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Case No: HQ16X01238

Neutral Citation Number: [2018] EWHC 2698 (QB)
THE POST OFFICE GROUP LITIGATION

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date 15 October 2018

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

Alan Bates and Others	**Claimant**
- and -	
Post Office Limited	**Defendant**

- -
- -

Patrick Green QC, Henry Warwick and Ognjen Miletic (instructed by Freeths LLP) for the **Claimants**
Anthony De Garr Robinson QC and Owain Draper (instructed by Womble Bond Dickinson LLP) for the **Defendant**

Hearing date: 10 October 2018

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Judgment (No.2)

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Mr Justice Fraser:

1. These proceedings are being conducted pursuant to a Group Litigation Order ("GLO") made on 22 March 2017 by Senior Master Fontaine. Further introduction concerning these group proceedings is included in my first written judgment in this matter, also on procedural rather than substantive issues, which is at [2017] EWHC 2844 (QB). This judgment is my ruling on an application by the defendant to strike out considerable passages of the evidence contained in the six witness statements lodged by the claimants. There are six Lead Claimants whose cases have been selected to be dealt with first, in the circumstances which I explain further below. Depending upon whether one counts the challenged evidence in pages, paragraphs or lines, the defendant seeks to strike out between about one quarter to one third of all of the evidence served by the claimants for the Common Issues trial due to start on 5 November 2018.

2. The broad outline of the litigation as a whole is as follows. There are now approximately 600 claimants, who were all for the most part sub-postmasters, although a small number were Crown Office employees and managers/assistants, whose contracts of employment with the defendant are different to the contracts of the sub-postmasters. The defendant, as is well known, operates the network of over 11,000 Post Office branches throughout the UK. The defendant has been independent of Royal Mail Group since 2012. All of the claimants (regardless of their precise individual status, and whether they were individually either sub-postmasters or Crown Office employees) at the material times were responsible for running Post Offices. "Material times" obviously means different periods for each claimant, as the dates upon which they became sub-postmasters or Crown Office employees differ between them, as do the dates upon which they ceased to have that status. The term sub-postmaster is one widely understood in society and is used to describe the person appointed by the defendant to run a particular branch. The range and type of services provided is not identical in all of the branches, and in particular those in rural areas are sometimes seen as the hub of small communities. The Crown Office employees perform similar functions to sub-postmasters, but do so at branches that are (or were) directly managed by the defendant. These are called Crown Office branches. This distinction is not currently material (but may become so on some of the substantive issues).

3. In about 1999/2000 the defendant introduced a system called Horizon, an electronic point of sale and accounting system, for all of its branches. It was a computerised system with both hardware and software, as well as comprising communications equipment in the branches and central data centres. This is explained further at [3] of my first judgment, which must now be called ***Bates v Post Office Ltd (No.1)***, the numbering being required in what promises to become a long-running series. All of the claimants were users of the Horizon system, and indeed they were required to use the Horizon system. The parties are somewhat apart in their view of what Horizon did, and how it in fact operated. The claimants' case is that the Horizon system contained, or must have contained, a large number of software coding errors, bugs and defects. Alleged shortfalls in the claimants' financial accounting with the defendant are said, on the claimants' case, to have been caused by these problems with the way the Horizon system operated. These shortfalls, it is said by the claimants, originated

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after Horizon started being used. Horizon was designed and installed by Fujitsu Ltd, another well-known company, which is not a party to these proceedings. The treatment of the claimants by the defendant when such shortfalls occurred is highly controversial, and this judgment contains no findings in this respect (nor could it, given no trial has yet taken place). The defendant, in many instances, pursued with some vigour the shortfalls with different claimants as accounting discrepancies for which those claimants were responsible. The claimants denied responsibility, but at the time had to deal with the consequences of the defendant's stance in this respect. Some claimants paid the relevant amounts to the defendant out of their own resources, even though they did not believe or accept that there was anything deficient in their accounting. Some claimants found accounting irregularities in their favour. Some were convicted in the criminal courts of false accounting, fraud, theft or other offences. Some had their contracts with the defendant terminated, sometimes very abruptly. The claimants also are of the view that the defendant, over time, came to know about these difficulties with the Horizon system, but did not address them and did not publicise these problems. There are claims for damages for financial loss, personal injury, deceit, duress, unconscionable dealing, harassment and unjust enrichment brought against the defendant. There is currently a Criminal Cases Review Commission ("CCRC") review underway in respect of the convictions of a significant number of the claimants.

4. The defendant disputes the whole basis of the claimants' case, and maintains that Horizon worked perfectly adequately, that the claims against it are time-barred, and also mounts a range of what could be called contractual defences. These include the terms of settlements reached with individual claimants when many branches were closed as the defendant rationalised its branch network. The defendant also maintained, both at the relevant times and in this litigation, that the burden of showing that there was something wrong with the Horizon system (and what it was that caused the shortfalls) is upon the claimants. The claimants deny that they have this burden, and also deny that they have the ability to do this in any event. This may, in due course, potentially prove to be a modern version of *probatio diabolica*; but the use of Latin is discouraged. Because full legal argument has not yet been advanced by either party on any substantive issues, it is too early to express even preliminary views on this, and nothing in this judgment should be taken as my expressing any view on any substantive component or issue in this case in any respect.

5. Over the years, and prior to the issue of proceedings by the claimants (and the making of the GLO itself) there was an action group formed, called the Justice For Sub Postmasters Alliance ("JFSA"). Encouraged by some Members of Parliament, an independent inquiry was set up by the defendant using a specialist company called Second Sight Services Ltd ("Second Sight") that ran from 2012 until 2015, when it was terminated in circumstances that are currently unclear. Evidence was given to a Parliamentary Select Committee by the Chief Executive of the defendant in February 2015. This was in relation to a Mediation Scheme that had run for a while jointly under the auspices of the defendant, Second Sight and JFSA. There have been various reports and documentaries in the media, including a BBC Panorama documentary entitled "Trouble at the Post Office" in August 2015. The subject matter of this group litigation is highly controversial.

