POL00270457

THE POST OFFICE GROUP LITIGATION

Claim No. HQ16X01238, HQ17X02637
& HQ17X04248

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BEFORE: The Hon. Mr Justice Fraser
B E T W E E N:-

ALAN BATES & OTHERS

Claimants

– and –

POST OFFICE LIMITED

Defendant

[DRAFT] GROUNDS OF APPEAL

A. Request for permission to Appeal

1. Post Office seeks permission to appeal against the order on Judgment of Mr. Justice Fraser ("the Judge") dated 15 March 2019 on the basis that it has reasonable prospects of success on each of the grounds set out below. The Judge [refused/accepted] permission [on…./ all grounds].

2. Post Office contends that the Judge has gone seriously wrong on law, procedure and fact. There is also a separate appeal seeking the recusal of the Judge for apparent bias.

3. This notice to appeal is in five parts:

   Part A: Request for permission to appeal.

   Part B: Request for expedition of appeal.

   Part C: Procedural unfairness grounds of appeal.

   Part D: Error of law grounds of appeal.

   Part E: Error of fact grounds of appeal.

4. Post Office also seeks permission to appeal the Order of the Judge dated ….refusing its application to stay the directions contained in the Courts Order dated…….leading to the hearing of issues of breach and limitation listed in the Post Office Group

POL00270457

Litigation listed for November 2019 ("the Further Issues Trial"). That hearing is intended to apply the determinations of the Judge in the Judgment under appeal. Accordingly, Post Office –seeks an interim stay of the Further Issues Trial (and the directions leading to it), pending appeal.

5. Post Office also seeks the direction and relief at paragraph [REF _Ref5724852 \w \h * MERGEFORMAT] as to the future conduct of the Post Office Group Litigation.

6. Post Office also seeks permission to serve a skeleton argument in excess of 25 pages pursuant to CPR PD 25C paragraph 31(1)(a) having regard to the very large number of issues covered by the appeal.

B. Expedition

7. Post Office also seeks expedition of this appeal on public interest grounds that:

   (1) The holding of the Judge as to the implication of good faith into the law of contract and (in particular) the broad reach of the principle as applied by him to "relational contracts" (including to limit express rights of termination- for cause and on notice) would, if correct, have a dramatic impact on a wide range of contractual relationships. If wrong, it needs to be overturned quickly to avoid other Courts (and litigants) erroneously relying on it.

   (2) The holdings of the Judge as to the operation of the Subpostmasters Contract ("SPMC") and the "Network Transformation Contract" ("NTC") is not limited to the c.550 litigants in this Group Litigation but also applies to 11,000 serving Subpostmasters ("SPMs") throughout the UK. The Judgment has a wide and dramatic impact. In particular:

      (a) the implication of "good faith" to all contractual rights in both the SPMC and NTC;

      (b) the inability of Post Office to rely on its SPMs as its common law and contractual agents in relation to the cash and stock that they hold and handle on its behalf;

      (c) the inability of Post Office to rely on the truth of monthly Branch Trading Statements submitted to it by SPMs;

      (d) the 22 terms implied into these detailed written contracts (in particular, implied term (m) – which effectively prevents Post Office from enforcing

POL00270457

accounting shortfalls as principal and under the express terms of the contracts);

(e) the inability of Post Office to effectively manage SPMs out of the business – by suspending them or terminating their contracts for cause or on notice in accordance with the express terms of the contracts.

Taken together, the dramatic changes made by the Judgment make it prevent Post Office from effectively manage and operate its 11,000 branches nationwide.

(3) Those 11,000 branches nationwide (a) hold £643 million of Post Office cash, (b) process 47 million transactions every week and (c) produce 286 million cash declarations per month (on which Post Office ordinarily could rely to maintain appropriate oversight and control of its vast cash exposure across the network). There is a very substantial amount of public money that is, as a result of the Judgment, under much less effective control than it was.

(4) The Further Issues Trial (as part of the Group Litigation) to determine issues as to whether the duties as found by the Judge in this Judgment have been breached (and associated issues of limitation) is listed to be heard in November 2019. In order to avoid wasted money and huge inconvenience to the parties, this appeal should be heard and determined before that trial is heard.

C. Procedural Unfairness

8. The Judge is the current Managing Judge of The Post Office Group Litigation. He ordered that there be a "Common Issues Trial" which involved a number of legal questions, primarily issues of contractual interpretation. That is the Judgment which is the subject of this appeal. The Judge erred in law when determining those questions in admitting and relying on extensive post-contractual evidence (evidence to which Post Office objected). The Judge also erred in law in admitting and making findings (or expressing concluded, and often trenchant, views) upon such evidence into the trial in circumstances which were unfair given that:

(1) They were not part of the Common Issues Trial. They were matters properly to be determined in the subsequent "Horizon Trial" (dealing with technical issues as to the information technology system used in branches), the Future Issues Trial or

POL00270457

further breach and damages trials to be ordered. Those issues included: training on the Horizon system, operation of the Post Office helpline, investigations into discrepancies in SPMs' accounts, and the suspension and termination of SPMs' contracts.

(2) The evidence that the Judge relied upon in this regard was partial and limited. They were not matters on which witness evidence or proper disclosure had been ordered. Post Office did not bring forward evidence on what are breach issues or disclosure in relation to them. Nor did the SPMs give such disclosure. Post Office correctly limited its evidence to matters which would assist the Judge in determining the terms of the contracts entered into, and did not address how the contractual relationship in fact developed and operated over the course of different SPMs' engagements.

(3) The Judge roundly criticised and unfairly made adverse findings about Post Office witnesses for *not* addressing matters that were clearly outside the scope of the Common Issues Trial.

(4) The Judge has made these (unfair) findings which relate to a Group Litigation with 550 Claimants (which represent a fraction of the current 11,000 SPMs, let alone the 35,000 SPMs who have been in place over the relevant period) and made comments which indicate the findings that he will make in the future based on this partial and unfairly admitted evidence from only 6 Lead Claimants. Those Lead Claimants were not chosen to be representative of the 550, and they are not representative. Three claims were chosen by each side to give some exemplar factual matrix for the interpretation of the SPMC and NTC contracts and to provide examples of those two types of contract.

(5) PO will contend that having such a large amount of irrelevant material, including material which is post-contractual material produced with the benefit of hindsight, unfairly brought into the trial process must necessarily have affected the holdings and findings in his Judgment. Reliance on that material is, in many instances, the only credible explanation for the approach taken by the Judge to interpreting the contracts and, more generally, resolving the Common Issues.

9. Accordingly, the Judge erred in law in his approach to evidence (at paragraphs 21, 34, 54, 61 and 62) in holding that he was entitled to make findings on such evidence

POL00270457

(including evidence that went to credit) that was outside the ambit of the Common Issues Trial, was irrelevant to the issues in that trial and was therefore inadmissible.[1] Such findings were not necessary for the Judge to perform his judicial function in the Common Issues Trial. It was obviously unfair for him to do so given that (unsurprisingly) there had not been disclosure or witness evidence from Post Office on these issues. As such, it was inappropriate for the Judge to make any findings or comments upon this material, still less to make findings and comments upon it in the trenchant terms that he did. This was made even worse by the fact that he is the Managing Judge in Group litigation and that two further trials had been set down before him where these other matters would be tried. Post Office seeks an order quashing those findings and comments listed at schedule 1 hereto on the basis that they are subject to the unfairness objection.

10. This material subject to the procedural unfairness objection was also the subject of an application to the Judge to recuse himself for apparent bias on the basis of pre-determination. There is a separate application for permission to appeal against the refusal of the Judge to recuse himself as the Managing Judge in the Post Office Group Litigation.

11. The Court of Appeal will also be asked, in the alternative to the recusal appeal, to determine whether in light of the seriousness and extent of this procedural unfairness, and in accordance with the overriding objective, a different Judge should be appointed the "Managing Judge" of the Post Office Group litigation to deal with future trials, in particular having regard to the requirements in CPR 1.1(1) and (2) to deal with cases "justly" and "fairly".

[1] The parties had permission only for evidence "In respect of each Lead Claimant and in relation to the Common Issues": see the First CMC Order at para. 10.

POL00270457

Part D: Error of law

Index

POL00270457

Common Issues 17 and 18: The "true agreement" argument (based on Autoclenz) on termination under the SPMC and NTC: paragraph [REF _Ref5704619 \r \h * MERGEFORMAT].

Common Issue 14: Proper construction and terms implied into right to suspend in SPMC and NTC: paragraphs [REF _Ref5704643 \r \h * MERGEFORMAT] to [REF _Ref5704647 \r \h * MERGEFORMAT].

Common Issues 5 and 6: Onerous and unusual terms in the SPMC and NTC: paragraphs [REF _Ref5704669 \r \h * MERGEFORMAT] to [REF _Ref5704673 \r \h * MERGEFORMAT].

Common Issues 7,19 and 20 – application of the Unfair Contract Terms Act 1977 to the SPMC and NTC: paragraphs [REF _Ref5704699 \r \h * MERGEFORMAT] to [REF _Ref5704709 \r \h * MERGEFORMAT].

Common Issue 1 – "Relational Contract": Implied term of "good faith" [Holding: Para.1122(1); Reasoning para.702 to 768].

12. The Judge erred in law in implying into the SPMC and NTC contracts a term of "good faith and fair dealing" and in applying that term to every right and power vested in Post Office within those commercial contracts. This includes the express right of termination on notice. The Judge also relies on the implied term as to good faith to justify the implication of 22 further implied terms, many of which are in stark contrast to the express terms. In doing this, the Judge substantially re-wrote the commercial bargain between the parties in favour of SPMs and against Post Office. Such approach is unwarranted and, if correct, revolutionary in its effect upon the law of contract.

13. The Judge should have held that such term is not to be implied because it was not "necessary" applying *Marks & Spencer v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 (*"Marks & Spencer"*). In particular the form of SPMC and NTC contracts under review have been in place for 20 years and have worked perfectly well for 99% of SPMs, approximately 35,000. The Judgment represents a dramatic and indefensible departure from the orthodoxy on contractual interpretation,

POL00270457

cannot be justified on the authorities and, in particular, goes well beyond anything that Leggatt J (as he then was) did in the *Yam Seng* case.

14. The Judge said of this implied term of "good faith" (at paragraph 738):

> "This means that both the parties refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, co-operation, and trust and confidence are, in my judgment, implicit within the implied obligation of good faith."

15. The Judge erred in law because:

(1) He should have found that they were, as a matter of contractual interpretation, *not* long-term contracts and not relational contracts, not least because they were expressly terminable on 3 months (SPMC) and 6 months (NTC) written notice. The contract may or may not turn out to be of long duration in practice, depending on whether one or both parties remained happy in the business relationship or, for whatever reason, decided instead to give notice to terminate. As such, on execution (when the question of implied terms must be judged), what the duration in practice would be was unknown, but the **contractual** term was clearly limited by the express right to terminate on notice. In holding to the contrary, the Judge misunderstood and misapplied the decisions he set out in paragraph 705 and 712.

(2) Therefore, the rationale for such a general implied term was wholly absent: neither party would be stuck in the relationship over a long period despite a change of circumstances and so require the protection of general obligations as to the behaviour expected within and in relation to the contractual relationship. The safety valve in the event that the express terms did not work in a satisfactory manner was termination.

(3) He found (in paragraph 728(3)) that: "the role of the SPM providing personal service" (and if he did being entitled to a substitutional allowance) indicated this was a "relational contract". In fact, under the contract there was no obligation upon an SPM to provide *any* personal service. Indeed, some SPMs are limited companies.

(4) He found that the SPMC and NTC were long term "relational contracts" and that *therefore* a term of good faith should be implied (see paragraph 711), rather than focusing on the ultimate question which is whether an implied term of "good

POL00270457

faith" was necessary in accordance with *Marks & Spencer*. Whether or not a contract is held to be "relational" is simply one step along the road to focus attention of the possibility of the need to imply terms under the necessary rubric in a contract of that type. By contrast, the Judge proceeded on the false basis that if he found a contract was a "relational contract" that *therefore* the good faith term was automatically to be implied and then applied to control and affect *every* right and obligation in the contract. As such, the Judge failed to properly address his mind to the correct question.

(5) He failed to recognise that these were commercial contracts into which an implied term of "good faith" was not necessary and where, in fact, there was no space into which such a broad "good faith" term could be implied given:

(a) Express terms – there were many detailed terms in the SPMC and NTC regulating the contractual relationship, including the parts of the relationship now said to be regulated by the general implied term of "good faith". And the Judge failed to consider (separately) how the "good faith" term was necessary to imply into the SPMC as opposed to the NTC, bearing in mind that the two contracts date from almost two decades apart and are very differently structured and worded.

