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Claim Nos. HQ16XO1238, HQ17X02637 & HQ17X04248

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

The Post Office Group Litigation

MR JUSTICE FRASER

BETWEEN:

ALAN BATES & OTHERS

Claimants

– and –

POST OFFICE LIMITED

Defendant

NOTE ON POTENTIAL APPEAL OF HORIZON JUDGMENT

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1. It is not known when the Court will hand down judgment in the Horizon Issues Trial ("HIT"). The oral hearing finished in early July 2019 but submissions on discrete points were not completed until the end of July.

2. The judgment could appear at any time and it is a matter of speculation trying to work out when it might do so. The work involved in preparing the judgment is substantial and the Judge is likely to have taken off a significant amount of August (and perhaps September) as holiday. That said, given the delays in the HIT resulting from the recusal application, the Judge may have made some progress on parts of the judgment even before the end of the trial and it is equally possible that he made considerable progress before the end of July – or even during August. It is equally possible that he has so far made little or no progress – and the fact that judgment in the CIT was delivered much later than originally anticipated (and just before the beginning of the HIT) perhaps indicates a tendency on the Judge's part to take more rather than less time. Also, the fact that the scope of trial 3 has been reduced has perhaps eased some of the pressure on the Judge to deliver a quick judgment.

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3. My best guess (for what little it is worth) is that judgment is not likely to appear much before the end of September and that it is more likely to be delivered in the course of October.

4. Post Office will obviously need to give urgent consideration to the terms of any judgment once it is delivered and in particular, if any findings adverse to Post Office are made in the judgment, whether any application to appeal is to be made.

5. The timetable for the making of any such application is tight: the starting point is that an appellant has 21 days from the date of the decision to file an appellant's notice (CPR 52.12(2)(b)), although the lower court may direct that such period be longer or shorter (CPR 52.12(2)(a)).

6. The White Book notes (52.12.3) that the brevity of the 21-day period "*reflects a clear policy decision in favour of finality*" and that "*[i]n the immediate aftermath of the judgment below both the party and their advisers are fully seized of the case and are at that time best equipped to formulate grounds of appeal*". Although some examples are provided of situations where an extension of time has been (or might be) granted, it cannot be assumed that any such application will succeed.

7. Further, the 21-day period is not the period for making a decision as to whether or not to appeal but the time allowed to file the appellant's notice itself. That exercise will be complex and will require extensive review and sign-off. It could easily take 21 days in itself.

8. Accordingly, Post Office will need to arrive at a quick decision as to whether it wants to seek permission to appeal.

9. The purpose of this Note is to flag some initial points which may need to be considered once the judgment is delivered in due course. This is necessarily speculative since all will inevitably depend on the terms of the judgment itself.

10. I note at the outset that an appeal of the Horizon Issues is a very different creature from an appeal of the Common Issues. The Horizon Issues are primarily issues of fact and the Common Issues being appealed are primarily questions of law. As I explain below, it is

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always more difficult to get permission to appeal fact. Any appeal of the Horizon Issues therefore requires separate and distinct consideration based on their own circumstances.

The Legal Tests for Permission to Appeal

11. The test for granting permission to appeal (for first appeals) is set out in CPR 52.6:

> *(1) Except where rule 52.7 applies, permission to appeal may be given only where—*
>
> *(a) the court considers that the appeal would have a real prospect of success; or*
>
> *(b) there is some other compelling reason for the appeal to be heard.*
>
> *(2) An order giving permission under this rule or under rule 52.7 may—*
>
> *(a) limit the issues to be heard; and*
>
> *(b) be made subject to conditions.*
>
> *(Rule 3.1(3) also provides that the court may make an order subject to conditions.)*
>
> *(Rule 25.15 provides for the court to order security for costs of an appeal.)*

12. In the vast majority of cases, the focus is on 52.6(1)(a) i.e. whether the appeal has a real prospect of success. It is difficult to envisage circumstances in this case where the Court of Appeal could be persuaded that there was some other compelling reason for the appeal to be heard.

13. The test is easy to articulate – it is whether there is a realistic, rather than fanciful, prospect of success – see Swain v Hillman [2001] 1 All ER 91 and Tanfern Ltd v Cameron-McDonald (Practice Note) [2000] 1 WLR 1311.

14. Meeting the real prospect of success test on an appeal on fact will be difficult since the appeal court will need to be satisfied that the findings were either unsupported by the evidence before the judge or that the decision was one that no reasonable judge could have reached (The Mayor and Burgesses of the Haringey LBC v Ahmed & Ahmed [2017] EWCA Civ 1861).

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15. The Court of Appeal (or the court at first instance) can also grant limited permission or conditional permission.

16. The Court of Appeal has made it clear that appeals on questions of fact from the TCC will only be heard very exceptionally. The position is summarised in the White Book at 52.3.13.

17. Although the HIT was technically not a TCC case (since it took placed in the QBD), to all intents and purposes it is a TCC case: the Judge is head of the TCC; the issues in the HIT are typical of TCC disputes; and the Court of Appeal Judge who appears to be taking the lead in determining questions of permission to appeal, Coulson LJ, was himself a TCC Judge until his elevation to the Court of Appeal (so that the Court of Appeal is likely to be treating this as a TCC case).

