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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 OPENING SUBMISSIONS COMMON ISSUES TRIAL

Key abbreviations used in this document

"Post Office" refers to the Defendant; "Cs" refers to the Claimants.

"AGPOC" refers to the Amended Generic Particulars of Claim [B3/1/1]

"GDXC" refers to the Generic Defence and Counterclaim [B3/2/1]

"Generic Reply" refers to the Generic Reply and Defence to Counterclaim [B3/3/1]

"Bates IPOC" refers to the Individual Particulars of Claim of Mr Bates [B5.1/2/1]

"Name WS" refers to the named witness' witness statement.

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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 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.

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[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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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 co-operation" 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 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.

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

[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, 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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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 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 co-operation 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 co-operate 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

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

[7] Cs did not make this admission in the Generic Reply, but it was recorded in Schedule 1 to the First CMC Order at Issue 2.

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already providing "necessary co-operation" 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. Post Office anticipates that Cs will persist at trial in this misguided attack in relation to the meaning and effects of implied terms that they have admitted. 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 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 should 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.

(1) NATURE OF THE RELATIONSHIP

14. It is common ground that SPMs are not employed by Post Office.[10] This is unsurprising given that the contracts at issue are in place not just with individuals but also with corporate SPMs,

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[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 in issue as "unreasonable" without seeking to set out a case on each of the terms (see para. 68 of AGPOC [B3/1/39]). Cs promised better particulars in the Generic 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].

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

[10] 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

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including large retailers.[11] 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.

15. 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.[12] 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.[13]

16. SPMs often take on a Post Office branch precisely because they value the autonomy and flexibility that the role involves.[14] As befits independent business owners, they decide how much work to carry out themselves, how much to delegate, and to whom.[15] 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.[16]

17. 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 cash and stock.[17] 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[18]). It

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(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.*"

[11] Angela Van Den Bogerd WS, para. 27. [C2/1/7]

[12] ibid, para. 66.

[13] ibid, para. 65.

[14] ibid, para. 71.

[15] Sarah Rimmer WS, paras 12 to 19. [C2/4/3]

[16] 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.

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

[18] See Helen Dickinson WS [C2/6].

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is also exposed to SPMs' error, and to fraud or errors by assistants (whom only the employing SPM is in a position to supervise[19]).

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

19. 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.[20] 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 their day-to-day responsibilities.

20. Second, Post Office lays down certain standards governing the operation of branches.[21] These range from rules on what products and services to sell within the branch, to the requirement to submit prospective assistants for basic vetting,[22] 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.

21. 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.[23] 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

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[19] See ibid, para. 26 [C2/6/7].

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

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

[22] Sarah Rimmer WS, paras 12 to 19 [C2/4/3].

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

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carry out.[24] 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.[25] And any implied terms need to be considered (and shown to be necessary) against that agency background.

22. 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*".[26] This core fact suffuses the contractual relationship.

(2) ROLE OF THE LEAD CASES

23. 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. This is not, however, a general inquiry 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[27] 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*."[28]

24. 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

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[24] Nicholas Beal WS, para. 42 [C2/2/9].

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

[26] **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.

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

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

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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).

25. A lot of time will doubtless be spent in cross-examination aimed at determining what documents these 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 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.

26. 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. 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 matrix of fact and far too little weight to the overall commercial context of the agreements and the words that they parties used to record their agreement in detailed written contracts.

27. 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: for example, would it have made any difference to the Court's conclusion on a given issue if Claimant A had (contrary to the Court's finding) in fact seen document X pre-contract?

28. 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

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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.

(3) SCOPE OF THE PRESENT TRIAL

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.

(4) LAW ON THE INTERPRETATION OF COMMERCIAL CONTRACTS

32. 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

33. 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**,[29] *per* Lord Hodge at para. 10.

34. Second, "*where the parties have used unambiguous language, the court must apply it*": **Rainy Sky SA v Kookmin Bank**,[30] *per* Lord Clarke at para. 23. The more difficult questions of

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[29] [2017] A.C. 1173.

[30] [2011] 1 W.L.R. 2900.

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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.

35. 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**,[31] *per* Lord Neuberger at para. 21; Lewison, The Interpretation of Contracts (6th Edition), at 3.17(d) and (e).

36. 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**[32], approving *dicta* of Vos J in **Spencer v Secretary of State for Defence**.[33]

37. 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. 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)

38. 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 parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what*

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[31] [2015] A.C. 1619.

[32] [2018] EWCA Civ 14 at para. 37(iii) *per* Gloster LJ (with whom Patten LJ and Lord Briggs agreed).

[33] [2012] EWHC 120 (Ch) at paras 73-74.

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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)

39. Lord Steyn made the same point in **Mannai Investment v Eagle Star Life Assurance Co Ltd**,[34] 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*".

40. 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. In assessing what "*a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant*", the Court "*must have regard to all the relevant surrounding circumstances*": **Rainy Sky**, *per* Lord Clarke at para. 21.

41. 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:

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 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

[34] [1997] A.C. 749.

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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)

42. 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.

43. 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 13-086; Lewison, at 7.08(h). It cannot do anything like the extreme work that Cs want it to do in re-writing the contracts.

Implied terms: legal principles

44. In **Geys v Société Générale**[35], Baroness Hale stated that there are two types of implied terms:

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)[36]

45. The implied terms asserted by Cs are all terms in the first category: terms that it is alleged should be implied in fact – terms that *must* have been intended on the facts of these agreements.

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[35] [2013] 1 A.C. 523.

[36] The Court of Appeal recently confirmed the importance of this distinction in **J N Hipwell & Son v Mrs Clare Szurek** [2018] EWCA Civ 674.

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46. In **Marks and Spencer v BNP Paribas Securities Services**,[37] the Supreme Court re-affirmed the high threshold for implying a term in fact. 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:

> *…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."*

47. 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 necessary, rather than merely reasonable, fair or appropriate. He said, at paras 21 and 23:

> *… 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 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.)*

48. 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*

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[37] [2015] 3 W.L.R 1843.

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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 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)

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

50. 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**,[38] 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 inconsistent with one of its express terms

[38] [2009] EWCA Civ 1046. Affirmed by the Supreme Court: [2011] ICR 1157.

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is to allege that the written terms do not accurately reflect the true agreement of the parties. (para. 88; emphasis added)

51. One effect of this principle is that the Court must, before considering whether to imply any terms, 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**.[39]

52. 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**,[40] Gloster J said at para. 41:

> *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)

53. Dyson J made essentially the same point in **Bedfordshire CC v Fitzpatrick Contractors**:[41]

> *... 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. (emphasis added)*

54. 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**:[42]

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[39] [2018] EWCA Civ 1525 at [13] *per* Asplin LJ, with whom Singh and Hickinbottom LJJ agreed.

[40] [2012] EWHC 3468 (Comm).

[41] [1998] 62 Con LR 64.

[42] [1995] EMLR 472 at p.481.

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> *... 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.*

55. 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**. The hurdle is a high one.

56. 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):

> *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.*[43]

57. 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). This is unsurprising given that 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.

58. The principle was recently re-affirmed in the **Bou-Simon** case.[44] 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*

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[43] This passage was approved by Lord Neuberger in **Marks & Spencer** at [19].