(b) An express legal relationship of agent and principal, with all the common law duties inherent in such a legal relationship. At paragraph 618 the Judge holds that agency is: "bound up (inextricably in my view) with any finding as to whether these contracts are relational ones or not...". The Judge nowhere explains why or how that might be the case, but he appears to relegate the parties' express choice of agent and principal to some small importance, preferring to focus instead on the *ex-post* imposition of a new and vastly less certain form of legal relationship (the relational contract). Further, as set out at paragraph [REF _Ref5704481 \r \h * MERGEFORMAT] below he was wrong in law to find, in effect, that these were not contracts of agency, despite the *express* appointment of the SPM as "agent."

(c) A fiduciary relationship (which was admitted by the Claimants and referred to fleetingly by the Judge at paragraph 785) pursuant to which the SPM owed a fiduciary obligation to Post Office in relation to the holding and handling of

POL00270457

Post Office stock and money and the entering of transactions on the Horizon system. The Judge made no attempt to seek to reconcile that admitted fiduciary duty (and the express appointment of the SPM as "agent") which created significant duties from SPMs to Post Office with an *implied* (but weaker) duty of good faith going in the *opposite direction* in relation to the same subject matter, which implication the Judge held was necessary.

(d) Implied terms which the parties *agreed* formed part of the SPMC and NTC contracts, namely, terms of "necessary co-operation" and under *Stirling v. Maitland* - which were themselves powerful implied terms operating in close conjunction with the express terms. The Judge did not even attempt to give these agreed implied terms meaning and effect beyond suggesting that the term as to necessary cooperation was somehow inadequate because it only provided for such cooperation as was necessary (which calls into question how any more onerous duty of cooperation could meet the test in *Marks & Spencer*): see paragraph 740. He should have interpreted these implied terms in conjunction with the express terms and only then considered what if any (further) implied terms were necessary under *Marks & Spencer*. The Judge failed to do this, despite accepting Post Office's submission that this is what he should do (paragraph 958). Inexplicably, he effectively dismissed the argument as a "pleading point" (paragraphs 740 and 741). The Judge's reasoning on this issue is very hard to follow.

(6) If the Judge had done this exercise properly or at all, he would have realised that the suggested implied term was contrary to the express terms of the contract and/or was not necessary.

16. The Judge was wrong to hold that the commentary in Chitty (in the passage set out at paragraph 708) was wrong. That passage of Chitty dealt with the judgment in *Yam Seng* given by Mr. Justice Leggatt (as he then was) who was (rightly) exceptionally careful in limiting the scope of the specific terms he implied by reference to an implied obligation of "good faith." Mr. Justice Leggatt (as he then was) carefully narrowed the terms sought by the Claimant in that case to terms which were necessary and in accordance with the requirements of "good faith". This is in (very) stark contrast to the broad brush and unprincipled approach of the Judge (applying "good faith" controls to every important provision in the contracts, including termination on

POL00270457

notice). The Judge went very much further than any Judge has previously thought possible or desirable. His approach was contrary to the usual incremental development of the common law.

17. The Judge also erred because his definition of what the implied term of "good faith" entails is far too wide and uncertain. In particular, the term that he implies makes use of the words "transparency and trust and confidence", the former having no clear meaning in a commercial context and the latter being erroneously imported from employment law (where it has a specific meaning). Detailed commercial contracts have been replaced by a quasi-employment relationship of ill-defined meaning and content.

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

Common Issue 2:

A. Terms implied because the SPMC and NTC contracts were "relational ones…" [Holding: Para.1122(2) and 1122(16); Reasoning paragraphs 743 to 748 and 1117].

19. The Judge erred in law in holding that his finding that the SPMC and NTC were "relational contracts" provided a justification for implying the obligation of good faith with a very broad brush into every right, and power and provision within each of those contracts.

Termination on notice

20. The Judge erred in law in finding that the express provisions in the SPMC and NTC for termination on notice (3 months and 6 months respectively) could only be exercised "in accordance with the implied duty of good faith…" (Paragraph 1122).

21. The reasoning for this far-reaching holding is limited to the following words:

POL00270457

"….I find that the Claimants are correct and the Post Office was required to act in accordance with the implied duty of good faith in these contracts (as a result of their being relational ones) in exercising power to terminate the contracts" (paragraph 1117).

22. The Judge erred in that:

(1) He failed to apply the correct test of necessity in *Marks & Spencer* when seeking to apply a term of "good faith" to an express termination provision. Had he done so, he could not have held that it was necessary.

(2) Even if this were a "relational contract" in which considerations of good faith might play a role, to apply this concept to an express provision for termination on notice was clearly wrong.

(3) He failed to give any, or any proper, consideration to the commercial impact of implying good faith across the whole of these contracts with a broad brush.

(4) He failed to have any regard to legal certainty and the fact that termination on notice provisions are very common (and contained in virtually every commercial contract) and are expected by both parties to be enforceable in accordance with their plain words. Subjecting such a right to an implied term of "good faith" greatly undermined the clarity and utility of such right.

(5) He failed to have any regard to the fact that the termination on notice provisions are, on their plain words, *mutual* rights and that the good faith implied term is itself *mutual* . He held that only the exercise of that right by Post Office is subject to the good faith provision. This is incoherent. It betrays an unarticulated objective of re-balancing the commercial bargain.

(6) He failed to provide any or any sufficient reasoning for his holding.

Summary Termination

23. The Judge erred in law in finding (paragraph 899) that a summary termination under the SPMC was subject to the implied duty of good faith. He also (implicitly) found that the summary termination provision in the NTC contract was subject to an implied duty of good faith. These are dealt with at paragraphs [REF _Ref5704587 \r \h * MERGEFORMAT] to [REF _Ref5704589 \r \h * MERGEFORMAT] below.
[DCQC- he seems not to imply the same duty into the NTC contract – see: para.904

POL00270457

to 907: I suspect this is an oversight- I have assumed he has included it and appealed on that basis].

Further Implied terms – said to be "incidents" of "good faith" implied term

24. The Judge held that it was necessary to imply (whether as implied terms or "incidents" of the good faith implied term) into the SPMC and the NTC the further 17 implied terms set out at paragraphs 2(i) (c)(d)(e)(f)(g)(h)(i)(j)(k)(l) and (m) (n)(as amended)(o) (as amended) (p)(q) (r) and (s).

25. First, the Judge erred in law to imply these further 17 terms into the SPMC and NTC contracts on the basis that they were "relational contracts", when they were not: see above in relation to Common Issue 1.

26. Further or alternatively, even if the contracts were "relational", it was not necessary to imply into the SPMC and NTC contracts the 17 implied terms. The Judge's reasoning is at paragraph 747 and is limited to the point that because this is a "relational contract" that *therefore* the 17 implied terms are to be incorporated. This is flawed reasoning. The Judge erred in law in that:

    (1) He fails to apply the correct test of "necessity" in *Marks & Spencer* to the 17 terms he implies into the SPMC and NTC contracts. He implies them into these contracts on the basis that these are "relational contracts". That is the wrong test. A relational contract is a description that could be applied to a contract that (often) – but not always – contains certain features. It is not a specific established species of contract known to the law (such as an employment contract) into which terms (such as a term as to trust and confidence) can be implied *in law.* The Judge wrongly treated it as if it was, notwithstanding that he *purported* to be implying these 17 terms in fact (see paragraph 692).

    (2) This error of law (and confusion) is demonstrated by paragraph 757 where the Judge holds that whether or not the SPMC and NTC contracts are "relational" he would "…in any event…." imply the terms at (n) (o) (q) and (r) on the basis that they were necessary. This shows that he was not, on his preferred approach, applying the "necessity" test to those four implied terms or any of the other 13 implied terms considered above. This is a clear error of law. This identical error

POL00270457

is evidenced by paragraphs 762 and 763 in relation to implied terms (c)(d) and (m).

(3) The Judge apparently fails to have regard to the fact that he is implying a whole raft of implied terms dealing with a computer accounting system that did not even *exist* as at the date of execution of certain of contracts he was considering. Implied terms in relation to something that did not exist cannot have been necessary at the date of contracting. By way of example, the SPMC contracts of Lead Claimants Mr. Bates and Mrs. Stubbs were entered into before Horizon was introduced.

(5) The Judge erred in law in that he provides no proper reasons for holding that the 17 implied terms or any of them are necessary, whether individually or cumulatively. He lists them at paragraph 746 and treats them *en masse* without providing any detailed reasoning or justification for their implication. He should have considered them individually. If he held that, say, two of those were to be implied, he should then have determined whether in light of the implication of *those* two terms it remained necessary to imply the remaining 15.

(6) The Judge errs in law in that he provides no rationale or basis for holding that the 17 terms, or any of them, are necessary notwithstanding the existence of the agreed implied terms under *Stirling v. Maitland* and "necessary co-operation". There is no consideration whatever of the impact of these *agreed* implied terms (which have their own construction and effect) upon the subject areas covered by *any* of the 17 implied terms.

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

Implied term (m)

27. By way of example (under this ground of appeal), the Judge implied term (m) (paragraph 755). The Judge held that this is to be implied into the SPMC and NTC contracts in the form suggested by the Claimants. That term provided as follows:

POL00270457

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

28. The Judge erred in law in so doing because:

(1) Given his construction of clause 12.12 of the SPMC (paragraph 646 and 653) and his implication of the same term into the NTC (paragraph1103), the onus is upon Post Office (not the SPM) to demonstrate that the "losses" sought to be recovered were caused by "…his own negligence, carelessness or error….". In those circumstances, to *also* imply this term is clearly not necessary, and the Judge was wrong in law to have implied it.

(2) Even if the Judge had construed clause 12.12 properly (as advanced in paragraph [REF _Ref5711391 \r \h * MERGEFORMAT] below - such that there is no contractual allocation of burden of proof), it would still not be necessary to imply such a term for the following reasons:

(a) The contract works and has worked perfectly well without it for very many thousands of SPMs over 20 years. It is a classic example of a term that would suit one of the parties but that cannot sensibly be described as necessary for the business efficacy of the agreement.

(b) No commercial party would ever agree to having its right of recovery (of *its* money) in an agency relationship be subject to such an onerous and expensive procedure, which makes it virtually impossible to reliably control over £600 million in funds across the Post Office network countrywide. Most shortfalls are, for obvious reasons, not disputed: the SPM is well-placed to know or think that the shortfall results from an error in the branch (e.g. paying too much change to a customer or mis-keying a transaction), and Post Office will often have no special insight whatsoever. The implied term would prevent Post Office collecting undisputed shortfalls until it had jumped through various hoops imagined by the Claimants and imposed by the Judge.

(c) By way of example, if an an SPM's assistant loses £200 cash from the till, resulting in a shortfall at month end, applying implied term (m) Post Office

POL00270457

cannot seek to recover such funds until it has investigated the matter and is able to demonstrate that the £200 was not lost through any other cause. This might include any one of the potentially thousands of transactions performed by SPMs in their branches and involving Post Office clients (e.g. Camelot for lottery sales or Bank of Ireland for cash point services). It requires Post Office to identify whether, by reference to its relationships with those clients, it will ultimately suffer a "genuine loss" as a result of the shortfall in the SPM's branch. It does this without knowing why the branch is £200 short or even (in many cases) when the £200 loss first arose. And this implied term places that impossibly onerous obligation on Post Office despite the fact that the SPM is expressly appointed the agent of Post Office and is the person in the branch who handles all the cash and transactions and who is in a much better place to know what happened to the missing £200.

(d) As such, the implication of such a term is so uncommercial and so contrary to the agency and fiduciary duties placed on SPMs that it is absurd. No commercial party in the position of Post Office would ever have agreed to it.

(3) Furthermore, the prohibition on recovering shortfalls until PO has complied "…with its duties above (or some of them)…" is obviously unclear and unwarranted. Those duties constituted all the other implied terms listed "above." That is each of implied terms (a) to (l). So following this logic, if it could be said that Post Office was in breach of its obligations on training, it could therefore not recover shortfalls, no matter how they were caused. Such an implied term is not necessary. Such a prohibition on the recovery of shortfalls is obviously wrong and so uncommercial as to be beyond coherent argument.