18. It is worth considering the TCC-line of cases referred to in a little more detail.

19. In Skanska Construction UK Ltd v Egger (Barony) Ltd [2002] EWCA Civ 1914, permission was given to appeal (and cross-appeal) arising out of some relatively small areas of the first-instance judgment, relating to additional costs of installing a second fire-fighting main and the costs of installation of some process and structural steelwork.

20. Collins J said this at paras 7-8:

> *"...the decisions of the Technology and Construction Court have special characteristics which affect the readiness of the Court of Appeal to reconsider them on appeal. First, the findings of fact often fall within an area of specialist expertise, where the evidence is of a technical nature and given by experienced experts, and which is evidence of a kind which judges of the Technology and Construction Court are particularly well placed to assess. Second, the conclusions of fact will frequently involve an assessment or evaluation of a number of different factors which have to be weighed against each other, which is often a matter of degree. Third, the decisions may deal with factual minutiae not easily susceptible of reconsideration on appeal. Fourth, the judgments will frequently be written on the basis of assumed knowledge of the detail by the parties and their advisers, and will not address a wider audience, with the consequence that the underlying reasoning may not always be readily apparent or fully articulated.*

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> *8.. Consequently the recent pronouncements of this Court on appeals against findings of fact apply with particular force to the decisions of the Technology and Construction Court. In particular* ***this Court will be reluctant to interfere with a trial judge, not only on findings of primary fact based on the credibility or reliability of witnesses, but also where conclusions of fact involve an assessment of a number of different factors which have to be weighed against each other and involve an evaluation of the facts.****"* (emphasis added)

21. In Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd [2005] EWCA Civ 894; [2005] BLR 395 the Court of Appeal explored the background to this principle in a little more detail and referred with approval to the Skanska decision. Per May LJ at para 27:

> *"...The policy has been somewhat relaxed, and findings of fact such as Lord Bingham described on page 35 in Virgin Management are not no-go areas[1]. The burden on a prospective appellant in these areas is nevertheless hard to discharge. In my view, the more complicated and technical the facts, the harder generally speaking is the burden. The reason again is obvious. The more complicated and technical the facts, the longer and more expensive would be this court's enquiry, whether by review or re-hearing, and the more disproportionate would be the whole exercise for the parties and the court alike. Importantly, this court would have the disadvantage of not having heard any of the witnesses, including the experts, give oral evidence. I venture to think that, at the extreme, some questions of fact may be so complicated and technical that they should only be investigated in detail judicially once, provided that the resulting decision is not palpably incompetent. That would not only apply to decisions of TCC judges. The facts in the present case are quite close to any extreme. So far from being palpably incompetent, Forbes J's factual decisions are, so far as I have been able to judge, of the highest quality. In so far as I have reached this conclusion upon no more than 5 days reading and one day of oral argument, care must be taken, as Lord Bingham said, to prevent applications for leave blossoming into dress rehearsals for a full appeal."*

22. The Court of Appeal is therefore quite clear that there are issues of policy as well as practicality at play here. May LJ went on to give the following illustration at para 30:

> *The technical complexity of the present case is well beyond the practical judicial experience of most judges. To talk in this appeal about primary facts and*

[1] Lord Bingham was referring to the fact that the test for permission will be more easily discharged if he is seeking to challenge a secondary inference drawn from the facts: on that important point, see below

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inferences, the credibility of oral evidence and other matters normally relevant to an appeal against relatively uncomplicated findings of fact has something of an air of unreality about it. The well-known principles are of course relevant and to be applied. But no appellate court would solemnly set about deciding in this case which of the judge's findings were findings of primary fact and which inferences. A broader approach would of necessity be needed. Most of the evidence was technical and complex. Most of the witnesses, including those giving factual evidence, were experts. Credibility was scarcely in issue in judging who was telling the truth. But credibility was centrally in issue in the sense of judging which strands of evidence, opinion and argument were persuasive. It was here that the judge had the unique advantage both of hearing the evidence, opinion and argument expressed, and of being able, through becoming steeped in the subject, to put together in 557 paragraphs of dense technical prose the interlocking pieces of a highly complicated jigsaw. Understanding the jargon is an effort in itself.

23. It is also instructive to consider how the Court of Appeal approached the proposed grounds of appeal of facts. 12 factual grounds of appeal are listed in para 103. May LJ said this at paras 104-105:

104. The shape of many of these proposed grounds of appeal is to summarise what the judge found, and then say that he was wrong because he failed to take account of material circumstances (which are set out) or because he drew incorrect inferences. Generally speaking, the grounds seek to reargue in this court matters which were advanced and unsuccessfully argued before the judge, and which, upon mature consideration and for convincingly explained reasons, he rejected. The repeated proposition that the judge failed to take material circumstances into account is, again speaking generally, untenable. A startling example of this is in Ground 15 (microthrix parvicella) where the judge is said to have failed to take into account 9 material circumstances set out in paragraphs 15.7, 7 of which are expressed in the Grounds themselves as "the fact (as he himself found) ..." (my emphasis). The very grounds themselves show that the judge did take these matters into account.

