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Claim No. HQ16X01238, HQ17X02637 & HQ17X04248

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

BEFORE THE HONOURABLE MR. JUSTICE FRASER
BETWEEN:

ALAN BATES & OTHERS

Claimants

AND

POST OFFICE LIMITED

Defendant

POST OFFICE'S WRITTEN CLOSING SUBMISSIONS
COMMON ISSUES TRIAL

Abbreviations as per Post Office's Written Opening Submissions {A/2}

For convenience, these Closing Submissions include those parts of the Written Opening Submissions that are unaffected by the trial. It will be apparent to the Court that some of the sections of these submissions are largely unchanged from the Opening Submissions.

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A. INTRODUCTION

1. The purpose of this trial is to determine the meaning and effect of the parties' contractual relationship, encompassing disputes as to construction, implied terms and other related issues. The issues for trial – the Common Issues – are identified at Schedule 1 to the First CMC Order.[1]

2. Post Office has to place a great deal of trust in Subpostmasters ("**SPMs**"). They run its agency branches and handle large quantities of cash and stock that belong to Post Office. If SPMs or their assistants are careless, incompetent or dishonest, Post Office stands to lose large sums of money. Approximately 47 million transactions are undertaken in Post Office branches every week, and at any given time an average of £643 million in cash is held within the network.[2] Over 11,000 agency branches produce daily cash declarations, amounting to over 286,000 cash declarations per month.[3] These cash declarations form an important part of Post Office's high-level oversight of its network and the assets within it.

3. In broad summary, Cs mount a two-pronged attack on (1) the responsibility of SPMs to Post Office for what goes on in their branches (with money and stock) and to duly account to Post Office in respect thereof, and (2) the ability of Post Office to terminate the agency contract on notice (or otherwise) when things go wrong. If Cs were right in the broad thrust of their case, this would represent an existential threat to Post Office's ability to continue to carry on its business throughout the UK in the way it presently does.

4. If it were right that Post Office had to prove *how* losses of cash or stock had occurred in a branch in order to recover in respect of the resulting shortfalls, this would have a very serious impact on Post Office and its ability to control its network throughout the UK. That network, in an age when very many bank branches are closing, is the only way in many places that communities (individuals and businesses) are able to access cash, banking services, and financial services. Post Office is required by government

[1] Order dated 25 October 2017. {B7/7/1}

[2] Angela Van-Den-Bogerd WS, para. 28. {C2/1/7}

[3] ibid, para. 129. {C2/1/35}

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to maintain a broad network of branches across the country, even in locations that would not normally be commercially viable, and it can only do this because of the high degree of control that it has over branch operations and the strength of its contractual and common law rights to protect its cash and stock against 'shrinkage' in branches.

5. Similarly, if Cs were correct, and Post Office were not able to bring contracts to an end on 3 months' notice (under the SPMC) or 6 months' notice (under the NTC) when problems emerged, Post Office would be required to keep in place SPMs who (for whatever reason) were failing to meet the standards set by Post Office. Cs contend that the period of notice was (despite what the contracts actually say) at least 12 months, which would involve putting Post Office cash and stock at risk for long periods of time. No commercial business of this kind could ever have agreed such a restriction.

6. Furthermore, it is important to recognise (as explained below in section C.1) that Post Office contended even at the pre-action stage of these proceedings for the implication of a term that Post Office provide reasonable co-operation to SPMs where this is necessary to the performance of their obligations.[4] Cs admitted this term. This will enable the Court to do justice in individual cases if it is shown that the overall contractual super-structure, which worked for the overwhelming majority of SPMs on the express terms alone, would otherwise fall short on individual occasions, for individual SPMs. The "necessary cooperation" implied term provides the answer to the question of how the contract would work to prevent outcomes that neither side can have anticipated and which were not catered for in the express terms. The answer is not to construe that contractual super-structure in a strained way; nor is it to imply a further phalanx of highly specific and onerous implied terms, terms which would often be of significant detriment to the operations of the overwhelming majority of SPMs and/or to the public interest inherent in the continued operation of Post Office.

7. In broad terms, Cs are trying to rewrite the agency contracts, twisting what is expressly a principal-agent, business-to-business relationship, into some kind of quasi-employment relationship (indeed, in key respects going beyond what even an

[4] See para. 105 of the GDXC {B3/2/47}.

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employment relationship would require[5]). In doing so they seek to significantly re-write the bargain struck by the parties as reflected in the words of the contracts, and to alter the balance of risk and reward inherent in that agreed relationship.

8. That approach is fundamentally wrongheaded. It should not be surprising that its wrongheadedness feeds through, in perplexing and unorthodox ways, into (a) which issues are being contested at all and (b) the detail of the Cs' positions on individual issues.

9. As to (a), whilst there are a number of genuine, if limited, issues which will require careful consideration, other matters that Cs have put in dispute have straightforward answers. It is peculiar that the relevant allegations were made at all, let alone maintained to this stage. This applies to many of the clauses that are challenged by reference to UCTA 1977, for example.

10. As to (b), Cs' approach leads them to assault, rather than interpret, the terms of the contracts in issue and the relationship that they set out. They seek, without the aid of any textual warrant or commercial imperative, to insert a phalanx of 21 implied terms, including a very wide implied term relying on classifying the contract as "relational", and assuming from that the implication of an unusually extensive term as to good faith. Cs also advance an unparticularised case on the incorporation and validity of terms (using the **Interfoto** principle and UCTA) to say that express terms do not mean what they say and otherwise to do violence to the conclusions which flow from the application of ordinary legal principles to the Common Issues. They also invoke the exceptional principle in **Autoclenz** to say that the express terms dealing with

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[5] For example, Cs contend that on termination the protection given to SPMs even exceeds that given to employees – whose contracts (at common law) are readily terminable in accordance with the express notice time limits set out in such contracts, however unreasonable the employer's behaviour in deciding to terminate see: **Geys v Societe Generale** [2012] UKSC 63 {A.1./42}. Cs, by contrast, say that such notice provisions in their contracts for 3 months' written notice (SPMC) or 6 months' written notice (NTC) are unenforceable (on **Interfoto** and UCTA grounds) and/or do not represent the "true agreement" between the parties (**Autoclenz***)*. This is a very ambitious proposition. If right, it would have significant ramifications for the very many commercial contracts that include similar terms.

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termination on notice in a detailed written business-to-business contract do not reflect the parties' "true agreement". On any view, this approach is radical and unorthodox.

11. As noted above, it is crucial to understand that this assault upon the terms of the contract is proceeded with notwithstanding the fact that at a very early stage Post Office averred that the standard terms often implied into contracts of this type fall to be implied here, namely (1) a necessary cooperation term (2) a Stirling v Maitland term.[6] Those are significant implied terms, and importantly Cs *have admitted*[7] that those terms are to be implied into the contracts ("**the Agreed Implied Terms**"). Those implied terms will, in appropriate cases, enable the court to justly determine disputes between the individual SPMs and Post Office where SPMs allege that Post Office did not cooperate with them sufficiently or at all, including in relation to any disputed shortfalls.

12. Accordingly, Cs' case that *yet further* terms fall to be implied into the contract requires to be considered against the backdrop that the Agreed Implied Terms are already incorporated and already providing "necessary cooperation" obligations on both sides. To mount such a case, Cs necessarily have to identify the gaps which they say remain following the incorporation of the Agreed Implied Terms which make *necessary* the implication of a further raft of implied terms. They have singularly failed to do so. Cs instead make repeated and often heated criticisms of Post Office for its supposed failure to explain to them the precise practical effects of the Agreed Implied Terms. It is, in Post Office's submission, nothing more than an attempt to divert the Court's attention away from the weakness of Cs' case on the alleged further implied terms.

13. Cs have adopted a "kitchen sink" approach to this case - to throw every conceivable allegation at this contract and see what comes out. As the Court will see, the case advanced is exorbitant and largely unparticularised.[8] Cs' hope seems to be that, if they

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[6] See para. 105 of the GDXC {B3/2/47}.

[7] The admission is recorded in Schedule 1 to the First CMC Order at Issue 2.

[8] For example, the attack on incorporation based on the **Interfoto** principle extends to *every* written term in issue and set out in Section B.2 of the AGPOC {B3/1/16-34} (without setting out a case in relation to each term as might be expected): see para. 66 of AGPOC) {B3/1/38}. The case on UCTA simply repeats the case on **Interfoto**, again attacking each and every term

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overshoot the bounds of what is reasonably arguable, and point repeatedly to inadmissible material on the supposed merits of these lead Cs' cases, they will get "half a loaf". That aspiration does not merit any measure of success. It should be remembered that over the last 18 years there have been a significant number of SPMs in the network, the vast majority of whom have operated their branches successfully and without issue. The SPMs now raising issues are a very small proportion of the SPMs in the existing network, and an even smaller proportion of those loyal and successful SPMs who have been in post over the last 18 years (during which time Horizon has been operating).[9] Furthermore, it might be noted that the National Federation of Subpostmasters ("NFSP"), which is the organisation which represents SPMs and their interests nationwide, does not support this action and does not endorse the factual premises of the Claims.

14. It is perhaps for this reason that Cs mounted at trial an unjustified attack on the NFSP. It was insinuated in cross-examination that the NFSP's approval of the terms of the NTC[10] was somehow linked to the conclusion of a new agreement under which Post Office (rather than SPMs) funds the NFSP: {Day 6/91:10} to {Day6/94:3}. This was a thoroughly misguided attack, for three reasons:

    (a) First, whatever the organisation's precise degree of independence, the NFSP's views on the terms of the contracts are irrelevant to the Common Issues. The Court gave several reminders of this in the course of cross-examination: {Day6/84:18}, {Day6/110:7} and {Day6/117:23} to {Day6/118:7}. The Lead Cs were not even parties to the negotiations between Post Office and the NFSP, and there is no reliance on anything said or done by the NFSP as matrix of fact to any issue of construction.

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in issue as "unreasonable" without seeking to set out a case on each of the terms (see para. 68 of the AGPOC {B3/1/39}). Cs promised better particulars in the Reply, but that document provides none. Even the IPOCs plead by reference to all the terms taken together see, e.g., Bates IPOC, paras. 93-97 {B5.1/2/25}. Cs' Opening Submissions largely follow this approach.

[9] Post Office estimates that, over a 20-year period, there have been around 35,000 SPMs.

[10] See Beal WS, para. 36, referring to the NFSP having been "*broadly supportive*" {C2/2/7}.

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(b) Second, the NFSP approved the terms of the NTC in October 2012[11] and so well before the negotiations over its funding to which Mr Beal was referred, which dated from August 2013 {G/94}. There was no connection between the two things.

(c) Third, the related suggestion that Post Office and the NFSP intended to keep the terms of the Funding Agreement secret from SPMs was also demonstrably wrong: the MoU dating from 2013[12] shows a clear intention that the Funding Agreement be published (as it was in December 2016), and the MoU was itself published itself in 2015, before the FOIA correspondence to which Mr Beal was referred (which was in mid-2016 {G/74}).[13]

(d) Fourth, even from the limited correspondence with the NFSP that is before the Court, there are clear examples of the organisation's advocacy for SPM's and opposition to Post Office.[14]

(1) NATURE OF THE RELATIONSHIP

15. The following outline of the relationship is taken from Post Office and/or lead C evidence that was not challenged at trial. It appears to be largely uncontroversial.

16. It is common ground that SPMs are not employed by Post Office.[15] This is unsurprising given that the contracts at issue are in place not just with individuals but

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[11] Ms Van Den Bogerd's unchallenged evidence is that the NTC was cleared for use in October 2012: {Day7/155:12} to line 14.

[12] See para. 10 at {G/80/2}.

[13] An email from the NFSP showing the date of upload was handed up on Day 11 {G/99}.

[14] See, for example, letter of 9 February 2012 from the General Secretary of the NFSP to the Chairman of Post Office (to be added to the bundle).

[15] Notably, even if these were employment contracts, that would not detach them from the ordinary rules of construction: see **Geys v Societe Generale** [2012] UKSC 63, *per* Lord Sumption (dissenting in part, but not on this point) at para. 118: "*Subject to the intervention of statute, contracts of employment are governed by the same principles as other contracts, except in those cases where their subject-matter gives rise to compelling policy considerations calling for a different approach.*" {A1.1/42/45}

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also with corporate SPMs, including large retailers.[16] Some Cs were never themselves SPMs but were merely the owners of companies that contracted with Post Office on the terms that they now seek to re-write. Overall, in approximately 7,500 of the 11,500 branches Post Office contracts with a company to run the branch {Day7/156:16-19}. About 3,300 branches are run by SPMs or companies who run multiple branches {Day7/157:1-2}.

17. The Post Office branches that SPMs run are, in important respects, their own businesses, and SPMs almost invariably run completely freestanding retail offerings alongside those businesses. Post Office's understanding is that only a very small minority of agency branches, i.e. branches run by SPMs such as Cs, do not include parallel retail offerings.[17] A key attraction of becoming an SPM is that the availability of Post Office products and services in the branch can be expected to drive footfall and revenue for the associated retail business.[18]

18. SPMs often take on a Post Office branch precisely because they value the autonomy and flexibility that the role involves.[19] As befits independent business owners, they decide how much work to carry out themselves, how much to delegate, and to whom.[20] And as befits a business-to-business relationship, prospective SPMs were free when applying to take whatever independent advice they deemed appropriate, including as to the contractual terms on offer.[21]

19. The trust that Post Office necessarily reposes in SPMs has been referred to above. Post Office does not have a day-to-day presence in the branches. It relies on SPMs to accurately conduct and record transactions and to take proper conduct of Post Office's

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[16] Angela Van Den Bogerd WS, para. 27. {C2/1/7}

[17] ibid, para. 66.

[18] ibid, para. 65.

[19] ibid, para. 71.

[20] Sarah Rimmer WS, paras 12 to 19. {C2/4/3}

[21] Timothy Dance WS, para. 20. {C2/5/7} This was made express in the documentation upon the introduction of the NTC contract – see: {E6/37/1}, which "*strongly suggest[ed]*" applicants to seek legal advice on the contract.

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cash and stock.[22] Post Office is exposed to the full range of frauds (both determined schemes and those instances of false accounting which begin as relatively innocent attempts to make the numbers work[23]). It is also exposed to SPMs' error, and to fraud or errors by assistants (whom only the employing SPM is in a position to supervise[24]).

20. This reliance provides crucial context for three important aspects of the parties' relationship.

21. First, it underscores how carefully Post Office (as well as the prospective SPM) needs to consider, pre-appointment, the suitability of a given applicant to run a given branch. For its part, Post Office insists on the production of a business plan, and on testing the applicant's skills and business acumen at interview.[25] It is similarly incumbent on prospective SPMs to consider thoroughly whether they will be able to run a branch competently, to assess the level of remuneration that it will likely provide, and to decide whether they want to employ assistants to discharge some or even all of their day-to-day responsibilities.

22. Second, Post Office lays down certain standards governing the operation of branches.[26] These range from rules on what products and services to sell within the branch, to the requirement to submit prospective assistants for basic vetting,[27] to accounting processes. As with Post Office's assessment of a prospective applicant, these rules are designed, in part, to mitigate the risks attendant on giving the SPM broad day-to-day autonomy (and to make sure that the people providing these products and services are suitably vetted), without undermining that autonomy so much as to make the position less attractive to applicants. They exist in the context of Post Office's regulatory obligations and its contractual obligations to its clients/ government. They are similar, in generic terms, to the sort of rules that a franchisor might lay down for its (independent) franchisees.

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[22] Angela Van Den Bogerd WS, paras 126 to 127 {C2/1/34}.

[23] See Helen Dickinson WS {C2/6}.

[24] See ibid, para. 26 {C2/6/7}.

[25] See John Breeden WS, para. 13 {C2/3/3}. See also Timothy Dance WS, para. 10 {C2/5/3}.

[26] Angela Van-Den-Bogerd WS, para. 72 {C2/1/22}.

[27] Sarah Rimmer WS, paras 12 to 19 {C2/4/3}.

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23. Third, and most importantly, SPMs act as Post Office's agents when transacting Post Office business, with all the ordinary obligations and liabilities that agency entails.[28] Ultimately, Post Office cannot (and does not seek to) supervise or prescribe in detail everything that SPMs do in operating the agency business, but the basic fact is that SPMs are transacting Post Office business on its behalf. As with a more straightforward commission-based agency, SPMs are generally remunerated by reference to the number and value of Post Office transactions they carry out.[29] The express and implied terms of the SPMC and the NTC need to be viewed through the prism of an expressly created agency relationship, and so the express contractual terms sit atop the body of law regulating the duties of agents to their principals. The common law principles of agency are important background to the contracts.[30] And any implied terms need to be considered (and shown to be necessary) against that agency background.

24. As such, SPMs are obliged to account to Post Office as its agent. They are acting on Post Office's behalf, and Post Office relies on them to do so. SPMs are fiduciaries; Post Office is "*entitled to* [their] *single-minded loyalty*".[31] This core fact suffuses the contractual relationship.

(2) ROLE OF THE LEAD CASES

25. It is important to stress one further point by way of general introduction. Post Office acknowledges that many of the Claimants feel aggrieved, and wish to put forward their stories. Post Office sees these proceedings as being the best means of resolving what in many cases are long-held and deeply-felt grievances. It was for this reason that Post Office agreed to there being a GLO.[32] This is not, however, a general inquiry

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[28] As is stressed to applicants: Sarah Rimmer WS, para. 65 {C2/4/14}.

[29] Nicholas Beal WS, para. 42 {C2/2/9}.

[30] See the GDXC at paras. 69(3), 90-91, 93 and 183 {B3/2} at pages 33, 41, 42 and 71.

[31] **Bristol and West Building Society v Mothew** [1998] Ch 1, *per* Millett LJ at p.18. See also Bowstead & Reynolds (21st Edition) at 6–001 and 6–033.

[32] See para. 3 of Post Office's Skeleton Argument at {B8.1/2/2], reflecting the position taken at the outset in correspondence at {H/2/3} (para. 2.1.11}.

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into the actions of Post Office. It is group litigation. The purpose of the Common Issues trial is to advance the resolution of that litigation by, in particular, construing the key contracts which governed the relationships between the bulk of the 557[33] Cs and Post Office. Within the framework set by the Court, the role of the lead cases, and their attendant factual evidence, is to provide relevant context. As Leading Counsel for Cs put it, at the First CMC, "*the relevance of the evidence here is to give the court the context in which to construe and determine the contractual questions and to provide evidence so that the court is not doing the exercise in a vacuum*."[34]

26. The six cases before the Court at this trial are lead cases, not test cases. The distinction is important. They have not been chosen (and could not have been chosen) to fairly represent the large population of claims in this group litigation in relation to matters such as the types of breach allegations that they make, the factual circumstances of the alleged breaches or the types of losses alleged to have been suffered. They have been chosen simply as claims which cover the SPMC and NTC contract periods. Beyond that, there were no express criteria for selection. Cs chose three, and Post Office chose three. As such, the six lead Cs' experiences will not necessarily be representative of anyone else's experience, and should not be treated as if they were. They are being used to provide context to the contractual documents, in order to reach conclusions on construction and other legal questions which can apply to all Cs. In some cases, that context will be of greater utility than in others (for some of these lead Cs, whose claims appear to be clearly statute-barred, their very old accompanying factual allegations would ordinarily be too stale to even reach trial).

27. A lot of time has been spent in cross-examination aimed at determining what documents the six lead Cs were provided with prior to contracting and what their reasonable expectations were upon entering into the contract. These points are peculiar to these six claims, although of course similar issues may arise in other claims. Against that background, the purpose of this trial is to reach conclusions which can be applied across the whole Claimant group. That ought to be possible – it would, after all, be completely unworkable if the standard form contracts were to

[33] A Notice of Discontinuance in respect of 4 Cs was served on 18 October 2018.

[34] Transcript of CMC on 19 October 2017, 12B {B8.2/3/4}.

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mean dramatically different things for different Cs. But, for precisely that reason, the detailed factual nuances of each case cannot play a significant role in the determination of the Common Issues.

28. The huge costs of this trial are not justified by reference to the particular outcomes for these six lead Cs. The exercise can only be justified if the answers provided are capable of being generic. These claims only comprise about 1% of the total 557 claims. As such, it would not advance these proceedings (indeed, would positively retard them) if the Court (only) engaged in a highly fact-specific construction of these contracts in the particular factual matrices attaching to each of the lead Cs or, which would be a legal error, in light of the particular factual circumstances that followed entry into the agreements for these lead Cs (such as post-appointment training and support, alleged problems with Horizon, suspension and termination). The implication of that approach would be that hundreds of further such exercises would have to be undertaken, for each of the other Cs, in the light of their particular factual circumstances. That would neutralise the utility of this trial. It would also, for reasons outlined below, require the Court to attach far too great a weight to individual matrices of fact and far too little weight to the overall commercial context and sense of the agreements and, crucially, the words that the parties used to record their agreement in detailed written contracts.

29. In this context, it may assist the parties to know to what extent the Court's conclusions on the issues would or might have been different, based on slight changes to the facts as found.

30. Normally, Courts are appropriately reluctant to determine such hypothetical questions. But for the usefulness of the Judgment to be maximised for the benefit of *all* the claims in this group litigation, Post Office respectfully invites the Court to consider such points rather than limiting itself strictly to the facts as found in these particular claims. Such an approach is also suggested by the effects of CPR, r. 19.12 which provides that a Judgment on "*one or more of the GLO issues*" is binding on all other claims on the Group Register when the judgement is given – "*unless the court orders otherwise*". Therefore, a highly fact-specific judgement – without more – is unlikely to be capable of being binding (in any meaningful sense) on the many other claims in this group litigation.

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(3) SCOPE OF THE PRESENT TRIAL

31. This trial is the first stage in the resolution of the issues in the group litigation. It necessarily precedes the determination of issues as to the functions and reliability of the Horizon system and the determination of matters going to breach of contract and liability in individual cases.

32. The Court confirmed in Judgment No. 2 that it would not be drawn into "*making findings on the Horizon Issues, or…making findings on breach*" at the present trial (para. 52). {B7/27/19}. Post Office respectfully submits that the Court should also resist any invitation to comment on the substance of those issues and disputed facts going to them, even if those comments fall short of findings.

33. It remains, even after hearing the evidence and cross-examination, wholly unclear on what basis Cs will seek to persuade the Court that it can have some regard to (or should make any findings or comment upon) the evidence of post-contractual conduct and documents. Nothing that Cs argued in their opening submissions sheds any light at all on how Ms Stockdale's experience of shortfalls in 2016 is said to be something to which the Court can have regard in interpreting the relationship that she entered into with Post Office in 2014, for example. Nor is there anything to suggest that her experience is relevant to any other C's relationship with Post Office at any relevant time. The same goes for the other lead Cs.

34. Para. 31 of Judgment No 2 reflects submissions from Cs to the effect that Mr Bates' concerns about Horizon in 2002 or 2003 might ultimately be relevant to claims advanced by other Cs, including Mr Abdulla {B7/27/12}. There is nothing in Cs' 244 page Written Opening Submissions that seeks to make good those submissions. Ultimately, Cs have not even attempted to set out a case for the relevance of Mr Bates' post-contractual experience. Further:

    (a) Cs' contention that Mr Bates' experience was somehow relevant to the other Lead Claims or other claims in this litigation was a surprising one because there is no pleading anywhere in the IPOCs or the Individual Replies as to how Mr Bates' concerns or Post Office's knowledge of them might be relevant to any other C. There is no pleading in any other lead Cs' claim about Post Office knowing x, y or z from the correspondence with Mr Bates in 2003. There is no

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pleading as to how such knowledge might be relevant to Mr Abdulla's contract in 2006 or anyone else's contract at any time. There is no pleading that Mr Bates' problems somehow formed part of the matrix of fact to the agreements from 2003 onwards, for example. These are not mere pleading points. It is particular important, as a matter of fairness, that allegations as to knowledge be properly pleaded. The same goes for averments as to matrix of fact.

(b) If Cs wished to advance a case that Post Office had some particular knowledge as to Horizon at some particular point in time and that this was relevant to the Common Issues, whether generally or in respect of some of the lead Cs, such a case would have had to be pleaded. It has not been pleaded, or even set out in opening submissions, and it is now far too late to try to advance any such case. This is all the more so given that the allegation would appear to be one of guilty knowledge, given that Post Office has maintained at all times that Horizon is generally robust.

35. Ultimately, no case as to the relevance of the post-contractual events has been pleaded or set out in the Written Opening Submissions because there is no such case to advance. The simple truth is that Cs have always intended to ignore the limitations on the scope of the Common Issues Trial in the hope of securing some advantage by bringing the whole of their claims (without proper responsive evidence from Post Office and without full disclosure).

36. Now that the promised case as to relevance has failed to materialise, it is clear that Cs' intention must always have been to engineer a situation in which they can fight out the merits of the lead claims on an unlevel playing field.[35] Cs must anticipate, for example, that the absence of full evidence and disclosure puts them in a stronger position to obfuscate in relation to their own post-contractual conduct (although, ultimately, one of the lead Cs felt that she had to invoke the privilege against self-incrimination as regards her accounting to Post Office). All this must be in the vain hope that the Court might be influenced by inadmissible evidence in determining the Common Issues.

[35] Cs also appear to contend that they can then re-litigate the same issues at later breach trials: see, Bates IPOC, para. 2 {B5.1/2/1}.

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

38. In this context, it was wholly unfair and unattractive for Cs to criticise Post Office's witnesses for having failed to address irrelevant material in their witness statements: see, e.g., the implied criticism of Ms Van Den Bogerd for not having addressed in her witness statement various internal Post Office documents that have been disclosed {Day8/165:12}, despite the fact that such documents are irrelevant to the Common Issues and any evidence in relation to them would be inadmissible. Ms Van Den Bogerd's witness statement was of course prepared in light of the limited permission to file and serve evidence "*in relation to Common Issues*": see para. 10 of the First CMC Order {B7/7/5}. She makes clear in the witness statement itself that her evidence is limited to matters that she considers could have been known or anticipated by an applicant SPM at the time of contracting: see, e.g., para 64 (in relation to the operation of an agency branch) {C2/1/17}, paras 91-98 (in relation to Horizon) {C2/1/27}, paras 114-115 (in relation to further training and support) {C2/1/32} and para 116 (in relation to retail "shrinkage") {C2/1/33}. She was careful not to trespass onto the Horizon Issues: see, e.g., Fn. 22 and 24 {C2/1/23}. It is perverse to criticise a witness for seeking to comply with a direction as to the scope of evidence and for limiting herself to admissible evidence. Ms Van Den Bogerd of course had the benefit of advice as to the proper scope of her evidence: {Day9/73:7} to line 14.[36]

39. By contrast, Cs' submissions and cross-examination of Post Office's witnesses ignored the limits on the proper scope of the present trial and strayed well beyond

[36] For the avoidance of doubt, there is no waiver of the privilege in this advice.

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anything that could be relevant and admissible for the purposes of resolving the Common Issues. This was in at least five respects.

40. First, Cs sought to explore technical matters that are set down for determination in the Horizon Trial and which have no relevance to the Common Issues:

(a) Mr Green QC invited the Court to look at transaction log print-outs from the Horizon terminal, arguing for the utility of such print-outs in tracing the transaction history of the branch: {Day1/19:7} to line 22. There is extensive evidence on this in the Horizon Trial.

(b) Ms Van Den Bogerd was taken to documents relating to known bugs and errors in Horizon: see, e.g. {Day8/81:16}. The Payments Mismatch bug to which the witness was referred was presented as having created shortfalls or gains (and this was reflected in the Court's questions on it[37]), whereas its effect was in fact to obscure (or "lose") a shortfall or net gain that existed at the time of rolling over into the next trading period: see {G/8}. Any superficial exploration of technical issues creates a substantial risk of misunderstanding. Cs cannot invite the Court to skate over the surface of these technical issues.

(c) Ms Van Den Bogerd was asked to comment on various proposals for incremental improvements to technical aspects of the Horizon system: {Day 8/114:16} to {Day8/118:9} and {Day9/2:19} to line 25. The suggestion, which is wrong as matter of a logic and common sense, seemed to be that because system was or might be improved, it must previously have been inadequate.

(d) Ms Van Den Bogerd was asked about the technical possibility of remote alteration of branch data by Fujitsu: {Day9/30:24} to {Day9/35:21}. The Court intervened to stop the line of questioning on the basis that it could not be "*of the remotest assistance*": see {Day9/35:23}.

(e) Mr Green even sought to cross-examine Ms Van Den Bogerd on parts of her witness statement for the Horizon Trial: {Day8/60:4} to line 24. It is hard to imagine a starker example of Cs' refusal to respect the structure of this group litigation and the scope of the Common Issues Trial.

[37] {Day 8/88:9} to line 11.

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(f) Mr Breeden was asked about the possibility of various technical problems with the Horizon system, including as to "*client data integrity*": {Day7/113:17} to {Day7/114:4}.

41. All of this – the documents put to the witnesses, the questions and the witnesses' answers – is wholly irrelevant to the determination of the Common Issues. This is obvious even from Cs' oral opening submissions, in which it was stated that the technical detail in relation to Horizon was not known to SPMs at the time of contracting: "*incoming subpostmasters, prior to contracting with Post Office, would have no knowledge of how Horizon itself worked and in particular the accounting points…*": {Day 1/27:7} to line 11. None of it can be matrix of fact or otherwise relevant to the Common Issues.

42. Second, Cs repeatedly invited Post Office witnesses to construe terms of the contracts and/or to express a view on how those terms were or should have been applied to particular factual circumstances:

(a) Mr Beal was invited to construe the words "*rules*" and "*manual*" in the SPMC: {Day6/47:12} and {Day6/49:23}.

(b) Mr Beal was invited to construe and apply the words "*Any other instructions to operators or updates to such instructions issued by Post Office Limited from time to time*" in the SPMC and to comment on whether various communications to an SPM would fall within the proper construction of those words: {Day6/51:13} to {Day6/52:3} and {Day6/70:16} to {Day6/71:20}. Ultimately, the witness gave the unsurprising answer that he did not know whether or not a specific letter would be treated as an "*instruction*" within the meaning of the contractual words to which he had been referred. It was not a matter on which he could properly be invited to comment.

(c) Mrs Rimmer was asked to construe and apply section 16 of the SPMC: {Day7/40:24} to {Day7/41:25}.[38] Her evidence on that point was irrelevant

[38] In any event, the construction put to the witness was wrong: the contract does not "*come to the knowledge of a Subpostmaster…through the work of his sub-office*" (in the words of section 16(1) SPMC). He has the contract before the work commences and receives it in the

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and inadmissible. She did, however, give potentially relevant (and unchallenged) evidence that Post Office in practice permits outgoing SPMs to show their contracts to applicants: {Day7/40:15} to line 23. This is relevant to issues as to notice of terms (under **Interfoto**).

(d) Mrs Rimmer was asked to construe and compare the provisions of the SPMC and NTC in relation to suspension: {Day7/52:21} to {Day7/54:21}.

(e) Mrs Rimmer was asked to express a view as to whether or not a particular letter would qualify as a "*Postal Instruction*": {Day7/67:16} to line 18.

(f) Ms Van Den Bogerd was asked to construe and apply section 12, clause 12 of the SPMC to a loss arising in hypothetical circumstances: {Day8/148:7} to line 10.

(g) Mr Shields was asked to comment on various provisions of the SPMC in relation to suspension: {Day9/179:16} to {Day9/183:14}. Bizarrely, he was even asked to comment on the Mains NTC, a contract that is not within the scope of the Common Issues (and on which there are no pleadings): {Day 9/184:9}.

(h) Mrs Ridge was invited to comment on certain provisions of the SPMC in relation to statutory entitlements to sick pay: {Day10/79:13} to {Day10/80:6}. Mr Green then sought the witness' opinion as to how close the agency relationship is to one of employment, by reference to case law. The Court had to intervene to prevent any further cross-examination on these issues: {Day10/80:7} to line 11.

(i) Mr Longbottom was asked whether there is any material difference between the liability provisions under the SPMC and the Modified SPMC: {Day 10/151:10}.

43. A witness' view on the construction of a contractual term is irrelevant and inadmissible. A witness' view on the legal character of a contractual relationship is no more admissible or relevant.

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process of contracting, rather than in the work of the sub-office. If the contract itself were to be confidential, there would be a specific term to that effect. There is none.

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44. Third, Post Office witnesses were asked to express a view on the appropriateness of alleged implied terms. The questions were put with the benefit of hindsight and from the witness' personal perspective, rather than from the perspective of an objective observer at the time of contracting. The witnesses' answers (which are irrelevant in any event) were answers to the wrong questions, exemplifying the error of law seen in **Robert Bou-Simon v BGC Brokers LP** [2018] EWCA Civ 1525 {A1.1/75} – the "*tempting but wrong*" approach of fashioning an implied term to address the facts as they turned out to be. For example:

(a) Ms Van Den Bogerd was taken through the process of disputing a transaction correction – a process that Cs accept would not have been known to an SPM at the time of contracting – and was asked whether various obligations (mirroring alleged implied terms) would be appropriate to govern that process: {Day8/184:8} to {Day8/186:7}. The Court again had to intervene to stop an irrelevant line of questioning: "*Mr Green, there is probably a limit to the utility of exploring matters like good faith*": {Day8/186:8}.

(b) Mr Beal was invited to review part of Post Office's pleading and comment on the appropriateness of implied contractual fetters on Post Office's contractual right to change the terms of the SPMC: {Day6/75:2} to {Day6/80:3}. The questions were put expressly in the context of the allegations in these proceedings as to Horizon, i.e. with the benefit of hindsight: see {Day6/74:18}to line 24.

(c) Remarkably, Mr Breeden was even taken to a Judgment of the Court of Appeal and asked to comment on the legal principles that it addressed and how those principles may inter-relate with other principles of law. Specifically, he was invited to consider the Court of Appeal's decision in **Lalji v Post Office Limited** [2003] EWCA Civ 1873 {A1.1/22} and to comment on the extent to which implied restrictions on a discretion as to repaying remuneration may coincide with duties of fairness, principles of natural justice and obligations as to openness, transparency and fair-dealing: {Day7/110:7} to {Day7/112:10}. There is zero value to a witness' response to that kind of questioning; the answers are inadmissible and irrelevant.

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45. Fourth, Post Office witnesses were taken to various internal Post Office documents recording and/or commenting on its practices and procedures from time to time. None of these documents was known to SPMs at the time of contracting. None of these documents is relevant to any of the Common Issues. The most notable example was the repeated reference to the "Losses and Gains" policy document at {F3/8}, dating from 1998.[39] There is no suggestion that the document was known to any of the lead Cs at any material time. It cannot be matrix of fact or otherwise relevant to the Common Issues.

46. The short point is this: if Post Office had at any time misunderstood and/or misapplied the contractual terms, that would be irrelevant to their proper construction. No policy document said to show anything of this kind could be relevant.

47. In any case, Cs dramatically mis-stated the content of the Losses and Gains document in cross-examination. Specifically:

    (a) The effect of section 12, clause 12 SPMC is stated fully and fairly in the fourth para. of p. 4 of the document{F3/8/4}. It is then stated that "*this stance may be varied in appropriate circumstances*", going on to refer to circumstances in which "*mitigation might be admissible*". The document provides for the contractual position (liability in accordance with clause 12) to be ameliorated through the application of various "*reliefs*" that are identified in the document, including at p. 14 (the page to which Cs refer repeatedly) {F3/8/14}.

    (b) On p. 14, the words "*The Subpostmaster is required to make good all losses however they occur*" are followed immediately by a reference in parenthesis to the contract: "(*Subpostmaster's contract Section 12, paragraph 12)*". Given what is said on p. 4 of the document, that is plainly not intended to replace the full effect of the cited contractual provision with liability for "*all losses*". The document is emphasising that, whereas the particular cause of the loss is ordinarily irrelevant to liability under the contract (using the words "*however they occur*"), the particular cause or circumstances of the loss may be relevant to the grant of relief.

[39] Mr Breeden was taken to the document at {Day7/60:15} and Ms Van Den Bogerd was taken to it at {Day7/181:1}.

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(c) Cs' attempt to suggest that the Losses and Gains Policy shows that Post Office considered clause 12 to impose liability for "*all losses*" is hopeless as a matter of interpreting the document as a whole. Of course, the prior point remains: the document is flatly irrelevant to the Common Issues, however it might be interpreted.

48. Fifth, witnesses were taken to correspondence with SPMs dating from years after their appointments and invited to comment on whether Post Office had correctly identified the SPM's contractual obligations in that correspondence: see, e.g., {Day7/63:21} to {Day7/65:2}, where Mrs Rimmer was asked to comment on letters sent to Mrs Stubbs in 2010. It is fair to say that the debt recovery letters should have summarised correctly the effect of section 12, clause 12 SPMC (or perhaps even quoted from it), but that point is irrelevant to the interpretation of Mrs Stubbs' contract with Post Office, not least given that the contract was entered into a decade earlier. In the context of the Common Issues Trial, reliance on the 2010 debt letters is a jury point.

49. It is notable, although also irrelevant, that Mrs Stubbs herself was not surprised to receive automatically generated debt recovery letters,[40] and she of course did not pay in response to them. Nonetheless, Post Office regrets that it failed to put an effective hold on the chasing letters once Mrs Stubbs had disputed the relevant shortfall. Ms Van Den Bogerd acknowledged that this mistake should not have happened: {Day9/48:4} to line 10.

50. In short, Cs have tried to expand the trial away from the Common Issues and have roved without discrimination through irrelevant and inadmissible material. It is inevitable that Cs will now try, no doubt attractively and subtly, to draw the Court into legal error, most especially the error in **Bou-Simon** case. It is therefore particularly important that the Court identify in its Judgment the specific evidence to which it has regard in determining each of the Common Issues.

51. Lastly in relation to the conduct of the trial, it is appropriate to raise a note of caution as to the fairness of some of the cross-examination of Post Office's witnesses. It was characteristic of the cross-examination for the witness to be taken at speed from one document to another over a 20-year period, many of which the witness had not seen

[40] {Day3/69:1}

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before and some of which were undated. It is unsurprising that the witnesses were at times unable to understand immediately the question being put to them: see, e.g., Ms Van Den Bogerd's best efforts to interpret the Camelot document at{F3/195}, which was introduced to her only as "*a spreadsheet*" {Day8/162:12} to {Day8/165:16}.[41] As noted above, Ms Van Den Bogerd was then implicitly criticised for not having addressed inadmissible internal documents in her evidence: {Day8/165:12}.

(4) LAW ON THE INTERPRETATION OF COMMERCIAL CONTRACTS

52. Many of the Common Issues are, or involve, issues of contractual interpretation. It is useful to set out, in this introduction, the key legal principles on which Post Office will rely in the course of its submissions.

Contractual construction: legal principles

53. First, the "*court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement*": **Wood v Capita Insurance Services Ltd**,[42] *per* Lord Hodge at para. 10. {A1.1/67/7}

54. Second, "*where the parties have used unambiguous language, the court must apply it*": **Rainy Sky SA v Kookmin Bank**,[43] *per* Lord Clarke at para. 23. {A1.1/37/9}.

55. The more difficult questions of construction only arise if the "*language used by the parties*...[has] *more than one potential meaning*", so that "*there are two possible constructions*": ibid. at para. 21. {A1.1/37/9}

56. Third, when "*interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties*": **Arnold v Britton**,[44] *per* Lord Neuberger at para. 21. {A1.1/58/11}. See also Lewison, The Interpretation of Contracts (6th Edition), at 3.17(d) and (e). {A1.3/3/10}.

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[41] See also her answers in re-examination at {Day9/58:21} to {Day9/60:7}.

[42] [2017] A.C. 1173.

[43] [2011] 1 W.L.R. 2900.

[44] [2015] A.C. 1619.

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57. Fourth, the above rule does not apply to knowledge of any "*clear and well known legal principles*" that are relevant to the parties' relationship and/or the transaction(s) at issue; contracts are to be construed in light of the relevant law, even if it was not known to the parties at the time of contracting, at least where the legal position was clear at that time. This was recently confirmed by the Court of Appeal in **First Abu Dhabi Bank v BP Oil International**[45] {A1.1/74/19}, approving *dicta* of Vos J in **Spencer v Secretary of State for Defence**.[46]

58. Fifth, the construction exercise proceeds by "*focussing on the meaning of the relevant words…in their documentary, factual and commercial context*": **Arnold v Britton**, *per* Lord Neuberger at para. 15 {A1.1/58/9}. Even if that language is not wholly unambiguous, its ordinary meaning will generally be decisive (ibid., at paras. 17 and 18):

> *The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract…the clearer the natural meaning the more difficult it is to justify departing from it.* (emphasis added)

59. Moreover:

> *The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made…*
>
> *[A] court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the*

[45] [2018] EWCA Civ 14 at para. 37(iii) *per* Gloster LJ (with whom Patten LJ and Lord Briggs agreed). {A1.1/74/19}

[46] [2012] EWHC 120 (Ch) at paras 73-74.

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> *parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.* (ibid., para. 19 and 20)

60. Lord Steyn made the same point in **Mannai Investment v Eagle Star Life Assurance Co Ltd**,[47] at p.768, by saying that the relevance of "*surrounding circumstances*" will be limited by "*what meanings the language read against the objective contextual scene will let in*". {A2/25/20}

61. Sixth, contractual construction is a "*unitary exercise*". It "*involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated*": **Wood v Capita**, *per* Lord Hodge at para. 12. {A1.1/67/7}

62. Seventh, the relative significance of the different factors will vary depending on the type of contract that is being construed. As Lord Hodge explained in **Wood v Capita**, at paras 12-13: {A1.1/67/7}

> *To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
>
> *Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen*

[47] [1997] A.C. 749.

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> *to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.* (emphasis added)

63. In practice, there is what might be called an "interpretative spectrum" of contracts, ranging from sophisticated contracts which have been carefully negotiated and/or professionally drafted, at one end, to informal and/or brief contracts which have not been carefully negotiated and/or professionally drafted at the other. The nearer the contract in question is to the former category, the greater the emphasis that is given to the natural meaning of the contractual words used. The contracts in this case fall towards the sophisticated end of the spectrum.

64. Finally, it is worth noting that Cs place undue weight on the *contra proferentem* principle of construction. That principle in fact applies only where the term is ambiguous and the ambiguity cannot be resolved through the application of the usual principles of construction; it should not be used for the purpose of creating an ambiguity; it is, or is close to, a principle of last resort: see Chitty, at 13-097 {A1.3/2/11} and Lewison, at 7.08(h) {A1.3/3/48}. It cannot do anything like the extreme work that Cs want it to do in re-writing the contracts.

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Matrix of fact for the issues of contractual interpretation

65. In Post Office's submission, the contractual terms at issue can be interpreted, at least very largely, without regard to any matrix of fact, let alone any matrix of fact that can be seriously controversial. The contractual words are clear and unambiguous. It is notable that Cs have not identified the specific pieces of matrix of fact that they say assist in interpreting any particular words in the contracts, enabling any ambiguity in those words to be resolved.

66. The matrix of fact is not, however, entirely irrelevant.

67. Post Office contends that the most important element of the matrix of fact is simple and uncontroversial: Post Office is not present in the branch, whereas the SPM is present either personally or through his or her employees.[48] Because Post Office is not present in the branch, it has no first-hand knowledge of what physically occurs there. It is therefore, to that extent, necessarily reliant on SPMs to conduct transactions honestly and accurately. Mrs Stubbs captured the point perfectly in her oral evidence:

> *Q: …when you count cash or hand cash to customers, Post Office doesn't know how much you are handing to those customers, does it?*
>
> *A: I presume not since they are many, many miles away.* {Day3/3:11}

68. Bizarrely, Cs nonetheless deny that Post Office does not have first-hand knowledge of the transactions that take place in branches: see Factual Matrix at para. 76 {B6/1.1/16}. It is telling that Cs feel unable to admit this basic and obvious fact.