Implied terms (n) and (o)

29. In addition to the general grounds in relation to implied terms, the Judge erred in relation to:

(1) Implied term (o) (paragraph 748) in which he held that the implied duty of "good faith" meant that PO could not terminate the contract of an SPM if the Post Office was itself *also* "…in material breach of duty in respect of the matters which the

POL00270457

Defendant considered gave it the right to terminate….". The Judge erred in law because:

(a) This is contrary to the well-established principle of law that if both parties are in repudiatory breach of contract *either* can accept such a breach and bring the contract to an end.

(b) It is a mis-use and unjustified extension of the principle of "good faith" to circumscribe the rights of Post Office in this way.

(c) It is not necessary to do so.

(d) It is unfair and unjustified to use the *mutual* "good faith" term to restrict the rights of termination of one of the parties – i.e. Post Office. There is no reason why, if the Judge's reasoning were right, SPMs should be able to terminate the contract where are themselves in breach (e.g. by not making good shortfalls). It is an implausible bargain.

(e) The implied term is uncertain and unworkable and would never have been agreed to by a party in the position of Post Office.

(2) Implied term (n) (paragraph 748) in which he held that the implied duty of "good faith" meant that Post Office could not suspend a SPM if the Post Office "…was itself in breach of duty in respect of the matters which the Defendant considered gave it the right to suspend". The Judge erred in law because:

(a) It was not necessary to imply such a term.

(b) It was an unjustified extension of the principle of "good faith" to circumscribe the rights of Post Office in this way.

(c) Objectively, the right to suspend is there to enable Post Office to protect its stock and money whilst it investigates any loss. It is irrelevant to that contractual objective that the Post Office may itself be in breach of contract in respect of, say, one of the "matters" that resulted in the suspension.

(d) A commercial party would never have agreed to such an inhibition on its right to suspend, given that suspension is its only real way of acting urgently to protect its cash and stock when problems emerge. The prospect of leaving a potential fraudster or a lazy or incompetent SPM in charge of a Post Office when serious problems emerge (because Post Office was itself in breach of contract in relation

POL00270457

to one of the "matters") is obviously wrong. So too where an SPM might have unwittingly employed a dishonest assistant who was (unknown to the SPM) exposing him to losses and liabilities.

(e) The implied term is uncertain and unworkable and would never have been agreed to by a person in the position of Post Office.

B. Terms implied into the SPMC and the NTC because they are necessary [holding: paragraph 1122(2); Reasoning paragraphs 749 to 766].

Implied term (t) (paragraph 751)

30. [PO accepts on this appeal a re-cast formulation of the implied term at (t) in the following terms on the basis that it is necessary: (paragraph 751/752):

"that the Post Office take reasonable care in performing its functions under the SPMC and NTC contracts which could affect the accounts of Subpostmasters".

[Query: whether tactically giving up this implied term at this stage is a good idea and may (together with the Agreed Implied terms) persuade the Court of Appeal to set aside all the other nonsense ? In particular this implied term could be seen as an incident of the Agreed Implied term of "necessary co-operation" [INSTRUCTIONS REQUIRED]

Implied terms (a) and (b) (paragraph 749)

31. The Judge held additionally that the terms listed at Common issue 2(i)(a) (b) (paragraph 749 -751) are to be implied into the SPMC and NTC on the basis that they are necessary.

32. [***Post Office accept on this appeal that a recast formulation of the implied terms at (a) and (b) in the following terms on the basis that they are necessary:***

POL00270457

(1) Implied term (a): "to provide reasonable training and support if Post Office imposed new working practices or systems or required the provision of new services".

(2) Implied term (b): "to ensure that the Horizon computer system was reasonably fit for purpose."

[DCQC: consider whether tactically giving up these implied terms in this form at this stage is a good idea and may (together with the Agreed Implied terms) persuade the Court of Appeal to set aside all the other "good faith" nonsense ? Again the first of these two terms might be seen as part of the agreed "Necessary co-operation" implied term INSTRUCTIONS REQUIRED]

33. Insofar as the Judge went beyond these re-cast implied terms (t)(a) and (b) he erred in law in that he failed to properly apply the test of "necessity" in that:

(1) He failed to consider the *express terms* which dealt with training and support as they applied to implied term (a).

(2) He failed to consider the agreed implied terms of *Stirling v. Maitland* and "necessary co-operation" and their impact on the subject matter of these implied terms, before deciding whether the terms at (a) (b) and (t) were necessary.

(3) He failed to provide proper reasons as to why such terms were necessary and, in particular, why they were necessary notwithstanding the implication of other terms covering the same matters (specifically, the 17 implied terms referred to above).

(4) He never stood back and considered the cumulative effect that the implied terms would have on the nature and balance of the commercial relationship created by the express terms.

(5) He never stood back and considered the commercial reality arising from the cumulative effect that the implied terms would have when considered in conjunction with his findings on agency and the Branch Trading Statement. Judged at the inception of the contracts, the relationship created by the Judge's implication of terms was not only fundamentally different from that created by the express terms but was an implausible commercial bargain.

POL00270457

Implied terms (n)(o)(q)(r) (paragraph 756 to 757)

34. The Judge held additionally that, if not implied because the SPMC and NTC are "relational" contracts, then the terms at (n)(o)(q) and (r) are to be implied into the SPMC and NTC contracts because they are necessary."

35. The Judge dealt with this at paragraph 759 to 761. He erred in law in that he failed to properly apply the test of "necessity". Specifically:

    (1) He failed to consider the Agreed Implied terms of *Stirling v. Maitland* and "necessary co-operation" and the impact they would have upon the relevant subject areas before deciding whether the terms at (a) (b) and (t) were necessary.

    (2) He failed to provide proper or any reasons as to why such terms were necessary.

Implied terms (c) and (d) (paragraph 762)

36. The Judge held additionally that if not implied because the SPMC and NTC are "relational" contracts, then the implied terms at (c) and (d) are "…plainly necessary to give business efficacy to the contracts…". The content of these terms is set out in paragraph 45.

37. As to (c) Post Office accept on this appeal that the recast implied term set out below was "necessary":

    " Properly and accurately to effect transactions using Horizon and to maintain and keep records of such transactions for a reasonable time.

    [DCQC: I consider that we should think about not appealing on implied term (c) in the form I have recast it and limiting our attack to (d). It will be suggested to us that we must do the things set out in (c) (as recast) – due to the agreed "Necessary co-operation term INSTRUCTIONS NEEDED.]

38. As to implied term (d) incorporated by the Judge, it provided:

    "(d) Properly and accurately to produce all relevant records and/or explain all relevant transactions and/or any alleged or apparent shortfalls attributed to Claimants"

39. The Judge dealt with this at paragraph 762. He erred in law in that he failed to properly apply the test of necessity in that:

POL00270457

(1) He failed to consider the Agreed Implied terms of *Stirling v. Maitland* and "necessary co-operation" and the impact they would have upon the relevant subject matter before deciding whether the terms at[(c)] and (d) were necessary.

(2) As to implied term (c) the form of the term incorporated by the Judge was too wide and unlimited in time.

(3) As to implied term (d) he was wrong to impose an obligation on Post Office to produce "all relevant records" when the SPM himself has and/or has access to records through the Horizon system. He was also wrong to impose an obligation on Post Office to "explain" all transactions or shortfalls, when such transactions and shortfalls originated in the branch operated by the SPM, are largely self-explanatory and, where they are not, Post Office is typically in no better (and usually a much worse) position than the SPM himself to explain the transactions / shortfalls in the SPM's branch.

(4) He failed to provide proper or any reasons as to why such terms were necessary, simply asserting the necessity of the implied term without identifying why the contract would otherwise lack practical or commercial coherence.

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

Common Issue 3 – exercise of discretion and powers [Holding paragraph 1122(3); Reasoning paragraph 768].

41. The Judge erred in law in holding that all powers and discretions in the SPMC and NTC are subject to the implied term of good faith. He failed to apply the test of necessity under *Marks & Spencer*. Had he done so he would not have held that it was necessary. In particular, the Judge:

(1) Fails to identify the "powers" and "discretions" in each of the SPMC and NTC which are subject to the implied "good faith" term.

(2) Necessarily, therefore, he has failed to address his mind to which of those particular other powers and discretions the implied term applies. That is a blanket

POL00270457

approach and is wrong in principle, not least given that the appropriate implied fetter (if any) on a contractual power or discretion depends on the proper construction of the contractual provision in question.

42. One discretion or power identified by the Judge as being subject to this implied duty of good faith is the right of Post Office to alter terms and conditions (paragraph 998). Such a duty of good faith is not necessary; indeed, the Judge does *not* find that it is necessary if (in the alternative) it is not covered as part of a "relational contract" (paragraph 1000).

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

Common Issues 12 and 13: SPM's as "Agents" Branch Trading Statement [Holding: paragraph 1122(12) and (13); Reasoning paragraph 782 to 853].

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

45. The Judge erred in law at paragraph 798 in holding (as a matter of construction) that the *only* purpose and content in the express appointment of SPMs as "agent" (in both the SPMC and the NTC) was to distinguish them from "employees". There was no warrant or justification for such a limitation, having regard to the factual matrix of the appointment of SPMs. More so given that SPMs had, by reason of that appointment, fiduciary duties in relation to the cash and stock they held on behalf of Post Office and in relation to making accounting entries in the Horizon system. The reasoning here is particularly hard to follow given that employment is itself a sub-species of agency.

46. The Judge should have held that the express contractual appointment of an SPM as agent meant what it said and that the normal common law principles of agency applied and provided the matrix against which the express terms of the contract were to be construed.

POL00270457

47. The Judge erred in law at paragraph 789 in holding that "…it is relevant to consider the conduct of the parties and all the circumstances of the relationship...." to determine "…the full extent of the agency". The SPMs were *expressly* appointed as agents under a commercial contract. It was therefore not relevant to consider post-contractual matters to determine the terms or extent of that agency relationship. That agency relationship was entered into, and its scope was set, at the inception of the contract, and is not to be interpreted by reference to post-contractual conduct.

48. The Judge also erred in law at paragraph 1122(13) in finding that SPMs did not bear *any* burden of proof relating to the Branch Trading Statement, an accounting statement provided by the SPM to Post Office at the end of each month (or 6 weeks) setting out the state of its accounts. It is accompanied by a declaration of truth.

49. The Judge correctly stated the principle applicable to the Branch Trading Statement at paragraph 820, however he should have held that it would not be regarded as an account rendered *in respect of the discrepancies notified to the helpline* as being the subject of a dispute (so, to that limited extent, the account was qualified). Insofar as he suggests otherwise, he has made an error of law.

50. The Judge erred in law paragraph 842 in holding that the Post Office cannot hold the SPMs to the contents of Branch Trading Statements. He should have held that:

    (1) In relation to Branch Trading Statements submitted to Post Office that were *not* subject to a dispute (notified via the agreed contractual route of the helpline[2]) that this was in law an account stated so that if the SPM wished to subsequently dispute its contents the burden was on the SPM to demonstrate the mistake. And that the common law principles set out in paragraphs 835 to 840 applied.

    (2) In relation to Branch Trading Statements submitted to PO that *were subject* to a dispute notified via the contractual route of the helpline, that this was in law an account stated with the same result as in (1), save that, those parts of such Branch Trading Statement that were subject to the notified dispute remained at large between the parties and were not subject to the common law principles of account stated.

[2] See Agreed Appendix 3 to Judgment (bottom right hand box); and Agreed Appendix 4 (bottom box). See also agreed fact 31 in the Factual Matrix document (agreed before trial).

POL00270457

51. The Judge erred in law in the following holdings in this connection:

(1) That the amounts disputed by SPMs via calls to the helpline were not taken out of the branch trading account (paragraph 831). As to this, the true position is set out in the *Agreed* Appendices 3 and 4. The disputed amount was taken out of the Branch Trading Statement because it is recorded as being in dispute. As such, it was no longer part of the account declared to Post Office and it could not be recovered pending resolution of the dispute. The trading statement *must* be set to zero to commence the *subsequent* trading period (or "rollover"). Therefore, by definition, the disputed debit from the earlier trading period cannot be part of it.

(2) That the case put by Post Office was that the "account stated" was represented by the Branch Trading Statement *even in respect of* items that had been notified to Post Office as being in dispute via the helpline (paragraph 834). In fact, the case put by Post Office is correctly set out by the Judge himself in paragraph 829. That is, and always has been Post Office's case. The Judge seems to have been confused by the mechanics relating to accounting treatment of discrepancies in fact under Horizon, whereby:

(a) At the end of the accounting period, the "Accept now" button on the first screen needs to be pressed irrespective of whether the SPM intends ultimately to dispute or agree the entry - "Stage 1."