[44] [2018] EWCA Civ 1525 at para. 13 *per* Asplin LJ, with whom Singh and Hickinbottom LJJ agreed.

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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].

59. 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. 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 been anticipated at the time the agreement was made.

60. At the present trial, the Court has before it considerable amounts of evidence from Cs as to alleged crises in the commercial relationship and their views as to how they felt let down by Post Office. It would be tempting, but wrong, 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.

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

61. 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)).

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62. Cs admit that they were agents.[45] However, they deny that this "*affords the Defendant any defence to the Claimants' claims*"[46], and specifically deny that the SPMs were bound by the accounts which they submitted.

63. 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*".[47] But Post Office does not rely on analogy; it relies on the express terms and the common law principles that are imported by the parties' express choice of an agency accounting relationship.

64. More specifically, 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.

    (b) Second, 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 that equity demands that the account be re-opened entirely.

    (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.

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

65. SPMs are Post Office's agents under the express terms of the contracts.[48] The parties expressly chose that relationship and the ordinary legal incidents of it. The common law rules and principles that apply to agency relationship are also admissible background to the construction of the contracts.[49]

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[45] Reply, para. 60.1 [B3/3/33].

[46] Reply, para. 59 [B3/3/33].

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

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

[49] See para. 36 above.

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66. Those principles form part of the contractual relationship unless modified or excluded by agreement.[50] Cs have not pleaded any relevant modification or exclusion of those principles under the contracts.

67. It follows that SPMs, in their fiduciary capacity, are required to account to Post Office, both on the face of the contracts[51] and as a matter of applying the common law principles that apply to the relationship. In this context, Cs are accounting parties and bear the burden of proof to show that their accounting was wrong: see Bowstead & Reynolds on Agency (21st Edition), at 6–097 and **Post Office Ltd v Castleton**.[52]

68. Indeed, Cs accept, 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.*"[53]

69. Furthermore, where a fiduciary's breach of duty (such as a failure to comply with accounting and associated obligations) 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**;[54] see also Snell's Equity, [20–018(4)]. Cs have not identified anything in the contracts to exclude or modify the application of this principle.

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

70. 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)

71. In their Skeleton Argument on Post Office's application to strike out evidence, Cs revealed something of the case that they apparently intend to run. It appears that Cs rely on the principle

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[50] See Chitty, 31–006: "*On the orthodox and accepted 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.*"

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

[52] [2007] EWHC 5 (QB), at para.1.

[53] Para. 80 at [B8.10/1/29].

[54] [2013] HKCFA 93, at [174].

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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. In that connection, they refer to three 19th century cases: **Watson v Rodwell**[55], **Coleman v Mellersh**[56], and **Lewes v Morgan**[57].

72. 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 his 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.

(b) In **Coleman**, an account settled between solicitors and their client principal was reopened on the basis that the solicitors 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.*" 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*", 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).

(c) **Lewes** was a broadly similar (although much more complicated) case, with broadly similar conclusions.[58] It is not an easy case to follow.

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[55] [1879] 11 Ch D150.

[56] [1850] 2 Mac & G 309.

[57] [1817] 5 Price 42.

[58] 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 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.*" And per Baron Graham, at p.156: "*the*

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73. 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' aforementioned Skeleton Argument concedes that "*It does appear to be relevant whether the party seeking to reopen the settled accounts is the principal or the agent.*"[59] 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.

74. Indeed, in the (slightly more recent) case of **In Re Webb**[60], Davey LJ said, at p.84, of **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.*

75. 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 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).

76. 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

77. The issues for 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 he 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

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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."

[59] See at para. 81.1 at [B8.10/1/29].

[60] [1894] 1 Ch 73.

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SPMs generally. They are accordingly appropriate issues to be determined as Common Issues, the determination of which will bind all Cs.

78. 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.

79. 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.

80. 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 the false accounting that it will allege in any trials as to breach / liability; [61] 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[62]: in that case, the Judge went through the accounts on a week-by-week basis, 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 on specific accounts in the absence of evidence from Post Office and full disclosure from the lead Cs.

81. 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.[63]

82. 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.[64] 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

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

[62] [2007] EWHC 5 (QB).

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

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

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could not rely on the principles as to false accounting in relation to that account[65] (although this point does not strictly fall within the Common Issues). There is nothing like full pleading.

83. Post Office anticipates that the precise scope of the dispute between the parties, and what Cs in fact invite the Court to find under Common Issues 12 and 13, will become clearer at trial and can be addressed more fully in closing. In particular, it is possible that Cs might (depending on determinations in the Horizon trial) *subsequently* seek to argue that they have grounds to open the accounts based on the accounting system being faulty. But that would depend upon them proving that, and demonstrating that any such fault caused an error to be made in their account which they wish to correct. Obviously, this is not a matter for this trial. But what it demonstrates is that issues of burden of proof (at the breach trial) may depend, at least in part, on the outcome of the Horizon trial as well as the outcome of the present trial.

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

COMMON ISSUE 8

84. 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

85. 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.[66]

86. 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*".

87. 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

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

[66] [C2/1/22-25] and [C2/1/34-38]

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not, or it would be extremely difficult for Post Office to, recover shortfalls, to the extent that its very business model might not survive.

88. 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 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.

89. 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,[67] 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 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,

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

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the words of clause 12 cannot legitimately be read as imposing a "*contractual burden*" of proof on Post Office to identify the 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.

The meanings of "deficiency" and "loss" under the clause

90. The clause operates by reference to two important concepts – a "*deficiency*" and a "*loss*".[68] It is common ground that the latter term is synonymous with "*shortfall*", the term that is more commonly used in practice.

91. 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 (1) the cash and stock that the SPM declares he holds in the branch (or that is identified in branch on an audit) and (2) 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). The clause does not use "*deficiency*" to mean whatever is presented as such on Horizon, not least because the clause was drafted and in use for many years before Horizon even existed.

92. 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*" (emphasis added). Post Office itself bears the cost of any other deficiencies.

93. 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.

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

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A loss caused by Horizon would not quality under section 12, clause 12

94. 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. This would, on the natural meaning of the word "*loss*", include both (1) physical losses, such as mislaying or stealing cash from the branch (2) transaction losses in the branch, such as taking too little payment for a given item of stock (e.g. taking £10 in payment for an item of stock with a price of £20[69], resulting in a £10 loss on that transaction).

95. 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.

96. Crucially, the clause does not impose liability for any *apparent* deficiency that results instead from a bug or error in Horizon. 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. If Horizon were to be affected by a bug that caused it to inject £100 into the derived cash figure for the branch, it 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, and there would be no "*deficiency*" within the meaning of clause 12. The SPM is liable for shortfalls that result from losses in the branch, not for whatever number may be shown on Horizon. This is unsurprising given that the clause pre-dates Horizon.

97. 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 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 that were conducted in the branch, its error does not create liability.

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[69] Post Office sets these prices. The SPM cannot sell at a loss in the usual sense of that concept (i.e. setting a price that is below some relevant measure of cost and deliberately selling at that price). In this context, a loss only results where the transaction is performed wrongly.

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

98. 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. The clause does not distinguish between types of loss because they all result in the same thing: a shortfall on the account.[70]

99. 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).

