quite.

MR. JUSTICE FRASER: What happens if they have a meeting and agree some questions that either fall outside the list of expert issues or do not include the expert issues?

F MR. GREEN: I think may not be helpful.

MR. JUSTICE FRASER: Mr. Cavender, do you have anything else to say?

MR. CAVENDER: The idea that behind this was that whichever view you take of the

G Horizon Issues they are quite broad and within that broad compass there will be expert questions that they will come upon through the demonstration or through the documents that they will think the most appropriate for court to have evidence on.

MR. JUSTICE FRASER: I do understand that, but is this something different to the

H requirement in CPR 35.12(1)(a) which says if I direct a discussion between experts it is to identify and discuss the expert issues in the proceedings and, where possible, reach an

- A agreed opinion. It is something that they have to do as part of their expert meeting anyway.
- B MR. CAVENDER: It is but this is meant in advance. What it is meant to do -- in a case where we do not have the pleaded issues on this, we do now I think have paragraph 8 -- is agree what it is sensible for their reports to deal with. It is not seeking to agree issues, agree the answer to the issue; it is agreeing what the focus of their reports is to be. It is the questions to be addressed as opposed to the CPR rules.
- C MR. JUSTICE FRASER: The CPR rule is identify and discuss which issues are going to be addressed.
- D MR. CAVENDER: My Lord, yes.
- E MR. JUSTICE FRASER: It is broadly the same.
- F MR. CAVENDER: Yes.
- G MR. JUSTICE FRASER: All right. Well, what I will do then is I am going to order, it is going to be a slightly wider paragraph than is normal, "by date X", which we can come on to in a minute, "the parties' experts are to commence their meetings and discussions under CPR 35.12, including both 35.12(1)(a) and 35.12(1)(b)". That then covers both the identification and discussion of the issues that they are going to deal with and whether they reach agreement on them.
- H That paragraph is then going to continue because there is going to be an early date. Those discussions are to continue as or not, as necessary, with a view to achieving the first joint statement under CPR 35.12 by date Z. I would like you now, please, to give me, each of you, a date by which you say they should start and a date by which you say they should have reached the first joint agreement.
- Once they have reached one they can then continue, but we have to have a date at the beginning of that process and a date for the giving of the first statement. So, Mr. Green dates, please?
- MR. GREEN: I am just trying to think about, I am getting some thoughts on sequencing. If there is a joint statement prior to our expert report that might at least save some time.
- MR. JUSTICE FRASER: You want one before 18th July. Okay, suggest a date.
- MR. GREEN: Shall we say 4th July?

- A** MR. JUSTICE FRASER: Then your date for the first joint statement? While you think about that I will ask Mr. Cavender.
- Mr. Cavender, what about the date by which they should start these meetings?
- It is suggested it should be before their preliminary provisional outline document.
- B** MR. CAVENDER: I think that is probably sensible, the sooner the better frankly.
- MR. JUSTICE FRASER: Do you have any objection to 4th July?
- MR. CAVENDER: At the end of the day these people are meeting, the experts have already engaged in this process, the trouble is, if you put a date then they will not do anything probably before that. That is the danger.
- C** MR. GREEN: They will.
- MR. JUSTICE FRASER: That is for both sets of legal advisers to sort them out. This is the date by which they actually have to have started. It does not mean they did not do anything before then.
- D** MR. CAVENDER: That is the only danger.
- MR. JUSTICE FRASER: All right. Pick a Friday for me, please, somebody, penultimate Friday in June.
- MR. GREEN: 29th?
- E** MR. CAVENDER: 29th?
- MR. JUSTICE FRASER: I think that is actually the ultimate.
- MR. GREEN: 22nd?
- MR. CAVENDER: 22nd?
- F** MR. JUSTICE FRASER: 22nd June 2017 is the date by which those discussions have to have started. Now, Mr. Green, give me a suggested date for the first joint statement.
- MR. GREEN: There might be some sense in having the first joint statement after our experts report, but then they can ----
- G** MR. JUSTICE FRASER: I understand that, just give me a date.
- MR. GREEN: Shall we say from 28th September, my Lord, because that gives them two weeks?
- MR. JUSTICE FRASER: Fine. Mr. Cavender?
- H** MR. CAVENDER: You either do that or you do it as a result of them doing the work again in July and do it in advance of my learned friend's report in September.

A

MR. JUSTICE FRASER: You mean if they have agreed something they do not need to deal with it in their report?

MR. CAVENDER: Exactly, especially as it is going to be the first one. It may not say very much. If there are things to be agreed it is good to take them out of the mix.

B

MR. JUSTICE FRASER: If things are agreed, that makes sense.

MR. GREEN: My Lord, I think it does. The only thing I was thinking, the way that your Lordship has got them going earlier they will be recording what is agreed as they go along anyway.

C

MR. JUSTICE FRASER: I want a date by which a proper joint statement, the first one, has to have produced. It seems to me that on the assumption they will at least agree something ----

MR. GREEN: We could make it the end of July possibly.

D

MR. JUSTICE FRASER: I will choose a Friday in August.