(b) That gets to a second screen – where the options are "pay now" or "settle centrally". The Judge explains the "settle centrally" function at paragraph 832 - "Stage 2."

(c) Then, even though the discrepancy has been (1) "Accepted" at Stage 1 and (2) "Settled Centrally" at Stage 2, it can nonetheless be disputed by way of a call to the helpline - "Stage 3."

(d) Each of those three stages are part of the agreed accounting procedure. The Judge in error seemed to want to stop at Stage 2 and conclude that SPMs had to "accept" (small "a") discrepancies in the Horizon system and to use this to dilute the application of ordinary accounting principles. The helpline procedure was part of the system provided. It was wrong and an error of law for the Judge to hold otherwise. It was also contrary to a contradictory finding

POL00270457

later in the Judgment in connection with other implied terms (at paragraph 778) that the helpline function was, "…an important component of branch accounting and of the way Horizon itself…". It was not, "…an ancillary and separate system or process…".

(e) It is right that SPMs had no choice but to "Accept" (capital A) such discrepancies on the first computer screen at Stage 1. Both the Judge and certain witnesses when asked about these matters shared this confusion between pressing "Accept" on the first screen (merely bringing the amount into the branch records) and substantively accepting the amount in the sense of agreeing it as part of the account stated.

(f) It was an agreed part of the factual matrix that the only way for SPMs to dispute discrepancies at the end of a trading period when submitting a Branch Trading Statement was *not* via a button on Horizon but via the helpline.

52. Accordingly, the Judge was wrong to state at paragraph 35 that the parties could "…not even agree how Branch Trading Statements were produced". The Judge set out at paragraph 63 matters agreed in fact but whose relevance to the Common Issues was not agreed: paragraphs 32, 36,37 and 44 of the Agreed Matrix document. These included the production of Branch Trading Statements and that the only way to register disputes at the time of submitting a Branch Trading Statement was via the helpline. The Judge erred in finding (paragraph 35) that the "truth" of these matters was in dispute. It was not. It was not open to him to find that this was in dispute and/or that finding is perverse. It provided no justification for exploring post-contractual conduct and events.

53. The Judge erred in law (paragraph 525) in holding that Post Office's submissions "amount to an attempt to give Branch Trading Statements the status of an agreed and settled account" even in relation to items that are disputed. Those submissions were in accordance with the orthodoxy in relation to settled accounts and were correct.

54. The Judge erred in law in making the holdings in Common Issue 12 and 13 (above) in reliance upon large quantities of post-contractual evidence as to how the relationship between PO and the SPM's operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

POL00270457

Common Issue 8 : SPM's liability under the SPMC for "losses" [holding: paragraph 2211(8); reasoning at paragraph 640 to 676.

Section 12 clause 12 of the SPMC

55. The Judge erred in law in construing Section 12 Clause 12 of the SPMC as if it placed an express burden on Post Office to demonstrate that the SPM had been negligent, careless or had made an error before a SPM was liable for "losses": see paragraphs 646 to 647 and 653.

56. The clause provided:

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

57. The Judge erred in law because:

(1) He failed to have any or any proper regard to the fact that the SPM was expressly appointed as Post Office's agent with possession and control of Post Office's cash and stock, to be traded by the SPM and by its assistants (is any).

(2) He failed to have any or any proper regard to the fact that the SPM as agent owed fiduciary duties to the Post Office in relation to such cash and stock and in relation to making entries in the Horizon system.

(3) He failed to distinguish between the conditions for liability for losses, on the one hand, and any contractual burden of proof on the other. He elided one with the other.

(4) He should have held that the contractual wording was neutral as to burden of proof and that questions of burden of proof are part of the law of evidence and would be needed to decided at subsequent trials on breach.

(5) He failed to have any or any proper regard to the fact that the SPM had control of the cash and stock, of the premises and of the operation of the Horizon system at his branch and that the Post Office had none of these advantages. A contractual allocation of the burden to Post Office was commercially unsound and unlikely.

(6) He failed to have any or any proper regard to the difficulties faced by Post Office in meeting any contractual burden of proof given the matters set out above.

POL00270457

(7) He failed to have any or any proper regard to the fact that the Post Office has a network of 11,000 SPMs countrywide which have some £640 million of cash, and is unable to know what is going on in each branch on a day-to-day basis.

(8) He failed to have any or any proper regard to the commercial realities.

58. Alternatively, the Judge should have held that if and to the extent that Section 12 clause 12 *implicitly* allocated the burden of proof it did so by allocating it onto the SPM to demonstrate why it was not liable under the clause:

(1) For the same reasons set out directly above at paragraphs [REF _Ref5711391 \w \h * MERGEFORMAT][REF _Ref5714383 \w \h * MERGEFORMAT], [REF _Ref5714387 \n \h * MERGEFORMAT] and [REF _Ref5714390 \n \h * MERGEFORMAT].

(2) Because this allocation is in-keeping with:

(a) SPM's being liable for *all* losses caused by assistants- whether or not caused by negligence or error. Given that liability, if the SPM is to avoid liability under the clause, he would first need to show that the loss was not caused by one of his assistants. If that burden is on the SPM, then it would make no sense to *then* place the burden on Post Office to show that the loss was due to negligence or error of the SPM.

(b) Section 12 Clause 17 – which permits the SPM to apply for "relief" from "losses" – on the showing *by him* of reasons why he should not be liable or fully liable for such losses.

59. The Judge misunderstands or mis-states Post Office's argument (his understanding of which is at paragraphs 669 to 675) and erred in law in construing Section 12 Clause 12 on the basis that it was capable of making SPM's liable for "losses" or "deficiencies" caused by a bug in the Horizon system because, in fact:

(1) such would not be "a loss"; and/or

(2) any shortfall on the account would not be a "deficiency due to such loss" (within the meaning of the clause).

It would be an *apparent* loss caused by a defect or bug in Horizon. Accordingly, properly construed the clause did not have the effect of making SPMs liable for such losses.

POL00270457

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

61. The Judge erred in law (at paragraph 671) in finding that Post Office's argument was "…both circular, and is an overly intricate attempt to sow confusion and obscure the true issues in the case…". In fact, the Judge failed to understand the argument (or at least mis-states it). The Judge instead wrongly focused on what happened in fact (see the fourth and final sentences of paragraph 670 and paragraph 675, i.e. Post Office chased SPMs for payment under the clause) and upon what would be questions of breach in order to determine a question of construction of the clause. Whether or not Post Office was right to chase a particular SPM in relation to a particular loss under this clause will be a matter for the trial on breach. It has nothing whatever to do with the proper meaning of this clause. This is a simple error of law and demonstrates a flawed approach by the Judge.

62. The Judge erred in law (at paragraph 670) in holding that Post Office argument on this clause, "verges on misrepresenting the Post Office's own case. It wholly ignores that the Post Office effectively denies that there can be losses "caused by Horizon" because it is "robust…" ", because:

    (1) As the Judge correctly records at paragraph 10 it is *not* Post Office's case that the Horizon system is perfect, but that, whilst errors do sometimes occur, it is generally a reliable system.

    (2) This holding (indeed the whole of this paragraph) again confuses the meaning of the clause (and the conditions for imposing liability), on the one hand, and the respective positions of the parties as to whether those conditions have been met in any particular case, on the other (which will depend on evidence and is a question of breach). The latter is not relevant to the former.

    (3) Post Office accepted at trial that if at any future breach trial a SPM disputed that there was a "loss" or "deficiency due to such losses" (because of an alleged bug in Horizon creating an "apparent loss/ deficiency"), that Post Office would have at

POL00270457

least an evidential burden of showing that there was a real "loss" within the meaning of the clause, and of showing that Horizon had not created an "apparent loss/ deficiency".

(4) As a matter of law, such "apparent losses/deficiencies" fall outside the clause and the SPM is *not* liable for them. Accordingly, the clause, properly construed is dealing with losses other than "apparent losses", e.g. losses caused by an assistant mistakenly losing a packet of foreign currency. This was clear from paragraph 94 of Post Office's Generic Defence (see further below).

(5) The final sentence of paragraph 670 and paragraph 674 illustrate this error of law by the Judge and his confusion on this point. It is true that Post Office seeks to use the clause to recover losses even where SPMs *claim* that the losses are caused by errors in Horizon. It does so on the basis that it does *not agree* with the SPM on that evidential point and on the basis that Post Office will satisfy the evidential burden of showing that these were "losses" within the meaning of the clause at a trial on breach. Post Office has never, in any proceedings, argued that SPMs are liable for apparent deficiencies or losses caused by bugs in the Horizon system. On any view, it is wrong to use those features to construe the meaning of the clause..

(6) The Judge had correctly recorded Post Office's case at paragraph 651 of the Judgment. However, he clearly misunderstands it as set out at paragraph 652 and as confirmed by the last sentence of paragraph 653.

63. The Judge erred in law in holding that Post Office's pleading did not reflect the case being argued at trial (paragraph 671 to 673) and Post Office had done a "volte face" for reasons that "..can only be guessed at…" (paragraph 676). The Judge again disregards what was in fact pleaded. The Judge quotes paragraph 94(2) of the Generic Defence (paragraph 673) which defines "losses" for the purposes of Post Office's construction of Section 12 clause 12 "…(as defined at paragraph 41 above)":

(1) That definition (in paragraph 41 of the Defence (which the Judge does not quote and appears not to have considered) *expressly* provides that "discrepancy" and "loss" for the purpose of Section 12 clause 12 do not include what is defined separately in paragraph 41 as a "Horizon generated shortfall".

POL00270457

(2) The pleaded definitions define "discrepancy" in terms of the difference between the actual cash and stock in the branch, and, what the cash and stock should be on Horizon where that second figure is "…derived from transactions input by branch staff into the branch's terminals". That definition defines a "loss" as a negative discrepancy.

(3) Thus, the definition of "discrepancy" always exclude apparent discrepancies caused by bugs in Horizon, as these would not be derived from transactions input by branch staff but would result instead from a bug in the software. There was no "…volte face" (paragraph 676).[3]

(4) Further, even if it were a "volte face", the correct question is whether or not the construction of the clause put forward by Post Office was right or wrong.

Section 12 clause 12- liability for assistants (paragraph 667)

64. The Judge erred in holding that Section 12 clause 12 only imposed liability upon SPMs for the acts of their assistants where Post Office could show that losses were caused by "negligence, carelessness or error" of the assistants. The Judge erred because:

(1) He ignored the express words in the clause: "…and also for losses of *all kinds* caused by his assistants." The words "all kinds" is in obvious distinction to "losses caused through negligence …etc" as it applies to SPMs in the first line of the clause. He failed to give any or full effect to the words "and losses of all kinds".

(2) He failed to given any or any proper consideration to the commercial reality that SPMs decide whether to employ assistants, whom to employ and how much training and supervision to provide to them. There was a clear commercial rationale for the difference in treatment between losses caused by SPMs and those caused by their assistants.

(3) He should also have found that to escape liability under the clause, the SPM would first have to show that the loss was *not* caused by an assistant. If the SPM was able to do that, then the court would need to determine on the evidence (at the

[3] This point was explained to the Judge and the definitions in paragraph 41 of the Generic Defence were brought to his attention in closing: see Day [REF].

POL00270457

breach trial) whether the conditions for liability of the SPM under the clause were met.

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

Common Issue 9 : SPM's liability under clause 4.1 of the NTC for "losses" [Holding: paragraph 2211(9); Reasoning at paragraph 677 to 689].

Clause 4.1 of the NTC Contract

66. The Judge erred in law in finding that "….the NTC imposes a very wide liability which requires *no fault* on the part of the SPM" (paragraph 2211(9)). The wording of the clause is set out at paragraph 678 of the Judgment. Whilst it is a differently worded clause to that contained in the SPMC at Section 12 Clause 12, the Claimants' and Post Office's position was that, in effect, it was very similar in its practical operation. The Judge was wrong in law to reject those contentions because:

    (1) Leaving aside criminal activity (which is expressly excluded under both contracts), it is difficult to imagine how there could be any loss or damage to "stock or cash" within the custody and control of the SPM without fault or "..error" (using the wording of Section 12 clause 12), on behalf of the SPM or his assistant(s).

    (2) Accordingly, in its effect, the practical difference between section 12 clause 12 SPMC and clause 4.1 NTC would not be as dramatic as held by the Judge. The constructions are different, but the practical effects are similar.