100. 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.[71]

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

101. 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.

102. 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 <u>not</u> 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.

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[70] 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.

[71] 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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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*".

103. 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 four alleged restrictions on Post Office's ability to require SPMs to make the account whole, none of which appears in the clause. The restrictions go well beyond any sensible attempt to try to exclude liability for Horizon-generated shortfalls (which, as explained above, does not require any words to be read in); they involve instead a wholesale assault on the SPM's liability for branch losses.

104. 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 on the branch accounts 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 account and 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 on the account. 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).

105. 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.

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(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 a contingent or incipient loss (perversely, even though he may not yet know that a mistake has happened). 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 days or weeks, leaving the SPM in limbo and unable to finalise his accounts for any accounting period. That would be a bizarre and novel form of accounting relationship.

(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 basic principles of accounting that the parties adopted and that provide key background to the construction of clause 12. The SPM should not have to ask questions of Post Office to find out whether the branch 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. The parties are entitled to the benefit of the account.

106. 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.

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(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.[72] 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 business that it carries out on Post Office's behalf.[73] This is a huge advantage to the SPM relative to operating a substantial and cash-intensive business on his own account.

107. 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".[74]

(b) If the bank is informed of the mistake and agrees that it be corrected, Post Office would propose to the branch a Transaction Correction, 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 the branch account 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.

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[72] 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]

[73] 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]

[74] 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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(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.

108. 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.

109. 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

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to 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.

110. 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.

111. In **Carewatch Care Services v Focus Caring Services**[75], 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*".[76] 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**,[77] 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).

112. 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.

(ii) Distinction between the SPMs' personal liability and liability for assistants

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

(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).

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[75] [2014] EWHC 2313.

[76] ibid, at paras 102 to 103.

[77] ibid, at para. 112.

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(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*".

114. 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.

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

116. 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.

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

(a) 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.[78] Post Office has no substantial involvement in the selection and supervision of assistants.

(b) 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.

(c) 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.

(d) By contrast, the SPM was selected and trained by Post Office, and he has a contractual relationship with Post Office. It is commercially rational for Post Office to be prepared

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[78] 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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to absorb the cost where its agent causes a loss acting within his authority and without negligence, carelessness or error.[79]

(iii) The burden of proof

118. Post Office's case is that the burden of proof in 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.

119. 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.

The requirement to prove a deficiency

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

121. 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 to note.

122. 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[80], it will be for the SPM to challenge the finality of the account by showing a mistake in it and/or showing that equity otherwise requires that it be re-opened. 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).

(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 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

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[79] 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.

[80] 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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particular account at issue). 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 it generated an apparent shortfall in the relevant account. If the opposite is true, it may be much easier for the SPM to undermine reliance on Horizon to prove a shortfall. There may also be factors specific to a given branch at a given time.

(c) In either of these two factual scenarios, however, Post Office bears the ultimate legal burden of proving the deficiency.

123. 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.[81] 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.

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

124. 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 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.

125. 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.

126. 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.

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[81] 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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127. 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.

128. 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.[82] The parties expressly chose a relationship of principal and agent.[83] 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 (although this is not stated in terms in the Reply).

129. 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. 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 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.

130. 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. There are two reasons for this.

131. The first is a matter of making 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) 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

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[82] 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).

[83] Section 1, clause 1 of the SPMC [D2.1/3/5].

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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[84]; 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 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[85] 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.

132. 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

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

[85] 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.

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difficult to imagine how a loss could arise without negligence, carelessness or error.[86] 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.

133. The second point involves testing the commercial sense of Cs' "construction" against the kind of 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.[87] 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.[88] 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. 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 exposed to dishonesty on the part of persons that

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[86] This was the approach of HHJ Havery in **Post Office Limited v Castleton** [2007] EWHC 5, at paras 2 (last line), 39 and 40.

[87] 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.

[88] 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].

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those agents then choose to employ to work in its branches. If Post Office were required, before enforcing a shortfall, 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.

134. 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.

135. 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

136. Cs invoke the *contra proferentem* principle in relation to clause 12 (and generally).[89] 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 limited use in construing commercial contracts (see para. 43 above), and it has no application here.

137. 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

138. 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 (howsoever this occurs and whether it occurs as a result of any negligence by the*

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

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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

139. 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.[90] Para. 4.1 is said to be a "*similar clause*" to clause 12.[91]

140. This is yet another instance of Cs' 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.

141. Post Office contends that there are two obvious and important differences between the terms:

(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).

142. There are, however, several features that are common to clause 12 and para. 4.1:

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

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

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[90] [B3/1/24]

[91] 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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(c) The points made at paras 128 to 129 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[92], and the SPM is subject to an express duty to account.[93] This is important background to the construction of para. 4.1.

(d) 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.

143. 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.

(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 (Horizon-generated) shortfall would not qualify; 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

144. The term draws no distinction here. The SPM "*shall be fully liable for any loss… (howsoever 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.[94]

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[92] Part 2, para. 1.2 [D1.6/3/6].

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

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

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145. It is plain, including from the use of the word "*howsoever*", 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

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

147. 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 it does not.

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

(a) The first part of the phrase in parenthesis is "*howsoever 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 "*howsoever 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.

149. 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.[95] 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 of two very different things: either (1) confirm/clarify/explain the concept stated in those general words or, on the

[95] 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). Sir Paul Kenedy and Mummery LJ agreed.

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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 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 – "*howsoever*" – a word that confirms 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.[96] 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).

150. 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 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 sense and effect cannot be right. Cs' construction would do precisely that.

(iii) The specific and narrow exception to liability

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

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[96] 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, citing (amongst other authority) **Antigua Power Company Ltd v AG of Antigua and Barbuda** [2013] UKPC 23 at [38] *per* Lord Neuberger (with whom Lords Mance, Sumption and Toulson agreed; Lord Carnwath dissented, but not on the issues of contractual construction).

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152. 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

153. 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.

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

155. 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.

156. 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.

157. Third, the structure of para. 4.1 is plainly to impose liability for all shortfalls (howsoever caused), 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.[97] 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).

(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

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[97] 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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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

158. Post Office repeats its submissions at para 136 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.

(3) ASSISTANTS (COMMON ISSUE 23)

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

159. 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.

160. The most obviously relevant express terms are quoted at para. 56 of the AGPOC,[98] and include the following:

(a) In the SPMC (1994-2006), section 15, clause 2 provides: "*Assistants are employees of the Subpostmaster*".[99]

(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...*".[100]

(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*

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[98] [B3/1/25]

[99] [D2/3/65]

[100] [D2.1/4/32]

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to ensure that all subsequent Managers and all other Assistants receive sufficient initial training from properly trained Managers."[101]

161. 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:[102]

> *...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.*

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

163. 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.[103] 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.

164. 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.

165. 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

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[101] [D1.6/3/7]

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

[103] 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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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.

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

167. As Ms Van Den Bogerd explained at paras 88.2 to 88.3 of her witness statement[104]:

> *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.*

C. IMPLIED TERMS: GENERAL

INTRODUCTION

168. 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.

169. 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 these 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.

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[104] [C2/1/27]

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170. 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.

171. 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.