69. Another important element of the matrix of fact is also denied by Cs, again without any basis in evidence. Post Office asserts that losses do not arise in the ordinary course of things without fault or error on the part of SPMs or their assistants. Cs deny this: see Factual Matrix at para. 79 {B6/1.1/16}. Cs' denial here is perhaps based on a misunderstanding. Post Office does not allege that losses cannot arise without fault or error on the part of SPMs or their assistants, but only that the usual cause of a loss is,

[48] It is an agreed part of the factual matrix that SPMs can exercise supervision and control over their assistants: see Factual Matrix at para. 20 {B6/1.1/4}. This is important to issues relating to the responsibility for assistants.

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or would be anticipated to be, such fault or error. This ought to be uncontroversial given that:

(a) A properly performed transaction cannot (by definition) give rise to a loss or a gain. The other side of that coin is that losses and gains result from mis-performed transactions, at least ordinarily.

(b) As to other causes, the parties would not at the time of contracting have known or anticipated that something other than error or fault would give rise to losses in the branch, at least not in the ordinary course of things. There was no basis for any such anticipation. Post Office's practice in interviews with potential SPMs was to refer to the possibility of losses arising from errors by the SPM and/or assistants: see, e.g., Mr Haworth's response to the Court's question at {Day11/72:21} to {Day11/73:8}.

(c) More specifically, applicant SPMs would not anticipate Horizon generating losses in their branches, at least not in the ordinary course. The lead Cs' gave clear evidence that, at the time of contracting (or at the time of the introduction of Horizon), they anticipated (and/or a reasonable person would have anticipated) that the system would be reliable: see {Day 2/90:22} (Mr Bates); {Day2/172:5} (Mrs Stubbs); {Day3/126:14} and {Day3/141:12} (Mr Sabir); {Day4/84:2} (Mr Abdulla); {Day4/180:8} (Mrs Stockdale) and {Day5/46:9} (Mrs Dar).

(d) Ms Van Den Bogerd gave unchallenged evidence that, in her experience, this would be what an applicant SPM would expect: WS, para. 98 {C2/1/29}. She also gives examples of the kinds of basic errors that obviously could occur in branches: paras. 116-125 {C2/1/33}. A reasonably diligent applicant would appreciate the risk of those types of loss, although he or she would of course intend to limit their occurrence as far as possible.

(e) It is common ground that Post Office could cause a loss in the branch (by instructing an SPM to perform a transaction wrongly, for example). But there is again no suggestion, and it is inherently implausible, that this would have been anticipated at the time of contracting as a likely cause of losses, or that it would be expected to occur in the ordinary course of things. It was not raised

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as a possibility during interviews: see Mr Carpenter's response to the Court's question at {Day11/91:9}.

70. Even if one were to have regard to the actual position as it transpired, which is inadmissible and not part of the matrix, the picture is largely the same:

(a) Simply as a matter of everyday language, a loss caused by a computer bug or error is not a loss "*in the ordinary course of things*". It is a loss caused by something extrinsic to the conduct of transactions in the branch, and it is the conduct of transactions that is the ordinary course of running a branch and the core of the contractual relationship.

(b) The witness evidence at trial painted an unsurprising picture of losses arising from mundane errors on the part of the lead Cs and/or their assistants. For instance: one of Ms Stubbs' assistants put through a BT bill as £308, rather than £38 (a typical mis-keying error) {E2/14/1}; Mr Bates found that the bulk of a £6,000 shortfall in his branch could be traced to branch errors and corrected {E1/23/1}; Mr Sabir's evidence was that one of his assistants was repeatedly making the same basic error in processing scratch cards {Day3/151:20}; and Mrs Stubbs had an assistant with a mental block when it came to dealing properly with batch control vouchers {Day 3/12:11}. Mrs Stubbs in particular gave commendably frank evidence that even some of the unexplained losses in her branch could have been caused by her assistants: {Day2/128:18}. She also acknowledged that errors such as mis-keying transactions probably could happen easily {Day3/22:14}.

71. Post Office will address any other relevant matrix of fact when considering specific points of contractual interpretation. Overall, Post Office contends that its case on the matrix of fact was made good at trial (and, indeed, much of it was unchallenged).

Implied terms: legal principles

72. In **Geys v Société Générale**[49] at para. 55, Baroness Hale stated that there are two types of implied terms:

[49] [2013] 1 A.C. 523. {A1.1/42}

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> *In this connection, it is important to distinguish between two different kinds of implied terms. First, there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them: see Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988. Such terms are only implied where it is necessary to give business efficacy to the particular contract in question. Second, there are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it*… (emphasis added) {A1.1/42/25}

73. This important distinction is trite law. The implied terms asserted by Cs are all terms that, in order to be implied, must be shown to satisfy the test for terms in the first category: terms that it is alleged should be implied in fact – terms that are necessary and must have been intended on the facts of these agreements. There are three reasons for this.

74. First, contrary to Cs' submissions, there is a bright line distinction between the two kinds of implied term. There is no "*nexus*"[50] between them where a contract that does not qualify for the implication of a term as a legal incident of a particular class of legal relationship (implication by law) can nonetheless invite the implication of a similar (or different) term without having to satisfy the test of necessity for implying a term in fact. If a term does not fall to be implied by law, there is one, and only one test for implication: the test of necessity in **Marks and Spencer v BNP Paribas Securities Services**.[51] {A1.1/61}

75. The Court of Appeal recently confirmed the importance of the bright line distinction in **J N Hipwell & Son v Mrs Clare Szurek**[52] {A2/58}. In that case, the Judge at first instance was wrong to have had regard to the principles that apply to terms implied by

[50] Cs' Written Opening Submissions, para. 155 {A/1/64}.

[51] [2015] 3 W.L.R 1843.

[52] [2018] EWCA Civ 674.

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law when considering an alleged implied term that, if to be implied at all, had to meet the test in **Marks and Spencer**: see para. 25 {A2/58/10}.

76. Second, there is no scope for terms implied by law in a commercial contract of agency. The parties have, by adopting a legal relationship with substantial common law content and character, excluded the possibility of the law imposing further or different implied terms as "legal incidents" of their relationship. The legal incidents of a contract of agency and accounting are the common law principles that attach to that relationship, rather than terms implied by law. The common law imposes the necessary content through the incidents of the law of agency, rather than contractual terms implied by law.

77. Third, Cs' attempt to elevate "relational contracts" to a category of contract into which terms are implied by law is not supported by the authorities. In **Yam Seng** at paras 131 to 132, Leggatt J was careful to make clear that the exercise of implying a term as to good faith is an exercise in implying a term in fact, expressly distinguishing this from implication by law {A1.1/43/30}.[53] In **Monde Petroleum**[54], Richard Salter QC, sitting as a Deputy Judge, summarised the law correctly at para. 249 {A1.1/69/70}:

> *A duty of good faith is implied by law as an incident of certain categories of contract (for example, contracts of employment and contracts between partners or others whose relationship is categorised as a fiduciary one). However, in all other categories of contract… such a duty will only be implied where the contract would lack commercial or practical coherence without it and where all the other requirements for implication are met. By reference to Baroness Hale's classification of implied terms in [**Geys**], such a term falls into the first category, not the second.*

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[53] See also Leggatt LJ's reasoning in **Al Nehayan v Kent** [2018] EWHC 333 (Comm) at paras 168 and 170, referring to a greater willingness or readiness to imply a duty of good faith into relational contracts, rather than such a duty being implied automatically by operation of law. {A1.1/72/45}. See also para. 174, applying the test in **Marks and Spencer** (where, although it is suggested that the same result could be reached through implication in law, no reasoning is provided in support of that suggestion).

[54] **Monde Petroleum SA v Westerzagros Ltd** [2017] All E.R. (Comm) 1009.

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78. Cs must therefore show that the alleged implied terms satisfy the test for implying a term in fact, which **Marks and Spencer** makes clear is a high hurdle.

79. In **Marks and Spencer**, Lord Neuberger, with whom Lords Sumption and Hodge agreed, clarified that the process of implication is distinct from the construction of the contract. He said, at para. 29 {A1.1/6/16}:

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

80. Lord Neuberger also emphasised that the test for the implication of a term in fact, no matter precisely how that test is expressed, always requires that the term be <u>necessary,</u> rather than merely reasonable, fair or appropriate. He said, at paras 21 and 23 {A1.1/6/13}:

> *... a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term.*
>
> *... the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy... The first proviso emphasises that the question*

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whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459 that a term will be implied if it is essential to give effect to the reasonable expectations of the parties as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that "The legal test for the implication of ... a term is…strict necessity", which he described as a stringent test.)

81. His Lordship went on at para. 21 to set out six overarching principles of implication as follows:

In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the BP Refinery case 180 CLR 266 as extended by Bingham MR in the Philips case [1995] EMLR 472 and exemplified in The APJ Priti [1987] 2 Lloyd's Rep 37.

First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting.

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

However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term

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> *satisfies the other requirements, it is hard to think that it would not be reasonable and equitable.*
>
> *Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied.*
>
> *Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09.*
>
> *Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.* (formatting and underlining provided)

82. There are several other important and well-established principles that flow from these rules and that operate to restrict the implication of terms in fact.

83. First, a term will not be implied where it would be inconsistent with the express terms of the contract. In the Court of Appeal in **Autoclenz**,[55] Aikens LJ expressed the principle as follows:

> *Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is*

[55] [2009] EWCA Civ 1046. Affirmed by the Supreme Court at para. 20: [2011] ICR 1157. {A1.1/39/7}

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> *inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.* (para. 88; emphasis added)

84. One effect of this principle is that, before considering whether to imply any terms, the Court must first construe the relevant express terms of the agreement. Lord Neuberger pointed this out in **Marks & Spencer**, and it was recently confirmed and applied by the Court of Appeal in **Robert Bou-Simon v BGC Brokers LP**[56] at para.13. {A1.1/75/13}

85. Second, there is a strong presumption against implying terms where the agreement is a detailed written contract that appears to represent a complete bargain and, in particular, appears to cover the subject matter in relation to which it is argued a term should be implied. In **Greatship (India) v Oceanografia SA de CV**,[57] Gloster J said at para. 41 {A1.1/46/13}:

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

86. Dyson J had made essentially the same point in **Bedfordshire CC v Fitzpatrick Contractors** at p. 71 {A1.1/13/9}:[58]

> *... the court should in any event be very slow to imply into a contract a term, especially one which is couched in rather general terms, where the contract contains numerous detailed express terms such as the contract in this case. In my judgment, in such a case, the court should only do so where there is a clear lacuna. The parties in this case took a great deal of trouble to spell out with precision and in detail the terms that were to govern their contractual*

[56] [2018] 179 ConLR 32 at [13] *per* Asplin LJ, with whom Singh and Hickinbottom LJJ agreed.

[57] [2013] 1 All E.R. (Comm).

[58] [1998] 62 Con LR 64.

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> *relationship. The alleged implied term is expressed in broad and imprecise language. I can see no justification for grafting such a term onto a carefully drafted contract such as this*. (emphasis added)

87. Third, a term will not be implied merely because, had the parties considered or anticipated the subject matter of the alleged implied term, it is clear that they would have made some provision for it. It must be shown that the alleged implied term is the very term that they would necessarily have chosen and agreed. Sir Thomas Bingham MR expressed this principle as follows in **Phillips Electronique Grand Public v British Sky Broadcasting**[59] at p.482: {A2/23/11}

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

88. Fourth, the Court must always bear in mind that a party that argues for an implied term is engaged on an "*ambitious undertaking*" and that English law "*imposes strict constraints on the exercise*" of the "*extraordinary power*" to imply terms: see **Marks & Spencer** at para. 29, quoting from **Phillips Electronique** {A1.1/61/16}. The hurdle is a high one.

89. Fifth, it is an error of law to rely on post-contractual facts to justify the implication of a term. In a famous passage from the **Phillips Electronique** case, the Master of the Rolls warned of the risk of using hindsight to justify an implied term (at p.482) {A2/23/11}:

> *The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong.*[60]

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[59] [1995] EMLR 472.

[60] This passage was approved by Lord Neuberger in **Marks & Spencer** at para. 19 {A1.1/61/12}

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90. The temptation must be resisted because the question of whether or not a term is necessary "*is to be judged at the date the contract is made*" (**Marks & Spencer** at para. 23). {A1.1//61/14} The classic tests for implication – the "*so obvious as to go without saying*" and "*officious bystander*" tests – logically must be applied at that time. The implied term, if to be implied at all, must have been implicit in the contract when it was made and not at some later date or because of later facts.

91. The principle was recently re-affirmed in the **Bou-Simon** case.[61] In that case, HHJ Curran QC (sitting as High Court Judge) erred in implying a term requiring Mr Bou-Simon to repay money paid to him by the broker partnership should he leave the organisation within an initial period. The Court of Appeal held that Judge had wrongly allowed hindsight to affect his analysis:

> *It seems to me that the judge succumbed to the temptation described by Bingham MR in the Philips case, referred to in Marks & Spencer at [20] and therefore, fell foul of the first proviso to what Lord Neuberger described as a "notion" at [23]. The judge implied a term in order to reflect the merits of the situation as they now appear. He did not approach the matter from the perspective of the reasonable reader of the Agreement, knowing all its provisions and the surrounding circumstances at the time the Agreement was made. It is not appropriate to apply hindsight and to seek to imply a term in a commercial contract merely because it appears to be fair or because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for the implication of a term: see Marks & Spencer per Lord Neuberger at [21].*
>
> (para. 12 {A1.1/75/12})

92. On a proper analysis of the circumstances of the agreement, the facts that had actually arisen (the payment having been made to Mr Bou-Simon without his becoming a partner and his then leaving before the end of the initial period) were not covered by the agreement at all: see paras 18 and 22 in the Court of Appeal {A1.1/75/14}. The agreement did not lack practical or commercial coherence merely because it failed to provide an answer to a question of what should happen in circumstances that had not

[61] At para. 13 *per* Asplin LJ, with whom Singh and Hickinbottom LJJ agreed.

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been anticipated at the time the agreement was made and which fell outside the four corners of the agreement.

93. At the present trial, the Court has before it considerable amounts of evidence from Cs as to what they will presumably argue are crises in the commercial relationship. It would be tempting, but wrong in law, to have regard to that evidence and to accede to Cs' requests to re-write the contracts so as to make them respond better or more fully to the facts as they allege them to be. In any event, those factual matters have not even been the subject of proper disclosure and evidence from both sides, such that the Court could not confidently or fairly reach any view as to existence or detail of any crises in the relationship.

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B. SUBPOSTMASTERS' OBLIGATIONS

(1) AGENCY AND ACCOUNTING (COMMON ISSUES 12 AND 13)

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

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

Outline of the parties' contentions

94. At paras 90 to 93 (and paragraphs 69(3) and 183) of the GDXC, Post Office contends that SPMs, as Post Office's agents, were bound by certain obligations characteristic of agents: (1) they were fiduciaries for Post Office and owed it a duty to account, (2) they were bound by such an account "*unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account that he should be permitted to correct*" (GDXC, paragraph 93(2)), and (3) where "*an agent deliberately renders a false account to his or her principal, in relation to the matters covered by the account the Court should make all presumptions of fact against that Subpostmaster as are consistent with the other facts as proven or admitted*" (GDXC, paragraph 93(3)).

95. Cs admit that they were agents.[62] However, they deny that this "*affords the Defendant any defence to the Claimants' claims*"[63], and specifically deny that the SPMs were bound by the accounts which they submitted.

96. It is not clear on what basis Cs contend that SPMs are not presumptively bound by the accounts that they render to Post Office. In the IPOCs, it is contended that Post Office is wrong to draw an "*analogy with traditional accounting by an agent… to his principal*".[64] But Post Office does not rely on analogy; it relies on the express terms

[62] Reply, para. 60.1 {B3/3/33}.

[63] Reply, para. 59 {B3/3/33}.

[64] See, e.g., Bates IPOC, para. 106. {B5.1/2/29}

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and the common law principles that are imported by the parties' express choice of an agency accounting relationship.

97. Cs' Written Opening provides no elucidation: see Annex VIII of that document {A/1/233}. It is simply asserted that the contractual relationship here is "*far from a traditional accounting relationship*", but no explanation is provided as to how that factor (even if true, which it is not) would affect the application of the ordinary principles of agency, all of which apply with full force by reason of the express choice of an agent / principal relationship. No authority is cited for the (implicit) submission that the Court can modify or disapply the ordinary principles of agency based on its view of the merits or, more specifically, in response to some alleged unfairness in the application of those principles in particular cases and/or as tested against specific real or hypothetical facts.

98. Post Office submits as follows:

(a) First, ordinary principles of agency, as described above, apply by reason of the express terms of the contracts and, in particular, the agreement that SPMs shall be agents to Post Office and shall account to it. It is of course right that a particular entry or amount may not form part of the accounting party's account for the purposes of the principles on which Post Office relies. An amount that is in dispute does not form part of the account for those purposes (i.e. the account does not presumptively bind the agent as regards the disputed entry or amount).

(b) Second, subject to this, it is for the SPM to show that he should not be bound by his account. Post Office accepts that this can be done by showing a mistake in the account or, in theory at least, by showing in a particular case that equity demands that the account be re-opened entirely. This appears to be common ground.

(c) Third, the application of these principles (i.e. the question of whether any particular SPM should be permitted to correct or re-open any particular account) is not a Common Issue and does not fall for determination in this trial. It is not clear whether this is common ground, but it is hard to see how Cs could contend otherwise.

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(i) The principles on which Post Office relies apply to the relationship

99. SPMs are Post Office's agents under the express terms of the contracts.[65] The parties expressly chose that relationship and the ordinary legal incidents of it. The common law rules and principles that apply to agency relationships are also admissible background to the construction of the contracts.[66]

100. The principles form part of the contractual relationship unless modified or excluded by agreement: see Chitty, at 31–006 "*On the orthodox and accepted common law analysis, the full paradigm relationship of principal and agent arises where one party, the principal, consents that another party, the agent, shall act on his behalf, and the agent consents so to act.*" {A1.3/2/24}. It is a matter of contractual interpretation whether the principles have been modified or excluded by agreement. Evidence of post-contractual conduct or events is therefore inadmissible and irrelevant. Cs have not even pleaded any relevant modification or exclusion of the principles under the contracts.

101. SPMs, in their fiduciary capacity, are required to account to Post Office, both on the face of the contracts[67] and as a matter of applying the common law principles that apply to the relationship. It applies most obviously when SPMs submit their accounts and make the following declaration to Post Office at the end of each trading period: "*I certify that the content of this balancing and trading statement is an accurate reflection of the cash and stock on hand at this branch*": see, e.g., {E5/229.1/2} (Ms Dar, 2016); {E2/36/3} (Mrs Stubbs, 2009) and {F4/21/46} (branch trading manual from 2006, showing the certification).[68]

102. In this context, Cs are accounting parties and bear the burden of proof if they later want to argue that the account that they rendered to their principal was mistaken: see

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[65] SPMC, section 1, clause 1 {D2.1/3/5}; NTC Part 2, para 1.2 {D1.6/3/6}.

[66] See para. 57 above.

[67] SPMC, section 12, clause 4 {D2.1/3/51}; NTC, Part 2, para 3.6.6 {D1.6/3/12}.

[68] Cs did not disclose any accounts for earlier periods, but it is common ground that they too required certification as to the declared cash and stock.

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Bowstead & Reynolds on Agency (21st Edition), at 6–097 {A1.3/1/11} and **Post Office Ltd v Castleton**.[69]

103. Indeed, Cs accepted, in their skeleton argument on Post Office's application to strike out evidence, that "*as a matter of principle where accounts show that an agent has credited his principal with money received, the agent will be presumed to have received that money and will be liable for it to his principal.*"[70] An SPM that declares that he has counted and holds £10,000 of Post Office cash in his branch and in fact holds only £9,000, is ordinarily bound by his declaration and the account that he stated.

104. There is, however, an important qualification that Cs' argument appears to ignore. An agent is of course not bound by any amount or entry that he disputes at the time of rendering his account (including, to be clear, by raising the dispute as soon as possible after submitting the account). The accounting principles do not bite on that amount – it remains in dispute, rather than forming part of the account as stated. Applying that principal to the contractual relationship at issue here:

(a) It is common ground that an SPM that disputes a shortfall at the end of a trading period must, in order to rollover into the next trading period, settle that amount centrally subject to a dispute.[71] Such a dispute is notified to Post Office through the Helpline. The amount is then taken out of the branch trading account and is recorded as being in dispute. The SPM does not lose any ability to challenge that amount by reason of settling centrally. It does not form part of the account stated. Post Office has not contended otherwise in these proceedings.[72]

(b) An SPM that disputes a Transaction Correction ("TC") at the end of a trading period must, in order to rollover into the next trading period, settle the TC

[69] [2007] EWHC 5 (QB), at para.1. {A1.1/30/1}

[70] Para. 80 at {B8.10/1/29}.

[71] For completeness, the SPM could also make good a shortfall and nonetheless maintain a dispute in relation to it. He may adopt this approach if the shortfall is too small to be settled centrally (under £150) or simply out of preference.

[72] See, e.g., GDXC, para. 43(3) {B3/2/17}.

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centrally subject to a dispute. The TC then does not enter the trading account but is instead recorded centrally (i.e. with Post Office) as being in dispute. The SPM does not lose any ability to challenge the TC by reason of settling centrally. It does not form part of the account stated. Post Office has not contended otherwise in these proceedings.[73]

105. At various times during the course of the trial, Cs tried to suggest that, in practice, the process for settling centrally somehow required the SPM to accept an entry in his account that he considered to be wrong (i.e. to abandon a dispute and render an untrue account):

(a) In oral opening, Cs put forward a hypothetical scenario in which the SPM was forced one evening to put a cheque for over £9,000 in the till in respect of a shortfall because "*there is no way of disputing it*" {Day1/25/19}. The hypothetical scenario is uninformative because it is based on false facts. The SPM has at all times been able to dispute a shortfall.

(b) Most dramatically, Mr Green tried to advance Cs' case in cross-examination of Mr Haworth by putting to him only the first part of the following sentence from an internal policy document, stopping before the word "*unless*": "*choosing the option to "Accept and Settle Centrally" signifies acceptance of a loss or gain within a branch unless the dispute process is instigated*" – see {G/35/16} (an internal Post Office policy document from 2012). The transcript fails to record the intervention from Mr Cavender to request that the question put to the witness be based on the whole sentence: {Day11/35:14} to {Day11/35:24}.

106. This is misconceived for the simple reason that settling centrally, whether for a TC or a shortfall, does <u>not</u> alter the treatment of the amount under the contract:

(a) The act of settling centrally does <u>not</u> affect whether or not there is a deficiency / shortfall for the purposes of section 12, 12 of the SPMC or Part 2, para. 4.1 of the NTC.

[73] See, e.g., GDXC, para. 39 {B3/2/14}.

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(b) There is no separate contractual regime for determining liability in relation to amounts that are settled centrally; none is even alleged. An amount that is settled centrally does not exit the contractual regime and become a simple debt (as Cs seem to argue).

(c) This is unsurprising: settling centrally merely moves the amount from one account ledger to another, so that the branch trading account can "zero" and so commence a new trading period with a clean slate, allowing losses and gains to be isolated clearly to the period in which they arose.[74] The same was true of the earlier practice of shortfalls being placed into a suspense account. The two systems are, for all practical purposes, the same.

(d) Settling centrally also has the practical benefit of allowing the SPM to avoid making good the disputed amount while his or her challenge to the TC or shortfall is resolved. From the SPM's perspective, this is an improvement on the contractual requirement that shortfalls be made good immediately.

107. In any event, there are two fatal problems with Cs' suggestion that they could not, in practice, dispute TCs or shortfalls and that this is somehow relevant to whether the accounting principles apply to the relationship under the contracts.

108. First, Post Office cannot, by some practice or procedure, make an amount subject to the accounting principles despite it being in dispute (such that it does not, as a matter of law, form part of the account stated). It is possible for the contract to adjust the operation of the accounting principles, but a mere practice or procedure cannot do so. Cs have not even argued (let alone pleaded) that SPMs' accounts were, as a matter of contractual construction, subject to the accounting principles even in relation to disputed amounts. This is the end of the point.

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[74] See Ms Van Den Bogerd's evidence at {Day9/72:7} ("*There's a suspense account within the branch, it holds the amount within the branch although it takes it out of the payments and the receipts balance line. Settle centrally takes it out of the branch account and takes it into the bigger Post Office account. It is associated with the postmaster customer account but not -- it doesn't affect the branch account at the time it is taken out of it.*"); Ms Dickinson's evidence at {Day9/165:10} ("*The way I understand settle centrally is parking it to be discussed further. So you either don't accept it or you are not happy with it or you can't afford to settle it at that time.*").

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109. Second, merely to balance the impression that Cs try to create, it may be worth noting that even Cs do not seem, when pressed, to contend that TCs and shortfalls could not be disputed:

(a) Cs put to Post Office witnesses that SPMs could settle centrally and dispute the amount: see, e.g., {Day9/37:24} to {Day9/38:13}. Cs put a factual case that conflicts with what they seem to want to argue.

(b) Lead Cs under both the SPMC and the NTC gave evidence that knew that they could settle centrally and dispute the relevant shortfall or TC: see, e.g., {Day4/188:3} (Mr Abdulla) and {Day5/68:10} (Ms Dar).

(c) Most strikingly, lead Cs did in fact settle centrally in respect of both shortfalls and TCs and dispute them: see, e.g., {E1/33/1} (relating to the shortfall that Mr Bates placed in suspense[75] and that was ultimately written off); {E2/53/6} (in relation to Mrs Stubbs) and {E6/137} (showing amounts settled centrally and disputed by Mrs Stockdale). Indeed, some of the amounts in dispute between Post Office and the lead Cs in these proceedings are amounts that Cs settled centrally and that remain in dispute even now, years later.

110. Ultimately, Cs' argument seems to boil down to this: the Court should disregard the ability to dispute a shortfall and a TC because the dispute process is initiated and conducted outside the Horizon system – by telephone, email and letter rather than through a dispute resolution process within Horizon itself: see, e.g., the case put to Ms Van Den Bogerd at {Day9/38:11} to {Day9/40:19}. Cs seem to argue that it would all be different somehow if the Horizon system included a button marked "dispute", rather than the SPM having to make a phone call: {Day9/41:5} to {Day9/42:15}.

111. Cs can provide no sensible reason as to why it should matter to the legal analysis whether a dispute is initiated online or by telephone. A disputed amount does not form

[75] The process at the relevant time was for the amount to be held in a suspense account (as part of the branch accounts) while under dispute, rather than being held in a separate central account (as is now the practice – settling centrally). Mr Bates confirmed that he knew he could, at the end of a trading period, either make a shortfall good or obtain authority to put it in the suspense account: {Day2/94:4} to {Day2/94:13}. This was set out in the Manual at {F4/5/76}. Mr Bates confirmed that he had every opportunity to then dispute the shortfall put in suspense: {Day2/98:3}.

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part of the account stated, irrespective of the administrative process by which the dispute is recorded. There was a time before Horizon and even before the internet; agents were nonetheless able to render an account whilst keeping parts of it under dispute. The SPMC pre-dates Horizon.

112. In considering these factual issues, the Court should not lose sight of the prior and more important point that what happened in practice (including what individual Cs knew from time-to-time and what Post Office's internal views may have been) are irrelevant and inadmissible as to the question of whether the contracts exclude or modify the accounting principles. That is a question of contractual interpretation.

113. Post Office also relies on the principle that where a fiduciary's breach of duty has led to an incomplete evidential picture, the Court will be "*entitled to make every assumption against the party whose conduct has deprived it of necessary evidence*": *per* Lord Millett, in the Hong Kong case of **Libertarian Investments Ltd v Hall**;[76] see also Snell's Equity, 20–018(4) {A1.3/4/7}. Cs have not identified anything in the contracts to exclude or modify the application of this principle.

114. It is important to bear in the mind the kind of factual situation that is encompassed by this principle. For example:

(a) An SPM may render false accounts for months, inflating the daily cash declarations to hide that there is a shortfall. There are examples of this in the lead claims: for illustration only, Mr Abdulla admitted in interview that he had inflated the cash declared in his branch in order to disguise shortfalls {E4/82/5};[77] Mrs Stockdale relied on the privilege against self-incrimination when asked how she had got her accounts to zero despite having shortfalls and without making them good or settling centrally: {Day4/203:17}; and Mrs Dar had the misfortune to engage an assistant who falsified cash declarations and seemingly lost or stole large amounts of foreign currency: {Day5/55:4} to {Day5/60:13}.

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[76] [2013] HKCFA 93, at para. 174 {A1.1/47/54}

[77] At trial. Mr Abdulla suggested implausibly that he had admitted to false accounting merely in order to get reinstated: {Day4/121:3}. The simple fact is that he had declared £2,500 more in mutilated notes than were in fact in the till. No honest explanation could be given for that.

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(b) Post Office's evidence at trial was that accurate and honest accounting is necessary to allow any effective investigation as to the root cause of any loss or shortfall: see, e.g., Ms Van Den Bogerd WS, paras 135-140 {C2/1/37}. Ms Van Den Bogerd explained in oral evidence that accurate and honest cash declarations would identify a shortfall when it arose: see {Day8/84:5} to {Day8/86:23}; {Day9/43:25} to {Day9/45:9} and {Day9/46:3} to {Day9/46:16}.

(c) Mr Howarth explained that a large shortfall disclosed in an audit would typically have been known to the SPM before then and may have accumulated over a long period of time but been hidden by false accounting: {Day11/120:5} to {Day11/123:21}.

(d) It is appropriate that the evidential difficulty created by false accounting work to the detriment of the dishonest agent, rather than the innocent principal.

115. Cs have advanced no case on the contractual exclusion or modification of any of the accounting principles.

116. Post Office respectfully invites the Court to hold that they apply to the contractual relationship.

(ii) It is for the SPM to show that he should not be bound by his account

117. The scope of the dispute between the parties on this issue is not entirely clear. It may even be common ground that it is for Cs to show that the account should not be binding (either in relation to a specific entry because it contains a mistake that should be corrected and/or because equity demands that the account be re-opened generally). Post Office respectfully invites the Court to hold that this principle applies to the accounts rendered to Post Office under the contracts.

118. This of course will not affect the treatment of amounts that are put in dispute and so do not form part of the account stated: see above.

119. In their Written Opening, Cs rely on the principle that an agent's account that has been accepted by the principal may be re-opened where the accounts were settled under undue influence on the part of the agent: Bowstead, at 6–098 {A1.3/113}. In

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that connection, they refer to three 19th century cases: **Watson v Rodwell**[78], **Coleman v Mellersh**[79], and **Lewes v Morgan**[80].

120. As to these authorities:

(a) **Watson** was a case in which an account was settled between a solicitor and his client principal, an elderly lady. The account was reopened because it was found that the principal had acted under undue influence and without sufficient information when she agreed the account. She was dependent on the solicitor's advice, and, abusing her trust, he "*avail[ed] himself against an unprotected client, a lady of advanced years*", by demanding the payment of improper charges: *per* James LJ, at p.158/ {A1.1/3/9}

(b) In **Coleman**, an account settled between solicitors and their client principal was reopened on the basis that the solicitor (the agent) had put in a false charge. The Court, *per* Lord Cottenham LC, said, at p.317, that this was "*not only an error in the sense in which the term is used for the purpose of opening accounts, but a misstatement and a false representation designedly made.*" {A1.1/2/4} Lord Cottenham noted that the Court could direct "*the taking of an open account*" if it would be "*inequitable for the accounting party to take advantage of it*" (emphasis added), and said that "*Amongst the grounds on which the Court rests the application of this principle, none are stronger than the fact that the accounting party was the solicitor or agent of the party sought to be charged, or that the circumstances gave him a commanding power or influence over him, or that the facts prove that he possessed and abused the confidence which had been reposed in him*" (pp.314-315) {A1.1/2/3}.

(c) **Lewes** was a broadly similar (although much more complicated) case, with broadly similar conclusions.[81] It is not an easy case to follow.

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[78] [1879] 11 Ch D150. {A1.1/3}

[79] [1850] 2 Mac & G 309. {A1.1/2}

[80] [1817] 5 Price 42. {A1.1/1}

[81] Per its internal summary, or quasi-headnote, at p.42: "*An attorney acting as agent for the mortgagor and mortgagee, in the matter of the mortgage, and as agent and quasi banker, for the mortgagor (that is, receiving the mortgage money, and giving his accountable receipts to*

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121. Standing back, we are left with three cases in which an agent was not allowed to rely on his own misconduct in securing his principal's agreement to the settlement of accounts. It is difficult to see how that could ever apply to a principal. Cs' Skeleton Argument for the last interlocutory hearing concedes that "*It does appear to be relevant whether the party seeking to reopen the settled accounts is the principal or the agent.*"[82] That rather seriously understates the position. Cs have cited no authority for the proposition that an agent can re-open the account that he has given in relation to his principal's business.

122. Indeed, in the (slightly more recent) case of **In Re Webb**[83], Davey LJ said at p.84 {A2/7/12}, referring to **Coleman**:

> *That is the law, as I understand it, stated by Lord Cottenham in Coleman v Mellersh, where he points out that there is this material difference in dealing with settled accounts where the parties between whom the account has been settled are in a fiduciary position and where they are not. Where they are in a fiduciary position the Court sets aside the account upon proof of some error and allows the account to be taken notwithstanding the settlement; but where the parties are not in a fiduciary position, upon proof of an error in the absence of fraud, all the Court does is to give an opportunity to surcharge and falsify.*

123. On the present state of the law, it is unclear whether and in what circumstances an agent may re-open an account that he has rendered to his principal and confirmed to be true. On the face of it, if that were to be permissible, the agent would at least have to show that he had been tricked by the principal into declaring a mistaken account and that the circumstances were otherwise such that equity would intervene to require

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the mortgagor), will not be allowed to charge the mortgaged premises with a greater sum, (although actually advanced by him on account of his principal and client, and within the amount of the sum to be borrowed on mortgage) than shall be proved to have been really paid to him in money by the mortgagees, on account of and as agent for the mortgagor." {A1.1/1/1} And per Baron Graham, at p.156: "*the final settlement of the accounts is the only argument that remains; but that has been answered again and again, by the fact of the peculiar circumstances in which these parties were situated.*" {A1.1/1/38}

[82] See at para. 81.1 at {B8.10/1/29}.

[83] [1894] 1 Ch 73.

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that the account be re-opened. Those circumstances might include the dealings between the agent and the principal and, in principle, even the personal circumstances of the agent (bearing in mind that the age and vulnerability of the elderly lady client appeared to be important to the result in the **Watson** case).

124. The Court is, however, not required to address those matters in detail at the present trial, for the reasons given below.

(iii) The application of the pleaded principles is not a matter for this trial

125. The issues for the Common Issues trial are whether the principles on which Post Office relies applied to the relationship (Common Issue 12) and whether, under those principles, SPMs bear the burden of proving that any statement that they signed or returned to Post Office was incorrect (Common Issue 13). Each of these issues goes to the nature of the relationship between Post Office and SPMs generally. They are accordingly appropriate issues to be decided as Common Issues, the determination of which will bind all Cs.

126. The further factual matters that Cs appear to want to investigate are not Common Issues. Cs appear to want to address, and obtain findings on, the individual accounts that the Lead Cs rendered to Post Office. There are four fundamental objections to that idea.

127. First, any issue as to whether or not a particular account falls to be corrected or re-opened is not a Common Issue. It is not directed for trial.

128. Second, unsurprisingly, therefore, Post Office has not adduced evidence in relation to the specific accounts that Cs seem to want to put in issue. Post Office has not, for example, sought to prove and obtain findings on the false accounting that it will allege in any trials as to breach / liability;[84] more generally, it has not led any evidence dealing with each of the potentially relevant branch accounts over the months and years that the lead Cs want to put in issue. The kind of detailed factual investigation that may be required in any dispute over specific accounts is clear from the **Castleton** case[85]: in that case, the Judge went through the accounts on a week-by-week basis,

[84] See, e.g. Stockdale Defence, para. 35(11)(c) {B5.6/3/17}.

[85] [2007] EWHC 5 (QB). {A1.1/30}

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analysing stock levels and hearing evidence from Fujitsu and from persons other than the SPM who had worked in the branch. Only 10 weeks of accounts were in issue, but the trial of that one case took 6 court days. It would be extremely unfair to make any findings (in favour of either side) on specific accounts in the absence of evidence from Post Office and in the absence of full disclosure.

129. Third, Cs' case on these issues necessarily overlaps with the factual issues for determination at the Horizon Trial. Cs cannot advance their case without, for example, findings as to Horizon's reliability and their ability to investigate shortfalls using it.[86] It would be inappropriate for the Court to express any views, let alone to make findings, on these issues in advance of their proper consideration in the Horizon Trial.

130. Fourth, the lead Cs have not pleaded by reference to specific accounts that they contend should be re-opened or corrected. In fact, the pleadings are entirely general and, in some instances, seem to assert hypothetical facts.[87] No specific account is properly in issue on the pleadings. In this context, Post Office has done what it can to give a generic response to some of the points that Cs have raised. Specifically, Post Office has accepted that if, in any particular case, Post Office instructed an SPM to sign off an account that it knew to be false and the SPM did so, it could not rely on the principles as to false accounting in relation to that account[88] (although this point does not strictly fall within the Common Issues).

131. It is possible that Cs might, following the Horizon Trial, argue that they have grounds to open the accounts based on the accounting system being faulty. But that is not a matter for the present trial.

Conclusion

132. Post Office respectfully invites the Court to answer "Yes" to Common Issue 12 and to determine Common Issue 13 as follows: "Yes, subject to any dispute that was raised at the time."

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[86] See, e.g., Bates Reply, para. 100.3. {B5.1/4/46}.

[87] See, e.g., Bates Reply, paras 100.2 as to when the principles "*would not apply*" {B5.1/4/45}.

[88] See, e.g., Bates Defence, para. 100(1). {B5.1/3/54}

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(2) RESPONSIBILITY FOR LOSSES (COMMON ISSUES 8 AND 9)

COMMON ISSUE 8

133. Common Issue 8 concerns "*the proper construction of section 12, clause 12 of the SPMC*":

> *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.*

Outline of the parties' contentions

134. Issues 8 and 9 concern the proper approach to responsibility for losses. They should be considered against the factual background of how accounting works in a Post Office branch, as described by Angela Van-Den-Bogerd at paras. 73 to 82, and 126 to 140, of her witness statement.[89]

135. Cs contend that clause 12 makes SPMs liable only for "*actual losses*" caused by negligence, carelessness or error on the part of either the SPM or his assistant and that the contract allocates a legal burden of proof to Post Office: see AGPOC, para 55. Cs also contend (apparently as a matter of construction) that the SPM would not be liable for any loss that was "*caused or contributed to by the Defendant's own breach of duty*".

136. Post Office submits that Cs' supposed "construction" of clause 12 is, in reality, no such thing. It is an unwarranted attempt to replace the term that the parties in fact agreed with one devised for the purposes of these proceedings. It also would lead to a position where Post Office could not, or it would be extremely difficult for Post Office to, recover shortfalls, to the extent that its very business model might not survive.

137. It is understandable that Cs should want to make sure that clause 12 cannot create liability for apparent shortfalls or losses that do not result from transactions in the branch (or anything else done in the branch) but instead result from bugs or errors in the Horizon system. But Cs do not need to do any violence to the clause to achieve

[89] {C2/1/22-25} and {C2/1/34-38}.

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that objective, because the clause does not, on its proper construction, extend to mere apparent shortfalls that are shown on Horizon and result from bugs or errors in the system. Cs want to write into the clause several vague, complex and uncommercial limitations that are aimed at preventing something that cannot happen even without those limitations.

138. Post Office's case on clause 12 is relatively simple and, more importantly, respects the plain language of the contract. In short:

(a) First, the term does not seek to define what qualifies as a "*loss*". It does not limit or modify the ordinary meaning of that word. The same is true of the word "*deficiency*", which it is common ground has the same meaning as "*shortfall*". Neither concept is defined to be whatever may be shown on Horizon. Crucially, on the plain meaning of these words, there is no "*deficiency*" where Horizon shows only an apparent shortfall, attributable to a bug or error in the system. There is only liability where there is in fact a shortfall.

(b) Second, the clause distinguishes between (1) liability in respect of shortfalls that result from losses caused by the SPM and (2) liability in respect of shortfalls that result from losses caused by the SPM's assistants. The distinction is important because liability in the latter case is strict, whereas liability in the former case is not.

(c) Third, as to the burden of proof, although this is not strictly a matter of contractual construction,[90] Post Office accepts that it bears the burden of showing a "*deficiency*" and a "*loss*" for the purpose of clause 12. A "*deficiency*" or shortfall that was generated by a bug or error Horizon could not be used to prove the existence of a "*loss*" under the clause. Aside from this, the term should be read consistently with the SPM's duty to account to Post Office as fiduciary and the agency law principles on which Post Office relies more generally. In that context, and as a matter of making commercial sense of the clause, the words of clause 12 cannot legitimately be read as imposing a "*contractual burden*" of proof on Post Office to identify the

[90] This point does not, therefore, fall within Common Issue 8.

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specific losses underlying the shortfall and show them to have resulted from the SPM's negligence, carelessness or error (or that of an assistant). There is no express contractual allocation of the burden of proof on these matters.

(i) The meanings of "deficiency" and "loss" under the clause

139. The clause operates by reference to two important concepts – a "*deficiency*" and a "*loss*".[91] It is common ground that the former[92] term is synonymous with "*shortfall*", the term that is more commonly used in practice.

140. There is nothing in the words of the clause or in the admissible background to suggest that "*deficiency*" was intended to refer to anything other than a shortfall between:

(a) The cash and stock that the SPM declares he holds in the branch (or that is identified in branch on an audit). These can be called the "actual" cash and stock figures.

(b) The cash and stock that *should be* in the branch, based on the transactions conducted in the branch (i.e. derived figures for cash and stock). These can be called the "should be" cash and stock figures.

141. The clause does not use "*deficiency*" to mean whatever is presented as such on Horizon to the exclusion of all other information, not least because the clause was drafted and in use for many years before Horizon even existed. To determine the cash and stock that "*should be*" in the branch, one needs to look at all the accounting information about the transactions conducted in a branch. The branch accounts held on Horizon are a key part of this (and in some cases may be determinative of the issue) but one may also need to factor in sums settled centrally and any disputes raised by the SPM. Horizon is only ever evidence of the accounting position.

142. In any event, clause 12 does not require SPMs to make good all deficiencies. It is only deficiencies that result from losses for which the SPM is responsible that must be made good: "*Deficiencies due to such losses must be made good without delay*"

[91] SPMs and Post Office staff often use the terms "loss" and "shortfall" interchangeably, but the two concepts are importantly distinct.

[92] In the Written Opening Submissions, there was a drafting error in para. 90 (where "*latter*" appeared instead of "*former*") {A/2/27}.

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(emphasis added). Post Office itself bears the cost of any other deficiencies, however they arise.

143. In addition to the textual analysis, only Post Office's construction of clause 12 makes commercial sense and fits into the contractual relationship as a whole. Putting Horizon to one side, it is important to recognise the fundamental difference between Post Office's case on clause 12 and the case advanced by Cs. Post Office contends that clause 12 forms part of the accounting relationship between Post Office and the SPM. It does not relate to the relationship between Post Office and the customer or Post Office and the third-party client. Post Office is responsible for the transaction as a whole (and is liable as such to the third-party client and the customer), whereas the SPM is only responsible for the branch operations and for effecting transactions correctly. If the SPM makes no error, it does not matter what ultimately happens in the transaction – if an SPM correctly processes a cheque in payment for stock, it is Post Office that loses out if the cheque then bounces. This is essential context to the construction of the clause.

