

Filed on behalf of the: Defendant
Witness:
Statement No.: First
Date Made: 16 March 2019

Claim Nos: HQ16X01238, HQ17X02637 & HQ17X04248

POST OFFICE GROUP LITIGATION
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION

B E T W E E N:

ALAN BATES AND OTHERS

Claimants

AND

POST OFFICE LIMITED

Defendant

**[XTH] WITNESS STATEMENT OF ANDREW PAUL
PARSONS**

I, Andrew Paul Parsons of Oceana House, 39-49 Commercial Road,
Southampton, SO15 1GA WILL SAY as follows:

Introduction

1. I am a partner at Womble Bond Dickinson (UK) LLP, solicitors for the Defendant (**Post Office**) in the above proceedings. I am duly authorised to make this statement in support of Post Office's application for an order that the Honourable Mr. Justice Fraser be recused as the Managing Judge of the Post Office Group Litigation. The facts set out in this statement are within my own knowledge.

Commented [GC1]: To consider whether WS should be made by Tom, for same reason as Senior Counsel will be AGQC rather than DCQC?

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2. In this statement I refer to documents which are contained in the trial bundle for the Horizon Issues Trial in the form {Section / Tab / Page}.

Commented [GC2]: I would just refer to an exhibit to this WS, and put all the docs there.

Structure of this litigation

3. As the Court will be aware, these proceedings are being managed in stages. The Managing Judge is the Hon. Mr Justice Fraser (the “**Judge**”).
4. It was ordered that the nature of the legal relationship between Subpostmasters and Post Office should be determined first. Paragraph 1 of the Court’s Order of 27 October 2017 provided that there “*shall be a trial of common issues, to determine issues relating to the legal relationship between the parties*” (the “**Common Issues**”, to be tried at the “**Common Issues Trial**”) [REF]. Schedule 1 to that Order listed those “*common issues*” [REF].
5. That Order, at paragraph 34, also scheduled a further “*trial of substantive issues*” for 11 March 2019 [REF].
6. Schedule 1 to the Court’s Order of 23 March 2018 listed a set of issues regarding the operation of Horizon to be determined at the March 2019 trial (the “**Horizon Issues**”, to be tried at the “**Horizon Trial**”) [REF]. That trial is ongoing.
7. In broad summary, the Horizon Issues cover:
- a. The likelihood of errors (Issues 1, 3, 4, 6);
 - b. How the Horizon system reported/ allowed discovery of errors (Issues 2, 8, 9, 14(a));
 - c. How Horizon compares transaction data and processes transaction corrections (Issues 5 and 15);
 - d. How Horizon deals with shortfalls and disputes (Issue 14(b) and (c));
 - e. How Horizon interacts with the Branch Trading Statement (Issue 14(d) and (e));

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- f. The extent to which Post Office/ the IT company with which it contracted (Fujitsu) could remotely access and/or alter Horizon data (Issues 7, 10 to 13).
- 8. A further Order, dated 20 February 2019, provided, at paragraph 1, for the determination of further issues, principally pertaining to limitation and breach [REF].
- 9. On 15 March 2019, the Court handed down judgment following the Common Issues Trial (the “**Judgment**”).

Scope of the Common Issues Trial

- 10. As noted above, the Common Issues were described in the 25 October 2017 Order as relating to the parties’ legal relationship. That has been reiterated by the Judge, who described the Common Issues (a) at a hearing on 2 February 2018, as dealing with “*the contractual relations*” [REF]; (b) at a hearing on 22 February 2018, as “*purely points of construction*” [REF].
- 11. The Common Issues are, in summary:
 - a. Issues as to contractual construction/ implication, governing good faith (Issue 1); training; support; provision of Horizon; the Helpline; the investigation of shortfalls; communication of bugs; recovery of shortfalls; suspension; termination (Issues 2, 3, 4 and 14 to 20); Subpostmasters’ liability for losses (Issues 8 and 9), Post Office’s discretion over whether to appoint a prospective purchaser of a Subpostmaster’s branch as the next Subpostmaster (Issue 21), assistants (Issues 22 and 23).
 - b. Mixed issues of construction and common law, as to whether and to what extent agency principles apply to Subpostmasters and/or Post Office (Issues 10 to 13).
 - c. Issues as to the status of various terms, i.e. whether they are onerous and unusual and/ or invalid under the Unfair Contract Terms Act (Issues 5 and 7).