MR. GREEN: Very well.

MR. JUSTICE FRASER: Is 31st August a Friday?

MR. CAVENDER: It is, my Lord.

E

MR. JUSTICE FRASER: Yes, 31st August.

MR. GREEN: We are up to number 12 after that. We have already dealt with 10 and 11.

MR. JUSTICE FRASER: 12 is actually wrapped into the wider paragraph I have done, that deals with meetings and joint statements.

F

MR. GREEN: Exactly, so that goes.

MR. JUSTICE FRASER: Paragraph 13, on Mr. Cavender's draft is unnecessary and could it be removed, please? You are going to have liberty to apply anyway at the end of the order so you do not need 13.

G

Supplemental reports, is there any reason they cannot be exchanged Mr. Cavender?

MR. CAVENDER: The reason for this was the general reason and secondly, if there is any fall out from the Common Issues trial.

H

MR. JUSTICE FRASER: Yes. There should be provision for supplemental expert reports, it should be some time after Christmas 2018. Is there any particular reason it cannot be an exchange?

- A MR. GREEN: No.
- MR. CAVENDER: Except that, this is the whole ships passing in the night thing, is it not?
My learned friend's side may think something that has come out of the Common Issues
trial has an expert impact and the first time we see it is in their report. We may think
B there is not or think there is another one and then suddenly you do not have expert
evidence that is married(?)
- MR. JUSTICE FRASER: You can always come back under liberty to apply. I am going to
make exchange of supplemental reports, I am going to be generous, is 18th January 2019
C a Friday? I am being told it is.
- MR. CAVENDER: Yes.
- MR. JUSTICE FRASER: So 18th January 2019. Pre-trial review.
- MR. CAVENDER: What about the joint memo, my Lord, do we have a final ----
- D MR. JUSTICE FRASER: A date by which they need to have ----
- MR. GREEN: That is number 16.
- MR. CAVENDER: 16.
- MR. JUSTICE FRASER: I have already, I think, built in a provision for you to issue a first
joint statement. I am of the view that they should continue their discussions as or not as
E necessary anyway.
- MR. GREEN: Yes.
- MR. CAVENDER: 15th February might not be a bad date anyway, it is a month after
F supplementals. As far as they were going to reach agreement they would have done by
then.
- MR. JUSTICE FRASER: The experts shall produce ----
- MR. GREEN: Can we put it ----
- G MR. JUSTICE FRASER: Go on.
- MR. GREEN: I may not be troubled in relation to that final document, it is primarily for the
experts but I am in the Supreme Court the previous week so I would be grateful if that
date could be just one week later.
- H MR. JUSTICE FRASER: Is the 11th March ----
- MR. GREEN: The one in paragraph 16 is 15th February.
- MR. JUSTICE FRASER: No, no, the date of the Horizon trial is 11th March.

- A** MR. GREEN: It is.
MR. JUSTICE FRASER: It cannot go too late.
MR. GREEN: No.
MR. JUSTICE FRASER: But the ----
- B** MR. GREEN: The 22nd?
MR. JUSTICE FRASER: No, the 20th should be a Wednesday, is 20th February a
Wednesday? That needs to be worded so that it is by reference to CPR 35 whatever it is
and come up with a suitable form of words that makes it clear that that is to included
both matters that are agreed and where matters are disagreed, why they are disagreed or a
short summary of why they are disagreed.
- C** Then I had got to pre-trial review before you dragged me back no the bowels
of paragraph 16. 22nd February 2019; is that a Friday?
- D** MR. GREEN: It is, my Lord, I think. Hold on a second, yes, it is.
MR. JUSTICE FRASER: All right, that is when it can be. Time estimate one hour.
There are two other listing matters that need to be dealt with. The first is for
you to come back on your Horizon Issues/date range point. Second, I do not need to fix
this now, but just to make it clear that it does have to be fixed, Mr. Cavender I think the
Post Office has an application to join the funder and that reached me yesterday but you
will want that listed.
- E** MR. CAVENDER: My Lord, we do but we asked for a listing after Easter because there are
so many negotiations ongoing, as you have probably seen, to allow those to come to ----
- F** MR. JUSTICE FRASER: All right, let us deal with those two things one after the other.
You want to have met by two weeks on Monday?
MR. GREEN: My Lord, yes.
MR. JUSTICE FRASER: That is the week commencing the 19th or the 12th.
- G** MR. GREEN: The 12th.
MR. JUSTICE FRASER: 12th March. So you will need I think a one hour CMC sometime
in the week commencing ideally the 19th.
- H** MR. GREEN: The 19th if possible.
MR. JUSTICE FRASER: However, I have looked at that week and it is beyond crammed
with other things so you could have Monday, 26th March at a time which we would