144. It would be obvious to anyone considering the commercial context of the agreement that Post Office could not be expected to somehow involve each and every one of the many thousands of SPM in its dealings with third-party clients behind the scenes. That would be unworkable.

(ii) A loss caused by Horizon would not qualify under section 12, clause 12

145. Post Office pleads at GDXC, para. 41 a meaning for the word "*loss*" in the context of the accounting relationship between the parties – in short, any event that causes a negative difference between two things: (1) the actual cash and stock position in the branch and (2) the cash and stock position for the branch derived from the transactions conducted in the branch – the cash and stock that there should be. This would, on the natural meaning of the word "*loss*", include both (1) physical losses, such as mislaying or stealing cash from the branch and (2) transaction losses in the branch, such as mis-recording a £10 bank account deposit as £100 (thereby causing Post Office to pay £100 to the customer's bank but the branch only taking £10 over the counter).

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146. It follows that a deficiency giving rise to liability under clause 12 must be one that results from a loss-causing event (or more than one such event) in the branch.

147. Crucially, the clause does not impose liability for any apparent deficiency that results instead from a bug or error in Horizon, i.e. a "*Horizon-generated shortfall*" as defined at GDXC, para. 41 {B3/2/16}). If Horizon is affected by some bug or error that prevents it showing the true data for the branch transactions, what the system shows when it conducts a balance is not the comparison between the "actual" and "should be" positions for cash and stock that is essential to the concept of a deficiency or shortfall.

148. For example, if Horizon were to be affected by a bug that caused it to inject £100 into the derived (*should be*) cash figure for the branch, the accounts on Horizon may then show an apparent shortfall of £100, but that would not be the result of either a physical loss or a transaction loss at the branch. In this scenario, the information on Horizon would not be reflecting the cash and stock that *should be* in the branch, and the £100 apparent shortfall would not be a "*deficiency*" within the meaning of clause 12

149. Cs ignore this basic and important point because it suits them to suggest that Post Office's case is that clause 12 can somehow be used to impose liability for apparent shortfalls that are generated by bugs in Horizon, rather than resulting from the conduct of the branch. Cs use this to distract the Court from the true issues that arise under that clause. If Horizon fails to reflect the transactions entered into the system by the SPM or branch staff, its error does not create liability.

(iii) Post Office's detailed submissions on the meaning of "loss"

150. Loss is an ordinary word. As noted above, it is used here to refer to transaction (or accounting) losses, which is one of its ordinary uses, and also to physical losses in the sense of cash or stock going missing, being stolen or being lost to damage or fire, etc.

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The clause does not distinguish between types of loss because they all result in the same thing: a shortfall on the account.[93]

151. A loss is an event that results in there being less cash or stock than there should be based on the transactions that have been conducted in the branch. To take two examples:

(a) If an assistant sells 1 packet of stamps but accidentally provides the customer with 2 packets of stamps, that event gives rise to a loss of 1 packet of stamps. There is a loss on a specific transaction.

(b) If, over a day, the branch conducts transactions that, taken together, should result in a net outflow of £1,000 in cash, but at the end of the day the branch declares cash that is £1,100 lower than it was on the previous day, there is a loss of £100, taking the transactions on that day together. This daily loss may have arisen from a single event or it could have arisen incrementally from a number of smaller loss-causing events (such as an assistant giving too much change or putting cash in the wrong till).

152. This is basic and essential to the accounting relationship: if the accounting party has less cash and stock than follows from his dealings with the principal's assets, there is a shortfall, and there must logically have been at least one underlying loss-causing event.[94]

(iv) Cs' case on "loss": four supposed restrictions on Post Office's ability to enforce a shortfall

153. Cs have not identified any specific factual matrix said to bear on the meaning of the word "*loss*" in clause 12. There is no good reason to give it anything other than its ordinary meaning, which includes an accounting / transaction loss.

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[93] Strictly, a loss will necessarily result in a shortfall unless it is cancelled out by a gain (or gains) or a Transaction Correction of equal or greater size before the end of the accounting period.

[94] Similarly, if the accounting party has more cash and stock than follows from his dealings with the principal's assets, there is a gain. He may take the benefit of that gain at the end of the accounting period.

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154. Cs nonetheless assert that clause 12 extends only to "*actual losses*", a concept that does not appear anywhere in the contract and that Cs even now cannot define. Cs provide at para. 55 of the AGPOC examples of what they say would not qualify as an "*actual loss*", i.e. examples of what the concept excludes. But there is no attempt to define the positive content of the phrase. If Cs wanted simply to clarify that "*loss*" would not include a loss that was only apparent (i.e. did not in fact exist), that could hardly be controversial. But Cs want instead to import a whole raft of limitations as to what qualifies as "*actual*" or "*real*" under clause 12.

155. This is clear from Cs' pleaded examples of what the concept of an "*actual loss*" would exclude. These examples show that importing the concept would involve nothing short of a radical re-drafting of clause 12. In effect, Cs advance three restrictions on Post Office's ability to require SPMs to make the account whole, none of which appears in the clause; all of them must be somehow implicit in the use of the word "*loss*".

156. Notably, the restrictions go well beyond any sensible attempt to try to exclude liability for shortfalls generated by bugs or errors in Horizon (which, as explained above, does not require any words to be read in). Cs' approach involves a wholesale assault on the SPM's liability for branch losses.

157. The first restriction is that there will be no "*actual loss*" where such loss does not "*represent a real loss to the Defendant*". This piles a second vague concept – a "*real loss to the Defendant*" – on top of the first vague concept of an "*actual loss*". If, which is unclear, Cs intend to distinguish between a loss in the branch and some ultimate economic detriment to Post Office, that is plainly not what is intended by the word "*loss*":

    (a) There is nothing in the clause or the contract as a whole to support the idea that identifying a loss requires an investigation of Post Office's ultimate economic position.

    (b) The SPM is under a duty to account to Post Office. The business conducted in the branch is Post Office business, conducted through its agent, the SPM. It would involve a fundamental subversion of the basic principles of the relationship to turn the focus away from the agent's conduct of the branch and

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onto the presence or absence of an ultimate economic detriment to the principal. Post Office is entitled to an account of the transactions undertaken with its assets, and it is entitled to the net cash that results from those transactions and the payment by the agent of any shortfall. Similarly, the SPM is responsible only for the conduct of the branch, and not the overall transaction from customer to third-party client (with all the regulatory and commercial duties and risks that those transactions may involve).

158. It is useful to test Cs' preferred construction of clause 12 against a hypothetical scenario:

(a) An assistant processes a £100 bank deposit in the branch, but he in fact takes only £10 in cash from the customer.

(b) On any sensible view, this generates a loss of £90 in the branch: the transaction creates a liability for £100 but only £10 of that liability is offset by the money taken in.

(c) But on Cs' case, there is not necessarily a loss at this point. There could only be a potential loss. The "*actual loss*" or "*real loss*" would only occur / crystallise once Post Office is in fact out of pocket as a result of the transaction – i.e. when it pays over £100 to the bank but receives only £10 from the branch. If the SPM accounts to Post Office before the ultimate position is resolved with the bank and the customer, his account would presumably have to show some kind of contingent or incipient loss. The SPM would not know whether there was an "*actual loss*" until Post Office had concluded its dealings with the third-party client and reported those to the SPM. This process could take time, leaving the SPM in limbo and unable to finalise his accounts. That would be a bizarrely and unnecessarily complex accounting relationship to have agreed.

(d) There is nothing in the contract or any of the matrix of fact to suggest that the parties intended to create such a heavily modified accounting relationship. It is alien to the simple accounting process that the parties adopted and that provides the immediate context to the construction of clause 12. The SPM should not have to ask questions of Post Office to find out whether the branch

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operations, for which she is responsible, have resulted in a loss; Post Office should not have to report to the SPM in relation to its dealings with its third-party clients. Both parties are entitled to the benefit of the account between them.

159. This hypothetical scenario can be taken further to demonstrate the logical irrelevance of what ultimately happens between Post Office and its third-party client:

(a) If the bank were, for whatever reason, to fail to recover the £100 from Post Office, Cs would presumably argue that there would be no "*real loss*" to Post Office and so no "*actual loss*" under clause 12.

(b) Cs' case would require that Post Office pass on to the SPM the benefit of the bank's failure to recover in relation to the deposit. But if that were right, logically Post Office would also be able to pass on to the SPM any detriment that it suffers where a client fails to meet its side of a transaction. If Post Office were unable to recover from a bank in respect of a cash withdrawal made in a particular branch, for example, Cs case would seem to imply that Post Office could call on the relevant SPM to indemnify it against the loss it would suffer. This would be so even though the branch account would (correctly) show no shortfall. Cs' construction makes a nonsense of the agreement and ignores the obvious commercial logic that underpins it.

(c) In reality, the position is much simpler: the SPM effects the transaction for Post Office, and it is Post Office that is responsible for that transaction with the client and the customer, for good and for bad. [95] It is Post Office that may be sued by the client or the customer. The accounting position between Post Office and the SPM must make commercial sense on its own terms, rather than depending on what ultimately may happen with Post Office's third-party client or the customer. That is part of the essence of an accounting relationship: it is largely self-contained, and it protects the SPM from the commercial risk of the

[95] See Angela van Den Bogerd WS, paras 79-80 as to the absence of commercial sense to the suggestion that Post Office should somehow involve the SPM in its relationships with clients. {C2/1/24}

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business that it carries out on Post Office's behalf. [96] This is a huge advantage to the SPM relative to operating a substantial and cash-intensive business on his own account.

160. Further, there is again no reason to strain the language of the contract to achieve the result that Cs seem to want to achieve. The goal of this part of Cs' construction of the clause appears to be to prevent the SPM being out of pocket where the transaction was mistaken and can be corrected. There is no need to do violence to clause 12 to achieve that. The contract already provides adequate and appropriate protection for that eventuality. Specifically, in the scenario set out above – the deposit of £100 where only £10 in cash was taken from the customer:

(a) It could be that the SPM intended to carry out a deposit for £10, i.e. the amount collected from the customer was "right" but the deposit that the SPM in fact recorded (£100) was "wrong".[97]

(b) If the bank is informed of the mistake and agrees to it being corrected, Post Office would propose a Transaction Correction to the branch, which (if accepted) would reverse the £90 loss at the branch. Post Office accepts that it is required by the contracts to propose corrections to branch accounts where it becomes aware of an error that can be corrected, including from information provided to it by third-party clients. It would be a breach of the Necessary Cooperation Term for Post Office to fail to propose a correction in that circumstance.

(c) But unless and until a correction takes place, the SPM's error has caused a loss on the branch accounts, and there is nothing surprising or unfair about his being liable in relation to it. It is commercially reasonable for the cost of the error to rest with the accounting party, unless and until the transaction and the account are corrected.

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[96] Ms Van Den Bogerd describes in para.77 of her WS the distinction between responsibility for the transaction as a whole (which the SPM does not have) and responsibility for the branch operations and accounts (which the SPM does have). {C2/1/23}

[97] Equally, however, it could be that it was the amount of money taken that was the error. Either part of the intended transaction could have been performed wrongly.

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161. The second restriction that Cs say flows from the use of the word "*loss*" being taken to mean "*actual loss*" is that there would be no loss until it is "*established by the Defendant, after due enquiry, to be such a real loss*". No explanation is given as to how the words of the contract are said to give rise to that condition. Clause 12 does not refer to any action by Post Office, let alone "*due enquiry*". Again, Cs advance a case that does not involve construction or interpretation at all, but a re-writing of the agreement.

162. In any event, Cs' construction here makes no commercial sense. On Cs' case, Post Office would be required to carry out "*due enquiry*" into the loss or losses underlying each and every shortfall in the thousands of branches across its network. The obligation would be extremely broad, onerous and unreasonable. No rational commercial party in Post Office's position would ever have agreed to. Further:

(a) The obligation would apparently apply to all shortfalls, even where (as in in the overwhelming majority of cases) the shortfall is not disputed by the SPM. There is no commercial or even rational justification for that.

(b) The contract reflects the SPM's common law duty to account to Post Office. The essence of an accounting relationship is that the parties are ordinarily entitled to rely on the account. The proposed obligation is inconsistent with the accounting relationship and would remove much of its benefit to both parties.

(c) An obligation on Post Office to investigate and identify the underlying loss(es) before requiring repayment of a shortfall would generate a perverse incentive for SPMs to maintain poor records or, in an extreme case, actively conceal the circumstances leading to shortfalls.

(d) The supposed obligation to make "*due enquiry*" is vague and unlikely to be the subject of agreement by any sophisticated commercial party. It would inevitably lead to disputes as to what enquiry was "*due*" in all the circumstances of any shortfall, bearing in mind that Post Office is not present in the agency branch and has no first-hand knowledge of its transactions. Further, the object of enquiry is itself unclear: it is to ascertain whether the shortfall in the account "*represents a real loss to*" Post Office, but it is unclear even now what Cs mean by a "*real loss*". There is nothing in the contract to

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suggest that the parties had such a concept in mind at all, let alone that it would control the operation of clause 12 and subvert the accounting relationship.

163. Cs then try to impose a third restriction that is not set out in the clause, namely that Post Office cannot enforce any shortfall where the underlying loss was "*caused or contributed to by the Defendant's own breach of duty*". This is not a process of construction. There is nothing in the clause or the contract to give rise to such a restriction. Cs want to restrict Post Office's ability to exercise its rights under clause 12 where it is itself in breach of contract (in some relevant way), but that is a legal argument and not a matter of construing the clause.

164. In **Carewatch Care Services v Focus Caring Services**[98] {A1.1/53/1}, Henderson J rejected an attempt to import into a franchise contract the principle that a party is not entitled to benefit from its own wrong. The principle was pleaded in that case as an implied term. He refused to imply the term on the basis that it was "*essentially a proposition of law* and "*not really an implied term at all*".[99] The same point applies to Cs' attempt to restrict the operation of clause 12 by reference to a proposition of law that Post Office's (unspecified) breach of contract may prevent it relying on its rights under the clause. As in **Carewatch**,[100] it is of course possible that the principle of law that Cs seek to rely upon could help them in some cases, but it does not form part of the contract (whether by construction or by implying a term).

165. Taken as a whole, Cs' restrictions do not amount to any genuine attempt to construe the words of clause 12 against the admissible background to the agreement. None of them should be implied by way of supposed construction of the clause.

(v) Distinction between the SPM's personal liability and liability for assistants

166. The words of the term draw a clear distinction between liability in two distinct factual circumstances:

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[98] [2014] EWHC 2313 (Ch).

[99] ibid, at paras 102 to 103. {A1.1/53/32}

[100] ibid, at para. 112. {A1.1/53/35}

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(a) Liability for shortfalls where the underlying losses resulted from acts or omissions on the part of assistants, where there is no fault requirement – using the words "*losses of all kinds caused by…Assistants*" (emphasis added).

(b) Liability for shortfalls where the underlying losses resulted from acts or omissions on the part of the SPM, where a degree of fault is required – using the words "*all losses caused through his own negligence, carelessness or error*".

167. Cs' attempt to remove this distinction would do gross violence to the words of the clause and, in particular, the use of the plain words "*losses of all kinds*" as regards assistants. Cs' construction is not supported by any linguistically available reading of the words used in the clause. It flies in the face of those words.

168. Post Office makes two further points in relation to the distinction.

169. First, the fact of strict liability for losses caused by assistants is clear from other provisions of the contract: see, most notably, section 15, clause 2, providing (amongst other things) that the SPM "*will also be required to make good any deficiency, of cash or stock, which may result from his assistants' actions*" (emphasis added). Clause 12 must be read so as to cohere with the rest of the contract.

170. Second, the basic commercial sense of the distinction is obvious:

(a) It is immaterial, as between the SPM and Post Office, whether or not the assistant acted carelessly, negligently or committed an error. The assistant could, for example, cause a loss by diligently following mistaken instructions given by the SPM.

(b) Post Office has no contractual relationship with the assistant. Post Office does not even require that the SPM employ assistants. If he does, Post Office does not require that they perform any specific roles or tasks within the branch.[101] Post Office has no substantial involvement in the selection and supervision of

[101] In practice (and as would be understood or at least anticipated by an applicant for the role), SPMs take differing approaches to how they manage and staff their branches: see Angela Van Den Bogerd WS, para. 71 {C2/1/21}.

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assistants. There is no reason for Post Office to be willing to absorb the cost of any losses caused by assistants.

(c) It is the SPM, and not Post Office, that decides whether to employ an assistant and, if so, whom to employ and in what specific role. It is the SPM, and not Post Office, that is then able (and required by the contract) to monitor his assistants for competence and honesty and to provide such training and/or assistance as may be necessary.

(d) The use of an assistant is therefore fairly at the SPM's risk in the sense that, where an assistant causes a loss in the branch, it is the SPM (as his employer) that is liable for that loss. It is for the SPM to reflect that risk as he sees fit in the terms of his contractual relationship with his assistants.

(e) By contrast, the SPM was selected by Post Office, and he has a contractual relationship with Post Office. It is commercially rational for Post Office to be prepared to absorb the cost where its agent causes a loss acting within his authority and without negligence, carelessness or error.[102]

(vi) The burden of proof

171. Post Office's case is that the burden of proof in relation to any specific disputed shortfall will ultimately be determined largely by reference to the principles of agency and accounting and the ordinary common law principles by which the burden of proof is allocated. Post Office pleads these principles at paras 69(3), 93 and 183 of the GDXC. Ultimately, disputes as to whether or not a shortfall shown on Horizon gives rise to liability under section 12, clause 12 will depend on the facts of the individual case (including, where relevant, the grounds on which the reliability of the evidence provided by Horizon is called into question).

172. It follows that the bulk of Post Office's case on the burden of proof does not strictly fall under Common Issues 8 and 9, as these issues are concerned only with contractual construction.

[102] It would be equally rational for liability to be strict or near-strict. There is a range of commercially rational and comprehensible bargains that could have been struck. The words of the clause are the surest indicator as to which of those bargains was in fact struck.

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(vii) The requirement to prove a deficiency

173. The contract does, however, identify the factual issues in relation to which the burden of proof must ultimately be allocated. Most notably, clause 12 only applies at all where there is a "*deficiency*". There are three important points in relation to this issue.

174. First, Post Office accepts that it, as the party asserting that there is a deficiency, bears the burden of proving it. This is not strictly a matter of construction, but it is important. It shows there to be nothing in Cs' argument that SPMs are somehow loaded with an impossible burden.

175. The Court, like Post Office's witnesses, will doubtless be presented with hypothetical scenarios in which it is said SPMs would unfairly be put in an impossible position, but there is a limit to how instructive these scenarios can be when it comes to construing the contract, given that they are typically extreme and/or fail to take proper account of the full circumstances that would be relevant to the assumed facts.

176. Second, Post Office will ordinarily seek to prove the existence of a deficiency (shortfall) by reference to the branch accounts. There are therefore two different types of case:

(a) Where the SPM has signed off on the relevant account[103], it will be for the SPM to challenge the finality of the account by showing a mistake in it that should be corrected and/or showing that equity otherwise requires that the account be re-opened entirely. That gives rise a case-specific factual enquiry that could extend to a consideration of the circumstances in which the account was settled (e.g. where economic duress is asserted). The SPM can also call Horizon's accuracy into question in alleging that there is a mistake in the account shown on Horizon and/or that the accounts should be re-opened generally.

(b) Where the deficiency is not apparent from accounts that have been signed off, any dispute as to the accuracy of the figures on which Post Office relies to show a deficiency is at large. Post Office may rely on an inference from the

[103] Or otherwise rendered an account to Post Office such that the principle pleaded at para. 93(2) of the GDXC applies.

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general reliability of Horizon, whereas the SPM may argue that the figures shown on Horizon should not be taken to be reliable (generally and/or by reference to factors specific to the branch or even the particular account at issue).

177. In both scenarios, the strength of the case on each side will depend, in large part, on the resolution of the issues to be considered at the Horizon Trial. If, for example, Horizon has a high degree of reliability, it will inevitably be harder (all else being equal) to suggest that a bug or error led to a mistake in the account that gave rise to an apparent shortfall. If the opposite is true, it may be much easier for the SPM to undermine Post Office's reliance on Horizon. There may also be factors specific to a given branch at a given time – Mrs Stubbs, for example, raises the possibility of problems between the system in the portacabin and related equipment in the main building. In both scenarios, Post Office bears the ultimate legal burden of proving the deficiency.

178. Once it established that Post Office bears the burden of showing a deficiency and that a mere apparent shortfall would not qualify as such, there is relatively little practical importance to the dispute over the burden of proof under clause 12. This is for two reasons:

(a) First, the fact of a discrepancy / shortfall itself proves by necessary inference that there must have been one or more losses in the relevant period.[104] Proof of a deficiency necessarily implies proof of a loss.

(b) Second, the only remaining issue is therefore whether the loss is a qualifying loss under the words of clause 12, namely a loss that was either (1) caused by an assistant or (2) caused by an SPM's own negligence, carelessness or error.

(viii) The burden of proof as to who caused a loss and whether there was negligence etc

179. As to this remaining issue, Cs plead at para. 55 of the AGPOC that clause 12 places a "*contractual burden of proof*" on Post Office to prove that the underlying loss was

[104] This is complicated slightly by the use of Transaction Corrections, but these can only affect which accounting period shows the shortfall, and not whether one exists at all.

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caused by the negligence, carelessness or error on the part of the SPM or an assistant. The contention that liability for losses caused by assistants is fault-based has been addressed above.

180. On the burden of proof, the first point is that clause 12 does not, on its face, deal with the burden of proof at all. It does not identify the party that must prove or show any particular fact. It does not even use the language of proving or showing. There is no express allocation.

181. Cs are forced to argue, therefore, that clause 12 somehow implicitly allocates a contractual burden of proof to Post Office. That is a hopeless contention, for three reasons.

182. First, there is nothing in the clause or the part of the contract in which the term appears to suggest that the parties intended a contractual allocation of a burden of proof on this issue.

183. Second, the parties contracted against the background of the agency and accounting principles on which Post Office relies in the GDXC. Those principles are relevant background to the construction of clause 12, irrespective of whether they were known to the SPM.[105] The parties expressly chose a relationship of principal and agent.[106] The contract includes provisions that reflect and coincide with the ordinary legal incidents of that relationship: see section 12, clause 3, imposing a duty to maintain and produce accounts as requested. Cs appear to accept that SPMs are accounting parties.

184. These incidents of the agency accounting relationship include that the accounting party is ordinarily bound by the account that he renders to his principal unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account that he should be permitted to correct: see GDXC, para. 93(2), reflecting the rule identified in Bowstead at 6-098 {A1.3/1/12}. He can also seek to re-open the account on equitable grounds (as Cs now argue). But it is for him to show that this is

[105] See **First Abu Dhabi Bank v BP Oil International** [2018] EWCA Civ 14 at para. 37(iii) *per* Gloster LJ (with whom Patten LJ and Lord Briggs agreed). {A1.1/74/19}

[106] Section 1, clause 1 of the SPMC {D2.1/3/5}.

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justified. Against this legal background, there is nothing in the clause to suggest that the parties intended to create an unusual bespoke regime that would put the onus on the principal to prove that the account should be made whole.

185. Third, and in any event, the allocation of a burden to Post Office would be so commercially unreasonable that the Court should strain against that outcome, rather than seeking to impose it without any clear basis in the words of clause 12.

186. The first step is to test the proposed construction against the sense of the clause as a whole:

(a) The clause makes a clear distinction between liability in respect of shortfalls that result from losses caused by assistants, where liability is strict, and liability in respect of shortfalls that result from losses caused by the SPM, where it is not. There is an inescapable contractual intention to treat the two situations differently.

(b) Because liability is strict where an assistant caused the loss, if the SPM wishes to dispute liability on the basis that the loss did not result from negligence, carelessness or error, he must first say that it was him, rather than an assistant, that caused it. It is for the SPM to prove that assertion, not least given that it entitles him to the potential benefit of an exception to liability. The factual enquiry that goes to that initial question overlaps substantially with the enquiry as to whether the loss arose from negligence, carelessness or error: most obviously, the loss itself must be identified or at least localised by time and/or by transaction before the person responsible can be identified and the issue of fault explored.

(c) It is here that the matters pleaded by Post Office in para. 93 of the GDXC come into play: losses do not arise in the ordinary cause without negligence, careless or error[107]; the truth of the matter as to whether the loss in a particular case did so arise lies within the peculiar knowledge of the SPM as the person with conduct of the branch operations; it would be unjust for Post Office to be required to prove something (the presence or absence of negligence or error in

[107] See the examples given at paras 117-125 of Ms Van Den Bogerd's WS {C2/1/33}.

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causing the loss) that falls within the peculiar knowledge of the SPM; and where a person, such as the SPM, is subject to a fiduciary obligation as regards his dealing with assets, it is for him to justify his dealing with those assets. These points are principally relevant to the allocation of the legal burden under the usual principles applied by the Court, rather than contractual construction, but they reveal the lack of commercial sense in Cs' suggestion that the contract implicitly allocates a burden to Post Office. The account itself will show only that there is a shortfall (and so there must necessarily[108] have been one or more losses). Much of what remains to be known inevitably falls within the knowledge and responsibility of the person who operates the branch in which the loss occurred. Applying the usual principles as to allocation of the legal burden would result in the burden falling on the SPM. There is nothing in the contract to justify a stark departure from that outcome.

187. It may be important to note that the practical importance of the legal burden on this issue would often be relatively small. Were Post Office to bear the legal burden, it would typically be able to discharge that burden by relying on an inference of negligence, carelessness or error from the simple fact of the loss. In circumstances where Horizon cannot be blamed for the loss (because, if it were, there would be no deficiency under clause 12 in the first place), it is difficult to imagine how a loss could arise without negligence, carelessness or error.[109] At the very least, the SPM would have to give some particular explanation as to how he caused a loss but did so without any error on his part. Post Office accepts that one such circumstance would be where the SPM was, in causing the loss, merely doing, in good faith, something that Post Office had instructed him to do (because, in that case, the error would be that of Post Office, rather than the SPM). But that situation is unlikely to arise with any real frequency relative to the ordinary run of slips and mistakes.

188. Cs put in cross-examination a hypothetical scenario in which the SPM failed properly to check the stock provided by Post Office, entering more stock into the system than

[108] It is important to recall here that a Horizon-generated shortfall would not engage section 12, clause 12 at all for the reasons given above.

[109] This was the approach of HHJ Havery in **Post Office Limited v Castleton** [2007] EWHC 5, at paras 2 (last line), 39 and 40. {A1.1/30/2} and {A1.1/30/12}

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had in fact been provided: see {Day8/145:23} to {Day8/149:8}. In the scenario, Post Office had failed to send the right amount of stock, and the SPM had failed to notice and so had entered the wrong amount. The witness was then asked to express a view as to which of the SPM and Post Office would be at fault for "*any loss that resulted*".

189. The scenario was, somewhat unhelpfully, not grounded in the operation of the accounting relationship. If the scenario is unpacked and tested, the correct analysis is obvious:

(a) The SPM is required to check the stock that he receives in branch and to record the stock correctly in the accounts (specifically, on Horizon).

(b) If the SPM miscounts the stock and enters the wrong amount into Horizon, this will feed into the derived figures for stock (i.e. the system will expect there to be the amount of stock recorded as having been received and will deduct from that figure when there are sales).

(c) If the SPM realises his error, he can request a Transaction Correction to correct the stock figure. On Mr Green's hypothetical facts, the stock was indeed over-counted, and a TC would be made to reflect that.

(d) Once the TC is made and accepted, the branch accounts would be corrected to show the true figure for the stock received in branch, which would then feed into the derived stock figures that are used to identify any shortfall in stock (by comparison with the stock actually held in branch at a given time).

(e) The corrected accounts would therefore show no loss and no shortfall. Fault would not enter into it. The question put to the witness, which related to fault, was therefore misconceived.

190. At a more basic level, however, Cs' approach to the hypothetical was telling. Mr Green observed that the "*emphasis of this is on effectively the subpostmaster or postmistress checking things themselves a lot, isn't it?"*, as though that were surprising or unreasonable or unfair: {Day9/149:9}. The SPM is responsible for the branch and for properly accounting for the cash, stock and transactions in the branch. The contracts make that abundantly clear. There is nothing unusual, let alone unfair,

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about an agent having to conduct proper checks to confirm the cash and stock entering and leaving the branch.

191. It is useful to test the commercial sense of Cs' construction of clause 12 against different (and inherently more likely) hypothetical facts that are obviously within the contemplation of the agreement:

(a) Assume an incompetent assistant that often (but without any dishonest intent) gives the wrong amount of change to customers.[110] The SPM is in a position to supervise his or her assistants and to identify any lack of competence or diligence. Post Office, by contrast, is not in the branch and has no relationship with the assistants. On the face of the account available to Post Office, a transaction that involves an overpayment of change is identical to one that does not, and the loss will only be revealed in the accounts once a physical count of cash is undertaken and compared against the accounting position.

(b) Assume a branch in which the division between Post Office business and the associated retail business is not well observed by the assistants, and cash sometimes goes into the wrong till.[111] The "root cause" of shortfalls in the branch would be the physical act of putting cash in the wrong till – something that leaves no trace on the account available to Post Office but can and should be prevented by the person who has responsibility for the branch operations.

(c) Assume an SPM or assistant with an intention to steal Post Office cash. It is common ground that there are dishonest SPMs and assistants.[112] Under its agency branch business model, Post Office is exposed to the risk of dishonesty on the part of the agents to whom it entrusts its cash and stock. It is also

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[110] Incompetence of this kind will tend to lead to shortfalls (rather than net gains) for the obvious reason that people are more likely to report being given too little change than too much.

[111] Section 12, clause 3 requires the SPM, amongst other things, to "*be careful to keep the Post Office money separate from any other monies*" {D2.1/3/51}.

[112] There were vivid examples in the evidence at trial, including Ms Dar's experience with an apparently dishonest and/or incompetent assistant (see {Day5/55:4} to {Day5/60:13}) and Mrs Stubbs' experience with an apparently dishonest and/or incompetent "holiday relief" (see {Day2/160:13} to {Day2/162:21}).

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exposed to dishonesty on the part of persons that those agents then choose to employ to work in its branches. If Post Office were required, before enforcing a shortfall shown in the submitted accounts, to identify and prove the event that caused loss and then to go on to prove the existence of negligence, carelessness or error in that event, the dishonest SPM could remove Post Office cash from the branch with near-impunity. There would be nothing on the account to identify that cash was being taken from a till or never put into it. Mrs Stubbs explained that she was herself in this position when a holiday relief assistant lost or stole £600 while she and her husband were away. They had "*no idea what this gentleman had done*", and it would have been futile to try to trace the underlying cause of the loss (which could have been simple theft): see {Day2/160:23} to {Day2/162:21}.

192. It would make no commercial sense for the contract to allocate a burden of proof to Post Office in relation to matters that turn, at least in large part, on what in fact takes place in the branch. It would generate perverse incentives and would undermine the viability of the network and the agency business model. There is no such allocation.

193. In the alternative, for the same reasons as set out above, Post Office contends that any implicit allocation of the burden would result in the following: where an SPM disputes liability for a deficiency under clause 12 on the basis that there was no negligence, carelessness or error, he must show (1) that it was his act (rather than that of an assistant) that caused the loss and (2) that the loss did not involve negligence, carelessness or error. This would be consistent with section 12, clauses 17 and 18, each of which envisages the onus being on the SPM to prove the facts relevant to "*relief*" from liability.

Cs' miscellaneous points

194. Cs invoke the *contra proferentem* principle in relation to clause 12 (and generally).[113] But they do not identify any ambiguity in the words of the clause that should be resolved against Post Office in accordance with that principle. The principle is of (at best) very limited use in construing commercial contracts (see para. **Error! Reference source not found.** above), and it has no application here.

[113] See, e.g., Bates IPOC, para. 98.1. {B5.1/2/28}

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195. Cs' case that clause 12 is onerous, oppressive and/or unfair is addressed under Common Issues 5, 6 and 7. In short, Cs' attack on the clause is misguided and misplaced, not least because the clause is consistent with the common law that applies to accounting parties and so can hardly be said to onerous, oppressive or unfair.

COMMON ISSUE 9

196. Common Issue 9 concerns "*the proper construction of Part 2, paragraph 4.1 of the NTC*". Post Office refers to this below as "para. 4.1". It reads as follows:

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

Outline of the parties' contentions

197. Cs' only pleaded case on para. 4.1 is that it should be construed as having the same meaning as section 12, clause 12 of the SPMC (addressed above): see AGPOC, para 55.[114] Para. 4.1 is said to be a "*similar clause*" to clause 12.[115]

198. This shows almost total disregard for the words of the contracts. No matter how inventive an approach to construction is taken, para. 4.1 cannot be read as having the same meaning and effect as section 12, clause 12. At the most basic level, the words of the two terms are very different. That does not totally preclude them having the same meaning, but it is certainly not a good starting point for Cs' contention.

199. Cs tried in cross-examination to extract evidence from Post Office witnesses to support the idea that the two terms should be read to mean the same thing: see, for

[114] {B3/1/24}

[115] The IPOCs take Common Issues 8 and 9 together: see, e.g., Bates IPOC, paras 98-99 {B5.1/2/28}.

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example, Mr Beal's cross-examination at {Day6/29:3} to {Day6/30:1} and {Day6/42:12} to {Day6/43:17}. There is a myriad of problems with that approach:

(a) The witnesses' views are irrelevant to the proper construction of the terms. Any evidence given by the witness can only relate to the subjective intention of one or more persons, which is inadmissible.

(b) It is not even alleged that any of the witnesses had sufficient authority within Post Office that any intention that they had would be attributed to Post Office (for the purposes of a rectification claim, for example). There is of course no such pleaded claim.

(c) The NFSP, whose views were also explored in cross-examination, were not even parties to the relevant contracts. Any view or intention that they might have held is doubly irrelevant to the proper construction of the terms.

200. In any event, the evidence given by the Post Office witnesses is wholly consistent with Post Office's case: section 12, clause 12 and para. 4.1 are broadly similar provisions. They are, from a lay person's perspective, fairly alike and will often lead to the same outcome in practice. But that is a different point from analysis of the two terms to discern their proper constructions as a matter of law.

201. Post Office contends that there are two obvious and important differences between the two terms, as a matter of contractual construction:

(a) Unlike clause 12, para. 4.1 does not draw any distinction between liability for shortfalls that result from losses caused by (1) acts of the SPMs herself and (2) acts of assistants. That distinction is plain on the face of clause 12 but entirely absent from para. 4.1.

(b) Unlike clause 12, para. 4.1 does not use the concept of "*negligence, carelessness or error*" to limit the SPM's liability for shortfalls that result from losses that she causes. It uses different words and creates a narrower exception to liability (i.e. where there is a criminal act by a third party).

202. There are, however, various features that are common to clause 12 and para. 4.1:

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(a) At the highest level of generality, both impose a broad liability for losses and resulting shortfalls. This is the key point from a lay person's perspective and is reflected in the evidence.

(b) Both provide that the SPM is liable for shortfalls / deficiencies except in specified circumstances, creating exceptions to liability.

(c) Both create an obligation to make good shortfalls / deficiencies that result from losses other than those that are covered by the exception to liability.

(d) The points made at paras 183 to 184 above in relation to the agency and accounting law principles that provide the background to the SPMC apply also to para. 4.1. The NTC creates an agency relationship[116], and the SPM is subject to an express duty to account.[117] This is important background to the construction of para. 4.1.

203. It is also notable that Cs' case on the burden of proof does not differ between the two terms. Cs therefore argue that para. 4.1 must be read as imposing a burden on Post Office to prove that the narrow exception to liability does not apply (i.e. to prove a negative, namely that the loss was not caused by the criminal act of a third party). That is fanciful.

204. As regards the meaning of "*loss*" and the meaning of "*shortfall*", Post Office repeats its submissions in relation to clause 12. In addition, Post Office submits that para. 4.1 has, on its proper construction, four essential elements:

(a) First, it is irrelevant whether the loss was caused by an act of the SPM or of an assistant.

(b) Second, there is no general fault requirement for liability. The starting point is that the SPM is liable for all shortfalls, whatever the cause of the underlying loss. This is of course subject to the point that a Horizon-generated shortfall would not fall within the words of the clause.

[116] Part 2, para. 1.2 {D1.6/3/6}.

[117] See, most notably, Part 2, para. 3.6.6 {D1.6/3/12}.

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(c) Third, the SPM is only not liable in specific and carefully delineated circumstances. There is a narrow exception to liability.

(d) Fourth, as regards the burden of proof: (1) as with the SPMC, it is for Post Office to prove the existence of a shortfall, and an apparent shortfall generated by a bug or error in Horizon would not qualify under the clause; and (2) on the remaining issue requiring proof, whether the exception to liability applies, it would be for the SPM to show that the facts of the loss fall within the exception to liability (whether or not this is characterised as a contractual allocation of the burden).

(i) No distinction between losses caused by assistants and those caused by the SPM

205. The term draws no distinction here. The SPM "*shall be fully liable for any loss… (however this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise…) except for*" a specific class of losses caused by third-parties "*other than Personnel*". References to "*Personnel*" include assistants.[118]

206. It is plain, including from the use of the word "*however*"[119], that the circumstances of the loss will generally not affect liability. One such circumstance is the identity of the person who caused the loss. The fact that losses caused by Personnel are to be treated no differently from losses caused by the SPM is also clear from the drafting of the exception to liability – for the purpose of that exception, third-party losses do not include losses caused by Personnel; the term uses the words "*other than Personnel*".

(ii) No general fault requirement

207. If the words in parenthesis in the first sentence are removed, it reads, "*The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock … except for*" the narrowly defined category of third-party loss. There can be no possible

[118] The NTC defines "Personnel" as "the Operator's employees, agents, contractors and advisors (including Assistants)" {D1.6/3/4}.

[119] This was, by a typographical error, reproduced as "*howsoever*" in the Written Opening Submissions at paras 138 *et seq* {A/2/41}.

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doubt that, absent the words in parenthesis, there would be no general requirement for fault.

208. The question, therefore, is whether the words in parenthesis introduce a general fault requirement. Post Office submits that there are three reasons to conclude that they do not.

209. First, the words in parenthesis are themselves exhaustive of all possible causes of losses:

(a) The first part of the phrase in parenthesis is "*however this occurs*". It is difficult to imagine a clearer set of words to emphasise that the cause of the loss is irrelevant.

(b) The word chosen to link "*however this occurs*" and the examples that follow is "*and*", rather than any word suggesting that the examples will somehow contradict or limit the effect of those general words. The use of "*and*" suggests consistency, not contradiction.

(c) There then follows reference to "*negligence*" and to breach of the agreement, but the addition of the words "*or otherwise*" in the middle of the phrase makes clear that these are non-exhaustive examples of how a loss may arise.

210. Second, it is relevant that the drafter of the clause put the phrase in parenthesis:

(a) This indicates that it is subordinate in some way to the main text of the clause.[120] It is likely to be intended to explain, confirm or qualify the words in the main text.

(b) In this case, the parenthetical phrase comes after the use of the general words "*any loss*". In that context, the phrase in brackets is likely to do one or other of two very different things: either (1) confirm/ clarify/ explain the concept stated in those general words or, on the contrary, (2) qualify/cut down/limit that concept in some way. Any intention to do the second of these two things – to limit the breadth of any "*any loss*" – would be communicated by the use after

[120] See Carnwarth LJ's approach to the parenthetical phrase at issue in **KPMG v Network Rail Infrastructure** [2007] L. & T.R. 32 at paras 52 to 54 (a case on correction by construction) {A2/38/14}. Sir Paul Kennedy and Mummery LJ agreed.

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the opening bracket of words such as "*except*", "*other than*" or "*save for*". No such words appear in this clause. Instead, the drafter begins the parenthetical phrase with the opposite kind of word – "*however*" – a word that confirms and emphasises the breadth of "*any loss*".

(c) It is true that the parenthetical phrase could be removed entirely without changing the meaning of the rest of the sentence. Yet that does not mean that it is superfluous.[121] Words in parenthesis often perform a role of explaining, clarifying or "unpacking" the words that appear before them. That is what the words do here. The parenthetical phrase confirms and clarifies that it is indeed "*any loss*" that is the subject of liability, save for the where the exception to liability applies.

211. Third, para. 4.1, read as a whole, only makes sense if there is liability for shortfalls arising from losses of all kind other than those covered by the express exception to liability discussed below. If the parenthetical phrase were somehow construed so as to limit the concept of "*all losses*" to cases of fault and/or breach of contract, there would be no need for the carefully worded exception to liability that begins, "*except for losses arising from…*" There would be no need for the exception (and, in particular, the requirement that any loss under it be non-negligent) because non-negligent losses would not, even without the exception, give rise to liability. Any construction that deprives the whole second half of the clause of effect cannot be right. Cs' construction would do precisely that and is wrong.

(iii) The specific and narrow exception to liability

212. On the words of para. 4.1, the SPM is not liable for losses that satisfy three cumulative criteria: (1) the loss arose from the criminal act of a third party other than Personnel, (2) the SPM could not have prevented or mitigated the loss by following

[121] Even if the words were superfluous, that would carry very little weight in determining the proper construction of the term: see Lewison, at 7-03 {A1.3/3/23} at p.27, citing (amongst other authority) **Antigua Power Company Ltd v AG of Antigua and Barbuda** [2013] UKPC 23 at para. 38 *per* Lord Neuberger (with whom Lords Mance, Sumption and Toulson agreed; Lord Carnwath dissented, but not on the issues of contractual construction). {A2/49/12}

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Post Office's security procedures and (3) the SPM could not have prevented or mitigated the loss by taking reasonable care.

213. Despite these clear words, Cs maintain that para. 4.1 has the same meaning and effect as section 12, clause 12 of the SPMC. That is untenable. The conditions for non-liability are clear. The words of the term do not permit any alternative construction.

(iv) The burden of proof in relation to liability under para. 4.1

214. Cs contend that para.4.1 imposes a "*contractual burden*" on Post Office to show that the loss was due to the SPM's negligence, carelessness or error or that of his assistants.

215. There is no such contractual allocation of that burden to Post Office, for three reasons.

216. First, liability under para. 4.1 does not depend on negligence, carelessness or error. It does not even rely on any of those concepts (except in the narrow exception). The clause cannot allocate a burden to prove facts that are not necessary for liability.

217. Second, as with clause 12, the term does not involve any express allocation of any burden. Any allocation would have to be implicit. Cs cannot point to anything that shows an implicit allocation. Post Office's primary case is accordingly that there is no contractual allocation.

218. Third, the structure of para. 4.1 is plainly to impose liability for all shortfalls (however caused),[122] save for where the shortfall results from a loss that falls within the narrow exception to liability discussed above. Once it is shown that there is a shortfall, the term does not require any further factual enquiry, unless the SPM alleges that the exception applies.[123] As to this:

(a) It is the SPM who must raise that contention. It is his branch that is (or alleged to have been) the subject of a criminal act (typically, third-party theft). It is a matter that falls within his peculiar knowledge.

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[122] This of course excludes Horizon-generated shortfalls and apparent losses, for the reasons given above in relation to clause 12.

[123] It is implicit in the structure of the clause and the use of the words "*resulting shortfall*" that the obligation in the second sentence only applies to losses falling within the first sentence (i.e. all losses that are not covered by the exception to liability).