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6. It should also be recorded that the making of a GLO at all was opposed by the defendant. The parties first appeared before me on 19 October 2017, which was the first date possible after the making of the GLO Order. At that hearing, I made Directions Order No.1 and ordered the trial of certain issues to take place on 5 November 2018. That was the earliest date that the parties maintained could be achieved in terms of their being ready to try any of the issues. There are currently three trials due to take place in the next 12 months, all before me as the Managing Judge. The trial on 5 November 2018 is to resolve a number of issues of contractual construction, and is entitled the Common Issues trial. In February 2019, the issues relevant to the operation of the Horizon system itself are to be tried, including expert evidence from computer experts, and this is called the Horizon Issues trial. The parties have been put on notice that in the summer of 2019 the third trial is to occur. The issues or claims for that trial have not yet been formalised but are likely to be some of the Lead Claimants' individual cases.

7. This judgment relates to an application issued by the defendant on 5 September 2018. This seeks to strike out large parts of the factual evidence served by the six Lead Claimants for the trial on 5 November 2018. These statements were served on 24 August 2018, although they were available for exchange earlier on 10 August 2018. The defendant requested an extension of time to finalise its own statements, hence a two week extension was agreed. The total number of passages in the statements under attack is in excess of 160 paragraphs. The application is supported by the 9th witness statement of Mr Parsons, of the defendant's solicitors.

8. When the application was issued on 5 September 2018, there was already a hearing before me listed for 19 September 2018, to deal with a number of case management matters and also an outstanding application by the defendant for security for costs. The claimants had in an earlier Consent Order consented to giving such security, as the *quid pro quo* for the defendant not proceeding with an application to join the claimants' litigation funder as a party to the proceedings for costs purposes. Ordinarily, claimants who are resident in the jurisdiction in a case such as this would not be susceptible to an application for security for costs. The amount and type of security was contentious, hence the hearing, and the requirement for that hearing to deal with suitable security pursuant to the Consent Order had been known for some weeks. The defendant sought to have its strike out application also dealt with on 19 September 2018, even though the strike out application was a heavy one and was only issued two weeks before that date, which had been known about for some time. The security for costs application alone was likely to prove highly contentious (and so it proved) so I listed a directions hearing at short notice on 11 September 2018. It seemed to me on 10 and 11 September 2018 that it was highly unlikely that both the security for costs application and the application to strike out could be dealt with in the time set aside on 19 September 2018. After this matter was debated with counsel on 11 September, I remained of that view, and therefore listed the strike out application for 10 October 2018, the earliest date it could sensibly be accommodated. As at 11 September 2018, the claimants had not even had sufficient time to put in evidence in opposition, which they were entitled to do. I therefore ordered further service of the grounds upon which the different passages were challenged by the defendant, and responses thereto by the claimants, and ordered a date for the claimants to put in their evidence in response to the application as well.

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9. Somewhat surprisingly, on 19 September 2018 the defendant then altered its stance over the hearing of its strike out application – which it had originally sought to have heard within 10 working days of its issue - and this time asked for an adjournment of the hearing of 10 October 2018, seeking instead to have the strike out application dealt with actually during the trial itself on 5 November 2018. I refused that application. The Common Issues, which are included at Appendix 1 to this judgment, have to be resolved at the first trial. Extensive time at the trial, both in my judgment and applying normal sensible case management measures, should not be spent arguing about what evidence should be admitted at that very trial. That trial has six Lead Claimants giving evidence and 14 witnesses giving evidence for the defendant. The defendant had relied, inter alia, as one of the grounds justifying its strike out application, upon lack of time at trial. It would be rather circular to hear such an application relying upon such grounds at the very trial for which it was argued there was insufficient time. Given the breadth of the application, and the length of time (even prior to the challenged evidence being served) that the parties had been arguing about it, it seemed to me that the application should be dealt with in advance of the trial. These were not isolated passages that were being attacked. The parties also needed to know in advance of the trial what evidence was to be led at that trial, particularly given the root and branch attack by the defendant upon such substantial amounts of the claimants' evidence.

10. The claimants served their own evidence on 28 September 2018 in opposition to the application in the 4th witness statement of Mr Hartley, their solicitor, and also a counter schedule identifying the response to each of the grounds relied upon by the defendant which were said to justify its application in respect of separate passages.

11. Before turning to the application itself, there are two other matters that must be mentioned. Firstly, the parties also agreed between themselves (as part of the litigation funder/security for costs Consent Order) that Costs Management Orders would be sought from the court, and hence voluntarily adopted the costs management regime in the CPR. This led to three separate hearings, and ultimately to such orders being made in respect of each of their costs budgets. This means that the court has a highly developed idea of the parties' joint costs burden to date; the total costs expended by all the parties to date exceeds £10 million.

12. Secondly, this is a large and complicated case. The technical subject matter of the Horizon issues is likely to be complex. The litigation must be conducted in accordance with the overriding objective. CPR Part 1.1(2)(d) expressly requires the case to be dealt with expeditiously and fairly. CPR Part 1.4(1) requires that it be actively case managed; CPR Part 1.4(2)(l) requires directions to ensure that the trial of a case proceeds expeditiously and fairly. Group litigation has its own Practice Direction 19B, but that must be considered within the context of CPR Part 1. As I have said before, the subject matter of the litigation is a matter of obvious public interest. The defendant is an important public institution, and the way that the substantive issues affected the claimants is also very important. Resolving the many issues in the group litigation is likely to take some time.

13. I have now had a total of 10 separate interlocutory hearings with these parties in a 12 month period prior to the trial of even the first issues. The legal advisers for the parties regularly give the appearance of taking turns to outdo their opponents in terms of lack of cooperation. Behaviour from an earlier era, before the overriding objective

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emerged to govern all civil litigation, has appeared to become almost the norm, at least from time to time. One would have thought that *all* of the parties involved in this litigation would wish to resolve the many different issues between them – which are highly controversial – fairly, speedily and with as much cost-efficiency as possible. I am making no findings about this at this stage, and which party is primarily responsible for this state of affairs is only likely to be considered, if at all, at the final costs stage of the litigation, far in the future. However, it appears to me that extremely aggressive litigation tactics are being used in these proceedings. This simply must stop. It is both very expensive, and entirely counter-productive, to proper resolution of what is so far an intractable dispute. I made similar comments in judgment No.1. These must have fallen on deaf ears, at least for some of those involved in this case. There is a limit to what the court can do other than, yet again, to exhort the parties to remind themselves – daily, if necessary – of what the overriding objective requires.