Overview of the parties' contentions

172. As long ago as the pre-action correspondence in 2016[105], 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".[106])

173. Cs admit those terms.[107] 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).

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

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

[107] Cs did not admit these terms in the Generic Reply, but then stated in Schedule 1 to the First CMC Order that they were admitted: see the note to Issue 2. [B7/7/13]

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174. 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.[108] 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.

175. There is one further introductory point. Cs' case on many of their alleged implied terms has not, even now, been properly pleaded. 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[109] 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.

176. 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

177. 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. 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.

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[108] [B3/3/43]

[109] 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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178. 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. In **James E McCabe v Scottish Courage** Ltd [2006] EWHC 538 (Comm), Cooke J expressed the essence of a duty to cooperate as follows at [17]:

> *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.*[110]

179. 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 (that they admit) 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[111]:

(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 existence of the Agreed Implied Terms was a reason not to imply those alleged terms.[112]

(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

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[110] 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.

[111] 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).

[112] [B4/2/24].

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express provisions of the contracts.[113] Despite threats to apply for yet further information, Cs did not make any such application.

180. 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 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[114] to test various implied terms against the facts of individual cases to see which of them would best meet the merits of those cases.

181. 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.

182. First, as regards training and support[115]:

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[113] [B4/3/1].

[114] To test implied terms against post-contractual facts would involve the error of law discussed in **Bou-Simon v BGC Brokers LP** [2018] EWCA Civ 1525 at [9] and [12] *per* Asplin LJ (with whom Hickinbottom and Singh LJJ agreed).

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

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(a) Post Office accepts that, for new SPMs[116], it could be required, by the Necessary Cooperation Term, to provide reasonable initial training.[117] 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 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. 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.

183. 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.

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[116] 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.

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

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(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 accounting obligation. 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).

(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.

184. 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 (through no fault of her own) 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

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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 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.

185. 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.

186. In this context, it would always be 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 that Cs say arose in practice. This is the effect of the strict principles by reference to which implied terms must be proven.

(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)?

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Outline of the parties' contentions

187. 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**.[118] 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**.

188. Post Office invites the Court to resist that invitation, to apply the orthodoxy and to follow the overwhelming judicial trend against developing some new and uncertain legal principle from the interesting discussion in **Yam Seng**.

189. More specifically, 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 contract and relating to the relationship arising thereby between the parties*": see para. 63 of the AGPOC.[119]

190. Post Office makes three principal submissions in response:

(a) First, the contracts are not "relational contracts" in the **Yam Seng** sense. Amongst other things, they are terminable on relatively short notice (which is entirely inconsistent with that characterisation).

(b) Second, if the contracts were "relational", this would not alter their interpretation or effects, because there are no special rules or principles that apply to such contracts. Such characterisation simply raises the possibility that if such a contract contains a lacuna then the law will look at applying existing principles of implication of terms to reflect that status.

(c) Third, the implied term(s) alleged by Cs in reliance on **Yam Seng** should not be implied because they do not satisfy the test for implying terms in fact, including because they would contradict the express terms of the contracts. The terms that Cs allege go well beyond the terms that were implied in **Yam Seng** itself, and nothing said in that case could logically justify their implication in this.

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[118] **Yam Seng Pte v International Trade Corp** [2013] 1 CLC 662.

[119] [B3/1/35].

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191. Before turning to those three principal submissions, it is important to identify (1) the key elements of the discussion in **Yam Seng** and (2) what the Courts have since said as to the proper interpretation of that case and any new principle of law that it may contain.

The principles discussed in Yam Seng

192. **Yam Seng** contains a detailed and interesting 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 simply background to the key parts of Leggatt J's reasoning on the case before him.

193. The background discussion is linked to the core reasoning by the following passage:

> *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)

194. Leggatt J (as he then was) 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 he says may more readily accept the implication of obligation to share information (i.e. a duty to disclose):

> *... 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.*

195. 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.

196. Against this background, the Judge in fact implied two fairly limited obligations: first, that the defendant would not knowingly provide false information to Yam Seng on which it was likely to rely (at para. 156) and, second, that the defendant would not authorise the sale of any product

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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 (at para.164). The Judge was only persuaded to imply this second term 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*".

197. In a more recent case, **Al Nehayan v Kent**[120], Leggatt LJ (now elevated but sitting as a High Court Judge) provided a gloss on his reasoning in **Yam Seng**:

> *I have previously suggested in Yam Seng Pte Ltd v International Trade Corp [2013] EWHC 111 (QB), 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. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith.* (emphasis added)

198. In the **Al Nehayan** case, a key factual finding that contributed to the decision that the joint venture agreement included an implied duty of good faith was that the parties had not attempted "*to formalise the basis of their cooperation in any written contract but were content to deal with each other entirely informally on the basis of their mutual trust and confidence that they would each pursue their common project in good faith*" (at para. 173). As in **Yam Seng** itself, there was scope to imply general obligations to give effect to the essential nature of the relationship because the parties had failed to articulate the basis of their cooperation.

The status of the discussion in Yam Seng

199. Since **Yam Seng**, the Court of Appeal has emphasised that English law does not recognise any general principle of good faith in contractual performance.

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[120] [2018] EWHC 333 (Comm).

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200. First, in **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland**,[121] Jackson LJ said at para. 105:

> *...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).*[122]

201. 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.

202. Second, in **Globe Motors v TRW Lucas Varity Electric Steering** at paras 67-68,[123] Beatson LJ stated (obiter)[124] as follows:

> *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 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*

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[121] [2013] EWCA Civ 200.

[122] 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.

[123] [2016] EWCA Civ 396.

[124] 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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(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, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract.
(emphasis added)

203. Third, in **MSC Mediterranean Shipping Co v Cottonex Anstalt**,[125] Moore-Bick LJ said as follows at para. 45[126], 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 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)

204. Many first instance Judges have also emphasised that **Yam Sang** does not stand as authority for some general principle as to implied duties of good faith: see **Hamsard 3147 v Boots**

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[125] [2016] 2 C.L.C. 272

[126] Tomlinson LJ and Keehan J agreed.

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UK[127] (Norris J) at para. 86; **Greenclose v National Westminster Bank**[128] (Andrews J) at para. 150; **Carewatch Care Services v Focus Caring Services**[129] (Henderson J) at para. 108 (agreeing with Norris J in **Hamsard**), **Myers v Kestrel Acquisitions**[130] (Sir William Blackburne) at paras 40 (agreeing with Andrews J in **Greenclose**), 43 and 50 to 63; and **Monde Petroleum v WesternZagros**[131] (Richard Salter QC) at paras 249 to 250. In the last case, the Deputy Judge stated pithily that, save where a duty of good faith is implied by law[132], "*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*".

205. 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 so-called relational contracts, relying on **Yam Seng**: see **Al Nehayan** at paras 167 to 169.

206. Overall, however, the picture that emerges from the subsequent cases and *dicta* is clear. **Yam Seng** and the concept of a "relational" contract have not made any (or any substantial) change to the principles by which the Court must consider whether to imply terms into commercial contracts. The discussion in **Yam Seng** yields to the test as stated in **Marks & Spencer**.