    (3) Indeed, it is striking that this meaning (as implicitly requiring fault or error) was the construction the Judge gave to another contractual document (the ARS 43) which provided the SPM was "..personally responsible for all losses or gains….". The Judge held (paragraph 601) that as a matter of construction that this provision only applied to "…losses caused by *fault* on the part of the SPM."

    (4) The Judge should have taken the same approach to clause 4.1 of the NTC.

POL00270457

(5) The Judge should have found that the main difference between the effect of the two clauses is in the arguments on burden of proof, clause 4.1 of the NTC incontrovertibly placing the burden of proof on the SPM to show that any given loss was not due to his error.

67. The Judge erred in law in making the holdings in Common Issue 9 in reliance upon large quantities of post contractual evidence as to how the relationship between Post Office and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

Common Issue 16 – termination on notice of the SPMC and NTC [Holding: paragraph 2211(16); Reasoning at paragraphs 892 to 899].

The SPMC

68. The Judge erred in law in finding that Section 1 Clause 10 of the SPMC: "….may be determined by [Post Office] on not less than 3 months' notice" – was not a legal right, but instead introduced a discretion which had to be exercised by Post Office in "good faith", such exercise said to include a range of factors, including whether the SPM lived at the premises, period of service and many other factors.

69. The Judge was wrong in law because the words "…not less than" in termination provisions are a legal device of longstanding to avoid the problems that had been historically experienced in giving notice which had to end on a precise date. Such wording is used in a large number of commercial contracts, and it would be shocking (to the parties to those contracts) if the "not less than" wording was regarded as creating a discretion to which a *Braganza* type duty could be attached. This is a simple error of law.

70. The Judge should have held that the provision meant what it said: 3 months written notice would always be sufficient, although longer notice could of course be given at will. The Judge's reasoning that the words "not less than" would be deprived of meaning unless they create a discretion as to how much notice to provide is wrong. Those words have a clear and well-known meaning and effect.

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

POL00270457

72. The Judge also failed to have any regard to the fact that termination on 3 months' notice was a *mutual* right under this clause and that the implied duty of good faith was said to be *mutual*. Thus, it would be very peculiar if, despite those two elements of mutuality, the SPM could give 3 months' notice as he liked (and however inconvenient for Post Office) but if Post Office wishes to give an SPM notice of termination, it is inhibited from doing so in its own interests and has to exercise the right as though it were a discretion.

The NTC

73. The Judge erred in law in finding (paragraph 901) that the words "…not less than 6 months" mean anything different to "at least 6 months' notice". The same points as to the origin of the "not less than" formulation and its meaning effect, set out above in relation to the SPMC apply equally here.

74. The same point set out above at paragraphs [REF _Ref5720230 \w \h * MERGEFORMAT] and [REF _Ref5720231 \w \h * MERGEFORMAT] as to such words not introducing a discretion or power applies equally here.

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

76. The same point set out above at paragraph [REF _Ref5720172 \w \h * MERGEFORMAT] as to the Judge's failure to take into account the mutuality of the termination provision applies equally here.

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

Common Issue 15: termination for cause under the SPMC and the NTC [Holding 2211 (15); Reasoning at 896 to 899

The SPMC

POL00270457

78. The Judge correctly finds (paragraph 898) that the proper construction of Section 1 clause 10 of the SPMC limits the ability of Post Office to terminate the contract of a SPM to the commission of a repudiatory breach.

79. The Judge erred in law by implying into this clause a duty upon Post Office to act in good faith when operating this clause (paragraph 899). The test for repudiatory breach is an objective one. There is no warrant for introducing a subjective element which will introduce uncertainty into the contract, and to do so is not necessary, whether or not it is a "relational contract".

80. The Judge erred in law in making the holding in paragraph [REF _Ref5720332 \w \h * MERGEFORMAT] (above) in reliance upon large quantities of post contractual evidence as to how the relationship between Post Office and the SPM's operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

The NTC

81. The Judge correctly finds (paragraph 907) that the proper construction of clause 16.2 of the NTC limits the ability of Post Office to terminate the contract of a SPM in the commission of a repudiatory breach.

82. To the extent (which is unclear) the Judge intended his holding at paragraph 899 to apply to both the SPMC and NTC contracts, he erred in law. The test for repudiatory breach is an objective one. There is no warrant for introducing a subjective element of "good faith" which will introduce uncertainty into the contract, and to do so is not necessary, whether or not it is a "relational contract".

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

Commented [OD1]: Our submissions on this were not absolutely clear – we could argue that the requirement for a "material" breach means less than repudiatory breach may suffice (as this argument is favoured by Lewison).

DCQC: I think given where we are I would favour not taking this point – but I am open to persuasion.

Common Issue 17 and 18 – termination: the "true agreement" argument based on *Autoclenz* (Reasoning – in the alternative- paragraph 925).

POL00270457

84. The Judge erred in law in holding (at paragraph 925) that if the point arose for determination (in the alternative) that he would have held that that the "true agreement" principle applied to the SPMC and NTC and that he would have disregarded the express written terms of those contracts governing termination and substituted a longer period of notice – up to 12 months (or longer for the SPMC). He erred because:

    (1) The principle in *Autoclenz* is a truly exceptional one, and it has no application to commercial, business-to-business contracts. The principle is limited to "sham" contracts (and contracts that, although not shown to be shams in the strict legal sense, do not amount to any genuine record of the parties' agreement). It has been properly limited to employment contracts and, in particular, the true status of employees or workers under such contracts.

    (2) There was no evidence whatever of another practice or "true agreement" to replace the express agreement set out in the express terms of the SPMC and NTC. There was no evidence to justify a finding of a period of notice of 12 months or any other period. Such holding would have been perverse. In fact, the Claimants led evidence that Post Office did in fact terminate contracts in accordance with the express contractual rights.

Common Issue 14 – suspension [holding: paragraph 1122(14); reasoning paragraph 872 to 878, paragraph 881 and 885]

The SPMC

85. The Judge held (paragraph 873-875 and 878) that the right of Post Office to suspend SPMs had to be shown to be necessary and in accordance with the implied term of good faith, and also on the basis that the power to suspend was not a "right" but a discretion (paragraph 878).

86. The Judge erred in law in each of those three respects, because:

    (1) The wording of Section 19 clause 4 of the SPMC is that a SPM may be suspended at any time if:

    "that course is considered desirable in the interests of [Post Office] in consequence of his: (a) being arrested (b) having civil or criminal proceedings

POL00270457

brought or made against him (c) where irregularities or misconduct at the office(s) where he holds appointment(s) have been established to the satisfaction of [Post Office], or are admitted, or are suspected and being investigated."

(2) Post Office conceded at trial (paragraph 313 of its Opening) that the reason for suspension would need to be "reasonably and properly related to one or more grounds for suspension."

(3) There is no requirement or warrant to interpret this clause as meaning that suspension must be necessary and nor are there grounds to imply such a requirement. To do so contradicts the plain words of the clause.

(4) There is no justification for implying a term of good faith into this right of suspension (paragraph 885). No such implication is necessary.

(5) There are no grounds for treating the contractual *right* to suspend as if it were a discretion and/or introducing public law concepts to govern its exercise.

87. The Judge should have held that in exercising this right Post Office (as it conceded) would need to ensure that the decision to suspend was "reasonably and properly related to one or more grounds for suspension."

88. The Judge also erred in law in holding (paragraph 881) that the power to suspend was also subject to the further caveat that Post Office was not entitled to use the power to suspend in any case where it was itself, "…in material breach in respect of the matters which the Defendant considers give it the right to suspend". The Judge found that this caveat arose "…as a matter of *construction* of the clause in its commercial context….". This is not a proper construction of the contract. There are no words in the SPMC which the Judge construes to reach this result. It is re-writing the contract to accord with the Judge's view as to fairness.

89. Commercially, this caveat is unwarranted. The right of suspension is just that – it has suspensory effect – seeking to freeze the positions of the parties (and securing the cash and stock) whilst any deficiencies or conduct issues can be investigated. That might well be to the SPM's advantage if one of his assistants is, unbeknown to him, stealing from him. The fact that the SPM and Post office are also in dispute about deficits and discrepancies (in a manner which might arguably put Post Office in material breach of its obligations), is no reason to prevent Post Office exercising the

POL00270457

right of suspension. It is again re-writing the contract to accord with the Judge's view as to what would be fair.

The NTC

90. The Judge held that, despite the different wording of Part 2 Paragraph 15.1 of the NTC dealing with suspension, the result was the same (paragraph 872).

91. The Judge further held (in common with the corresponding provision in the SPMC) that the right to suspend had to be exercised in accordance with the implied term of good faith (paragraph 885), and also on the basis that the power to suspend was not a "right" but a discretion (paragraph 878). The Judge erred in each of those two respects, because:

    (1) The express term limits Post Office exercise of this right to those, "..where [Post Office] considers this to be necessary in the interests of [Post Office] as a result of……" one or more of the grounds set out in the clause.

    (2) There is no justification for implying a term of good faith into this right of suspension (paragraph 885). It is not necessary to do so.

    (3) There are no grounds for treating the contractual *right* to suspend as if it were a discretion and/or introducing public law concepts to govern its exercise.

92. The Judge should have held that in exercising this right Post Office (as it conceded) would need to ensure that the decision to suspend "…reasonably and properly related to one or more grounds for suspension."

93. The Judge also erred in law in holding (paragraph 881) that the power to suspend was subject to the further caveat that Post Office was not entitled to use the power to suspend in any case where it was itself, "…in material breach in respect of the matters which the Defendant considers give it the right to suspend". The Judge found that this caveat arose, "…as a matter of *construction* of the clause in its commercial context….". This is not a proper construction of the contract. There are no words in the NTC which the Judge construes to reach this result. It is re-writing the contract to accord with the Judge's view as to what would be fair.

94. The point as to commerciality in paragraph [REF _Ref5721055 \w \h * MERGEFORMAT] above applies here also.

POL00270457

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

Common Issues 5 and 6 – onerous and unusual terms [holding: paragraph 1122(5) and (6); reasoning paragraph 1007 to 1047]

Part 2 paragraph 4.1 of the NTC (liability for losses)

96. The Judge erred in law in finding (paragraph 1007) that Part 2 paragraph 4.1 of the NTC was onerous and unusual. Even on the Judge's "strict liability" interpretation of that clause, it is not onerous and unusual.

97. On the proper construction of that clause (see: paragraph [REF _Ref5704534 \w \h * MERGEFORMAT] above), it is not onerous and unusual –because liability under it can only be anticipated where there is some error on the part of the SPM or an assistant, which makes it very similar in practical effect to Section 12 Clause 12 of the SPMC (a clause that the Judge did not hold to be onerous and unusual). The concept used in the clause may approach strict liability, but that concept is not onerous or unusual when applied to the anticipated factual circumstances of its operation (i.e. given that a loss cannot arise without some type of error, strict liability is not materially different from fault-based liability).

Part 2 paragraph 13.1 of the NTC (reimbursement of PO for losses)

98. The Judge erred in law in finding (paragraph 1007(2)) that Part 2 paragraph 13.1 of the NTC was onerous and unusual. It is a standard provision to provide that SPMs are liable for: "…all losses, claims, demands ……incurred by [Post Office] as a result of ….any negligence or breach of the Agreement by [SPM] or its Personnel……". The Judge's reasoning at paragraph 1011 would, if correct, result in many standard commercial terms being considered onerous and unusual because they provide for a "potentially very wide liability" (not least where the contractual liability is broadly consistent with what the common law would impose).

POL00270457

Provisions permitting PO to withhold payments to a suspended SPM (paragraph 1023).

(1) Section 19, Clauses 5 and 6 of the SPMC

(2) Part 2 Paragraph 15.2 and paragraph 15.3

99. The Judge erred in law in holding that each of these provisions was onerous and unusual. In particular:

(1) The Judge failed to recognise (paragraph 1024) that Post Office had effectively conceded (in the pleadings and at paragraph 430 of its written closing) that the power to withhold remuneration from SPMs following a suspension, "…should not be exercised dishonestly or in an arbitrary, capricious or irrational manner". That was the version of the term that the Judge should have focused his attention upon when deciding if it was onerous and unusual.

(2) Had the Judge realised that the right to withhold remuneration following a suspension was *not* unbridled he would not have reached this conclusion. He would have found that *such* clause was not "onerous and unusual".