105. As to allegedly mistaken inferences, this comes nowhere near a case in which this court might consider re-examining inferences on the basis that an inference is a deduction from primary facts and intrinsically more amenable to appeal. In the present case, inferences were so interlocked in the jigsaw of technical fact and opinion as to be inseparable from them. As to the facts and opinions themselves, they were supported by evidence or opinion to which the judge referred and which he was entitled to prefer to other evidence or opinion which he rejected. There are even some instances where, as Mr Streatfeild-James or Mr Elliott submitted, the proposed appeal now seeks to challenge

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findings which were based on evidence which was not challenged before the judge.

24. These principles were recently restated by Coulson LJ in Wheeldon Brothers Waste Ltd v Millennium Insurance Company Ltd [2019] 4 WLR 56. He said at para 4:

> *For the reasons set out below, I do not consider that different rules apply to applications for permission to appeal from the TCC, as compared with any other part of the High Court. On the other hand, because TCC cases often involve complex and interlinked findings of fact and assessments of expert evidence, it is inevitable that wide ranging applications for permission to appeal against such findings and assessments will rarely be successful.*

25. Coulson LJ goes on to explain why that is the case but also flags that while the applicable test on an application for permission to appeal from the TCC is that set out in CPR 52.6(1), "*from a practical perspective, that is not quite the whole story*" [para 6].

26. The general approach is set out by Coulson LJ in para 7:

> *The general approach of an appellate court to appeals on questions of fact was memorably summarised by Lewison LJ in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] ETMR 26 . In para 114, he said:*
>
> > *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1 , Piglowska v Piglowski [1999] 1 WLR 1360 , Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] 1 WLR 1325 , In re B (A Child) (Care Proceedings: Threshold Criteria [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] 1 WLR 2477 . These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:*
> >
> > > *"(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
> > >
> > > *"(ii) The trial is not a dress rehearsal. It is the first and last night of the show.*

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> *"(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
>
> *"(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *"(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *"(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."*

8. Shortly thereafter, in Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 , Lord Reed JSC said, at para 67:

> *"It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."*

27. Coulson LJ's summary is at para 10:

> *In short, to be overturned on appeal, a finding of fact must be one that no reasonable judge could have reached. In practice, that will usually occur only where there was no evidence at all to support the finding that was made, or the judge plainly misunderstood the evidence in order to arrive at the disputed finding.*

28. On expert evidence, Coulson LJ says this @ para 11:

> *A first instance judge's assessment of, or evaluations based upon, expert evidence adduced at trial must be approached by an appellate court with similar caution. Whilst it has been said that a reconsideration of an expert's opinion may be slightly easier than a finding of fact, because the underlying report will be in writing (see Thomson v Christie Manson & Woods Ltd [2005] EWCA Civ 555; [2005] PNLR 38), the same case also provides a salutary warning that, since the evaluation of expert evidence is likely to be bound up with a wider evaluation of matters of fact, an appellate court will still be very slow to intervene. At para 141 of his judgement in Thomson's case, May LJ said:*

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> *"But, even accepting that individual points such as these are amenable to judicial appellate evaluation whatever the expert opinion, no appellate court should cherry pick a few such points so as to disagree with a composite first instance decision which, in the nature of a jig-saw, depended on the interlocking of a very large number of individual pieces, each the subject of oral expert evidence which the appellate court has not heard."*

29. In relation to TCC cases, Coulson LJ goes on to consider the Skanska and Yorkshire Water cases (and Virgin Group Ltd v De Morgan Group plc (1994) 68 BLR 26 per Sir Thomas Bingham MR) said, and concluded that they remained good law.

30. Coulson LJ's summary of the principles appears at para 17:

> *In those circumstances, I consider that the applicable principles can be summarised as follows:*
>
> > *(i) The CPR provides a single test for applications for permission to appeal which covers the entirety of the High Court, including the TCC (Virgin Group Ltd).*
> >
> > *(ii) Any application for permission to appeal on matters of fact or evaluations of expert evidence must surmount the high hurdle identified in Fage UK Ltd case, Henderson's case, Thomson's case and the Grizzly Business Ltd case.*
> >
> > *(iii) In addition, because a judgment in the TCC is likely to involve (i) detailed findings of fact in an area of specialist expertise (Virgin Group and Skanska) and/or (ii) lengthy and interlocking assessments of both factual and expert evidence (the Skanska Construction UK Ltd case and Thomson's case) and/or (iii) factual minutiae which is difficult or impossible sensibly to reconsider on appeal (the Skanska Construction UK Ltd case), the Court of Appeal will be reluctant to unpick such a judgment (Thomson's case), with the inevitable result that obtaining permission to appeal on such matters in a TCC case may be harder than in other, non-specialist types of case (the Virgin Group Ltd, Skanska Construction UK Ltd and Yorkshire Water Services Ltd cases).*

31. Coulson LJ makes it very clear that he is issuing this judgment in the hope that it reaches a wide audience. Para 72:

> *I have considered a number of applications for permission to appeal in TCC cases over the last six months. Complaints about factual findings and expert*

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> *evaluation, of the kinds unsuccessfully raised in the present case by Millennium, are surprisingly commonplace. It has therefore been convenient to use this judgment to re-state the relevant principles that are and will continue to be applied by the Court of Appeal to appeals on such matters from the TCC, and for that purpose only, I direct that this judgment can be referred to in other cases. I hope it provides at least some guidance to the parties in TCC litigation, and to the judges who sit doing that work around the country, and who are the first port of call for any application for permission to appeal.*

32. One further point for completeness: the Court of Appeal's approach to reviewing the approach taken by the court below to the assessment of evidence and witness credibility. Judges should give adequate reasons for their decisions and where there is a conflict of evidence (whether of fact or expert opinion) they should explain why they preferred one witness over another (White Book 52.21.2 and 52.21.7 and the cases referred to there). Note that if the criticism of the judge is that he failed to give sufficient reasons, the approved procedure is that in the first instance the judge should be invited to elaborate his reasoning.