14. The background situation that has led to this application suggests, sadly, that this counter-productive approach lurks in the background to this application. The defendant first made complaint – or raised concerns – about the scope of the claimants' evidence about one year ago in October 2017. Given the statements themselves were only served in August 2018, that shows considerable, if not almost supernatural, foresight on the part of the defendant. There have been various proxy wars about the claimants' witness statements in the period from October 2017 onwards, even though no such statements were in existence. Indeed, notwithstanding the high number of interlocutory appearances before me, it was a rare hearing when the subject was *not* mentioned. Given there were no witness statements available to be considered on the majority of these occasions (and indeed not at all prior to the short notice hearing on 11 September 2018), this was a highly unusual situation. All it did identify was that there was a major interlocutory battle looming. And so it has proved.

15. This application has an agreed bundle of authorities numbering 25 different judgments; skeleton arguments of 36, and 49, pages respectively; and a hearing bundle containing (amongst other things) no fewer than 62 letters passing between the solicitors for the parties on this subject, in addition to the witness statements themselves, and the witness statements both supporting and opposing the application itself. The principles of contractual construction, the scope of each of the first two trials (Common Issues, and Horizon Issues), the approach to striking out evidence, and various pleadings point have been debated almost endlessly between the parties. The hearing was set down for a day.

16. Finally, no judge ever knows (and should never speculate) about what is going on in the background to any litigation, particularly complex litigation such as this. However, this application regrettably falls into a pattern that has, in my judgment, clearly emerged over the last year at least. Attempts are being made to outmanoeuvre one another in the litigation, and tactical steps have led to constant interlocutory strife. This is an extraordinarily narrow-minded approach to such litigation.

17. I will now turn to the application itself.

18. This is effectively a case management decision. Even the defendant does not argue that the contents of the witness statements are not relevant to the issues in each of the individual Lead Claimant's claims against the defendant. It is effectively accepted that they include both principal facts and evidentiary facts, although those words were not

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expressly used. Those terms are taken from Chapter 7 of Phipson on Evidence (19th edition) at 7-02 and 7-03. The former are those necessary in law to establish the claim, liability or defence. The latter are those relevant to the issue which either directly or indirectly tend to prove or disprove a fact in issue. The defendant's approach is that the challenged passages are not relevant to the Common Issues trial and hence, although admissible in the technical sense for each of the Lead Claimants in their different claims against the defendant, are not admissible in the Common Issues trial.

19. The defendant has five main areas of complaint, which it is said justify the passages being struck out. The categories are not numbered sequentially, and I will adopt the description, numbering and lettering of the defendant for each category.

1. Post-contractual. This evidence relates to events that took place after the contracts were formed.

2. Subjective. This relates to the knowledge and belief of the claimant and not common knowledge to the defendant.

A. Breach. This evidence goes to issues of breach and liability and cannot be relevant to issues of contractual construction.

B. Horizon. This description is said to be self-evident. It is said to be evidence that goes to the Horizon Issues which are not being dealt with in the Common Issues trial. As explained at [3] and [4] above, the claimants' case generally is that the Horizon system had defects such that it threw up unexplained shortfalls in the claimants' accounting. The defendant disputes this.

C. Loss and Damage. This goes to causation, loss and damage. Again, this is said to be not relevant to the Common Issues trial.

20. There are five reasons said to justify the application being made, explained to the court in the oral submissions made by Mr De Garr Robinson QC, which refined and expanded upon those in the skeleton argument. These are:

1. The court had ordered that evidence be served restricted to the Common Issues.

2. There would be insufficient time at trial to deal with the evidence advanced by the claimants.

3. The defendant did not have its own evidence available in response to the challenged passages.

4. There was no benefit in the court receiving such evidence.

5. The court should not make findings on the matters included in the evidence, in particular (but not limited to) matters of breach alleged against the defendant by individual claimants.

21. The approach on an application to strike out witness statements or parts thereof is well known. It is neatly encapsulated in a decision of Mann J, ***Wilkinson v West Coast Capital*** [2005] EWHC 1606 (Ch). In that case, which concerned a petition under

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s.459 of the Companies Act 1986, the respondent to the petition sought, at the pre-trial review, to strike out certain passages of the petitioner's witness statements. This application failed.

22. The relevant paragraphs of the judgment are as follows. Mann J stated:

"4. In support of his application that I should strike out paragraphs in the witness statements now on the grounds of obvious irrelevance and/or disproportionality, Mr Onions [counsel for the respondent to the petition] drew my attention to various cases which demonstrate the power of the court to control adducing evidence. ***Re Unisoft Group Limited (No 3)***[1994] 1BCLC 609 was a case in which Harman J observed (in the context of a s.459 petition) that the courts had to be careful not to allow the parties to trawl through irrelevant grievances. In ***Vernon v Bosley*** [1999] PIQR 337 Hoffman LJ approved a passage from the judgment of Sedley J below, in which Sedley J had said:

"A point comes at which literal admissibility has to yield to the constraints of proportionality… such proportionality may in any one case depend on issues of remoteness, fairness, usefulness, the ratio of cost benefit in terms of time or money and other things besides."

Hoffman LJ approved that, with one slight modification:

"I think I would prefer 'relevance' to 'literal admissibility' but the general tenor of this passage expresses the principle which I have tried to explain in my own words, namely that in some cases a ruling on admissibility may involve weighing a degree of relevance against 'other things'."

5. Those cases, and indeed others in a similar vein, illustrate the very important powers of the court to control proceedings before it to make sure they remain manageable, proportionate and fair to the parties. If one were constructing a list of cases to which that power might be thought to be particularly appropriate, unfair prejudice petitions would be fairly high on the list. However, desirable though the power to control evidence obviously is, particular care must in my view be taken when it is sought to exercise the power before a trial. It is noteworthy that the two cases which I have referred to above were both cases in which the issues as to evidence arose during the course of trials. By the time that the issue arises in that context, the judge is likely to have a much fuller overall picture of the issues in the case and of the evidence which is going to be adduced in support of them. In a large number of cases, he or she is likely to be in a better position to make judgments which turn on the real value of the line of evidence in question and its proportionality, and in very many cases its admissibility. A court which is asked to approach these questions at the interlocutory stage is much less likely to have that picture, and should be that much more careful in forming a view that the evidence is going to be irrelevant, or if relevant, unhelpful and/or disproportionate. One must also bear in mind the extent to which it is desirable to consider these matters at all at an interlocutory stage. One must be on one's guard, in applications such as this, not to allow case management in relation to witness statements to give rise to significant time- and cost-wasting applications; those should not be encouraged. In my view, I should only strike out the parts of the witness statements which I am currently considering if it is quite plain to me that, no matter how the proceedings look at trial, the evidence will never appear to

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be either relevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it. With evidence of this nature, that is likely to be quite a heavy burden.