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- d. If and insofar as any terms are found to be onerous and unusual, what steps Post Office needed to take to bring them to Subpostmasters' attention (Issue 6).
12. As to the structure of the Common Issues Trial, the 25 October 2017 Order specified:
- a. At paragraph 7, that the parties should choose 6 Lead Claimants [REF].
 - b. At paragraph 8, that the parties should serve, “[i]n respect of each Lead Claimant and in relation to the Common Issues”, Individual Particulars of Claim, Defences and Replies.
 - c. At paragraph 10, that the parties should serve, “[i]n respect of each Lead Claimant and in relation to the Common Issues”, witness statements.
 - d. At paragraph 4, that some disclosure should be given in respect of Claimants identified as potential Lead Claimants.
13. Further disclosure was controlled by reference to the Common Issues. See the hearing of 22 February 2018, at which the Judge, when deciding whether to order disclosure of specific items, considered whether they were “*relevant to the Common Issues*”: see e.g. p.26B [REF]; p.46G [REF].

Dispute over admissibility of evidence

14. The six Lead Claimants served Individual Particulars of Claim on 13 April 2018 [REFS].
15. In its Individual Defences, Post Office noted that the Claimants' pleadings went far beyond the scope of the Common Issues Trial. Post Office specifically identified, as inadmissible and/or irrelevant content, those parts of the pleadings which dealt with training, the Helpline, the introduction and withdrawal by Post Office of specific products or services for sale in the branch, the Claimants' experiences of shortfalls, Post Office's

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investigations of shortfalls, and terminations. See, for example, Individual Defence to Mr Abdulla's claim, at paragraph 2 [REF].

16. At a hearing on 22 February 2018, the Judge said, at 9D-E: *"I thought I made this crystal clear last time but I appear not to have done so I am going to repeat myself, so far as resolving the Common Issues which are, and I have reminded myself what they are, purely points of construction... On the authorities the only factual matrix which is relevant to construe the meaning of those contracts in law is common knowledge. That is without doubt orthodox and the correct way of doing it."* [REF] He also said, at p.48A, that *"what happened or what should have happened is not relevant to construing the Common Issues."* [REF]
17. At a hearing on 5 June 2018, Post Office expressed continuing concerns that the pleadings indicated that the Claimants intended to adduce wide swathes of irrelevant evidence. In response, the Judge gave the Claimants the following warnings:
 - a. At p.57E-F: *"Whatever the factual evidence upon which you seek to rely it has to be relevant to the Common Issues... If it is not relevant to the Common Issues it is not admissible.... In those circumstances it is difficult based on reading the authorities to see for example, to use Mr. Cavender's example, how evidence of breach could remotely be relevant to the Common Issues Trial."* [REF]
 - b. At p.59C-E: *"So this is what I am going to do. I am going to express myself very clearly. If you serve evidence of fact which includes passages which are plainly not relevant and, hence, not admissible, Mr. Cavender is going to have a choice. He can either simply say, 'I am not going to be cross-examining at all' or he is going to issue an application to have it struck out. If he does issue an application to have it struck out and that application is effective, it will involve the court going through it and simply striking out large amounts. The court will make time to do that but cringing costs consequences will follow."* [REF]

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- c. At p.60A, he warned against the adducing of “*wide-ranging evidence of fact...that cannot possibly form part of the factual matrix.*” [REF]
- d. At p.60C: “*a very powerful shot has now been fired across your bows on two occasions and I do not mean by [counsel for Post Office]. I mean by me.*” [REF]
- 18. Nonetheless, on 10 August 2018, the Lead Claimants served witness statements which covered all of this ground, in effect telling the ‘whole story’ through to termination [REFS].
- 19. Accordingly, Post Office applied to strike out large parts of the Claimants’ evidence [REF].
- 20. That application was refused by the Judge on 17 October 2018: Bates v Post Office [2018] EWHC 2698 (QB). At paragraph 52 of that judgment, the Judge said the following:

“as a result of admitting this evidence (by which the defendant means failing to find it inadmissible and striking it out) the court will either find itself asked, or will make, findings on matters that are in reality to be dealt with in the Horizon Issues trial, or in the later trials that are to deal with specific breach, loss and damage alleged by the individual Lead Claimants. I do not accept that there is such a risk...There is no such risk of the court making findings on the Horizon Issues, or of the court making findings on breach. Judges are expected to be able to consider relevant matters pertaining to different issues, keeping them compartmentalised where necessary...I consider this point to be an exceptionally weak one. The court will not find itself making findings almost by accident, which is what the defendant came perilously close to submitting.”

Post Office’s position at Common Issues Trial

- 21. At the Common Issues Trial, Post Office continued to make very clear its position that no findings should be made which went beyond the proper scope of the Common Issues Trial. The key extracts from Post Office’s Written Opening submissions, Oral Opening submissions, Written Closing

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submissions and Oral Closing submissions are at Annex 1 to this statement.

The Judgment

22. Notwithstanding the above the Judgment made findings, or observations, on a wide range of matters which properly fall to be decided at the Horizon Trial or at future breach trials.
23. They include findings and observations on such matters as the adequacy of training, the quality of the Helpline, Post Office's alleged knowledge of problems with Horizon, the cause of shortfalls, how easy or difficult it was for Subpostmasters to discover the cause of shortfalls, Post Office's investigations of shortfalls, the circumstances of individual Claimants' suspensions and terminations, and whether Post Office sent unjustified demands for payment and/or threats of legal action to Subpostmasters.
24. These findings give the clear impression that the Judge has already formed a firm view on these matters. It is to be expected that this will prevent him from taking an impartial view on the same matters when they are revisited, at subsequent trials, with the benefit of full evidence and disclosure.
25. The Judgment also contains a great deal of critical invective directed at Post Office, none of which is relevant to the determination of the Common Issues. That, too, creates a clear impression that the Judge has not behaved impartially.
26. In those circumstances, Post Office believes it has no choice but to make this application for the Judge to recuse himself from these proceedings. As an adjunct to that, Post Office applies for an adjournment of the ongoing Horizon Trial.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

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Signed:

Date:

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Annex 1: Extracts from Post Office's submissions at the Common Issues Trial

Written Opening submissions

27. In its written opening submissions Post Office sought to remind the Court that (at paragraphs 29-31 [REF]):

"29. 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.

30. 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). Post Office welcomes that ruling. Post Office anticipates that Cs' case on the supposed relevance of its breach allegations to the Common Issues will become more fully articulated at trial.

31. In any event, it will be important for the parties not to stray into issues that fall to be determined at the Horizon trial and/or issues as to breach. 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. The function of this trial is not to reach any findings on those issues, or on facts that go to those issues."

Oral Opening submissions

28. This position was reiterated in oral opening submissions (Page 165 to 166 [REF]):

"You will see what we said in our written opening about things that it would be useful -- findings to make and not to make. In your number two judgment you made it clear you are not making findings on the breach allegations or allegations about Horizon.

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MR JUSTICE FRASER: Everyone is agreed about that

MR CAVENDER: See paragraph 52. What I also ask that you don't do is make any findings of fact that go to -- are ancillary to those breach allegations or Horizon allegations, rather than the Common Issues. Otherwise, again, you have the difficulty of overlap and arguments about issue estoppel and all these kinds of things.

MR JUSTICE FRASER: It depends what you mean by findings of fact that go to breach. I imagine, if there are any necessary findings of fact at the end of the evidence in terms of disputes of fact as to whether Mr Bates got document X, you won't want me to leave that floating in the air, will you?

MR CAVENDER: My Lord, no. That goes to my first category of --

MR JUSTICE FRASER: I know that and I haven't yet bottomed that out with Mr Green. Because, on one view, a finding of fact that goes to breach could involve any finding of fact in relation to the contractual relationship, couldn't it?