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(b) Under the legal principles set out in para.93 of the GDXC, it would therefore be for the SPM to show that the three conditions for non-liability are met. It is the SPM who asserts that those conditions are met, and the facts relevant to determining the truth of that assertion are peculiarly within his knowledge. The SPM is responsible for his branch and should know what security procedures were in place, what level of care was in fact taken and, relatedly, whether the loss would have arisen even had Post Office's procedures been followed and reasonable care taken.

(c) Post Office therefore submits, in the alternative, that any contractual allocation of the burden would leave that burden with the SPM, rather than Post Office. The plain logic and commercial sense of the term is that, save in specified circumstances (which are within the peculiar knowledge of the SPM), Post Office can establish liability by the fact of the shortfall. There is nothing surprising or uncommercial about that given that the SPM has a common law and contractual duty to account and can ordinarily be held to that account. It is precisely what would be expected.

Cs' miscellaneous points

219. Post Office repeats its submissions at para. 194 above as to C's attempted reliance on the *contra proferentem* principle and the (presumably alternative) case that the liability provisions are onerous, oppressive or unfair. C has no case on those points that is specific to para.4.1.

The application of these liability terms in individual cases

220. It may be useful to consider how Post Office's construction of the terms as to liability will feed into the later stages of this litigation and otherwise assist in the resolution of individual claims.

221. The accounting position of the branch (the *should be* figures for cash and stock) will have to be proven by reference to Horizon and other evidence. The overall position as to any net gain or shortfall will, however, be affected by other information, such as whether there are any accepted shortfalls that have been settled centrally, and whether any disputed amounts can be resolved. Post Office will seek to prove the *actual* cash and stock position from cash and stock declarations made by the SPM (unless those

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fall for some reason to be corrected) and/or findings made at audit, supported by the relevant documents and witness evidence in each case.

222. On Post Office's arguments above, the resolution of the Horizon Issues will be very important to liability trials. Post Office will face more substantial difficulty in proving the existence of shortfalls and losses if Horizon is found not to provide generally reliable evidence of the accounting position. Particular issues with Horizon may of course arise in individual cases and need to be resolved at the relevant liability trials, irrespective of the general reliability of the system.

223. There will also be detailed factual enquiry into the circumstances in which losses and shortfalls arose and were recorded (or hidden) by Cs in the process of declaring cash and/or submitting accounts. This will be relevant to the discharge of the burdens that fall on either side, which is (as argued above) not a matter of contractual construction.

224. It will be relevant here whether or not Post Office has the benefit of submitted branch accounts on which it can presumptively rely, applying the account stated principle. As noted in these submissions, that principle will of course not apply to any amounts that were put dispute when the account was submitted (e.g. amounts settled centrally subject to a dispute). Amounts put in dispute are not affected by the submission of an account, as the account is to that extent qualified; but the undisputed parts of the account may be relied upon, subject to any attempt to correct or re-open the account generally.

225. Issues may also arise under section 12, clause 12 as to whether a loss was caused by negligence, carelessness or error in circumstances where, for example, an SPM alleges that he caused the loss because of some erroneous instruction given to him by Post Office.

226. The liability provisions will then be applied to the fact as established. SPMs may of course also contend that they would have an offsetting claim for damages against Post Office, where its breach of contract brought about the situation in which the SPM became liable. Arguments of that kind are likely to be highly fact-sensitive, including as to the alleged relationship of causation between any breach by Post Office and the circumstances of the shortfall.

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(3) ASSISTANTS (COMMON ISSUE 23)

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

227. This issue can be taken relatively shortly. The SPMC and the NTC make clear that the SPM was ultimately responsible for providing or procuring the provision of such training as was necessary to enable the assistant to assist the SPM in discharging his obligations to Post Office.

228. The most obviously relevant express terms are quoted at para. 56 of the AGPOC, [124] and include the following:

(a) In the SPMC (1994-2006), section 15, clause 2 provides: "*Assistants are employees of the Subpostmaster*".[125]

(b) In the SPMC (as amended in July 2006), section 15, clause 7.1 provides: "*...it is the Subpostmaster's responsibility to ensure the proper deployment within the Post Office ® branch of any materials and processes provided by* [Post Office] *and to ensure that his Assistants receive all the training which is necessary in order to be able to properly provide the Post Office ® Products and Services...*".[126]

(c) In the NTC, Part 2, para 2.4 provides: "*The Operator shall ensure that the first Manager cascades the training to all other Assistants and to any replacement Manager in order to ensure that all subsequent Managers and all other Assistants receive sufficient initial training from properly trained Managers.*"[127]

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[124] {B3/1/25}

[125] {D2/3/65}

[126] {D2.1/4/32}

[127] {D1.6/3/7}

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229. There is no proper pleading in the AGPOC or Reply as to the content of the contractual duties in relation to training assistants. In their IPOCs, the lead Cs contend as follows:[128]

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

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

231. In any event, the contracts make clear that a SPM need not rely on assistants to operate the branch but that, if he does, they are his employees and he is responsible for any losses that they cause.[129] In that context, it follows that, to the extent that an assistant cannot perform properly his duties without training, it is incumbent on the SPM to provide or procure such training. This is a practical consequence of his contractual responsibility for assistants.

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

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[128] See, e.g., Abdulla IPOC, paras 95-96 {B5.4/2/23}.

[129] See (1) the SPMC at section 12, clause 12 {D2.1/3/53} and section 15, clause 2 {D2.1/3/65} and (2) the NTC at Part 2, para. 4.1 {D1.6/3/13} and Part 2, para. 3.1.4 {D1.6/3/9}.

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233. It is important to take a step back and consider the commercial sense of Cs' case here. The SPM chooses whether or not to employ assistants, and if so whom and on what terms and to perform what role. The SPM can assess potential assistants for competence. The SPM is responsible for the branch operations and can supervise the assistant in practice and identify any requirement for advice, training or other help. The SPM is in a position to provide that help first-hand and immediately. By contrast, Post Office has no relationship with the assistant whatsoever, is not responsible for the branch operations and is not able to supervise the assistant and identify any need for training or support. It is not there to provide a guiding hand or a firm word. It has no contract with the assistant.

234. There is accordingly no basis on which to read into the contracts some implied limitation on the SPM's responsibility for his assistants, including to train them as necessary.

235. As Ms Van Den Bogerd explained at paras 88.2 to 88.3 of her witness statement[130] (which was not challenged):

> *If Post Office were to compel all forms of training for an assistant, he would generally be entitled to be paid by the Subpostmaster for that period of training. The Subpostmaster might prefer not to pay that cost, being happy to run his branch with untrained assistants or to dismiss an assistant. It may be that the Subpostmaster has given the assistant only a limited role in the branch, such that some parts of the training may not be needed for their job.*
>
> *Post Office does not know what, if any, supervisory regime the Subpostmaster has put in place. It may be that the Subpostmaster is closely supervising his staff, on the one hand, or providing no supervision at all (in the case of an 'absentee' Subpostmaster), on the other hand. Subpostmasters can tailor the training that they provide to reflect the roles that they have given to their assistants and the extent of oversight that they themselves wish to provide.*

236. Cs' Opening does not advance matters on this issue. They simply assert, again, that "*any obligation upon Subpostmasters to train their Assistants cannot be construed so*

[130] {C2/1/27}

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to require Subpostmasters to have been better able to train Assistants than the training provided by the Defendant would allow or enable": para 426 {A/1/167}.

237. Revealingly, that is not a positive statement as to the content of SPMs' obligations. Rather, it asserts a limiting principle that would have to be implied and which does not withstand scrutiny:

(a) An SPM may have been running a branch for many years, having learned how to do so well through a combination of training provided by Post Office, self-education through manuals, advice from others including the Helpline, assistants and other SPMs and finally his own on hands-on experience. It would be nonsense to say that that SPM's responsibility was somehow restricted to passing on his training from Post Office, rather than also passing on the benefit of the know-how that he has gained through other routes. A restriction of that kind would be artificial, far from obvious and would make no commercial sense.

(b) As the clauses set out above make plain, training assistants was the SPMs' responsibility. It would not have gone without saying that this responsibility was in effect to defer to Post Office's training. The SPM's responsibility was to do whatever was necessary to train any assistants they chose to employ.

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C. IMPLIED TERMS: GENERAL

INTRODUCTION

238. Cs' case on implied terms is extreme and contrary to orthodoxy. Cs seek to imply no fewer than 21 implied terms into the detailed written agreements that were entered into on a business-to-business basis. That would be unprecedented. As with their case on contractual construction, Cs propose to re-write the contracts and to fundamentally subvert the agency and accounting relationship to which they voluntarily signed up in the expectation of profit.

239. Post Office opposes the vast majority of Cs' implied terms. Post Office has, however, identified some powers and discretions under the contracts to which some limited implied restriction should apply. Post Office has done this without the benefit of any properly particularised case from Cs to which it can respond. As regards the terms that Post Office opposes, none of them is necessary, and Post Office relies (amongst other things) on the express terms of the agreements and the implied terms that are agreed between the parties. The further implied terms that Cs allege would contradict those terms and/or are unnecessary in light of them.

240. Post Office anticipates that Cs will criticise it for the firm position that it has taken on implied terms. Cs have argued, often in an intemperate tone, that Post Office has somehow failed properly to explain the meaning of the implied terms that Post Office asserts and that Cs have admitted. Cs also argue, again often intemperately, that (contrary to what the GDXC says) Post Office must "*in substance*" admit some of Cs' alleged implied terms but is refusing to say which. The position is simple: Post Office admits none of those terms, as is clear from its pleadings. The criticisms are entirely misplaced and should never have been made.

241. The Court will of course ignore the noise and focus on the arguments. On the arguments, and on proper application of the test, Cs' alleged implied terms fall to be refused.

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Overview of the parties' contentions

242. As long ago as the pre-action correspondence in 2016[131], Post Office asserted two important and powerful implied terms that it contended formed part of the SPM contracts:

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

(b) A term requiring that each party provide the other with such reasonable cooperation as is necessary to the performance of that other's obligations under or by virtue of the contract (the "**Necessary Cooperation Term**").

(Taken together, the "**Agreed Implied Terms**".[132])

243. Cs admit those terms.[133] They accordingly form part of the agreements. Post Office's case is that these implied terms meet any necessity to imply general obligations to make the express terms of the agreements work as expected and to provide a fact-sensitive response to difficult or unanticipated factual circumstances. Those are the conventional purposes of the Agreed Implied Terms and why they are often appropriate to be implied into complex commercial arrangements. They do the job that might otherwise be done by more specific implied terms (which would typically be hard to show were necessary at the time the contract was agreed).

244. Cs nonetheless persist in seeking no fewer than a further 21 implied terms, which are pleaded in para. 64 of the AGPOC and para. 96.1 of the Reply.[134] Post Office opposes Cs' alleged further implied terms. None of them satisfies the test for implication. Many of the alleged implied terms can fairly be characterised as nothing more than examples of the very many terms that the parties could possibly have agreed but did not.

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[131] See the Letter of Response (July 2016) at para. 4.35. {H/2/18}

[132] Post Office pleaded these terms at GDXC, para. 105. {B3/2/47}

[133] It is stated in Schedule 1 to the First CMC Order that these terms are admitted: see the note to Issue 2. {B7/7/13}

[134] {B3/3/43}

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245. There is one further introductory point. Cs' case on many of their alleged implied terms has not, even now, been properly pleaded or even argued in written submissions. Most notably, Cs have not identified the contractual powers, discretions or rights that they say are subject to implied restrictions as to rationality, non-maliciousness, etc. Post Office has taken it upon itself to identify certain powers and discretions[135] that it accepts are subject to implied restrictions. However:

(a) Post Office should not be required to plead against itself. It maintains a strong objection to Cs' approach and their decision not to articulate a proper case.

(b) It is for Cs to identify the terms that they contend are subject to implied restrictions, and such terms must be relevant to claims that are articulated in the AGPOC. It is impermissible to allege some ambulatory restriction on the exercise of unidentified contractual provisions. This is not a public inquiry into the contracts.

246. The rest of this section is divided into three parts, as follows:

(a) The Agreed Implied Terms.

(b) The relational contract argument and the **Yam Seng** implied term (Common Issue 1).

(c) Other alleged implied terms governing the relationship generally (Common Issue 2).

(1) AGREED IMPLIED TERMS

247. The Stirling v Maitland Term is often implied into complex commercial agreements, although even it must satisfy the test of necessity if disputed: see Lewison, at 6.14 {A1.3/3/17}. It serves an important function of ensuring that the parties' legitimate expectations are respected: given that each side is required to perform, it must be anticipated that the other side will not get in the way of that performance.

[135] See, for example, Individual Defence to Bates IPOC, at para 65(2) {B5.1/3/38}; Individual Defence to Stockdale IPOC, at para 47 {B5.6/3/24}.

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248. The Necessary Cooperation Term is in many respects similar to the Stirling v Maitland Term. But it creates a broader and more powerful obligation in that it may require positive action to facilitate the other party's performance, rather than merely not hindering it. It is nonetheless bounded in its operation by the express terms of the agreement and the need to make the contract work in accordance with those express terms: see Lewison, at 6.15 {A1.3/3/20}.

249. In **James E McCabe v Scottish Courage Ltd**[136], Cooke J expressed the essence of a duty to cooperate as follows at para. 18 {A2/36/12}:

> *A duty to co-operate in, or not to prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract and the law can only enforce a duty of co-operation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty of co-operation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself.*[137]

250. Cs admitted both of these implied terms. They have nonetheless, since that admission, repeatedly asked Post Office to explain what effects the Agreed Implied Terms would have in various factual circumstances, including as to when and to what extent those terms' effects would overlap in practice with the effects of the further implied terms that Cs allege. Most notably[138]:

(a) Request 61 of Cs' First RFI asked which of the Cs' further alleged implied terms were "*in substance accepted*" because of Post Office's averment of the Agreed Implied Terms. Post Office responded on 13 September 2017 that, amongst other things, none of the further terms was admitted and that the

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[136] [2006] EWHC 538 (Comm).

[137] This passage was recently approved by the Court of Appeal in **Ukraine v The Law Debenture Trust Corp PLC** [2018] EWCA Civ 2026 at para. 207 {A1.1/73/60}.

[138] The Court should be aware that there has also been substantial correspondence on this issue and also exchanges between Counsel for the parties (including a meeting).

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existence of the Agreed Implied Terms was a reason not to imply those alleged terms.[139]

(b) On 29 December 2017, Cs made another RFI on these issues. Post Office responded on 9 February 2018, contending that it was for Cs to identify the reasons for which the further alleged implied terms are necessary and giving (amongst other things) detailed examples of the inconsistencies between the alleged further implied terms and the express provisions of the contracts.[140] Despite threats to apply for yet further information, Cs did not make any such application.

251. In Post Office's submission, Cs' challenge to Post Office's case on the importance of the Agreed Implied Terms is wrongheaded:

(a) Those terms are common ground. They are as much part of the agreements as are the express terms. They have a proper construction and can be understood on that basis.

(b) On their proper construction, the terms are necessarily fact-sensitive in their application and, in that sense, protean. This is why they are so valuable in complex commercial contracts: they provide a versatile tool for dealing with matters that are not addressed in detail by the express terms and/or that were not capable of anticipation at the time of agreement but to which the contracts must respond. The purpose of the Agreed Implied Terms is to make the contracts work properly against the (perhaps difficult) facts of specific cases and, in particular, to allow the contracts to provide an appropriate response to facts that are not catered for sufficiently by the express terms alone.

(c) In that context, the parties will of course make submissions as to how the express terms, the Agreed Implied Terms and the various alleged implied terms may respond to particular types of factual scenario. That process forms part of any argument as to the necessity of implied terms. But those submissions must be grounded in the question of whether a given term falls to

[139] {B4/2/24}.

[140] {B4/3/1}.

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be implied in light of the admissible background material to the entry into the contract. The factual scenarios must be considered prospectively, from the position of the parties at the time of contracting. This is different from using the benefit of hindsight[141] to test various implied terms against the facts of individual cases to see which of them would best meet the merits of those cases.

252. Post Office can provide some examples as to how the Agreed Implied Terms would, at the time of contracting, have been anticipated to make the contracts work effectively.

253. First, as regards training and support[142]:

(a) Post Office accepts that, for new SPMs[143], it could be required, by the Necessary Cooperation Term, to provide reasonable initial training.[144] SPMs could, depending on the circumstances, be unable properly to discharge their obligations under the contract without such training, such that it was necessary for Post Office to provide reasonable cooperation in that regard.

(b) Where the SPM requested further training or support and such training or support was necessary to the proper discharge of his obligations under the contract, the Necessary Cooperation Term would require Post Office to cooperate in providing (or helping the SPM to procure) reasonable further training or support. This may, for example, be the case where a new product or service or technology was introduced; alternatively, it might be reasonable for Post Office to rely upon the provision of written guidance. A good example of

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[141] To test implied terms against post-contractual facts would involve the error of law discussed in **Bou-Simon v BGC Brokers LP** [2018] Con. L.R. at paras 9 and 12 *per* Asplin LJ (with whom Hickinbottom and Singh LJJ agreed). {A1.1/75/8}

[142] Support can be provided by written or oral guidance and advice and/or through visits to the branch: see Van Den Bogerd WS, paras 114-115. {C2/1/32}

[143] This would not be true of all applicants. In particular, some applicants have worked for years as assistants and/or as SPMs in other branches.

[144] Under the SPMC, section 7 of the Operations Manual required the provision of such training {F4/85/24}.

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where further reasonable training was required was the introduction of Horizon (where Post Office in fact offered training).

(c) The same analysis applies to assistance provided through the Helpline. The scope of the Agreed Implied Terms does, therefore, overlap to some extent with the further implied terms alleged at para. 64.2 of the AGPOC (i.e. adequate training and support). But the obligations are not the same.

(d) Post Office would not, however, be required to monitor and assess the SPM's individual training and support needs from time-to-time. That would be practically impossible across a network of over 11,000 branches. It is for the SPM to seek cooperation in the performance of his obligations. The SPM is well-placed to identify any obstacles to his proper performance of his obligations and to explain why cooperation is needed.

254. Second, as regards the means by which SPMs account to Post Office (including, as relevant, through Horizon):

(a) The Agreed Implied Terms require (1) that any system provided by Post Office and that it requires SPMs to use be such as to not inhibit or prevent SPMs from complying with their obligations to account and (2) that Post Office operate such system so as to cooperate reasonably with SPMs where such cooperation is necessary to the performance of the SPMs' obligations.

(b) For example, the Agreed Implied Terms would be breached if Post Office were knowingly to require SPMs to account through a system that was so flawed that it prevented them being able to discharge the accounting obligations. If it was impossible for an SPM to, by using the system, reliably provide an account of the transactions performed in branch, the requirement to use the system would hinder the discharge of the SPM's accounting obligations (in breach of the Stirling v Maitland Term) and/or Post Office would be required to take steps to facilitate performance of those obligations by some other means (under the Necessary Cooperation Term). Post Office could not sit on its hands if it knew that the system through which it required SPMs to account was fundamentally unreliable (whether generally or in relation to a specific branch at a specific time).

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(c) The scope of the Agreed Implied Terms does, therefore, overlap to some extent with the further implied term alleged at para. 64.1A of the AGPOC (i.e. to provide a system that was reasonably fit for purpose). But the obligations are not the same.

255. Third, as regards the investigation of any disputed shortfalls:

(a) It is in relation to this kind of issue that the application of the Agreed Implied Terms is necessarily highly fact-specific. That is to be expected and is an advantage of the terms for both parties. The terms' application will depend, for example, on the specific issues in dispute between the parties, the information available to each of them in relation to those issues, the degree of cooperation that each party is reasonably entitled to expect of the other (including under the express terms of the agreement) and the background to the dispute.

(b) It is nonetheless possible to provide some examples that, in Post Office's submission, fall clearly on either side of the line – (1) cases where Post Office would clearly be required to take steps to assist an SPM and, on the other hand, (2) cases where the Agreed Implied Terms would not require any action on Post Office's part.

(c) In the first category – cases where the Agreed Implied Terms would require Post Office to act – the most obvious example is where Post Office is aware of some important fact about the branch's accounts that is not known the SPM. If Post Office is aware, for example, that a transaction shown in the account is in fact mistaken and can be corrected, it must inform the SPM of this. This is done by means of proposing a Transaction Correction to the branch (e.g. where Post Office has checked the transactions against a third-party data source and concludes that the branch account contains an error).

(d) In the second category – cases where the Agreed Implied Terms would not require Post Office to act – the most obvious example is where the SPM has made any effective investigation impossible through false accounting and/or his own refusal to cooperate. An SPM may disguise the existence of a shortfall for months by inflating his cash declarations to Post Office and falsifying his accounts, making it at least extremely difficult for anyone other than the SPM

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to identify even the time at which the loss(es) underlying the shortfall arose. In that kind of case, the SPM may then refuse to attend an interview and/or refuse to provide any answers to questions that Post Office has about the account. In a case where the party seeking cooperation has acted dishonestly and/ or in such a way as to render the object of the cooperation impossible or excessively difficult, no cooperation may be necessary (or, which amounts to much the same thing, it may be reasonable to take no active steps in cooperation).

(e) Between these two sets of cases, the obligation on Post Office is to provide reasonable cooperation to SPMs in relation to disputed shortfalls where such cooperation is necessary to the performance of their obligations. It is impossible to delineate all the circumstances that would trigger a requirement for positive steps (and what positive steps) to be taken in performance of that duty. The duty is necessarily fact-sensitive.

256. It follows that Post Office's obligations in relation to shortfalls under the Agreed Implied Terms will overlap to an extent with the obligations that Cs would seek to impose by the further implied terms alleged in paras. 64.3-64.12 of the AGPOC. But the obligations are not the same.

257. In this context, it would always be extremely difficult for Cs to show that the parties must have intended far more specific implied terms (and precisely the alleged terms rather than other terms that might also have been chosen) to deal with factual situations/perceived difficulties. Cs cannot, as a matter of law, rely on anything that a reasonable person in their position did not and could not have anticipated at the date of the contract, but which Cs say arose in practice (by reference to inadmissible post-contractual evidence). This is simply the effect of the principles in **Marks & Spencer**.

258. This is to say nothing of the difficulty of showing that those numerous specific terms are <u>necessary</u> notwithstanding the existence of the Agreed Implied Term as to necessary co-operation.

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(2) RELATIONAL CONTRACT (COMMON ISSUE 1)

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

Outline of the parties' contentions

259. Cs place a great deal of weight on the suggestion that the contracts in this case are "relational" in the sense in which that term is used in **Yam Seng**.[145] Cs use **Yam Seng** as a springboard to taking a radical approach to the agency contracts in this case, using it as a supposed reason to put strained (and even impossible) constructions on the contracts' express terms and to imply a raft of implied terms *in addition to* the kind of terms discussed in **Yam Seng**.

260. Cs' approach here is radical. It goes well beyond anything that Leggatt J (as he then was) did in **Yam Seng**. Cs invite the Court to break new ground and to proceed in disregard of clear indications given by the Court of Appeal and contrary to the principles set out by the Supreme Court in **Marks & Spencer**.

261. Post Office invites the Court to resist that invitation, to apply the orthodoxy and to follow the overwhelming judicial trend since **Yam Seng**. That trend has been to regard Leggatt J's decision in that case as being, on analysis, consistent with the law as set out in **Marks & Spencer**. In short, for any term as to good faith to be implied into a commercial agreement, the test for implying terms in fact must be met: the term must be necessary in the **Marks & Spencer** sense of that word.

262. Cs contend that each of the contracts in this case is "*properly characterised as a 'relational contract*'" and that, "*as such*", Post Office was subject to "*a duty of good faith and obligations of fair dealing, transparency, co-operation and trust and confidence, governing Post Office's exercise of all powers and discretions under the*

[145] **Yam Seng Pte v International Trade Corp** [2013] 1 CLC 662. {A1.1/43}

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contract and relating to the relationship arising thereby between the parties": see para. 63 of the AGPOC.[146]

263. Cs' pleaded case relies, therefore, on the assumption that the mere categorisation of a contract as relational is sufficient to justify the implication of broad and general terms as to good faith, encompassing a duty of transparency (i.e. a positive obligation of disclosure). But it goes even beyond this: Cs then use the categorisation as a reason to imply a further 20 terms (in para. 64 of the AGPOC).

264. Post Office makes four principal submissions in response:

(a) First, Cs' ambitious approach finds no support in authority. It goes vastly beyond anything in **Yam Seng** or subsequent case-law. It is dramatically wrong in law.

(b) Second, there are no special rules or principles that apply to relational contracts, aside from this: the Court will look more carefully at a relational contract to see whether an implied term as to good faith may be necessary, applying the test in **Marks & Spencer**.

(c) Third, the contracts here are not relational contracts in the **Yam Seng** sense. Most notably, unlike relational contracts, the SPMC and the NTC are terminable on relatively short notice.

(d) Fourth, the implied terms alleged by Cs in reliance on **Yam Seng** should not be implied because they do not satisfy the test in **Marks & Spencer** and are not terms that would be appropriate even in a relational contract.

(i) Cs' approach finds no support in authority, including Yam Seng

265. **Yam Seng** contains a detailed discussion of the English legal system's traditional hostility to any general guiding principle of good faith (or similar general obligations). Much of that discussion is background to the key parts of Leggatt J's reasoning on the case before him.

266. The background discussion is linked to the core of the Judge's reasoning by the following key passage:

[146] {B3/1/35}.

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> *Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.* (para. 131; emphasis added) {A1.1/43/30}

267. Leggatt J then moved from a consideration of legal policy to a more concrete discussion of the circumstances in which a term as to good faith can be implied in fact in commercial contracts. He referred at para. 142 to a category of contract that may more readily accept the implication of an obligation to share information (i.e. a duty to disclose), which he makes clear is an enhanced type of good faith obligation:

> *... While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment. Such 'relational' contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements.* {A1.1/43/32}

268. This is the only paragraph of the judgment in which the word "relational" appears. The Judge did not have to decide whether the contract before him included a positive obligation of disclosure (as an element of some broader duty as to good faith): see at para. 143.

269. Against this background, the Judge in fact implied two fairly limited obligations:

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(a) First, that the defendant would not (i) lead Yam Seng to expect that products were going to be supplied in circumstances where it did not in fact intend to supply them or knew that it would be unable to do so or (ii) knowingly provide false information to Yam Seng on which it was likely to rely: see at para. 156. {A1.1/43/35}

(b) Second, that the defendant would not authorise the sale of any product in the domestic market of any territory covered by the agreement at a lower retail price than the duty-free retail price for the product which had been specified in the agreement with Yam Seng: see at para.164. {A1.1/43/36}

270. As to the first term, Leggatt J rejected the first limb of the implied term as proposed by Yam Seng because it did not include any concept of dishonesty or wilfulness: "…. *the essential difficulty with this formulation is that it does not distinguish between encouraging expenditure in the expectation that products would be supplied, or providing false information, dishonestly and doing so innocently. In my view, such a distinction is critical.*" (para. 156). He also re-formulated the second limb of the term so as to include a requirement that the false information be provided knowingly, on the basis that doing so would "*infringe the core expectation of honesty*". For both limbs, the essence of the term was a prohibition on dishonest conduct that would obviously tend to damage Yam Seng's interest in the performance of the contract.

271. The Judge was only persuaded to imply the second term (as to pricing) because, amongst other things, the contract was a "*skeletal document which does not attempt to specify the parties' obligations in any detail*" and, in such a case, "*it is easier than in the case of a detailed and professionally drafted contract to suppose that a part of the bargain has not been expressly stated*". The implied term had gone without saying: see para. 163 – "*.... without spelling this out"*. The second term passed the ordinary test for implication in fact.

272. On analysis, there is nothing radical about the approach in **Yam Seng**.[147] Leggatt J did not imply anything like the extremely broad obligation that Cs press upon the Court in para. 63 of the AGPOC. He did not imply any obligation of disclosure. He did not imply any general duty to assist Yam Seng in the performance of the contract. He did

[147] The authors of Chitty express a broadly similar view at 1-058 {A1.3/6/4}.

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not imply any general duty on the defendant to protect, or even have regard to, Yam Seng's interests.

273. Most notably, as mentioned above, Leggatt J considered and rejected a term proposed that Yam Seng that "*insofar as* [ITC] *instructed or encouraged* [Yam Seng] *to incur marketing expenses it would not do so for products which it was unable or unwilling to supply, nor offer false information on which* [Yam Seng] *was likely to rely to its detriment*". The Judge refused to imply that term (without heavy modification), reasoning that it failed to draw the crucial distinction between honest and dishonest conduct on the part of the defendant: see paras 155-156 {A1.1/43/35}. Yam Seng was only entitled to protection from dishonest conduct and could not impose onerous obligations on the other party under the guise of good faith.

274. There is an obvious parallel to be drawn with the 19 terms that Cs invite the Court to imply in para. 64 of the AGPOC. Most of them are framed, in essence, as obligations on Post Office to protect and/or further Cs' interests, rather than to merely to refrain from acting dishonestly. Cs will have to explain why those terms should be implied when the term proposed in Yam Seng was not.

275. In a more recent case, **Al Nehayan v Kent**[148], Leggatt LJ (now elevated but sitting as a High Court Judge) emphasised that the essence of the duty of good faith is honest cooperation: "*It is trust that the other party will act with integrity and in a spirit of cooperation*": see para. 167 {A1.1/72/45}.[149] The parties would be required to act "*honestly and with fidelity to the bargain*", but the obligation of good faith "*is not a demanding one*": para. 175 {A1.1/72/48}.

276. None of this comes even close to justifying the extremely broad obligation pleaded by Cs at para. 63 of the AGPOC, let alone the use of that term to then imply a whole raft of one-sided and onerous obligations in para. 64. There is no authority that supports that approach.

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[148] [2018] EWHC 333 (Comm). {A1.1/72}

[149] See also para.170, noting without adverse comment that Beatson LJ had characterised good faith as "*essentially…a duty to cooperate*" in **Globe Motors v TRW Lucas Varity Electric Steering** [2016] 1 CLC 712: see paras 67-68 {A1.1/62/20}

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(ii) There are no special rules or principles that apply to relational contracts

277. For the reasons set out above, Post Office contends that, properly understood, **Yam Seng** does not represent any dramatic departure from orthodoxy.

278. The Court of Appeal has, since **Yam Seng**, taken the opportunity to emphasise that English law does not recognise any general principle of good faith in contractual performance.

279. First, in **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland**,[150] Jackson LJ said at para. 105 {A1.1/44/24}:

> *...I start by reminding myself that there is no general doctrine of "good faith" in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract: see Horkulak at paragraph 30 and Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB) at paragraphs 120-131. If the parties wish to impose such a duty they must do so expressly* (emphasis added).[151]

280. The passage referred to from **Yam Seng** includes the statement that English law does not recognise a duty of good faith to be implicit in all commercial contracts (quoted above).

281. Second, in **Globe Motors v TRW Lucas Varity Electric Steering** at paras 67-68 {A1.1/62/20},[152] Beatson LJ emphasised (obiter)[153] that whether or not a term as to good faith can be implied will depend on the terms of the particular contract (rather than its categorisation as a relational contract):

> *One manifestation of the flexible approach referred to by McKendrick and Lord Steyn is that, in certain categories of long-term contract, the court may be more willing to imply a duty to co-operate or, in the language used by Leggatt J in*

[150] [2013] EWCA Civ 200.

[151] Lewison LJ agreed with Jackson LJ's reasoning: see para. 132. Beatson LJ agreed as to the outcome and provided reasoning of his own, not touching on this specific point.

[152] [2016] EWCA Civ 396.

[153] Underhill and More-Bick LJJ agreed with Beatson LJ but made no reference to his comments on implying duties of good faith.

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Yam Seng PTE v International Trade Corp Ltd [2013] EWHC 111 (QB) at [131], [142] and [145], a duty of good faith. Leggatt J had in mind contracts between those whose relationship is characterised as a fiduciary one and those involving a longer-term relationship between parties who make a substantial commitment. The contracts in question involved a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and expectations of loyalty "which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements". He gave as examples franchise agreements and long-term distribution agreements. Even in the case of such agreements, however, the position will depend on the terms of the particular contract. Two examples of long-term contracts which did not qualify are the long-term franchising contracts considered by Henderson J in Carewatch Care Services Ltd v Focus Caring Services Ltd and Grace [2014] EWHC 2313 (Ch) and the agreement between distributors of financial products and independent financial advisers considered by Elisabeth Laing J in Acer Investment Management Ltd and another v The Mansion Group Ltd [2014] EWHC 3011 (QB) at [109].

This is not the occasion to consider the potential for implied duties of good faith in English law because the question in this case is one of interpretation or construction, and not one of implication. It suffices to make two observations. The first is to reiterate Lord Neuberger's statement in Marks and Spencer PLC v BNP Paribas Security Services Trust Co (Jersey) Ltd (see [58] above) that, whatever the broad similarities between them, the two are "different processes governed by different rules". This is, see the statement of Lord Bingham in Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472, at 481 cited by Lord Neuberger, because "the implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision". The second is that, as seen from the Carewatch Care Services case, an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context,

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> *permits it. It is thus not a reflection of a special rule of interpretation for this category of contract.* (emphasis added)

282. Indeed, much the same point can be taken from **Yam Seng** itself: Leggatt J emphasised at para. 147 that any obligation of good faith is "*established through a process of construction of the contract*" and applying a "*case-by-case approach*" {A1.1/43/34}.

283. Third, in **MSC Mediterranean Shipping Co v Cottonex Anstalt**,[154] Moore-Bick LJ said as follows at para. 45[155] {A1.1/63/19}, addressing the approach taken by Leggatt J at first instance in that case:

> *The judge drew support for his conclusion from what he described as an increasing recognition in the common law world of the need for good faith in contractual dealings. The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case. It is interesting to note that in the case to which the judge referred as providing support for his view, Bhasin v Hrynew 2014 SCC 71; [2014] 3 SCR 494, the Supreme Court of Canada recognised that in Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland [2013] EWCA Civ 200 this court had recently reiterated that English law does not recognise any general duty of good faith in matters of contract. It has, in the words of Bingham LJ in Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433, 439, preferred to develop 'piecemeal solutions in response to demonstrated problems of unfairness', although it is well-recognised that broad concepts of fair dealing may be reflected in the court's response to questions of construction and the implication of terms. In my view the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some 'general organising principle' drawn from cases of disparate kinds. For example, I do not think that decisions on the exercise of*

[154] [2016] 2 C.L.C. 272. {A1.1/63}

[155] Tomlinson LJ and Keehan J agreed.

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> *options under contracts of different kinds, on which he also relied, shed any real light on the kind of problem that arises in this case. There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction, against which the Supreme Court warned in Arnold v Britton [2015] UKSC 36; [2015] AC 1619.* (emphasis added)

284. Any legitimate expectation as to good faith, and specific terms implied to give effect to that expectation, must arise from and be consistent with the proper construction of the contract. The key concept, as stated in **Al Nehayan**, is fidelity to the bargain, and that bargain is found in the express terms of the agreement. The express terms dictate the extent to which any such terms should be implied and the scope of their application (as ever, applying the approach in **Marks & Spencer**).

285. Many first instance Judges have also emphasised that **Yam Sang** does not stand as authority for any general principle as to implied duties of good faith in commercial contracts and, crucially, that any implied term as to good faith must pass the test in **Marks & Spencer**, applied to the specific contract at issue and in light of its express terms[156]:

(a) In **Hamsard 3147 v Boots UK**[157], Norris J stated as follows:

> *I do not regard the decision in* [**Yam Seng**] *as authority for the proposition that in commercial contracts it may be taken to be the presumed intention of the parties that there is a general obligation of "good faith". I readily accept that there will generally be an implied term not to do anything to frustrate the purpose of the contract. But I do not accept that there is routinely to be implied*

[156] For completeness, it should be noted that, as Leggatt LJ identified in **Al Nehayan**, there have also been several cases in which duties of good faith have been implied into relational contracts, relying on **Yam Seng**: see **Al Nehayan** at paras 168 to 169. {A1.1/72/46}

[157] [2013] EWHC 3251.

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some positive obligation upon a contracting party to subordinate its own commercial interests to those of the other contracting party.[158] {A1.1/48/27}

(b) In **Greenclose v National Westminster Bank**[159], Andrews J cautioned at para. 150 against a mis-reading of **Yam Seng**:

So far as the 'good faith condition' is concerned, there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms' length. Leggatt J's judgment in Yam Seng Pte Ltd v International Trade Corp Ltd [2011] EWHC 111 (QB); [2013] 1 CLC 662, on which Greenclose heavily relies, is not to be regarded as laying down any general principle applicable to all commercial contracts. As Leggatt J expressly recognized at [147] of that judgment, the implication of an obligation of good faith is heavily dependent on the context. Thus in some situations where a contracting party is given a discretion, the court will more readily imply an obligation that the discretion should not be exercised in bad faith or in an arbitrary or capricious manner, but the context is vital. A discretion given to the board of directors of a company to award bonuses to its employees may be more readily susceptible to such implied restrictions on its exercise than a discretion given to a commercial party to act in its own commercial interests. (emphasis added) {A1.1/54/47}

(c) In **Carewatch Care Services v Focus Caring Services**[160] at para. 108, Henderson J agreed with the remarks of Norris J in **Hamsard** (quoted above). {A1.1/53/34}

(d) In **Myers v Kestrel Acquisitions**[161], Sir William Blackburne agreed at para. 40 with the remarks of with Andrews J in **Greenclose** (quoted above). He

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[158] More recently, Leggatt LJ stated in **Al Nehayan** that the obligation of good faith, in a relational contract, does not require any subordination of commercial interests: para. 167 {A1.1/72/45}

[159] [2014] 1C.L.C.562.

[160] [2014] EWHC 2313.

[161] [2016] 1 B.C.L.C 719.

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went on to emphasise, at para. 50, that the implication of a term as to good faith was subject to the ordinary principles of contractual interpretation:

In assessing whether to imply the good faith term I remind myself that, as Lord Hoffmann said in Belize (at [16]), the court has no power to introduce terms to make the instrument it is asked to construe fairer or more reasonable and that the most usual inference, if the instrument does not expressly provide for what is to happen when some event occurs, is that nothing is to happen and that where the event causes loss, the loss lies where it falls. I remind myself also that the overall documentation entered into when the Myers sold control of Swift to Alchemy and Indigo is extensive and detailed. In inviting me to imply the good faith requirement for the protection of the Myers (as holders of the VLNs) I am being asked to conclude that the parties omitted to insert an important term… {A1.1/64/21}

(e) In **Monde Petroleum v WesternZagros**,[162] Richard Salter QC (sitting as a Deputy Judge) stressed at paras 249-250 that any implied term as to good faith would have to satisfy the test of necessity identified in **Marks & Spencer**:

There is no general doctrine of "good faith" in English contract law. A duty of good faith is implied by law as an incident of certain categories of contract (for example, contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one). However, in all other categories of contract – including the CSA - such a duty will only be implied where the contract would lack commercial or practical coherence without it and where all the other requirements for implication are met. By reference to Baroness Hale's classification of implied terms in Geys v Société Générale, London Branch, such a term falls into the first category, not the second.

In Yam Seng, Legatt J gave "some joint venture agreements, franchise agreements and long-term distributorship agreements" as examples of contracts which may perhaps "involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding

[162] [2017] 1 All E.R. (Comm) 1009.

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> *and necessary to give business efficacy to the arrangements", and in which the implication of a term requiring the parties to perform their obligations in good faith might therefore sometimes be justified. However, it is clear that the mere fact that a contract is a long-term or relational one is not, of itself, sufficient to justify such an implication. As Beatson LJ recently noted in Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd*
>
> > … an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract ..
> >
> > (emphasis added; footnotes omitted) {A1.1/69/70}

286. There are three points that emerge clearly from the authorities identified and quoted above.

287. First, the categorisation of an agreement as a relational contract does not, without more, result in the implication of a term as to good faith: see **Globe Motors** at paras 67-68 {A1.1/62/20}; **Carewatch** at paras 101-109 {A1.1/53/31} and **Monde Petroleum** at paras 249-254 {A1.1/69/70}.

288. Second, whether or not a term as to good faith may be appropriate depends on the particular terms of the contract and whether the language of the contract, viewed against its contract, permits the implication of such a term: see **Globe Motors** at paras 67-68 {A1.1/62/20} and **Monde Petroleum** at paras 250 {A1.1/69/70}

289. Third, a term as to good faith should only ultimately be implied if it satisfies the test(s) for implying terms in fact identified in **Marks & Spencer** – i.e. such a term must be so obvious as to have gone without saying and/or must be necessary for the practical or commercial coherence of the agreement: **Globe Motors** at para. 68 {A1.1/62/20}; **MSC Mediterranean Shipping** at para. 45 {A1.1/63/20}; **Carewatch** at paras 101-105 {A1.1/53/31} and **Monde Petroleum** at para. 249 {A1.1/69/70}. Adopting Beatson LJ's phrase in **Globe Motors**, there is no "*special rule of interpretation*" for relational contracts.

290. Post Office respectfully invites the Court to hold that the law is as stated in those three propositions.

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291. A further important point arises in this case specifically and follows from the above: there are no special rules of admissibility or relevance that apply to relational contracts. Material that is inadmissible and irrelevant to the construction of an ordinary commercial agreement is also inadmissible and irrelevant to the construction of a relational contract.[163] This applies, most pertinently, to evidence of post-contractual events or conduct (e.g. evidence relating to alleged breaches of contract), evidence of subjective intention and evidence of matters known or available only to one of the parties (which cannot therefore form part of the matrix of fact to the agreement).

A role for the categorisation of a contract as relational

292. Despite the above, Post Office accepts that identifying whether or not a contract is relational can form part of the process of interpreting the agreement. It is generally accepted that relational contracts may, in some respects, require particular consideration: see, for example, Jackson LJ's remarks at paras 92-93 in **Amey v Birmingham**.[164] Post Office respectfully submits that it may be useful, as a step in the process of considering implied terms, to identify whether the agreement at issue has the following characteristics:

(a) The necessity of practical cooperation between the parties over the course of the relationship.

(b) Long minimum duration.

293. A contract having those characteristics can usefully be categorised as relational.

294. The purpose of such categorisation is to invite further scrutiny as to whether any implied term(s) relating to cooperation and/or good faith and/or honesty and integrity may be necessary. This is because terms of this kind are more likely to be appropriate to relational contracts than they are to contracts that involve a "*simple exchange*" (Leggatt J's phrase at para. 142 in **Yam Seng** {A1.1/43/32}). The categorisation provides an effective screening process.

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[163] Cs submission to the contrary, as recorded by the Court at para. 28 of Judgment No 2, is plainly wrong and contrary to binding authority {B7/27/11}.

[164] [2018] EWCA Civ 264.

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295. But the categorisation is not the end of the analysis – it must then be shown that the alleged implied term is in fact necessary, applying the principles in **Marks & Spencer**.

296. This is consistent with **Yam Seng**, where Leggatt LJ stated that contracts that are categorised as relational "*may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements*" (emphasis added): see para. 142 {A1.1/43/32}. The categorisation is one step in the process – the Court then looks to apply the ordinary test for implying terms in fact. It is also consistent with Beatson LJ's remarks in **Globe Motors**, referring to "*certain categories of long-term contract*" in which "*the court may be more willing to apply a duty to cooperate or, in the language used by Leggatt J in* [**Yam Seng**], *a duty of good faith*" (emphasis added): see para. 67 {A1.1/62/20}.