6. As far as the relevant passages which I am currently considering are concerned, I do not consider that the defendant has discharged that burden. I will not set out all the paragraphs which are under attack. There are about 20 of them in about five different groups. On a purely numerical basis, they form a very small part of the evidence that the claimant will seek to adduce, though that by itself is not a reason for leaving them in. In relation to none of them am I satisfied that they can never be relevant, or can never be sufficiently helpful to the petition or to the trial judge so as to make it right to strike them out now. Indeed, my present view in relation to some of them is that they were plainly relevant as part of the background narrative at least."

(emphasis added)

23. This authority is distilled by the editors of the White Book, in the notes to CPR Part 32.4.21, to the following sentence, which I adopt; the heading to that paragraph in the notes being "Application to strike out witness statement":

"A judge asked to approach such questions at the interlocutory stage is at a disadvantage and should only strike out proffered evidence if it is quite plain that, no matter how the proceedings may look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it."

24. It is that approach that I therefore adopt in considering this application. It is correct that, as the Managing Judge of this Group Litigation, I have a better grasp of the issues in the proceedings generally, than would a judge ordinarily hearing an interlocutory application in a more habitual case. However, I do not consider that a different approach in terms of diluting the test, making it easier to strike out passages in witness statements, should or does apply in Group Litigation compared to other cases. Further, even if there were to be applied any different test – and I find that there is not – there are in any event good arguments that it should be harder to strike out evidence, not easier, in Group Litigation. This is because Common Issues, or the cases of Lead Claimants, are selected at an early stage in Group Litigation. Relevance has to be considered against the litigation as a whole; unless this is done, steps in the litigation (such as resolving at trial Common Issues that will be relevant to hundreds of claimants) could be taken on an artificially narrow basis. It must also be remembered that, given there are a total of 23 different Common Issues, evidence may be relevant to only one of those, and not relevant to the other 22. Adopting therefore the summary in the White Book above, for the evidence to be struck out, it must be quite plain that, no matter how the proceedings may look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful, to *any* of the Common Issues. I consider that in this case, as Mann J said, "to be quite a heavy burden".

25. Just because evidence may be admitted because it is of relevance to the case, does not mean that the court will necessarily and automatically apply that evidence (and deal with it as though it is of primary relevance) to every single one of the 23 Common Issues. The task of resolving the Common Issues will require considerable legal

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analysis, and the principles (as an example) of contractual construction will not necessarily require the same evidence as, say, the principles of re-opening a settled account in the field of agency. There are likely to be detailed legal submissions to be made in the Closing Submissions of the Common Issues trial concerning what evidence (both in the witness statements and from the oral evidence) is relevant to which Common Issues, and how.

26. The application by the defendant to strike out this evidence appears to be an attempt to hollow out the Lead Claimants' case to the very barest of bones (to mix metaphors), if not beyond, and to keep evidence with which the defendant does not agree from being aired at all. In order to provide an illustration of this, I use the case of Mr Bates, a Lead Claimant and the person whose name is used in the title of this litigation. He is Claimant No.19 in the Register of Claimants, and was the sub-postmaster of the Craig-y-Don Post Office at Craig-y-Don, Llandudno, in North Wales. He was in post from 31 March 1998 to 5 November 2003. He and his wife purchased the Branch for £175,000. Previous employment of his had included being Administration Director and then Operations Director at the Museum for Children in Halifax in Yorkshire. Horizon was installed sometime in 2000. Mr Bates had some prior experience with IT from his other employment at the Museum, and became involved in attempting to resolve discrepancies which began to occur in his branch. He involved the defendant in this. He was unable to resolve these shortfalls, and he has certain criticisms in respect of the defendant in this respect. In August 2003 he was given three months' notice of termination by the defendant. Some of the passages which the defendant seeks to strike out, of the 51 paragraphs in his evidence subject to challenge on admissibility in this application, are the following:

"136. I certainly do not recall the trainers [of the Horizon system] highlighting, before the requirement was imposed on me to use Horizon, that I, as Subpostmaster, would be held liable for all alleged shortfalls apparent on the system, regardless of whether I was at fault or the cause had been ascertained."

This is said to deal with his training on Horizon, and to be objectionable because it is post-contractual, goes to breach by the defendant and deals with Horizon (categories 1, A and B).

"143.9 On 3 September 2003, I called the Helpline as Horizon was showing a loss of £600 when I was trying to complete a weekly balance. It transpired that this was due to incorrect advice being given by the Helpline to refund a debit card payment, when no payment had actually been taken from the card."

This is said to deal with his training on Horizon and support provided by the defendant, and to be objectionable because it is post-contractual, goes to breach by the defendant and deals with Horizon (categories 1, A and B).

"146. However, one of my fundamental concerns when Horizon was introduced, which I clearly communicated to Post Office through various letters, was the lack of transparency and control available to me in reviewing transactions when trying to balance. [Examples are then provided] I was therefore clearly dependent upon Post Office for this sort of information and, therefore, in order to ascertain the cause of any apparent shortfall and whether it was in fact a real loss."

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This is said to deal with his training on Horizon and support provided by the defendant, and to be objectionable because it is post-contractual, goes to breach by the defendant, deals with Horizon, and deals with shortfalls and hence loss and damage (categories 1, A, B and C).

"147. When carrying out this [weekly] balance on Wednesday 13 December 2000, the Horizon system showed that there was an unexplained variance of over £6,000 relating to Giro deposits."

This is said to deal with his training on Horizon and support provided by the defendant, and to be objectionable because it is post-contractual, goes to breach by the defendant, deals with Horizon, and deals with shortfalls and hence loss and damage (categories 1, A, B and C).

27. By striking out such passages, the background narrative to Mr Bates' claim against the defendant would be wholly removed. His evidence of what in fact happened to him, his practical experience of how Horizon worked, the shortfalls that he experienced and the particular circumstances of these (which, it must be remembered, all occurred before November 2003) is said by the defendant on this application not to be part of the factual matrix for any of the 600 odd claimants in the Group Litigation.