33. A rule set out in Brown v Dunn (1894) 6 R. 67 remains important: namely that where a party contends that the evidence of their opponent's witness should be disbelieved on particular matters, the witness should be cross-examined on them. The rule is principally directed at advocates but it can also have application to a judge e.g. disbelieving a witness who was not challenged on a point.

34. The law was summarised by the Privy Council in Chen v Ng (British Virgin Islands) [2017] UKPC 27. Lords Neuberger and Mance said this at paras 49-50:

> *...Recent guidance has been given by the UK Supreme Court in McGraddie v McGraddie [2013] 1 WLR 2477 and Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600 and by the Board itself in Central Bank of Ecuador v Conticorp SA [2015] UKPC 11 as to the proper approach of an appellate court when deciding whether to interfere with a judge's conclusion on a disputed issue of fact on which the judge has heard oral evidence. In McGraddie the Supreme Court and in Central Bank of Ecuador the Board set out a well-known passage from Lord Thankerton's speech in Thomas v Thomas [1947] AC 484 , 487-488, which encapsulates the principles relevant on this appeal. It is to this effect:*
>
> > *"(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate*

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court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

50. In Henderson at paras 62 and 66, the Supreme Court said, in shorthand, that an appellate court should only interfere with a judge's conclusion of fact if it was one which "no reasonable judge could have reached" or the judge's decision "cannot be reasonably explained or justified". In Central Bank of Ecuador , the Board, after reciting once again Lord Thankerton's famous passage (above) and examining other considerations bearing on the matter, pointed out that these principles do not mean that an appellate court should never intervene, that they "assume that the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities" (para 8). In the present case, the Judge made findings of primary fact about Mr Ng's credibility and case, based on reading his lengthy written material and seeing him in the witness box for one and a half days in the context of the material before him as a whole. Ultimately, however he expressed only two reasons for rejecting Mr Ng's evidence, so that it is on them that the appeal in this area must focus. It is not suggested that the Judge's two grounds for rejecting Mr Ng's evidence were unreasonable or unjustified, and rightly so: his grounds were plainly reasonable in themselves. However, the attack on the Judge's finding in this case is not based on the merits of his grounds for disbelieving Mr Ng: it is founded on an alleged procedural flaw in relation to each of those grounds.

51. Mr Parker's argument is, as it was before the Court of Appeal, that if the two grounds cited by the Judge were to be relied on as reasons for disbelieving Mr Ng, they ought to have been put to Mr Ng in cross-examination. As neither ground was raised with him, runs the argument, it was unfair for the Judge to have relied on either of them as reasons for disbelieving Mr Ng; accordingly, it would be wrong to let the decision of the Judge stand. The Court of Appeal accepted this argument, and, albeit with some hesitation, the Board considers that they were right to do so.

52. In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the

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world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it.

35. They went on to say this at paras 55-56:

55. At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds.

56. It is also worth an appellate court having in mind in this context what was said by Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360 , 1372:

> *"If I may quote what I said in Biogen Inc v Medeva Plc [1997] RPC 1 , 45:*
>
> *'...[S]pecific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'*
>
> *... The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed."*

57. In the instant case, the Board is of the view that it would not be fair to let the rejection of Mr Ng's evidence stand, given that the two grounds upon which the Judge reached his decision were not put to Mr Ng..."

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36. It will be clear from the extracts quoted above that the position is nuanced. The point to have in mind for present purposes is that if the Judge makes adverse findings about reliability of witnesses, it will be worth considering whether the relevant witness was appropriately cross-examined and whether there is any proper basis for such conclusions (i) expressed in the Judgment and (ii) on the evidence.

The Court's Powers on an Appeal

37. By CPR 52.20 in relation to an appeal the appeal court has all the powers of the lower court and can, for example, affirm, set aside or vary any order or judgment given below, refer any claim for determination to the lower court or order a new trial or hearing (52.20(2)).

38. By CPR 52.21(3) the appeal court will allow an appeal where the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

Wrong

39. What constitutes "wrong" can be complex: particularly bearing in mind the reluctance to interfere with the judge's findings of fact for the reasons outlined above. The reality is that the burden is a heavy one – the more so in TCC cases. On the application for permission, the Court of Appeal would have to be satisfied that there was a reasonable prospect that the Judge was wrong, and that necessarily involves a consideration of the extent to which the Judge has specialist expertise, has made nuanced judgments, heard evidence first hand etc.

Serious irregularity

40. As far as serious irregularity is concerned, in broad terms the parties are entitled to a fair trial, and there are many facets to this.. There are accordingly various different types of irregularity that can arise – but in each case the appellant will need to show that the irregularity was serious and that it caused the decision to be unjust in some way.