297. The Court should be aware that this is subtly different from the categorisation process that Leggatt LJ describes in para. 167 of **Al Nehayan**:

> *... I have previously suggested in* [**Yam Seng**]*, at para 142, that it is a mistake to draw a simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships....* {A1.1/72/45}

298. If, as set out in that passage, the process of categorising a relational contract includes a determination that the parties have "*committed to collaborating with each other… in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract*", that process of categorisation begins to subsume the overall question of

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whether a term as to cooperation and/or good faith should be implied. It asks not only whether the contract is a good candidate, by type, for an implied term but also whether the specific contract contains a *lacuna* to be filled by an implied term.

299. In the analysis that follows, Post Office prefers the approach in **Yam Seng** and identified above – first testing whether the contract is relational (by type) before considering, as a distinct question, whether any term as to good faith should be implied. Ultimately, it does not matter to the outcome which approach is preferred.

(iii) The contracts in this case are not relational

300. It appears from **Yam Seng** that there are two essential characteristics of a relational contract: (1) the agreement requires cooperation and collaboration (rather than being a "*simple exchange*") and (2) the agreement is long-term.

301. As to first characteristic - the agreement requiring cooperation and collaboration - this is true to an extent of the contracts at issue in this case. However, the extent of that cooperation and collaboration is provided for in the express terms of contracts (including the express choice of an agency and accounting relationship) and in the Agreed Implied Terms.

302. The second characteristic - the agreement being long-term - is not present here. The contracts at issue in these proceedings are not long-term agreements.

303. The SPMC and the NTC are expressly terminable on relatively short notice: 3 months in the SPMC[165], and 6 months (but notice not to expire within the first year) in the NTC.[166]

304. It is clear from the authorities that written contracts that are terminable on relatively short notice cannot be relational:

(a) In **Yam Seng**, Leggatt J described relational contracts as involving a "*longer term relationship*", and he gave examples of some joint ventures, franchise agreements and "*long term distribution agreements*": see para. 142

[165] Section 1, clause 10 of the SPMC {D2.1/3/6}.

[166] Part 2, para. 16.1 of the NTC {D1.6/3/25}.

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{A1.1/43/32}. The contract in **Yam Seng** case was for a total minimum duration of around 2.5 years.[167]

(b) In **Hamsard 3147 v Boots UK**,[168] Norris J found that an interim agreement, which was terminable on reasonable notice,[169] was not a relational contract, including because it was not a "*long-term arrangement*": see para. 84 {A1.1/48/27}

(c) In **Acer Investment Management v The Mansion Group**,[170] Laing J found that the agreement at issue was terminable on a "*relatively short period of notice*" and that this was a reason (amongst others) to reject the submission that it was a relational contract: see para. 109 {A1.1/55/25}.[171]

(d) In **Globe Motors**, Beatson LJ identified the duration of a contract as essential to any characterisation as relational, referring at para. 67 to "*certain categories of long-term contract*", involving a "*longer-term relationship*". {A1.1/62/20}

(e) In **Amey v Birmingham**, Jackson LJ clearly considered the duration of the agreement before him (25 years) as highly relevant to its categorisation: see paras 92-93.

(f) The two recent cases referred to by Leggatt LJ in **Al Nehayan** as providing examples of relational contracts both involved long term agreements. **Bristol Groundschool v Intelligent Data Ltd**[172] involved an agreement with a minimum duration of 5 years: see para.19 (at the bottom of the quotation)

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[167] The initial duration was from 12 May 2009 to 30 April 2010, but the contract included a conditional extension to 31 December 2011. The extension was triggered: see paras 26 {A1.1/43/10} and 37 {A1.1/43/13}.

[168] [2013] EWHC 3251 (Pat). This case concerned an agreement under which a retailer had outsourced the supply of own-brand children's clothes for sale in its stores

[169] Norris J found that the notice that was in fact given, 9 months, was reasonable: see para. 78. {A1.1/48/25}

[170] [2014] EWHC 3011 (QB). This case concerned an agency agreement for the sale of financial investment products.

[171] The notice period was implied, rather than express: see **Acer** at para. 87 {A1.1/55/21}

[172] [2014] EWHC 2145 (Ch).

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{A1.1/52/8}. The contract in **D&G Cars Ltd v Essex Police Authority**[173] also had a minimum duration of 5 years, with an option to extend for a further year: see para. 13 {A1.1/56/5}.

305. Contracts of the type referred to by Leggatt J in **Yam Seng** have minimum durations measured in years, rather than months. The fact that the contracts here are terminable on short notice is fatal to the suggestion that they are relational.

306. It is obvious why long duration is essential to the characterisation of an agreement as relational. In a contract that involves close cooperation and has a long minimum duration:

(a) It can be anticipated that the factual circumstances of the contract's operation may well change substantially over its long duration. It is more likely that substantial cooperation will be required in light of such changes.

(b) For the same reason, the express terms are less likely to be capable, on their own, of giving effect to the parties' bargain as that bargain is applied to changing factual circumstances over time, many of which may not have been capable of being anticipated and addressed in the drafting of the express terms.

(c) Crucially, the parties will be bound to each other by the terms of the contract, despite the changed circumstances. It therefore may well have gone without saying that there would be strong mutual obligations of cooperation and/or good faith to reduce or eliminate the potential prejudice that would arise were the parties unable to respond to changed and unanticipated circumstances by bringing the contract to an end. In the absence of obligations as to honesty and integrity, the parties could be bound to each other for years despite one of them having undermined the bargain through dishonest conduct.

307. The same cannot be said of a contract that is terminable on relatively short notice. The "safety valve" in that case is the ability to end the relationship on notice (without even giving a reason). There is no necessity to imply a term as to good faith because the parties are ultimately protected by the ability to terminate the contract and exit the relationship.

[173] [2015] EWHC 226 (QB).

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308. Cs have argued that the termination provisions in the SPMC and the NTC cannot operate as "*trump card[s]*" to prevent them being classified as relational: see Written Opening, para. 126 {A/1/53}. Cs point out SPMs often remained in post for a long time, and argue that the actual duration of the contract in practice is somehow relevant to its interpretation. Cs also contend, in short, that SPMs expected the contract to last a long time. Both these points are misconceived in law:

(a) The actual length of the contract as it turned out is irrelevant and inadmissible as to its interpretation. The contract is to be interpreted at its inception and by reference to its express terms and any admissible matrix of fact. Here, the express terms as to termination on notice provide the answer as to the contract's minimum duration.

(b) The subjective expectations of Cs (or Post Office) as to the likely duration of the relationship are also irrelevant and inadmissible. The contract is to be interpreted (including its categorisation as relational or not) on the basis of the express terms and the admissible matrix of fact, rather than any subjective intention or expectation.

(c) If Cs were right, the SPMC and the NTC would be relational for some SPMs and not for others, depending on the subjective intention or expectation of the particular SPM (or Post Office) and/or the length of the contract as it turned out to be. On Cs' case, might the contract even become relational at some ill-defined point in its lifetime? The argument does not survive analysis.

309. Cs also rely on the fact of "*long-term commitments to the relationship*" as necessitating treating the contract as relational: see para. 129 of the Written Opening {A/1/54}. This too is misconceived:

(a) The question is not whether an incoming SPM might anticipate the contractual relationship turning out to last a long time (despite the contract permitting termination on notice). He or she might well do so. It would not be irrational or unwise to anticipate that the relationship would probably last a fairly long time, not least given that Post Office has strong incentives to keep branches open. It would not be irrational or unwise to make investments on that basis, taking a commercial view and balancing risk and reward.

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(b) But that is very different from the incoming SPM being contractually locked into a contract with a long minimum duration: see para. 46 above. A long expected duration is not the same as a long minimum contractual duration, and only the latter is relevant to the interpretation of the contract. In this sense, the express terms do indeed "*trump*" any subjective intention or expectation, but that is simply the effect of English law's objective approach to contractual interpretation.

310. In any event, Cs' argument is overblown on the facts: the value of the SPM's investments in the branch do not magically disappear at the end of the relationship; any goodwill generated by improvements to the branch and the associated retail premises will pass to any purchaser of the business, and the value of the investments will be reflected in the price paid to the outgoing SPM.[174]

(iv) The alleged implied terms fail the test for implication

311. For the reasons set out above, any term to be implied in fact must satisfy the test in **Marks & Spencer**, even in a relational contract.

312. Even if, contrary to the above, the contracts in this case were relational, the implied terms alleged by Cs would not fall to be implied.

The terms fail the test in Marks & Spencer

313. First, there is no space for the alleged implied terms because the parties' agreements are detailed and make express provision for the subject matter of the term alleged in para. 63 of the AGPOC (i.e. the legal character of the parties' relationship and the nature of the cooperation required of them).

314. A key characteristic of a contract that invites the implication of a term as to good faith is the absence of express provision for the nature or extent of the parties' core relationship and the cooperation that it requires. This can be seen in the leading cases:

(a) In **Yam Seng**, Leggat J defined relational contracts as involving "*expectations of loyalty which are not legislated for in the express terms of the contract*" (para. 142), and he went on to rely, in support of implying a term, on the fact

[174] See Angela Van Den Bogerd WS, para. 68 {C2/1/20}.

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that the agreement at issue was "*a skeletal document which does not attempt to specify the parties' obligations in any detail*" (para. 161) {A1.1/43/35}.

(b) In para. 167 of **Al Nehayan**, Leggatt LJ referred to agreements under which parties are "*committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract*" (emphasis added) {A1.1/72/45}

(c) In **Carewatch**, Henderson LJ refused to imply various general implied terms on the basis that the agreement before him was a detailed written agreement that had "*no clear lacuna*" that called out to be filled by such terms: see para. 109 {A1.1/53/34}.

315. The contracts at issue here do not have this characteristic. Post Office and the SPMs agreed expressly to a relationship of agent / principal, including duties to account. There is very substantial content to that relationship, derived both from the common law and from the detailed express provisions of the contracts. The parties expressly chose the particular legal character and content of their relationship and cooperation. The express choice of a legal relationship with a defined character and content precludes any attempt to imply in further or different implied obligations as to the nature and extent of the cooperation required.

316. Further, the parties made detailed express provision for the operation of the agency and accounting relationship in the particular context of operating a Post Office agency branch. This includes not only the long written agreements but also operating manuals and other contractual documents that provide the granular detail of how the relationship would work. This is in stark contrast to **Yam Seng** and **Al Nehayan** and the "*skeletal*" express provision in those cases. There is no lacuna. There is no space for any general implied term to spell out the basic character and legal content of the relationship. The parties spelled it out for themselves.

317. Cs want to imply terms to provide for the basic nature of the contractual relationship, but that space is already filled. Specifically, Cs seek to impose a duty of "*trust and confidence*" – the characteristic duty of employer and employee – in circumstances where the parties expressly chose a relationship of agent / principal and expressly

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rejected an employment relationship.[175] Cs admit that they were not employees but then try to escape the consequences of that admission by imposing the essence of an employment relationship in an implied term – getting through the back door what they admit cannot fit through the front.

318. In the **Carewatch** case, Henderson J was faced with a slew of very general alleged implied terms that were, as here, said to be justified by the nature of the contract at issue – in that case, a long term franchise agreement. The Judge reminded himself that the parties (as in this case) had contracted "*for a commercial relationship, from which both parties hoped to profit, and where both sides had interests of their own to protect*". He found "*no "clear lacuna" in the detailed provisions of the agreement which has to be filled if the agreement is to work commercially*". He applied the orthodox test for the implication of terms in fact, refusing to imply any term that would be inconsistent with the express terms and rejecting the alleged implied terms: see paras 101-112 {A1.1/53/31}.

319. Post Office commends Henderson J's approach to the Court: any implied term, whether as to good faith or anything else, must satisfy the strict test for implication in fact; if it does not, it cannot be implied. The discussion in **Yam Seng** does not authorise the kind of dramatic departure from orthodoxy that Cs want to press upon the Court.

320. Second, more generally, there can be no sensible argument that the alleged implied terms are necessary for the practical or commercial coherence of the SPMC and the NTC and/or were so obvious as to have gone without saying:

(a) The contracts work perfectly well without the alleged implied terms. Even many of the lead Cs operated under them for years without any substantial problems. Cs have not identified any lack of coherence (but only alleged unfairness).

(b) It is unrealistic to contend that Post Office accepted onerous obligations that must have gone without saying whilst, in the same breadth, contending that the principal express obligations of the contracts are all in favour of Post Office as

[175] Section 1, clause 1 of the SPMC {D2.1/3/5} and Part 2, para. 1.2 of the NTC {D1.6/3/6}.

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principal. If the express terms show an agreement crafted to favour one party, the implied terms cannot reflect some alternative reality in which the bargaining power was more even. Similarly, the existence of a fiduciary relationship (agent to principal) precludes the implication of some lesser (or greater) legal relationship requiring good faith. The space is filled.

(c) The real thrust of Cs' case is that the agreements should be re-balanced in favour of SPMs, but that is an invitation to re-draft or improve the parties' bargain, rather than to interpret the agreement that they in fact made.

321. Ultimately, Cs' argument for the implied terms as to good faith proceeds on the basis of the error of law in **Bou-Simon**. Cs identify what they will presumably argue were crises in the operation of the contracts, most notably relating to bugs or errors or other flaws in Horizon[176] or unfairness in Post Office's practices and procedures in relation to support, investigation, suspension and termination. None of the matters on which Cs rely are even alleged to have been known to or anticipated by the parties at the time of contracting. None of them can play any role in deciding whether or not terms are to be implied.

322. This is because identifying whether a contract is relational, and whether or not it invites the implication of a term as to good faith (and if so, what term exactly) are matters of contractual interpretation: see, e.g., **Yam Seng** at paras 130-133 {A1.1/43/30} and 144 {A1.1/43/33}; see also paras 27 to 29 above. The usual exclusionary rules apply.

323. Lastly, any gap that there otherwise might be in the express provision is filled by the Agreed Implied Terms. This is the final nail in the coffin of the idea that these contracts might somehow require the imposition of a further implied term to spell out what was obvious but unsaid. The Agreed Implied Terms do the necessary work to make sure that the express obligations work in accordance with the overall contractual bargain.

[176] See, e.g., Bates IPOC, paras 84.10 and 84.12 - 84.14 {B5.1/2/23} and Bates Reply, para. 61 {B5.1/4/23}

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324. In the pleadings, Cs argue that they were heavily reliant on Post Office, arguing that this characteristic of the relationship necessitates implying the broad terms that they allege.[177] But there are three glaring problems with their arguments in that regard:

(a) First, Cs seek to rely on post-contractual events (such as the introduction of Horizon) to justify categorising the contract as relational and implying terms as to good faith and transparency (etc). This involves a fundamental error of law. Whether a contract is relational and whether it includes implied terms as to good faith are matters that have to be judged at the inception of the contract, by reference to the admissible background at that time.[178]

(b) Second, one party may be heavily reliant on the other even in an ordinary commercial relationship. He may be unable to monitor the performance in which he trusts and on which he relies. None of that requires the Court to intervene and impose a different legal character on the relationship: see, by analogy, **Re Goldcorp Exchange Ltd**[179] at p.98 *per* Lord Mustill {A1.1/11/25}

(c) Third, even without the alleged implied terms, Post Office owed obligations as principal, under the express terms and under the Agreed Implied Terms. There is no gap that cries out to be filled. There is no incoherence.

The alleged terms would not be appropriate even in a relational contract

325. The alleged implied terms would not be presumptively appropriate even were the contracts relational. None of them would find favour with Leggatt J (based on his reasoning in **Yam Seng**). They would not even proceed to the final stage of being tested for necessity. Specifically:

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[177] See, e.g., Bates IPOC, para. 84.11 {B5.1/2/23} and Bates Reply, para. 61 {B5.1/4/23}

[178] See, for example, **Globe Motors**, *per* Beatson LJ at para. 68: "*an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract.*" {A1.1/62/20}

[179] [1995] 1 A.C.74 (PC).

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(a) The term alleged in para. 63 of the AGPOC is extremely broad and onerous. It goes well beyond anything that Leggatt J was prepared to imply in **Yam Seng**. It seeks to impose a positive duty of disclosure ("*transparency*") and the characteristic duty of employee and employer ("*trust and confidence*"). Terms of that extraordinary generality would have to be agreed expressly, as Jackson LJ observed in the **Mid Essex Hospital** case at para. 105 {A1.1/44/24}.

(b) The terms alleged in para. 64 of the AGPOC are unilateral: they all seek to impose obligations on Post Office alone, rather than mutual duties. They are not terms that could be characterised as incidents of a mutual obligation of good faith or cooperation. Post Office would, for example, be required by the term alleged at AGPOC, para. 64.5 to seek to identify the causes of shortfalls even where the SPM has made that process practically impossibly by rendering false accounts and has himself refused to cooperate.

(c) The terms alleged in para. 64 of the AGPOC are not qualified by concepts of honesty, integrity or loyalty to the parties' bargain: they are absolute obligations to do certain things to assist SPMs, without regard to whether failing to do those things would be dishonest or inconsistent with parties' agreement. They are similar to the term that Leggatt J refused to imply in **Yam Seng** at paras 155 to 156 {A1.1/43/35}.

(3) THE GENERAL IMPLIED TERMS (COMMON ISSUE 2)

326. Many of Cs' alleged implied terms are addressed by topic area in these submissions – for example, the term alleged at AGPOC, para. 64.14, which relates to termination, is addressed in the section on termination below.

327. Five of the terms alleged in para. 64 of the AGPOC, however, relate to the nature and content of the contractual relationship in general and can usefully be taken together. They are pleaded at AGPOC, paras 64.15 to 64.19.

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Outline of the parties' contentions

328. Unfortunately, Cs' case on these alleged terms has not been pleaded with clarity or completeness. Post Office has had to do what it can to make sense of the case against it.

329. Prior to the Individual Replies, Cs' case on these alleged terms was extremely sparse. All the implied terms alleged in para. 64 of the AGPOC are taken together in the IPOCs: see, for example, Bates IPOC, paras 86-90[180]. It was only in response to the detailed pleading from Post Office in the Individual Defences, that Cs decided to go into any detail whatsoever on these alleged implied terms: see, e.g., Bates Reply, paras 70, 72 and 73.[181]

330. Even in the Replies, however, Cs still refuse to provide proper particulars of the contractual discretions and powers that they contend are affected by the alleged implied terms: see Bates Reply, para. 73.1, referring generically to "*all contractual and other powers and discretions*". Cs even purport to put Post Office to proof of some general "*entitlement…to act…dishonestly or in bad faith in its dealings with the Claimant*" – i.e. a requirement on a defendant to prove the absence of implied terms that would control (unidentified) contractual entitlements. There is no pleaded allegation of bad faith or dishonesty to which this bizarre plea is anchored.

331. Nothing is added by Cs' Written Opening Submissions. Para. 151 states that Cs' case is that the alleged implied terms "*apply to all contractual and other powers and discretions*", without identifying those powers and discretions: {A/1/63}.

332. Against this background, Post Office contends that none of the implied terms alleged in para. 64 of the AGPOC satisfies the test for implication. Post Office relies[182] on the following general matters:

    (a) None of the terms is so obvious as to have gone without saying. The contracts do not lack practical or commercial coherence without them.

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[180] {B5.1/2/24}.

[181] {B5.1/4/30}.

[182] See, e.g., Bates Defence, para.56. {B/5.1/3/34}

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(b) The contracts are detailed and professionally drafted written agreements designed and used for a business-to-business relationship. They make express provision for the nature of the parties' relationship and contain detailed terms addressing the key elements of the contractual and agency relationship (e.g. the duty to account). They are not the kind of contract into which terms can readily be implied.

(c) The contracts contain the Agreed Implied Terms, which complement the express terms and further identify the cooperation required for the proper operation of the contractual relationship. In addition to these terms, the contracts also include an implied restriction on Post Office's power to change the contract and/or operational instructions and other specific implied restrictions identified below.[183]

(d) The fact that Cs plead so many detailed and overlapping implied terms demonstrates that none of them is a term upon which the parties would necessarily have agreed had they sought to make express provision for its subject matter. There is a vast number of substantially or subtly different terms that the parties could have agreed in relation to any given subject matter falling within the contractual relationship, but they in fact chose the terms of the written contracts.

(e) The alleged terms would have prevented or constrained the parties' acting commercially, sensibly or flexibly.

(f) Had it been asked to do so, Post Office would not have agreed the alleged implied terms, not least because they would be onerous, unreasonable, uncommercial and/or unnecessary in practice. Such a refusal would have been reasonable.

333. There is one further introductory point. Cs' submissions on the alleged implied terms start from the erroneous proposition that the two "*categories of implied term*" identified in para. 152 of Cs' Written Opening Submissions "*are not, on analysis, actually distinct*" {A/1/63}. That is fundamentally wrong:

[183] See, e.g., Bates Defence, para. 65(2). {B5.1/3/38}

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(a) The two types of implied term, to which Cs then refer confusingly as "*Type 1*" and "*Type 2*" are substantively and importantly distinct. They are (1) terms implied in fact and (2) terms implied by law. This is clear from **Geys** at para. 55 {A1.1/42/25} and is trite law.

(b) Crucially, there can be no suggestion that any of the implied terms alleged by Cs is a term that can be implied by law. It is a basic error of law to seek to imply any of the alleged terms on that basis. Nor is there any "*nexus*" between the two types of implied term, such that Cs can seek to equivocate between the two sets of distinct legal principles and rules.

334. Cs go on, at paras 167-171 of the Written Opening Submissions, to try to obscure the distinction between terms implied in fact and terms implied by law {A/1/64}. Cs rely on the fact that the contracts at issue here are in some respects similar to contracts of employment to try to lower the hurdle for implying terms. But the basic point is this: terms implied by law into a certain and well-defined category of contract are only implied into contracts within that certain and well-defined category. The fact that terms are implied by law into employment contracts (under long-standing high authority) does not mean that similar or different terms should be implied into contracts that are to some degree or in some respect similar to employment contracts.

335. Cs have to show that the alleged implied terms should be implied in fact. As noted in the Introduction above, Cs' approach in cross-examination was to invite witnesses to opine on the suitability of alleged implied terms with the benefit of hindsight, expressly inviting the error of law seen in the **Bou-Simon** case {A1.1/75}. Cs will presumably try to lure the Court into the same error.

336. Post Office now addresses the specific terms alleged in AGPOC, paras 64.15-64.19.

The implied term alleged in AGPOC, para. 64.15

337. The implied term alleged in AGPOC, para. 64.15 is "*Not to take steps which would undermine the relationship of trust and confidence between Claimants and the Defendant.*". In addition to the general reasons set out above, there are two specific reasons not to imply this term.

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338. First, it forms part of Cs' attempt to replace a business-to-business agency and accounting relationship with an employment relationship. It would contradict the express terms of the contracts, including the express choice of an agent-principal relationship and the express rejection of any employment relationship.[184] The parties of course owed each other the common law duties of agent and principal, but these are not the same as the employment law duties that Cs wish to crowbar into the agreement.

339. Second, outside an employment relationship, there is no necessity for such a broad, general and imprecise term, especially where the parties have agreed detailed express terms. The implication of broad terms of this kind into commercial agreements is consistently refused. A good example is **Bedfordshire County Council v Fitzpatrick Contractors Ltd**[185], in which Dyson J was asked to imply a term of trust and confidence into a long-term highway maintenance contract. He held that the proposed term was not necessary. He continued:

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

340. Dyson J's approach was followed by Henderson J in relation to the long-term franchise agreement in the **Carewatch** case.[186] Post Office respectfully invites the Court to follow it here.

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[184] Section 1, clause 1 of the SPMC {D2.1/3/5} and Part 2, para. 1.2 of the NTC {D1.6/3/6}.

[185] [1998] 62 Con LR 64. {A1.1/53}.

[186] See at paras 106 and 109, in particular.

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The implied term alleged in AGPOC, paras 64.16 to 64.17

341. Cs plead at paras 64.16 to 64.17 two terms that would restrict the exercise of contractual powers and discretions. Cs do not identify the powers and/or discretions that are the target of these alleged implied terms, which are as follows:

> *64.16. To exercise any contractual, or other power, honestly and in good faith for the purpose for which it was conferred.*
>
> *64. 17 Not to exercise any discretion arbitrarily, capriciously or unreasonably.*

342. Cs left it to Post Office to identify the contractual powers and discretions that might conceivably be in issue. That is an inappropriate and fundamentally objectionable approach. It is for Cs to identify (1) the powers and discretions that they contend are subject to implied restrictions and (2) how those powers and discretions are said to be relevant to claims that are advanced in the AGPOC. Cs have done neither of those things, not even in their Written Opening Submissions.

343. Without prejudice to this objection, Post Office identified in its Individual Defences several potentially[187] relevant contractual powers, and it has volunteered restrictions on those powers in the Individual Defences. Specifically:

(a) Under section 1, clause 18 of the SPMC, Post Office has a power to change the contract and its operational instructions. Post Office accepts that, where it proposes to use this power to make a change without the agreement of the NFSP, it cannot exercise that power dishonestly or in an arbitrary, capricious or irrational manner. An implied restriction to that effect is appropriate.[188]

(b) Under Part 2, para 20.2 of the NTC, Post Office is entitled to make certain sorts of amendments to the contract on giving 3 months' notice (or shorter notice where necessary to comply with a statutory or regulatory requirement). Post Office accepts that this entitlement is subject to a restriction that it cannot be exercised dishonestly or in an arbitrary, capricious or irrational manner.[189]

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[187] Post Office of course does not concede such relevance.

[188] See, for example, Individual Defence to Bates IPOC, at para 65(2) {B5.1/3/38}.

[189] See, for example, Individual Defence to Stockdale IPOC, at para 47(2) {B5.6/3/24}.

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(c) By Part 3, para 3.1 of the NTC, Post Office is entitled to vary on notice the fees payable for the performance of transactions. Post Office accepts that there is an implied restriction that such entitlement cannot be exercised dishonestly or in an arbitrary, capricious or irrational manner.[190]

(d) By Part 5, para 1.3 of the NTC, Post Office is entitled to amend on notice the list of documents coming under the definition of "Manual" and to amend the content of those documents. Post Office accepts that there is an implied restriction that this entitlement cannot be exercised dishonestly or in an arbitrary, capricious or irrational manner.[191]

344. Bizarrely, Mr Beal was subjected in cross-examination to questioning as to whether Post Office should have admitted that a restriction on the power in section 1, clause 18 of the SPMC should apply also to the power to change the contract and/or instructions with the agreement of the NFSP: {Day6/75:2} to {Day6/80:3}. As noted above, the questions were put expressly in the context of the allegations in these proceedings as to Horizon, i.e. with the benefit of hindsight: see {Day6/74:18}to line 24. The question was, in any event, misconceived:

(a) The issue is not whether Post Office would be expected to act capriciously, dishonestly or maliciously in making changes to the contract or operational instructions.

(b) The issue is whether it is obvious and/or necessary that there be an implied term in the contract – i.e. whether the parties, at the time of contracting, would have answered with a terse "of course" if asked whether there was such a restriction and/or whether the contract would lack practical or commercial coherence without such a restriction.

345. Neither of those tests is met as regards changes made with the agreement of the NFSP, a body tasked with protecting the interests of SPMs. The contract itself provides an express "*control mechanism*" (namely, the need to obtain approval from the NFSP), and this precludes any implied restriction. In **Mid Essex Hospital**

[190] ibid, para 47(3) {B5.6/3/24}.

[191] ibid, para 47(4) {B5.6/3/24}.

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Services NHS Trust v Compass Group UK and Ireland [2013] B.L.R.265 at para. 139, Lewison LJ stated as follows: "*Where the contract itself expressly provides the control mechanism, especially where the control mechanism is an objective test, there is no warrant for implying a different one*" {A1.1/144/31}.

346. It is an objective test whether or not the NFSP has granted its approval for a change, and there is nothing incoherent (whether practically or commercially) in the parties agreeing to such a control mechanism, to the exclusion of any implied restriction. If the parties had been asked at the time of contracting whether changes agreed by the NFSP were subject to any additional restriction, they would not have replied with a terse "of course" but with confusion as to why any further restriction would be necessary. The NFSP could be expected to block any highly controversial change, leaving it to Post Office to decide whether or not to impose the change or any similar change without the benefit of agreement (in which circumstance the implied restriction will apply).

347. Beyond these terms that Post Office has itself put forward, ones is left guessing at what other (if any) contractual rights, powers or discretions it is that Cs are seeking to control by the general implied terms alleged in paras 64.16 and 64.17. It is important to identify the precise contractual entitlements at issue because the appropriateness of implying a term (and what term) depends on the nature of the express term at issue, including whether it creates, on its proper construction, a contractual *discretion* (properly so-called) or a contractual *power* or a contractual *right*. Specifically:

(a) It is only contractual discretions (properly so-called) that typically invite the implication of a term to prevent irrationality and capriciousness: see **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland**[192] at paras 83-95 *per* Jackson LJ {A1.1/44/21} and **British Telecommunications v Telefonica O2 UK**[193] at para. 37 *per* Lord Sumption. {A1.1/51/17}

(b) Contractual powers may be subject to slightly different restrictions, depending on the particular power at issue and its context: see, for example, the restriction discussed in **Property Alliance Group v The Royal Bank of**

[192] [2013] B.L.R.265. {A1.1/44}

[193] [2014] Bus L.R. 765. {A1.1/51}

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Scotland[194] (requiring a contractual power to be exercised in the pursuit of legitimate commercial aims and not maliciously).

(c) Contractual rights, by contrast, are not controlled by any general implied restriction. The existence of an express and unconditional right precludes the implication of a term that would be inconsistent with it (by turning it into a conditional or limited right).

348. Cs' unexplained failure to plead a properly articulated case has prevented Post Office being able to provide a full response by reference to these well-established principles. Post Office cannot admit to any general restriction without knowing to what terms it is alleged to apply.

The implied term alleged in AGPOC, para. 64.18

64.18 To exercise any such discretion in accordance with the obligations of good faith, fair dealing, transparency, co-operation, and trust and confidence.

349. In addition to the general reasons, there are two specific reasons to reject this alleged term.

350. First, the case for its implication assumes that Cs succeed on Common Issue 1. In the absence of the implied terms that Cs plead in para. 63 of the AGPOC, there can be no argument for the control on discretions pleaded in para. 64.18. Post Office submits that this implied term falls away with those alleged under Common Issue 1.

351. Second, even were Cs right on the relational contract issue, there could be no justification for such a broad and vague control on Post Office's discretions (which are not identified):

(a) In **Yam Seng** itself, Leggatt J was careful only to imply the minimum necessary terms to give effect to the principles as he saw them – he crafted the implied terms around the express terms and in light of the background, rather than imposing a broad and vague obligation of the kind that Cs seek to impose. Cs' approach is vastly more ambitious than Leggatt J's and is flatly contrary to the principles in **Marks & Spencer**.

[194] [2018] 1 W.L.R 3529. {A2/59}

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(b) The Courts have repeatedly stressed that broad and vague obligations cannot be implied into detailed commercial contracts: see the cases cited at paras 240 and 241 above. It is wholly unclear what practical effects Cs' alleged term would have. Outside the types of relationship where such broad obligations are implied by law, the parties to commercial contracts can of course agree them expressly, but it is inappropriate to impose them in the guise of terms implied in fact (see, e.g., **the Mid Essex Hospital Services NHS Trust** case at para. 105 *per* Jackson LJ, quoted above at para. 200).

(c) In this case, the Agreed Implied Terms meet any need for fact-sensitive and flexible terms, and they do so in a structured way that is appropriate to commercial contracts and supported by authority. Specifically, they ensure that the express terms work properly in the face of unanticipated circumstances and in accordance with the parties' legitimate pre-contractual expectations. If the circumstances make it necessary for Post Office to provide reasonable cooperation to the SPM for her to be able to perform her obligations under the contract, such cooperation is required of Post Office.

The implied term alleged in AGPOC, para. 64.19

64.19 To take reasonable care in performing its functions and/or exercising its functions within the relationship, particularly those which could affect the accounts (and therefore liability to alleged shortfalls), business, health and reputation of Claimants.

352. In addition to the general reasons, there are three specific reasons to refuse this alleged term.

353. First, it would hollow out and replace the parties' expressly chosen relationship of agent and principal with something less specific, less structured and very different. Implying a broad duty of care would be inconsistent with the parties' decision to create and regulate their relationship in accordance with detailed written agreements and the agent-principal relationship. Implying such a duty would cut across that choice and would be inconsistent with the express terms of the agreements. The Court must be careful to avoid interfering with a commercial bargain by implying broad and general terms, including where such terms may limit each side's ability to further its own interests: see, e.g., **Carewatch** at para. 109 {A1.1/53/34}. **Al Nehayan**

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confirms that even an implied obligation as to good faith does not require any subordination of commercial interests: see para. 167 {A1.1/72/45}.

354. Second, the term implicitly assumes some responsibility, on Post Office's part, for the "*health and reputation*" of Cs. There is no pleaded case that such responsibility arose under any express or implied term of the agreements. Imposing it by the back door is impermissible. Such a duty, is, any event, obviously not necessary to a business-to-business relationship entered into in the expectation of profit, including where not all SPMs are even natural persons. The idea that it could be so obvious as to have gone without saying is fanciful.

355. Third, implying such a broad and vague term would cut across Post Office's entitlement to have regard to its own commercial interests in the operation of its network. It is unrealistic to contend that Post Office must necessarily have undertaken some duty to protect the SPMs' "*business*". Can it really be said that the agreement would lack commercial or practical coherence unless Post Office undertook such a duty? Would it extend to the protection of the SPMs' associated retail business?

356. Post Office has an express contractual right to withdraw services from branches, notwithstanding that doing so may of course be to the disadvantage of a particular SPM and his associated retail business. But that is of the essence of the relationship: Post Office has to have a good measure of control over its network of branches, given that it is Post Office that has the contracts with the third-party clients[195] and Post Office that owes obligations to government. Post Office therefore needs the ability to take actions to benefit its business and the branch network as a whole, including where this is contrary to the interests of a particular SPM. Even Mr Abdulla accepted that he knew from the outset that Post Office could change the services available to the branch: {Day4/35:19}.

357. In this context, Post Office would obviously never have agreed to such a vague and potentially powerful restriction on its right to run its business and network in accordance with its commercial interests[196] and the public interest[197]. Those interests

[195] Ms Van Den Bogerd gives the example of DVLA services at para. 56 of her WS {C2/1/15}.

[196] See Angela Van Den Bogerd's WS at paras 23-32 {C2/1/7}.

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will not always overlap with those of any particular SPM. Cs' implied term would risk turning all express contractual rights into contractual discretions to be exercised with regard to both sides' interests on an individual SPM-by-SPM basis, which would be impossible to do in a network with more than 11,000 branches and in which Post Office must manage the network in accordance with third-party requirements and so as to maintain profitability overall (or at least limit overall losses).

358. Cs' argument for the implied term in the Individual Replies is telling:

> *The duty…is entirely consistent with the nature of the relationship between a statutory monopoly*[198] *and individuals in the position of Subpostmasters. There is nothing inherently unreasonable (still less onerous, uncommercial or unnecessary) in requiring the taking of reasonable care.*[199] (footnote added)

359. There is no attempt to show the term to be necessary but only reasonable. There is no attempt to show that the term would be consistent with the detailed written agreement that Cs chose to enter into with Post Office on a business-to-business basis. Cs do not even engage with the obvious point that Post Office is entitled to run the network in accordance with its own commercial interests, without having to somehow try to balance its interests against those of each and every individual SPM and his associated retail business.

The Discretionary Payments Agreement

360. For the first time in their Individual Replies, Cs seek to rely on the Discretionary Payments Agreement dated 1 April 1989 ("the DPA") as forming part of the contracts and so limiting Post Office's exercise of unspecified contractual rights, powers and discretions.[200]

361. There was some cross-examination of Ms Breeden in relation to the DPA on Day 7: see {Day7/125:13} to {Day7/127:23}. On the face of it, none of the questions or

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[197] ibid, paras 33-37 {C2/1/8}.

[198] Which Post Office in fact is not.

[199] See, e.g., Bates Reply, para. 74. {B5.1/4/32}

[200] See, e.g., Bates Reply, para. 70. {B5.1/4/30}. It is also pleaded in relation to the NTC: see, e.g., Dar Reply, para. 60. {B5.5/4/26}

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answers has any relevance to any Common Issue, although Cs seem to contend that the DPA is tangentially relevant to Common Issue 17 ("true agreement"): see Written Opening Submissions, para. 401.2 {A/1/155}.

362. In any event, Cs' attempt to somehow force the DPA into the contracts should be rejected, for four reasons:

(a) First, the contracts contain express provisions as to how they are to be varied.[201] None of them was ever varied so as to incorporate the DPA. No allegation to that effect is even pleaded. None is advanced in the Written Opening Submissions.

(b) Second, none of the lead Cs was ever a party to the DPA. It is an agreement between Post Office and the NFSP. There is no pleaded basis for any suggestion that the NFSP contracted as agent for Cs (or any of them).

(c) Third, the DPA is a discretionary arrangement that operates outside the contractual rights and obligations as between Post Office and the SPM.[202] It is expressly stated not to be legally enforceable.[203] It assumes the operation of the contracts in accordance with their terms, rather than modifying or qualifying those terms. It is wrong and unprincipled to read the extra-contractual scheme into the contract, not least because the DPA would obviously (were it an enforceable agreement between the parties) contradict the express terms of the contracts into which it is supposedly to be inserted.

(d) Fourth, there is an important point of legal policy. If it were right that a discretionary compensation scheme could be used to attack the express provisions of the agreement in relation to which it operates, that would create a strong disincentive to the use of such schemes. It should be open to large organisations to agree mechanisms for discretionary payments that sit outside

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[201] Section 1, clause 18 of the SPMC {D2.1/3/8} and Part 2, para 20.2 of the NTC {D1.6/3/30}.

[202] This is made clear by the DPA itself, referring throughout to "*discretionary payments*" and to SPMs being "*eligible for consideration*" in certain circumstances. {G/84/1}

[203] See clause 24. {G/84/6}

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the terms of the contractual relationship, without risking undermining their contractual rights under that relationship.

363. Cs further contend that the implied terms alleged in paras 64.14 to 64.19 prohibited the exercise of powers and discretions in a relation to termination, compensation for loss of office and/or subsequent appointment "*so as to subvert the DPA or any entitlement to or eligibility of the Claimant for compensation thereunder*". Post Office does not know what this is supposed to mean. There is no pleading as to any "*subversion*" of any provision of the DPA that is said to have resulted from anything Post Office is alleged to have done in accordance with the contracts' terms (express or implied). Nor does the DPA give rise to any entitlements: it is not legally binding. Again, Cs have decided not to plead a proper case.

The implied term alleged at Reply, para. 96.1

364. Cs allege that Post Office's entitlement to recover in respect of shortfalls was limited by an implied term to the effect that any claim had to be made "*within a reasonable time of discovery or the date by which, with reasonable diligence, Post Office could have made such discovery*".[204] Confusingly, Cs also refer to this as a "*construction*" of the contract.

365. The only matter that Cs advance in favour of this implied term is the suggestion that imposing it would be "*consonant with*" the requirements for SPMs to make good shortfalls "*without delay*" under section 12, clause 12 SPMC and para. 4.1 of the NTC.

366. The allegation that there was such an implied term is beyond the scope of reasonable argument:

(a) It cannot sensibly be said that an implied restriction is necessary for the business efficacy of the agreements. The agreements work perfectly well without any such restriction. The parties contracted against the background of the existence of limitation periods and the relevant principles under the common law.

[204] {B3/3/43}.

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(b) It is impossible to argue that such a restriction can have gone without saying. Post Office would obviously never have agreed a term that would see it potentially lose its rights to enforce shortfalls within the limitation period; it would obviously never have agreed to a duty to investigate whether it might have a claim "*with reasonable diligence*", given its strong bargaining position.

(c) The term would be onerous, uncommercial and unreasonable. On the face of it, it would prevent Post Office recovering within the limitation period, even in cases of fraud, as long as the fraud should have been discovered earlier with "*reasonable diligence*".

(d) If the fact that Post Office contracted for a requirement that SPMs make good shortfalls "*without delay*" is relevant at all, its relevance is that it undermines the suggestion that some cognate obligation was placed on Post Office to act without delay in enforcing its rights, but without similar words being used. The obvious inference from the absence of any such words is that parties chose not to impose such an obligation on Post Office.

(4) SCOPE OF THE GENERAL IMPLIED TERMS (COMMON ISSUE 3)

367. As already noted, Cs have not pleaded the terms to which the implied terms above are alleged to apply. Nor is there any proper case set out in the Written Opening Submissions.

368. It follows that there is no properly pleaded or argued case that Cs can advance under Common Issue 3. Post Office has identified above the contractual discretions or powers that it accepts are subject to implied restrictions.

369. It is now far too late for Cs to try to advance any case under Common Issue 3 by identifying, at the last second of the last minute, some further contractual terms that it alleges are contractual discretions or powers which should be subject to implied restrictions.

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D. OTHER SPECIFIC IMPLIED TERMS

(1) SUPPLY OF GOODS AND SERVICES ACT (COMMON ISSUE 4)

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

370. Cs have alleged wide-ranging implied terms governing Post Office's provision, to SPMs, of Horizon, the Helpline and training. Those terms are alleged to be implied both under section 13 Supply of Goods and Services Act 1982 ("**the Act**"), and as freestanding terms.

371. There is no basis for implying any of these terms. The so-called "services" provided do not fall within the scope of the Act, and the test for the implication of terms is not close to being met. (It is also worth noting that there is a particular oddity, with which Cs have not grappled, about asserting that Post Office agreed to provide Horizon when, for some of the relevant period covered by the contracts, Horizon had not yet been introduced.)

372. Section 13 of Act provides as follows {A1.2/2/3}:

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

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

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

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> *(3) Subject to subsection (2) above, a contract is a [relevant contract for the supply of a service] for the purposes of this Act… whatever is the nature of the consideration for which the service is to be carried out."*

374. A number of authorities have considered the scope of this provision. They clearly establish that the answer to this Common Issue is "No".

375. **Euroption Strategic Fund v Skandinaviska Enskilda Banken**[205] involved a claim brought by an investment fund against its bank. The fund failed to deposit a contractually mandated margin payment, following which the bank exercised its contractual right to close out the fund's portfolio. The fund contended that the bank had carried out the close-out negligently. One issue was whether, in carrying out the close-out, the bank was bound by a term implied pursuant to section 13 of the Act.

376. At paras 111-113, Gloster J (as she then was) concluded that no such term should be implied:

> *In my judgment, SEB's rights under the Mandate to impose limits on Euroption's activities under clause 6, to close out Euroption's positions under clause 11, or to refuse instructions under clause 12 (c) cannot be characterised as "services" within the definition contained in section 12 (1) of the Act. The definition in section 12(1) of "contract for the supply of a service" is (subject to exclusions) "a contract under which a person ('the supplier') agrees to carry out a service". Thus the "implied term about care and skill" imposed by section 13 of the Act only applies to services agreed to be provided under a contract for services and not to all rights and obligations under such a contract. Section 13 provides:*
>
> > *"In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill." (Emphasis added)*
>
> *...SEB's right to impose limits, its right to refuse instructions, or its right to close out…were not on any basis services which SEB had agreed to carry out under the Mandate. First, it is difficult to see how, in ordinary language, the*

[205] [2012] EWHC 584 (Comm) {A1.1/41}.