- A have to identify to you because it might have to be around a normal court day.
Normally, as you both know, I am not going to take counsel's availability into account but because that is so close to Easter and I am feeling in a ridiculously indulgent frame of mind I am going to. Are you both available on Monday, 26th March?
- B MR. CAVENDER: I am, my Lord.
MR. GREEN: My Lord, I do not know.
MR. JUSTICE FRASER: You might need to top up your tan.
MR. GREEN: I may have individual child responsibilities.
- C MR. JUSTICE FRASER: In that case I am going to leave it on this basis. If you agree the list of issues and the date range by 12th March, there is no need to come back. If you do not you are going to have to come back on Monday, 26th March at a time to be agreed. I am perfectly willing, because I have done this once before when I was in the admin
- D court, physically to let you in the building myself if it has to be a very early hearing, although obviously one would rather not do that, to get around your responsibilities. I am also very willing to see you at six o'clock. The time of day can be very, very flexible but it is going to have to be that day. That is an incentive on you.
- E Pre Easter week, that gives you maximum time to eat chocolate eggs, you have the incentive to reach a sensible agreement; is that everything?
- F MR. CAVENDER: My Lord, the only other thing we discussed about the date range in the order as resulting today.
MR. JUSTICE FRASER: Yes.
MR. CAVENDER: Are we going to leave that blank or are you going to say ----
MR. JUSTICE FRASER: Try to agree a date range. If you can't agree a date range, when you come back on 26th March I will, just having reminded myself of the dates of different matters in the pleadings, simply give you a date.
- G MR. GREEN: I think my learned friend's question was directed to the order we preparing for your Lordship from today.
MR. JUSTICE FRASER: Yes.
- H MR. GREEN: One way of doing it is for us to say in the order ----
MR. JUSTICE FRASER: Date range to be agreed.
MR. GREEN: On a date range to be agreed in default which there be a hearing.

- A** MR. JUSTICE FRASER: Well, in default of which you will be decided (*unclear*).
MR. GREEN: Exactly.
MR. JUSTICE FRASER: 26th March.
MR. GREEN: We will provide an order now without provision in it.
- B** MR. JUSTICE FRASER: This order of today has to include, although I regret it does not include, the order that you in fact meet to agree that list of issues.
MR. GREEN: Indeed.
MR. JUSTICE FRASER: All right.
- C** MR. CAVENDER: The only other thing is security.
MR. JUSTICE FRASER: Yes, I do need to explore that with you, your post Easter listing, the time estimate of about a day?
MR. CAVENDER: It is, my Lord, yes.
- D** MR. JUSTICE FRASER: Yes. Obviously, it will not only or necessarily at all involve Mr. Green, but there are other representatives who would be here, are there?
MR. CAVENDER: I imagine because the fund is being represented separately. My learned friend is involved as well.
- E** MR. GREEN: My Lord, all I was saying, in these cases there is an impact on the claimants.
MR. JUSTICE FRASER: I am not saying you cannot come.
MR. GREEN: No, no, no, which may mean we intend to make a distinct point from the funder.
- F** MR. JUSTICE FRASER: No, Mr. Green, you misunderstand. You are allowed to come, you are allowed to be heard. In some cases like this claimants just do not come.
MR. GREEN: I understand.
MR. JUSTICE FRASER: I dare say if they are not agreed the funders will come. If not Mr.
- G** Cavender might have a slightly easier go at the argument than if they do, but either way, you need a date; is that right?
MR. CAVENDER: My Lord, yes.
MR. JUSTICE FRASER: Would you like a date now?
- H** MR. CAVENDER: My Lord, yes.

- A** MR. JUSTICE FRASER: I will not be able to give you a specific date but you will get the date very shortly afterwards by my clerk, but it is going to be the week commencing 16th April which I think is the first full week of term.
- MR. CAVENDER: I am involved in a Commercial Court case over that period. I think Mr. Robinson(?) is available.
- B** MR. JUSTICE FRASER: How long is your Commercial Court hearing?
- MR. CAVENDER: It finishes on 19th April.
- MR. JUSTICE FRASER: When did it start?
- MR. CAVENDER: It starts on Tuesday, 10th.
- C** MR. JUSTICE FRASER: So, the first day of term.
- MR. CAVENDER: There are two reading days and then it starts.
- MR. JUSTICE FRASER: Mr. Green, are you available in that period, week commencing the 16th?
- D** MR. GREEN: I actually do not have my availability for that date.
- MR. JUSTICE FRASER: What I am going to do about the date for that hearing is I am going to take a more considered view based on the actual CE diary which will be all the judges in the TCC. I imagine it does not matter other than the obviously de minimis effect whether it is the week of the 16th April or the week of 23rd April. You will be contacted, probably with a view to exploring a day that suits you both. If it is not possible, it is not possible. As long as it is in that narrow window.
- E**
- Mr. Cavender, has that application been served yet?
- F** MR. CAVENDER: Yes, my Lord.
- MR. JUSTICE FRASER: Do you know when? Was it yesterday?
- MR. CAVENDER: Friday.
- MR. JUSTICE FRASER: Friday of last week, all right. Somebody I hope, will draw up the order for today, I am not looking at anyone in particular to fix it. Is there anything else?
- G** MR. GREEN: My Lord, no.
- MR. JUSTICE FRASER: Is that everything?
- MR. CAVENDER: My Lord, yes, thank you.
- H** MR. GREEN: Thank you.

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