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41. Many of the commonly-cited grounds are things which, if applicable, Post Office would already be aware of, such as failing to pay attention during trial, or asking excessive or inappropriate questions. I do not think that any of the Judge's conduct in the Horizon Issues trial comes close to any such serious irregularity.

42. As far as bias is concerned, in light of the failed recusal application, I anticipate that, even if Post Office had such concerns having seen the Horizon Judgment (and there is presently no specific reason to suppose that that will be the case) there would be zero appetite on Post Office's part to make any attempt to repeat any such argument.

Inadequacy of Reasons

43. There is a duty to give reasons for the decisions given and a failure to do so adequately can constitute a self-standing right of appeal (Coleman v Dunlop Ltd (No 1) [1997] 11 WLUK 450). Note that a failure to give adequate reason makes the decision unjust – not necessarily wrong.

44. The extent of the duty to give reasons depends on the circumstances of the case. See Flannery v Halifax [2000] 1 WLR 377 per Henry LJ at 382:

> *The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.*

45. The duty has been described by the Court of Appeal in English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 by Lord Phillips MR at para 19:

> *...if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not*

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> *mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.*

46. The key issue is whether the party is able to understand why the judge has reached an adverse decision – so the Court of Appeal is willing to consider those inferences which would have been evident to the parties.

Application of the law to any appeal of the HIT Judgment

47. There are obviously important strategic and political considerations to be taken into account about whether Post Office would want to be seen to be trying to appeal another judgment – and the sort of points that it would be prepared to pursue in light of, amongst other things, the failed recusal application. It will also be highly relevant to consider the outcome of the application for permission to appeal the CIT. If the outcome of that application is known by the time the HIT judgment is handed down that will obviously have an effect on Post Office's thinking: the landscape may be very different if permission is either granted or refused - or only granted on narrow or stringent terms.

48. Although these matters are of the utmost importance, I shall do no more in this Note than to flag them and will proceed on the basis that if the HIT judgment is adverse, Post Office will want to consider the possibility of seeking permission to appeal.

The Nature of the HIT

49. It is important to bear in mind certain key characteristics of the HIT:

    (1) There is very little law involved. Very few authorities were referred to by either party and those that were, related to peripheral issues (e.g. previous criticism of Mr Coyne, and the need for experts to apprise the court of changes of view). There are no central

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legal issues which are likely to require the Judge to consider any authorities in any detail, still less to reconcile conflicting authorities. It follows that it is very unlikely that there will be any central finding of law which is susceptible to review by a higher tribunal. In itself this means that it will be difficult to get permission to appeal.

(2) It follows that the issues are primarily factual ones. The key issue is probably (in summary): what was the state of the Horizon System from time to time and how likely was it that Horizon was responsible for financial shortfalls? This involves a detailed consideration of a vast quantity of evidence, much of it given or referred to by Post Office's factual witnesses. As set out above, a first-instance judge is generally considered to be much better-placed to assess such evidence than an appeal court.

(3) An appeal on law is always easier to mount than an appeal on fact – or an appeal which necessarily depends on the view taken by the Judge of the facts which were heard at first-instance. One can readily see that many of the points which Post Office may want to appeal will fall into these categories;

(4) As explained above, I think this case will be treated as in effect a TCC case – which makes matters all the more challenging.

50. It seems highly likely that any conclusions of fact which Post Office might want to appeal will fit the description in Skanska (for example) precisely i.e. will be findings of fact based on the credibility or reliability of witnesses and/or will involve an assessment of a number of different factors which have to be weighed against each other and involve an evaluation of the facts.

51. It should also be borne in mind that the Judge is likely to be astute to ensuring that as far as possible, the Judgment is appeal-proof. He will know that by presenting his findings in a way which makes it clear that they are based on these sorts of complex assessments (which in fairness they probably need to be) he will be making it much more difficult for either side to challenge his judgment.

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52. Just by way of example. Imagine the sort of conclusion the Judge could reach on Horizon Issue 1 i.e. (in summary) to what extent was it possible or likely for bugs to have the potential to cause apparent or alleged shortfalls or to undermine the reliability of Horizon accurately to process and record transactions?

53. The Judge is likely to consider (amongst other things): the evidence of individual claimants about their experience of Horizon; the evidence of Fujitsu witnesses about the sorts of bugs/issues they were aware of, investigations they ran and records they (or others at Fujitsu) kept; the evidence of Post Office witnesses on the records they kept and communications they made; and the expert evidence from Mr Coyne and Dr Worden on their own investigations and likelihood of there being significant numbers of undetected bugs causing discrepancies.

54. These are mixed questions of analysis of fact and assessment of the reliability of witnesses, including experts. The Judge is likely to make the point that he is having to arrive at conclusions which are necessarily based on incomplete evidence and as such his assessment of the reliability of witnesses is even more important.

55. Simply by way of example and illustration the Judge might conclude that he could not rely on the account given by Mr X of Peaks that had been investigated or of the records about the nature of such Peaks, or that Ms Y's recollection of the number of times Post Office branches had been contacted about a known bug was reliable. Instead he would rely on the expert evidence and the investigations carried out by them. He might conclude that he was satisfied that Mr Coyne's searches were thorough and that Dr Worden had not gone into the detail of such investigations because he considered it pointless to do so in light of his views on the figures. The Judge did not accept Dr Worden's conclusion on the figures point and as such is left with Mr Coyne's evidence as the only reliable account of the extent of bugs. He then goes on to draw conclusions which are adverse to Post Office's interests.