MR CAVENDER: But what I am talking about is downstream. So the training wasn't good enough, that they didn't have sufficient report writing, that they didn't have enough help with investigations; all those things that are downstream. Potentially breach. We haven't brought the evidence to the trial to deal with it. There hasn't been full disclosure on some of these issues. So we won't be dealing -- and this has been our persistent position -- obviously this is a trial about the contract and the relationship. Those are my submissions. Obviously the court will do what it will do."

Written Closing submissions

29. Post Office's closing written submissions also made a number of points on the scope of the Common Issues Trial – see paras 31 to 51 and paras 126 to 131 [REFS]. In particular,

"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

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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." [REF]

"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 [MISSING WORD] [REF]"

Oral Closing submissions

30. Finally it was addressed in oral closing submissions [REFS]:

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Day 14, page 27

18 MR JUSTICE FRASER: And you don't take post-contractual

19 matters into account on either footing.

20 MR CAVENDER: Or hindsight or views from hindsight. You

21 have to ask the right question. The right question is

22 not: well, is it reasonable? You don't ask: well, what

23 term should be implied in light of what happened in

24 fact? That is the mistake made in Bou Simon by the

25 First Instance that the Court of Appeal identified. And

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1 there is a real risk of doing that here - -

2 MR JUSTICE FRASER: I don't think there is .

3 MR CAVENDER: It's an easy mistake to make as Bou Simon

4 shows. There is a lot of evidence here of that nature.

5 My learned friend has put his case both in

6 cross-examination and his closings on that basis. So

7 you have a yawning invitation to make a mistake and it

8 is my job to try and prevent that happening and I intend

9 to try and do that. But in doing that, you have to be

10 very careful what question you ask and what evidence you

11 have regard to when you ask it .

12 I will just divert a moment and put some skin on

13 those bones. When you are looking at implied terms

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14 particularly, my learned friend is fascinated by doing
15 it in the guts of the dispute and the thing going wrong.
16 When you know a lot more detail - - and at that stage you
17 would be able to identify certain cardinal obligations
18 and things that have gone wrong and try and put them
19 right. "Tempting but wrong", in the words of M&S.
20 At the stage you're contracting you know very much
21 less. You have a very high level view of what you
22 expect. So the very notion of being able to imply
23 precise terms dealing with suggested infelicities or
24 difficulties down the line is itself wrong headed
25 because you wouldn't be able to do that.
...

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24 We also say it was somewhat cynical of the claimants
25 to take this approach because there has not been full

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1 disclosure on either side dealing with the issues they
2 now seem to want to be dealt with. In particular, what
3 we call the breach allegations, we only have a few
4 documents that happen to be caught in the net of the
5 word searches. Your Lordship should not think that we

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6 have full disclosure on all these issues. We do not.
7 And the real temptation here is to think you have and to
8 draw inferences from an incomplete documentary record,
9 incomplete evidence, which would in my submission be
10 obviously wrong.
11 So, for instance, your Lordship should not be fooled
12 into thinking there has been anything like proper
13 disclosure on allegations as to training or shortfalls
14 or investigations. Your Lordship did not order such
15 disclosure, there has not been such disclosure, and
16 Post Office has not led evidence on those issues. My
17 learned friend has put questions on those areas - -
18 MR JUSTICE FRASER: You have led evidence on training.
19 MR CAVENDER: My Lord, only very, very high level. I think
20 it was a couple of paragraphs --
21 MR JUSTICE FRASER: Quite a lot of your evidence was high
22 level in some areas, and I'm not criticising, I'm
23 observing, but you did lead evidence on training.
24 MR CAVENDER: My Lord, only just high level evidence. If
25 you wanted evidence on training, we would have evidence

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1 from trainers and the proper documentary record of the
2 plans et cetera. All we did was have a few slides, that

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3 wasn't proper evidence.

4 The other thing about training of course is it is

5 wholly irrelevant. Why? Because my learned friend's

6 case is that all the contracts were made in advance of

7 even initial training, let alone subsequent training, so

8 the whole question is wholly irrelevant.