207. Against this background, Post Office moves to its three principal submissions.

(i) The contracts in this case are not "relational"

208. It appears from **Yam Seng** that there are three key characteristics of a "relational" contract: (1) the agreement requires cooperation and collaboration (rather than being a "*simple exchange*"), (2) the agreement is long term and (3) the parties have failed to specify in their agreement the basic nature of their relationship and the cooperation required under it, such that there is a lacuna to be filled by an implied term that addresses those things. The contracts in this case can be tested against those characteristics / requirements.

209. First, - 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

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[127] [2013] EWHC 3251.

[128] [2014] 1C.L.C.562.

[129] [2014] EWHC 2313.

[130] [2016] 1 B.C.L.C 719.

[131] [2017] 1 All E.R. (Comm) 1009.

[132] As Leggatt J stated in **Yam Seng**, a duty of good faith is implied by law into partnership contracts and fiduciary relationships, for example.

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provided for in the express terms of contracts (including the express choice of an agency and accounting relationship) and in the Agreed Implied Terms.

210. Second, - the agreement being long-term - this does not apply to the contracts at issue in this case. They are expressly terminable on relatively short notice: 3 months in the SPMC[133], and 6 months (but notice not to expire within the first year) in the NTC[134]. In **Hamsard 3147 v Boots UK**,[135] Norris J found that the agreement at issue, which was terminable on reasonable notice,[136] was not a relational contract, including because it was not a "*long-term arrangement*". Similarly, in **Acer Investment Management v The Mansion Group**,[137] Laing J found that the agreement before her 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.[138] In **Globe Motors**, Beatson LJ rightly identified the duration of a contract as essential to any characterisation of it as "relational", referring at para. 67 to a "*longer-term relationship*".

211. The contracts to which Leggatt J referred in **Yam Seng** typically 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".

212. The third characteristic is the absence of express provision for the nature or extent of the parties' relationship and the cooperation that it requires. This is essential to the characterisation of an agreement as "relational", bearing in mind that the *purpose* of that characterisation is to identify whether it is appropriate to imply a term as to good faith – a term to fill a gap.

213. The contracts at issue here do not have this fundamental third 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

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[133] Section 1, clause 10 of the SPMC [D2.1/3/6].

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

[135] [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

[136] Norris J found that the notice that was in fact given, 9 months, was reasonable: see para. 78.

[137] [2014] EWHC 3011 (QB). This case concerned an agency agreement for the sale of financial investment products.

[138] The notice period was implied, rather than express: see **Acer** at para. 87.

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relationship with a defined character and content precludes any characterisation of the agreement as "relational".

214. 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.

215. 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.

216. It is in this context that Cs are forced to make the strange case that is set out in the Individual Replies. Specifically, Cs contend that the existence of the agent / principal relationship, and even the existence of the Agreed Implied Terms are positive reasons to treat the contracts as "relational", rather than reasons for which they resist that characterisation.[139] This involves a fundamental misunderstanding of the reasoning in **Yam Seng** and **Al Nehayan**. Cs do not engage at all with the fundamental point that a general implied term will be precluded by the existence of express terms that cover the same ground (i.e. the essential legal character of the relationship and the basis of the parties' collaboration).

217. Applying the reasoning in **Yam Seng** and **Al Nehayan**, the contracts do not fall to be categorised as "relational".

(ii) If the contracts were "relational", this would make no difference

218. It is clear from the cases cited above (including Beatson LJ's remarks in **Globe Motors**) that whether or not a term as to good faith falls to be implied depends on an examination of the contract at issue, rather than any exercise in classifying it as "relational".

219. Any other approach would involve a departure from the law as stated in **Marks & Spencer**. There is no special test for the implication of terms that applies to "relational" contracts.

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[139] See, e.g., Bates Reply, paras 57-59 [B5.1/4/22]

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(iii) The implied terms pleaded by Cs should not be implied in any event

220. A remarkable feature of Cs' pleading on **Yam Seng** is that they try to use that case to justify the implication of a series of terms that go far beyond anything Leggatt J was prepared to imply in **Yam Seng** itself. Cs put forward not only three extremely broad general terms (identified in para. 63 of the AGPOC) but also the 20 implied terms set out in para. 64 of the AGPOC, which are advanced on the primary basis that the Court should imply them "*by reason of the contract being relational*". Cs expressly set this up as a further or alternative basis to the orthodox tests in **Marks & Spencer** (which they refer to implicitly by using the words "*business necessity and/or obviousness*").

221. Seen in this light, Cs' case invites the Court to go well beyond anything that can be justified by the reasoning in **Yam Seng**. It is a frontal assault on the restrictive approach to the implication of terms. If right, it would mean that there is some new and radical exception to the principles in **Marks & Spencer**.

222. As to the general terms set out in para. 63 of the AGPOC, the very breadth and generality of the implied terms is a reason to reject them. In **Yam Seng**, Leggatt J was careful to imply only the minimum obligations that were necessary to make the contract work as it must have been intended to work. He did not imply some overarching and vague duty as to good faith and/or "*obligations as to fair dealing, transparency and cooperation, and trust and confidence*" as Cs invite this Court to do. Terms of that extraordinary generality would have to be agreed expressly (as Beatson LJ stated in **Globe Motors**).

223. Further, as argued above, the implication of such general terms as to the nature of the relationship would cut across and be inconsistent with the parties' express choice of an agent / principal relationship. 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 rejected an employment relationship.[140] 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.

224. In the **Carewatch** case, Henderson J too 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 - a long term

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[140] 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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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.[141]

225. 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.

226. 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.[142] But there are three glaring problems with their arguments in that regard:

227. First, Cs seek to rely on post-contractual events (such as the introduction of Horizon) to justify treating the contract as "relational" and implying terms as to good faith and transparency (etc).[143] 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.[144]

228. 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**[145] at p.98 *per* Lord Mustill.

229. Third, 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.

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[141] See at paras 101 to 112.

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

[143] 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]

[144] See, for example, **Globe Motors**, *per* Beatson LJ at [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.*"

[145] [1995] 1 A.C.74 (PC).

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230. As to the more specific terms set out in para. 64 of the AGPOC, these are addressed in due course. In short, none of them is necessary, and many of them would contradict the express terms of the agreements and so cannot be implied.

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

231. 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.

232. 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.

Outline of the parties' contentions

233. 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.

234. Prior to the Individual Replies, Cs' case on these alleged terms was extremely sparse. All 20 of the implied terms alleged in para. 64 of the AGPOC are taken together in the IPOCs: see, for example, Bates IPOC, paras 86-90[146]. 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.[147]

235. 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 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.

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[146] [B5.1/2/24].

[147] [B5.1/4/30].

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236. 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[148] 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.

(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.[149]

(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.

237. Post Office now addresses the specific terms alleged in AGPOC, paras 64.15-64.19.

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[148] See, e.g., Bates Defence, para.56. [B/5.1/3/34]

[149] See, e.g., Bates Defence, para. 65(2). [B5.1/3/38]

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The implied term alleged in AGPOC, para. 64.15

238. 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.

239. 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.[150] 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.

240. 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**[151], 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.*

241. Dyson J's approach was followed by Henderson J in relation to the long-term franchise agreement in the **Carewatch** case[152], and it should be followed here.