56. I mention this not because I think such a combination of conclusions is likely or inevitable, but simply to illustrate how difficult it may be to challenge findings of fact made by the

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Judge: they are likely to be nuanced assessments of a range of factors, inextricably bound up with matters which the Court of Appeal sees as matters for the first-instance judge alone – a position which is considerably stronger for TCC cases.

57. There is (or may be) a glimmer of hope for the possibility of an appeal of fact namely the test summarised by Coulson LJ in para 10 of Wheeldon Brothers (quoted above). The test is whether the finding of fact is one that no reasonable judge could have reached. As Coulson LJ remarks, in practice, that will usually occur only where there was no evidence at all to support the finding that was made, or the judge plainly misunderstood the evidence in order to arrive at the disputed finding. This should be borne in mind when considering the judgment in the HIT.

58. Note that a distinction can be drawn between seeking to appeal the judge's findings of primary facts and seeking to appeal the inferences he drew from those facts. See for example Datec Electronics Holding Ltd v UPS Ltd [2007] 1 WLR 1325: the Court of Appeal held in that case that it was entitled to re-consider for itself the judge's finding as to what should or should not be inferred regarding causation (on the facts, concerning the likely cause of the loss of some parcels) from the primary facts found by the judge (various matters as to when the parcels had been delivered to warehouses and the like). Lord Mance at para 46:

> *46. As to the correct approach in an appellate court to findings and inferences of fact made by a judge at first instance after hearing evidence, there was no disagreement between counsel. In Assicurazioni Generali SpA v. Arab Insurance Group [2003] 1 WLR 577, Clarke LJ summarised the position, referring also to a passage in a judgment of my own:*
>
> > *"14. The approach of the court to any particular case will depend upon the nature of the issues kind of case* [sic] *determined by the judge. This has been recognised recently in, for example, Todd v Adam (trading as Trelawney Fishing Co) [2002] EWCA Civ 509, Lloyd's Rep 293 and Bessant v South Cone Incorporated [2002] EWCA Civ 763. In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the*

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documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.

15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a 'rehearing' under the Rules of the Supreme Court and should be its approach on a 'review' under the CPR .

16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.

17. In Todd's case [2002] 2 Lloyd's Rep 293 , where the question was whether a contract of service existed, Mance LJ drew a distinction between challenges to conclusions of primary fact or inferences from those facts and an evaluation of those facts, as follows, at pp 319–320, para 129:

> *'With regard to an appeal to this court (which would never have involved a complete rehearing in that sense), the language of "review" may be said to fit most easily into the context of an appeal against the exercise of a discretion, or an appeal where the court of appeal is essentially concerned with the correctness of an exercise of evaluation or judgment — such as a decision by a lower court whether, weighing all relevant factors, a contract of service existed. However, the references in rule 52. 11 (3) (4) to the power of an appellant court to allow an appeal where the decision below was "wrong" and to "draw any inference of fact which it considers justified on the evidence" indicate that there are other contexts in which the court of appeal must, as previously, make up its own mind as to the correctness or otherwise of a decision, even on matters of fact, by a lower court. Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellant court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case,*

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> *therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence. In the present case, however, while there was oral evidence, its content was largely uncontentious.'*

In the same case Neuberger J stressed, pp 305–306, paras 61 to 64, that the question whether there was a contract of service on the facts involved the weighing up of a series of factors. Thorpe LJ agreed with both judgments.

The judgment of Ward LJ in the Assicurazioni Generali case may be read as advocating a different test, which would equate the approach of an appellate court to findings of fact with its approach to decisions taken in the exercise of a discretion. As Waller LJ correctly pointed out in Manning v. Stylianou [2006] EWCA Civ 1655 , that is not the correct test, and it is the judgment of Clarke LJ in the paragraphs quoted above from his judgment that gives proper guidance as to the role of the Court of Appeal when faced with appeals on fact."

59. This distinction is worth bearing in mind. It is possible in this case that the judge might make primary findings e.g. re which bugs existed and perhaps their likely extent (which might be very difficult to challenge), but then seek to draw inferences from that (e.g. re the extent to which it is likely that many more such bugs are present) which are more questionable.

60. The challenges faced by such an approach should not be under-estimated: the position is likely to be considerably more complex than that considered in the Datec case (and note the warning in the Yorkshire Water case (quoted above) that "*inferences were so interlocked in the jigsaw of technical fact and opinion as to be inseparable from them*"). Nevertheless this may be an angle of attack worth considering.