28. There are no passages in the witness statement of Mr Bates that are identified as being challenged for Category 2 reasons, which is that the evidence is subjective and goes to the knowledge and belief of the claimant only. For completeness I will therefore provide an example of this from another statement. Mr Naushad Abdulla was the sub-postmaster in Charlton, London SE7, from January 2007 until May 2009 when the appointment was summarily terminated. It can immediately be noted that Mr Abdulla contracted with the defendant some years after Mr Bates' appointment was terminated, hence Mr Bates' experience as communicated to the defendant concerning shortfalls (even though it post-dated Mr Bates' contract) could be relevant to Mr Abdulla's contract with the defendant, if that is a relational contract. Regardless of that, however, paragraph 85 is challenged by the defendant as being within Category 2. The objectionable passage reads:

"I was genuinely shocked and surprised at the lack of adequate support provided to me in relation to apparent shortfalls".

Another passage that is subject to challenge as Category 2 is paragraph 113:

"I am shocked to see in Post Office's disclosed documents that a Post Office auditor accepted a transaction correction on the day of the audit when I wasn't present and without my knowledge."

29. Whether Mr Abdulla's shock is seen by the defendant as sufficiently central to warrant cross-examination is something that the defendant's counsel will have to consider themselves. However, whether it is or not, I do not accept that the court can safely conclude that such evidence will never be relevant to any of the claimants in the Group Litigation such that it should be struck out, given the claimants' case includes that this is a relational contract, and also given the burden of demonstrating which party has to show fault or carelessness (or the lack thereof) is so centrally in issue.

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30. Not only that, but applying the test as set out in the notes to CPR Part 32.4.21, the court would need to be satisfied that it was plain that such evidence as given by Mr Bates and Mr Abdulla would never be relevant to the Common Issues, or if relevant, would never be sufficiently helpful to make it right to allow the claimants to adduce it. One has only to state such a proposition to see how very difficult it is for the defendant to clear such a hurdle on this application.

31. Contractual orthodoxy in terms of construing the contract requires knowledge common to the parties to be considered. However, it is part of the claimants' case that the nature of the contract between the claimants and the defendant is what is called a relational contract. That is the very first of the Common Issues. Such a contract would import duties of good faith, fair dealing, transparency, co-operation, and trust and confidence (as set out in ***Yam Seng Pte Ltd v International Trade Corp*** [2013] EWHC 111 (QB), and in particular [143] to [153]). This authority deals with fragrances branded with the name "Manchester United" for those customers with an affinity for such products. If – and it is a very considerable "if", given the stage at which this Group Litigation is at – the claimants are right about this aspect of their case, and this is (or these are) a relational contract or contracts, then the state of knowledge of the defendant about Mr Bates' experience would become of direct relevance to the Group Litigation generally. In particular this state of knowledge may do so in respect of each of the claimants who may have contracted with the defendant after Mr Bates raised his concerns. At the very latest, claimants who contracted after August 2003 might be able to rely upon such material as being highly relevant. Given that at least one of them, Mr Abdulla, is also a Lead Claimant, such evidence from another claimant could be relevant to his claim.

32. When one considers the purpose of this Group Litigation, attempting to strike out such evidence now on the grounds of lack of relevance at this stage of the proceedings to the Common Issues seems to me to be rather puzzling. Mr Green QC relied very heavily that this was Group Litigation and what may not be of primary and direct relevance to one Lead Claimant could very well be of considerable relevance to a large number of the others. I accept that submission. He also submitted in his written skeleton that the application "appears to be an attempt by Post Office to secure an advantage at the Common Issues Trial by selectively tailoring the evidence which the Court is to consider." I accept that submission too; the application certainly gives that appearance.

33. Mr Green had three other arguments in respect of all of the categories sought to be struck out by the defendant. I shall deal with each in turn.

34. Firstly, he points out that Common Issues 12 and 13, which deal with the principles of agency as they affect sub-postmasters as agents, are without doubt to be dealt with at the Common Issues trial. They form part of Schedule 1 to the Order I made on 19 October 2017. Common Issue 12 states:

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

Those passages of the Defence – the actual title of the pleading is the Generic Defence, to differentiate it from the Individual Defences to each of the six claimants'

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Individual Particulars of Claim – deal with the circumstances in which an agent is bound to an account, and whether that account can only be opened if the agent discharges the burden of showing that there is a mistake. Paragraphs 93(2) and (3) of the Generic Defence are quoted below at [40].

35. There are two passages in the authorities upon which Mr Green relies, so far as the law of agency is concerned. In ***Garnac Grain Co Inc v HMF Faure & Fairclough Ltd*** [1968] AC 1130, the House of Lords considered the circumstances in which an agency was created or was held in law to arise. The Court of Appeal had held that no agency arose. In dismissing the appeal, Lord Pearson (who gave the only speech, and with whom their Lordships all agreed) stated (at 1137C to D):

"The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in *Ex parte Delhasse*. But the consent must have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important."

(emphasis added)

36. The second passage is contained in ***Coleman v Mellersh*** (1879) 11 Ch.D 150. That case deals with the circumstances in which a settled account between principal and agent can be opened. In that case the account had been settled between an old lady and her solicitor. The court ordered it to be opened, on two grounds. The first was undue influence, and the other was that she had settled it without sufficient information. In the Group Litigation, whether accounts that have been settled can be opened is an issue, and the Common Issues deal with this. The Court of Appeal stated, per James LJ (at 159):

"….no settlement, no payment, no taxation even, is or would have been of any avail between a solicitor who had got his client bound by such an obligation and that client, unless and until she had the fullest information and independent legal advice as to that obligation, and as to all the circumstances under which he had continued to multiply and accumulate costs against her."

The phrases "the fullest information" and "all the circumstances" are obviously of potentially wide effect.

37. It is not necessary to decide the full scope of the Common Issues concerning agency at this stage in the Group Litigation, or of all the arguments that might arise. These are older cases, and there will doubtless be a great deal of legal argument on both sides as to how, if at all, such principles are now to be approached and applied on the facts of the relationship between the defendant and the claimants. All that is necessary on this application is to consider whether the evidence which the defendant seeks to strike out now is of potential relevance to those issues. In view of the two different authorities

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relied upon by the claimants, I consider that the answer to that question is in the claimants' favour on the application.

38. Secondly, Mr Green points out that part of the defendant's pleading, the Generic Defence, itself expressly raises consideration of the matters which the defendant seeks to strike out. To read the pleading in context it is necessary first to quote that part of the Generic Particulars of Claim to which it pleads.