9 MR JUSTICE FRASER: The irrelevance point I understand, but

10 it is wrong to submit you didn't put in any evidence on

11 training - -

12 MR CAVENDER: We didn't put any proper evidence on

13 training - -

14 MR JUSTICE FRASER: Mr Cavender, there is no distinction

15 between putting in evidence and putting in proper

16 evidence. You might have a point that it could have

17 been more comprehensive --

18 MR CAVENDER: There has been no disclosure on training.

19 MR JUSTICE FRASER: There might not have been. But you did

20 put in evidence on training because some passages of

21 your witness statements expressly deal with training.

22 MR CAVENDER: My Lord, yes, there is a paragraph or two in

23 Mrs Van Den Bogerd's statement that on a very high level

24 says. But not evidence of training where your Lordship

25 can make any finding. Her evidence is about what could

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1 have been known or anticipated at the date of inception,
2 that is what her evidence goes to if you look at it, not
3 the actual experience of training, how good or bad it
4 was, were shortfalls dealt with in sufficient detail,
5 which is the point my learned friend wants it for.
6 MR JUSTICE FRASER: By "date of inception ", do you mean ...
7 MR CAVENDER: The contractual date.
8 MR JUSTICE FRASER: The contractual date.
9 MR CAVENDER: Indeed. That is why it is so general.
...

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2 MR CAVENDER: The
3 bright line I am making is issues of breach really.
4 MR JUSTICE FRASER: You are saying don't go near findings
5 that relate to breach, is that right?
6 MR CAVENDER: Indeed.
7 MR JUSTICE FRASER: Is that the best way of summarising it?
8 MR CAVENDER: It is, and we said that at the beginning. And
9 your Lordship said in judgment 2 you are not going to
10 make findings on breach, and I said good, obviously, but
11 also don't make findings of fact leading to those
12 questions of breach. Not obviously whether there is
13 a contract or not, you could - - if you took that too

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14 far . But not in directly leading up to findings on
15 breach, or would do. Platforms of fact that would lead
16 to that.

17 MR JUSTICE FRASER: Understood.

...

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11 MR CAVENDER: So in summary on important points of this
12 introduction in terms of scope, the court should not
13 have regard to post-contractual evidence, evidence of
14 breach, for two distinct reasons: firstly, to do so
15 would involve a basic error of law, and, secondly, would
16 involve a serious procedural irregularity. It would do
17 the second because the orders of the court setting out
18 the issues for trial and the issues on which evidence
19 were to be admitted is set out in the Common Issues.
20 The Statements of Case have been ordered to be limited
21 to those issues, see paragraph 8, and the witness
22 statements were limited to those issues, see
23 paragraph 10. That is the trial Post Office has
24 attended and involved itself in. It has not engaged in
25 wide-ranging evidence on breach, which the claimants

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I have, and so not only would it be an error of law to

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2 have regard to it, it would also be procedurally unfair
3 for that reason. Because in the absence of full
4 disclosure on matters such as the dispute, Horizon,
5 accounting, procedures, deficits, training and Helpline,
6 without full evidence and disclosure on all those
7 points, the court should not engage in inferential
8 findings or comments along the way. It shouldn't do so
9 as a matter of procedural fairness but also particularly
10 given there are two other trials that have been loaded
11 in the system effectively on Horizon and on breach,
12 where on those very matters there will be full
13 disclosure, there will be full evidence and there will
14 be determinations.
15 The other point I mentioned I think earlier was
16 whether you should also be careful because of the nature
17 of the way it has been set up - - we had a humorous
18 debate about whether it was odd or not, but whether you
19 should make comments as well about "be careful to",
20 because, otherwise, an independent observer might think,
21 wrongly obviously, that the comments you make are
22 a route along the way to reaching a particular view or
23 a finding, which you would then have to find in judgment
24 two or three - - sorry, in trial two or three . So again
25 there is that sensitivity, which your Lordship no doubt

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I will obviously have in mind.

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IN THE HIGH COURT OF JUSTICE

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COURTS OF ENGLAND AND
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B E T W E E N:

POST OFFICE LIMITED

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Claimant

[X] WITNESS STATEMENT OF
[X]



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