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61. There is a related line of cases which considers the proper approach to the appeal of a so-called "evaluative" judgment. This term is used in contrast to a case where a judge makes a decision concerning a primary fact or law, or exercises a discretion. The key characteristic of such an evaluative judgment is that the judge, having made various findings, whether of fact or law, then has to evaluate whether taken together these matters mean that some other measure is reached e.g. whether negligence is made out. An example is the case of Abela v Baadarani [2013] 1 WLR 2043 where the judge had to decide whether there was "good reason" retrospectively to validate steps which a party had taken to serve documents. Lord Clarke JSC at para 23:

> *The judge held that there was* [good reason]. *In doing so, he was not exercising a discretion but was reaching a value judgment based on the evaluation of a number of different factors. In such a case, the readiness of an appellate court to interfere with the evaluation of the judge will depend on all the circumstances of the case. The greater the number of factors to be taken into account, the more reluctant an appellate court should be to interfere with the decision of the judge. As I see it, in such circumstances an appellate court should only interfere with that decision if satisfied that the judge erred in principle or was wrong in reaching the conclusion which he did.*

62. The Court of Appeal will be slow to interfere with an evaluative judgment but it is a matter of degree. In Bessant v South Cone Inc [2002] EWCA Civ 763 Robert Walker LJ said at para 26:

> *26. How reluctant should an appellate court be to interfere with the trial judge's evaluation of, and conclusion on, the primary facts? As Hoffmann LJ made clear in Grayan there is no single standard which is appropriate to every case. The most important variables include the nature of the evaluation required, the standing and experience of the fact-finding judge or tribunal, and the extent to which the judge or tribunal had to assess oral evidence.*

63. The basic test for whether the appeal court will interfere with an evaluative judgment was set out in Aldi Stores Ltd v WSP Group plc [2008] 1 WLR 748 at para 16:

> *None the less an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors; see the discussion in Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577 and the cases cited in that decision and Mersey Care NHS Trust v Ackroyd (No 2) [2007] HRLR 580 , para 35. The types*

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of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him.

64. Although the judge in the HIT will inevitably be making a wide range of evaluations, it is not obvious that the judgment will be an evaluative one in the sense described here. There is, for example, no obvious legal standard against which the facts are to be assessed. Nevertheless, I think this line of authority is worth bearing in mind for a number of reasons. First, it is possible that the Judge might set out a standard e.g. of robustness and then evaluate the evidence against that standard. Secondly, it might just provide a means of trying to present some sort of appeal if Post Office considers that the Judge's overall gloss on the evidence, or inferences he seeks to draw about e.g. Post Office generally, is objectionable.

65. Some further thoughts on these points:

(1) If the Judge finds for Post Office or makes some limited and justifiable criticisms of Post Office which Post Office can live with, all well and good. The question of an appeal is unlikely to arise. We are not concerned with that scenario. The scenario we are trying to prepare for is the one where Post Office loses and perhaps loses badly e.g. on points which it considers unfair or where the Judge arrives at conclusions which are more far-reaching than Post Office considers justifiable or proper;

(2) I think it fair to say that one of Post Office's views of the CIT judgment is that the Judge did reach conclusions about certain matters which he should not have i.e. for which he did not have any or sufficient evidence or in relation to an issue which should not have been determined at that time. If that is correct, then it at least suggests that this Judge may have, to put the point neutrally, a tendency to overreach the evidence and if this tendency comes to the fore in the HIT judgment, there may be scope for challenge;

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(3) The indications from the Judge – in particular in terms of the questions he asked and exercises he requested during closing submissions – suggest that he may be getting ready to make some serious criticisms of Post Office. If that is correct, it is still unclear what the extent and relevance of such criticisms might be: but again there is a risk that he might overreach himself;

66. It is obviously a matter of speculation as to whether the Judge will approach things in a way which makes his Judgment potentially appealable, but it occurs to me that there are a number of areas where there is a greater risk of him putting things in a way which might be challengeable. I set out some thoughts below.

67. The HIT is an unusual trial. It is a creature of the Judge, not the parties. There is a sensible argument that if the Judge properly directs himself the whole trial will be shown to have been a waste of time since it will not dispose of any part of any claim, and will not really advance matters in any useful way. The Judge is unlikely to take that view and is likely to want to deliver a judgment which he considers progresses the resolution of the dispute. It is not obvious how the Judge can properly do so and there is a real chance that he might go further than he ought to (at least in Post Office's view). Note however that just as the Judge is likely to strive to make the HIT Judgment meaningful, so the Court of Appeal may be just as reluctant to reach a conclusion that effectively means that huge amounts of money have been wasted.

68. With that proviso, it is worth considering some of the areas where there is potential for error on the Judge's part.

69. For example, the Judge ordered specifically that it was not to be "claimant-specific". Notwithstanding that direction, the Claimants called claimant-specific evidence. Post Office was emphatic (and in my view correct) in saying that the Judge should not reach any concluded view on whether particular claimants were affected by a bug. If he does so, that might be appealable.

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70. Similarly Post Office submitted that the Claimants' approach was impressionistic and that the Court could not properly draw the sorts of inferences which the claimants invited it to, based on the actual number and nature of bugs identified by both experts. The Claimants' case on this arguably amounts to little more than optimistic assertion on their part. In other words it might be argued that they have not really given the Judge adequate material or argument to enable him properly to reach a conclusion that they want him to. This raises a more general point about the Claimants' failure to spell out in any credible way what they think the Judge should conclude. It is right to say they present a case on this in Appendix 1 to the Closing Submissions but the basis for their assertions (e.g. alleging that there is a "significant & material risk" that it is likely that bugs caused discrepancies) is obscure in my view and not obviously supported either by the lay or expert evidence of either side.