The implied term alleged in AGPOC, paras 64.16 to 64.17

242. 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:

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

[151] [1998] 62 Con LR 64.

[152] See at paras 106 and 109, in particular.

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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.

243. 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.

244. Without prejudice to this objection, Post Office identified in its Individual Defences several potentially[153] 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,[154] it cannot exercise that power dishonestly or in an arbitrary, capricious or irrational manner. An implied restriction to that effect is appropriate.[155]

(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.[156]

(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

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[153] Post Office of course does not concede such relevance.

[154] Where the agreement of the NFSP is obtained, the requirement for agreement with the representative body provides the control mechanism intended by the parties, and the existence of this mechanism prevents the implication of any other control on the power: see **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland** [2013] B.L.R.265 at [139] *per* Lewison LJ.

[155] See, for example, Individual Defence to Bates IPOC, at para 65(2) [B5.1/3/38].

[156] See, for example, Individual Defence to Stockdale IPOC, at para 47(2) [B5.6/3/24].

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restriction that such entitlement cannot be exercised dishonestly or in an arbitrary, capricious or irrational manner.[157]

(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.[158]

245. Beyond this, Post Office 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**[159] at [83]-[95] *per* Jackson LJ and **British Telecommunications v Telefonica O2 UK**[160] at [37] *per* Lord Sumption.

(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 Scotland**[161] (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).

246. 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.

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[157] See, for example, Individual Defence to Stockdale IPOC, at para 47(3) [B5.6/3/24].

[158] See, for example, Individual Defence to Stockdale IPOC, at para 47(4) [B5.6/3/24]].

[159] [2013] B.L.R.265.

[160] [2014] Bus L.R. 765

[161] [2018] 1 W.L.R 3529.

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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.

247. In addition to the general reasons, there are two specific reasons to reject this alleged term.

248. 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.

249. 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**.

(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.

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250. In addition to the general reasons, there are three specific reasons to refuse this alleged term.

251. 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.

252. 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.

253. 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? 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 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. 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[162] and the public interest[163]. Those interests will not always overlap with those of any particular SPM. Cs' implied term would risk turning all

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[162] See Angela Van Den Bogerd's WS at paras 23-32 [C2/1/7].

[163] Ibid, paras 33-37 [C2/1/8].

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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.

254. In this context, 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 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.*[164]

255. 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 (in general) 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

256. 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.[165] This 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.[166] None of them was ever varied so as to incorporate the DPA. No allegation to that effect is even pleaded.

(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.

(c) Third, the DPA is a discretionary arrangement that operates outside the contractual rights and obligations as between Post Office and the SPM.[167] It is expressly stated not

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[164] See, e.g., Bates Reply, para. 74. [B5.1/4/32]

[165] 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]

[166] Section 1, clause 18 of the SPMC [D2.1/3/8] and Part 2, para 20.2 of the NTC [D1.6/3/30].

[167] 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]

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to be legally enforceable.[168] 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 the terms of the contractual relationship, without risking undermining their contractual rights under that relationship.

257. 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). Again, Cs have decided not to plead a proper case.

The implied term alleged at Reply, para. 96.1

258. 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*".[169] Confusingly, Cs also refer to this as a "*construction*" of the contract.

259. 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.

260. 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 on Post Office's right is necessary for the business efficacy of the agreements. The agreements work perfectly well without

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[168] See clause 24. [G/84/6]

[169] [B3/3/43].

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any such restriction. The parties contracted against the background of the existence of limitation periods and the relevant principles under the common law.

(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*".

(c) The term would be onerous, uncommercial and unreasonable. On the face of it, it would prevent Post Office recovering 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)

261. As already noted, Cs have not pleaded the terms to which the implied terms above are alleged to apply. It follows that there is no properly pleaded case that Cs can advance under Common Issue 3. Post Office has identified above the contractual entitlements that it accepts are subject to implied restrictions.

262. Post Office will respond in closing to any case that Cs decide to bring at trial. For the avoidance of doubt, Post Office does not accept that Cs are entitled to advance an un-pleaded case.

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?

263. 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.

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264. 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.)

265. Section 13 of Act provides as follows:

> *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.*

266. 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.]*
> *…*
>
> *(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."*

267. A number of authorities have considered the scope of this provision. They clearly establish that the answer to this Common Issue is 'no'.

268. **Euroption Strategic Fund v Skandinaviska Enskilda Banken**[170] 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.

269. 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*

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[170] [2012] EWHC 584 (Comm).

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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 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)

270. Field J reached a similar conclusion in **Marex Financial v Creative Finance**.[171] 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)

271. In **DC Accountancy Services v Education Development International**,[172] 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:

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[171] [2013] EWHC 2155 (Comm).

[172] [2013] EWHC 3378 (QB).

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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)

272. 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 essential function is to operate as part of a mechanism that enables SPMs to fulfil their side of the contractual bargain.

273. 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**[173], *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.

274. 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*",[174] that the Helpline was described to them as an

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[173] [2016] EWHC 1236 (QB).

[174] Mr Sabir's witness statement, paragraph 106 [C1/3/18].

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"*excellent service*",[175] 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.[176] 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*".[177] 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.

(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)

275. This alleged implied term partly duplicates, in respect of Horizon only (which presumably is the intended target of the unparticularised reference to a "*system*"[178]), 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).

276. 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 for ensuring that transactions are carried out accurately*".[179] Part 2, para. 3.1.4 of the NTC provides that the Operator shall "*accept full responsibility for the proper running of the Branch*".[180]

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[175] Mr Bates' witness statement, paragraph 122 [C1/1/26].

[176] Ms Dar's witness statement, paragraph 106 [C1/5/20].

[177] Mr Bates' witness statement, paragraph 124 [C1/1/26].

[178] The vagueness of this term is another reason why it should not be implied.

[179] [D2.1/3/99]

[180] [D1.6/3/9]

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(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:[181]

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.

277. 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.

(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

278. These terms should not be implied for very similar reasons.

279. The contracts firmly place responsibility for the production and maintenance of accounts on the SPM.

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[181] [D1.6/3/39]

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280. Section 12, clause 4 of the SPMC provides as follows:[182]

> *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.*

281. The relevant sub-clause of Part 2, para. 3.6 of the NTC provides[183] 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)…*
>
> *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*

282. 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.

283. 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.

284. 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.

285. 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

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[182] [D2.1/3/51]

[183] [D1.6/3/11]

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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 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.

286. 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.

287. 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.

288. 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.

289. 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

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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.

(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);*

290. Once again, the contracts are very clear as to the circumstances in which SPMs should receive training or other support.

291. Pursuant to the SPMC, section 24, clause 5.1,[184] 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,[185] as "*the provision of sorting facilities, and supervision of Postmen for both delivery and collection of mail*".

292. Pursuant to the relevant sub-clauses of Part 2, para. 2 of the NTC:[186]

> *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.*

293. 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

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[184] [D2.1/3/105]

[185] [D2.1/3/103]

[186] [D1.6/3/6]

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stipulated circumstances. To imply a further, broad, obligation, would completely cut across this contractual scheme.

294. 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*".[187]

295. 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*

296. This is a strange litany of implied terms in relation to disclosing problems with Horizon. They obviously do not meet the test for implied terms. 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.