Provisions permitting PO to terminate SPMs on 3 months written notice

100. The Judge erred in law (paragraph 1039) in finding that if the 3 months' written notice termination provision took effect in accordance with its terms (i.e. absent the "good faith" implied term) that it would then be onerous and unusual. In fact, a termination on notice provision is almost always contained within any commercial contract of this nature and, as is customary, the right was mutual. There is nothing onerous or unusual about a mutual right to terminate on notice, especially where the contractual relationship requires close cooperation and one or other of the parties may have good reasons to terminate in the absence of breach (e.g. a desire on the part of an SPM to cease trading or a desire on the part of Post Office to rationalise its network of branches).

Provisions entitling PO to recover losses from SPM in NTC: Part 2 paragraph 4.1 and 13.1

101. The Judge erred in law (paragraph 1060 and 1061) in finding that the provisions in the NTC entitling Post Office to recover losses from the SPM were

POL00270457

onerous and unusual, in the alternative event that the signature of the SPM on the NTC did *not* constitute sufficient notice (the Judge rightly held that signature was sufficient). In fact, they are ordinary terms to be expected to be included in a commercial agreement of this type between an agent and his principal.

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

Common Issues 7, 19 and 20 – application of Unfair Contract Terms Act ("UCTA") [holding: paragraph 1122(7)(19) and (20); reasoning paragraph 1063 to 1110.]

Not Post Office's standard terms of business

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

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

(2) He was wrong to (impliedly) conclude that the "business" of Post Office was engaging SPMs.

(3) He was wrong to distinguish *Commerzbank AG v Keen* [2006] EWCA Civ 1536.

(4) He should have held that the business of Post Office, for the purposes of UCTA, was the selling of postal, financial, insurance and foreign currency and associated products (akin to a bank) to members of the public nationwide.

(5) Post Office can determine how to structure and manage that "business". Post Office chose to do so by appointing agents under the terms of SPMC and the NTC. Doing so does not make such appointments the Post Office's "business" for the purposes of UCTA. It merely indicates the manner in which it chose to structure and operate that business.

(6) Thus, the Judge ought to have held that neither the SPMC nor the NTC were subject to the terms of UCTA.

POL00270457

Relevant terms did not entitle Post Office to render "substantially different" performance to that reasonably expected of it

104. The Judge erred in law in holding that the provisions of the SPMC and NTC set out at paragraph 1084 entitle Post Office to render a contractual performance "substantially different" from that which was reasonably expected of it, or in respect of the whole or part of any part of its contractual obligation to render no performance at all.

105. In particular the Judge misapplied s.3(2)(b) of UCTA:

(1) The clauses dealing with the SPM's liability for losses (SPMC Section 12 clause 12, and NTC Part 2 paragraphs 4.1 and 13.1) set out the conditions under which SPMs are liable for losses in the PO branch that they run. They are to do with the *SPM's* performance, not Post Office's performance. Still less are they about Post Office rendering contractual performance "substantially different" to that reasonably expected. The Judge reasons that Post Office would be "entitled to claim payment" under these clauses, but that in itself shows his approach to be wrong: Post Office is claiming payment (performance) from the SPM, rather than itself performing any obligation.

(2) The clauses dealing with termination of the SPM's contract on written notice (SPMC Section 1 clause 10 (3 months); NTC Part 2 paragraph 16.1 (6 months)) set out the rights of *both* parties to terminate the contract on notice. They are not to do with Post Office's performance under the contracts; they are to do with the duration of the contractual obligations owed in each direction. Still less are they about the Post Office rendering contractual performance "substantially" different to that reasonably expected (not least given that there can be no reasonable expectation that a contract terminable on notice will not be so terminated).

(3) The clauses dealing with suspension of SPMs (SPMC Section 19 clauses 5 and 6; NTC Part 2 paragraphs 15.2 and 15.3) set out the rights of Post Office to suspend SPMs in certain defined circumstances. They are nothing to do with Post Office rendering contractual performance "substantially different" to that reasonably expected.

(4) The clauses dealing with alterations to contract terms (SPMC Section 1 clause 18; NTC Part 2 paragraph 1.1 and Part 5 paragraph 1.3) set out the right of Post Office

POL00270457

to dictate the content of the contract and operational instructions and has nothing to do with Post Office performing the contract.

[DCQC Query: I have not included under this heading PO ability exclude compensation for loss of office: as that seems to me to be more arguable as being covered by s.3(2)(b) of the Act – and including it might weaken the clarity of the point here ? INSTRUCTIONS NEEDED].

Application of test of reasonableness under s.11(1) UCTA

(a) Responsibility for losses

106. The Judge erred in holding (paragraph 1102) that:

(1) Part 2 Paragraph 4.1 of the NTC contract (which made SPMs responsible to Post Office for losses at their branches) and:

(2) Part 2 Paragraph 13.1 of the NTC contract (which requires SPMs to reimburse Post Office for losses at their branches)

failed the test of "reasonableness" in s.11(1) of UCTA.

107. The Judge erred in law in relation to both such clauses because:

(1) They are ordinary terms to be expected in an agency agreement, making the agent (who also owes fiduciary duties in relation to its holding of cash and stock) responsible for losses and for reimbursement to its principal for such losses.

(2) Even if the Judge were correct that Part 2 Paragraph 4.1 of the NTC should be construed as imposing strict liability on SPMs, in the context of this relationship, where the SPM has complete custody and control of the branch and of the cash and stock, any losses which the SPM did suffer must necessarily result from his "fault" or "error", other possible causes such as third-party criminal acts (e.g. theft from the branch) being expressly excluded. An agency branch cannot make losses by properly executed transactions.

(3) And as regards losses caused by bugs in Horizon, the parties contended that such losses would *not* be covered by the clause. Reasonableness must be judged in light of that fact.

POL00270457

[DCQC: I assume that we do not want to appeal the holding at 1107 that new terms introduced by PO under its unilateral power to alter contractual terms are subject to the test of reasonableness ? This still leaves open the point that we do take in relation to this that neither the SPMC nor the NTC are subject to UCTA. INSTRUCTIONS NEEDED.]

(b) Suspension

108. The Judge erred in law in holding (paragraph 1107(5)) that the provisions of the SPMC (Section 19 clauses 5 and 6) and the NTC (Part 2 paragraphs 15.2 and 15.3) dealing with suspension fail the test of reasonableness in s.11(1) UCTA.

109. The Judge erred because he failed to apply the test to the correctly worded clause. The Judge failed to recognise that Post Office had conceded (at paragraph 430 of its written Closing) that the power to withhold remuneration from SPMs following a suspension, "…should not be exercised dishonestly or in an arbitrary, capricious or irrational manner".

110. That was the version of the term that the Judge should have focused his attention upon when deciding if it satisfied the test of "reasonableness". He failed to do so.

111. Had the Judge realised that the right to withhold remuneration following a suspension was *not* unbridled, he would not, or should not, have reached this conclusion. He would, or should, have found that such clause did not fail to meet the test of reasonableness within the meaning of s.11(1) UCTA.

(c) Termination

112. The Judge erred in law in holding at paragraph 1107(6) (in the alternative) that the rights of termination on notice under the SPMC (Section 1 clause 10) and under the NTC (Part 2 paragraph 17.11) failed to meet the test of reasonableness under s.11(1) UCTA because:

(1) As to the NTC provision – there is nothing unreasonable in a *mutual* right of 6 months' written notice to terminate which can only be given after the effluxion of the first year of the agreement. Indeed, the Judge held (paragraph 1040) that such

POL00270457

a clause was *not* onerous and usual for that reason. The Judge was wrong to find (and provides no reasoning) to justify his holding that a right that was (a) mutual and (b) not onerous and unusual was nonetheless not reasonable within the meaning of s.11(1) UCTA.

(2) As to the SPMC provision – the same considerations apply in that the right was a *mutual* one (albeit that the term was for 3 months' notice that could be given by either party at any time).

(d) Exclusion of damages for loss of office

113. The Judge erred in law in holding (paragraph 1107(7)) that the exclusion of the right to damages for "loss of office" in the SPMC (Section 1 Clause 8) and in the NTC (Part 2 paragraph 17.11) failed to meet the test of reasonableness under s.11(1) UCTA because clauses limiting or excluding losses for breach of contract are common place in commercial contracts and there was nothing unreasonable about the exclusion in this case.

114. The Judge erred in law in answering Common Issue 20 (which asked whether claims for damages were limited to the period of notice under the contracts) by holding (paragraph 1110) that claims for damages were not limited by such notice provisions. This is contrary to a basic proposition of law that for the purposes of the calculation of damages the contract breaker is assumed to have exercised his rights in a way to minimise his liability for such losses. Accordingly, the Judge ought to have held:

(1) On the Judge's construction of the 3 month notice provision (SPMC) and the 6 month notice provision (NTC) such clauses are valid and enforceable, albeit subject to the "good faith" caveat. He ought therefore (on that basis) to have held that the claims to damages were limited to such notice periods as provided for under the SPMC and NTC. There could be no objection, on that basis, to damages being expressly limited by the contract in the same way as the common law would limit them (i.e. to the notice period under the contract).

(2) On the Post Office construction of those clauses (that they mean what they say) the Judge held that he would strike them down as being onerous and unusual and/or unreasonable under UCTA. Even in this eventuality, a reasonable period

POL00270457

of notice would be implied and *that* reasonable period would provide a cap on the damages claims under the common law, and the Judge should have so held.

(3) The Judge should have held that (assuming that it was not excluded) any claim for damages was limited to the express periods of notice, i.e. 3 months (SPMC) and 6 months (NTC).

115. The Judge erred in law in making the holdings on Common Issues 7,19 and 20 (above) in reliance upon post-contractual evidence as to how the relationship between Post Office and the SPMs operated in fact, using a large degree of hindsight. He also relied upon evidence which had been introduced into the trial unfairly.

SPMC – Holdings on effect of contractual documents sent to SPM's – "notice"

116. The following holdings of the Judge as to the legal effect of documents sent to those SPMs operating on the SPMC were wrong in law.

Mr. Bates - paragraph 94 and 103

117. The Judge erred in law in finding that someone in the position of Mr. Bates did not have sufficient notice that his appointment as a SPM by Post Office was subject to the terms of the standard "Subpostmaster Contract." In particular:

(1) Paragraph 6 of Mr. Bates "Conditions of Appointment" contained the following words:

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

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

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

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

POL00270457

118. The Judge erred in law and/or in fact in holding at paragraph 91 that, " a reasonable diligent person in receipt of the documents that Mr. Bates says he received with the Letter of Appointment could quite easily have mistaken the reference to the "Standard Subpostmaster Contract" as being with the 2 page document entitled "CRAIG Y DON – CONDITIONS OF APPOINTMENT", or the 4 page document entitled "CONDITIONS OF APPOINTMENT FOR CRAIG Y DON SUB POST OFFICE". The Judge erred because:

    (1) The reference at paragraph 6 of Mr. Bates "Conditions of Appointment" (4 page document) containing the words: "by the terms of the standard Subpostmasters Contract for services at scale payment offices, a copy of which is enclosed" was obviously talking about a document *other than* the "Conditions of Appointment" themselves, as it purported to "enclose" the relevant document.

    (2) The two page and four page "Conditions of Appointment" documents referred to by the Judge are in the relevant respects identical, save for an extra single paragraph (paragraph 13) at the end of the 2 page document. Accordingly, the reasonably diligent person would *not* think that the "Subpostmasters Contract" – "a copy of which *is enclosed*" -was merely another (almost identical) version of the "Conditions of Appointment".

    (3) Such a "reasonably diligent" person would realise that the two page and four page documents were practically the same document, as Mr. Bates in fact accepted that *he* did (a piece of evidence ignored by the Judge).[4]

    (4) The Judge should have held that:

        (1) someone in the position of Mr. Bates was given sufficient notice of the terms of the Subpostmasters Contract by receipt and signature of the "4 page" Conditions of Appointment.

        (2) The holding in (1) applied whether or not such a person had also been sent the "2 page" (almost identical) "Conditions of Appointment" in error.

119. The Judge erred in law by failing to find that (in any event) Mr. Bates' conduct after appointment, including expressly referring to, operating under and relying upon the

[4] Day .....page.....

POL00270457

detailed terms of the SPMC over the following 4 years, resulted in him being bound by its terms.

Part E: Error in fact

120. The findings of fact set out in Part E were not open to the Judge on the evidence and/or are perverse. Those findings set out below and marked with an ** indicate when same finding is *also* attacked on the unfairness ground in Schedule 1.