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> *exercise of such rights by SEB, at its discretion, for the purposes of protecting its own position, could be characterised as a "service" being provided "to" Euroption. Even if, contrary to my view, the exercise of such rights could arguably be so characterised, since SEB had not agreed under the Mandate, to provide any such "service", it is difficult to see how rights exercisable at SEB's discretion could be said to be "services" for the purpose of section 13."* (emphasis in original)

377. Field J reached a similar conclusion in **Marex Financial v Creative Finance**.[206] That case involved a broker seeking money due on its account with the defendant. The broker had closed out the defendant's account, and, again, one issue was whether in carrying out the close-out, the bank was bound by a term implied pursuant to section 13 of the Act. Field J said at paragraphs 70 to 71:

> *Mr Cox argued that s. 13 is not confined to the performance of "primary" services to be supplied under the contract but applies also to services that are ancillary to the primary subject matter of the contract, whether that subject matter concerns the sale of goods or the provision of a service. In his submission, the closing out of positions forms part of the wider process by which Marex provided its clients with access to the FX markets. Positions that were built up also need to be closed out, whether forcibly or otherwise. It is artificial to sever the close-out from the parties' wider relationship.*
>
> *71 I decline to accept Mr Cox's submissions. In my judgement, the implication under Section 13 is in respect of the particular service which the supplier has agreed to carry out pursuant to the contract, and the exercise by Marex of its right to close out the Defendants' positions was not a "service" that Marex had agreed to carry out for the Defendants. Rather, it was a right that Marex elected to exercise in its own interests and for its own protection. This was the view of Gloster J in Euroption (paras 111, 113 and 114) and I agree with her analysis."* (emphasis added)

[206] [2013] EWHC 2155 (Comm) {A1.1/45}.

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378. In **DC Accountancy Services v Education Development International**,[207] the question was what duties were owed by a company (EDI) which awarded qualifications when it carried out assessments of (and imposed sanctions on) a business school (DCAS). Andrews J held at paras 31 to 32:

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

379. The reasoning in these authorities applies straightforwardly to the provision of Horizon, the Helpline, training and/or materials. Post Office has not agreed to supply these things; it is not selling, or renting, them to SPMs. In the language of Andrews J, Post Office was not "*being paid*", in any form of consideration, for their provision. Rather, Post Office chose to provide them, for its own ultimate benefit. The putative "services" are merely facilitative of the more substantial exchange under which it is SPMs that provide the services and Post Office that pays the remuneration. Their

[207] [2013] EWHC 3378 (QB) {A1.1/49}.

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essential function is to operate as part of a mechanism that enables SPMs to fulfil their side of the contractual bargain.

380. Further, a party seeking to imply a term pursuant to section 13 must identify relevant provisions in the contract by which the other party has specifically agreed, in exchange for consideration, to assume the obligation to provide a relevant service to and for the benefit of the first party. It is necessary to "*plead and prove a contract under which the Defendant has agreed to provide a service that included the provision of*" the relevant service: **Finch v Lloyds TSB Bank**[208], *per* HHJ Pelling QC at para.49. Cs have not done so; nor could they, as there are no contractual provisions to which they could refer.

381. The closest that Cs come, and only in their witness evidence, is to say that they were "*told lots of positive things about the Helpline*",[209] that the Helpline was described to them as an "*excellent service*",[210] and that they were emailed a restrictions policy which noted that SPMs benefitted from being part of the Post Office network, including by getting support such as the Helpline.[211] That does not come close to placing the provision of that, or any other, service, as something Post Office is agreeing to provide as part of a contractual bargain. As to Horizon, Mr Bates argues that its provision fell within the Act because it was "*imposed upon me by Post Office with no prior consultation*", and because its purpose was "*to enable me to carry out transactions in the Branch and record Branch accounts accurately*".[212] These are factors which in fact point strongly away from treating Horizon as something which Post Office was providing to Mr Bates as a benefit for which he was bargaining. It was being provided at Post Office's initiative, and for Post Office's ultimate benefit.

382. Cs' Opening, following the same theme, sets out lots of ways in which Horizon, the Helpline and training might be helpful to them. But that merely serves to obscure Cs' core mistake as to the structure of this relationship.

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[208] [2016] EWHC 1236 (QB). {A2/55}

[209] Mr Sabir's witness statement, paragraph 106 {C1/3/18}.

[210] Mr Bates' WS, para. 122 {C1/1/26.

[211] Ms Dar's WS, para. 106 {C1/5/20}.

[212] Mr Bates' WS, para. 124 {C1/1/26}.

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383. At para 223.2 {A/1/89} they describe the relevant contracts as comprising a "*package of services provided by each party to the other*". That is a fundamental mischaracterisation.

384. The Supply of Goods and Service Act 1982 will typically apply to services contracts where Party A pays Party B money to provide him with a service. Of course, there can be contracts in which Party A pays not just in money, but (in whole or in part) by providing services of his own. In such a contract, the Act will imply terms as to the quality of the services provided by both parties. But that is atypical.

385. More conventionally, Party A, who is paying Party B to do something, agrees himself to do something to facilitate Party B's performance. That does not mean that Party A is supplying services in exchange for consideration. And the Act will only bite on services which are being supplied in exchange for consideration: see section 12(3).

386. That is the structure of this contractual relationship. Post Office does not agree to provide certain services in exchange for the services provided by SPMs. Post Office pays the SPMs to provide their services. In order to facilitate SPMs' performance, Post Office has established a common accounting, Helpline, and training regime. It does so ultimately in its own interests. It does not do so because SPMs have bargained to receive those services in exchange for the services that they are providing.

387. At para 220.2 {A/1/88} Cs seek to support their position by pointing out (correctly) that in some circumstances Post Office required SPMs to undertake training, as, for instance, when Mr Sabir specifically agreed "*to avail myself of the pre-appointment introductory training*".[213] That point rebounds on them. In that example, training was a requirement. It was not something Mr Sabir was being 'paid with' as part of his bargain. It was the opposite – something he was being obliged to do.

388. Of course, Post Office could also have an associated obligation. For Mr Sabir to undertake the aforementioned "*pre-appointment introductory training*", Post Office had to provide it. If Post Office did not do so, that would be a breach of the Necessary Cooperation implied term.

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[213] {D1.3/1/1}

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389. But that does not assist Cs. A necessary cooperation term is focused on facilitation by Party A of Party B's performance of his obligations (or, conversely, excusing Party B's non-performance if Party A does not do what is necessary to enable Party B to perform). It does not constitute something which Party B is paying Party A (whether in money or otherwise) to provide.

390. The standard of performance required is dictated by the same commercial imperative which requires the term to be implied – i.e. that each party should do what is necessary to enable the other party to fulfil their obligations. That is obviously not overlaid, by the Act or otherwise, with a further, different, obligation of reasonableness.

(2) PROVISION OF HORIZON

Implied term alleged at para. 64.1A

64.1A to provide a system which was reasonably fit for purpose, including any or adequate error repellency (as at paragraph 24.1 above)

391. This alleged implied term partly duplicates, in respect of Horizon only (which presumably is the intended target of the unparticularised reference to a "*system*"[214]), the implied term which the Cs also seek to imply pursuant to the Supply of Goods and Services Act 1982 (while also imposing an obligation to provide a "*system*" in the first place). The SPMC of course pre-dates Horizon, such that the reference to a "*system*" (if that means Horizon) cannot possibly have been part of the agreement as it stood at the outset and when Mr Bates entered into his contract.

392. The onus is on the Cs to show that the test for the implication of terms is met for this, and the other, alleged implied terms. That test, which is discussed in detail above, cannot be met. There is no commercial imperative necessitating the implication of this term, in circumstances where:

(a) Overarching responsibility for accounting rests with the SPMs. Section 22, clause 3 of the SPMC provides that "*The Subpostmaster will be responsible*

[214] The vagueness of this term is another reason why it should not be implied.

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for ensuring that transactions are carried out accurately".[215] Part 2, para. 3.1.4 of the NTC provides that the Operator shall "*accept full responsibility for the proper running of the Branch*".[216]

(b) Pursuant to the Agreed Implied Terms, Post Office is obliged to provide all reasonable cooperation which is necessary for SPMs to fulfil their obligations. By definition, if Post Office's support is required, it will be provided. Conversely, if the system as provided, including (for the sake of argument) any flaws therein, was sufficient to enable SPMs to fulfil their obligations, Cs cannot imply any obligation of which Post Office would have been in breach.

(c) Post Office does have specific obligations in relation to the provision of the Horizon system, as set out in Part 4, para. 5 of the NTC:[217]

Where Appendix 2 of the Preface so specifies, the Operator shall be responsible for arranging and ensuring all repairs and maintenance of, and shall observe all statutory obligations and regulations in respect of the operation of, the relevant item of Equipment. Post Office Ltd will maintain the Horizon equipment and Post Office Ltd shall be responsible, at its cost, for repairing inherent defects in any other item of the Post Office Ltd Funded Equipment which are not caused by the act or omission of the Operator or its Personnel.

Those maintenance obligations are precisely delineated. They do not include any generalised obligation to provide a system meeting certain set standards.

393. The SPM contracts work perfectly well without any need to make specific provision for the quality of the Horizon system. If Post Office were to provide a system that was so inadequate as to prevent SPMs being able to comply with their duties to account (for example, by inserting false transactions or entries into branch accounts), it would be in breach of the Agreed Implied Terms. There is no necessity to go further.

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[215] {D2.1/3/99}

[216] {D1.6/3/9}

[217] {D1.6/3/39}

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(3) MAINTENANCE OF ACCOUNTS

Implied terms alleged at paras. 64.2 and 64.3

64.2. properly and accurately to effect, record, maintain and keep records of all transactions effected using Horizon;

64.3. properly and accurately to produce all relevant records and/or to explain all relevant transactions and/or any alleged or apparent shortfalls attributed to Claimants

394. These terms should not be implied for very similar reasons.

395. The contracts firmly place responsibility for the production and maintenance of accounts on the SPM.

396. Section 12, clause 4 of the SPMC provides as follows:[218]

> *The Subpostmaster must ensure that accounts of all stock and cash entrusted to him by Post Office Counters are kept in the form prescribed by Post Office Counters Ltd. He must immediately produce these accounts, and the whole of his sub-office cash and stock for inspection whenever so requested by a person duly authorised by the Regional General Manager.*

397. The relevant sub-clause of Part 2, para. 3.6 of the NTC provides[219] that the SPM shall*:*

> *3.6.1 record such data and information relating to the Branch as Post Office Ltd may require;*
>
> *3.6.2 at the request of Post Office Ltd, promptly provide either Post Office Ltd or any third party with such information and data as Post Office Ltd may reasonably require;*
>
> *3.6.3 maintain an accounting system, prepare, sign and maintain financial statements and accounts, record Transactions and maintain all records in accordance with the provisions contained in the Manual, in particular paragraphs 9.2 to 9.4 (inclusive)…*

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[218] {D2.1/3/51}

[219] {D1.6/3/11}

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3.6.6 account for and remit to Post Office Ltd all monies collected from Customers in connection with Transactions in accordance with the Manual

398. It is the SPMs who are contractually responsible for the accounts – unsurprisingly, given that they are agents and accounting parties. And they are the people with control of the branch and with knowledge and control over the transactions carried out.

399. Specifically as to the implied term alleged at para. 64.3 of the AGPOC, that term fails the test of necessity for at least four reasons.

400. First, it is hopelessly vague. It seeks to impose an obligation to "*produce all relevant records and/or explain all relevant transactions and/or any alleged or apparent shortfalls attributed to Claimants*". It does not identify any test by reference to which the relevance of any particular category of "*records*" or transactions could be ascertained. It does not even identify the circumstances in which the obligation to "*produce all relevant records*" would be triggered.

401. Second, it would be onerous and unreasonable and so cannot be implied:

(a) If an SPM with a disputed shortfall that he had concealed for months were to call on Post Office to "*produce all relevant records*" and "*explain all relevant transactions*", he could impose a practically impossible burden on Post Office. Post Office would typically be unable to identify from the transaction data alone which transactions might have been mis-performed in some way, because it is not present in branch and there is often nothing in the transaction data to indicate that some mistake may have been made. But an obligation to explain each and every transaction, irrespective of whether it may have been mis-performed would be bizarre and obviously uncommercial.

(b) The obligation is unbounded in time. An SPM could, on the face of it, require Post Office to "*explain*" transactions and produce records going back months or even, on Cs' case, many years. No commercial party in Post Office's position would ever have agreed to such an obligation.

(c) It is thoroughly uncommercial. It would impose a potentially onerous and expensive set of obligations on one party without necessarily conferring any valuable benefit on the other party. In many cases, the SPM would not benefit

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from Post Office providing a deluge of documents and explanations in relation to weeks or months or years of accounting. Post Office might spend thousands of pounds dealing with a £10 shortfall that, in the overwhelming majority of cases, would be attributable to some undetectable and minor error in the branch operations (such as giving too much change to a customer). Would Post Office be able somehow to recover the costs of the process where the loss is finally shown to have resulted from the SPM's error? No bargaining process could result in such an obligation. It cannot have gone without saying.

402. Third, it is inconsistent with, and would contradict, the express terms of the contracts that give rise to an accounting obligation on SPMs, rather than Post Office. It would subvert the agency and accounting relationship by requiring Post Office to account to the SPM in relation to the branch's transactions – transactions performed by the SPM as agent to Post Office.

403. Fourth, there is no gap to be filled. In any case where it is necessary for Post Office to produce records and/or explain transactions in order to provide reasonable cooperation to an SPM in relation to a disputed shortfall, the Agreed Implied Terms provide the necessary obligation. They provide an obligation that will respond appropriately to the facts of the shortfall and the dispute, rather than imposing an onerous and uncommercial blanket duty.

404. The contention that such an implied term is "*obvious*" and/or is necessary for the "*commercial or practical coherence*" of the contracts is beyond reasonable argument. Many thousands of SPMs have operated branches in a satisfactory way for many years without the need for any such obligation. It is a term fashioned with the benefit of hindsight and without any genuine attempt to make sense of the parties' contractual relationship.

405. Again, Post Office will, pursuant to the Agreed Implied Terms, have to provide any reasonable cooperation that is necessary for the SPMs to fulfil their obligations. Again, there is no basis for implying any further obligation. Even more plainly here than is the case regarding provision of the Horizon system, imposing detailed accounting obligations on Post Office would cut directly against the contractual allocation of responsibility.

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(4) TRAINING AND SUPPORT

Implied term alleged at para. 64.1

64.1. to provide adequate training and support (particularly if and when the Defendant imposed new working practices or systems or required the provision of new services);

406. Once again, the contracts are very clear as to the circumstances in which SPMs should receive training or other support.

407. Pursuant to the SPMC, section 24, clause 5.1,[220] Post Office accepted an obligation to provide "*Training in all aspects of Mailwork to include not only new entrant training but also on-going training.*" Mailwork is defined, at clause 1 of the section,[221] as "*the provision of sorting facilities, and supervision of Postmen for both delivery and collection of mail*".

408. Pursuant to the relevant sub-clauses of Part 2, para. 2 of the NTC:[222]

> *2.3 Where Post Office Ltd considers it necessary, it shall initially train the first Manager and such number of Assistants as Post Office Ltd shall determine, in the operation of the System at the Branch…*
>
> *2.5 Post Office Ltd may require the Manager and/or the Assistants to undertake further training at any reasonable location and time during the Term if Post Office Ltd:*
>
> *2.5.1 reasonably considers such training to be essential; or*
>
> *2.5.2 wishes to train them in new and improved techniques which have been devised and which the Operator will be required to use in operating the System…*
>
> *2.9.8 The Operator shall:*
>
> *…properly complete, and ensure that the Assistants properly complete, any Compliance Training required by Post Office Ltd by the deadline(s) notified by Post Office Ltd.*

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[220] {D2.1/3/105}

[221] {D2.1/3/103}

[222] {D1.6/3/6}

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409. There is no generalised obligation on Post Office to provide training. The relevant provisions provide for Post Office to (a) provide very specific, limited training, (b) provide further training where it deems it necessary, (c) oblige SPMs and/or assistants to undertake further training in stipulated circumstances. To imply a further, broad, obligation, would completely cut across this contractual scheme.

410. The same goes for unparticularised allegation of an obligation to provide "*support*". Where Post Office is to provide specific support, the relevant contract says so, as where Part 2, para. 1.6.1 of NTC states that Post Office shall provide "*a helpline to enable the Operator to consult with Post Office Ltd about running the Branch*".[223]

411. There is no necessity for Post Office to be under an obligation to provide "*training and support*" beyond (a) the express provisions of the contract, and (b) the requirements of the Agreed Implied Terms. Pursuant to these requirements, Post Office must provide such reasonable training and support as is necessary to enable SPMs to perform their functions. Implying more than that cannot be a necessity, or so obvious as to go without saying.

(5) OBLIGATIONS TO COMMUNICATE

Implied terms alleged at paras. 64.8, 64.9, 64.10

64.8. to communicate, alternatively, not to conceal known problems, bugs or errors in or generated by Horizon that might have financial (and other resulting) implications for Claimants;

64.9. to communicate, alternatively, not to conceal the extent to which other Subpostmasters were experiencing [sic – presumably 'problems'] relating to Horizon and the generation of discrepancies and alleged shortfalls;

64.10. not to conceal from Claimants the Defendant's ability to alter remotely data or transactions upon which the calculation of the branch accounts (and any discrepancy, or alleged shortfalls) depended

[223] {D1.6/3/6}

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412. This is a strange litany of implied terms in relation to disclosing problems with Horizon. They obviously do not meet the test for implied term:

(a) They are specific to Horizon, yet the SPMC, and Mr Bates' contract specifically, pre-date Horizon. Similarly, there was no reason to assume that, even once Horizon was introduced, it might not be changed or replaced with some other system. The terms are obviously crafted to fit the facts as they allegedly turned out to be, rather than representing any genuine attempt to interpret the contracts.

(b) The idea that the suggestion of these terms at the time of contracting would have been met with a terse "of course" can be dismissed with nearly equal brevity. There is no suggestion that the parties contracted in the anticipation of problems with Horizon, let alone that they had any detailed and mutual understandings as to what would be required of the parties as regards disclosure of any such problems.

413. It is particularly obvious that this detailed disclosure scheme cannot be described as having gone without saying in circumstances where the parties had in place detailed contracts, supplemented by the Agreed Implied Terms – and also had operations manuals covering much of this ground.

414. Importantly, if it is necessary for Post Office to communicate with SPMs in order to enable them to fulfil their obligations, then the Agreed Implied Terms will meet that necessity. For example, in certain, very limited, circumstances, it could be necessary for Post Office to tell SPMs about a particular problem with Horizon in order to enable them to comply with their accounting obligations. It is this criterion of necessity which will determine whether the Agreed Implied Terms are triggered.

415. Moreover, in certain other, very limited, circumstances, provision is made for Post Office to communicate with SPMs; at section 24, clause 9 of the SPMC,[224] it is stated that:

> *Any changes in conditions of service and operational instructions, including those which are agreed with the National Federation of Sub-Postmasters, will be communicated to Subpostmasters either directly, through "Counter News" or by amendment to Postal Instructions*

[224] {D2.1/3/106}

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416. Beyond these limited circumstances, in which there is an obligation to communicate, there is no room for implying, out of thin air, further such obligations. The contention that Post Office must implicitly have agreed not to conceal something very specific that it did not even itself know at the time of contracting (that transaction data could be "remotely altered" by Fujitsu) is not properly arguable.

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(6) SHORTFALL INVESTIGATIONS

Implied terms alleged at paras. 64.4, 64.5, 64.6, 64.7, 64.11, 64.12

64.4. to co-operate in seeking to identify the possible or likely causes of any apparent or alleged shortfalls and/or whether or not there was indeed any shortfall at all;

64.5. to seek to identify such causes itself, in any event;

64.6. to disclose possible causes of apparent or alleged shortfalls (and the cause thereof) to Cs candidly, fully and frankly;

64.7. to make reasonable enquiry, undertake reasonable analysis and even-handed investigation, and give fair consideration to the facts and information available as to the possible causes of the appearance of alleged or apparent shortfalls (and the cause thereof);

64.11. properly, fully and fairly to investigate any alleged or apparent shortfalls;

64.12. not to seek recovery from Claimants unless and until: a. the Defendant had complied with its duties above (or some of them); b. the Defendant has established that the alleged shortfall represented a genuine loss to the Defendant; and c. 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)

417. These alleged implied terms would provide for a detailed scheme of obligations in relation to dealing with shortfalls.

418. The idea that this extensive and freestanding system of obligations would have gone without saying verges on the absurd. Many of the same points as set out above apply here: the detailed scheme is clearly constructed with the benefit of hindsight and in an attempt to craft obligations that can then be said to have been breached.

419. It is the SPMs who are obliged, both as agents and pursuant to the relevant contracts, to maintain accounts and avoid shortfalls. Insofar as Post Office's cooperation is necessary in order to enable them to do that, it is obliged to provide that cooperation pursuant to the Agreed Implied Terms. There is no basis, on any possible reading or application of the test for implied terms, for going beyond that. None of the terms are commercially necessary – indeed, some would be potentially commercially disastrous.

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If Post Office cannot seek recovery of any shortfalls, even undisputed shortfalls, before engaging in a lengthy fact-finding exercise, that would be commercially paralysing. It is difficult to see how a party in Post Office's position would or could ever agree to pre-conditions which could have this effect. It would remove the simplicity and viability of an agency accounting model for such a large business.

420. The implied term alleged at para. 64.5 of the AGPOC is about as unnecessary and uncommercial as can be imagined. It would require Post Office, without any request from an SPM, to "*seek to identify the likely causes of any apparent or alleged shortfalls*". There is no threshold for this potentially onerous obligation to be triggered – nothing as to the size of the shortfall or the circumstances in which it arose or the grounds on which it has been disputed (if at all). The lack of commerciality is obvious if the alleged term is tested against the ordinary case where Post Office has no real insight into how a modest shortfall may have arisen. On the face of the term, Post Office would be required in that kind of case to go through the motions of "*seeking to identify the likely causes*", only to conclude that the cause could be any one or more of the very mundane ways in which losses typically arise in branches.[225] Post Office would then, presumably (although the term does not say this), have to communicate this unhelpful conclusion to the SPM. No commercial party, acting rationally, would ever have bargained for such an obligation, let alone obtained agreement on it.

(7) SUSPENSION

Issue 14, implied term alleged at para. 64.13

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

64.13. not to suspend Claimants: a. arbitrarily, irrationally or capriciously; b. without reasonable and proper cause; and/or c. in circumstances where the Defendant was itself in material breach of duty

[225] See, for example, paras 116-125 of Ms Van Den Bogerd's WS. {C2/1/34}

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421. In addition to the implied term alleged at para 64.13, the lead Cs now contend in their IPOCs[226] that, on their proper constructions, the express contractual terms dealing with suspension were limited in the following ways (1) Post Office could not suspend on a "*knee jerk*" basis and (2) Post Office could not suspend without first giving "*fair consideration to all relevant circumstances and to whether or not to suspend the Claimant even if the threshold for doing so was established*".

422. In fact, the circumstances in which Post Office can suspend an SPM are set out, in detail, in the relevant contracts.

423. The SPMC provides as follows, at section 19, clause 4:[227]

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

424. And the NTC provides, in the relevant part of Part 2, para. 15.1:[228]

> *15.1 Post Office Ltd may suspend the Operator from operating the Branch (and/or, acting reasonably, require the Operator to suspend all or any of its Assistants engaged in the Branch from working in the Branch), where Post Office Ltd considers this to be necessary in the interests of Post Office Ltd as a result of:…*
>
> *15.1.3 there being grounds to suspect that the Operator is insolvent, to suspect that the Operator has committed any material or persistent breach of the Agreement, or to suspect any irregularities or misconduct in the operation of the Branch, the Basic Business or any other Post Office® branches with which the Operator and/or any Assistant is connected (including any financial irregularities or misconduct)*

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[226] See, e.g. Abdulla, para 86 {B5.4/2/22}.

[227] {D2.1/3/87}

[228] {D1.6/3/24}

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425. Cs' case involves no attempt to make sense of the contractual words used by the parties. Each of the express terms identifies in detail the circumstances in which the power to suspend arises.

426. There is no room for over-writing these terms with a (vague) requirement that suspensions should not be "*knee jerk*", or should involve the (equally unparticularised) "*fair consideration*" of "*all relevant circumstances*" (where relevance is defined, only in negative terms, as being not limited to consideration of the contractual grounds for suspension).

427. There is nothing in the contractual words used to suggest that Post Office would have a duty to give "*fair consideration*". On the contrary, the words used indicate that Post Office is (merely) required to reach a view that suspension is "*desirable*" in its interests (under the SPMC) or "*necessary*" in its interests (under the NTC), for one or more of the stated reasons. It would be commercially absurd for Post Office to be unable to suspend a SPM whom it suspected (on reasonable grounds) of having stolen or mishandled its cash or stock merely because it had not yet been able to carry out the kind of investigation and consideration that Cs contend was required. Post Office is unable to supervise SPMs on a day-to-day basis. It is unsurprising that Post Office should insist upon a right to suspend on suspicion alone, given the obvious need to preserve its cash and stock and, more generally, the integrity of its business.

428. The terms of the suspension provisions make it clear that Post Office is entitled to act in its own interests and is under no duty to attempt to balance its interests against those of the SPM. In these circumstances, there is no scope for implying a term which would impose the substantial constraints on the power to suspend that Cs propose.

429. At most, it might be implied, by strict reference to the specified contractual grounds for suspension, that Post Office's decision to suspend should be *reasonably based* on one of those grounds (and hence, not arbitrary, irrational, capricious, or without reasonable and proper cause (i.e. reasonably and properly related to one or more grounds for suspension)).

430. Similarly, it might be argued with some force that the power to suspend the Subpostmaster's remuneration during any period of suspension (SPMC, section 19,

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clauses 4 and 5; NTC, Part 2, para. 15.2.1) should not be exercised dishonestly or in an arbitrary, capricious or irrational manner.

431. However, there are no contractual words referring to Post Office's own conduct, let alone to any "*material breach*" on its part. As a matter of the commercial sense of the agreement, it is difficult to see why Post Office should lose the power to suspend merely because it is itself in breach of contract, given that such breach could be entirely irrelevant to the circumstances of the intended suspension. It is important to emphasise that, while a SPM remains in post, he has control of Post Office cash and stock; he has the right to enter into transactions on its behalf; and, in the locality of his branch, he is the face of the Post Office brand. Given the wide rights that he enjoys, and the substantial damage that he could do if he misconducts himself, it is to be expected that Post Office should be able to suspend him from his post in circumstances where it no longer, at least at the time of suspension, can have the required level of faith in his willingness or ability to do fulfil the role of SPM properly.

432. Cs observe that, in employment contracts, an employer's right to suspend his employee should not be exercised on unreasonable grounds: Opening, Annex II, para 21.1 {A/1/200}. They then argue that the same should apply here. That is wrong for at least three reasons.

433. First, Cs cannot just extrapolate at will from employment law to these contracts. These are business-to-business relationships. The businesses with which Post Office contracts are sometimes individuals, and those individuals are sometimes small-businesspeople running single branches. On the other hand, thousands of branches are run by large corporates or individuals who run multiple branches: {Day7/156} to p.157. These contractual relationships simply cannot be reclassified as quasi-employment relationships.

434. Second, even in employment contracts it is necessary to construe the relevant term on suspension, to consider whether any restriction on its exercise should be implied (and if so, what). That is plain from one of the cases relied upon by Cs: **McClory v Post Office**,[229] in which the-then David Neuberger QC noted that "*there is no general*

[229] [1993] 1 All ER 457

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obligation on an employer to act reasonably", and that "*[o]ne is here concerned with the proper construction [of the relevant clause], and whether there is an implied term that the defendant will exercise is power thereunder reasonably, and not with a general principle.*"[230] By contrast, Cs have made no effort to construe the words of the particular terms in this case. Instead, they rely on "*the lack of clarity in the wording of the terms*": para 388.2 {A/1/150}. But even if there was any such lack of clarity, that would not give Cs a licence to rewrite the relevant clauses.

435. Third, Cs observe, correctly, that in the employment context, restrictions on the right to suspend can be linked back to the application of an implied term of trust and confidence: Annex III, para 21.2 {A/1/201}. In another case cited by Cs, **Gogay v Hertfordshire County Council**,[231] Hale LJ said that the question was whether the decision to suspend met the "*severe*" test set by that implied term, which required "*conduct…such as to destroy or seriously damage the relationship*".[232] (It was relevant in that case that the notification of suspension also recorded an allegation of sexual abuse.) For the reasons set out above, in this case there is no such general implied term of trust and confidence. The implication of one in the employment context is nothing to the point.

436. It is also worth re-emphasising that Cs' case is not merely that the power to suspend must be exercised reasonably. They in fact argue for the implication of a multi-headed term which includes both unwarranted specific provisos (for example, the stipulation that Post Office cannot itself be in material breach of any duty as at the time the suspension decision is taken) and (similarly unwarranted) requirements of extraordinary breadth, such as that Post Office must give "*fair consideration to all relevant circumstances and to whether or not to suspend the Claimant even if the threshold for doing so was established*" (in which neither "*fair consideration*" nor "*relevant circumstances*" is given any further definition). There is no shred of support for a term of this kind, either in the words of the relevant clauses, or in any authority. Indeed, even in the employment context of **McCrory v Post Office**, the judge

[230] p.464 {A1.1/8/8}.

[231] [2000] IRLR 703

[232] Para 55 {A1.1/16/8}

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emphasised, in rejecting the attempt to imply a term that the employer should give full reasons for the suspension, that "*I do not consider it right to import the rules of natural justice, which are connected with judicial decisions and some administrative decisions, into the purely contractual relationship of employer and employee*".[233] Here, in a non-employment context, Cs want to require ill-defined "*fair consideration*" going beyond the establishment of any (similarly ill-defined) "*threshold*". That is more even than a judicial process would demand and cannot be achieved by implying terms.

(8) TERMINATION

Summary Termination: Common Issue 15, implied term alleged at para. 64.14

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

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

64.14. not to terminate Claimants' contracts: a. arbitrarily, irrationally or capriciously; b. without reasonable and proper cause; and/or c. in circumstances where the Defendant was itself in material breach of duty

437. Just like suspension, termination (both summary and on notice) is covered by detailed express contractual provisions.

438. As to summary termination, section 1, clause 10 SPMC states (as relevant):[234]

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

439. Part 2, para 16.2 NTC provides (as relevant):[235]

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[233] p.463 {A1.1/8/7}.

[234] {D2.1/3/6}

[235] {D1.6/3/25}

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> *[Post Office] may terminate the Agreement immediately on giving written notice to the Operator if the Operator:*
>
> *16.2.1 commits any material breach of the provisions of the Agreement or any other contract or arrangement between the Parties and fails to remedy the breach (if capable of remedy) within 14 days of written notice from [Post Office] specifying the breach and requiring the same to be remedied. Any references in these Standard Conditions to a breach of a particular obligation by the Operator being deemed to be material and/or irremediable are not intended to be exhaustive and shall not prevent [Post Office] from exercising its rights under this clause in respect of any other breach of the Agreement which is material and/or irremediable;*
>
> *16.2.2 fails to provide the Products or Services to the standards required by [Post Office] as set out in the Manual and fails to remedy the failure (if capable of remedy) within 14 days of a written notice from [Post Office] specifying the failure and requiring the same to be remedied; ...*
>
> *16.2.15 fails to properly account for any money due to, or stock of, Post Office Ltd or the Clients; or*
>
> *16.2.16 fails to pay any sum due to [Post Office] under the Agreement by the due date.*

440. These terms expressly permit summary termination for cause, subject only to the limitations expressly identified.

441. Cs' position is that, in addition to the restrictions imposed by the implied terms alleged at para 64.14, Post Office could not terminate on a "*knee jerk*" basis.[236] This should be rejected for much the same reasons as apply to Cs' similar arguments on suspension.

442. In relation to section 1, clause 10 of the SMPC, the short answer to Cs' argument is that a clause which entitles a party to terminate a contract if the other party commits any breach of the contract is in general interpreted as being limited to repudiatory

[236] See, e.g., Abdulla, paras 87 (referring in error to GPoC, para 64.13; the reference should be to para 64.14) {B5.4/2/22}.

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breaches: Lewison, at 17-16. That is supported here by the clause's use of the phrase "*Breach of Condition*".[237] The test for repudiatory breach is an objective one. That being so, there is no basis, and no room, for interpreting the clause in the way suggested by Cs. Nor is there any necessity to subject it to implied terms to the same effect.

443. As regards the right to terminate provided for in Part 2, para 16.2 of the NTC, the grounds of termination are exhaustively set out in paras 16.2.1 to 16.2.16. Para 16.2 is the sort of clause, and it is drafted in a way, that one frequently sees in commercial contracts. Para 16.2 is clear on its face. Cs' case involves an attempt to re-write its terms to coincide with their perception of fairness, rather than to discern the meaning of the contractual words used. Cs have not identified any ambiguity in those words and there is no basis, no room and no necessity for subjecting them to the constraints that Cs advance.

444. In Opening, Cs' case on termination was that they would "*rely upon the same matters in support of its construction as set out above, in relation to suspension*": para 391 {A/1/151}.

445. It follows that Cs' case on summary termination suffers from all the same vices as their case on suspension, and should be dismissed for the same reasons.

446. Moreover, the authorities which are relied upon by Cs in support of their attempt to fetter the power of suspension make clear that, even in the employment context, any restrictions on suspension cannot be read across to termination. See **McCrory v Post Office**, at p.464: "*an employer does not have to act reasonably when exercising his express or implied right to determine a contract of employment*".[238]

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[237] The phrase is not defined in the SPMC and it appears to be used in its technical sense of a term of which any breach gives the innocent party the right to terminate.

[238] {A1.1/8/8}

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Termination on notice: Common Issue 16

447. As to termination on notice, section 1, clause 10 SPMC states (as relevant): "*The Agreement… may be determined by [Post Office] on not less than three months notice*".[239]

448. Part 2, para 16.1 NTC provides (as relevant):[240]

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

449. Nonetheless, in addition to the implied terms alleged at para 64.14 of the AGPOC, and to the alleged prohibition on "*knee jerk*" termination, Cs contend that termination could not be given without Post Office applying "*conscientious*" consideration to whether to terminate, and what period of notice to give,[241] and that:

> *70. In reality, and in the circumstances set out at paragraph 43 above, neither party intended that the Claimants' investments in goodwill or otherwise in the business should or would be forfeited on 3 months' notice:*
>
> *70.1. without substantial cause or reason, established after a fair investigation and consideration;*
>
> *70.2. if the Defendant was itself in material breach of contract;*
>
> *70.3. vindictively, capriciously or arbitrarily; or*
>
> *70.4. in response to reasonable correspondence about (i) any apparent breach by the Defendant, or (ii) alleged shortfalls and the difficulties faced by Subpostmasters in investigating alleged shortfalls (such as in the case of Alan*

[239] {D2.1/3/6}

[240] {D1.6/3/25}

[241] See Abdulla IPOC, para 88 {B5.4/2/22}.

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Bates and his letters dated 19 December 2000, 18 July 2001, 7 January 2002, and 13 February 2002).[242]

450. There is simply no basis for any of this. The words of the clause are clear. There is no ambiguity in the language. It is the sort of language that is common in commercial contracts. There is no properly arguable basis to read in those requirements, either in the words of the terms, the commercial sense of the agreements or the matrix of fact.

451. The attempt to insert a restriction based on Post Office's breach suffers all the same vices as it does when Cs make the same argument for the suspension clauses.

452. No process of consideration going beyond the words of the clauses is required. Nor is there any basis on which to identify the factors that Post Office would have to take into account, and to identify what would constitute a "*substantial cause or reason*".

453. If the Court were to read in such a requirement in the SPMC and the NTC, it is difficult to see why it would not read in the same requirement in the many other contracts which use similar language. And as Richard Salter QC pointed out in **Monde Petroleum v WesternZagros**[243] at para. 272, the "*purpose of a contractual right to terminate is to give the party on whom that right is conferred the power to bring the contract to an end. It is a right to bring an end to the parties' shared endeavour. It is unlikely that the hypothetical reasonable commercial man would expect the party exercising that right to be obliged to consult anyone's interests but its own.*"

454. Furthermore, at least in the absence of any clear criteria against which to measure the appropriateness of any proposed notice period on the facts of any given case, a requirement to give "*conscientious*" consideration would be both vague and potentially onerous to Post Office and would give relatively little comfort to any prospective SPM, whilst undermining legal certainty on both sides.

455. The curiously specific stipulation that termination should not follow "*reasonable correspondence*" (again, whatever that might mean) is even odder. There is no limitation on the circumstances which could lead Post Office (or, indeed, the SPM) to

[242] AGPOC, para. 70 {B3/1/39}.

[243] [2017] 1 All ER (Comm) 1009 {A1.1/69/78}.

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decide to terminate on notice. The idea that a stipulation of this kind is so obvious that it would have gone without saying can plainly not be sustained.

456. Indeed, it is worth noting that SPMs could also terminate on 3 months' notice: see the first sentence of clause 10. There are advantages to both sides in being able quickly to extricate themselves from the relationship should it prove not to work as well as anticipated (especially given that some SPMs would have no prior experience of operating a Post Office branch or any other similar business). Indeed, even if the relationship is working well, the SPM might decide to pursue another opportunity, or may wish to retire due to age, illness, or family reasons; or Post Office might decide (unusually) to place another SPM in branch. Those are things that each party is entitled to do, so long as they comply with the notice provisions. There is no justification for ignoring the plain words of their bargain. Post Office has a commercial need to be able to terminate on notice, in particular if there is either a "*capability or performance issue*"[244] with the SPM or a broader imperative, such as a branch closure programme.[245] That is why, from Post Office's perspective, these clear provisions need to be in place. Cs' implied terms would completely cut across that.

457. This is another example of the Cs seeking to inappropriately borrow concepts from the employment law context. But even employment contracts at common law are terminable on notice – however unfair that might turn out to be in an individual case – see **Geys v Societe Generale**[246] where Mr Geys, a senior (and very successful) MD, was terminated on notice to seek to prevent him obtaining a large end of year bonus. The Supreme Court had no problem with that in principle, providing that due notice/payment in lieu was given (which, on the facts, it was not). The only protection employees have from terminations duly given on notice is that provided by statute[247] giving them a right not to be "*unfairly dismissed*." That is provided as a matter of public policy by Parliament. The current attempt by Cs to apply a like principle (via the common law) not to have a commercial contract "unfairly

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[244] John Breeden's witness statement, para. 60 {C2/3/15}.

[245] ibid., para. 65 {C2/3/16}.

[246] [2012] UKSC 63 {A1.1/42}.

[247] Employment Rights Act 1996.

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terminated" is absurd, unprincipled and would involve a radical change to the law governing commercial contracts.

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E. THE "TRUE AGREEMENT" (COMMON ISSUES 17 AND 18)

17 Do the express written terms of the SPMC and NTC between Post Office and Subpostmasters represent the true agreement between the parties, as to termination (in this regard, the Claimants rely on Autoclenz v Belcher [2011] UKSC 41)? [GPOC, paras 50, 69-71; Defence, paras 86, 110-112]

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

458. If Cs lose on construction/ implied terms, their fall-back is to assert that the "*true agreement*" as to termination on notice,[248] albeit not reflected in the relevant contracts, was that Post Office would observe the limitations pleaded in AGPOC, para. 70.

459. They also seek to deploy this "*true agreement*" argument for an additional purpose: to contend that Post Office cannot "*terminate without giving such notice as the court may hold to be reasonable (which the Claimants will contend was, on any view, never to be less than 12 months).*"[249]

460. Cs are arguing that there is a clear gap, not bridgeable by the ordinary processes of construction or the implication of terms (or indeed rectification), between the contract as agreed, and what the "*true agreement*" between the parties in fact was.

461. That is a highly unorthodox submission. Any suggestion that the Court look beyond the written terms signed by the parties to find their "*true agreement*" would ordinarily be rejected as contrary to principle. As Lord Neuberger has observed, in the case of **Secret Hotels2 v HMRC**[250] at para. 31, the correct approach is as follows:

> *Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of the relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless is established that it constitutes a sham.*

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[248] Implicitly their argument must be restricted to termination on notice rather than summary termination, although they do not make this expressly clear.

[249] AGPOC, para. 71 {B3/1/40}.

[250] [2014] UKSC 16 {A1.1/50/13}.

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462. The sham exception is explained in this way in Chitty, at 2–171 {A1.3/2/2}:

> *In deciding issues of contractual intention, the courts normally apply an objective test…The objective test, moreover, merely prevents a party from relying on his uncommunicated belief as to the binding force of the agreement. The test therefore does not apply where the parties have expressed their actual intention in the document alleged to constitute the contract: the question whether they intended the document to have contractual force then becomes one "of construction of the documents as a whole what effect is to be given to such a statement"; and the general rule in cases of this kind is that a party who has signed the document is then bound by its terms, as so construed.*
>
> *This general rule is however subject to two exceptions. First, where the express terms of the document are a "sham", in the sense of being designed by one party to give the appearance that the relationship created by the contract differs from the reality of that relationship, so as to deprive the other party of some protection or benefit given by law to a class of persons to which that other party belongs (e.g. as tenants or as employees). Thus, an agreement may take effect as a lease even though it is expressed by the lessor to take effect only as a licence; and an agreement may take effect as a contract of employment even though (contrary to the reality of the relationship created by it) it described the party who is in truth the other's employee as being an independent contractor and not an employee. Second, an agreement, may, on its true construction, be of a different character from the way in which it has been characterised. Thus, where "the parties may have thought that they were creating a tenancy" but their "agreement is incapable of taking effect as a tenancy for some old and technical reason of property law", then there is "no reason for not holding that they have agreed a contractual licence" if applying the objective test, that is what "they are likely to have intended".* (underling for emphasis added)

463. Chitty footnotes **Autoclenz v Belcher** {A1.1/39} following the underlined text, classifying it as an instance of the sham doctrine (or a variant of it) that applies especially in employment contexts.

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464. **Autoclenz** was a case in which twenty individuals who had been engaged as car washers alleged that they were "workers" under the National Minimum Wage Regulations 1999 and the Working Time Regulations 1998, and accordingly were entitled to the minimum wage and paid holiday. They were required to sign written contracts in which they were described as sub-contractors, were said to responsible for paying their own tax and national insurance, and were said to be entitled to provide a substitute to carry out the work. The contracts also stated that they were not obliged to work and that the car wash company did not undertake to provide them with work. However, the company in fact told them how to carry out the work, provided the cleaning materials, determined the rate of pay, prepared their invoices and required them to give prior notification if they were unable to work. The Supreme Court held that the written contracts did not reflect what had actually been agreed between the parties, and that under their "true agreement", the car washers were workers. This fits into the orthodox approach, as described in **Secret Hotels2**, without any particular difficulty. It is simply a modern example of the exception referenced by Lord Neuberger.

465. The Supreme Court in **Autoclenz** stressed just how narrow this exception was. At para. 21, Lord Clarke said:

> *Nothing in this judgment is intended in any way to alter those principles, which apply to ordinary contracts and, in particular, to commercial contracts. There is, however, a body of case law in the context of employment contracts in which a different approach has been taken.*[251]

466. The principles to which his Lordship was referring he took, at para. 20, from paras. 87 to 89 of Aikens LJ's judgment in the Court of Appeal:

> *Express contracts (as opposed to those implied from conduct) can be oral, in writing or a mixture of both. Where the terms are put in writing by the parties and it is not alleged that there are any additional oral terms to it, then those written terms will, at least prima facie represent the whole of the parties' agreement. Ordinarily the parties are bound by those terms where a party has signed the contract: see eg L'Estrange v F Graucob Ltd [1934] 2 KB 394. If a*

[251] {A1.1/39/8}. Lords Hope, Walker, Wilson and Collins agreed.

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party has not signed a contract, then there are the usual issues as to whether he was made sufficiently aware of the clauses for a court to be able to conclude that he agreed to the terms in them. That is not an issue in this case.