297. It is particularly obvious that this 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.

298. 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

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[187] [D1.6/3/6]

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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.

299. 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,[188] 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*

300. 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.

(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)*

301. These alleged implied terms would provide for a detailed scheme of obligations in relation to dealing with shortfalls.

302. The idea that this extensive and freestanding system of obligations would have gone without saying verges on the absurd.

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[188] [D2.1/3/106]

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303. 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. If Post Office cannot seek recovery of any shortfall 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.

304. 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.[189] 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

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[189] See, for example, paras 116-125 of Ms Van Den Bogerd's WS. [C2/1/34]

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305. In addition to the implied term alleged at para 64.13, the lead Cs now contend in their IPOCs[190] 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*".

306. In fact, the circumstances in which Post Office can suspend an SPM are set out, in detail, in the relevant contracts.

307. The SPMC provides as follows, at section 19, clause 4:[191]

> *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.*

308. And the NTC provides, in the relevant part of Part 2, para. 15.1:[192]

> *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)*

309. 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.

310. 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).

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[190] See, e.g. Abdulla, para 86 [B5.4/2/22].

[191] [D2.1/3/87]

[192] [D1.6/3/24]

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311. 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.

312. 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.

313. 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)).

314. 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, clauses 4 and 5; NTC, Part 2, para. 15.2.1) should not be exercised dishonestly or in an arbitrary, capricious or irrational manner.

315. 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 has faith in his willingness or ability to do fulfil the role of SPM properly.

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(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?*
>
> *[GPOC, paras 34-37, 61, 64 and 99; Defence, paras 66-72, 100,104-106 and 142]*
>
> *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?*
>
> *[GPoC, paras 49, 61 and 64, Defence para. 100]*
>
> *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*

316. Just like suspension, termination (both summary and on notice) is covered by detailed express contractual provisions.

317. As to summary termination, section 1, clause 10 SPMC states (as relevant):[193]

> *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…*

318. Part 2, para 16.2 NTC provides (as relevant):[194]

> *[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*

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[193] [D2.1/3/6]

[194] [D1.6/3/25]

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16.2.16 fails to pay any sum due to [Post Office] under the Agreement by the due date.

319. These terms expressly permit summary termination for cause, subject only to the limitations expressly identified.

320. 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.[195] This should be rejected for much the same reasons as apply to Cs' similar arguments on suspension.

321. 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 breaches: Lewison, at 17-16. That is supported here by the clause's use of the phrase "*Breach of Condition*".[196] 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.

322. 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.

Termination on notice: Common Issue 16

323. 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*".[197]

324. Part 2, para 16.1 NTC provides (as relevant):[198]

The Agreement will continue until:

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[195] 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].

[196] 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.

[197] [D2.1/3/6]

[198] [D1.6/3/25]

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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…

325. 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,[199] 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 Bates and his letters dated 19 December 2000, 18 July 2001, 7 January 2002, and 13 February 2002).[200]

326. 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.

327. 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.

328. 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*".

329. 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**[201]

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[199] See Abdulla IPOC, para 88 [B5.4/2/22].

[200] AGPOC, para. 70 [B3/1/39].

[201] [2017] 1 All E.R. (Comm) 1009.

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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.*"

330. 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.

331. 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 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.

332. 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 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*"[202] with the SPM or a broader imperative, such as a branch closure programme.[203] That is why, from Post Office's perspective, these clear provisions need to be in place. Cs' implied terms would completely cut across that.

333. 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**

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[202] John Breeden's witness statement, para. 60 [C2/3/15].

[203] ibid., para. 65 [C2/3/16].

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Generale[204] 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[205] 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 terminated" is absurd, unprincipled and would involve a radical change to the law governing commercial contracts.

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?

334. If Cs lose on construction/ implied terms, their fall-back is to assert that the "*true agreement*" as to termination on notice,[206] albeit not reflected in the relevant contracts, was that Post Office would observe the limitations pleaded in AGPOC, para. 70.

335. 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).*"[207]

336. 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.

337. 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

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[204] [2012] UKSC 63.

[205] Employment Rights Act 1996.

[206] Implicitly their argument must be restricted to termination on notice rather than summary termination, although they do not make this expressly clear.

[207] AGPOC, para. 71 [B3/1/40].

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contrary to principle. As Lord Neuberger has observed, in the case of **Secret Hotels2 v HMRC**[208] 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.*

338. The sham exception is explained in this way in Chitty, at 2–170:

> *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)

339. Chitty footnotes **Autoclenz v Belcher** following the underlined text, classifying it as an instance of the sham doctrine (or a variant of it) that applies especially in employment contexts.

340. **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

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[208] [2014] UKSC 16.

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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.

341. 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.*[209]

342. 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 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,*

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[209] Lords Hope, Walker, Wilson and Collins agreed.

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[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…

343. Lord Clarke went on, at para. 32, 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 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)

344. 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.

345. 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 such a proposition.

346. 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

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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.

(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**[210] 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.

347. 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.

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?

348. It appears from the IPOCs[211] that this issue no longer arises. Cs apparently do not intend to make any construction argument on this point.

(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

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[210] **Pimlico Plumbers v Smith** [2017] I.C.R. 657, at para. 88 *per* Sir Terence Etherton MR and *per* Underhill LJ at para. 131. Davis LJ agreed with both judgments.

[211] 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].

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losses as would not have been suffered if Post Office had given the notice of termination provided for in those contracts?

349. The position here is the same as for Common Issue 19. Cs appear to have dropped their construction argument.[212]

(3) SUBSEQUENT SUBMPOSTMASTERS (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?

350. Cs rely on the implied terms that they allege at AGPoC, paras 64.15 to 64.19.[213] There is no construction issue on the IPOCS, only an implied term issue.

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

351. 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*".[214] They 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).

352. 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.

353. Post Office's more detailed response is in three parts:

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[212] ibid.

[213] 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].

[214] [B3/1/45]

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(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).

(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.

354. 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[215] – 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.

(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 to act as agent to SPMs

355. 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.

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[215] See Chitty, at 31–022.

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356. Cs do not even plead any later written or oral agreement under which Post Office promised to act as their agent for any purpose. None of the lead Cs gives evidence of any such agreement, or even facts from which the existence of such an agreement could be inferred.

(ii) Post Office did not undertake any of the characteristic functions of an agent

357. 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. But lest there be any misunderstanding, Post Office's own evidence is crystal clear that it never undertook any such role: Ms Van Den Bogerd notes, "*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.*"[216] That would be contrary to the core nature of the relationship under the contracts and under the common law.

358. The simple fact is that 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[217], 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 Post Office. He is not liable for the transaction to the third-party client or customer. That structure suits both parties. [218]

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[216] Paragraph 80.4 [C2/1/24]. See also Mr Carpenter's witness statement, paragraph 10 [C2/10/4]; Mr Haworth's witness statement, paragraph 20 [C2/14/6]; Ms Ridge's witness statement, paragraph 19 [C2/12/5].

[217] See Angela Van Den Bogerd WS, para. 50 [C2/1/13]

[218] Ibid, para. 65 [C2/1/18]

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359. 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.

360. Lastly, the express appointment of SPM's 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.

(ii) The matters relied upon by Cs cannot establish an agency relationship

361. 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.