(a) Receipt by Mr. Bates of a copy of the SPMC

121. The finding (paragraph 91) that Mr. Bates did not receive a copy of the SPMC on 31st March 1998 at the time he was appointed a SPM, was not open the Judge on the evidence and/or is perverse because:

(1) The events occurred 21 years ago. The witness cannot sensibly have any memory of whether he actually received the document on that day. Any assessment on the balance of probabilities should be based on other evidence/documents and the inherent probabilities. It is the Judge's interpretation of the wording/effect of those documents which grounded his finding, and the Court of Appeal is in as good a position as the Judge to interpret those documents.

(2) Post Office's position was that it had a good system for sending out documents at this time and the SPMC would have been included with the letter of appointment. And the Court heard direct evidence from Mr. Williams to the effect that the small team working for him at that time – who performed this task - were reliable.

(3) The position of Mr. Bates is that he got a copy of the SPMC *in response to* a query he raised about by letter of 4 August 1998 about holiday allowances. The crucial point about that written query is that it was written 5 months after he was appointed as SPM and betrayed a detailed knowledge of the actual provisions of the SPMC and in particular clause 4.1 dealing with "holiday substitution allowance."

(4) The *only* rational explanation is that the writer of that letter (set out below) had received a copy of the SPMC by the time he wrote it, for two reasons: (1) he

POL00270457

actually says in the letter that he had "…consulted" his contract (2) the description set out below is only consistent with having seen the contract:

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

(5) The Judge held (paragraph 91) that Mr. Bates *could* have written that letter based on an earlier document (entitled "SERV 135") that he had been sent in May 1998 – on "handover day". But that explanation was not open to the Judge, as the SERV 135 only contained the heading and very brief summary of the provision and could not rationally have justified the words underlined extracted from that letter (above); nor does the Judge explain any basis upon which it could have done so. It also ignores the fact that Mr. Bates did not consider the SERV 135 to be his contract (and could not sensibly have done so given its content). The letter makes no sense on any basis other than that contended for by Post Office.

(6) The Judges, alternative holding, "…even if he did, this post-dated contract formation" entirely misses the point. Mr. Bates did not suggest that he got the contract sometime between being appointed on 31st March 1998 and August 1998 when he wrote the letter. If Mr. Bates had the contract on 2nd August 1998 (which he clearly did), the likelihood was that he got it with the letter of appointment on 31st March 1998 as set out in the "Conditions of Appointment" which he dated and signed.

(7) That conclusion was also supported by three other considerations, all of which were ignored by the Judge:

(a) The specific evidence of a reliable system of sending out copies of the SPMC from this particular area at the material time, which evidence was not undermined in cross-examination. The unsurprising evidence was that whether or not an envelope contained an SPMC would be readily ascertainable to the operative sending it out. The difference between an envelope containing a few pages and an envelope containing those few pages plus the many pages of the SPMC would be obvious to even the most careless employee.

POL00270457

(b) The fact that the contractual documents alerted the recipient (in this case Mr. Bates) to the fact that the letter intended to include a copy of a standard contract – with the result that, if it were missing, someone like Mr. Bates (who the Judge accepted was a "details man") can be expected to have chased it up if he was *not* sent a contract, both in terms of the contents of the letter and more generally. Mr. Bates never suggested he did so, supporting the inference that he did not do so *because* he had no need to because he *was* sent the document at that time.

(c) The fact that, in subsequent and sometimes ill-tempered correspondence with Post Office, Mr. Bates never once complained that he had not been provided with his contract at the outset. In light of the content and tone of that correspondence, the inescapable inference is that Mr. Bates would have raised this complaint if it had been a good one.

(8) For all those reasons, the conclusion reached by the Judge about Mr. Bates' receipt of the SPMC on his appointment was on the facts not open to him and/or is perverse.

(b) Findings adverse to Post Office and its behaviour (and those of its witnesses) which were unjustified and unwarranted

122. The following findings by the Judge were not open to the Judge on the evidence and/or are perverse. They are relied upon by the Judge to justify his reasoning/conclusions and/or are relied upon by the Claimants to seek indemnity costs, and so are directly in issue for those reasons.

(i) That the case of Post Office was subject to a "volte face"

First alleged volte face

123. The Judge erred in fact in finding at paragraph 834 that Post Office: (1) had performed a "volte face" in relation to the operation of the accounting system and (2) had behaved in a way that is, "…. directly contrary to the case that was originally put to the Lead Claimants in cross-examination". He erred because neither conclusion was available to him on the evidence and/ or they are perverse. The Judge made a

POL00270457

number of allied findings on this subject at paragraphs 227-230, 251, 271-272, and 298-301, which are challenged on the same basis.

124. The case for Post Office was that the manner in which discrepancies and transactions corrections were dealt with was: (a) that they first had to be "Accepted" at Stage 1 of the process (2) they could then at Stage 2 be paid or "settled centrally" (which did not involve paying them immediately). They could then be disputed (even if paid) by registering a dispute via the helpline in which case any recovery of them was put on hold (and they did not need to be paid). Each of these three processes needed to be viewed as part of a single system of dealing with disputed items. Stages 1 and 2 happened on the Horizon computer itself, and Stage 3 was via the helpline. This was agreed as a fact by the Claimants and Post Office in the factual matrix document at paragraph 32,36,37, and 44 in advance of trial. The only dispute was the *relevance* of such facts.

125. The Judge in the references above sought to draw some distinction between Stages 1 and 2 which were carried out on the computer and Stage 3 which was done on the helpline. This was clearly wrong.

126. It also contrasted markedly with his finding at paragraph 778 (when dealing with implied terms) which described the helpline as: "not an ancillary and separate system or process; it was an important component of branch accounting and of the way Horizon itself….".

127. The Judge also sought to suggest (paragraph 301) that "settle centrally" "...was used by the Post Office for the majority of the Common Issues trial at least as though it was synonymous with disputing a transaction correction in some way….". That finding was not available to the Judge on the evidence and/or is perverse. Indeed, that perversity is demonstrated by the cross-examination he quotes in paragraph 299 which clearly accepts that "settle centrally" does *not* involve disputing the transaction.

128. The Judge never understood this point properly or at all, as evidenced by the findings in the paragraphs listed above. The Claimants also agreed the process outlined above; the parties had no problem agreeing the operation of the system in Appendices 3 and 4. The only issue between the parties was whether Post Office followed this agreed process as regards disputed debts in relation to Mrs. Stubbs and perhaps Mr. Abdulla, but even that is a question of breach and so was not before the Court.

POL00270457

129. The Judge has sought to justify the admissibility and commenting upon large amounts of disputed evidence by reference to this apparent "volte face" or confusion. In fact, if there was a confusion, it was that of the Judge alone, and in the event was capable of simple agreement (see paragraphs 271 and 272).

(1) The accounting procedure was never an issue before the Court. There had been no disclosure on the issue and Post Office did not lead evidence on it. The Post Office case was limited to existence of accounting duties and the ability to dispute debts via the helpline (which was common ground). The Judge misunderstood the cross-examination of Mr. Abdulla. The point put to him in cross-examination was that despite having to "Accept" the discrepancies at the first stage and either pay or "settle centrally" at the second stage, the SPM always had the contractual option of disputing such matters by phoning the helpline – which had the effect of putting the payment obligation in relation to such sums on "hold". That is and always was common ground.

(2) The Judge has misconstrued the cross-examination of Mr. Abdulla in the extract at paragraph 227. In particular, the Judge failed to understand that the line of questioning was directed to the fact that whatever the process at the first stage of dealing with discrepancies (in particular pressing a screen with the word "Accept" on it to move through to the next screen), the SPM was still able to dispute the discrepancy by telephoning the helpline. The position taken by Mr. Abdulla (which was wrong) was his suggestion (end of paragraph 227) "…even if it is in dispute, you cannot roll over until you have sorted it out before branch transfer period". There was, on the agreed facts, no need to sort out the dispute prior to rollover. The Judge simply failed to understand this – see the end of paragraph 230.

Second alleged "volte face"

130. The Judge erred in fact in finding at paragraph 676 that Post Office had radically changed its case and performed a "volte face" on its construction of Section 12 clause 12. Such finding was not open to the Judge on the facts and/or was perverse. In particular:

POL00270457

(1) This finding is contrary to the finding of the Judge at paragraph 651 that "Upon consideration, however [Post Office's case] had not changed at all".

(2) This finding demonstrates that the Judge failed to understand the Post Office case and failed to understand why, therefore, he was right to think that the case had not changed from the pleading (see: paragraph [REF _Ref5723984 \w \h * MERGEFORMAT] above), the written opening or the oral opening. In particular, the Judge failed to understand the difference between the legal conditions necessary for liability (on the one hand) and the evidence necessary to establish liability (and from where and which party that evidence would come) on the other.

(3) Post Office's case was consistent and was as follows:

(a) The Horizon system was reliable and robust but was *not* infallible (as is obvious from, amongst other things, the simple fact that Post Office admitted bugs that had caused shortfalls). The Judge at times acknowledges this in the Judgment but then seems to forget it: see paragraph 652, contending that Post Office's case was that "…such a shortfall cannot and does not exist, hence there is no such thing". (This is to be contrasted with the finding at paragraph 10 that: "Post Office's position in this litigation is not quite that it is impossible for Horizon to ever generate any errors……").

(b) That "apparent losses/ deficiencies" caused by a bug or error in Horizon are not (and are clearly not) "losses caused through his own negligence carelessness or error…." within the meaning of Section 12 clause 12. This is the liability question.

(c) That, when considering whether a given deficiency is caused by an error by a SPM or is in fact an "apparent deficiency" caused by a bug or error in Horizon, Post Office's case was that they would rely on Horizon as being generally reliable and therefore unlikely to be the cause of a given deficiency. This is the evidential question. This has nothing to do with the meaning of the clause. It is a question about evidence and the role of Horizon in that evidential debate.

(4) The Judge's repeated error (see paragraphs 653 and 670) and his invective (paragraph 670) was borne out of his failure to understand the argument, and in particular to differentiate stage (b) (above) conditions for liability and (c) evidence

POL00270457

available to prove liability. It also arises from seeking to construe the contract by reference to post-contractual conduct and events.

(ii) Relevance of evidence/ findings sought**

131. The Judge erred in fact in finding (paragraph 21) that Post Office wanted "…findings on that only if they were in the Post Office's favour. This is a peculiarly one-way approach by any litigant". This finding was not available on the evidence and/or was perverse, because:

(1) Post Office made abundantly clear from at least the time it filed Defences to individual claims that post-contractual evidence and the full accounts of the SPMs' experience of operating branches were not relevant to the Common Issues trial dealing with issues of construction of the SPMC and NTC and related issues. There was nothing one-sided about that simple (and correct) proposition of law.

(2) That position was re-asserted at the application to strike out large parts of the witness evidence served by the Claimants and dealing with post-contractual matters.

(3) That position was maintained in Post Office's written opening, oral opening, written closing and oral closing. Post Office made clear to the Judge in its final oral submissions [Day 14 page 36 to page 39] that he should not make findings *against* the SPMs based upon allegations put to them about false accounting, on the basis that this was post-contractual and would be the proper subject matter of later trials. It is perverse for the Judge to accept Post Office's warning against making findings against the Lead Claimants about these matters (and he is careful to make no such findings) while criticising Post Office for adopting a one-sided approach.

(4) During oral closing, the Judge ordered Post Office to provide a summary of its position on the findings that he was entitled to make. Post Office provided such a summary – no fair reading of that document is consistent with a conclusion that Post Office only wanted findings in its favour. Post Office's position was principled and correct.

POL00270457

132. The Judge can therefore have been in no doubt that the position of Post Office was that evidence deployed in witness statements and/or obtained in cross-examination on irrelevant matters that were not before the court should not be taken into account by the court for any purpose (irrespective of which party would benefit from the finding). The only point in the Common Issues trial to which credit was relevant was whether or not the four SPMs on the SPMC contract were giving honest and reliable evidence as to whether or not they had been provided with a copy of that contract on appointment (and other contractual or pre-contractual documents). Post Office made the point that, in fairness to the SPMs who gave evidence, answers about irrelevant matters such as how shortfalls arose in their branch (which in two cases were suggestive of dishonesty on the part of the SPMs) should *not* go to or against their credit. This was because these matters were not properly before the Court on the Common Issues trial, and there had been no disclosure or evidence from Post Office on these matters. Post Office made clear that it was testing this irrelevant material to ensure that the Court was not left with a false impression by reference to it, and in circumstances where the Claimants resolutely refused to articulate a proper or any basis as to its relevance. Post Office was concerned that the Judge appeared to be interested in the inadmissible and irrelevant evidence, and the Judgment shows that Post Office was right to have that concern. It cannot properly be criticised for its approach.