71. Although Mr Coyne was inconsistent on this point, there is a great deal of evidence from him – in writing and during his cross examination – which makes it clear that Horizon is robust and has been robust for most, and perhaps all, of its lifetime. If the Judge finds otherwise (as he may want to) then that might be wholly inconsistent with the evidence.

72. Both sides' experts invite the Judge to make extrapolations based on the evidence. For the reasons set out above it may be virtually impossible to challenge the Judge's primary findings of fact but the inferences he draws from that evidence might be more susceptible to review. There are significant challenges here – after all, Post Office (and Dr Worden in particular) is inviting the Court to reach some far-reaching conclusions based on the analyses carried out so can hardly complain if the Court engages in that exercise but arrives at different conclusions from the ones preferred by Post Office – but nevertheless this is an area of the Judgment which might be worth focusing on in particular.

73. Post Office is well aware of the ways in which Dr Worden's evidence might be criticised. But there are formidable criticisms of Mr Coyne's evidence as well which emerged during his cross examination and which are articulated in Post Office's closing submissions. If the Judge prefers Mr Coyne's evidence, the authorities suggest that he has got to explain why and in my view there are respects in which that may present him with a real challenge: not so much in saying that he prefers Mr Coyne's evidence but in accepting it lock, stock and

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barrel and making the sort of inferences based on that evidence which the Claimants invite him to (but in respect of which Mr Coyne's position is far less clear and arguably much closer to Post Office's views i.e. in terms of the number of other bugs that may be out there).

74. A more moderate line might be to reject much of Dr Worden's work on the numbers, accept Mr Coyne's investigations (and to some extent suspicions) but to stop short of reaching the conclusion that Horizon was therefore riddled with bugs. I can see how that would be a moderate and defensible line (and one which Post Office might well be content with).

Summary and Conclusions

75. I will try to draw these disparate elements together:

(1) This Note comes with a huge and obvious proviso/ health warning. We do not yet have the HIT Judgment and until we do, Post Office cannot tell whether it even wants to appeal, still less the possible grounds of any appeal. The Note is necessarily highly speculative and matters should be comprehensively revisited once the Judgment appears;

(2) There are wider tactical considerations which Post Office will want to have in mind. In particular, if permission is refused on the CIT (or only narrow permission is granted) this is likely to have an impact on the attitude towards appealing the HIT. Similarly, if permission to appeal is granted on the CIT in the terms sought, that may signal some encouragement. It is beyond the scope of this Note to consider such points;

(3) It will be enormously difficult – and perhaps impossible - to get permission to appeal the HIT Judgment. There are virtually no questions of law involved. The Court of Appeal is very reluctant to allow appeals on matters of fact due to a variety of evidential and policy reasons. There is a strong presumption of finality: there is no right of appeal and establishing that there is a reasonable prospect of success, when seen against the authorities, is formidable. Those significant hurdles are made even more difficult in technically complex cases such as this one. The Court of Appeal (in

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the form of Coulson LJ – likely to be the Judge considering any application) has recently reiterated these principles in clear and strong terms;

(4) The Judge's conclusions in this case are likely to amount to nuanced findings based on a wide variety of evidential sources – written evidence, oral and expert testimony. It can be enormously difficult to disentangle such findings and the Judge – whether deliberately or by necessity – may present his findings so that it becomes virtually impossible to challenge any finding without trespassing onto areas, such as his assessment of the reliability of witnesses, which the Court of Appeal is likely to consider his exclusive domain;

(5) That said, there are various areas where there might be some scope for further consideration. The ones which appear possible candidates are:

i. A distinction is to be drawn between findings of primary fact and the inferences to be drawn from them: the latter can, in some circumstances, be more susceptible to review. Disentangling primary fact from inference can, however, be very complex in a case such as this;

ii. Similarly, if the Judge makes evaluations based on the primary findings, that might be easier to challenge than the primary findings themselves. It is not obvious how the HIT judgment will be evaluative in this way but we should bear this in mind e.g. in the Judge's consideration of robustness;

iii. A Judge at first instance needs to provide proper explanation for the findings he makes. What amounts to proper explanation can vary: in some circumstances, it might simply be that he finds a witness more credible but where, as here, there are competing explanations, further cogent explanation is likely to be required. The point applies, perhaps even more obviously, to expert evidence. This may present the Judge with some challenges;

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iv. Similarly, although the Claimants assert that they are entitled to findings couched in far-reaching terms, it is unclear (at least to me) how such findings can properly be justified on the basis of the evidence. If the Judge accedes to their requests as to such findings, he will need to explain why;

v. If the Judge arrives at conclusions for which there is no, or no sufficient, evidence, that can constitute a ground of appeal. Similarly if he arrives at a conclusion which plainly evidences a misunderstanding of the evidence;

(6) There is a separate category for serious procedural or other irregularity which has caused an unjust decision. It is difficult at this stage to see how this category might otherwise avail Post Office – but again, an open mind should be kept.

(7) I urge caution in relation to all of these potential categories. Candidly the likelihood is that, given the issues in the HIT, the nature of the evidence, and the likely nature of the Judgment, it may be very difficult to obtain permission to appeal and there may be powerful tactical reasons for not even trying to do so.

Simon Henderson

16 September 2019