362. 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.[219] 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:

> *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 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*

[219] See, e.g., Bates Reply, para. 97 [B5.1/4/44].

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.... 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)*

363. 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 closing submissions.

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]

364. The answer to the question posed by this issue is 'No'.

The clauses

365. Section 15, clause 7.1 of the SPMC[220] 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

[220] [D2.1/4/32]

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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)

366. Part 2, paras 2.3 and 2.5 of the NTC[221] 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)

367. 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.[222] Post Office reserves the right to respond to a proper articulation of Cs' case on this point if and when it is forthcoming.

The test under the Act

368. Section 1 of the Contracts (Rights of Third Parties) Act 1999 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) ...

(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.

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[221] [D1.6/3/7]

[222] 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*".

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369. In **Dolphin Maritime & Aviation v Sveriges Angartygs Assurans Forening**,[223] 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)*

370. 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.

371. 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 on section 1(2): **Nisshin Shipping Co v Cleaves & Co**[224]. This is a "*matter of construction having regard to all relevant circumstances.*" (para. 23).

Application of the test to the terms at issue

372. 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

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[223] [2009] EWHC 716 (Comm), at paragraph 74.

[224] [2003] EWHC 2602 (Comm); Colman J.

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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**.

373. 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 obligation to provide any required 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.

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);

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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?

374. 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.

375. 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.

376. In summary, the clauses in question:

(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).

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The onerous and unusual test

377. Cs contend that, in accordance with the principle discussed and applied in **Interfoto Picture Library v Stiletto Visual Programmes**,[225] each of the above terms was onerous and unusual and so unenforceable unless brought fairly and reasonable to their attention.

378. That contention is plainly wrong.

379. The relevant principle is set out in Chitty, at 13–015:

> *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.*

380. The questions of whether (1) a term is "*onerous and unusual*"[226] 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*".[227]

381. As Hale LJ said in **O'Brien v MGN**,[228] at para. 23:

> *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.*

382. 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*".[229]

383. Crucially, the clause at issue in this case arise in a commercial context. In **Sumukan** v **Commonwealth Secretariat**,[230] 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 being changed at any time*

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[225] [1989] Q.B. 433.

[226] 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].

[227] Lawson, Exclusion Clauses and Unfair Contract Terms (12th Ed), at p.26.

[228] [2001] EWCA Civ 1279.

[229] [2018] EWCA Civ 1103, *per* Longmore LJ at para. 42.

[230] [2007] EWCA Civ 1148.

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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). 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.*

384. Similarly, in the **Carewatch** case,[231] Henderson J said as follows, at para. 84:

> *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.*

385. 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.

386. More specifically, the core duties (as referred to in para. 376(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.

387. The SPM's liabilities (as referred to in para. 376(b) above) are not unusual or onerous. It is entirely unsurprising that the SPM, as agent to Post Office, should be responsible 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).*"[232]

388. 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),

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[231] [2014] EWHC 2313 (Ch).

[232] Para. 142.

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and a commercially conventional allocation of risk will not be onerous: see **Do-Buy 925 v National Westminster Bank**,[233] at para. 93 (Andrew Popplewell QC).

389. 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.[234] In **Lalji v Post Office**[235], the Court of Appeal referred without any adverse comment to Post Office's right to terminate on 3 months' notice under the SPMC.[236] The term did not jump out in the way that an onerous and unusual term might be expected to.

390. In this case, as John Breeden of Post Office explains:

> *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.*[237]

391. 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.[238] He can agree to receive payment from any temporary SPM appointed during the period of suspension.[239] If the decision to suspend was incorrect, the SPM will be paid.[240]

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[233] [2010] EWHC 2862 (QB).

[234] In **Chan v Barts & The London NHS Trust** [2007] EWHC 2914 (QB) (Burnton J) even a term which stripped a doctor of his right to appeal against dismissal was not considered onerous.

[235] [2003] EWCA (Civ) 1873.

[236] See at paras 5 and 10 (Brooke LJ) and 25 (Sedley LJ).

[237] Paras 37 to 40 [C2/3/11].

[238] John Breeden WS, para. 51.2 [C2/3/13].

[239] ibid, paras 51 and 52 [C2/3/13].

[240] 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.

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392. 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.

393. As to the incorporation/ ongoing updating of further terms (as referred to in para. 376(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**,[241] 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.

394. Cs have 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 have not even tried to do so. For the reasons given above, any such attempt would be hopeless; these terms are entirely unexceptionable.

Adequate notice

395. Even if that 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.[242]

396. 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*"). 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**,[243] Mance LJ said as follows, at para. 16:

> *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*

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[241] [2006] EWHC 479 (Ch). Approved in the Court of Appeal: [2007] Bus L.R. 1052 at para. 14.

[242] 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.

[243] [2003] EWCA Civ 1447.

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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.

397. 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.*"

398. 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.

399. 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**[244], "*buried away in the middle of a raft of small print*" (para. 53). Cs do not seriously suggest that that is what has 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.

(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?

400. 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.

401. Both contentions are utterly without any basis in reasonable argument.

The UCTA reasonableness test

402. 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—

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[244] [2018] EWCA Civ 1371.

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...

(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.

403. 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.

404. Cs fall at both of these hurdles.

(i) Cs did not contract on Post Office's written standard terms of business

405. It is true that the contracts in question were produced, in a standard, non-negotiable form, by Post Office.

406. However, this is not sufficient for the purposes of section 3 of UCTA. In **Commerzbank AG v Keen**,[245] 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. Mummery LJ rejected that submission at para.104:

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.

407. Similarly, at para. 115 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

[245] [2006] EWCA Civ 1536.

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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.

408. 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 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)

409. 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.

(ii) No entitlement to render a substantially different contractual performance

410. 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.

411. 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. 376(a) and 376(b), and the obligation to help Post Office retain access to customers during any period of suspension (listed above at para.376(c)).

412. A number of the terms listed above at para. 376(d) entitle Post Office to update and amend rules and instructions applying to SPMs. That, too, is outwith the scope of section 3.

413. In **Paragon Finance v Nash**[246] 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, 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*

[246] [2002] 1 W.L.R. 685.

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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'.

414. Exactly the same applies here. Updating the rules applicable to SPMs does not change Post Office's obligations; it changes the SPMs' obligations.

415. 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 receive less remuneration). These are terms which delineate the duration of contractual obligations, rather than stripping away or neutering Post Office's obligations.

416. Chitty, at 15–086 of its current edition, 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."

417. This passage was approved by Dyson LJ in **Paragon**. Other case law also accords with this view. In **Timeload v British Telecommunications**[247] 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**,[248] 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)

418. Similarly, in **Brigden**, Morland J said that:

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[247] [1995] EMLR 459.

[248] [2003] EWHC 1617.

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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 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)

419. Accordingly, these terms too cannot fall within section 3(2).

420. 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

421. The test for reasonableness is set out in section 11(1) of UCTA:

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.

422. 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**,[249] Chadwick LJ said, at para. 55:

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.

423. 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 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

[249] [2001] EWCA Civ 317.

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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.

424. 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)**[250]. 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.

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[250] [1997] 85 BLR 97.