(iii) Evidence of Mr. Beal

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

(1) Mr. Beal is not a lawyer and (when asked by Claimants' counsel) his view as to the difference between the liability clauses in the new NTC contract and the old SMPC was wholly irrelevant.

(2) Mr. Beal's answer was in the manner of a *concession* to the Claimants, given that it was *their pleaded case* that the two clauses should be read as if they meant

POL00270457

exactly the same thing. The Judge must, therefore, logically have considered that Mr. Beal was deliberately "misleading" the Court in order to support the Claimants' case. That is not a plausible hypothesis.

(3) It is at least arguable, as set out above, that a "fault" or "error" caveat to clause 4.1 of the NTC would not make any substantial difference to its effects in practice. It is certainly a rational view for a lay person to hold that the NTC and the SPMC liability provisions are very similar in their effects. A lay person is far more likely to hold a view as to a term's practical effects than he is to hold a view as to its proper construction (and any views on the latter point are wholly irrelevant). To find, in effect, that Mr. Beal cannot honestly have believed the two clauses to both give effect to the core principle that SPMs are liable for losses was not available on the evidence and/or was perverse.

(iv) Evidence of Mrs. Van Den Bogerd**

134. The Judge erred in fact finding at paragraph 416 that Mrs. Van Den Bogerd's view (that, "although a number of cases do have some features in common, Post Office's assessment is that each case is demonstrably different and influenced by its own particular facts….") was an entrenched refusal to "consider to be the common themes connecting all these claims…..". This finding was open to the Judge on the evidence and/or is perverse because:

(1) The Judge had only seen the facts of the 6 Lead Claims. There are in fact some 550 claims the facts of which he is largely unaware. The witness having been involved with the Second Sight investigation and reports and more, generally, involved with SPM claims for many years had a much broader understanding of the whole population of claims than the Court.

(2) The complaints of the Lead Claims and of the balance of the other 550 in fact vary a great deal. Practically the only thing they have in common is that they involve disputed losses and an allegation that Horizon was in some way involved in those losses. But those losses arise in a multifarious array of products and situations.

(3) The Judge compounded this error when returning to this theme (at paragraph 546), ignoring the fact that the witness had accepted that "...a number of cases do have some features in common…".

POL00270457

135. The Judge erred in fact in finding (paragraph 418) that the witness was trying to "…mislead" him when asked about detailed points of loss involved in the case of Mr. Abdulla. Such finding was not open to the Judge on the evidence and/or is perverse, because:

(1) The witness did not come to court to deal with the accounting details and losses of any particular Claimant. Her evidence was generic in nature as is appropriate in a case involving issues of construction and law.

(2) The question she was asked about Mr. Abdulla was wholly irrelevant to the trial and should not have been asked.

(3) The witness was shown a detailed excel spreadsheet dealing with Mr. Abdulla's losses in the course of her cross-examination [Day 8 page 45 line 15]. She was then asked detailed questions about various entries on that spreadsheet and what they meant – all of which was wholly irrelevant – but in which the Judge made clear he was interested. She said in relation to one detailed question about whether entries were made in error:

"….I am not sure it does, actually because when it says the other two you referred me to on row 61 says it will be dispatched within 7 days and the other one says the same, so I am not sure they were actually dispatched, so…I have just seen this cold, so I don't know what is behind it so I can't really comment further than that. I would need to understand what was actually dispatched….."

(4) It is therefore clear that what the witness had come to "cold" was the detailed spreadsheet. She said as much later in her oral evidence when it was put to her that she had not come to Mr. Abdulla's case cold because she had given a witness statement for the Horizon Trial in which she addressed his shortfalls: "No, I did know what was in the witness statement – you asked me to look at the screen and tell you then, so that is why I was reading, because I would need to follow through to see whether they were dispatched, is what I said" [Day 8 page 60 lines 16-20]. The Judge ignores this explanation and states that her explanation had been that her evidence "that she was coming **to the matter** cold was a 'a mistake'" (paragraph 418, emphasis added). In fact, the "mistake" to which Ms Van Den Bogerd referred was the suggestion that she had come to the specific *spreadsheet* cold (as it was one she had referred to in her Horizon Issues witness statement):

POL00270457

(Day 8 page 109 line 19) to (Day 8 page 110 line 3). The Judge's approach to the evidence here was perverse.

(5) The witness cannot reasonably be expected in a trial on points of construction to have to deal with (irrelevant) detailed points of accounting and to deal the content of Excel spreadsheets on the hoof. It was not open to the Judge to charge the witness with seeking to mislead him by saying that she was coming to the spreadsheet cold, and he was wrong to do so.

136. The Judge erred in fact in finding (paragraph 425) in regard to her witness statement that she was "an extremely poor judge of relevance….". The Judge said this in relation to the evidence in her witness statement dealing with the difficulties with Horizon over the years (paragraph 420). The finding was not open to the Judge on the evidence and/or was perverse because:

(1) The matters relating to the performance of Horizon were outside the matters to be determined at the Common Issues Trial, and so the Judge should not have been surprised that her witness statement did not deal with them. The witness herself made clear in her statement that she was not addressing the allegations about defects in Horizon: "I do not take into account in what I say here the Claimant's allegations regarding defects in Horizon because I understand that these are not within the scope of the Common Issues Trial" (fn 22).

(2) The Judge failed to have any regard to her (unsurprising) answer in re-examination that she had been advised by lawyers as to the proper scope of her witness statement [Day 9 page 73].

(3) It is perverse to criticise a witness for failing to give evidence that would have been irrelevant and inadmissible.

(v) Redaction of documents

137. The Judge erred in fact in finding (paragraphs 560(5) and 561) as regards the redaction of emails concerning the termination of the appointment of Mr. Bates that "I do not consider that [sic] they can be a sensible or rational explanation for any of [the redactions". As was pointed out to the Judge (on receipt of the draft Judgment), these were Mr. Bates' documents (rather than documents from Post Office), and these

POL00270457

copies were obtained by him under a Freedom of Information request and had the criticised redactions in them when he received them years before these proceedings and when *he* disclosed them in the action. As pointed out to the Judge this was nothing to do with Post Office. In those circumstances his finding that there cannot be "…a sensible or rational explanation for any of them", was not available on the evidence and/or is perverse, particularly given that an explanation which was both sensible, rational (and correct) had been given to the Judge when suggesting corrections to the draft judgment.

(c) Post Office conduct in the litigation

(i) Timely resolution

138. The Judge erred in fact in finding:

(1) (paragraph 14) – that Post Office has "…resisted timely resolution of this Group Litigation whenever it can… A good example of this is the fact that for these Common Issues , the Post Office submitted in paragraph 24 of its Opening Submissions that the six Lead Claimants cases should not be treated as representative of the other Claimants….."

(2) (paragraph 544) - that Post Office was determined to make the resolution of the dispute, "…as difficult and expensive as it can."

139. The finding on "timely resolution" was not open to the Judge on the facts and/or is perverse because:

(1) Post Office has always been keen to have a timely resolution of this dispute. It has not always agreed with the Judge about how the dispute should be managed and has sought to insist, for example (unsuccessfully) at the outset that proper pleadings on the matters in dispute would be required. The Judge is wrong to equate a difference about how a case is managed with an attempt to delay it. This is wrong and unwarranted. Post Office has never before sought to appeal the case management rulings of the Judge, even though they have disagreed with many of them, so as to avoid delay, not cause it.

(2) The Common Issues themselves were first identified by Post Office, and Post Office invited the Court to order a trial of them. The Claimants initially proposed

POL00270457

a trial of Common Issue 1 (relational contract) alone and only later agreed that the trial should include the further issues identified by Post Office (with minor drafting changes). [CONFIRM].

(3) Both the Claimants and Post Office have been overruled by the Judge even where they agreed on a sensible course of action, the Judge declaring (for example) "..I am going to disappoint you both…" [ref]. A good example concerns the Horizon Issues Trial, which neither side thought was a good idea to have been held at the time and in the manner that the Court directed. This was not because Post Office was seeking to delay matters. It was because Post Office wanted the actual disputes between the parties determined in an efficient and costs effective matter. The Claimants sought to have the Horizon Issues Trial held significantly later than that ordered by the Court.

(4) Indeed, in a letter dated ……..December 2017 that Post Office wrote to the Claimants and subsequently showed the Court, Post Office set out a long term plan for a more substantial trial to determine the matters in issue between the parties, which it has urged the court to adopt at numerous CMCs. The Judge has refused to make such an order. At the last CMC the Judge finally accepted Post Office's proposal to start looking into the claims of the other 550 claims.

(5) The example the Judge gives regarding "representative" claimants is simply wrong. The Lead Claimants are just that: they are not "Test Claimants" within the meaning of CPR Part 19; nor are they "representative" of the other 550 odd claimants. The six were chosen – 3 by each party simply to cover the SPMC and NTC contract periods. The point was made to try to emphasise to the Court that the Lead Claimants were merely exemplar and were not chosen to be typical or representative.

(6) For the Judge to hold against this background that Post Office was seeking to avoid timely resolution of this dispute is perverse.

140. The finding on "difficult and expensive" was not open to the Judge on the facts and/or is perverse:

(1) For all the reasons set out at paragraph 139 above.

(2) This is a difficult case and needs intelligent and thoughtful case management.

POL00270457

(3) No grounds or particulars of this finding are given.

DCQC 10th April 2019

POL00270457

Schedule 1

Particulars of findings subject to procedural unfairness

Operation of Horizon

1. Paragraphs 106 (second sentence), 141, 217(2)-(4), 301, 436, 515(1) and (2), 525 (sentence beginning "*These submissions also ignore…*"), 541, 543, 564, 567, 569(33), (34), (35: last sentence), (40), (42), (50), (51), (52), (59), (61), (67), (76-77: penultimate sentence), 806, 819, 852, 1115, 1116 (second and third sentences), and 1118.

2. **Grounds:** These were matters which were not properly before the Court at the trial of the Common Issues. Consequently, neither factual findings nor comments should properly have been made about them. They fall to be quashed and to be determined by the Court at a later trial, the parties having provided relevant disclosure and produced relevant witness evidence.

Operation of accounts/investigations/ debt collection

3. Paragraphs 107 (second sentence), 108 (second sentence), 109, 115, 116, 146, 148 (second and third sentences), 153 (first sentence), 158, 165 (fourth sentence onwards), 166 (penultimate and final sentences), 167, 169, 170 (first sentence), 172 (save the final sentence), 208, 217(1)-(2) and (5)-(6), 218, 219 (first and second sentences), 222, 223, 249, 250, 252, 263, 264, 302, 303, 304, 309, 310, 311, 313, 328, 462, 483, 515(3) to (5), 519, 557, 560(2), 723(1), and 824.

4. **Grounds:** These were matters which were not properly before the Court at the trial of the Common Issues. Consequently, neither factual findings nor comments should properly have been made about them. They fall to be quashed and to be determined by the Court at a later trial, the parties having provided relevant disclosure and produced relevant witness evidence.

Operation of helpline

5. Paragraphs 149, 151, 152, 204, 206, 208, 248 (second sentence onwards), 249, 274, 303, 357, 421, 422, 556, 558, 569(37), and 826 (second half, from "*This is to deal with…*" onwards).

POL00270457

6. **Grounds:** These were matters which were not properly before the Court at the trial of the Common Issues. Consequently, neither factual findings nor comments should properly have been made about them. They fall to be quashed and to be determined by the Court at a later trial, the parties having provided relevant disclosure and produced relevant witness evidence.

Effectiveness of training

7. Paragraphs 104, 105 (third sentence), 142, 193, 246 (second and third sentences), 247 (third sentence onwards), 297 (first three sentences), 346, 349, 352, 437, 492, 569(70), and 955.

8. **Grounds:** These were matters which were not properly before the Court at the trial of the Common Issues. Consequently, neither factual findings nor comments should properly have been made about them. They fall to be quashed and to be determined by the Court at a later trial, the parties having provided relevant disclosure and produced relevant witness evidence.

Suspension

9. Paragraphs 253, 318, 358, 359, 360, 473 (final sentence), 479, 480, 514, 515, 516, 517, 560(1), 723(3), 886, and 1117 (first four sentences).

   Grounds: These were matters which were not properly before the Court at the trial of the Common Issues. Consequently, neither factual findings nor comments should properly have been made about them. They fall to be quashed and to be determined by the Court at a later trial, the parties having provided relevant disclosure and produced relevant witness evidence.