39. The defendant made strenuous efforts in correspondence, then also in late September 2018 in Voluntary Further Information, and on the application itself, to persuade the court that Common Issue 8, which requires resolution of the proper construction of section 12, clause 12 of the Subpostmaster Contract (referred to as the "SPMC"), ought to be decided in a particular way. This clause potentially imposes liability upon a sub-postmaster if there were fault or negligence present (I paraphrase). The claimants' case on this is that each sub-postmaster was not *strictly* liable under this clause, but was (quoting from paragraph 55 of the Generic Particulars of Claim) liable only as follows:

> "55. For the avoidance of doubt, on a proper construction of section 12, paragraph 12 of the SPMC (and similar clauses said to impose such liability), the Subpostmaster is only liable for actual losses caused by the negligence, carelessness or error of the Subpostmaster, or his assistant, as to which the contractual burden of proof was on the Defendant. Thus, for example, the Subpostmaster would not be liable for an apparent shortfall in branch accounts:
>
> 55.1 which did not represent a real loss to the Defendant;
>
> 55.2 which was not established by the Defendant, after due enquiry, to be such a real loss;
>
> 55.3 in circumstances where the loss was caused or contributed to by the Defendant's own breach of duty;
>
> 55.4 where it was not established to be due to the Subpostmaster's own negligence, carelessness or error or that of his Assistants."

40. This paragraph is pleaded to by the defendant in paragraphs 93 and 94 of the Generic Defence. These state as quoted below. Another relevant passage precedes these, in paragraph 76. These paragraphs state as follows:

> "**B.1 Factual Matrix**
>
> 76. Post Office asserts that the following matters are important aspects of factual matrix against which the various Subpostmaster Contracts relied on by the Claimants should be construed.
>
> (1) Subpostmasters typically stood to benefit from the relationship with Post Office in at least two respects: first; by obtaining remuneration in accordance with their Subpostmaster Contracts and, second, as a result of offering Post Office services in the Subpostmasters' premises, by enjoying increased footfall and revenue for the retail business that Subpostmasters typically operated alongside the Post Office business.
>
> (2) Subpostmasters contracted with Post Office on a business to business basis and in the expectation of profiting from the business relationship as noted above.
>
> (3) Subpostmasters were under no obligation and no pressure to contract with Post Office on the terms that it offered or at all.

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(4) Post Office was unable to monitor at first hand the transactions undertaken in branches on its behalf, in relation to which it was liable to Post Office clients. These transactions and the manner in which they were carried out were the responsibility of the relevant Subpostmasters.

(5) Post Office was unable to monitor at first hand the custody and use of its property (principally, cash and stock) in branches. Again, these matters were the responsibility of the relevant Subpostmasters.

(6) Post Office relies on the accurate reporting by Subpostmasters of accounts, transactions and the cash and stock held at the branch. Should Subpostmasters not accurately report these things, it would be impossible or alternatively excessively difficult to determine (i) if a shortfall has occurred, (ii) when it occurred and/or (iii) why it occurred. See further paragraphs 68 and 69 above.

(7) Given the nature of Post Office's business and the variety of transactions and processes required for the operation of a Post Office branch, it would be impracticable for all of the parties' rights and obligations to be set out in a single contractual document. It was to be expected that Post Office would rely upon manuals and other documents containing instructions."

"93. Post Office notes that the Claimants' case set out in paragraph 55 applies only to Section 12, Clause 12 of the SPMC. More generally, as regards shortfalls disclosed in a Subpostmaster's accounts, Post Office notes the following principles, each of which applies to Subpostmasters:

(1) Where a Subpostmaster asserts that he or she is not responsible or liable for a shortfall, the legal and/or evidential burden of proof is on him or her to establish the factual basis for such assertion, in that:

(a) In the absence of evidence from a Subpostmaster to suggest that a shortfall arose from losses for which he or she was responsible, it is appropriate to infer and/or presume that the shortfall arose from losses for which he or she was responsible. Such an inference and/or presumption is appropriate because (1) branches are under the management of Subpostmasters or their Assistants, (2) losses do not arise in the ordinary course of things without fault or error on the part of Subpostmasters or their Assistants and (3) it would not be right to infer or presume that a shortfall and loss was caused instead by a bug or error in Horizon.

(b) Subpostmasters bear the legal burden of proving that a shortfall did not result from losses for which they were responsible. This is because (1) the truth of the matter lies peculiarly within the knowledge of Subpostmasters as the persons with responsibility for branch operations and the conduct of transactions in branches, (2) it would be unjust for Post Office to be required to prove allegations relating to matters that fall peculiarly within the knowledge of Subpostmasters and/or (3) where a person is subject to a fiduciary obligation as regards his or her dealing with assets, the burden is on that person to establish the justification for his or her dealings.

(2) Where an agent renders an account to his or her principal, he is bound by that 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.

(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.

94. As to Section 12, Clause 12 of the SPMC:

(1) Section 12, Clause 12 should be construed in accordance with the principles set out in paragraph 93 above.

(2) On the true construction of Section 12, Clause 12, Subpostmasters are responsible for all losses (as defined in paragraph 41 above) disclosed in their branch accounts save for losses which were neither caused by any negligence, any carelessness, or any error on their part nor caused by any act or omission ("act") on the part of their Assistants.

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(3) Subpostmasters who allege that they are not liable for any losses disclosed in their branch accounts bear the burden of proving that such losses were not caused by the things referred to in sub-paragraph (2) above.

(4) Regarding paragraph 55.1, no admissions are made as to what is meant by the term "real loss", but Post Office notes that, in Section 12, the concept of a "loss" is not tied to or dependent on economic detriment to Post Office.

(5) Paragraph 55.2 is denied.

(6) Paragraph 55.3 is denied.

(7) Paragraph 55.4 is denied."

It can be seen that a central plank of this litigation therefore involves which of the claimants, or the defendant, bears the burden of doing what when shortfalls emerge. To quote selectively from the above, the defendant's case is that a sub-postmaster who has settled an account "is bound by that account unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account". A different way of expressing what may be the same point is that "Sub-postmasters who allege that they are not liable for any losses disclosed in their branch accounts bear the burden of proving that such losses were not caused by "any negligence, any carelessness, or any error on their part". Given that the defendant expressly pleads as part of the factual matrix the matters at paragraph 76(4), (5) and (6) in particular, I do not see how it can be said that the evidence challenged in the witness statements going to each individual Lead Claimant's personal experience of having shortfalls identified, then their attempts to work out what had happened and how it had happened, can be said not to be relevant, or that it will never be sufficiently helpful to make it right to allow the Lead Claimants to adduce such evidence. The defendant's own pleading relies upon its interpretation or account of these events as part of the factual matrix, and does so expressly. Yet further, at paragraph 93(1)(a) of the Generic Defence, the defendant pleads that a certain inference or presumption arises "in the absence of evidence from a Subpostmaster to suggest that a shortfall arose from losses for which he or she was responsible". Given a considerable amount of the evidence challenged goes to establishing that there was such evidence, and hence the inference or presumption should not be applied to the resolution of the Common Issues, it is hard to see how such evidence can be said not to be of any relevance.