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

89. Generally, if a party to a contract claims that a written term does not accurately reflect what was agreed between the parties, the allegation is that there was a continuing common intention to agree another term, which intention was outwardly manifested but, because of a mistake (usually a common mistake of the parties, but it can be a unilateral one) the contract inaccurately recorded what was agreed. If such a case is made out, a court may grant rectification of a contract. See, generally, the discussion in the speech of Lord Hoffmann, [48] to [66], in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 with whom all the other law lords agreed…

467. Lord Clarke went on, at para. 32 {A1.1/39/12}, to quote Aikens LJ again, with approval:

Aikens LJ stressed at paras 90 to 92 the importance of identifying what were the actual legal obligations of the parties…. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:

"What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the Chartbrook case at [64] to [65]. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the

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> *time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."*
>
> *I agree.* (emphasis added)

468. The Court's role is to determine what was agreed. Its first, and usually last, port of call will be the four corners of the contract. Exceptionally, it can look beyond that, where there is clear evidence that the parties intended something different from what they have written down. But in either case, the purpose of the exercise is to identify the actual legal obligations, as agreed – not to displace them by reference to what one party would like the agreement to mean, or to what the usual or invariable practice of the parties may have turned out to be.

469. It is worth underscoring what Cs are trying to do by relying on **Autoclenz**. They are not saying that this was, in truth, an employment relationship. Nor are they seeking to reclassify the relationship in some other way, or to assert a different agreed understanding of some specific contractual provision. They are, in effect, seeking to imply a slew of detailed implied terms, providing a new, and extremely unusual, detailed framework governing termination on notice. There is no contractual warrant for that, and **Autoclenz** is not close to being authority for that approach.

470. More specifically:

(a) It is very odd for Cs to argue that the termination provisions only (but not the rest of the written contract) did not represent the "true agreement". **Autoclenz** was about mislabelling the nature of a relationship or contract. It does not allow one party to select parts of a contract to rewrite.

(b) Cs have not identified any conduct on the part of Post Office from which it could sensibly be inferred that the "true agreement" was as they allege. Cs in fact contend that Post Office's conduct in relation to termination was consistent with the terms set out in the written agreements, rather than being consistent with the terms that they now allege: see AGPoC, para. 99. Indeed, it is not in dispute that Post Office did in fact exercise its right to terminate on notice without compensation. Obviously, there is no analogy with the stark contrast in **Autoclenz** between the written terms and the facts on the ground.

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(c) Even if Cs were to plead and prove that Post Office did not enforce the termination provisions as drafted, this fact would also be consistent with Post Office adopting a practice that was more favourable to SPMs than the terms agreed between the parties would have allowed: see, by analogy, **Pimlico Plumbers**[252] at paras 88 and 131. The fact that one party acted more generously than it was required to under the terms of a written agreement that, on its face, governs the relationship is not enough to show that those terms were not part of the "true agreement". If Post Office often or sometimes did not use its right to terminate on notice without cause (or gave longer notice), that is consistent with a preference to adopt a more flexible attitude in some circumstances. It does not bespeak any acceptance that the disputed contractual right does not exist at all.

471. In the language of Lord Clarke's judgment in **Autoclenz**, the SPMC and NTC are "*ordinary contracts*" or "*commercial contracts*" and are to be construed in the usual way.

472. In Opening, it was accepted by Cs that "*the question to be addressed is:* what contractual terms did the parties actually agree?" (emphasis in original): Annex IX, para 3 {A/1/237}.

473. However, Cs' submissions did not follow the logic of this concession.

474. One might have expected them to focus on evidence of what the parties actually agreed, beginning (at least) with the words of the contract, and then relying on specific evidence that shows that, as at the time of the contract, the parties in fact intended to agree something different.

475. Cs do not do this. Instead, their position appears to be that the Court should focus on certain features of the relationship, classify it as the sort of relationship to which the "true agreement" analysis should apply, and then disregard what the parties in fact agreed in favour of imposing a detailed, and baseless, "true agreement". The Court should reject that invitation to make a clear error of law.

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[252] **Pimlico Plumbers v Smith** [2017] I.C.R. 657, at para. 88 *per* Sir Terence Etherton MR {A1.1/68/19} and *per* Underhill LJ at para. 131 {A1.1/68/31}. Davis LJ agreed with both judgments.

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476. More specifically, Cs say that, while "*the SPMC and NTC expressly disclaimed an employment relationship*", they "*nonetheless reflected similar relational imbalances, and similarly high degrees of discretion and control*" to those in **Autoclenz**. They say that this should "*allow this Court*" to apply the "true agreement" analysis: Annex IX, paras 8-9 {A/1/239-240}.

477. As it happens, the premises of Cs' argument that this is a quasi-employment relationship are ill-founded. In particular, the central plank of Cs' position is that "*Subpostmasters were generally required to agree how many hours of personal service they would provide*": Annex IX, para 8.2 {A/1/240}. That is simply wrong (as must be obvious in circumstances where SPMs could run multiple branches). As has been repeatedly explained, Post Office asked prospective SPMs how much personal service they intended to provide, so that it could document their entitlement to substitution allowances. It did not require SPMs to provide any particular amount of personal service. The document circulated internally by Post Office included codes pertaining to the actual Conditions of Appointment (i.e. the things a prospective SPM had to agree), and also noted whether the SPM had said they would provide over 18 hours per week of personal service: see, for example, {D1.4/2/1} and {Day10/102-104} (evidence of Ms Ridge); {Day11/81:3-6} (evidence of Mr Carpenter). If a SPM then decided to provide fewer than 18 hours of personal service, they were free to make that change.[253] It would not be a breach of the contract (and has never been treated as such). The only effect would be on the SPM's entitlement to substitution allowances.

478. So even on its own terms Cs' argument fails. More fundamentally, though, their approach is wrongheaded. Even if Cs did establish that this was some kind of quasi-employment relationship, that would not allow for the substitution of their chosen "true agreement".

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[253] See Mr Williams' evidence at {Day6/153:16}: "*it is my view that we did not make the appointments dependent upon that person rending personal service, we made the appointments of the basis of the agreed conditions of appointments, and we recorded in our internal documents that personal service had been -- he had told us, he or she had told us that they would render personal service, and we made those record so that we were then able to discharge the duty under the contract to provide holiday substitution allowance as and when it was claimed.*"

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479. Cs also appear to pray in aid expectations (not said to give rise to any estoppel) that their investments of time and money necessitated a longer term relationship than that provided for by the express terms of the contracts.

480. There is no way investments of that kind can, in themselves, re-write the terms of the contracts. As such, they are not legally relevant.

481. In any event, though, the factual argument does not stack up. SPMs' investments are not in fact 'wasted'. They will increase the quality of the business transacted in that branch. Upon termination, another SPM will invariably be found to run the branch. That SPM will have to purchase the premises from the incumbent SPM. If the quality of the business has been improved, that will increase the attractiveness of the branch, and so the price that can be demanded for it. For their part, Post Office assists in maintenance of that goodwill, in particular by appointing temporary SPMs to bridge the gap.

482. The contrast with a franchisee is stark. A franchisee makes much the same kind of investments. When he is terminated, he leaves that goodwill behind, and does not benefit from it at all. (And yet even a franchisee will be held to the terms of his contract.)

483. The residue of Cs' argument is that we should look at post-contractual behaviour to determine the "true agreement". It is important, in this context, to stress the very limited relevance of post-contractual behaviour. That behaviour can be relevant only insofar as it informs our understanding of what the parties <u>in fact agreed</u> at the time the contract was entered into.

484. No such post-contractual behaviour has been identified. Mr Breeden's evidence was that termination on the minimum notice period would likely be decided upon by Post Office where a SPM was failing to meet standards: {Day7/148:15} to {Day7/149:8}. Of course, it was also Ms Van Den Bogerd's unchallenged evidence that Post Office has implemented branch closure programmes (for reasons that plainly might have nothing to do with the performance of the relevant SPMs): para 36 of her statement {C2/1/9}.

485. Post Office might usually choose, for whatever reasons, to terminate only in limited circumstances. It might also choose sometimes to give longer than the minimum

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notice period. But that is irrelevant. Unless the parties' uniform practice was to deviate in consistent ways from what the contract says, and unless such practice was understood to be rooted in contractual obligation (and not in one party's gift), that post-contractual behaviour will not indicate any alternative "true agreement". No such "true agreement" is indicated here.

486. For their part, some of the lead Cs purported to have believed that their contracts could never be terminated on notice: see {Day2/13:18-21} (Mr Bates: "*we had planned to stay there through until retirement age…it is probably that level of loss of earnings that we are looking at*"); {Day2/179:6-7} (Ms Stubbs: "*I felt that, yes, I couldn't be terminated; just told to pick up and go away*"); {Day3/148:6-8} (Mr Sabir: "*I don't think Post Office can give somebody three months' notice, as far as I know. Postmaster has to give resign, as far as I know*"). As well as being commercially unreal, that is not consistent with Cs' case. These Cs do not say that their understanding of the agreement was that termination on notice would be qualified in the way Cs propose. They say that termination on notice could not happen at all. That is nobody's position as to the "true agreement". Conversely, Mrs Stockdale and Mrs Dar both said that they understood that Post Office could give the minimum notice period: {Day4/178:19} and {Day5/37:5} respectively. The "true agreement" advanced by Cs was prominent only by its absence from the evidence.

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F. POST-TERMINATION

(1) COMPENSATION FOR LOSS OF OFFICE (COMMON ISSUE 19)

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

487. It appears from the IPOCs[254] that this issue no longer arises. Cs apparently do not intend to make any construction argument on this point.

488. This is confirmed in Cs' Written Opening Submissions at paras 403-408 {A/1/157}.

(2) LIMITATION OF LOSSES (COMMON ISSUE 20)

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

489. The position here is the same as for Common Issue 19. Cs appear to have dropped their construction argument.[255]

490. This is confirmed in Cs' Written Opening Submissions at paras 403-408 {A/1/157}.

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[254] See Abdulla, para. 91 {B5.4/2/23}; Bates, para.114 {B5.1/2/31}; Sabir, para. 93 {B5.3/2/24}; Stockdale, para.105 {B5.6/2/24}; Stubbs, para. 117 {B5.2/2/27} and Dar, para. 106 {B5.5/2/27}.

[255] ibid.

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(3) SUBSEQUENT SUBPOSTMASTERS (COMMON ISSUE 21)

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

491. In the individual pleadings, Cs merely rely on the implied terms that they allege at AGPoC, paras 64.15 to 64.19.[256] There is no construction issue on the IPOCS, only an implied term issue.

492. In the Written Opening Submissions, Cs contend that there is a prior issue of construction, namely whether the relevant terms give rise to a discretion, properly-so-called or a contractual right. Cs say the question is whether the terms "*afforded the Defendant a 'discretion" as to subsequent appointments, as opposed to simply a right of 'veto' (i.e. unfettered commercial freedom to do as they pleased)*": para. 410 {A/1/160}.

493. That approach is fundamentally misconceived. It ignores the basic contractual and commercial reality of the situation. The true question is this: what, if any, restriction is imposed by the contract on Post Office's absolute commercial freedom to choose whom it appoints as its agent? The contract does not have to "*afford*" Post Office a right of any kind – its freedom to choose whom to appoint exists independently of the contract. Unless the contract imposes some restriction on that freedom, Post Office therefore remains free to choose with whom it contracts to be its agent and to trust with its cash and stock.

494. It would be exceptional for a principal to be constrained in its choice of agent, and clear contractual words would be needed to achieve that outcome. There are no such words here.

495. The relevant provision of the SPMC, section 1, clause 9, states as follows:

> *If on resignation of his appointment the Subpostmaster disposes of his private business and/or premises in which the sub-office is situated, the person*

[256] See Abdulla, paras 92-93 {B5.4/2/23}; Bates, paras 115-116 {B5.1/2/31}; Sabir, paras 94-95 {B5.3/2/24}; Stockdale, paras 106-107 {B5.6/2/24}; Stubbs, paras 118-119 {B5.2/2/27} and Dar, paras 107-108 {B5.5/2/27}.

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> *acquiring the private business and/or the premises or exchanging contracts in connection with the purchase of the private business and/or premises will not be entitled to preferential consideration for appointment as a Subpostmaster.*

496. There is nothing in the words of that clause to limit Post Office's freedom to choose whom, if anyone, to appoint as its agent to operate a given agency branch. On the contrary, it makes clear that any candidate agent proposed by the outgoing SPM will not be given "*preferential consideration*". As a matter of construction, Cs' argument is hopeless.

497. The relevant provision of the NTC, Part 2, para. 19, states as follows:

> *On termination of the Agreement, the appointment of any New Operator shall be entirely at the discretion of* [Post Office]. [Post Office] *may, but shall not be obliged to, consider any application for the operation of a Post Office branch at the Branch Premises made by a genuine prospective purchaser of the Basic Business and the property interest at the Branch Premises, but any such prospective purchaser shall not be given preferential treatment in the application or appointment process.*

498. As with the SPMC, the term makes express that any candidate put forward by the outgoing SPM will not be given "*preferential treatment*". That is wholly inconsistent with the suggestion that the term is, by using the word "*discretion*",[257] removing Post Office's untrammelled freedom to choose whom it appoints as agent and replacing it with a discretion (properly-so-called) to choose its agent, creating a process in which it has to balance its interests as principal with those of the outgoing SPM. Further, the words used are "*entirely at the discretion of* [Post Office]" – those words are far more consistent with the confirmation of Post Office's commercial freedom and the fact that it is to be exercised with regard to Post Office's interests alone. In this context, the use of the word "*discretion*" provides no support for the idea that there is a contractual discretion properly-so-called.

499. Further, the commercial freedom at issue here concerns a potential future relationship between Post Office and a stranger to the contract (the person whom Post Office may

[257] Ultimately, Cs' whole case on construction rests on the use of this word: see para. 416 {A/1/162}.

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or may not appoint as a new SPM), rather than relating to rights and obligations between Post Office and the outgoing SPM, the other party to the contract. The right exists outside the four walls of the contract, both as regards the persons involved in the relationship and temporal scope.

500. This is a million miles from the ordinary case in which restrictions are implied to control contractual discretions (properly-so-called) that are created by the contract and that regulate the rights and obligations between the parties to that contract. A good example is where the contract grants a discretion to Party A whether or not to consent to the exercise of a right that the contract grants to Party B: see, for example, **Watson v Watchfinder.co.uk Ltd** [2017] EWHC 1275 (Comm) {A/1/161}, where Party A had a discretion whether or not to consent to Party B's exercise of a share purchase option.

501. Cs rely on the **Watchfinder** case at paras 414 to 415. But there is no similarity between the circumstances at issue in that case and the circumstances here. Cs do not have any relevant right, granted under the contract, in relation to which Post Office could be exercising any controlling discretion. The only relevant right is Post Office's commercial freedom (which is not granted under the contract) to determine whom to appoint as its agent.

502. The implied restrictions on contractual discretions apply where the contract confers a discretion on one of the parties.[258] Cs appear to accept this, as they are forced to argue that "*a discretion is plainly conferred under both agreements*" (Written Opening Submissions, para. 416 {A/1/162}. But that is flatly wrong. The contracts do not create or confer any relevant right or discretion on Post Office. There are no words that even purport to create such a right or discretion. The contracts merely refer to and confirm a commercial freedom that pre-exists and is independent of the contractual relationship, namely Post Office's right under the common law to choose whom it

[258] See, e.g., paras 18-20 and 27 in the speech of Baroness Hale in **Braganza v BP Shipping Ltd** [2015] 1 WLR 1661 {A1.1/59/9}; see also Lord Neuberger's speech at para. 102 {A1.1/59/ 28}, referring to a contract that "*allocates only to one party a power to make decisions under the contract*" (emphasis added). Baroness Hale and Lord Neuberger disagreed as to the outcome but not the legal principles as to the control of discretions.

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appoints as an agent (a freedom that relates, in this context, to a stranger to the contracts).

503. Cs contend that, on Post Office's construction, the terms in the two contracts would be otiose. That is wrong. The obvious purpose and effect of the terms is two-fold:

(a) They draw to the SPM's attention that there is no restriction on Post Office's commercial freedom to choose whom to appoint. A contractual term can communicate information as well as creating rights and obligations.

(b) They block any attempt to imply a restriction on Post Office's pre-existing and untrammelled freedom to select its agents. Cs try to subvert that purpose and effect entirely by reading in a discretion, allowing them to then impose implied restrictions on that discretion. It would be perverse if the effect of including a term that states that Post Office need not give "*preferential treatment*" were to achieve precisely the opposite effect.

504. Ultimately, neither the words of the terms nor commercial sense provide any support for the contention that Post Office's freedom as to whom it appoints as its agent is any way restricted by the contracts. It would be commercially bizarre for Post Office to agree any restriction on its freedom to appoint whom it chooses to operate its branches and handle its cash and stock.

505. Further, it is unsurprising that SPMs were content with that position.[259] Post Office could rationally be expected to appoint any suitable candidate introduced to it by an outgoing SPM unless (a) it wished to close the branch (which is unusual) or (b) there were better candidates available (in which case no plausible contractual restriction could prevent Post Office choosing the better candidate). The SPM had no reason to bargain for any contractual restriction – he or she could rely on the inherent probability of Post Office acting in accordance with its own commercial interests, which interests would typically align with the SPM's. Both parties would ordinarily want the branch to be passed on to a suitable incoming SPM as quickly as possible and without any interruption in the provision of Post Office services.

[259] Mrs Stubbs considered it "*obvious*" that it was up to Post Office to decide whether persons she proposed were appropriate: see her letter of resignation dated 12 May 2010 {E2/57}.

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POST-TERMINATION

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G. AGENCY

(1) POST OFFICE AS AGENT (COMMON ISSUES 10 AND 11)

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

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

Outline of the parties' contentions

506. Cs contend at AGPOC, para. 82 that Post Office was their agent "*for the purposes of rendering and making available accounts and/or was under an equitable duty to render accounts*".[260] {B3/1/44}

507. Cs go on to plead, in the alternative, that Post Office acted both for itself and, simultaneously, as agent for Cs in "*effecting, reconciling and recording transactions*" (para. 83). Cs plead various duties that Post Office is therefore alleged to have to owed to them as a result of the supposed agency relationship (para. 84).

508. Post Office respectfully submits that Cs' case on this issue is extravagant and finds no support in authority or principle. It amounts to yet another attempt to rewrite the basic nature and content of the contractual and common law relationship between the parties.

509. Post Office's more detailed response is in three parts:

(a) First, Post Office did not agree to act as agent for SPMs. It did not do so under the contracts or under some later agreement (no such agreement is pleaded). No evidence of any ad hoc agreement was given at trial.

(b) Second, Post Office did not undertake any of the characteristic functions of an agent (such that a relationship of agency could be implied).

(c) Third, the factual matters that Cs allege could not, even if true, justify the imposition of an agency relationship.

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[260] {B3/1/45}

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510. In making these submissions, Post Office relies on the following principles of law:

(a) Absent an express agreement to act as agent for SPMs, Post Office will not be treated as an agent (and so will not be fixed with the duties of an agent) unless it has, as a matter of substance, undertaken one or more of the characteristic functions of an agent. This is an objective question[261] – it is irrelevant that an SPM may have thought Post Office was undertaking such functions if it was not in fact doing so.

(b) The defining characteristic of a fiduciary is that, within the scope of the relationship, he is required to subordinate his own interests and to act solely in the interests of his principal: see Snell's Equity, 7-005 to 7-006 {A1.3/4/2}

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

(i) Post Office did not agree or consent to act as agent to SPMs

511. No such agreement appears on the face of the contracts. No such agreement can be implied into them. Cs do not purport to identify any such express or implied agreement. On the contrary, the contracts make clear that it is the SPM that is agent to Post Office, and not the other way around. Implying an agency in the opposite direction would contradict the express terms of the contracts.

512. Cs do not even plead any later written or oral agreement or arrangement under which Post Office consented or promised to act as their agent for any purpose. None of the lead Cs gives evidence of any such agreement or consent, or even facts from which the existence of such agreement or consent could be inferred.

[261] See Chitty, at 31–022 {A1.3/2/25}

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513. At trial, Cs latched onto Ms Van Den Bogerd's use of the words "*on behalf of*" in para. 80.2 of her WS: "*Post Office handles this on behalf of the Subpostmaster*". Mr Green put those words to Mr Beal {Day6/19:6}, Mr Carpenter {Day11/100:19} and to Ms Van Den Bogerd herself {Day9/43:11}. There are two points on this.

514. First, it is an objective question whether or not Post Office agreed or consented to act as agent. It is similarly an objective question whether or not Post Office undertook any of the characteristic roles of a fiduciary. Neither question is determined by cross-examination of lay witnesses as to their particular use of language in describing the relationship, especially where this concerns phrases like "*on behalf of*" that are used loosely in ordinary speech (notably, Ms Van Den Bogerd uses "*on behalf of*" to mean "*for*" at para. 39 of her WS, referring to MPs raising issues "*on behalf of*" constituents {C2/1/10}).

515. Second, even were the witness evidence relevant or admissible, it would come nowhere near supporting Cs' case that Post Office agreed or consented to act as agent. Specifically:

(a) It was not even put to Ms Van Den Bogerd that she intended, by using the words "*on behalf of*", to denote a relationship of agency (where Post Office is agent). She obviously did not: she makes clear only two subparagraphs later that "*Nobody at Post Office would say that it effects customer transactions on behalf of Subpostmasters or that Post Office acts as the agent of Subpostmasters in recording and processing transactions*": see para. 80.4 {C2/1/24}. That evidence was not challenged.

(b) Mr Carpenter was not challenged on his evidence at para. 10 of his WS that he would never have said to Mrs Stockdale that Post Office acted as agent because that is not how the relationship worked {C2/10/4}: see {Day11/100:2} where Mr Green said "*Let's park agency for a moment*" and did not return to it.

(c) None of the Lead Cs gave evidence to the effect that Post Office gave express consent to act as their agent (for any purpose).

516. In their Written Opening, Cs contend that agency may be inferred from conduct where "*it was reasonable for the other to infer from that conduct assent to the agency*

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relationship": see para. 8 at {A/1/228}. That test could not be met here: Post Office's conduct was explicable in its entirety (and indeed could only be attributed to) the conduct of its own business and the performance of its agreed role under the contracts. There is no room for the conduct to be taken as evidence of consent to acting as fiduciary. In the context of an express agency relationship in the other direction and detailed contracts governing the parties' relationship, there is no scope for an inference of consent to agency from conduct that falls within the contractual relationship.

(ii) Post Office did not undertake any of the characteristic functions of an agent

517. This is an objective question. It would be irrelevant, if true, that any SPM thought that Post Office was acting as his or her agent for any purpose.

518. The simple fact is that, as a matter of analysis and objective reality, Post Office did not effect transactions on behalf of SPMs. Nor did it commit SPMs to transactions with third parties. This is obvious from the basic structure of the relationship:

(a) The business that is conducted through the Post Office agency branch is Post Office's business. The SPM operates the branch as Post Office's agent.

(b) The 130 third-party clients[262], such as banks, Camelot and government departments whose goods and services are sold through Post Office branches are Post Office's clients. It is Post Office that has contracts with these parties. It is Post Office that pays them and receives money from them. That money is Post Office's money.

(c) Post Office is the party that must pay out or recover from the third-party client as appropriate, and it bears the commercial risk on the transactions. If a bank becomes insolvent and fails to pay out in respect of a withdrawal of money from a Post Office branch, it is Post Office that is out of pocket, not the SPM. The SPM is responsible only for his branch accounts that he keeps as agent to

[262] See Angela Van Den Bogerd WS, para. 50 {C2/1/13}

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> Post Office. He is not liable for the transaction to the third-party client or customer. That structure suits both parties.[263]

519. Further, Post Office did not agree at any point to subordinate its own interests to those of SPMs. Specifically, Post Office maintained accounts and reconciled and recorded transaction data because the accounts in question were the accounts relating to the conduct of its own business, conducted through the agency of the SPM but involving its own transactions with or for third parties, its own stock and its own cash. It did not do any of these things on behalf of the SPM; it makes no sense to describe Post Office as conducting the affairs of the SPM or subordinating its interests to those of the SPM in circumstances where the business is Post Office's business. That basic point deals with the whole of Cs' case on this issue.

520. Lastly, the express appointment of SPMs as agents to Post Office makes it logically impossible to impose a fiduciary relationship in the opposite direction, in relation to similar and even overlapping functions (most obviously, accounting). The legal relationship that governs those functions has one and only one essential character.

(iii) The matters relied upon by Cs cannot establish an agency relationship

521. As noted above, Post Office performed transactions and reconciled data on its own account and in relation to its own business. Cs' reliance on the fact of Post Office doing those things cannot therefore support an assertion that it acted as agent to SPMs.

522. Cs also rely on a more general assertion that they were required to place their trust and faith in Post Office to perform its functions properly.[264] But that is not sufficient to establish a relationship of agent-principal or to impose a fiduciary duty. A party can be required to depose trust and faith in another's performance without the law imposing a fiduciary relationship. This is well-established: see, for example, **Al Nehayan** at paras 164-165 {A1.1/72/44}:

> *164 It is also necessary to identify more precisely the nature of the trust and confidence which is a feature of a fiduciary relationship. There plainly are*

[263] Ibid, para. 65 {C2/1/18}

[264] See, e.g., Bates Reply, para. 97 {B5.1/4/44}.

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many situations in which a party to a commercial transaction may legitimately repose trust and confidence in another without the other party owing any fiduciary duties. Thus, in Re Goldcorp Exchange Ltd (In Receivership) [1995] 1 AC 74*, the Privy Council rejected an argument that a company was a fiduciary because it had agreed to keep gold bullion in safe custody for customers in circumstances where the customers were totally dependent on the company and trusted the company to do what it had promised without in practice there being any means of verification. Lord Mustill said (at 98):*

> *"Many commercial relationships involve just such a reliance by one party on the other, and to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to their Lordships) have adverse consequences .... It is possible without misuse of language to say that the customers put faith in the company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies."*

165 Mutual trust and confidence between parties dealing with one another can be of different kinds. At a basic level any contracting party is entitled to rely on the other party to perform its contractual obligations without having to monitor performance or even if (as in Re Goldcorp Exchange Ltd) it is unable to monitor performance. The kind of trust and confidence characteristic of a fiduciary relationship is different. As discussed above, it is founded on the acceptance by one party of a role which requires exercising judgment and making discretionary decisions on behalf of another and constitutes trust and confidence in the loyalty of the decision-maker to put aside his or her own interests and act solely in the interests of the principal. (emphasis added)

523. For these reasons, the Court can confidently reject the extravagant suggestion that Post Office was an agent to its agent SPMs. The question of what duties Post Office would owe were it to have been Cs' agent does not therefore arise. Post Office will address that issue further, if appropriate, in oral submissions.

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H. ASSISTANTS

(1) COMMON ISSUE 22

22 *Did SPMC section 15, clause 7.1; NTC, Part 2, clauses 2.3 and 2.5 and/or any of the implied terms contended for by the parties and found by the Court purport to confer a benefit on Assistants for the purposes of section 1 of the Contracts (Rights of Third Parties) Act, and if so which of these terms did so?[See GPOC, para. 74; Defence, para. 116; Reply, para. 92]*

524. The answer to the question posed by this issue is 'No'.

The clauses

525. Section 15, clause 7.1 of the SPMC[265] provides as follows:

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

[265] {D2.1/4/32}

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526. Part 2, paras 2.3 and 2.5 of the NTC[266] provide as follows:

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

527. Common Issue 22 also refers to implied terms, but it is unclear which, if any, of the implied terms might be alleged to purport to confer a benefit on assistants for the purposes of the Act. Neither the agreed implied terms, nor the implied terms alleged by Cs, identify assistants as beneficiaries.[267]

528. In Opening, Cs (very slightly) expanded their (unpleaded) case on which implied term they say is intended to confer a benefit on the assistants. They now allege an implied term that training falling within these provisions must be "adequate": para 425 {A/1/167}. In circumstances where there is no underlying obligation to train falling within the scope of section 1, the alleged implied term plainly cannot add anything.

The test under the Act

529. Section 1 of the Contracts (Rights of Third Parties) Act 1999 {A1.2/4/1} provides, in relevant part, as follows:

> *(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if —*
>
> *(a) ...*

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[266] {D1.6/3/7}

[267] In **RBS v McCarthy** [2015] EWHC 3626 (QB), Picken J stated at paragraph 150 that reliance on section 1(1)(b) of the Act "*is all the harder when what is being considered is an implied term*" {A2/53/66}.

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(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

530. In **Dolphin Maritime & Aviation v Sveriges Angartygs Assurans Forening**,[268] Christopher Clarke J gave the following explanation as to the meaning of section 1(b):

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

531. In the **Dolphin** case:

(a) Party A was under an obligation to pay Party B. Dolphin was identified in the relevant term as the agent of Party B to whom payment should be made.

(b) The Judge reasoned that Dolphin was not the "*intended beneficiary of the promise*" (at para.75). He said that this would be the case even if Dolphin was entitled to a commission on the payment, i.e. if Dolphin stood to obtain a permanent benefit. In either case, benefiting Dolphin was not the *purpose* of the transaction.

532. If the test in section 1(1)(b) of the Act is met, it is then for the defendant to show that the parties did not intend the term to be enforceable by the third party in order to rely

[268] [2009] EWHC 716 (Comm), at paragraph 74. {A1.1/34/22}

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on section 1(2): **Nisshin Shipping Co v Cleaves & Co**[269]. This is a "*matter of construction having regard to all relevant circumstances.*" (para. 23).

Application of the test to the terms at issue

533. The relevant clauses do not contain any obligations falling within section 1 of the Act:

(a) As to the SPMC, Post Office does not in section 15, clause 7.1 promise to confer any benefit on assistants; it merely promises to provide materials and processes to the SPM, who is responsible for the provision of training. Any benefit which the assistant might derive from being better trained is clearly incidental – the purpose of the transaction is not to provide that benefit. The purpose of the term is to benefit the SPM, by enabling him better to discharge his responsibilities as to training. The term makes this clear in its final sentence. Accordingly, Post Office does not even make any fixed commitment to provide a particular amount of training, but rather to provide the "*relevant*" materials and processes to support the SPM in providing the training he determines is "*required*", and to update these when "*appropriate*". Post Office's obligations, such as they are, are subordinated to the SPM's judgment as to what is required; and that itself is directed towards the competent operation of the branch. This is a very long way from a purpose of conferring a benefit on the assistants.

(b) Similarly, as to paras 2.3 and 2.5 of the NTC, the training provided by Post Office is not for the ultimate purpose of benefitting assistants. Post Office's contribution to the training of assistants and managers is intended to enable SPMs better to discharge their duties in operating the branch. It is not the purpose of the bargain that assistants and managers receive training from Post Office. The purpose of the training provision is to ensure that the branch be run effectively, including through the use of competent assistants. It was for Post Office, in its discretion, to decide whether and when it was necessary to provide training, in the service of its own commercial goal. Any benefit obtained by assistants and managers is "*incidental*", in the sense in which that term is used in **Dolphin**.

[269] [2003] EWHC 2602 (Comm); Colman J {A1.1/23/7}.

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534. Cs' Opening (at Annex X, para 6 {A/1/242}) correctly stated the statutory test: i.e. that it must be a purpose of the term that the third party should benefit. However, they do not properly engage with the question of how, construing the words of these clauses, it could be said that their purpose is to benefit assistants.

535. At para 424(1)(b) {A1/1/167} Cs say that "*the very purpose of those terms is to ensure Assistants have the training needed to do their job*". But the terms' purpose is not to give the assistants a benefit. It is to give Post Office a discretion, to provide such training as it may wish to provide. That training will be provided when Post Office deems that it is in Post Office's interests to provide it. If Post Office decides that no such training should be provided, whether because it wishes to leave such matters to the SPM or for any other reason, the assistants can have no complaint.

536. The most that could be said is that if Post Office does, in its discretion, decide to train assistants, that might benefit those assistants by improving their skills. That would be an incidental benefit, falling outside the scope of section 1.

537. Further and in any event, both clauses fall within section 1(2) of the Act. Both clauses make it entirely clear that it is for the SPM and/or Post Office to decide how much training to give assistants – in order to serve the ends of Post Office and/or the SPM. That is not consistent with assistants having the right to demand particular training. Moreover, it would be commercially absurd for Post Office to be at risk of a claim from an assistant for a failure to provide adequate training in circumstances where Post Office would frequently not be in a position to know what, if any, training a particular assistant might require or had received from the SPM (and/or could be provided without the benefit of materials or processes from Post Office). Indeed, where the onus to provide training has been specifically imposed on the SPM, it would cut across the contractual scheme to generate a directly enforceable right for an assistant against Post Office.

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I. INCORPORATION AND VALIDITY

(1) INCORPORATION OF TERMS (COMMON ISSUES 5 AND 6)

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

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

para 52.1 and 52.3 (classes of business);

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

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

para 60.1 and 60.3 (suspension);

para 61.1 and 61.3 (termination).

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

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

538. The question raised by these issues is whether, in order for Post Office to be entitled to rely on the relevant clauses of the SPMC and NTC, it needed to draw those clauses and/or their effect to the attention of prospective SPMs; and, if so, what precisely it needed to do to that end. This question arises once the Court has determined the meaning and effect of those clauses, of the effect the Agreed Implied Terms upon them, and the effect of any of the Claimants implied terms that the Court is willing to imply.

539. The relevant threshold is not close to being crossed. These are ordinary commercial clauses. They did not need to be specifically drawn to Cs' attention. And in any event, Cs had ample opportunity to consider the clauses; if any special drawing of attention had been required, that requirement would have been satisfied.

540. In summary, the clauses in question:

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(a) Set out some of the core duties of the SPM, including to "*maintain the highest standards in all matters connected with the Branch and Branch Premises*" (see clause quoted at AGPOC, first part of para. 51.3(e)), ensure that accounts of Post Office stock and cash are kept in the prescribed form (para. 54.1(a)), hold Post Office cash on trust, to be remitted to Post Office, and not make any private use of said cash, on pain of the possibility of prosecution (para.54.3(a)).

(b) Set out some of the core potential liabilities of the SPM, such as his liability for losses of cash or stock during his tenure (including losses caused by the assistants he employs) (paras 54.1(b) and (c), 54.3(b), (c), (d) and (e), 56.1(a) and 56.2(a)).

(c) Set out circumstances in which the agreement can be suspended or terminated (on notice, or following breach), give Post Office the power to decide whether to withhold or forfeit SPMs' remuneration, and oblige SPMs to help Post Office retain access to customers during any period of suspension (paras 51.1(b), 60.1, 60.3, 61.1, 61.3, 62.1 and 62.3).

(d) Make provision for further rules and instructions not contained in the main contract, by identifying documents containing further terms with which the SPMs are obliged to maintain familiarity, and giving Post Office the power to adjust operational instructions, conditions of service, products and services to be offered (paras 51.1(a), 51.1(c), 51.1(d), 51.1(e), 51.3(a), 51.3(b), 51.3(c), 51.3(d), the latter part of 51.3(e), 52.1 and 52.3).

The onerous and unusual test

541. Cs contend that, in accordance with the principle discussed and applied in **Interfoto Picture Library v Stiletto Visual Programmes**,[270] each of the above terms was onerous and unusual and so unenforceable unless brought fairly and reasonably to their attention.

542. That contention is plainly wrong.

[270] [1989] Q.B. 433 {A1.1/7}.

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543. The relevant principle is set out in Chitty, at 13–015 {A1.3/2/8}:

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

544. The questions of whether (1) a term is "*onerous and unusual*"[271] and (2) it has been brought "*fairly and reasonably*" to another party's attention are necessarily fact-specific, but "*the trend has been to find that a disputed clause is not unusual or onerous*".[272]

545. As Hale LJ said in **O'Brien v MGN**,[273] at para. 23 {A1.1/20/7}:

> *the words 'onerous or unusual' are not terms of art. They are simply one way of putting the general proposition that reasonable steps must be taken to draw the particular term in question to the notice of those who are to be bound by it and that more is required in relation to certain terms than to others depending on their effect.*

546. The bar is high. In **Woodeson v Credit Suisse (UK) Ltd**, the Court of Appeal characterised it as requiring "*a clause [which] is onerous in the **Interfoto** sense of almost being a penalty*".[274]

547. Crucially, the clauses at issue in this case arise in a commercial context. In **Sumukan** v **Commonwealth Secretariat**,[275] the Court of Appeal was faced with the submission that "*it would be an unusual and onerous term in a contract that an arbitration be conducted by a panel wholly appointed by one side and under statutes capable of*

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[271] A term that is merely unusual is not sufficient to engage the rule: **HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co** [2001] EWCA Civ 735, *per* Rix LJ at [211] {A2/29/39}.

[272] Lawson, Exclusion Clauses and Unfair Contract Terms (12th Ed), at p.26 {A1.3/5/3}.

[273] [2001] EWCA Civ 1279.

[274] [2018] EWCA Civ 1103, *per* Longmore LJ at para. 42 {A1.1/76/11}.

[275] [2007] EWCA Civ 1148.

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being changed at any time by that one side", and that "*such terms would not be of contractual affect if they were not drawn to Sumukan's attention*" (at para. 9 {A1.1/33/5}). Waller LJ dismissed this argument in the following terms:

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

548. Similarly, in the **Carewatch** case,[276] Henderson J said as follows, at para. 84 {A1.1/53/26}:

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

549. Against that background, the argument that these terms, or at least some of them, were too onerous to be incorporated (or enforceable against the SPM) is hopeless.

550. More specifically, the core duties (as referred to in para 540(a) above) are not only not onerous or unusual. They are entirely normal and near-inevitable duties given the nature of the Post Office-SPM relationship, a principal-agent, business-to-business relationship.

551. The SPM's liabilities (as referred to in para. 540(b) above) are not unusual or onerous. It is entirely unsurprising that the SPM, as agent to Post Office, should be responsible

[276] [2014] EWHC 2313 (Ch).

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for losses, including those caused by his employees. As Ms Van Den Bogerd explains: "*Subpostmasters are solely responsible for their branch accounts. There is no transaction that enters their accounts without their consent (or their consent by proxy through their assistants).*"[277]

552. A SPM can be expected to retain a good degree of control over whom to employ in his branch. Those employees have no contractual relationship with Post Office and Post Office will know relatively little about them. Moreover, it is not unusual to make an agent or other fiduciary liable in this way (for example, law firm partners' liability for the actions of their associates), and a commercially conventional allocation of risk will not be onerous: see **Do-Buy 925 v National Westminster Bank**,[278] at para. 93 {A2/46/40} (Andrew Popplewell QC).

553. As to the suspension/ termination provisions (as referred to above), there is nothing surprising about allowing a principal to terminate or suspend a contract with his agent (with or without continuing to pay compensation). Where the principal is vulnerable to the actions of his agent, such powers will follow almost as a matter of course, even if their operation could, in certain circumstances, appear harsh to the agent. Indeed, wherever a principal (or even an employer), needs to place a great deal of trust in his agent (or employee), it will not be unusual or onerous to give the principal (or employer) broad powers to suspend and/or terminate.[279] In **Lalji v Post Office**[280], the Court of Appeal referred without any adverse comment to Post Office's right to terminate on 3 months' notice under the SPMC.[281] The term did not jump out in the way that an onerous and unusual term might be expected to.

554. In this case, as John Breeden of Post Office explains:

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[277] Para. 142.

[278] [2010] EWHC 2862 (QB).

[279] In **Chan v Barts & The London NHS Trus**t [2007] EWHC 2914 (QB) (Burnton J) even a term which stripped a doctor of his right to appeal against dismissal was not considered onerous {A1.1/31}.

[280] [2003] EWCA (Civ) 1873.

[281] See at paras 5 {A1.1/22/2}and 10 {A1.1/22/3} (Brooke LJ) and 25 {A1.1/22/4} (Sedley LJ).

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> *Post Office needs the suspension power in order to protect its assets and reputation…There will be instances where Post Office needs to act quickly to manage its financial and reputational risk. Suspension can also be important to prevent any further deterioration of the position, or to enable an investigation of the suspected breach…Where we decide to suspend we do so to protect Post Office's assets and reputation.*[282]

555. As to the power to suspend remuneration, that too follows naturally. The SPM is not an employee. His remuneration is tied to the provision of Post Office goods and services in branch. If he is not providing those goods and services (during a period of suspension), there is nothing to pay him for.[283] He can agree to receive payment from any temporary SPM appointed during the period of suspension.[284] If the decision to suspend was incorrect, the SPM will be paid.[285]

556. Similarly, a power to terminate, either for breach or on notice, is obviously not onerous or unusual. It is difficult to see how any commercial contract could be structured without these, or equivalent, provisions.

557. As to the incorporation/ ongoing updating of further terms (as referred to in para. 540(d) above), there is nothing surprising or onerous, in a commercial context, about requiring compliance with a body of rules, or about updating those rules from time to time: see, e.g, **Stretford v Football Association**,[286] at paras 16 to 17 (Sir Andrew Morrit). Nor is it surprising or onerous that an agent should be required to familiarise himself, and keep himself up-to-date, with such rules as govern the day-to-day operation of the branch and the business. That would be the case, for example, for any franchisee of a large franchise.

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[282] Paras 37 to 40 {C2/3/11}.

[283] John Breeden WS, para. 51.2 {C2/3/13}.

[284] ibid, paras 51 and 52 {C2/3/13}.

[285] ibid, para 55 {C2/3/14}. At most, a term that remuneration should not be withheld dishonestly, arbitrarily, capriciously or irrationally might be implied to undergird this practice.

[286] [2006] EWHC 479 (Ch). Approved in the Court of Appeal: [2007] Bus L.R. 1052 at para. 14-15 {A2/40/5}.

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558. Cs did not set out any pleading on why, they say, any of these terms are onerous and unusual. At para. 66 of the AGPOC (the paragraph referred to in the text of the Common Issue), they merely assert the same. The onus is on them to show that these terms are literally extraordinary in their harshness. They did not even try to do so.

559. In Opening, Cs did not add to their case, except to:

(a) Say, or insinuate, that in given circumstances these terms could lead to results which SPMs would not like: para 243 {A/1/93-95}. There is no attempt to show that the operation of these clauses is genuinely akin to a penalty. Nor is there any attempt to show that these terms are unusual, different to the sort of terms one might expect in this relationship (or, by loose analogy, the relationship between a franchisor and a franchisee). For example, Cs complain about Post Office's power to change the products and services offered in branch. But that is precisely the sort of term you would expect someone in Post Office's position, or, by analogy, a franchisor, to insist upon.

(b) Rely on things that allegedly happened after the contract was entered into, such as the "*apparent general inadequacies of the training, assistance, support and information available to Subpostmasters, including the inherent limitations in Horizon*": para 244.5 {A/1/96}. That is obviously wrong. You cannot determine whether terms have been incorporated into a contract by reference to things that only happen after the contract was entered into (by which time it either did, or did not, have all its terms incorporated).

Adequate notice

560. Even if the above was wrong, and some or all of these clauses were considered onerous or unusual, that would not invalidate them. It would merely mean that Post Office would have been obliged to bring those clauses to the SPMs' attention at or before the time of contracting.[287]

[287] Post Office has set out, in its Defences to the IPOCs, how it says notice was given in each of the individual Cs' cases. The evidence as it emerges at trial will be commented on further, as appropriate, in closing arguments.