41. These pleading points raised their head several times before, usually in the context of the parties wishing to debate (in advance of the evidence even being served) their approaches, as referred to at [13] and [14] above. Again, all that is necessary at this stage, in my judgment, is a conclusion by me that the evidence may become relevant, which may just be a different way of saying that the interpretation(s) proposed by the Lead Claimants is or are reasonably arguable. I consider that it is, or they are if there is in reality a number of different points. I do not consider that the "clarification" by way of Voluntary Further Information served by the defendant on 26 September 2018 makes any difference in this respect. That clarification is in respect of paragraphs 93 and 94 of the Generic Defence only in any event.

42. Even the Voluntary Further Information in respect of paragraphs 93 and 94 of the Generic Defence identifies that it is the defendant's own case (and remains its case) that "if the branch's dealings with cash and stock accord with the transactions input

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into the branch's terminals, the transactions would in the ordinary course of things not give rise to a loss." It is also stated in this Further Information that "events that give rise to losses without fault or error on the part of Subpostmasters or their Assistants in the branch would not be encountered in the ordinary course of things but would be unusual." Of course the phrase "in the ordinary course of things" will have different meanings to different parties, and in a sense in this litigation may sum up the different approaches, understanding and confidence in Horizon itself. The defendant is of the view that Horizon cannot have been the problem underlying the subject matter of this Group Litigation; the claimants are of the view that it most definitely was. Which of those two differing views represents "the ordinary course of things" is one of the matters that this litigation will eventually resolve. I do not see how the Voluntary Further Information that was served by the defendant on 26 September 2018 assists the defendant in avoiding the point that this evidence is relevant to the Common Issues on the defendant's own pleaded case.

43. Thirdly, Mr Green relies upon the fact that the defendant's own evidence contains passage after passage where the same subject matter is dealt with from the defendant's overall perspective. As an example, Ms Van Den Bogerd, the defendant's People Services Director, gives considerable evidence about the training provided to sub-postmasters, the core features of that training, including "how to declare, investigate, make good and dispute shortfalls". She gives evidence of the evolution of training on Horizon in the periods up to 2002, between 2003 and 2006, 2007 to 2011, and then into 2012. She also continues "I set out below a short summary of how initial training was delivered over the years".

44. She also addresses the investigation of shortfalls. A whole section of her witness statement is under the heading "Causes of Shortfalls", with nine different reasons given for why shortfalls occur (on the defendant's case, hence Horizon errors is not one of them). She makes statements such as "I have always taken the position that a diligent businessperson would check their accounts daily to identify any discrepancies and look to resolve them there and then…." and, having pointed out that very small shortfalls might not be worth the sub-postmaster's time to investigate, states "it would be unlikely that a Subpostmaster, having kept his accounts diligently, still had no idea where a material shortfall was arising from." She also states "In any event, for the reasons set out above, the Subpostmaster is best placed to investigate shortfalls and Post Office generally cannot find the root cause of a shortfall without the Subpostmaster's cooperation. A reversal of the burden for determining the root cause of shortfalls would also create the perverse situation whereby the greater the scale and sophistication of the false accounting by a Subpostmaster, the less likely Post Office will be able to find the root cause of a shortfall, and thus the more likely the Subpostmaster would not be held liable for that shortfall."

45. Mr Green's submission in this respect amounts to having two limbs. Firstly, it is to identify that the defendant on this application takes both a surprising, and unsupportable, position on relevance, given its own evidence in this respect, which seeks to deal with the same points from the defendant's point of view. Such material, he submits, is clearly relevant, which is why it is adduced by the defendant's witnesses. It is also to meet a submission advanced by the defendant that unless the claimant's evidence on the different topics challenged is struck out, the trial will become demonstrably unfair as the defendant simply had no idea such evidence

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would be required or would be admitted, and/or that did not realise that such issues would be relevant, and hence has no evidence of its own on this topics. Such a submission, Mr Green points out, is difficult to reconcile with the defendant's own evidence such as this.

46. Mr Green also points out that whereas the defendant can give general evidence in this respect – based upon the aggregate of its own experience across the piece, dealing with many different sub-postmasters – all that the Lead Claimants can do is give their own separate and distinct evidence of their own specific experiences. This would be what is properly called direct evidence. When Mr Bates gives evidence about how the Horizon system worked *for his Branch,* and how he experienced it *personally and on the shortfalls he says he found*, that is all he can do. He can give no evidence wider than his own experience. For the court to have a correctly balanced picture of what actually was going on – and this can be expressed at this stage of the proceedings as being either factual context to the issues and/or background narrative and/or "later words and conduct" and/or "the fullest information" and/or all the circumstances and/or the defendant's likely state of knowledge and/or (even, for some claimants) factual matrix – the Lead Claimants' evidence in this respect is relevant, and therefore admissible, upon the Common Issues.

47. I accept those submissions by Mr Green for the Lead Claimants. In respect therefore of the five different grounds relied upon by Mr De Garr Robinson identified at [20] above, the first – that the court had ordered that evidence be served restricted to the Common Issues – is answered by my finding that the evidence is relevant to the Common Issues as I have explained.

48. I can deal with the other points swiftly. I do not accept that there is insufficient time at trial to deal with the evidence advanced by the claimants. The time available for evidence to be tested in cross-examination has been identified in advance by me, and the parties are now on the third detailed draft of the trial timetable. Trials of this nature – and the Common Issues trial will now take place over a period of five weeks – can, and do, deal with evidence of a far wider compass than that contained in the different witness statements of these six sub-postmasters. The time at the trial has been allocated fairly between cross-examination of the Lead Claimants, and cross-examination of the defendant's witnesses. There is no justifiable concern that there is insufficient time at trial. The parties must and will be kept to the trial timetable.

49. The point advanced that the defendant did not have its own evidence available in response to the challenged passages is dealt with above. The fourth point, namely that there was "no benefit" in the court receiving such evidence, is also rejected.

50. I wish also to deal with the other arguments advanced for the defendant. The first is that no disclosure was ordered that went to such matters. I reject that, for two reasons. Firstly, Mr Green identified in the actual disclosure order itself where such disclosure was ordered. Secondly, for the most part, the Lead Claimants are in many of these passages actually giving evidence in respect of documents and so on given in disclosure by the defendant that specifically relates to them. That disclosure has been given in this Group Litigation by the defendant. The suggestion that no disclosure is available on these matters is not sound.

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51. The fifth point relied upon by the defendant is that the court should not make findings on the matters included in the evidence, in particular (but not limited to) matters of breach alleged against the defendant by individual claimants.

52. It is worth expanding on this point made by the defendant, which is relied upon in favour of allowing this application. It is that as a result of admitting this evidence (by which the defendant means failing to find it inadmissible and striking it out) the court will either find itself asked, or will make, findings on matters that are in reality to be dealt with in the Horizon Issues trial, or in the later trials that are to deal with specific breach, loss and damage alleged by the individual Lead Claimants. I do not accept that there is such a risk. The trial that is about to commence on 5 November 2018 is to deal with the Common Issues. Those Common Issues number 1 to 23. They are attached to Schedule 1 of the Directions Order of 19 November 2017. They are the agenda for that trial. There is no such risk of the court making findings on the Horizon Issues, or of the court making findings on breach. Judges are expected to be able to consider relevant matters pertaining to different issues, keeping them compartmentalised where necessary. What is relevant for one issue may not be relevant to another. A trial of this nature is not similar to a trial before a jury, where the risk of prejudice sometimes outweighs what might be called issues of strict admissibility (or probative value). Even jury trials admit evidence – for example admissions by co-defendants – where the jury will be directed that such evidence is admissible for certain limited purposes, but is not to be taken into account for others. I consider this point to be an exceptionally weak one. The court will not find itself making findings almost by accident, which is what the defendant came perilously close to submitting.

53. Finally, the defendant submits – and submitted before at the hearing of 19 September 2018 – that without striking out this evidence, the trial of the Common Issues would simply become unmanageable, and cross-examination would be constantly interrupted by regular repetitive objections by Leading Counsel for the defendant on the same grounds, again and again. I find that submission surprising. It is not possible to rule on objections to questions in cross-examination in advance, just as it was not possible for the court to deal with striking out passages in evidence before those witness statements were served. These submissions by the defendant could, on an uncharitable view, appear to be made almost as vague threats to disrupt the Common Issues trial. Any objections to questioning will be dealt with as and when they arise, on their merits. All the parties are professionally represented and I expect them to observe this ruling, unless it were to be overturned. However, should I in the fullness of time make findings on the Common Issues by taking into account matters irrelevant in law (and hence inadmissible) on some of those Common Issues, there is a remedy available. Applying the principles as I have explained them above, I find that the defendant has not satisfied the necessary test to have these passages struck out and I dismiss the application.

54. I also suspect that in the background to this application the defendant is simply attempting to restrict evidence for public relations reasons. Even Mr De Garr Robinson accepted that the evidence that was the subject matter of this application was properly admissible evidence that went to the claimants' cases as a whole. In other words, there would be nothing inherently objectionable to any of Mr Bates' evidence were the court to be about to embark upon the trial of Mr Bates' claim

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against the defendant in isolation. Mr De Garr Robinson's approach was that this challenged evidence was not relevant solely to the Common Issues, a point which I have dealt with above.

55. Even on the defendant's analysis – which I have rejected - the challenged evidence would be admissible in statements that would most likely have to be served in April or May 2019, in a matter of what is a few months' time. Mr Parsons gave evidence at paragraph 36 of his 9th witness statement in support of the application stating that the defendant was concerned that "advance allegations of misconduct by Post Office at the Common Issues Trial" would be made by the claimants for "prejudicial reasons or to generate adverse publicity for Post Office". (The defendant does not use the definite article when referring to itself.) It seems to me that this narrow passage in the witness statement of Mr Parsons, expressly supporting the application, might contain the origin of the expenditure of time, resources and money by the defendant on restricting the claimants' evidence, that has been the subject matter of this application. It certainly must have had some bearing upon the application in the defendant's mind, otherwise Mr Parsons would not have included it in his witness statement. Such concerns would be pertinent if the challenged passages constituted the airing of "irrelevant grievances", to use the expression of Harman J in ***Re Ubisoft***, quoted by Mann J in the passage quoted above at [4] of ***Wilkinson v West Coast Capital*** at [22] above.

56. However, they do not, in my judgment. I consider that the challenged evidence is relevant to the Common Issues trial for the reasons that I have explained, is therefore admissible, and ought not to be struck out. This conclusion has been reached having considered the principles applicable to an application such as this, and the Common Issues to be tried. Whether this "generates adverse publicity" for the defendant is not a concern of the court, as long as the evidence is properly admissible under the CPR, which I have found it is. The court is not a marketing or PR department for any litigant, and the principle of open justice is an important one.

57. Finally in terms of the tenor of this litigation generally, I make the following observation. Some passages of the Lead Claimants' evidence relate to the circumstances in which their engagement with the defendant was terminated. These terminations, for some Lead Claimants, occurred before other claimants in the Group Litigation (who are not Lead Claimants) contracted with the defendant. The Lead Claimants complain that such terminations were abrupt, came out of the blue, accused them of falsifying accounts and made other statements that were not factually accurate, and also that the defendant's approach (and that of its solicitors) was generally heavy handed. I have read some of this correspondence, as it was exhibited to the witness statements. The tone of some of it is undoubtedly aggressive and, literally, dismissive. I make no findings about any of this at this stage, nor do I even consider whether such an approach was, or was not, justified in any particular individual case at the time. However, regardless of any rights and wrongs of such an approach then, with the Lead Claimants individually in that correspondence, I wish to make one point entirely clear, so that this cannot be misunderstood. An aggressive and dismissive approach to such major Group Litigation (or indeed any litigation) is entirely misplaced. I repeat that such litigation has to be conducted in a cooperative fashion and in accordance with the overriding objective in the CPR.

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58. The application is therefore dismissed. I have already indicated to the parties that I would hand this written judgment down without the need for their attendance, and that I would deal with any costs arguments on the first hearing day of the trial.