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561. Where the term at issue was contained in a contractual document that was signed by the SPM, incorporation will follow almost inevitably: see **Woodeson**, at para. 46 ("*when the contractual documentation is signed, the Interfoto principle has no, or extremely limited, application*") {A.1/76/12}. Signature shows that the relevant SPM was aware (or could easily have made himself aware) of the relevant clauses, and made a commercial choice to sign the contract. In **Amiri Flight Authority v BAE Systems**,[288] Mance LJ said as follows, at para. 16 {A2/24/8}:

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

562. Even in the absence of a signature, providing the relevant clauses, and giving the SPM good time to read them, will generally be sufficient. In **Stretford**, Sir Andrew Morritt said, at para.17, that it was sufficient to be "*in possession of documentary material*", so that, "*if he did not know if its terms, he could and should have done.*"

563. Indeed, the key point is not even possession of the relevant document. Cs would have known that their contracts were likely to include, if not these terms, then similar ones. If the contracting party is "*in general terms aware*" of a term, or knew that "*it contains, or is likely to contain terms, of the type complained of*" that will be sufficient: **Allen Fabrications**, at paras 62 to 63 {A2/48/13}.

564. It is worth stepping back to consider the purpose of the **Interfoto** requirement. It is to prevent an unsuspecting party being ambushed by the inclusion of a term whose harshness is wholly out of the norm (and accordingly wholly unexpected). We might expect such an objectionable term to be, as Coulson LJ recently put it in **Goodlife Foods Ltd v Hall Fire Protection Ltd**[289], "*buried away in the middle of a raft of small print*" (para. 53 {A1.1/77/11}). Cs do not seriously suggest that that is what has

[288] [2003] EWCA Civ 1447.

[289] [2018] EWCA Civ 1371.

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happened here. These terms are not onerous or unusual, and nor have they been sprung upon Cs as a surprise. They are precisely the sort of terms one would expect in the context of this kind of contractual relationship, and they were not hidden away.

565. Those are the principles with which to approach the evidence in this case.

566. A signed document leaves no, or virtually no, room for Cs' argument (per **Woodeson**, the recent Court of Appeal authority not referred to in Cs' Opening).

567. If there is any extreme circumstance in which a signed document could still leave room for an **Interfoto** argument, it would be cases such as (to cite a part of **Amiri Flight Authority** cited by Cs, at Annex V, para 10.3 {A/1/211}) a car owner entering a car park and being asked to sign a ticket handed to him, or a tourist required to sign a long small-print document to hire a car at the airport. This case bears no resemblance to those situations. This is a serious business to business relationship, entered into, not on a whim, but following an exhaustive application process, and with every opportunity to obtain legal advice.[290] A signature is dispositive.

568. Even absent a signature, terms will always be incorporated if the relevant party (a) had an opportunity to read the document, and/or (b) knew that it was likely to contain terms of the type complained of.

569. Applying these principles:

(a) It is not in dispute that every Lead C, with the possible (but very improbable) exception of Mrs Stubbs, signed their agreement to be bound by the terms of the relevant contract. For each such Lead C, that is an end to the analysis. They are bound.

(b) Two of the Lead Cs (Mrs Stockdale and Mrs Dar) admit receiving full copies of their contract. Post Office's position is that all six received, or in the case of Mrs Stubbs, already had access to, copies. Post Office further maintains that the four Lead Cs who deny receiving copies in any event had, or could have easily obtained, access to copies. This is therefore a further, independent ground for holding that all of the terms were incorporated, (i) indubitably in

[290] See {Day4/175:4} (Mrs Stockdale); Document at {E5/138/1} (Mrs Dar); {Day2/30:20-23} (Mr Bates); {Day3/84:1} (Mr Sabir).

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the cases of Mrs Stockdale and Mrs Dar, (ii) for the other four Lead Cs too, if, in each case, the Court accepts that they either received, or had access to, a copy of the relevant contract.

(c) There is also a further, independent ground for incorporation. Each of the Lead Cs would (as is only disputed in part) have been aware of the content, or likely content, of the relevant terms. This is because (i) it was obvious (as in some cases they accept) that terms of this type would be included; and/ or (ii) they received a summary including reference to various of the relevant terms; and/or (iii) they were told by Post Office employees that terms of this type would be included, and/ or (iv) they obtained that knowledge from other sources, as part of their conversations with third parties in advance of entry into the contract. As to (ii), it appears, from various questions asked in cross-examination, that Cs will contend that because the summary stated that it was not to be relied upon (as a substitute for reading the full contract) it follows that no weight can be placed on it. That is absurd. The summary plainly, at a minimum, alerted the Lead Cs to the likelihood that the full contract would contain terms of this type. That is sufficient for incorporation.

570. Against that background, and on the basis that it follows that much of the factual dispute between the parties is irrelevant, the position in relation to each Lead C is summarised below.

Mr Bates

571. It is not in dispute that:

(a) On 30 March 1998, Mr Bates received notification that his application had succeeded, together with his Conditions of Appointment.[291] At point 6, this stated that "*You will be bound by the terms of the standard Subpostmasters Contract for services at scale payment offices, a copy of which is enclosed.*"

(b) Mr Bates signed this document, thereby acknowledging that "*I fully understand and accept these conditions*".[292] He returned it on 31 March 1998.

[291] {D1.1/1/1}

[292] {D1.1/1/4}

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(c) Before applying, Mr Bates had received the ARS 44 information sheet.[293] This told him, *inter alia*, of the SPM's status as an agent rather than an employee (which Mr Bates says he understood[294]), his responsibility for losses, his responsibility to train any assistants (which Mr Bates says he understood[295]), and his responsibility for the operation of the branch regardless of whether he was present.

(d) On 8 May 1998, Mr Bates signed an Acknowledgment of Appointment. This stated that "*I accept the Appointment as Subpostmaster at Craig Y Don and agree to be bound by the terms of my contract, the Personal declaration (p13) signed by me, and by the rules contained in the Book of Rules and the instructions contained in those Postal Instructions issued to me.*"[296] Mr Bates says he understood, as to the Book of Rules and Postal Instructions, that "*[p]resumably it was part of the package of all the documentation that was in Post Office.*"[297]

(e) Also on 8 May, Mr Bates received, and signed, the Serv 135[298] and ARS 110[299] documents.

(f) The Serv 135 document drew Mr Bates' "*attention to the following extracts, from your Contract*": *inter alia*, the obligation to keep accounts in the prescribed form; the scope of his responsibility for losses (which Mr Bates said would have grabbed his attention; he thinks he was "*already aware of that anyway*"[300]); the extent of Post Office's power to suspend him (as to which Mr Bates says he "*can understand it being there*"[301]); the possibility of summary

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293 {E1/3/1}

294 {Day2/19:11 and 20}.

295 {Day2/21:23}.

296 {D1.1/2/1}

297 {Day2/61:8-9}.

298 {E1/9/1}

299 {E1/5/1}

300 {Day2/67:12-13}

301 {Day2/69:23}

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termination (Mr Bates says of the extract containing this information that "*it probably would have made sense. There must have been something to cover that*"[302]).

(g) The ARS 110 document was headed "*LIST OF RULES, POSTAL INSTRUCTIONS AND FORMS ISSUED*", and listed the manuals and other documents falling into this category.

(h) Mr Bates admits that, from August 1999 onwards, he "*presumed*" he "*was bound by*" the SPMC contract.[303]

572. The only disputed issue is when Mr Bates first obtained a copy of the SPMC contract. As explained above, this is not actually relevant; Mr Bates signed documents explicitly agreeing to be bound by the SPMC. Additionally, his attention was drawn to particular key extracts.

573. But in any event, it is clear that Mr Bates did receive the SPMC on 30 March 1998, together with the notification that his application had been successful. His protestations to the contrary (and insistence that he did not get a copy until August 1999[304]) were implausible.

574. For its part, Post Office's evidence was clear. It was Mr Williams' unchallenged evidence that from "*around late 1995/ early 1996 we were also sending out copies of the SPMC in the post to the applicant before they took over a branch.*"[305] The SPMC was a bulky document. Mr Williams' oral evidence was that it would be "*self-evident*" to the team sending it out if it was accidentally not included, that he had "*tremendous confidence*" in his team's competence, and that he never received any complaints about their skill level or efficiency.[306]

575. Mr Bates' assertion that the ordinary procedure was not followed in his case was wholly unconvincing. As noted above, the Conditions of Appointment (3 page)

[302] {Day2/67:18-19}

[303] {Day2/89:2}

[304] See his IPOC, para 23: {B5.1/2/7}.

[305] Mr Williams' Witness Statement, para 24: {C2/9/10}.

[306] {Day6/184:1} to {Day6/185:4}1).

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document Mr Bates admits receiving on 30 March 1998 stated "*You will be bound by the terms of the standard Subpostmasters Contract for services at scale payment offices, a copy of which is enclosed.*" Mr Bates claimed he thought that this referred to another (2 page) document, apparently enclosed in error.[307] This document was entitled "*Craig Y Don Conditions of Appointment*". The bulk of this document was, as one might expect, the same as the 3 page document. Both dealt with Posters and Advertising; Quality of Service; Signage; Trading Hours; National Lottery; Weekly Accounting; Introductory and ongoing procedural training; Welsh Language Act; Post Office Point of Sale displays; Mystery Shopper Scheme; Queuing Area; and Counters Club.[308]

576. The idea that Mr Bates could have mistaken this for "*the **standard** Subpostmasters Contract for services at scale payment offices*" (emphasis added) is risible. At the beginning of his oral opening submissions, Mr Green QC correctly distinguished between "*matters such as opening hours and what improvements might be made to the premises*", which were "*recorded and agreed individually under what were known as conditions of appointment*", and "the *standard terms*" which were "*just that, standard terms*", not particular to any individual branch.[309] That was a distinction which would also have been obvious to Mr Bates. Mr Bates accepts that he was not "*commercially naïve*",[310] that he was a "*details man*" who did serious due diligence,[311] and that he knew that his relationship with Post Office would be governed by a contract.[312] He is an extremely careful man, who noticed, and complained, when only 49 of the 50 flags and ensigns he was expecting were

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[307] {D1.1/1/5}

[308] The three-page document also dealt with remuneration, training, opening hours and security recommendations. The two-page document also included a short section on "*Personal Service*": "*It is expected that you will render personal service at the Post Office in order to ensure a highly professional and accurate standard of POCL work and to focus on initiatives to grow volume*".

[309] {Day1/3:7-12}

[310] {Day2/16:15-16}

[311] {Day2/17:1-15}

[312] {Day2/19:16-18}

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delivered.[313] He obviously would not have understood the standard document to be a re-hash of the very limited and branch-specific Conditions of Appointment document, with none of the more general provisions he admits he was expecting to be bound by (as to responsibility for losses, training of assistants, etc). His claim that he thought the two-page document might have been "*standard for my branch*" was meaningless and nonsensical.[314] Ultimately, if he had been operating without sight of a contract, he is the sort of man who would have complained about that. When this was put to him, Mr Bates finally responded with a weak "*I don't know*",[315] which spoke volumes.

577. Two further pieces of evidence also show that Mr Bates clearly did receive the SPMC:

(a) First, Mr Bates' purchase agreement with the previous SPM[316] was conditional on Post Office agreeing to appoint Mr Bates as SPM on terms which were not "*materially different*" from Post Office's contract with the previous SPM (to the extent that a reasonable purchaser would be unwilling to proceed with the transaction).[317] In that context, he would obviously have wanted to know what his predecessor's terms were, and, in due course, what his own terms were. He would not have simply ignored these points.

(b) Second, on 4 August 1999 (before Mr Bates says he had a copy of the SPMC) he wrote a letter to the Head of Retail Network at Post Office, in which he said that he had "*consulted my contract, Section 4 – 'Absence on holiday – holiday substitution allowance*", which he said was "*very wordy*" and "*extremely vague*". He said that he could not find anything there about losing holiday allowance "*unless it is hidden away elsewhere in the contract*".[318] Mr Bates evidence[319] that he was referring to the Serv 135 document[320] was obviously

[313] {Day2/57:9-19}

[314] {Day2/54:15-16}

[315] {Day2/82:19}

[316] {E1/2/36}

[317] {E1/2/37}, at point (c).

[318] {E1/17/1}

[319] {Day2/78:24}

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untrue. The contract extract in that document was short and clear ("*A Subpostmaster is not entitled to annual leave as such, but subject to the certain conditions he may claim for reimbursement of the necessary cost of his substitution when taking a holiday. To qualify for reimbursement, the Subpostmaster must be able to certify that he renders on average not less than 18 hours personal services each week.*") Moreover, the Serv 135 document was only 2 pages long. There was no scope for anything to be "*hidden away elsewhere in the contract*". Mr Bates was plainly referring to his contract, which he must have had a copy of. Section 4 of the SPMC dealing with holiday substitution allowance is indeed "*very wordy*"[321] . That Mr Bates after all these years of campaigning has convinced himself of the truth of his account does not make it true. It just explains why he is prepared to give evidence which is plainly wrong.

Mrs Stubbs

578. Mrs Stubbs' case can be taken more briefly.

579. On 23 September 1999, Mrs Stubbs was sent notification that her application to take over the branch formerly run by her late husband had succeeded.[322] That letter included two copies of her Conditions of Appointment, one of which Mrs Stubbs was required to sign[323] (acknowledging that she did "*fully understand and accept*" the Conditions) and return. Those Conditions stated that she would "*be bound by the terms of the standard Subpostmasters Contract for services at scale payment offices.*" She would have signed and returned this document.

580. Post Office's position is that, in accordance with its ordinary procedures, she would also have been sent the SPMC, together with this letter, as well as the ARS 43 and 44 documents, and would have been provided with and signed an Acknowledgment of Appointment on transfer day (together with the ARS 110 and Serv 135 forms). Given

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[320] {E1/9/1}

[321] {D2.1/3/20-22}

[322] {D1.2/1/1}

[323] She accepted that it was "*as possible as anything else*" that this was the document she remembered signing: {Day2/170:22}.

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the passage of time, it is unsurprising that copies of these documents cannot now be located.

581. It is overwhelmingly likely that Mrs Stubbs received a copy of the SPMC. She also admits it is "*likely*" that she signed "*a document relating to her appointment*", from which it appears to follow that she signed her assent to being bound by the SPMC.[324] In any event, she "*assumed I would be taking over the branch on the same terms that my husband had run the branch*".[325] She accepted, in other words, that she would be bound by the same contractual terms that had bound her husband, whatever their precise content was.

582. In addition, she specifically accepted knowing that she had to account for Post Office's cash and stock,[326] that she was responsible for losses,[327] that she was responsible for the actions of her assistants,[328] and that if she was going to use assistants, it was her responsibility to train them.[329]

583. Mrs Stubbs understood she would be bound by (and very probably physically signed her agreement to be bound by) the terms of the SPMC. She largely knew, in any event, broadly what those provisions said. She very likely had a copy, and in any event had every opportunity to obtain a copy. She cannot resist the incorporation of any of the disputed terms.

Mr Sabir

584. It is not in dispute that:

(a) On 30 June 2006, Mr Sabir was sent a summary of the terms which would apply to him if his application to be SPM of the Cottingley branch was successful.[330] This document informed him of the circumstances in which he

[324] Mrs Stubbs' IPOC, para 8: {B5.2/2/3}.

[325] {Day2/157:16-18}

[326] {Day2/159:25}

[327] {Day2/160:13-16}

[328] {Day2/160:3-8}

[329] {Day3/59:3-5}

[330] {E3/53/1}

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would be responsible for losses, and made clear that he would be responsible for deciding whether to employ assistants, liable for their actions, forbidden to make any private use of Post Office's cash and stock, required to account, and that the products and services to be offered at the branch could be changed.

(b) On 13 July 2006, he was sent notification that his application has been successful, subject to "*written acceptance of the Subpostmasters Contract and the other terms and conditions set out in Appendix 1 to this letter*".[331] Appendix 1 contained the Conditions of Appointment, the first of which was that "*You will be bound by the terms of the standard Subpostmasters' Contract for Services at Scale Payment Offices.*"[332] The letter also stated that his Appointment Pack included a copy of the SPMC, and asked him to give it his *"utmost attention*".

(c) On 19 July 2006, Mr Sabir signed the Conditions of Appointment.[333] His signature was to confirm that "*I, Mohammad Sabir, fully understand these terms and conditions.*"

(d) On 8 September 2006, Mr Sabir signed an Acknowledgment of Appointment,[334] stating that "*I accept The Appointment as Subpostmaster at: Cottingley and agree to be bound by the terms of my contract, and by the rules contained in the book of rules and the instructions contained in those postal instructions issued to me.*"

(e) On the same date, he signed the Serv 135 document, agreeing that he had read and understood key extracts from his contract.[335] He also signed the ARS 110 document, to agree that he had received various contractual documents including relevant manuals.[336]

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331 {E4/64/1}

332 {E4/64/5}

333 {D1.3/3/1}

334 {D1.3/4/1}

335 {E3/102/1}

336 {E3/102/3}

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(f) On 16 August 2006, Mr Sabir was informed that his application to be SPM of the Crossflatts branch had been successful.[337] This letter again informed him that this was conditional on his acceptance of the SPMC and other terms and conditions, required him to sign and return the Conditions of Appointment, and asked him to give the SPMC his "*utmost attention*".

(g) He signed the Conditions of Appointment on 19 August 2006,[338] then received and signed the Serv 135 document on 11-12 October 2006.[339]

(h) Mr Sabir accepts that he understood, in any event, that he could be liable for losses in any amount,[340] that he would be an agent rather than an employee,[341] that he would be responsible for his assistants,[342] and that he had to account to Post Office.[343]

585. There is (or at least was) a point of dispute, as to whether Mr Sabir received a copy of the SPMC. Given (*inter alia*) all of the contractual documentation he signed accepting that he was bound by it, this is irrelevant. In any event though, it is clear that he did receive the SPMC (indeed, the overwhelming likelihood is that he received it twice).

586. Mr Sabir was an assistant accountant, who had to take care in his work.[344] He accepted that he would have considered carefully whether to take on a Post office branch,[345] and that he expected his relationship with Post Office to be governed by a contract.[346]

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[337] {E3/82/1}

[338] {E3/83/1}

[339] {E3/110/1}

[340] {Day3/86:5-18}

[341] {Day3/97:5}

[342] {Day3/104:3-4}

[343] {Day3/98:11}

[344] {Day3/79:1-5}

[345] {Day3/80:19-25}

[346] {Day3/89:14-21}

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587. His evidence, in the end, was that he simply could not remember whether any number of things had happened or not:

(a) As a general matter, he stated that he could not remember events at this distance in time: "*how can I remember twelve years things? I can't remember everything.*"[347]

(b) He could not remember whether he received the summary of contractual terms[348] (despite having admitted receiving them in his witness statement[349]).

(c) He could not remember whether he was taken through the extracts from his contract.[350]

(d) He could not remember whether he received a copy of the contract, either for Cottingley,[351] or for Crossflatts.[352]

588. In substance, then Mr Sabir had no evidence to weigh against Post Office's evidence that, in accordance with its well-established practices, it would have sent him a copy of the SPMC, as its letters indicated, in respect of the both the Cottingley and Crossflatts branches. He also had no evidence to weigh against Mr Haworth's evidence that he would have emphasised that it was a contract for services,[353] advised Mr Sabir to get legal advice,[354] and run through a summary of the contract,[355] including the termination provisions,[356] the obligation to account,[357] and the

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[347] {Day3/101:1-2}

[348] {Day3/100:13}

[349] At para 41 {C1/3/7}.

[350] {Day3/108:3}

[351] {Day3/120:22-23}

[352] {Day3/144:20-22}

[353] Witness Statement, para 13.1: {C2/14/3}.

[354] WS, para 19: {C2/14/6}.

[355] Witness Statement, para 10.2.

[356] Witness Statement, para 13.7.

[357] Witness Statement, para 13.6.

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possibility of products and services being changed,[358] and that Mr Sabir would be responsible for the operation of the branch including the actions of his assistants,[359] for training his assistants,[360] and for gains and losses.[361]

589. Moreover, even Mr Sabir's evidence that it was possible he had not received a copy of the contract did not stand up. His apparently weak grasp of English in oral evidence (which was notable for its variability) should not be confused with a lack of intelligence. It was implausible that, as a commercial man making a significant investment (in conjunction with a partner), who was expecting a contract, he would not have asked for a copy of the contract if one was not in fact enclosed. His evidence that he thought the "*standard*" term contract in fact contained his obligations to do certain things at the branch in his first 6 months as SPM was not credible.[362] As he conceded, he knew that the relationship between him and the Post Office would be governed by broader (standard) terms on subject matter such as losses.[363] That was the type of contract which he would have been expecting to receive, and which he would have understood the letters to be informing him he should have received. If he had not received it, he would have asked for it.

Mr Abdulla

590. It is not in dispute that Mr Abdulla:

(a) On 9 November 2006 was sent a letter inviting him to interview, and including a summary of the contractual terms.[364]

(b) Was then notified that he had been successful.

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[358] Witness Statement, para 13.5.

[359] Witness Statement, para 13.2.

[360] Witness Statement, para 13.3

[361] Witness Statement, para 13.4.

[362] {Day3/134:7-10}

[363] {Day3/134:18-20}

[364] {E4/30/1}

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(c) On 11 December 2006, signed Conditions of Appointment.[365] These stated that he would "*be bound by the terms of the Standard Subpostmasters' Contract for Services at Modified Payment Offices*", and he signed to say that "*I, Mr Naushad Abdulla, fully understand and accept these terms and conditions*".

(d) On 24 January 2007, signed an Acknowledgment of Appointment,[366] the Serv 135B document setting out extracts from the contract,[367] and the ARS 110 document.[368]

591. Again, the key dispute (albeit not ultimately legally relevant) was over whether Mr Abdulla received a copy of the contract.

592. The central fact about Mr Abdulla's evidence cannot be avoided: he lied frequently and brazenly. He began by denying that, as his interview records, his previous experience included tallying up figures.[369] He then claimed that he read the first and second paragraphs of a letter, and then what appeared on its second page, but missed out the (from his perspective, damaging) third paragraph.[370] He then said that a disclaimer meant that he would not have paid any real attention to a contract summary.[371] He first claimed not to have read any of the transfer day documents, then admitted he did read the key document.[372] He claimed that it was "*definitely true*" that Christine Adams and Christine Stephens were the same person,[373] and that it was "*not possible*" that they were two people.[374] He doesn't believe it was wrong to have told Post Office he had cash in the branch when he did not, and to have instead put an

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365 {E4/45/2}

366 {D1.4/3/1}

367 {E4/51/1}. He appeared to accept that he looked at this: {Day4/70:23}.

368 {E3/102/3}

369 {Day4/8:11}

370 {Day4/19:9} to {Day4/21:21}.

371 {Day4/27:17-24}

372 {Day4/75:6} to {Day4/77:21}.

373 {Day4/79:16}

374 {Day4/147:15}

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undated cheque in the till in case he was caught.[375] Indeed, he says that he would falsify the accounts again.[376] He said that he was given the impression in the interview held following the revelation of his wrongdoing that if he paid back the money he would be reinstated; that was untrue, as the transcript showed.[377] He claimed to have called the Helpline very frequently, then, when the call logs were put to him, said that in fact he gave up and stopped calling.[378] And he claimed to believe this was all a conspiracy to eject him from his branch.[379]

593. Mr Abdulla's evidence on whether he received the contract should be viewed in that context. He admitted that he knew the relationship was going to be governed by a written contract[380] (just as he had a contract with the pharmaceutical company which had previously employed him[381]). He accepted that he was looking for that contract to be provided for him at some point.[382] In those circumstances, he obviously would have asked for a copy of the contract if it had not received one. He tried to answer this by saying that he did not need a contract because everything was "*perfect*",[383] and inconsistently claimed that he did ask why he had not received the contract (which was new and obviously untrue).[384] He also tried what might or might not have been a joke, when he said that he thought he might have not been provided with the Standard Modified contract because "*Maybe it was still being modified or whatever.*"[385] This was all untrue. He plainly did receive the contract.

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375 {Day4/110:11-12}

376 {Day4/149:9}

377 {Day4/136:5-14}

378 {Day4/146:10-18}

379 {Day4/134:13-18}

380 {Day4/11:21-25}

381 {Day4/16:1} to {Day4/20:24-25}.

382 {Day4/12:3}.

383 {Day4/139:19-20}

384 {Day4/72:20-23}

385 {Day4/65:22-23}

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594. Although it is even less relevant than whether he received the contract, Mr Abdulla should also not be believed insofar as he contradicts Ms Ridge's evidence as to what she would have said in his interview.[386] Ms Ridge was very confident (9 out of 10) that she would have gone through her interview checklist,[387] and confident that she would have specifically mentioned the possibility of termination.[388]

595. But this is all doubly irrelevant. Not only did Mr Abdulla sign his agreement to the contract, and not only did he have the opportunity whenever he wished to read it, but:

(a) He accepted that he "*was willing to accept and be bound by the contract…even if I didn't have the contract with me, I was still happy to be bound by the terms of the contract.*"[389]

(b) He specifically accepted that he knew he was going to be a self-employed agent,[390] would be responsible for cash and stock,[391] would be responsible for hiring and training assistants,[392] and for losses caused by his assistants,[393] that it was "*common sense*" he would be responsible for losses,[394] and that products and services could be changed.[395] So the very terms he is saying were so onerous and unusual that they should not be incorporated, he also says he knew and/or expected would be in the contract.

596. In this context, the submission that Mr Abdulla's contract was not fully incorporated lacks reality. The Court will also recall that, strangely, Cs decided to plead Mr Abdulla's claim entirely on the basis of the Standard SPMC, notwithstanding that it is

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[386] See her Witness Statement, at paras 12 and 15: {C2/12/3-4}.

[387] {Day10/50:25}

[388] {Day10/101:13}

[389] {Day4/70:4-7}

[390] {Day4/29:10-11}

[391] {Day4/14:10-11}

[392] {Day4/36:6-11}

[393] {Day4/31:6-7}

[394] {Day4/34:4-6}

[395] {Day4/35:21-23}

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common ground that he contracted on the terms of the Modified SPMC. His entire claim is muddled and wrongly advanced.

Mrs Stockdale/ Mrs Dar

597. Mrs Stockdale and Mrs Dar admit that they received and signed their contracts.[396] In that context, there is no room for a debate about incorporation.

598. Mrs Stockdale believes she read the contract before her interview.[397] She accepts that nothing Mr Carpenter says he said at her interview would have been surprising,[398] and specifically that she would have been told to consider the contract carefully.[399] She considered whether to take legal advice, and decided not to.[400] She decided she was happy with the contract's terms, and accordingly agreed to it.[401]

599. Mrs Dar was a less straightforward witness, and tried to pretend that the documents were confusing – when they were clearly not – as Mrs Stockdale had demonstrated. But her evidence essentially ended up in the same place. She received the contact, and got her father to read it over.[402] She read it and talked it over with him.[403] It was "*strongly suggest[ed]*"[404] by Post Office that she should take legal advice, but she chose not to. She signed and returned the contract.

600. These are simply not cases which raise any question of incorporation.

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[396] {D1.6/4/8} (Mrs Stockdale); {D1.5/2/8} (Mrs Dar).

[397] {Day4/162:21} to {Day4/164:13}.

[398] {Day4/164:18}

[399] {Day4/171:11}

[400] {Day4/175:14}

[401] {Day4/179:13-17}

[402] Witness Statement, para 68: {C1/5/14}.

[403] Witness Statement, para 69: {C1/5/14}.

[404] Document at {E5/138/1}.

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(2) UNFAIR CONTRACT TERMS ACT 1977 (COMMON ISSUE 7)

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

601. Cs contend that all the terms identified in Common Issue 5 are unenforceable except in so far as they satisfy the requirement of reasonableness pursuant to ss. 3(2) and 17 UCTA. They further contend that these terms do not satisfy that requirement.

602. Both contentions are utterly without any basis in reasonable argument.

The UCTA reasonableness test

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

> *(1) This section applies as between contracting parties where one of them deals...on the other's written standard terms of business.*
>
> *(2) As against that party, the other cannot by reference to any contract term—*
>
> *...*
>
> *(b) claim to be entitled—*
>
> *(i) to render a contractual performance substantially different from that which was reasonably expected of him, or*
>
> *(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,*
>
> *except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.*

604. Cs must satisfy two threshold requirements to subject these terms to the requirement of reasonableness: they must establish (1) that they were dealing on Post Office's written standard terms of business and (2) the clauses complained of purport to entitle Post Office to render either a contractual performance substantially different from that which was reasonably expected of it, or no performance at all.

605. Cs fall at both of these hurdles.

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(i) Cs did not contract on Post Office's written standard terms of business

606. It is true that the contracts in question were produced, in a standard, non-negotiable form, by Post Office.

607. However, this is not sufficient for the purposes of section 3 of UCTA. In **Commerzbank AG v Keen**,[405] the Court of Appeal was faced with a clause in a banker's employment contract which required recipients of a discretionary bonus scheme to be employed by the bank at the time of distribution. It was submitted that this clause fell within section 3, on the basis that the bank was "*claiming to be entitled to render a contractual performance substantially different from that which was reasonably expected of it*": *per* Mummery LJ, at para. 77 {A1.1/29/14}. Mummery LJ rejected that submission at para.104 {A1.1/29/18}:

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

608. Similarly, at para. 115 {A1.1/29/21} Moses LJ said:

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

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

> *…accepting that the section applies as between the Claimant and the Defendants where the Claimant deals on the Defendants' written standard terms of business. The Defendants' business was banking not that of an*

[405] [2006] EWCA Civ 1536.

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

610. Post Office's business is the provision of services to customers, not the engagement of SPMs. The SPM, as agent to Post Office, is conducting transactions on its behalf and so enabling Post Office to conduct its business with customers. The contract with the SPM facilitates Post Office's conduct of its business, rather than itself representing the conduct of that business.

611. In Opening, Cs did not engage with these authorities at all.

612. Instead, they assert that Post office's position is "*somewhat ambitious*" (para 260.1: {A/1/102}), and then that it is "*obviously wrong*" (para 267: {A/1/105}).

613. Despite the escalating rhetoric, they do not explain why they say Post Office's position is wrong. The closest they come is to say that the "*appointment of Subpostmasters is an integral part of the Defendant's business*": para 269 {A/1/106}.

614. But, whether or not it is integral, the appointment of Subpostmasters is no more Post Office's business than retaining bankers is a bank's business.

615. Post Office's business is the sale of its products and services. As Ms Van Den Bogerd puts it, Post Office "*acts as a 'shop front' for the general public to access a range of products and services, from government benefit payments to postal and banking services.*"[406] Post Office offers these services through both Crown Office branches, which are run by Post Office employees, and Agency branches, run by SPMs.[407]

616. There is no distinction that can be drawn in Cs' favour between Post Office and the banks in the authorities – and they have not even tried to draw one.

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[406] Ms Van Den Bogerd's Witness Statement, para 24: {C2/1/6}.

[407] ibid, paras 26-27: {C2/1/6-7}.

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(ii) No entitlement to render a substantially different contractual performance

617. Moreover, the terms identified in Common Issue 5 do not entitle Post Office either to render a contractual performance substantially different from that which was reasonably expected of it, or to render no performance. For this distinct, freestanding, reason Cs cannot rely on UCTA.

618. A number of these terms are not focused on Post Office at all. The contractual provisions in question place obligations and liabilities on SPMs (see the terms listed above at para. 540(a) and 540(b), and the obligation to help Post Office retain access to customers during any period of suspension (listed above at para. 540(c)).

619. A number of the terms listed above at para. 540(d) entitle Post Office to update and amend rules and instructions applying to SPMs. That, too, is outwith the scope of section 3.

620. In **Paragon Finance v Nash**[408] Dyson LJ considered whether UCTA section 3(2)(b)(i) applied to a provision which gave a lender an entitlement to vary the rate of interest payable on a loan. At paras 75 to 77 {A1.1/19/27}, he said as follows:

> *…there is no relevant obligation on the claimant, and therefore nothing that can qualify as 'contractual performance' for the purposes of section 3(2)(b)(i). Even if that is wrong, by fixing the rate of interest at a particular level the claimant is not altering the performance of any obligation assumed by it under the contract. Rather, it is altering the performance required of the appellants [defendants].*
>
> *The contract term must be one which has an effect (indeed a substantial effect) on the contractual performance reasonably expected of the party who relies on the term. The key word is 'performance'.*

621. Exactly the same applies here. Updating the rules applicable to SPMs does not change Post Office's obligations; it changes the SPMs' obligations.

622. The final set of relevant terms deal with Post Office's ability to suspend and terminate contractual relations with SPMs (as a consequence of which the SPMs may also

[408] [2002] 1 W.L.R. 685.

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receive less remuneration). These are terms which delineate the duration of contractual obligations, rather than stripping away or neutering Post Office's obligations.

623. Chitty, at 15–086 of its current edition {A1.3/2/13}, comments as follows:

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

624. This passage was approved by Dyson LJ in **Paragon**. Other case law also accords with this view. In **Timeload v British Telecommunications**[409] Sir Thomas Bingham MR expressed uncertainty as to whether an unfettered right to terminate on notice would fall within section 3(2) of UCTA. In the more recent case of **Hadley Design Associates v The Lord Mayor and Citizens of the City of Westminster**,[410] HHJ Seymour QC noted that the "*provisional view, at any rate, of Sir Thomas [Bingham MR] seems to have been that the exercise of a right of termination did not fall within the subsection [3(2)]*": at para. 76. He went on to say, at para. 85, that he was:

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

625. Similarly, in **Brigden**, Morland J said that:

> *The clause "an employee may be dismissed by notice and/or payment in lieu of notice during the first 2 years of employment, without implementation of the disciplinary procedure", although expressed in negative terms, is a clause setting out the Claimant's entitlement and the limits of his rights. In my*

[409] [1995] EMLR 459 {A1.1/9}.

[410] [2003] EWHC 1617.

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> *judgment it is not a contract term excluding or restricting liability of the Defendants in respect of breach of contract or entitling the Defendants to render a contracted performance substantially different from that which was reasonably expected of them or to render no performance in respect of any part of their contractual obligation.* (emphasis added)

626. Accordingly, these terms too cannot fall within section 3(2).

627. Cs' summary of the effect of the relevant terms in Opening, at para 266 {A/1/104-105} ("*impose contractual requirements upon Subpostmasters…impose purported liability for alleged shortfalls upon Subpostmasters…*" etc), whilst inaccurate in various respects, inadvertently makes the essential point. These terms do not govern Post Office's performance. They concern either (a) SPMs' obligations and/ or (b) Post Office's powers.

628. In addition to the authorities cited above, Post Office relies on the Court of Appeal's judgment in **Barclays Mercantile Finance Ltd v Marsh**.[411] That case involved a guarantee. Two of its provisions specified a range of circumstances in which the guarantor would be liable. He argued that these provisions fell within section 3(2)(b). The Court, per Dyson LJ, rejected that argument, saying, at para 21:

> *So far as section 3(2)(b) is concerned, in my view that is directed at contracts which provide that a party may render contractual performance substantially different from that which was reasonably expected of him. This guarantee is not that sort of contract at all. It does not require any contractual performance from Barclays Mercantile at all.*

629. Cs set out, at para 275 {A/1/107}, the categories of clause which they say enabled Post Office to render a contractual performance substantially different from that which was reasonably expected. The flaws in their analysis can be easily identified:

    (a) As to the clauses enabling Post Office to vary the "*rules, instructions and standards*", Cs say (para 275.1) that, after Post Office had varied the contract, it might be able to render substantially different performance from what was expected. That is not the test. This section of UCTA does not bite on a clause

[411] [2002] EWCA Civ 948

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whose exercise might lead, down the line, to the performance of some other clause being substantially different from what was expected. If that were the case, it would cover a case like **Paragon**, in which a variation could have led to both parties' obligations being different down the line. Of course, in any event, the focus of the "*rules, instructions and standards*" which could be varied here was the SPMs' performance, not Post Office's.

(b) As to the clauses enabling Post Office to vary the products and services offered in branch, Cs say (para 275.2) that SPMs had "*key expectations*" as to these products and services. Again, that is irrelevant. UCTA does not bite on a variation clause, and in any event the ultimate relevant contractual performance was Cs' alone. Cs were obliged to offer the products and services; Post Office was not obliged to let them offer any particular product or service.

(c) As to the clauses imposing liability on SPMs, Cs say (para 275.3) that the imposition of liability meant that Post Office could perform the contract differently from what was expected. That is ridiculous. The liability, and the associated performance, were that of the SPMs, not Post Office.

(d) As to the clauses governing suspension and termination (see Cs' Opening, para 275.4), Post Office repeats its case as set out (above) from its Opening. It is noteworthy that Cs' own summary of the law, at paras 19 to 21 of Annex VI {A/1/221}, does not accurately summarise the law, not referring to **Brigden**, partially quoting **Timeload**, and not mentioning the subsequent explanation of it in **Hadley Design**.

630. There is also an additional reason why Cs' attempt to get these clauses into section 3(2) does not work.

631. Section 3(2) is designed to catch terms reliance upon which contradicts one party's contractual expectations. Those expectations will usually be grounded in the other terms of the contract. The examples given in Chitty are of a travel agent who sells a cruise on a particular vessel, but then relies on a clause to change that vessel; and a force majeure clause entitling one party not to provide the contractual performance which would otherwise be expected of him. In those cases, the terms of the contract

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generally would entitle you to expect a certain level of performance – which the impugned term departs from dramatically.

632. That is not Cs' case. Their case appears to be that their expectations were grounded in what was said to them before the contract was entered into. They cite (at Annex VI, para 17 {A/1/220}) authority for the proposition that, exceptionally, it can be "*a pre-contractual* ***representation*** *or* ***promise***" (emphasis added) which creates the contractual expectation. That is true. To take an example, if Post Office said, before the contract was agreed, 'Don't worry about this clause saying that you can be dismissed summarily; actually you can't', that might answer this point.

633. But Cs' evidence, taken at its highest, comes nowhere near saying that. Cs' assertions about pre-contractual discussions are that the 'mood music' was comforting, that Post Office hoped each relationship with a SPM would be cooperative and mutually profitable. As became clear, this was what the Lead Cs meant when they referred to an expectation of partnership: see {Day4/53:3}: "*you're working together to make money*" (Mr Abdulla); {Day5/88:20-22}: "*customer service and working with two businesses, working hand-in-hand with each other*" (Mrs Dar).

634. Those are not, on any view, pre-contractual representations specifically contradicting any of the contractual terms Cs are complaining about.

635. What Cs are really saying is that there is a mismatch between what they hoped and thought the contract would say, and what it actually says.

636. But that is not a legitimate argument. See Chitty 15–085:

> *where on its true construction a contract term provides for performance to a certain level by the party relying on the clause, the other party cannot claim that that very term entitles the party so relying to render a contractual performance substantially different from that which he reasonably expected.*

637. The authority cited by Chitty in support of this proposition is **Hodges v Aegis Defence Services (BVI) Ltd**.[412] In that case, an employee's widow claimed that his death in service benefit, which on its proper construction stipulated that she would be

[412] [2014] EWCA Civ 1449

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paid $200,000, meant that she was entitled to a minimum lump sum of $200,000. She had received a lower lump sum, plus a number of periodical payments under another insurance policy taken out by the employer, adding up to a total amount of $362,496.46. The Court dismissed her appeal. Only Longmore LJ considered whether, as a matter of principle, UCTA could apply to this clause. He held, at para 52, that it could not, because the Defendant company, given that it had complied with what the contractual provision in question, on its true construction, required, had not "*claimed to be entitled to render a contractual performance, substantially different from that which was reasonably expected of it*".

638. Exactly the same is true here. These clauses are, in each case, the ultimate source for contractual expectations in respect of each given subject matter. They do not stand in opposition to any pre-contractual promise, or to any other clause of the contract. That is another reason why they cannot be brought within section 3(2).

639. At para 276 of their Opening {A/1/108}, Cs advance a new case, not foreshadowed in the AGPOC. They say that because, on Post Office's case, the right to terminate on 3 months' notice caps any compensation Cs might obtain for loss of office, that makes it a limitation of liability clause falling within section 1(2)(a) of UCTA (*sic*; it appears from the context that section 3(2)(a) is intended).

640. It is too late for that case to be brought. It also remains essentially unexplained.

641. In any event, though, the analysis is obviously wrong. If a clause forms part of the explanation for why, as a matter of fact and causation, liability does not arise or continue past a certain date, that does not make it an exclusion clause. For example, suppose a contract which has a specified end date. If it is unlawfully terminated before that date, the wrongdoing party will be liable for damages only up until what would otherwise have been the contract's end date. That does not make the clause specifying the end date an exclusion clause. Cs' argument also ignores the right to terminate on notice is mutual, which is hardly the hallmark of a term that falls foul of UCTA.

642. As Gloster J noted in **JP Morgan Bank v Springwell Navigation Corp**,[413] at para 602:

[413] [2008] EWHC 1186

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terms which simply define the basis upon which services will be rendered and confirm the basis upon which parties are transacting business are not subject to section 2 of UCTA. Otherwise, every contract which contains contractual terms defining the extent of each party's obligations would have to satisfy the requirement of reasonableness.

643. For all of those reasons, the analysis does not get to the stage of considering whether these terms are reasonable. If, however, it were to get to that stage, they would pass the test.

(iii) The challenged terms are reasonable in any event

644. The test for reasonableness is set out in section 11(1) of UCTA {A1.2/1/2}:

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

645. Given the fact-specific application of the test, it is dangerous to reason from previous decisions on reasonableness (Chitty, 15–101). However, it is clearly relevant that this is a genuinely commercial context. In **Watford Electronics v Sanderson CFL**,[414] Chadwick LJ said, at para. 55 {A1.1/18/21}:

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

646. Post Office is much the larger business, but the SPMs were not consumers, or small suppliers, pressurised into contracting on draconian terms. They were independent business owners. They could have simply provided their customers with an independent retail offering. Instead, they made the free decision to add a Post Office branch to whatever other retail business they wanted to run. Their bargaining power might have been significant, if Post Office wanted, or was legally required, to operate a branch in a given locality and there was a shortage of capable applicants for the

[414] [2001] EWCA Civ 317.

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SPM position. Conversely, their bargaining power might have been weak, if Post Office was ambivalent about locating a branch in a given area and/or if there were many suitable applicants for the position. Either way, while the fact that the terms were (colloquially speaking) largely in standard form was a function of Post Office's greater size and commercial heft, the decision as to whether to accept the content of the contracts was made by the SPMs as independent-minded, informed businesspeople, with complete freedom of choice.

647. In that context, the key question is whether there was a cogent (and reasonable) commercial reason for including the relevant terms: see **Oval (717) v Aegon Insurance Co (UK)**[415]. For all of the reasons given above, these terms were not onerous; for the same reasons, they were not unfair or unreasonable. They served key commercial purposes, and they were reasonably adapted to those purposes. The fact that, in retrospect, the SPMs wish they had not been included, or had been formulated differently, does not make them unreasonable within the meaning of UCTA.

648. As might have been anticipated, in Opening Cs' only real point on substantive unfairness was that there was an imbalance of bargaining power between the parties. That will often have been true (although not always, in circumstances where Post Office could be mandated to maintain branches in certain locations). But that is obviously not enough by itself. It cannot replace the need to go through the relevant clauses, one by one, and identify in what respects they are said to be unreasonable.

649. For its part, Post Office's case is that these clauses are all unexceptionable – precisely the sort of clauses one would expect in a contract of this kind. That submission is fleshed out in the section of this document dealing with incorporation.

650. Insofar as relevant, the Lead Cs were well aware of these clauses. They received no inducement to agree – these were contracts they made an independent decision to enter.

651. More broadly, and in anticipation of the kind of arguments that might be made on this point by Cs, it is worth re-emphasising that "*the court assesses the issue of reasonableness at the time when the contract is made, and not by reference to what*

[415] [1997] 85 BLR 97 {A1.1/12/1}.

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has happened during the course of the contract with the benefit of hindsight": (**Shared Network Services Ltd v Nextira One UK Ltd**,[416] per Flaux J, at para 19).

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[416] [2011] EWHC 3845